

# THE BULLETIN

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*The Bulletin is a publication of the European Commission for Democracy through Law. It reports regularly on the case-law of constitutional courts and courts of equivalent jurisdiction in Europe, including the European Court of Human Rights and the Court of Justice of the European Communities, as well as in certain other countries of the world. The Bulletin is published three times a year, each issue reporting the most important case-law during a four months period (volumes numbered 1 to 3). The last two volumes of the series concerning the same year are actually published and delivered in the following year, i.e. volume 1 of the 2002 Edition in 2002, volumes 2 and 3 in 2003.*

*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 (primary)
3. Keywords of the alphabetical index (supplementary)
4. Headnotes
5. Summary
6. Supplementary information
7. Cross-references
8. Languages

**G. Buquicchio**

*Secretary of the European Commission for Democracy through Law*

# **THE VENICE COMMISSION**

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

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European Court of Human Rights .....

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Ph. Singer

Strasbourg, May 2003

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# Andorra

## Constitutional Court

### Important decisions

*Identification:* AND-2002-2-001

**a)** Andorra / **b)** Constitutional Court / **c)** / **d)** 09.05.2002 / **e)** 2002-1-L / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 13.05.2202 / **h)** CODICES (Catalan).

*Keywords of the systematic thesaurus:*

- 1.2.1.2 **Constitutional Justice** – Types of claim – Claim by a public body – Legislative bodies.
- 3.10 **General Principles** – Certainty of the law.
- 3.13 **General Principles** – Legality.
- 3.16 **General Principles** – Proportionality.
- 3.19 **General Principles** – Margin of appreciation.
- 3.20 **General Principles** – Reasonableness.
- 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
- 4.10.1 **Institutions** – Public finances – Principles.
- 4.10.2 **Institutions** – Public finances – Budget.

*Keywords of the alphabetical index:*

Administration, efficiency, flexibility / Budget, allocation / Budget, law.

*Headnotes:*

The empowerment of the government under the Budget Act to transfer appropriations does not constitute a breach of the law to the benefit of the authority with power to make regulations. It is a case of an attribution of power for a specific administrative act.

*Summary:*

Six members of the General Council (parliament) lodged a direct appeal on grounds of unconstitutionality against Section 3.4 of the Budget Act for 2002, which authorised the government to transfer appropriations “for real capital expenditure up to a maximum limit of 1% of the appropriations authorised for real capital expenditure under the budget for the financial year”.

In the applicants' view, this provision incorporated a quantitative limit on transfers, without method, without qualitative restrictions, and infringed the power of the General Council (parliament) to approve state budgets, thereby also jeopardising the principle of certainty of the law.

In its judgment, the Constitutional Court took the view that the empowerment of the government under the Budget Act to transfer appropriations did not constitute a breach of the law to the benefit of the authority with power to make regulations, but, instead, an attribution of power for a certain administrative act, similar to those for which the General Public Finance Act already provided, an act amended by the 2002 Budget Act. Like any attribution of power, it complied with the rule of strict compliance with the law affirmed by the Constitution, and which underlies the whole of Andorra's legal and administrative system. In practice, the legislation challenged complied with the requirements of the budget concept. The 1% figure did not exceed the bounds of proportionality and reasonableness required of the law when it sets a specific quantitative upper limit on the government's room for manoeuvre. This provision enabled the government to implement the budget with the flexibility essential to the efficiency of its action; the margin of freedom granted to it was not incompatible with the principle of certainty of the law, in so far as the exercise of that freedom took place within the bounds of the aforementioned upper limit and with reference to a specific category, that of the real capital expenditure appropriations in the budget for the financial year. Furthermore, the use which the government might make of the faculty granted to it would be subject to possible supervision by the ordinary courts, which might penalise transfers which did not comply with the budgetary empowerment.

*Supplementary information:*

One-fifth of the members of the General Council (parliament) may lodge an appeal on grounds of unconstitutionality against laws and decrees adopted through legislative delegation. There are 28 members of the General Council, and six of them are sufficient to lodge such an appeal.

*Languages:*

Catalan.



*Identification:* AND-2002-2-002

a) Andorra / b) Constitutional Court / c) / d) 09.05.2002 / e) 2001-23 i 25-RE / f) / g) *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 13.05.2002 / h) CODICES (Catalan).

*Keywords of the systematic thesaurus:*

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

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

4.7.8.2 **Institutions** – Judicial bodies – Ordinary courts – Criminal courts.

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

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

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

*Keywords of the alphabetical index:*

Decision, ground / Reason, statement / Offence, criminal, exact definition / Law, restrictive interpretation.

*Headnotes:*

The interpretation of texts relating to criminal cases must be restrictive: the infringement of a person's dignity through the calling into question of his or her sexual orientation cannot be treated as the offence of infringement of dignity on the ground of gender covered by the Penal Code without violating the principle of *nullum crimen, nulla poena sine lege*.

The courts are required to reply expressly to all the grounds submitted by the appellants.

*Summary:*

One of the appellants had been convicted of homicide, and the other of failure to assist a person in danger; both had also been convicted of violating the dignity of a person on the ground of gender.

Each of the appellants had lodged a separate appeal for constitutional protection, and although the complaints made were different, the Court had decided to join the two cases, which related to the same decisions of the ordinary courts, and which could be considered closely connected.

The first appellant took the view that the first court had violated the principle of *nullum crimen, nulla poena sine lege* by convicting him, not of the main offence, but of a minor offence of commission of acts infringing dignity, for having insulted the victim because of his alleged homosexuality, whereas the Penal Code makes punishable only infringements of a person's dignity on the ground of gender. During the proceedings, the second appellant had associated himself with this argument and requested the benefit, if applicable, of the court's decision, were this ground to be accepted.

The second appellant basically argued that the Court of second instance had failed to rule on one of the grounds of the appeal lodged with it, and claimed that this failure constituted a violation of the right of access to courts enshrined in Article 10 of the Constitution.

Where the first point was concerned, the Constitutional Court pointed out that Article 9.4 of the Constitution provided that: "No one shall be held criminally or administratively liable on account of any acts or omissions which were lawful at the time when they were committed", and that the Penal Code referred explicitly only to infringements of the dignity of a person on the ground of gender, making no mention of any infringement of dignity on the basis of sexual orientation. It therefore took the view that the first court, however legitimate its intention might have been, had wrongly extended to sexual orientation a text intended to protect the dignity of men and women as such, and had thereby penalised acts which, at the time when they were committed, had not constituted an offence.

Where the second point was concerned, the court noted that, among the reasons submitted by the appellant in the Court of Appeal was one numbered 4, which challenged "the assessment of the penalty according to the attenuating circumstances accepted by the court of first instance", this reason being completely independent of the three which preceded it. The Court of Appeal had replied to the other three reasons set out by the appellant and had merely indicated that the Court of first instance had made a fair assessment of the facts and accurately applied the criminal law, where the classifications adopted and the penalties imposed were concerned, and it had confirmed the first court's judgments. The Constitutional Court took the view that such a general, and non-specific, formula did not satisfy the constitutional requirement, laid down in Article 10 of the Constitution, concerning the right of access to courts, more particularly in the form of the right to a ruling based on the law.

*Languages:*

Catalan.



## Argentina

### Supreme Court of Justice of the Nation

#### Important decisions

*Identification:* ARG-2002-2-003

**a)** Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 05.03.2002 / **e)** P.709. XXXVI / **f)** Portal de Belén – Asociación Civil sin Fines de Lucro c/ Ministerio de Salud y Acción Social de la Nación s/ Amparo / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 324 / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

3.18 **General Principles** – General interest.  
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.  
5.3.41 **Fundamental Rights** – Civil and political rights – Right to self fulfilment.

*Keywords of the alphabetical index:*

Abortion / Child, unborn, protection / Conception, definition / Fertilisation, definition.

*Headnotes:*

Human beings are conceived at the moment of fertilisation.

International treaties with constitutional status protect the human person's life from the moment of conception.

Any method used to prevent the fertilised ovum from being implanted in the uterus must be regarded as abortive.

The official authorisation granted for a medicine which prevents implantation must remain void, and the manufacture, distribution and sale of this medicine be forbidden.

*Summary:*

A non-profit-making association lodged an appeal with the Supreme Court (*recurso de amparo*), seeking to have the authorisation granted by the National Ministry of Health and Social Action for the medicine marketed as “*Imediat*” revoked, and its manufacture, distribution and sale prohibited, on the ground that the abortive effects of that pill were concealed by the euphemism, “emergency contraception”. The Court of first instance had granted the application, but the Appeal Court had set the judgment given against the state aside. The applicant then brought an extraordinary appeal to the Supreme Court.

The Supreme Court first considered whether conception took place when the ovum was fertilised, or when the fertilised ovum was implanted in the uterus.

It found that human life began at the moment of fertilisation, i.e. when the two gametes united. “The human being exists from the moment the ovum is fertilised. The whole human being is already present in the fertilised ovum. It is wholly there, with all its potential qualities”, the Court declared, quoting Nobel Prize-winning biologist Jean Rostand.

The Court further found that the medicine affected the endometrial tissue, preventing the endometrium from maturing uniformly and inhibiting implantation of the ovum.

It concluded that any method used to prevent implantation must be regarded as abortive.

The Court also referred to its earlier ruling that the right to life is the first natural right of the human person, preceding all positive law and guaranteed by the national Constitution. The human being is the axis and focus of the whole legal system, which means that, as an end in itself – and regardless of its transcendent nature – his/her person is inviolable and constitutes a fundamental value, by comparison with which all other values invariably have an instrumental character.

It added that the relevant international treaties with constitutional status protected human life from the moment of conception: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception” (Article 4.1 of the American Convention on Human Rights). Similarly, every human being is considered a child from the moment of conception, and has an inherent right to life (Article 6.1 of the Convention on the Rights of the Child).

The American Convention also requires states parties to take all the measures needed to remove obstacles which may prevent individuals from enjoying the rights accorded to them in the text. Ratification of a treaty further obliges a state – of being held internationally accountable for any failure to do so – to ensure that its administrative, judicial and legislative authorities apply the treaty to the cases which it covers.

For these reasons, the Court ordered the defendant to invalidate the authorisation granted by prohibiting the manufacture, distribution and sale of the medicine, “*Imediat*”.

Four judges entered dissenting opinions, on the ground that the appeal was inadmissible for formal reasons.

*Supplementary information:*

Concerning the scientific reasons for considering that conception occurs at the moment of fertilisation, the Court took account – in addition to the one referred to – of the opinions of the following scientists: Basso, Domingo N.; Lejeune, Jerome; Larson, W.J.; Carlson, B.; Sadler, T.W. and Salet, G.

On the international obligations of states, the Court referred to the case-law of the Inter-American Court of Human Rights.

The pill in question was popularly known as the “morning-after pill”.

*Languages:*

Spanish.





# Armenia

## Constitutional Court

### Statistical data

1 May 2002 – 31 August 2002

- 10 referrals made, 10 cases heard and 10 decisions delivered including:
  - 9 decisions concerning the conformity of international treaties with the Constitution. All the international treaties were declared compatible with the Constitution;
  - 1 decision concerning an electoral dispute.

### Important decisions

*Identification:* ARM-2002-2-002

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 29.06.2002 / **e)** DCC-367 / **f)** On the dispute on the outcome of the additional elections of the National Assembly in constituency # 67 held on 19 May 2002 / **g)** *Tegekagir* (Official Gazette) / **h)**.

*Keywords of the systematic thesaurus:*

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

4.9.7.1 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Electoral rolls.

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

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

*Keywords of the alphabetical index:*

Election, additional, constituency / Election, electoral law, infringement / Election, voters' list, inaccuracies.

*Headnotes:*

If the drawing up of electoral rolls is not conducted in the manner provided for by law, the necessary

preconditions will not be met for holding elections in compliance with the requirements of Article 3 of the Constitution (governing electoral rights and the principle of holding elections/referenda).

If a citizen has not been sentenced to imprisonment and is not serving his or her penalty in prison on the basis of a judgment that has entered into force, he or she shall not be deprived of the right to vote and to stand for election.

*Summary:*

A candidate who participated in the additional National Assembly elections in constituency # 67, held on 19 May 2002, appealed to the Constitutional Court for a declaration that the elections in that constituency had been invalid. The candidate argued that violations of the Electoral Code had taken place during the organisation and running of the elections to such an extent that they had influenced the results of the elections.

In particular, the appellant argued that violations of pre-election campaign rules and of voting procedures had been committed, and that voter lists were not in conformity with the reality on the day of voting. In one of the precincts the voter lists were not compiled in the manner prescribed by law, and about 15% of voters had been deprived of their right to vote because of the inaccuracies of the voter lists.

The Constitutional Court, in its decision of 21 June 1999, had ruled, *inter alia*, that there had been serious flaws in the process of drawing up the voter lists in the same constituency, # 67. But instead of these defects and omissions being corrected in the meantime, they had been enlarged and extended to include a greater range of defects and omissions.

While adopting a decision on this case, the Court took Article 27 of the Constitution (eligibility to vote and to stand for election) as its reference, as well as the relevant provisions of the Electoral Code.

The Court found that the massive violations of the requirements of the Electoral Code that had occurred in the process of the organisation and running of the elections, which had affected the outcome of the elections, showed that the electoral commissions had disregarded the observations and decisions made on the results of previous elections (including decisions adopted by the Court). During the organisation and conduct of the additional elections in the constituency in question, the requirements of Articles 9.4 (drawing up and administration of voter lists), 11.3 (requirements with respect to voter lists), 13.2 (providing voter lists to

the precinct electoral commissions), 42.11 (powers of the constituency electoral commission) and 50.2 of the Electoral Code (preparation for voting) and other necessary preconditions had not been met for holding the elections in accordance with the requirements of Article 3 of the Constitution (concerning electoral rights and the principle of holding elections/referenda).

The appellant party also argued that one of the candidates participating in the additional elections in the constituency at issue was not entitled to participate in the elections, by virtue of Article 27 of the Constitution, as he had been sentenced to a correctional measure by a court of first instance and was serving his penalty in his work-place. In response to this argument, the Court, having evaluated the practice of implementation of laws, examined the constitutional experience of other countries and based its answer also on the requirements of Article 27 of the Constitution, according to which citizens sentenced to imprisonment by a court judgment that has entered into force, and serving their penalty, cannot vote or stand for election. The Court found that if the citizen had not been sentenced to imprisonment and was not serving his or her penalty in the prison on the basis of a judgment that had entered into force, then he or she would not be deprived of the right to vote and to stand for election.

The Court declared the additional elections in the above-mentioned constituency invalid and addressed the materials on the violations revealed in the process of the examination of the case to the General Prosecutor's Office for appropriate examination.

#### *Languages:*

Armenian.



## Austria Constitutional Court

### Statistical data

1 May 2002 – 31 August 2002

Session of the Constitutional Court during June 2002

- Financial claims (Article 137 B-VG): 1
- Conflicts of jurisdiction (Article 138.1 B-VG): -
- Review of regulations (Article 139 B-VG): 20
- Review of laws (Article 140 B-VG): 94
- Challenge of elections (Article 141 B-VG): 0
- Complaints against administrative decrees (Article 144 B-VG): 596  
(274 refused to be examined)

### Important decisions

*Identification:* AUT-2002-2-002

**a)** Austria / **b)** Constitutional Court / **c)** / **d)** 21.06.2002 / **e)** G 6/02 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

3.22 **General Principles** – Prohibition of arbitrariness.  
5.2.2.7 **Fundamental Rights** – Equality – Criteria of distinction – Age.  
5.2.2.11 **Fundamental Rights** – Equality – Criteria of distinction – Sexual orientation.

*Keywords of the alphabetical index:*

Homosexual, partnership, prohibition.

*Headnotes:*

Nothing in the Constitution speaks against the legislator's intention of protecting children and juveniles and shielding them from damaging premature sexual contacts, whether heterosexual or homosexual, as well as from sexual exploitation.

A legal provision that forbids sexual intercourse between a male person over the age of 19 and a male person older than 14 but younger than 18 is arbitrary and therefore unconstitutional.

### Summary:

The Innsbruck High Court of Appeal (*Oberlandesgericht Innsbruck*) filed its second application with the Constitutional Court to review § 209 of the Criminal Code (*Strafgesetzbuch*), alleging that this provision was inconsistent with the constitutional principle of equal treatment before the law and with Article 8 ECHR.

Under § 209 of the Criminal Code, a homosexual relationship between male juveniles of different ages that was not subject to punishment until one of the partners reached the age of 19 would then become punishable, and subsequently would again become exempt of punishment as soon as the younger partner turned 18. The provision therefore resulted in unequal treatment of individuals before the law. Furthermore, the High Court of Appeal argued that a provision such as § 209 of the Criminal Code would no longer fall within the margin of appreciation open to national legislators. The change in values that had taken place throughout Europe over the last 30 years had led to a broad acceptance of homosexuality, which was embodied in a certain standard of legal development in all states parties to the European Convention on Human Rights.

Sharing this reasoning in so far as it concerned the alleged violation of the principle of equal treatment before the law, the Court held that the provision in question actually entailed a series of punishable and unpunishable homosexual contacts between male juvenile partners. Male homosexual interactions between persons over 14 were not to be punished; nor were such contacts between partners less than one year apart in age. Sexual contacts between juvenile partners having an age difference of between one and 5 years were also exempt of punishment but became punishable at the moment at which the older partner reached the age of 19. Such contacts ceased to be punishable as soon as the younger partner turned 18. The length of the period in which such contacts were punishable by law (up to three years and eleven months) depended solely on the extent of the age difference.

The Court found no objective grounds justifying the fact that § 209 of the Criminal Code would at some time apply to male persons involved in homosexual relationships that were – for the time being – unpunishable. It was obviously not the legislator's objective to punish homosexual relationships

between partners over 14 and with a difference in age of more than one but less than 5 years; and it resulted in an inequality before the law to make such a relationship punishable by law from the moment at which the older partner turned 19 until such time as the younger partner turned 18. The Court annulled the provision in question but set a time limit for it to be amended.

### Supplementary information:

These were already the third review proceedings concerning § 209 of the Criminal Code. In 1989 the Court dismissed an application that was mainly based on the argument that the differentiation between male and female homosexual relationships resulting from this provision was unconstitutional. In November 2001 the Court had to reject the first application of the Innsbruck High Court of Appeal on procedural grounds, as it relied on arguments on which the Court had already ruled in 1989 (*res iudicata*).

It was not necessary for the Court to answer the question whether the impugned provision also contradicted Article 8 ECHR. However, some cases concerning this issue are currently pending before the European Court of Human Rights.

### Languages:

German.



# Azerbaijan

## Constitutional Court

### Important decisions

*Identification:* AZE-2002-2-003

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 31.05.2002 / **e)** 1/5 / **f)** / **g)** *Azerbaycan* (Official Gazette); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.  
 3.9 **General Principles** – Rule of law.  
 3.19 **General Principles** – Margin of appreciation.  
 4.7.8.1 **Institutions** – Judicial bodies – Ordinary courts – Civil courts.  
 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.  
 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

*Keywords of the alphabetical index:*

Civil Code / Damage, psychological, concept / Damage, individual assessment in judicial proceeding / Damage, compensation, natural and legal persons.

*Headnotes:*

The law admits the existence of non-pecuniary damage alongside material damage and provides for the responsibility of persons having caused such damage.

Causing injury infringes the subjective rights of a natural or legal person. At the same time, in civil law, the reason why damage has a social meaning is that the infringement of subjective rights is accompanied by the infringement of objective rights protected by law.

Non-pecuniary damage includes damage directly influencing the victim's conscience and, following the actions of the person causing the damage, provoking

negative psychological reactions in a victim. Such damage is an independent consequence of the infringement of citizens' rights. It is compensated both where material damage is caused and where it is not.

When providing compensation for non-pecuniary damage it is necessary to take into account the character and degree of mental and physical sufferings of the victim as well as the guilt of the party having caused it, his or her financial position and other important aspects. In each concrete case the details of compensation for such damage should be determined at the court's discretion.

Depending on its content and form, damage may be caused to things that are of a property or non-property character.

*Summary:*

The Supreme Court requested the interpretation of the concept of "damage" as used in the Civil Code.

The Constitutional Court noted that Article 21.1 of the Civil Code stipulates that a person whose right has been infringed shall be entitled to claim full compensation for damage caused to him or her if legislation or an agreement does not provide for the compensation of such losses at a lower rate. "Losses" shall imply the expenses incurred or to be incurred by the person whose right was infringed, in order to restore the infringed right, the loss of or damage to his or her property ("real damage") as well as any loss of profits, i.e. profits that the person would have earned under ordinary conditions if his or her right had not been infringed (Article 21.2 of the Civil Code). Thus, the damage provided for consists of real damage and loss of profits.

Article 21 of the Civil Code can be regarded as containing the general regulations governing compensation for material damage caused by the infringement of individual rights.

Article 23.4 of the Civil Code states: "Where untrue information harming the honour, dignity or business reputation of a natural person is disseminated, such a person has the right to recover the damages caused by such dissemination and obtain a declaration that the information is untrue". The same provisions are applicable with respect to the protection of the business reputation of legal entities (Article 23.6 of the Civil Code). However, there is no direct indication whether the damage in question is considered to be material or non-pecuniary damage.

Where the dignity, honour and business reputation of a person is harmed, he or she feels shock or anguish and is thus exposed to mental suffering. As a result, the person suffers both material and non-pecuniary damage.

The importance of compensation for non-pecuniary damage is enshrined in a number of international instruments.

Usually, non-pecuniary damage occurs when the non-material rights of citizens are infringed. Non-pecuniary damage refers to forms of injury having no direct economic significance. Such damage, by infringing citizens' rights relating to non-material things (such as dignity, honour, business reputation, family privacy, the right to move and choose a domicile, copyright, other private non-material rights and rights to use non-material things), which are attributable to him or her from birth or on the basis of legislation, shocks a physical person and causes him or her anguish.

Article 46 of the Constitution lays down the right of everyone to defend his or her dignity and honour, and guarantees the protection by the state of the dignity of each individual.

Among the fundamental rights and freedoms of humans and citizens, the Constitution clearly enshrines the guarantee of the social, political and economic rights and freedoms of individuals as part of the attributes of a democratic State governed by the rule of law. Further, it regards these rights as aspects contributing to the development or fulfilment of individuals, society and the state.

At the same time it should be noted that one of the basic principles of the development of society is the guarantee of the freedom of thought and speech. This right is enshrined in Article 47 of the Constitution. Article 10 ECHR *inter alia* states: "Everyone has the right to freedom of expression". It should be emphasised that the Civil Code provides for compensation for damage caused as a result of infringements of dignity, honour, business reputation, family privacy and personal security; however, it does not provide for compensation for damages caused as a result of the infringement of non-property rights or rights to use non-material things.

Taking into account the above reasons, the Court ruled that the provisions of Article 21 of the Civil Code provide for compensation of real damage as well as loss of profits. The damage envisaged in Article 23 of the Code implies both non-pecuniary (physical and psychological sufferings) and material

damage causing injury to dignity, honour or business reputation.

#### *Languages:*

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



#### *Identification: AZE-2002-2-004*

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 11.06.2002 / **e)** 1/7 / **f)** / **g)** *Azərbaycan* (Official Gazette); *Azərbaycan Respublikası Konstitusiyası Məhkəməsinin Məlumatı* (Official Digest) / **h)** CODICES (English).

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

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

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

4.7.7 **Institutions** – Judicial bodies – Supreme court.

4.7.8.1 **Institutions** – Judicial bodies – Ordinary courts – Civil courts.

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

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

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

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

Civil Procedure, Code / Appeal, right / Cassation, legal representation, compulsory / Citizen, right and guarantees / Legal Assistance, free, right.

#### *Headnotes:*

A provision making legal representation compulsory in order to gain access to the court of cassation is not contrary to the Constitution inasmuch as everyone has the right to obtain qualified legal assistance.

#### *Summary:*

Taking into account the difficulties encountered in judicial practice with respect to the access of persons

participating in civil proceedings to courts of cassation, the Supreme Court petitioned the Constitutional Court to verify the conformity with Articles 60 and 71.2 of the Constitution of Articles 67 and 423 of the Civil Procedure Code, which state that “the appeal may be lodged by a person participating in the examination of a case with legal representation”.

According to Article 67 of the Civil Procedure Code, in courts of cassation, where an applicant seeks the re-examination of a case based on newly revealed circumstances, the parties to this case shall be entitled to take part in its re-examination only if represented by a lawyer. According to Article 423 of the Code, additional cassation complaints may be submitted by persons participating in the case and represented by a lawyer.

Article 12.1 of the Constitution provides that the highest priority objective of the state is to ensure the rights and liberties of a person and citizen.

According to Article 71.2 of the Constitution, “no one may restrict implementation of rights and liberties of a human being and citizen”.

The state guarantees the protection of the rights and freedoms of all people (Article 26.2 of the Constitution). Among these guarantees is enshrined the guarantee of legal protection of human rights and freedoms.

Article 60 of the Constitution, which secures the legal protection of rights and freedoms of every citizen (paragraph I), also provides for the right to challenge before judicial bodies the decisions and activity (or inactivity) of state authorities and officials (paragraph II).

With a view to achieving these purposes, parliament has laid down the procedural rules governing the verification by higher instance courts of the legality and validity of decisions adopted by the lower instance courts.

Chapter 43 of the Civil Procedure Code deals with the right to challenge a court decision and its examination via the procedure of cassation.

The possibility of challenging court acts in accordance with the procedure laid down in the Civil Procedure Code, and the review of a case by a higher instance court on the basis of an appeal, flow from the meaning of Article 60 of the Constitution as integral elements of the right to legal protection. According to Article 416 of the Civil Procedure Code, the court of cassation shall verify the correct

application by lower courts of substantive and procedural norms of law. According to Articles 424 and 433 of the Code, the full bench of the Supreme Court shall examine exceptional cases concerning legal issues, as well as court decisions or rulings that had entered into legal force, on the basis of newly revealed circumstances. In this connection, with a view to ensuring the qualified and thorough protection of the rights of persons involved in a case under Article 67 of the Civil Procedure Code, it is stipulated that in courts of such an instance persons participating in the case shall act in court only if they are represented by a lawyer. These provisions of the Civil Procedure Code are in accordance with the requirements of Article 61 of the Constitution. According to Article 61.1 of the Constitution everyone shall have the right to obtain qualified legal assistance.

The right to the effective restoration of one’s rights by an independent court on the basis of fair trial is enshrined in a number of international instruments, including Article 14 of the International Covenant on Civil and Political Rights, Articles 7, 8 and 10 of the Universal Declaration of Human Rights and Article 6 ECHR.

For instance, according to Article 8 of the Universal Declaration of Human Rights, “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law”.

According to these provisions, concrete guarantees are given for the implementation *in corpore* of the right to legal protection.

The implementation of the right to fair trial on the basis of the legal equality of parties and the principle of adversarial proceedings is one of the guarantees of civil proceedings enshrined in Article 127 of the Constitution.

The scope of procedural rights enjoyed before the courts of cassation is narrower than the scope of procedural rights enjoyed before courts of first instance. But when determining these rights it must be borne in mind that provisions such as the equality of citizens before the law and before the courts (Article 25 of the Constitution), the guarantee of the protection of rights and freedoms by the courts (Article 60 of the Constitution), the holding of court proceedings on the basis of the equality of parties and of the adversarial principle (Article 127 of the Constitution) are enshrined in the Constitution. This means that at the various stages of civil proceedings, including at the stage of cassation, the parties enjoy equal procedural rights.

Besides other necessary conditions of civil court proceedings, the guarantee of procedural equality also implies the enjoyment of the same rights.

It is not merely by chance that Article 25.3 of the Constitution provides that the state guarantees the equality of rights and freedoms of everyone irrespective of their financial position.

According to Article 61.2 of the Constitution, “in specific cases envisaged by legislation legal assistance shall be rendered free, at governmental expense” (i.e. such legal assistance shall be publicly funded).

Article 20 of the Law on the Legal Profession, which is based on these provisions of the Constitution, stipulates that publicly funded legal assistance shall be provided to persons accused of committing a criminal offence and other low-income persons seeking legal assistance in court, without any restrictions.

In civil procedural legislation the free participation of a lawyer is not excluded. For instance, according to Article 121.2 of the Civil Procedure Code, where legal assistance to a party in whose favour the case was decided had been provided free of charge, the legal expenses of this party shall be covered by another party, for the benefit of the legal aid office.

At the same time, the amount of publicly funded payment for legal assistance and the procedures for its payment in civil court proceedings have not been clarified. In accordance with the relevant legislation the resolution of this issue falls within the competence of the Cabinet of Ministers.

The principle of legal protection and legal assistance as a part of the right to a fair trial is openly and clearly upheld by international judicial bodies.

As mentioned above, the right to a fair trial is envisaged in Article 6 ECHR. In its Judgment of 9 October 1979 in the case of *Airey v. Ireland*, the European Court on Human Rights noted that “...despite the absence of a similar clause for civil litigation, [Article 6.1 ECHR] may sometimes compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting states for various types of litigation, or by reason of the complexity of the procedure or of the case”.

In the cases specified in the relevant legislation, the right to free legal assistance shall be first of all

connected with the interests of a fair trial. This relates mainly to the guarantee of the principle of equality of the parties.

Where it is required in the interests of a fair trial, the right of low-income persons to free legal assistance amounts to a right to freely defend their opinion that cannot be altered. Where legal problems emerge on any issue that requires certain professional skills for its defence, the state should ensure not only the constitutional right to obtain qualified legal assistance but it should also ensure that such a right is implemented with respect to low-income persons in real situations.

In accordance with the above reasoning, when applying the provision of Articles 67 and 423 of the Civil Procedure Code according to which “the appeal may be lodged by a person with legal representation participating in the examination of a case”, one should take into account the provisions of Articles 25, 60 and 61 of the Constitution and of Article 20 of the Law on the Legal Profession. At the request of a person who is deprived of financial means, participating in the examination of a case and seeking the assistance of a lawyer, the court should consider the question of providing this person with a lawyer.

The Court found the provision of Articles 67 and 423 of the Civil Procedure Code according to which “the appeal may be lodged by a person with legal representation participating in the examination of a case” to be in conformity with Articles 60 and 71.2 of the Constitution. The Court further recommended that the Cabinet of Ministers fix the amount of the payment for legal assistance at governmental expense in civil court proceedings and the relevant procedures for its payment.

#### *Cross-references:*

- *Airey v. Ireland*, 09.10.1979, Series A, no. 32, *Special Bulletin ECHR* [ECH-1979-S-003].

#### *Languages:*

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



*Identification: AZE-2002-2-005*

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 21.06.2002 / **e)** 1/9 / **f)** / **g)** *Azərbaycan* (Official Gazette); *Azərbaycan Respublikası Konstitusiyası Mehkəməsinin Məlumatı* (Official Digest) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

1.1.1.1.1 **Constitutional Justice** – Constitutional jurisdiction – Statute and organisation – Sources – Constitution.

1.3.4.5.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Referenda and other consultations.

1.3.4.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Admissibility of referenda and other consultations.

*Keywords of the alphabetical index:*

Constitution, amendment.

*Headnotes:*

The proposals contained in the draft Referendum Act on the Introduction of Amendments to the Constitution of the Azerbaijan Republic submitted by the President of the Republic were in accordance with the general principles of the Constitution regarding the people's power and the foundations of the state, as well as with the provisions of Article 155 of the Constitution.

*Summary:*

The President, using his constitutional right under Article 153 of the Constitution, applied to the Constitutional Court with the above-mentioned proposal. The changes proposed in the draft Referendum Act submitted to the Constitutional Court for legal analysis are aimed at fine-tuning a number of constitutional provisions and securing more effectively the legal guarantee of the rights and freedoms of each individual.

*Languages:*

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

*Identification: AZE-2002-2-006*

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 19.07.2002 / **e)** 1/8 / **f)** / **g)** *Azərbaycan* (Official Gazette); *Azərbaycan Respublikası Konstitusiyası Mehkəməsinin Məlumatı* (Official Digest) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

4.7.7 **Institutions** – Judicial bodies – Supreme court.

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

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, guarantees / Appeal, right / Cassation, appeal.

*Headnotes:*

The law governing criminal procedure does not establish a procedural duty to appeal against a court judgment or ruling by way of a cassation complaint or protest. On the contrary, it provides for the free discretion of the parties to criminal proceedings and leaves them to decide themselves which court instance's judgment or ruling should be subject to such an appeal in accordance with the established procedure.

The non-exercise, for any reason, of this right by a person who is entitled to lodge an appeal against the judgment or rulings of a first instance court and the realisation of this right by another person cannot restrict the right to lodge a complaint with a higher instance court against the judgment or ruling of the first court of appeal, in accordance with the procedure and in the cases provided for in the Criminal Procedure Code.

*Summary:*

Article 408 of the Criminal Procedure Code ("the Code") governs the procedure for lodging an appeal by way of a cassation complaint or protest against judgments delivered by courts of appeal and rulings delivered by first instance courts with the participation of a jury.



Article 409 of the Code defines the circle of persons who are entitled to lodge such complaints or protests. According to this provision, the right to lodge a cassation complaint shall be enjoyed by an accused person who has been convicted or acquitted, his/her defence counsel or his/her legal representative; a victim (private prosecutor), his/her legal representative or his/her representative; a civil law plaintiff or respondent, their legal representatives or their representatives. A cassation protest can be lodged by the public prosecutor who took part in the legal proceedings in the court of appeal as well as by the Prosecutor General or his/her deputy. Taking into account that, in the case of the non-exercise of the right to lodge an appeal complaint or protest against the judgment or ruling of a first instance court by the persons entitled to exercise this right, because they are satisfied with the court decision or for any other reason, neither legislation nor practice specify whether those persons are entitled to lodge a cassation complaint or protest regarding the same case seeking its examination by other higher instance courts, the Supreme Court sought the Constitutional Court's interpretation of Article 409 of the Criminal Procedure Code.

The Criminal Procedure Code lays down rules with respect to whether acts that appear to be offences are criminal and whether a suspect is guilty, and specifies the legal procedures regulating the criminal prosecution and defence of suspects or accused persons as provided for in the criminal law.

According to the Constitution and the laws governing criminal procedure, criminal proceedings shall be carried out on the basis of an adversarial relationship between the prosecution and the defence. In accordance with Article 7.0.21 of the Code, "the prosecution" comprises the preliminary investigator, investigator, prosecutor, victim, private prosecutor and civil plaintiff. And in accordance with Article 7.0.28, "the defence" comprises the suspect or the accused person, his/her defence counsel and the civil respondent.

The prosecution shall seek to prove that a criminal act has been committed, the presence of *corpus delicti* in accordance with the relevant legislation, the involvement of the accused person in the commission of the offence and the possibility of imposing criminal liability on the person that committed the offence (Article 32 of the Criminal Procedure Code).

The legislator intended to ensure the implementation of legal proceedings in accordance with the adversarial principle, to ensure the procedural independence of parties, to clarify their procedural

positions and purposes, as well as to attribute equal procedural functions to the parties.

The adversarial relationship between the prosecution and the defence covers all stages of criminal proceedings and contributes to the delivery of a lawful, well-grounded and fair judgment by the court.

Other provisions of the Criminal Procedure Code (equality before courts of law, guarantees of human rights and freedoms enshrined in the Constitution, the presumption of innocence etc.) also ensure the full implementation of procedural rights and duties by the parties and other persons involved in criminal proceedings.

One of the fundamental principles enshrined in Article 35 of the Code is the right to appeal to a court, based on Articles 60 and 65 of the Constitution. According to Article 35 of the Code, a party to criminal legal proceedings shall have the right to appeal to a higher court, in accordance with the procedure specified in the Code, against the procedural decisions and acts of the court dealing with the criminal case or other prosecution materials.

Upon analysis of the Criminal Procedure Code, it is clear that when guaranteeing the right to complain to a higher court (court of appeal, court of cassation) the legislator conditioned the exercise of this right on the examination of cases by the appropriate court instances. Thus, an appeal complaint or protest against a judgment or ruling of a first instance court shall be lodged with the appropriate court of appeal. And a cassation complaint or protest against a judgment of a first instance court in which a jury has participated shall be lodged with the appropriate court of cassation. This means that except for judgments delivered by first instance courts with the participation of a jury, complaints or protests against the judgments and rulings of first instance courts shall be lodged with a court of appeal.

It should be noted that the exercise of this right by persons who are entitled to lodge a complaint is based on their free will. However, legal proceedings initiated before a court of appeal or cassation are held in the presence of another party who did not lodge the complaint or protest.

According to Article 32.2.5 of the Code, any party to criminal legal proceedings shall express his or her opinion independently and determine the means and methods by which to defend it.

Thus, the Constitutional Court noted that the non-exercise, for any reason, of the right of appeal by a person indicated in Article 409 of the Criminal

Procedure Code who is entitled to lodge an appeal complaint or protest against the judgment or rulings of a first instance court, and the realisation of this right by another person, does not restrict the right to lodge a complaint with a higher instance court against the judgment or ruling of the court of appeal in accordance with the procedure and in the cases specified in the Code.

*Languages:*

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



## Belgium

### Court of Arbitration

#### Important decisions

*Identification:* BEL-2002-2-005

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 03.07.2002 / **e)** 122/2002 / **f)** / **g)** *Moniteur belge* (Official Gazette), 17.09.2002 / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

2.2.1.6.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and domestic non-constitutional instruments.

5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.

*Keywords of the alphabetical index:*

Regional Euro-tax-disc / Transport, international / Employment law / Liability, employer, employee.

*Headnotes:*

It is not contrary to the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) that a lorry-driver, under legislation adopted in application of a European directive, be held jointly and severally liable in the event of non-payment of the regional Euro-tax-disc even where his/her employer cannot pay, although in principle workers are not liable under Belgian employment law for faults committed by their employers.

*Summary:*

A lorry-driver working for a Belgian international transport company was found to have committed an offence because he had no regional Euro-tax-disc. The transport company had been declared bankrupt and the employee, as driver of the lorry, was obliged to pay the regional Euro-tax disc. In effect, "in the event of non-payment by the owner, the vehicle's user, possessor or driver are collectively required to pay for the regional Euro-tax-disc, subject to their

bringing action against the owner" (Article 6 of the Law of 27 December 1994 "assenting to the Agreement on the collection of user charges for the use of certain routes by heavy goods vehicles, signed in Brussels on 9 February 1994 between the Governments of the Federal Republic of Germany, the Kingdom of Belgium, the Kingdom of Denmark, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, instituting a regional Euro-tax-disc in accordance with Directive 93/89/EEC of the Council of the European Communities, dated 25 October 1993").

The driver refused to pay. He claimed that, under Belgian employment law, employees were not liable for their employers' faults. Under Article 1384 of the Civil Code, employers are liable in tort for damage resulting from their employees' misconduct, and, in accordance with Article 18 of the law of 3 July 1978 on employment contracts, the employee is liable only in the event of deceit or grave misconduct.

The court ruling on the case submitted a preliminary point of law to the Arbitration Court, as to whether it was discriminatory that under the regulations on the regional Euro-tax-disc a driver was ultimately liable for the employer's faults in the event of the employer's bankruptcy and obliged to pay the regional Euro-tax-disc despite the fact that under the aforementioned employment legislation, employers remain liable in that event.

The Arbitration Court replied that the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) had not been infringed. The Court noted that Parliament had not wished to institute different treatment for Belgian and foreign vehicles, and that drivers were jointly and severally liable in order to avoid situations where the sums owed went unpaid if foreign vehicles were found to be in breach of the regulations.

The Court considered that, in the present case, the Parliament was entitled to treat employees otherwise than prescribed by Article 18 of the law on employment contracts, bearing in mind the specific nature of the regional Euro-tax-disc, which had been introduced with the objective of imposing on certain vehicles some of the costs pertaining to environmental hazards and road safety, and since payment of this charge could be demanded, if necessary, from both Belgian and foreign employees driving the vehicle concerned.

The Court held that the sanction's severity did not suffice to find the impugned measure disproportionate, bearing in mind that action against the owner might not succeed. This measure in fact arises from a need to

protect the public purse by means of regulations that can only be effective if applied with a certain stringency.

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2002-2-006

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 08.07.2002 / **e)** 86/2002 / **f)** / **g)** *Moniteur belge* (Official Gazette), 24.05.2002 / **h)** CODICES (French, Dutch, German).

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

1.6.5.1 **Constitutional Justice** – Effects – Temporal effect – Retrospective effect (*ex tunc*).  
 3.10 **General Principles** – Certainty of the law.  
 3.19 **General Principles** – Margin of appreciation.  
 5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

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

Criminal procedure, invalid documents, use as exonerating evidence / Defence witness.

#### *Headnotes:*

The Parliament disproportionately infringes the right to a fair hearing when it rules unconditionally and generally that documentary evidence declared void by an investigating court cannot be used in the criminal trial on the merits of the case, even as exonerating evidence.

#### *Summary:*

One of the accused in a highly-publicised murder case complained that he could not use items from the criminal case-file which he considered could prove his innocence. The evidence in question had been declared void by the investigating court and removed from the criminal case-file on the ground that an individual previously charged with aiding and abetting

in Belgium had given a witness statement in France, although no-one may be compelled to give evidence against themselves.

Pursuant to a decision by the Court of Cassation on 3 November 1999, and under the general principle of the right to a fair hearing, persons charged are entitled to cite documents previously declared void for the purpose of supporting their defence. However, the law of 4 July 2001 inserted a provision in the Code of Criminal Investigation stipulating that documents declared void may not be used in a criminal trial.

The accused applied to the Arbitration Court for judicial review of this provision. He claimed that parties to a criminal case where items vitiated by impropriety have been removed from the case-file suffer discrimination with regard to their right to a fair hearing in comparison to the parties in an ordinary criminal case, given that it is difficult, if not impossible, for them to prove their innocence under the new law. In particular, he cited Article 6 ECHR.

After dismissing the objections to admissibility put forward – which will not be elaborated on – the Court adverted firstly to the objective of the challenged law. According to the drafting history, the Court of Cassation's recent case-law had given rise to uncertainty and the principle of legal certainty required the adoption of an unambiguous rule, applicable to all parties, under which documents declared void could no longer be used during related criminal trials.

The Court did accept that in doing so the Parliament had adopted a measure that was relevant in terms of the desired objective, but ruled that the complete impossibility of adducing before the trial items of evidence which had been declared void by the investigating court, even where this contained elements that might be essential to a party's defence, infringed the right to a fair hearing. The Court held that the desired objective could be reconciled with the requirements of a fair trial by providing that a judge shall determine to what extent the observance of the right to a fair hearing requires that a party be able to use items of documentary evidence previously declared void, whilst ensuring that the rights of the other parties are not infringed.

The Court held that the challenged legislative provision should be set aside (*ex tunc*).

#### *Supplementary information:*

The aforementioned Cassation Court judgment of 3 November 1999 may be consulted in French and Dutch on the Cassation Court's internet site:

www.cass.be. All the Arbitration Court's judgments are published on www.arbitrage.be.

During the proceedings on the merits of the case, the Assize Court (i.e. the Criminal Court, which has a public jury and may try such crimes) had already decided in the meantime to permit the accused to use the documents declared void. In this Court's view, the challenged legislative provision (forbidding their use) could not be applied, since this would have been contrary to the right to a fair hearing secured by Article 6 ECHR (Belgium accepts the supremacy of treaty provisions with direct bearing on the law). The accused was nonetheless convicted, but announced that he would apply to the European Court of Human Rights should his appeal on points of law be unsuccessful.

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2002-2-007

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 10.07.2002 / **e)** 128/2002 / **f)** / **g)** / **h)** CODICES (French, Dutch, German).

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

3.10 **General Principles** – Certainty of the law.  
 3.12 **General Principles** – Clarity and precision of legal provisions.  
 3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.  
 3.19 **General Principles** – Margin of appreciation.  
 4.6.10.1.3 **Institutions** – Executive bodies – Liability – Legal liability – Criminal liability.  
 5.2 **Fundamental Rights** – Equality.  
 5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

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

Legal entity, criminal responsibility, act committed by a natural person / Crime, organised / Judge, discretion.

*Headnotes:*

By granting Parliament the power (a) to determine in what cases criminal proceedings are possible and what form they should take, and (b) to adopt legislation under which a penalty may be prescribed and applied, Articles 12.2 and 14 of the Constitution assure to all citizens that no action will be punishable and no penalty imposed except under regulations adopted by a democratically elected deliberative assembly.

However, these constitutional provisions do not preclude the granting by law, to judges responsible for its application, of an element of discretion provided such law satisfies the specific requirements of precision, clarity and predictability with which criminal laws must comply.

A provision of the Criminal Code to the effect that criminal judges, on finding that an offence has been committed unintentionally both by an individual and by a legal entity, should convict only the party which has committed the more serious offence, is not contrary to the constitutional rules on equality and non-discrimination (Articles 10 and 11 of the Constitution) in conjunction with the above-mentioned constitutional provisions and Articles 6 and 7 ECHR.

*Summary:*

A law of 4 May 1999 introduced the concept of the criminal responsibility of legal entities in Belgium. A legal entity is criminally responsible for offences intrinsically linked to the realisation of its aims or defence of its interests, or for offences the material facts of which prove that they were committed on its behalf. Where the legal entity's responsibility is incurred exclusively through the action of an identified individual, only the party that has committed "the more serious offence" may be convicted. If the identified individual committed the offence "knowingly and intentionally", he or she may be convicted at the same time as the liable legal entity.

The drafting history of the law in question shows that the Parliament was seeking to combat "organised crime" and act upon recommendations issued by the Council of Europe's Committee of Ministers.

Preliminary questions concerning the constitutionality of this provision were submitted to the Arbitration Court by a regional Criminal Court entertaining proceedings against legal entities as well as individuals who held positions in these legal entities, for various breaches of welfare legislation.

The questions invited the Court to determine whether any discriminatory interference with the right to a fair hearing arose from the law, or any discriminatory violation of the principle of legislation charging offences, conducting criminal procedure and imposing sentences in strict compliance with the law, in that the court could decide whether or not to convict individuals who had committed an offence "knowingly and intentionally", and could convict the party which had committed "the more serious offence" without the purport of this concept being specified.

In the first place, the Court stated that the right to a fair hearing was guaranteed by a general principle of law and by Article 6 ECHR. The principle of the strict compliance with the law in criminal cases was guaranteed by Articles 12.2 and 14 of the Constitution, and by Article 7 ECHR.

The Court held that by giving the Parliament the power (a) to determine the circumstances and form in which criminal proceedings were possible and (b) to adopt the legislation under which a penalty may be prescribed and applied, Articles 12.2 and 14 of the Constitution assure all citizens that no action will be punishable and no penalty will be imposed except under regulations adopted by a democratically elected deliberative assembly.

By prescribing that only the party having committed the more serious offence may be convicted, but refraining from giving its own definition of the criteria by which this seriousness is to be assessed, the Parliament allows judges discretion to determine which of these two parties should be convicted.

However, the Court does not consider this discretion to be so vast that the persons concerned would be unable to appreciate the criminal consequences of their actions. The requirement of the predictability with which the law must comply in criminal cases has not been infringed.

The Parliament certainly did not give the court a licence to create an offence, establish new forms of prosecution or introduce a new penalty: instead, it adopted a measure which, because it is favourable to the accused, is not a subject to the particular requirements of Articles 12.2 and 14 of the Constitution. Although Article 78 of the Criminal Code states that "no crime or offence may be exempted from punishment except where this is provided for by law", this provision does not preclude that it may be the judge who determines in each case which party should benefit from the measure in question.

The judges' discretion certainly does not prevent every person charged from exercising their right to a fair hearing by giving an account of themselves as regards to the seriousness of the alleged offences. The judges must assess this seriousness not on the basis of the subjective concepts that would make an application of the provision in question unpredictable, but by the yardstick of the ingredients of each offence, bearing in mind the individual circumstances of each case and assessing likewise in each case, the degree of autonomy enjoyed by the individual *vis-à-vis* the legal entity.

The Court was also asked to rule on the difference in treatment between legal entities governed by public law, whose criminal responsibility was excluded by the legislation, and legal entities governed by private law, whose responsibility could be incurred.

In the Court's opinion, public-law entities which are different from the private-law entities in that their sole object was public service and that they were meant to serve the public interest alone. The Parliament could reasonably consider that its wish to combat organised crime did not oblige it to adopt the same measures with regard to public-law entities as those taken in respect of private-law entities.

However, in order to reconcile the principle of equality with its wish to end legal entities' freedom from criminal responsibility, the Parliament must also target those public-law entities which carry out similar activities to private-law entities. Nonetheless, it can exclude those of the former which possess a democratically elected body from this criminal responsibility. Indeed, such entities have the distinction of being chiefly responsible for an essential political task in a representative democracy and of possessing democratically elected assemblies and bodies that are subject to political supervision.

The Court therefore ruled that the legislative provision was not discriminatory.

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2002-2-008

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 10.07.2002 / **e)** 129/2002 / **f)** / **g)** *Moniteur belge* (Official Gazette), 13.07.2002 / **h)** CODICES (French, Dutch, German).

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

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.  
 3.4 **General Principles** – Separation of powers.  
 3.10 **General Principles** – Certainty of the law.  
 4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.  
 5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.  
 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

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

Law, suspension, reasons / Prejudice, serious / Civil service, promotion.

#### *Headnotes:*

The principle of equal access to the civil service and the principle whereby appointments are made in accordance with legal rules laid down beforehand in a general and objective manner form a corollary to the constitutional rules on equality and non-discrimination (Articles 10 and 11 of the Constitution). The Arbitration Court suspended the challenged law since it was apparent from the particular circumstances in which the law had been adopted that the allegation of violation of these rules was well-founded, and since the facts submitted by the applicant demonstrated that the challenged law caused him serious prejudice that would be irrevocably difficult to redress, even were the law to be set aside, because he was losing a final opportunity for end-of-career promotion.

#### *Summary:*

The Court had before it an application for judicial review and a request for a suspension of a legislative provision replacing a Royal Decree found to be illegal by the *Conseil d'État*. The applicant was a civil servant who had already brought proceedings before the *Conseil d'État* in order to preserve his opportunities for an appointment to a higher post, and who had succeeded in having the aforementioned Royal Decree set aside.

Article 20.1 of the special law of 6 January 1989 on the Arbitration Court permits the suspension of a provision challenged before the Court, provided that the serious reasons are adduced and that immediate implementation of this provision is likely to cause serious prejudice that would be difficult to redress. These two conditions are cumulative.

The applicant claimed violation of the constitutional rules on equality and non-discrimination (Articles 10 and 11 of the Constitution), and of the right of access to a judge as guaranteed in Article 6 ECHR and Article 14 of the consolidated laws on the *Conseil d'État*.

The Court noted that, through the challenged provision, the Parliament was settling an issue which in principle was the province of the Crown. It held that the Parliament was entitled to take into its own hands a matter assigned by it to the Crown but not reserved for the Crown under the Constitution. However, with regards to the status of employees in semi-state bodies, this procedure meant that certain formalities normally mandatory in the event of settlement by Royal Decree could not be applied and these formalities served as guarantees for the civil servants concerned. It could not be permissible for the Parliament to take upon itself the matter assigned to the Crown if its sole purpose in doing so was to evade these formalities. The Court sought to cover the intent of the Parliament as revealed by the law's drafting history and concluded that, given the particular circumstances under which the challenged law had been enacted, the claims were valid. The Court also based its conclusion on the fact that the principle of equal access to the civil service, and the principle whereby appointments are made in accordance with legal rules laid down beforehand in a general and objective manner form a corollary to the constitutional rules on equality and non-discrimination.

As regards to serious prejudice that would be difficult to redress, the Court noted that the applicant had been obliged to bring several actions before the *Conseil d'État* since 1990 in order to preserve his opportunities for promotion. The *Conseil d'État* had ruled that his complaints were founded. Throughout this period, the applicant had been obliged to apply for promotion in circumstances that reduced his chances of success. The Court also took into consideration the fact that the applicant was 59 years old and therefore nearing the retirement age and that, given his age, his changes of promotion, in the event of a refusal to suspend the law, were liable to be so restricted as to be deemed non-existent.

In the Court's view, the loss of a final possibility for end-of-career promotion, after all the proceedings that the applicant had already brought, caused him serious prejudice that would be difficult to redress, even were the challenged law to be set aside.

#### *Supplementary information:*

When the Court suspends a legislative act, it must deliver its judgment on the application for judicial review within three months of the suspension order. This period cannot be extended. If such a judgment is not delivered, the suspension immediately ceases to be effective (Article 25 of the special law of 6 January 1989). The Court set aside the suspended provision by Order no. 138/2002 of 2 October 2002.

#### *Languages:*

French, Dutch, German.



# Bosnia and Herzegovina Constitutional Court

## Important decisions

*Identification:* BIH-2002-2-001

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 25.02.2002 / **e)** U 12/01 / **f)** D. N. / **g)** *Službeni Glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina), 20/2002, 13.08.2002 / **h)**.

*Keywords of the systematic thesaurus:*

3.11 **General Principles** – Vested and/or acquired rights.

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

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

*Keywords of the alphabetical index:*

Occupancy, right, holder, successor / Occupancy, right, transfer, conditions / High Representative, decision / Retroactivity.

*Headnotes:*

The legal position of family household members of the holder of an occupancy right, which enables them to take over the occupancy right under certain conditions, is that of an expectation only, which is not protected by the right to property. The Decision of the High Representative for Bosnia and Herzegovina repealing the amendment to the Law on Housing Relations, by which grandchildren were no longer to be considered as family household members, does not have retroactive effect.

*Summary:*

The appellant wanted to take over his grandmother's occupancy right.

The appellant lived in an apartment in Banja Luka with his grandmother. His grandmother was the holder of an occupancy right over the apartment until she died in July 1996. In October 1997, the appellant requested the apartment owner, a public company, to

transfer the occupancy right from his grandmother to him. His request was rejected. In December 1997, the appellant requested the Municipal Secretariat for Housing Affairs of the City of Banja Luka to issue a ruling which would replace a Contract on Use of the Apartment. This request was dismissed as ill founded, and the appellant was ordered to move out of the apartment and to hand it over into the possession of the apartment owner. In November 1998, the appellant challenged this ruling with the Ministry for Town Planning, Housing Affairs and Environmental Protection of the Republika Srpska. This complaint was dismissed as ill founded almost a year later. The appellant then filed a claim with the Supreme Court of the Republika Srpska. He stated that he had lived, as a member of his grandmother's family household, in the apartment in question since 1988. He affirmed that the Law enacted in 1993, which excluded grandchildren from the list of persons regarded as members of the family household, did not change the status that he had acquired as occupant of the apartment, since that provision had been repealed in accordance with a Decision of the Office of the High Representative for Bosnia and Herzegovina in 1997. The Supreme Court dismissed the claim as ill-founded based on the Law on Amendments to the Law on Housing Relations (Official Gazette of Republika Srpska, nos. 12/93 and 22/93), which did not provide that grandchildren could acquire the occupancy right upon the death of the holder of the occupancy right and which was in force at the time when the appellant's grandmother died.

The appellant challenged the Supreme Court's judgment with the Constitutional Court, arguing that it violated the applicable substantive law since the Supreme Court based its judgment on Article 2 of the Law on Amendments to the Law on Housing Relations, which excluded grandchildren from the list of persons who could be members of a family household, and failed to apply the provisions of the Law on Cessation of Application of the Law on Abandoned Property (Official Gazette of Republika Srpska, nos. 12/99 and 31/99). Thereby, the Supreme Court had violated his right to peaceful enjoyment of his possessions according to Article 1 Protocol 1 ECHR.

According to the Law on Housing Relations (Official Gazette of the SR BiH, nos. 13/74, 23/76, 34/83, 12/87 and 36/89), the users of an apartment shall be the holder of the occupancy right and his family members who live together with him permanently, as well as other persons who ceased to be members of that household but continued to live in the same apartment (Article 6.1 of the Law). Amongst others, members of the family household of the holder of the occupancy right included the grandchildren of the holder of the



occupancy right (Article 6.2 of the Law). Users of the apartment, together with the holder of the occupancy right, had the right to use that apartment permanently and freely, in accordance with the conditions laid down by law, whereas members of the family household continued to have that right even after the death of the holder of the occupancy right and when the holder of the occupancy right permanently ceased to use the apartment for other reasons (Article 21.1 and 21.2 of the Law). If the holder of an occupancy right died or permanently ceased to use the apartment for some other reason, and members of his or her family household continued to use the apartment, or if a spouse did not stay in the apartment as holder of the occupancy right, the members of the family household should agree to appoint a person to be holder of the occupancy right and should notify the owner accordingly (Article 22.1 of the Law). If the members of the household did not reach an agreement within a prescribed time-limit and if the owner of the apartment or the competent court did not determine which member of the household should be the holder of the occupancy right, the apartment owner could request from the housing authorities the eviction of the persons remaining in the apartment if it considered that none of the persons remaining in the apartment after the death of the holder of the occupancy right had the right to continue using the apartment.

Under Article 2 of the Law on Amendments to the Law on Housing Relations (Official Gazette of Republika Srpska, nos. 19/93 and 22/93), Article 6.2 of the Law on Housing Relations was amended so as to exclude the grandchildren of the holder of the occupancy right from the list of persons who had the status of members of family household. This amendment was repealed by Decision of the High Representative for Bosnia and Herzegovina, with effect from 28 October 1999.

The Court dismissed the appeal as ill founded since it could not find a violation of the appellant's right to property. The appellant had never had any right to the apartment which would have been protected by Article 1 Protocol 1 ECHR or Article II.3.k of the Constitution of Bosnia and Herzegovina. According to the case-law of the Court, the occupancy right had to be considered as a possession for the purpose of Article 1 Protocol 1 ECHR. However, the appellant was not the holder of the occupancy right over the apartment. As a member of the household of the holder of the occupancy right he had no more than an expectation to become, on certain conditions, holder of the occupancy right after his grandmother. This expectation was not to be considered as property or possessions and was not protected under Article 1 Protocol 1 ECHR. In 1993, while the appellant's grandmother was still alive, the Law on

Amendments to the Law on Housing Relations was enacted, excluding grandchildren as members of the family household and thus as possible successors to the occupancy right. This Amendment Law was still in force in 1996 when the grandmother died. Consequently, the appellant did not at that time have any legal right to have the occupancy right transferred to him. The fact that this legislation was repealed after the grandmother's death did not change the appellant's legal position, since the new Law entered into force on 28 October 1999 but did not have retroactive effect. It could not retroactively confer any right on the appellant.

#### *Languages:*

Bosnian, Croat, Serb.



#### *Identification:* BIH-2002-2-002

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 05.04.2002 / **e)** U 39/01 / **f)** M.H. / **g)** *Službeni Glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina), 25/2002, 10.09.2002 / **h)**.

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

- 1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
- 3.17 **General Principles** – Weighing of interests.
- 3.19 **General Principles** – Margin of appreciation.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.
- 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:*

Employment, termination / Working conditions / Insult, context.

#### *Headnotes:*

The Court's jurisdiction is limited to issues of a constitutional nature and so is its review of the application and interpretation of ordinary laws by the lower courts.

Plain insults do not fall to be protected under the freedom of expression.

### Summary:

The appellant sought to be re-instated into his previous position of employment.

The appellant was an employee of the Thermo-Electric Power Plant in Tuzla (Public Company "Elektroprivreda" of Bosnia and Herzegovina).

In 1995, the employer's Disciplinary Commission terminated the appellant's employment because of a serious violation of his professional obligations. The appellant was alleged to have insulted and threatened a colleague by writing into the logbook the words "Ustaso!! Stop filling the bottles with graphite ink at steam boilers 3 and 4, clean the tables after you, and take this as a warning". The Commission held that this behaviour had disturbed the inter-personal and inter-ethnic relations in the company. This decision was subsequently confirmed in the internal administrative as well as court proceedings through three instances. Therein, attention was drawn to the wartime conditions in the country at the time of the incident and the corresponding possible severe repercussions within and outside the company.

The appellant argued that these court decisions infringed his rights to a fair trial (Article II.3.e of the Constitution of Bosnia and Herzegovina, Article 6 ECHR), freedom of thought, conscience and religion (Article II.3.g of the Constitution of Bosnia and Herzegovina, Article 9 ECHR), freedom of expression (Article II.3.h of the Constitution of Bosnia and Herzegovina, Article 10 ECHR), and his right not to be discriminated against in the enjoyment of these rights (Article II.4 of the Constitution of Bosnia and Herzegovina, Article 14 ECHR). He claimed that the courts lacked a sufficient factual basis for their decisions. He further alleged that the courts had not taken into account the specific circumstances in Bosnia and Herzegovina and within the company at the time of the alleged insult or threat, nor had they evaluated its particular nature and context. The appellant did not deny having written the word or phrase at issue into the logbook, but he argued that the terms were less serious because at that time these terms were "even in official use" or "could be heard in the mass media".

The Court found the appeal to be admissible, but ill founded.

Regarding the merits of the case, the Court generally recalled that its jurisdiction in appeal proceedings was

limited to "issues under this Constitution", and the Court was therefore not called upon to review the establishment of facts or the interpretation and application of ordinary laws by the lower courts, unless the lower courts' decisions were in violation of constitutional rights. This was the case if in an ordinary court's decision constitutional rights had been disregarded or wrongly applied, including cases where the application of the law was obviously arbitrary, where the applicable law was in itself unconstitutional or where fundamental procedural rights (fair trial, access to court, effective remedies etc.) were violated.

The Court found no violation of the right to a fair trial (Article II.3.e of the Constitution of Bosnia and Herzegovina, Article 6 ECHR), since the appellant had been given the opportunity to defend himself throughout the court proceedings at three levels. The courts had gathered extensive evidence in order to establish the facts of the case and the appellant had not challenged the method of hearing the evidence.

Nor did it find any violation of the right to freedom of expression (Article II.3.h of the Constitution of Bosnia and Herzegovina, Article 10 ECHR). It recalled that freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10.2 ECHR, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broad-mindedness without which there is no "democratic society". The Court noted that, in general, human rights and fundamental freedoms were meant to protect the individual against unjustified interferences by the state, although in some cases those rights could affect also the relations between private individuals (so-called "*Drittwirkung*"). Regardless of whether the employment relationship between the employer and the appellant was of a private or public nature, the courts would have had to take into consideration, if applicable, the freedom of expression, when applying and interpreting the disciplinary regulations of the employer. The Court drew attention to the fact that the pertinent provisions gave ample room for interpretation and the weighing of conflicting interests. In cases where there could be a conflict between the freedom of expression and the right of other colleagues or clients to respect for their honour and reputation, the courts would have to take into account the importance of this fundamental freedom in a democratic society.

However, the Court considered that the appellant's insulting statement did not fall within the scope of Article 10 ECHR. When writing down the contested words, the appellant had not intended to express an opinion and thereby contribute to some dispute or to influence somebody's opinion regarding his colleague. Nor had he intended to provide information about his colleague. The word "ustaso" was meant as a plain insult and could have been replaced by any other insulting term without any political implication. Also, the lines were to be read by his colleague alone. The Court therefore held that in these circumstances it was not necessary for the Supreme Court to consider any implication of Article 10 ECHR in the present case, for which reason the Supreme Court did not violate the appellant's freedom of expression.

With regard to the alleged violation of the right to freedom of thought, conscience, and religion, of which, in the present case, only the freedom of thought entered into consideration, the Court held that the freedom of thought could be seen as a safeguard applicable to a stage prior to the expression of thoughts. In view of its reasoning concerning the freedom of expression, the Court found the freedom of thought not to be applicable either.

Finally, the Court found the allegations of a violation of the prohibition against discrimination (Article II.4 of the Constitution of Bosnia and Herzegovina, Article 14 ECHR) not to be sufficiently substantiated and therefore ill founded.

#### *Languages:*

Bosnian, Croat, Serb.



#### *Identification:* BIH-2002-2-003

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c) / d)** 05.04.2002 / **e)** U 62/01 / **f)** E. P. / **g)** *Službeni Glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina), 24/2002, 29.08.2002 / **h)**.

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

- 1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.
- 5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Reasoning.
- 5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.

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

Marriage, religious, contract, enforcement / Islam, rules on marriage / Marital separation / Abuse, of right / Remedy, effective.

#### *Headnotes:*

The Court's jurisdiction is limited to issues of constitutional nature and so is its review of the application and interpretation of ordinary laws by the lower courts.

It is constitutionally unobjectionable if the courts do not recognise religious compensation agreements as binding under civil law.

#### *Summary:*

The appellant claimed payment based on a religious agreement.

The female appellant had concluded a Sharia marriage with Mr D. before the Islamic Community of the Republic of Bosnia and Herzegovina in the presence of several witnesses. Part of the marital agreement was the defendant's obligation to pay the appellant the amount of 1 000 KM as compensation for damage if the marriage were to be terminated (the so-called "mahr"). The agreement, including the *mahr*, was certified and signed in a marriage certificate of the Islamic Community of the Republic of Bosnia and Herzegovina. A civil marriage was not concluded. Subsequently, the marriage was terminated, but the defendant refused to pay the *mahr*. The appellant's attempts through two court instances to enforce the *mahr* agreement were futile. The courts argued that the marriage had been concluded according to Sharia law and fell within the Islamic regulations, not the provisions of the Family Law, which were applicable to

civil marriages and which did not contain any reference to the *mahr* on which the appellant's claim was based. Neither the Family Law nor any other positive law recognised the provisions of Islamic law with regard to matrimonial relations.

The appellant argued that the court decisions violated her rights to return (Article II.5 of the Constitution of Bosnia and Herzegovina), to a fair trial (Article 6 ECHR), to respect for private and family life (Article 8 ECHR), to an effective remedy (Article 13 ECHR), and to the peaceful enjoyment of her possessions (Article 1 Protocol 1 ECHR). She also alleged a violation of Article 17 ECHR.

The Court dismissed the appeal as ill founded.

With regard to the alleged violations of the right to return and the right to respect for private and family life, the Court could not discern in what way the court decisions could have been in violation of these rights. Regarding the alleged violation of the prohibition of abuse of rights (Article 17 ECHR), the Court observed that this provision did not establish a separate individual right but was a rule of interpretation aimed at protecting the idea and aim of the European Convention on Human Rights itself.

The Court found no violation of the right to an effective remedy since it considered this provision not to be applicable in the present case. With reference to the case-law of the European Court of Human Rights, the Court noted that Article 13 ECHR had to be seen together with Article 6 ECHR, especially in the context of alleged violations of rights under the European Convention on Human Rights by court decisions. The wording of Article 6 ECHR and the relevant case-law of the European Court of Human Rights only guaranteed access to the courts, but not the possibility of appealing to a higher court once an independent court had decided on the matter. Therefore, in cases of alleged violations by court decisions, Article 13 ECHR did not oblige the state to provide for the possibility of an appeal to a higher court in order to establish whether there had been a violation of rights under the European Convention on Human Rights. In such cases, Article 13 ECHR gave no additional protection to that provided by Article 6 ECHR.

The Court also found no violation of the right to a fair trial. The Court noted that the appellant mainly complained about procedural and substantive violations of ordinary law which could fall under Article 6 ECHR. In this respect, the Court recalled that its jurisdiction in appeals proceedings was limited to "issues under this Constitution" (Article VI.3.b of the Constitution of Bosnia and Herzegovina), and that the Court was therefore not called upon to review the

establishment of facts or the interpretation and application of ordinary law by the lower courts, unless the lower courts' decision amounted to a violation of constitutional rights. This was the case if an ordinary court had interpreted and applied a constitutional right incorrectly or disregarded such a right, if the application of the law had been arbitrary or discriminatory, or if there had been a violation of procedural constitutional rights (fair trial, access to court, effective remedies etc.). The Court held that the right to a fair trial, *inter alia*, entitled a party to be provided with the basic reasoning of a judgment since this made it possible for him to exercise usefully any legal remedies which may be available. However, Article 6.1 ECHR did not require that the court deal with all arguments put forward by the parties in the course of the proceedings, but only with those that the Court considered to be relevant. The Court had to take into account the arguments of the parties, but there was no need for all of them to be reflected in the reasons of the judgment. Final decisions of appeals courts usually did not require extensive reasoning. In the concrete case, the Court held that the challenged judgments were constitutionally unobjectionable. It was true that the Municipal Court may not have *ex officio* examined possible alternative legal grounds for the appellant's claim, specifically the question whether the agreement on the *mahr* was binding in ordinary contractual law. However, the Cantonal Court's judgment referred to family law as well as any "positive law" in the reasons of the judgment and thereby indicated that the Court had examined all possible legal grounds for the appellant's claim. Any error by the Municipal Court in this respect therefore had to be considered to have been cured in the appeal proceedings.

With regard to the alleged violation of the right to property, the Court noted that ordinary courts had found that the marital agreement on the *mahr* was not legally valid, and that this conclusion was reasonable and thus constitutionally unobjectionable. Under these circumstances it was not the Court's task to replace the ordinary courts in taking a position on this legal question. Accordingly, the appellant had not acquired any possession within the meaning of Article 1 Protocol 1 ECHR, for which reason the present case fell outside the scope of this article.

#### *Languages:*

Bosnian, Croat, Serb.



*Identification:* BIH-2002-2-004

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c) / d)** 05.04.2002 / **e)** U 6/02 / **f)** M. D. / **g)** *Službeni Glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina), 10/2002, 24.05.2002 / **h)**.

*Keywords of the systematic thesaurus:*

3.19 **General Principles** – Margin of appreciation.  
 4.7.2 **Institutions** – Judicial bodies – Procedure.  
 5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to participate in the administration of justice.  
 5.3.13.19 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Equality of arms.  
 5.3.13.20 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Adversarial principle.  
 5.3.13.29 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to examine witnesses.

*Keywords of the alphabetical index:*

Supreme Court, procedure / Traffic, accident, alcoholism.

*Headnotes:*

The principle of equality of arms in criminal proceedings is not violated if in a court session both the appellant and the public prosecutor were absent.

Furthermore, in cases where the appellant's presence in criminal appeal proceedings is in general required by Article 6 ECHR, it is constitutionally unobjectionable if the appeals court understands the failure of the appellant, assisted by a defence attorney, to request to be present in the court session as meaning that the appellant is refraining from exercising his right to appear before the Court, and therefore decides in the absence of the appellant.

*Summary:*

The appellant challenged his prison sentence for a criminal offence.

The appellant was found guilty of an offence against public traffic safety under the Criminal Law of the Republika Srpska. He was sentenced to three years' imprisonment and he was prohibited from driving a "B" category motor vehicle for a period of one year. The appellant challenged this first instance judgment

before the Supreme Court of the Republika Srpska on the grounds that there had been errors of procedural and substantive law. The Supreme Court partly granted the appeal and amended the judgment of the first instance court regarding the legal qualification of the offence. It also mitigated the sentence, since the criminal law had been altered in favour of the accused after the offence had been committed and the first instance judgment had been rendered.

The appellant asserted that the court judgments violated his right to a fair trial (Article II.3.e of the Constitution of Bosnia and Herzegovina and Article 6.1 and 6.3.d ECHR). He pointed out that he had not had the possibility of attending the session of the Supreme Court but that the public prosecutor had attended the session, which violated the principle of equality of arms between the parties; that the challenged judgments were based on assumptions rather than facts; that a witness he had wished to be heard on the degree of his intoxication by alcohol had not been summoned and questioned; that the Supreme Court had not taken into account the role played by the injured parties in the traffic accident, and that the Cantonal Court of Banja Luka, in its judgment in case number Kz-441/99, had sentenced a person to only five months' imprisonment for a similar offence.

The Supreme Court affirmed that the defence attorney, in the appeal against the first-instance judgment, had not requested that he or the appellant himself should be allowed to be present at the session of the Supreme Court and that, accordingly, they had no right to be summoned or be informed of that session. Moreover, it appeared from the minutes and the judgment that the Public Prosecutor had not been informed of the session either and had not been present at the session. In the proceedings before the first-instance court, the appellant's defence had been evaluated in its entirety, and facts and circumstances which were favourable for him had been established and taken into account.

The Court dismissed the appeal as ill founded. It could not find a violation of the rights safeguarded under Article 6 ECHR.

With regard to the alleged violation caused by his not attending the session before the Supreme Court, the Court noted that one important aspect of the right to a fair hearing was the equality of arms between the parties. Another important principle closely connected therewith was that the proceedings should be adversarial in the sense that the accused should be informed of all arguments and evidence presented by the public prosecutor and be given the opportunity to reply to the arguments and adduce other evidence in

support of his defence. Furthermore, the accused should have the opportunity to be personally present during the trial. This applied, first of all, to the trial before the first instance court, but also before higher courts which decide on appeals except when the examination by these courts was limited to procedural or other purely legal issues in respect of which the personal appearance of the accused was of no relevance.

The Court found no violation of the principle of equality of arms because at the hearing before the first-instance court, the appellant and his attorney as well as the public prosecutor were present, while neither the appellant and his attorney nor the public prosecutor had attended the session of the Supreme Court in question. The Court further argued that it was true that the proceedings before the Supreme Court involved a new evaluation of the offence and of the punishment to be imposed, and that the proceedings were therefore such that the appellant could have claimed a right to appear and plead his case before the Supreme Court irrespective of whether or not the public prosecutor had attended the session. However, it found that the appellant, in his appeal to the Supreme Court, had not asked for permission to attend the session in question. He was assisted by a defence attorney who must have been aware that, if the accused wished to be present, he should indicate this to be Supreme Court. The Court found that his failure to make a request to this effect could therefore reasonably be understood as meaning that he had refrained from exercising his right to appear before the Court.

With regard to the alleged refusal to hear witnesses, the Court could not find a violation of Article 6 ECHR either. It noted that Article 6 ECHR did not give the party an unlimited right to hear witnesses before the Court. In particular, it remained open for the Court to assess whether the statements of a proposed witness were relevant to the case and could add useful information for the evaluation of the case. The Court that conducted the proceedings had to have a certain discretion in these matters, but it followed from Article 6.3.d ECHR that the accused must not be treated less favourably than the public prosecutor as regards the possibility of adducing evidence. In the concrete case, the Court considered that the first instance court had given a reasonable justification for its rejection of the appellant's request that the persons concerned should be heard as witnesses and found that the Court had acted within the limits of its discretion. The defence had asked for witnesses to be heard in order to test the accuracy of the finding on the degree of the appellant's alcohol intoxication. The first instance court had found this request imprecise, since it did not appear which circumstanc-

es should be tested and what kind of technique or expert finding should be offered.

With regard the remaining allegations the Court found no appearance of a violation of Article 6 ECHR or of any other constitutional right in these regards either.

#### *Languages:*

Bosnian, Croat, Serb.



#### *Identification:* BIH-2002-2-005

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 10.05.2002 / **e)** U 18/00 / **f)** K.H. / **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.
- 3.6 **General Principles** – Federal State.
- 3.8 **General Principles** – Territorial principles.
- 3.9 **General Principles** – Rule of law.
- 4.6.10.1 **Institutions** – Executive bodies – Liability – Legal liability.
- 4.6.10.1.2 **Institutions** – Executive bodies – Liability – Legal liability – Civil liability.
- 4.8.1 **Institutions** – Federalism, regionalism and local self-government – Federal entities.
- 4.8.8 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
- 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:*

Damage, compensation / Powers, implicit / Powers, negative, conflict / Remedy, effective / Transport, public, accident / State, successor, liability for obligations of former state.

*Headnotes:*

The State of Bosnia and Herzegovina must assume responsibility for those issues constitutionally assigned to it. It must provide for judicial bodies that adjudicate claims against State bodies. As long as the State does not provide for such judicial bodies, it is responsible for the payment of compensation that the individual is unable to achieve due to deficiencies in the legal order.

*Summary:*

The appellant requested compensation for damages.

In 1979, the appellant was injured in a traffic accident on a public road when a stone fell on and broke the window of the bus in which the appellant was sitting, and caused him serious injuries. He initiated legal proceedings for compensation for damage. In 1981, the Municipal Court of Visegrad ordered the Republic Fund for Main and Regional Roads of Bosnia and Herzegovina ("the Fund") to pay compensation for pecuniary and non-pecuniary damage, compensation for the treatment and care that the appellant was given and penalty interest. In later proceedings for compensation for loss of earnings against the same defendant, several judgments were rendered from 1983 to 1991, each of which ordered the payment of compensation for damage, however, in differing amounts and for differing periods of compensation.

In 1998, the appellant initiated proceedings before the Municipal Court of Sarajevo against the Federation of Bosnia and Herzegovina (Federal Ministry of Traffic and Communications). He requested compensation for loss of earnings with penalty interest for the period from 1 January 1998 as a result of the 1979 accident. In 1999, the Municipal Court rejected the appellant's claim due to the absence of a proper defendant for the claim. This judgment was confirmed by the Cantonal Court of Sarajevo.

The appellant complained that the challenged judgment of the Cantonal Court violated his right to property provided for in Article II.3.k of the Constitution of Bosnia and Herzegovina.

The Federal Ministry of Traffic and Communications declared itself incompetent and requested that the appeal be dismissed as ill founded. The Ministry of Civil Affairs and Communications of Bosnia and Herzegovina declared itself incompetent with respect to the subject of the appeal. The Ministry of Traffic and Communications of the Republika Srpska refused to express an opinion on the appeal due to its non-involvement in the proceedings conducted

before the Court of the Federation of Bosnia and Herzegovina.

The Court granted the appeal and quashed the challenged judgments. Moreover, it declared Bosnia and Herzegovina to be responsible for remedying the violation of the appellant's rights. The Council of Ministers of Bosnia and Herzegovina was ordered to implement the decision of the Court, and to pay the appellant a specified sum.

The Court found that the challenged court decisions violated the appellant's right of access to the courts (Article 6.1 ECHR), the right to an effective legal remedy (Article 13 ECHR) and the right to property (Article 1 Protocol 1 ECHR).

With regard to Article 6.1 ECHR, the Court recalled that the right of access to a court embodied not only extensive procedural guarantees and requirements of expeditious and public proceedings, but also required compatibility with the rule of law. If the right of access to the courts could be limited by the State, these limitations were not to restrict or reduce the access in such a way that the very essence of the right was impaired. Furthermore, a limitation would not be compatible with Article 6.1 ECHR if it did not pursue a legitimate aim and if there was not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

The Court found Article 6 ECHR to be applicable. It noted that all three public legal persons that had been addressed by the Court declined their competence regarding the present case. The event had occurred in 1979, on a location within the former territory of Bosnia and Herzegovina which was now within the territory of Republika Srpska. At the time, the responsible party was the Fund.

The Court held that the appellant's appeal fell within the exclusive responsibility of the State of Bosnia and Herzegovina. The Fund had in practical terms ceased to exist without providing for a successor. A new body taking over the Fund's duties and finances had never been established. On the one hand, the Republika Srpska had never taken over the responsibilities or financial means of the Fund and it could not be regarded as responsible for the compensation of damage caused on its territory at the time prior to the date of the entry into force of the Constitution of Bosnia and Herzegovina (14 December 1995). On the other hand, according to the Agreement on Realisation of the Federation of Bosnia and Herzegovina, the government of the Republic of Bosnia and Herzegovina retained the necessary competences to enable it to function as a government of the internationally recognised State of Bosnia and

Herzegovina, while all other civil responsibilities were transferred to the Government of the Federation of Bosnia and Herzegovina. This kind of transfer also included the transfer of responsibilities for functions that had been transferred by areas of competence and, therefore, included the transfer of obligations not specifically regulated but arising in the performance of duties. The Federation of Bosnia and Herzegovina therefore was intended to take over the responsibilities and financial funds previously belonging to the bodies of the Republic of Bosnia and Herzegovina. Consequently, the obligations of the Republic of Bosnia and Herzegovina, under Article 9 of the Law on Federal Ministries and other Bodies of the Federal Administration, according to which the Federal Ministry of Traffic and Communications would perform administrative, expert and other duties established by law, fell within the responsibility of the Federation in the field of traffic and communications.

However, the Court held that the State could not evade its obligation to establish bodies that were within its exclusive constitutional responsibilities. Nor could the Entities take over the State's responsibilities assigned to it in the Constitution of Bosnia and Herzegovina. According to Article I of the Constitution of Bosnia and Herzegovina, "the Republic of Bosnia and Herzegovina, the official name of which shall henceforth be 'Bosnia and Herzegovina', shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognised borders (...)". Moreover, Article III of the Constitution of Bosnia and Herzegovina regulated the responsibilities of and the relations between the institutions of Bosnia and Herzegovina and the Entities, and according to Article III.1.i of the Constitution, the regulation of inter-Entity transportation fell within the exclusive competence of the State.

The Court further argued that, regardless of whether the State had a *prima facie* legal interest in the present case, it was the legal entity that had the final responsibility with regard to possible violations of human rights under Article II of the Constitution of Bosnia and Herzegovina. The Court found that an individual must not be overburdened in determining the most effective way of realising his rights. One of the main principles of the European Convention on Human Rights was that the legal means available to an individual had to be accessible and understandable. It was the duty of the State to organise its legal system so as to allow the courts to comply with the requirements of Article 6.1 ECHR.

The matter at issue therefore fell within the competence of the State of Bosnia and Herzegovina and it had to comply with its constitutional responsibility. However, since there was, at the time of the decision, no State Court before which the appellant would have been able to defend his civil rights, the appellant had been denied his right of access to court.

Accordingly, the Court found a violation of the appellant's right under Article 13 ECHR. Article 13 ECHR had to be interpreted so as to guarantee an "effective remedy before a national authority" to everyone who claims that his rights and freedoms under the Convention have been violated. Article 13 ECHR guaranteed the availability within the national legal order of an effective remedy to enforce Convention rights and freedoms in whatever form they might happen to be secured. The object of this article was thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant effective relief to the aggrieved party. The remedy required by Article 13 ECHR must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent party.

The Court found that the appellant had a valid claim in the sense of Article 13 ECHR. As a result of constitutional re-organisation, Bosnia and Herzegovina had not established all the bodies necessary to perform its obligations under the Constitution of Bosnia and Herzegovina. It had not established an operative body that would be competent for inter-Entity transport matters or a judicial body that would deal with cases brought by appellants against the decisions of those State bodies that ran counter to the principle of the rule of law.

Finally, the Court found a violation of the appellant's right to peaceful enjoyment of his possessions. The present case did not fall within the ambit of the application of laws controlling the use of property; but it concerned a failure by the authorities to effectively secure the appellant's right to property. Despite its positive obligation to do so, the State of Bosnia and Herzegovina had failed to provide a proper legal protection of the appellant's property right. The Court could not see in what way the State had struck a fair balance between the demands of the general interest of the community and the requirements of the protection of the appellant's right to property.



The Court concluded that the appellant had a well-founded claim for compensation and that Bosnia and Herzegovina was responsible for honouring that claim. In the absence of a court before which he could have his claim confirmed, the Court argued that the State of Bosnia and Herzegovina had to be directly ordered to pay him compensation based on the average income in the Federation of Bosnia and Herzegovina.

*Languages:*

Bosnian, Croat, Serb.



## Bulgaria Constitutional Court

### Statistical data

1 May 2002 – 31 August 2002

Number of decisions: 1

### Important decisions

*Identification:* BUL-2002-2-002

**a)** Bulgaria / **b)** Constitutional Court / **c)** / **d)** 16.04.2002 / **e)** 06/02 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 40, 19.04.2002 / **h)**.

*Keywords of the systematic thesaurus:*

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.

1.3.5 **Constitutional Justice** – Jurisdiction – The subject of review.

*Keywords of the alphabetical index:*

Contract, state / Contract, applicable law / Contract, court jurisdiction / Private international law / Ratifying law, review / Corporation, foreign / UNCITRAL.

*Headnotes:*

The Constitutional Court's competence to test the constitutionality of international treaties does not extend to commercial contracts concluded between the State and foreign individuals and/or corporations. The Court is competent to rule only on the constitutionality of the laws by which such contracts were ratified. Where the application substantively challenges not the ratifying law but the contract alone, it is declared inadmissible.

*Summary:*

Proceedings were instituted by 48 members of the XXXIX<sup>th</sup> National Assembly. The application challenged the constitutionality of a law on the ratification of a number of financial services contracts

(investment, tax agency and dealers/managers) concluded between the Republic of Bulgaria and foreign corporations.

The Court pointed out firstly that in order to declare the application admissible for consideration on the merits, it needed to establish that the contracts in question were not outside its jurisdiction, and whether and to what extent they formed part of the instruments which it could review.

The Court ruled that the transactions designated in this piece of ratifying legislation came under civil law. They were effected between foreign private corporations on the one hand and, on the other, the Republic of Bulgaria. On its side, the Republic of Bulgaria participated in the three transactions as a civil law corporate body. In the Court's view, the Bulgarian State is not only an entity in international law but also an entity in national law, that is of its own legal order, as well as in the legal systems of other States to the extent that they recognise its status. As such, Bulgaria is a party to the contracts on equal terms with the other contracting parties, and has rights and obligations governed in particular by private law.

The will of the Republic of Bulgaria, expressed in the law to ratify the three contracts, is not of an authoritarian kind. The State did not express this will as a sovereign act (*iure imperii*) but in a civil law capacity (*iure gestionis*). The contracts in question even contain explicit clauses to that effect.

Next, the Court noted that in practice and in theory, having regard to their object and substance, the contracts in question were unanimously defined as State contracts. They differed essentially from international treaties, these being concluded between entities in public international law (such as States, intergovernmental organisations and institutions, and groups and organisations having international legal personality). It is important to recall that, in Bulgarian law, the two classes of transactions are equated linguistically in the absence of different words to distinguish them. In Bulgarian there is only one word, "*dogovor*", which refers to international treaties as well as to private contracts. Of course this does not mean that there is no need for the respective courts to have regard to the differing legal nature of these two classes of transaction.

The three contracts concluded between, on the one hand, Bulgaria, acting as a private law entity and, on the other, foreign individuals or corporations, are subject to the rules of private international law. This is the case as regards, firstly, the law applicable to the three contracts which, at the explicit behest of the parties, come under national, but not Bulgarian, law.

Given that the Constitutional Court's review is normally confined to the constitutionality of the instruments submitted to it, the application of foreign civil (commercial) law is plainly outside its jurisdiction.

This is also the case as regards international jurisdiction. In all three contracts, Bulgaria undertook to refrain from exercising its rightful jurisdiction. Consequently, the Bulgarian courts are not competent to entertain litigation arising from these contracts. As a private legal person within the meaning of its own law, Bulgaria has exercised the right which it enjoys under the terms of Article 9.3 of the Code of Civil Procedure and recognised the jurisdiction of the foreign courts. This is likewise the spirit of the clauses concerning the waiver of immunity, the recognition and enforcement of foreign judicial decisions, and the arbitration clauses which are included and refer to the UNCITRAL rules in the contracts. In the light of the foregoing, the Constitutional Court held that the transactions in question were not international treaties concluded between subjects of public international law, and thus did not come under the rules governing international treaties.

The Court explicitly stated that in conducting the review of a law enacted to ratify international treaties, it could also rule on the constitutionality of the actual treaties. International treaties ratified according to the constitutional procedure, which have been published and come into force, are part of the State's domestic law. They may therefore be regarded as laws and have force of law. That is why Bulgarian law does not accept provisions contrary to the Constitution which are introduced by an international treaty. Assessment of such provisions and certification of their possible incompatibility with the Constitution are characteristically within the jurisdiction of the Constitutional Court.

However, the above rule does not hold good where private law transactions are concerned, as these do not contain any legal provisions even when ratified and published. Their clauses are binding only on the parties to the contract. As the Court pointed out, the contracts in question "are not concluded between States" and therefore "do not come under international law". Not being international treaties, the three contracts are excluded from the ambit of Article 5.4 of the Constitution. That being so, they are not among the instruments subject to review by the Constitutional Court under the terms of Article 149.1.4 of the Constitution. They are not incorporated into the domestic law of the Republic of Bulgaria, nor can they be, even if published after ratification. In the Court's finding, where such is the case the ratifying law does not have the effect of incorporating legal provisions;

it is nothing more than a specially defined, constitutionally established form for conferring rights and duties of a private law character. In so far as this agreement is formally expressed by a law, the law may have its constitutionality examined by the Constitutional Court, in accordance with Article 149.1.2 of the Constitution. The Court's scrutiny relates to any defects by which the law may be vitiated and does not concern the contracts. All litigation arising from these contracts falls within the jurisdiction of the civil courts, in accordance with the applicable law, and is not matter for constitutional justice. Accordingly, since the objections raised in the application did not relate to any defects in the ratifying law but were directed at the contracts themselves, the Constitutional Court held that the requirements for considering the application on the merits were not met. In these circumstances, the Constitutional Court declared the application inadmissible and proceeded no further.

*Languages:*

Bulgarian.



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## Canada Supreme Court

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There was no relevant constitutional case-law during the reference period 1 May 2002 – 31 August 2002.



# Croatia

## Constitutional Court

### Important decisions

*Identification:* CRO-2002-2-014

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 17.04.2002 / **e)** U-III-896/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 49/02 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.

3.19 **General Principles** – Margin of appreciation.

5.2 **Fundamental Rights** – Equality.

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

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

*Keywords of the alphabetical index:*

Judgment, revision / Labour law.

*Headnotes:*

In constitutional proceedings with respect to a constitutional complaint, the Constitutional Court is bound only by the violations of constitutional rights raised in the complaint, and not by the substantial and procedural issues cited in the complaint by the applicant.

*Summary:*

The Supreme Court had handed down a decision rejecting as inadmissible the applicant's appeal for the re-opening of proceedings following judgments handed down by the lower instance courts with respect to compensation for damages suffered in the course of employment.

From the reasoning of this decision it was clear that, according to the Supreme Court, in property law disputes, in accordance with the provisions of

Article 398.2 of the Law on Civil Procedure (Official Gazette nos. 53/91, 91/92 and 112/99; "the Law"), proceedings may be re-opened if the value of the subject matter of dispute in the challenged part of the final decision exceeds a certain amount.

At the time when the complaint was lodged, this amount was fixed at 3 000 HRK. On 6 November 1999 the Law was amended and the amount was increased to 100 000 HRK. The applicant had, in accordance with the above changes and amendments to the Law, amended his appellate request on 21 January 2000, and the total amount subject to dispute was 202 000 HRK. Although the lower-instance court rejected the applicant's claim in the amount of 179 000 HRK, the Supreme Court, in dismissing his appeal, had incorrectly re-evaluated the relevant sum at 78 000 HRK.

In the constitutional complaint the applicant argued that he had suffered a violation of Articles 14.2 and 26 of the Constitution (concerning, respectively, equality before law and equality of citizens and aliens before the courts, government bodies and other bodies vested with public authority).

The Court analysed all the provisions of the Law regarding the value of the subject matter of a dispute in relation to the possibility of re-opening proceedings. It found that the Supreme Court decision on the applicant's appeal was in contradiction with the decisions of the lower-instance courts and its conclusions were not legally acceptable with respect to the legal provisions in force and established court practice.

Although the Court did not consider the applicant's argument (by which he sought to realise his right to submit the request for the re-opening of proceedings) as grounded, finding that the matter at issue was in fact a labour dispute, it decided to accept the constitutional complaint. This decision was based on the circumstances that had caused the violation of constitutional rights and on the underlying meaning of the issues raised in the constitutional complaint, and finally on the fact that the Court found that the conditions for the re-opening of proceedings, with respect to the legally prescribed value of the subject-matter of the dispute, were fulfilled.

*Languages:*

Croatian, English (translation by the Court).



**Identification:** CRO-2002-2-015

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 08.05.2002 / **e)** U-III-1458/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 55/02 / **h)** CODICES (Croatian, English).

**Keywords of the systematic thesaurus:**

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

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

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

**Keywords of the alphabetical index:**

Child, disabled, care / Parental leave, additional, conditions / Parent, rights and duties.

**Headnotes:**

Under Article 63.1 of the Constitutional Law on the Constitutional Court, the Constitutional Court shall open proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in cases where the Court of Justice has not ruled within a reasonable time on the rights and obligations of the party, or on the suspicion or accusation of a criminal offence, or in cases where the impugned individual act grossly violates constitutional rights and it is absolutely clear that grave and irreparable consequences may arise for the applicant if Constitutional Court proceedings are not initiated.

**Summary:**

The applicant lodged a constitutional complaint against the final and binding administrative act by which her request for authorisation to take a leave of absence until her child's seventh year, to care for a child who had serious developmental difficulties, was refused. The refusal was based on the provision of Article 3.1 of the Rules on Acquiring the Right to Take Leave of Absence until the Child's Seventh Year and to Work Half-Time to Care for a Seriously Disabled Child (Official Gazette no. 47/96; "the Rules"), since it was established that the father of the child was a self-employed attorney-at-law, and the Rules stipulated that both parents had to be employed full time in order for one of them to be entitled to such a leave of absence. The constitutional complaint was lodged before the existing legal remedies were exhausted, i.e. before the Administrative Court procedure had been concluded, on the basis of Article 63.1 of the

Constitutional Law on the Constitutional Court (Official Gazette no. 49/02; "the Constitutional Law").

In Case no. U-II-1993/2001, proceedings were conducted to review the constitutionality and legality of the above provision of the Rules, and the part of Article 1 of the Rules which read: "on condition of both parents being ..." was repealed. From the statement of reasons in the decision it appears that the competent Minister, in regulating the conditions under which one parent may acquire the right to take a leave of absence, arbitrarily narrowed the circle of persons who could realise this right, contrary to the intent and purpose of Article 66.1 of the Labour Law and contrary also to the constitutional principles enshrined in Articles 61.1, 62 and 63.3 of the Constitution.

The Constitutional Court found the constitutional complaint admissible, bearing in mind the above considerations, and because the conditions of Article 63.1 of the Constitutional Law – which enables the Court to act before the exhaustion of all legal remedies – had been fulfilled. Furthermore, the Court considered that in the instant case irreparable consequences could have arisen for the applicant and her child. In making this decision the Court also applied the provisions of Article 58.2 and 58.3 of the Constitutional Law, establishing that the applicant did not possess a formal legal act on the basis of which she could request new proceedings before the competent body, regarding the right to a leave of absence; and the provision of Article 58.5 of the Constitutional Law (which regulates the consequences of annulling the law or annulling or repealing another regulation with respect to the proceedings in which a final decision has not yet been made).

In repealing the disputed rulings of administrative bodies the Court returned the case to the first instance body for new proceedings with the instruction that in the new proceedings the administrative bodies were bound by the legal standards established by the Court in Decision no. U-II-1993/2001 of 20 February 2002.

**Cross-references:**

- Decision of 20.02.2002 (U-II-1993/2001).

**Languages:**

Croatian, English (translation by the Court).



*Identification:* CRO-2002-2-016

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 20.05.2002 / **e)** U-III-1002/2000 / **f)** / **g)** *Narodne novine* (Official Gazette), 71/02 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

3.13 **General Principles** – Legality.  
 4.7.2 **Institutions** – Judicial bodies – Procedure.  
 4.7.3 **Institutions** – Judicial bodies – Decisions.  
 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:*

Judicial decision, final / Court deposit, beneficiary.

*Headnotes:*

A determination that even one of the violations of constitutional rights alleged in a constitutional complaint is made out is sufficient for the constitutional complaint to be accepted.

*Summary:*

The legal validity of a court ruling was established by decision of the Court of first instance, and therefore pursuant to Article 98 of the Judiciary Act (Official Gazette nos. 3/94, 100/96, 129/00; “the Act”) the right of the beneficiary of a court deposit (the applicant in the present constitutional complaint) to withdraw the deposit was terminated, on the grounds that the deposited funds were not withdrawn within two years after the delivery of a final decision. It was therefore determined that the funds had become public property and they were transferred to the State Treasury.

The applicant's appeal was declared admissible in part by the second-instance court. However, the effect of the ruling on the appeal was nonetheless to transfer the deposit to the State Treasury.

In the constitutional proceedings it was established that the Municipal Court in P. had delivered a ruling dated 13 December 1994, permitting the creation of a court deposit for the purpose of the payment of an amount due under contract no. 1/93 of 11 September 1993, in favour of the applicant. Under item III of the

same ruling, if the beneficiary of the deposit did not withdraw the deposit within two years of the delivery of the final ruling determining the issue in the case and calling on the beneficiary to withdraw the deposit, the Court should deliver a further ruling ordering the termination of the beneficiary's right to withdraw the deposit and the transferral of the deposit to the State Treasury. The first ruling was delivered to the applicant's proxy on 27 December 1994, and the proxies in due time submitted an appeal against the ruling.

The second-instance ruling, by which the appeal was rejected and the first-instance ruling confirmed, was delivered to the proxy on 8 February 1995.

A further ruling, which was challenged in the present constitutional proceedings, established that the ruling on the creation of the court deposit had become final on 23 January 1995. Therefore, upon the expiration of the two-year term, the deposit became public property and was transferred to the State Treasury.

On the basis of the above-mentioned state of facts, the question was raised as to the date on which the ruling had become final, i.e. whether it became final on the date of the session of the second-instance court with respect to the appeal proceedings or on the date of the delivery to the applicant of the second-instance ruling.

The Constitutional Court established (by analysing the facts in the case and on the basis of Article 334.2 of the Law on Civil Procedure, and exceptions to the rule prescribed by Articles 4 and 145.2 of the Law on Civil Procedure) that the ruling had become final on 8 February 1995, i.e. the date of notification of the ruling, upon which date the two-year voluntary execution period began to run.

In connection with the above, the Constitutional Court found that there had been a violation of constitutional rights under Article 18.1 of the Constitution (according to which the right to appeal against first-instance decisions made by courts or other authorities shall be guaranteed), because this constitutional right cannot be effectively realised if the decision of the Court contains an incomplete statement of reasons, or no reasons at all. This is because it is the statement of reasons that provides the basis for determining whether the Court has applied the principle of legality and whether the proceedings were conducted in such a way as to enable full protection of the rights of the parties in dispute. The second-instance court did not consider the statements of the appellant with respect to the moment at which the ruling became final, and in spite of all statements given and evidence adduced, it reached an incorrect conclusion on the

regularity of the first-instance judgment with respect to the legal validity of the disputed ruling.

Since the violation of the constitutional right under Article 18 of the Constitution is sufficient reason for quashing the disputed rulings, the Constitutional Court did not review the other rights cited in the constitutional complaint, guaranteed under Articles 26, 48 and 49 of the Constitution.

#### *Languages:*

Croatian, English (translation by the Court).



#### *Identification:* CRO-2002-2-017

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 27.05.2002 / **e)** U-IX-163/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 65/02 and 75/02 / **h)** CODICES (Croatian, English).

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

4.7.2 **Institutions** – Judicial bodies – Procedure.  
 4.7.4.1.5.2 **Institutions** – Judicial bodies – Organisation – Members – Status – Discipline.  
 4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.  
 4.7.16.2 **Institutions** – Judicial bodies – Liability – Liability of judges.  
 5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.  
 5.3.13.29 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to examine witnesses.

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

Judge, disciplinary measure / Judicial function, responsible performance / Judicial Council, decision, review / Judge, suspension.

#### *Headnotes:*

While conducting constitutional proceedings in connection with an appeal against a decision to suspend a judge from office and a decision on the disciplinary liability of a judge, the Constitutional

Court functions like an ordinary court of appeal. In so doing, the right of the Council of the Court dealing with the case to establish the existence or non-existence of facts supporting a finding as to a violation of the constitutional rights of the appellant is not limited by special formal rules for giving evidence. The court's decision on the appeal excludes the right of the appellant to lodge a constitutional complaint.

#### *Summary:*

By decision of the National Council of the Judiciary (no. Sp-4/01 of 10 December 2001), the applicant was suspended from office for a term of three months for a breach of discipline under Article 20.2.2 and 20.3.1 of the Law on the National Council of the Judiciary (Official Gazette nos. 58/93, 49/99, 31/00, 107/00 and 129/00). The applicant was found guilty of a breach of discipline due to irresponsible performance of judicial office, on the grounds that he had failed, without justification, to write and deliver judicial decisions within the statutory time-limit. Thus in three criminal cases he had written and delivered the judgments seven, six and ten years respectively after their pronouncement.

The applicant, on the basis of Article 120.4 of the Constitution, lodged an appeal against the disputed decision of the National Council of the Judiciary, which he argued was based on erroneous and incompletely established facts, misapplication of substantive law and a fundamental infringement of the provisions on disciplinary procedures, in connection with the analogous application of the Law on Criminal Procedure (Official Gazette nos. 110/97, 27/98, 58/99 and 112/99). The appeal consisted of submissions by three attorneys-at-law, in which they presented the appellate claims, with respect to which the proponent of the proposal to initiate the disciplinary procedure (the President of the Supreme Court) duly responded.

The appellate claims with respect to erroneous and incompletely established facts were based on the fact that the applicant was not obliged, after 1993 – when he was appointed president of the County Court in P. – to work on specific cases at all; however, he ruled on as many court cases as 2.5 average judges. At the same time he conducted the referendum in 1991 and all the elections from 1990 to 2001, founded land registries for the B. area and was mobilized into the Crisis Headquarters of Municipality B., during the Homeland War, and participated in the work of the previous National Council of the Judiciary. He was, on the proposal of American judges, awarded the rank of honorary colonel, which he considered very important not only for his reputation but also for that of the Court.

The misapplication of substantial law, he argued, arose from the infringement of provisions of the Law on Criminal Procedure with respect to establishing whether a given act is a criminal act and whether there are any circumstances that preclude criminal prosecution, and especially whether the statute of limitations for criminal prosecution has expired or whether the matter has already been decided.

The applicant contended that the provisions on disciplinary procedure had been fundamentally infringed in connection with the analogous application of the provisions of the Law on Criminal Procedure, with respect to:

- Article 359.7, in accordance with which the Court shall show explicitly and completely which facts it considers proved or not proved and why, and in doing so it shall especially assess the validity of conflicting evidence, the reasons why it did not accept specific proposals made by the parties, the reasons why it decided not to examine in person a witness or expert whose written findings were read in court, the reasons on which it based its approach to legal issues, especially the issue of whether or not a criminal act has been committed and whether or not the defendant is guilty, and the basis for the application of specific provisions of the Criminal Code to the defendant and his acts;
- Article 367.1.9.11, under which it is a fundamental infringement of the provisions of criminal procedure if the decision steps beyond the bounds of the charges laid against the accused; if the statement of the decision is unclear, in contradiction with itself or with the reasons given in the decision, or if the decision includes no reasons at all or if it does not contain reasons about the decisive facts or if these reasons are completely unclear or largely contradictory, or if there is a substantial contradiction between what the decision states to be the decisive facts contained in the documents or records of evidence given in the proceedings, and those contained in the documents or records themselves;
- and paragraph 3 of the same article, in accordance with which it is also a fundamental infringement of the provisions of criminal procedure if the Court, during preparations for the main hearing, or during the main hearing, or in passing the sentence, did not apply or misapplied any of the provisions of the Law on Criminal Procedure, or infringed the rights of the defence at the main hearing, and this had or could have had a bearing on the sentence.

Specifically, the applicant indicated that his proposal to examine certain fellow judges as witnesses was refused, and pointed to the circumstances connected with the time when the breach of discipline was ascertained, arguing that his objections to the statute of limitations had been misinterpreted. The applicant also claimed that his right to defend himself had been infringed because the National Council of the Judiciary had refused the defence's proposal to examine the applicant in person and had not heeded the medical documentation submitted, which showed that the applicant was prevented from obeying the subpoena of the disciplinary body to give evidence for completely justified reasons. Nor was any valid reason given as to why this documentation had not been recognised. Finally, in connection with the breach of discipline itself, interpreting the provision of Article 20.2.2 of the Law on the National Council of the Judiciary, the applicant argued that a breach of discipline is characterised by an unspecified number of acts for which no justification is given as to why the judge does not write and deliver judicial decisions within the statutory time-limit. Therefore a breach of discipline would be committed at the time when these circumstances occurred, and prolonging the period in which no decision was handed down would not constitute a continuing breach. He disputed the National Council of the Judiciary's argument that as little as two decisions not written and delivered in the statutory time-limit, during eleven years of office, may serve to underpin the claim that he had not performed his judicial office properly.

Finally the applicant emphasised that the disciplinary proceedings were undertaken with the purpose of removing him from office, not with the purpose of establishing a breach of discipline and deciding on the merits of the case, and he considered that the aforementioned outstanding professional achievements in different fields as well as mitigating circumstances, which were not accepted by the Council, were in his favour.

In the constitutional proceedings against the decision of the National Council of the Judiciary, the Court on two occasions invited the applicant's representatives to deliver the statements of witnesses not heard in the previous proceedings, with the purpose of establishing the existence of any facts upholding the objection concerning the statute of limitations and to contest or verify the witness statement of the former president of the Supreme Court. The relevant statements were not delivered on time, and those that were delivered outside the newly determined time-limit did not contain facts in favour of the applicant or that would challenge the statement of the witness.



The Court found, further, that the breach of discipline was connected with the condition of no judgment having been delivered within the statutory time-limit, not with the set of circumstances prevailing at the moment at which the time-limit was passed. Thus the breach continued to occur for as long as the court decision was not written and delivered.

The Court also established that the applicant did not deny committing the breaches of discipline he was charged with. Instead he tried to justify the non-performance of his duties on the basis of the duties he had voluntarily accepted or chosen when he assumed a higher rank. In doing so he had obviously disregarded the meaning of performing his judicial tasks. Therefore, in the Court's view, performing other duties could not be considered a circumstance sufficient to bring into play Article 358.1.2 of the Law on Criminal Procedure, which lays down the reasons for which a judge may, exceptionally, extend the time-limits for writing and delivering judgments.

In connection with the challenged infringement of the procedural law, over which the appellate court exercises supervision in the ordinary course of its duties, the Court found no violation. The claims as to the existence of contradictions between the contents of the records, stepping beyond the bounds of the charges brought or infringement of the rights of the defence had been dealt with during the first-instance proceedings before the National Council of the Judiciary.

Furthermore, analysing in detail the case, the disputed judgment and the appeals, the Court did not find that the defence's claim that there had been a violation of Article 6.1 and 6.3 ECHR, in relation to the rights of the defendant to a fair trial, was substantiated. Equally the Court did not find any infringement of Article 29.2.2, 29.2.4, 29.2.5 and 29.2.6 of the Constitution governing the rights of the defence in proceedings before the competent Croatian courts and administrative and other bodies vested with public authority. Therefore, Article 44 of the Constitution (in accordance with which every citizen of the Republic shall have the right, under equal conditions, to take part in the conduct of public affairs, and have access to public services) was also not violated; nor was there a violation of Article 54 of the Constitution (under which everyone shall have the right to work and enjoy the freedom of work; everyone shall be free to choose his vocation and occupation, and all jobs and duties shall be accessible to everyone under the same conditions).

The appeals were therefore dismissed.

### *Supplementary information:*

On the basis of Article 27.4 and 27.5 of the Constitutional Law on the Constitutional Court, Judge Milan Vukovic delivered a separate opinion in writing.

Judge Vukovic found that the disputed decision of the National Council of the Judiciary and the decision of the Court violated the rights of the defence, as they misinterpreted Article 28.1 of the Law on the National Council of the Judiciary.

This article provides that a judge against whom disciplinary proceedings are being held must be offered the choice of presenting his defence in person or through defence counsel of his own choosing. Judge Vukovic considered that the applicant had not, in the given case, at any time or in any way, transferred this right to anyone, even to his representatives, and therefore the applicant had not been accorded full rights of defence. Specifically, he had been denied the right to be "tried in his presence", and the right to "examine or to have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him", as provided in Article 29.2.5 and 29.2.6 of the Constitution.

Judge Vukovic found that the views expressed in the decision of the Court, the views of the proponent of the disciplinary proceedings and those given in the decision of the National Council of the Judiciary, to wit that judge M., charged with breach of discipline, had by engaging defence counsel chosen the manner of his defence in accordance with the provisions of Article 28 of the Law on the National Council of the Judiciary, were not justified in law or on the facts.

The claim of the National Council of the Judiciary in Decision no. Sp-4/01 of 10 December 2001, on page 4, that the "National Council of the Judiciary finds that judge M. had exercised his legal option to present his defence through defence counsel of his own choice, and there was no need to hear him in person" was, in Judge Vukovic's view, impossible, because it was largely arbitrary and legally unfounded. In particular, it said nothing about when and where judge M. had stated that he had chosen this form of evidence.

Moreover, the defence counsel on several occasions, at the hearing before the National Council of the Judiciary, clearly demanded the examination of the judge subject to the disciplinary proceedings, who could not attend the hearing due to ill health. His state of ill health was confirmed by medical documentation, which the National Council of the Judiciary had clearly also failed to take into account.

Still less convincing and legally justifiable, according to Judge Vukovic, was the argument put forward by the proponent of the disciplinary proceedings concerning the right of the judge subject to the proceedings to defend himself in person, as follows: "It is Article 28.1 of the Law on the National Council of the Judiciary that provides differently. This provision stipulates that in the proceedings for breach of discipline the judge against whom the proceedings are being held must be offered the possibility of presenting his defence in one of two ways:

- in person or
- through the defence counsel of his own choice.

It is obvious that appellant himself opted for the possibility of presenting his defence in written form through his defence counsel, and in doing so he presented all the circumstances in his favour". Judge Vukovic considered that these facts had not been established in the proceedings and that there was no trace of their existence in the files.

Judge Vukovic stated that a hearing before the National Council of the Judiciary enables the judge subject to disciplinary proceedings to respond to the allegations made against him and provides better prospects for establishing the extent of the disciplinary responsibility, if any. When evidence is presented before the National Council of the Judiciary in clearly adversarial proceedings, the possibilities for presenting a real defence broaden greatly and provide the Council with a completely different insight from that gained when the judge subject to disciplinary proceedings is not present at the hearing.

Therefore, Judge Vukovic was of the opinion that, in these disciplinary proceedings, the denial to Judge M. of the opportunity to defend himself in person, which is the essence of the principles and right laid down in Article 3 of the Constitution, had infringed his human rights.

The right to defend oneself in person is firmly grounded in Article 6.3.b, 6.3.c and 6.3.d ECHR (Official Gazette – International Agreement, no. 6/99), which should have been taken into account because the Convention has become the part of the Croatian internal legal order.

During Croatian history, in the development of legal culture, the principles of Roman Law were accepted as one of the foundations for the development of European and Croatian culture in general, and of legal education. Judge Vukovic considered that the court's decision in Case no. U-IX-163/02 of 27 May 2002 had seriously undermined one of the basic

principles of this law, *audiatur et altera pars*, and this was the reason why he voted against this decision of the Court.

#### *Languages:*

Croatian, English (translation by the Court).



#### *Identification:* CRO-2002-2-018

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 19.06.2002 / **e)** U-I-107/1995 / **f)** / **g)** *Narodne novine* (Official Gazette), 86/02 / **h)** CODICES (Croatian, English).

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

3.10 **General Principles** – Certainty of the law.  
 3.11 **General Principles** – Vested and/or acquired rights.  
 4.6.9.2 **Institutions** – Executive bodies – The civil service – Reasons for exclusion.  
 4.6.10.1.3 **Institutions** – Executive bodies – Liability – Legal liability – Criminal liability.  
 5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.

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

Suspect, fundamental rights / Ministry of Defence, employment, termination / Indictment, criminal.

#### *Headnotes:*

The presumption of innocence and the constitutional provision on the consequences of criminal judgments protect the personal and political freedoms and rights of suspected, accused or prosecuted persons until the final court judgment is handed down. The protection of personal and political freedoms continues even after criminal responsibility has been established, since the consequences of a criminal sentence are prescribed by law, with the aim of protecting the legal order.

### Summary:

The constitutionality of Article 174.1 of the Defence Law (Official Gazette no. 74/93) was reviewed in constitutional proceedings, upon the proposal of two applicants.

Under the impugned provision, the office of a civil servant of the Ministry of Defence shall be terminated *ipso jure* if he or she ceases to fulfil special conditions laid down in Articles 42 and 173 of the Defence Law.

The applicants' claims were directed to the conditions laid down by Article 173.1.2 of the Defence Law, defining the conditions for employment in the Ministry of Defence. In addition to the general conditions prescribed by law for civil servants, a person applying for a job with the Ministry of Defence must fulfil the condition that there must be no criminal investigation open against him or her. In other words, no criminal proceedings may have been initiated for offences against official duties, against the person, against public authorities or against the armed forces.

According to the applicants, the application of the provision in question causes the termination of employment *ipso jure* as soon as an investigation is opened, i.e. at the moment at which criminal proceedings for certain criminal offences are initiated. This is not in accordance with Article 28 of the Constitution, which guarantees the presumption of innocence until guilt has been proved by a final court judgment.

With respect to the possible unconstitutionality of the impugned provision in terms of Article 30 of the Constitution, the applicants emphasised that only a judgment for a criminal offence may have as a consequence a loss of acquired rights or a ban on acquiring certain rights. Placing a ban on acquired rights above and beyond the extent provided for in Article 30 of the Constitution is unconstitutional.

During the constitutional proceedings, a new Defence Law was passed (Official Gazette no. 33/02), and under Article 147 of the new law, the previous Defence Law was abrogated. The Constitutional Court, according to its powers under Article 57.1 of the Constitutional Law on the Constitutional Court, decided to complete the proceedings that had already been opened for the review of the constitutionality of the law previously in force.

The Court decided, in ruling on instituting the constitutional proceedings, to review the impugned provisions and to determine whether they restricted personal and political freedoms and rights, and in particular whether they were contrary to the

constitutional provisions regarding the presumption of innocence and the entry into force of the legal consequences of a judgment of guilt concerning a criminal offence.

The Court found the proposals to be grounded, since Article 28 of the Constitution provides the foundation for the presumption of innocence, i.e. this is the constitutional rule according to which everyone is presumed innocent and may not be considered guilty of a criminal offence until his/her guilt has been proved by a final court judgment.

Therefore, it is only after a judgment on a criminal offence becomes final that one can be found guilty of a criminal offence. Thus the initiation of criminal proceedings, the fact that they are conducted, a confession of guilt and even a court judgment which is not final do not indicate a person's guilt. According to modern criminal law standards, along with the objective fact of committing a crime against the legally protected good, the guilt of a person has to be established, since without guilt there is no responsibility for an offence committed. Guilt can be established only in accordance with the rules on criminal procedure.

The consequences of a judgment concerning a criminal offence enter into force when this is required for the protection of the legal order, according to Article 30 of the Constitution. In the case of a serious and exceptionally dishonourable criminal offence, as provided by law, a final court judgment may cause the loss of acquired rights or a ban on acquiring certain rights relating to the conduct of specific affairs, but only for a specific period of time and when this is required for the protection of the legal order.

The Constitution does not recognise preventive injunctions against the performance of professional activities, and the criminal law system of the Republic of Croatia does not prescribe legal bans unless the guilt of the relevant party has previously been determined in accordance with the legally established procedure.

Therefore the Court found that the disputed provision of Article 174.1 of the Defence Law as previously in force was not in accordance with Articles 28 and 30 of the Constitution, since it was contrary both to the presumption of innocence and also to the conditions prescribed by law and by the Constitution, on the basis of which it is possible to deprive a person of existing rights or diminish their possibility of acquiring some future rights only where the person has been convicted of a criminal offence by a final court decision.

### Languages:

Croatian, English (translation by the Court).



*Identification:* CRO-2002-2-019

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 10.07.2002 / **e)** U-III-2000/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 86/02 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

1.5.6 **Constitutional Justice** – Decisions – Delivery and publication.

3.11 **General Principles** – Vested and/or acquired rights.

3.13 **General Principles** – Legality.

*Keywords of the alphabetical index:*

Lease, termination / Tenant, obligation to vacate apartment / Lease, contract / Tenancy, transformation in lease.

*Headnotes:*

Where a constitutional complaint does not include constitutional rights of humans and citizens protected by the institution of constitutional complaints, pursuant to Article 62.1 of the Constitutional Law on the Constitutional Court (Official Gazette no. 49/02; “the Constitutional Law”), the Court may nonetheless declare the complaint admissible where the issue to be settled is sufficiently important.

A tenant who has lawfully gained the rights and obligations of the lessee of an apartment, and who without justification refuses to conclude a lease, is in the apartment without a valid legal ground. The sanction imposed on such a lessee, which is not only the loss of protection enjoyed by a protected lessee, but also the loss of the right of further use of the apartment, is not unconstitutional.

*Summary:*

The applicant's tenancy was terminated by final court decision, according to the provisions of the Law on Apartment Leases (Official Gazette nos. 91/96, 48/98 and 66/98; “the Law”). She was ordered to move out of her apartment within fifteen days, and to deliver it, vacant, to the plaintiff.

The applicant alleged that she had suffered from a violation of Article 3 of the Constitution (the highest values of the constitutional order of the Republic of Croatia, which are the basis for interpretation of the Constitution); Article 19.1 of the Constitution (the principle of legality in the work of state administration and other bodies vested with public authority) and Article 115.3 of the Constitution (in accordance with which the courts shall administer justice on the basis of the Constitution and the law), stemming from the misapplication of the relevant substantive law, i.e. Article 33.3 of the Law on Apartment Leases. Under this provision, if the owner of the apartment does not sign or refuses to sign a lease within three months, the lessee may ask a court to deliver a decision replacing that contract. The applicant argued that in the instant case Article 33.3 of the Law had been wrongly applied when it was established, by the challenged court decision, that the applicant ceased to be the lessee, i.e. when the legally established lease was terminated because the lessee did not wish to sign a lease with the owner of the apartment.

The applicant also argued that the owner of the apartment, although he had invited her to sign the contract, did not provide the contract itself in the form and with the content specified by Articles 4 and 5 of the Law. She had thus been prevented from responding to the offer in the contract. In this situation, according to the applicant, the owner also had the option of lodging a claim and therefore the conditions of the lease of the apartment could be decided through legal proceedings.

Although the above-mentioned constitutional provisions do not include constitutional rights of humans and citizens protected by the institution of constitutional complaints, pursuant to Article 62.1 of the Constitutional Law on the Constitutional Court (Official Gazette no. 49/02; “the Constitutional Law”), the Court declared the complaint admissible in the particular case because of the importance of settling the issue of switching a tenancy right into a lease.

The Court found that, in the instant case, the substantive law had been correctly applied, and it upheld the legal reasoning of the courts as stated in the challenged decisions, in which Article 33.3 of the Law was interpreted as follows: if the lessee does not make a request to sign the contract of lease of the apartment, the lessor (owner) cannot force the lessee to do so; he can only ask for the lessee's eviction. These arguments derive from the conclusion that the person who has lawfully gained the rights and obligations of the lessee, and who without justification refuses to conclude the lease, is in the apartment without a valid legal ground. The sanction for such a lessee is not only the loss of protection enjoyed by a

protected lessee, but also the loss of the right of further use of the apartment.

The Court also accepted the argument of the lower courts with respect to other conditions laid down by Article 33 of the Law. Thus, where, as in the present case, the owner files a claim for eviction (after he has, on several occasions, acted pursuant to the provisions of Article 33.1 of the Law), the protected lessee may file a request, claim or even counterclaim for the conclusion of the lease. Otherwise, the owner would have no possibility of influencing the conditions of the lease.

In accordance with the above reasons, the Court rejected the constitutional complaint, but decided to publish the decision in its entirety.

#### *Languages:*

Croatian, English (translation by the Court).



#### *Identification:* CRO-2002-2-020

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 10.07.2002 / **e)** U-III A-880/2002 / **f)** / **g)** *Narodne novine* (Official Gazette) / **h)** CODICES (English).

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

1.4.4 **Constitutional Justice** – Procedure – Exhaustion of remedies.  
 3.19 **General Principles** – Margin of appreciation.  
 4.7.2 **Institutions** – Judicial bodies – Procedure.  
 5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

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

Civil proceedings, duration, excessive / Compensation / Insurance, policy.

#### *Headnotes:*

The organisational or personnel problems of a court cannot be considered to be grounds justifying an unreasonably long lack of activity by a court in proceedings before it, since the contracting parties of

the Convention for the Protection of Human Rights and Fundamental Freedoms are obliged to organise their legal systems in such a manner as to enable the courts to fulfil the requirements of Article 6.1 ECHR.

#### *Summary:*

A constitutional complaint was lodged pursuant to Article 63 of the Constitutional Law on the Constitutional Court (Official Gazette, no. 49/02; “the Constitutional Law”) due to a failure to act – by pronouncing a court verdict – within a reasonable period of time. This resulted in the violation of the applicant’s constitutional rights under Articles 26 and 29.1 of the Constitution.

The applicant sought an order from the Constitutional Court imposing a six-month deadline within which the competent court would be required to make its decision, and awarding compensation in the amount of 40 000 HRK for the violation of her constitutional right.

The Court has found the following facts relevant to the constitutional proceedings:

- a lawsuit for payment pursuant to an insurance policy was filed with the competent municipal court on 14 March 1994, and the defendant submitted a written reply to the lawsuit;
- the first hearing in the case was held on 15 March 1995, and the court, by a ruling, ordered the defendant to forward the general conditions for the insurance of property which were valid at the time of the harmful event in question (a fire in which a two-storey housing facility had burned down, on 11 July 1991). By the same ruling the court decided that the next hearing would take place upon the receipt of the requested information;
- the applicant requested in writing from the court, on 24 May 1995, 6 November 1995 and 28 October 1998, information as to whether the defendant had complied with the court order and urged the court to schedule a hearing. The applicant also informed the competent court that files were being kept at the Ministry of the Interior, Municipal State Prosecutor’s Office and in the Investigative Centre of the County Court under specified numbers, in connection with criminal charges laid brought for the destruction of another person’s property;

- from the statement of the competent court it was clear that the applicant's allegations were correct, although the Court indicated that the plaintiff had accidentally stated in the complaint that the insured facility had completely burned down, when in fact the facility had been mined; thus the Court had unnecessarily checked the circumstances of the fire with the competent bodies. The Court justified the failure to schedule a hearing on the grounds that the competent judge had been on sick leave, then maternity leave, and was currently on sick leave again.

In considering the constitutional complaint the Court bore in mind Article 29.1 of the Constitution which provides *inter alia* that everyone shall be entitled to have an independent and impartial court decide on his rights and obligations within a reasonable period of time, and also Article 63 of the Constitutional Law, which provides as follows:

- “1. The Constitutional Court shall initiate a procedure upon a constitutional complaint even before legal remedies have been exhausted, in case when a court failed to pass a decision on the rights and obligations of a party (...) within a reasonable period of time (...).
- 2 In a decision in which it adopts a constitutional complaint due to a failure to act within a reasonable period of time as per paragraph 1 of this article, the Constitutional Court shall determine a deadline for the competent court for the passing of an act whereby that court would competently decide on the rights and obligations (...) of the proponent. The deadline for the passing of the act starts on the next day from the day of publication of the Constitutional Court's decision in the “Official Gazette”.
3. In a decision as per paragraph 2 of this article, the Constitutional Court shall determine an adequate compensation which belongs to the proponent because of the violation of his constitutional right which was caused by a court when it failed to pass a decision on his rights and obligations (...) within a reasonable period of time. The compensation shall be paid from the state budget within three months from the day of submission of the party's request for its payment.”

The quoted provisions of the Constitution and the Constitutional Law are in compliance with the principles of international law that have become a part of the internal legal system, in particular with the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols nos. 1, 4, 6, 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette –

International Agreements – nos. 18/97, 6/99; “the Law on the Ratification of the Convention”) which came into effect on 5 November 1997.

Since that day the provision of Article 6.1 ECHR, on the right to a fair trial, has also formed part of the internal legal system of the Republic of Croatia, which stipulates, *inter alia*:

“In the determination of his civil rights and obligations (...) everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...).”

The right to a court decision within a reasonable period of time is also guaranteed by the constitutional right introduced by the amendments to Article 29.1 of the Constitution enacted on 9 November 2000 (Official Gazette no. 113/2000).

Thus, as a rule, prior to 5 November 1997, an examination of length of proceedings could not have been the subject of constitutional proceedings based on Article 63 of the Constitutional Law, because prior to this date such a right did not exist in the legal order of Croatia, whether as a conventional or a constitutional right.

The Court determined, in the specific case, that the legally relevant period of time from the point of view of the right to a reasonable length of proceedings was the period between 5 November 1997 (that is, from the day of the entry into force of the Law on the Ratification of the Convention) and 25 April 2002 (that is, until the day on which the applicant lodged the constitutional complaint), which amounted to a total of four years, four months and twenty days.

The violation of the constitutional right to a court decision within a reasonable period of time is to be considered in the light of the circumstances of each individual case.

The statement of the competent court by which it tried to present the sick leave of competent judges as an objective circumstance which justified the length of proceedings could not be considered, in compliance with the case-law of the European Court of Human Rights and with the point of view of the Constitutional Court, as a reason justifying the long lack of activity by the competent court in the particular case.

Therefore the Court found that the applicant's constitutional right guaranteed by Article 29.1 of the Constitution had been violated, and it set a deadline of six months for the competent court to pass a verdict.

Moreover, taking into account all the circumstances of the case and the overall economic and social circumstances of the Republic of Croatia, the Court fixed the compensation for the violation of a constitutional right at the amount of 4 500 HRK, which was to be paid from the State Budget, within three months from the date of the applicant's submission of a request for its payment.

*Languages:*

Croatian, English.



## Cyprus Supreme Court

### Important decisions

*Identification:* CYP-2002-2-002

**a)** Cyprus / **b)** Supreme Court / **c)** / **d)** 30.09.2002 / **e)** 7056-7057 / **f)** / **g)** to be published in *Cyprus Law Reports* (Official Digest) / **h)**.

*Keywords of the systematic thesaurus:*

1.3.5.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law – Laws and other rules in force before the entry into force of the Constitution.

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

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

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

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

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

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

*Keywords of the alphabetical index:*

Proceedings, criminal, guarantees / Law, preconstitutional, status / Witness, cross-examination / Witness, testimony outside trial.

*Headnotes:*

It is not possible to amend non-existing laws. Laws in force before the entry into force of the Constitution of 1960 are to be modified so as to conform to the Constitution.

Violation of the standards of fair trial results in the annulment of the relevant proceedings.

### Summary:

Article 30.2 of the Constitution safeguards the right to a fair trial. Article 30.3.c of the Constitution safeguards the right of every person “to adduce or cause to be adduced his evidence and to examine witnesses according to law”. Under Article 12.5.d of the Constitution every person charged with an offence has the right “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

Under the provisions of Article 188.1 of the Constitution, laws in force on the date of the coming into operation of the Constitution shall continue in force after that date but “shall be construed and applied with such modification as may be necessary to bring them into conformity with this Constitution”. Under Article 188.5.b “modification” includes amendment, adaptation and repeal.

The appellant, a medical practitioner, was tried on an indictment containing a count of indecent assault on a female. The victim of the assault was a schoolgirl aged 17. She was injured in a traffic accident and was conveyed to the clinic of the appellant for treatment. The alleged indecent assault was committed in the process of pro-narcosis of the girl. In convicting the appellant the trial court relied, *inter alia*, on the statement given to the Police by one Emma Ramos, a nurse, who was abroad at the time of the trial and did not testify before the Court. Her statement was produced, notwithstanding the objections of the defence, in exercise of the powers of the Court under Section 4.2 of the Evidence Law Chapter 9.

Section 4.2 was in force prior to the entry into force of the Constitution of the Republic in 1960. It made admissible, in any civil proceedings, a written statement made by a person “if having regard to all the circumstances undue delay or expense would otherwise be caused”. By virtue of an amendment effected by Law 94(I)/94, Section 4.2 was extended to criminal proceedings.

Upon appeal against conviction, counsel for the appellant contended that there was a violation of the right to a fair trial, which is safeguarded by Article 30.2 of the Constitution and Article 6.1 ECHR as well as of the minimum rights of the accused, safeguarded by Article 12.5.d of the Constitution. He argued that the production of the statement of Emma Ramos directly offended against the provisions of Article 12.5.d of the Constitution and Article 6.3.d ECHR.

The Supreme Court allowed the appeal and set aside the conviction. It held as follows:

The power to adapt pre-existing legislation to the constitutional norms now in force belongs to the judiciary. The case-law of the European Court of Human Rights clarifies that there can be no deviation from the right of an accused person to contest the evidence of every prosecution witness. The connection of the right to a fair trial with the right of every litigant to cross-examine the witnesses who testify against him is a quintessential part of the administration of justice. In the absence of this weapon the litigant is deprived of the guarantees of natural justice for his defence. This right is included in the notion of fair trial and is directly safeguarded in every judicial proceeding by the provisions of Article 30.3.c of the Constitution. Consequently the provisions of Section 4.2 of Chapter 9 of the Evidence Law, to the extent that they allow for the production of the statement of a witness, in the absence of a possibility of examining the witness and contesting his testimony, are no longer in force, since they are contrary to express constitutional provisions. Thus the legislator, by means of Law 94(I)/94, sought to amend a non-existing law. Furthermore, if it were held that by means of Law 94(1)/94 the legislator had re-enacted Section 4.2, then its provisions would be manifestly unconstitutional, since they are contrary to the notion of fair trial and to the provisions of Articles 30.3.c and 12.5.d of the Constitution.

In the instant case the admission of the statement of Emma Ramos, in the course of the trial of the appellant, deprived the appellant of the right to cross-examine her. Thus the proceedings for the determination of the criminal liability of the appellant deviated from the standards of fair trial. Violation of the guarantees of fair trial results in the annulment of the trial. Though the Supreme Court has the discretion to order a retrial, in this case a retrial would have been contrary to the guarantees of fair trial, taking into account the time that had elapsed between the filing of the indictment and the delivery of the judgment of the Supreme Court.

### Languages:

Greek.





# Czech Republic

## Constitutional Court

### Statistical data

1 May 2002 – 31 August 2002

- Judgments of the Plenum: 6
- Judgments of the Panels: 37
- Other decisions of the Plenum: 3
- Other decisions of the Panels: 792
- Other procedural decisions: 23
- Total: 861

### Important decisions

*Identification:* CZE-2002-2-005

**a)** Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 06.06.2002 / **e)** III. US 121/02 / **f)** Custody order / **g)** / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

- 1.3 **Constitutional Justice** – Jurisdiction.
- 3.16 **General Principles** – Proportionality.
- 3.20 **General Principles** – Reasonableness.
- 5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.
- 5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
- 5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.

*Keywords of the alphabetical index:*

Criminal procedure, guarantees / Custody order, legal grounds.

*Headnotes:*

A general finding stating that a person is a foreign citizen is not sufficient to justify his or her being taken into custody. This fact only forms an abstract, potential hazard, but not a specific threat supported by facts, which may be eliminated by taking the person into custody.

*Summary:*

In his constitutional complaint the complainant challenged a final ruling ordering him to be placed in custody and objected that his fundamental rights had been violated. In its statement, the Regional Court referred to the reasons contained in the challenged ruling. The complainant was being prosecuted for the crime of misappropriation. Based on the prosecutor's proposal, the District Court judge decided to take the accused into preventive and penal custody. The complainant lodged a complaint against the ruling. According to the Court of Appeal, there were no facts justifying the penal custody. However, the complainant was a citizen of Germany, and the reasons for preventive custody were therefore found to be reasonable. The Court of Appeal pointed out that the grounds for ordering custody might be equally satisfied by awarding bail. After some unsuccessful applications for his release from custody the complainant was released on bail. According to the Court of Appeal, the grounds for the custody still remain.

The constitutional complaint was found to be reasonable. The Constitutional Court is only authorised to become involved in the decision-making activity of ordinary courts regarding matters related to custody if the decision of the ordinary court on custody is not supported by legal reasons or if the grounds claimed but insufficiently established for taking a person into custody are in extreme contradiction with the constitutional order of the Republic, or with international treaties pursuant to Section 10 of the Constitution (III. US 18/96, file 6).

The decision to take the complainant into custody in the pre-trial proceedings was supported by facts of a general nature (the accused person was a foreigner, and had no permanent address in the Czech Republic) and of a speculative nature (he probably had family links abroad). Based on the above the Court reached a conclusion that the complainant could legally leave the Czech Republic. These conclusions appear to be general, non-specific, and thereby insufficient grounds for custody.

The Constitutional Court has already explained before that "from the procedural point of view, the requirement of proper and comprehensive justification of decisions of public authorities is one of the essential conditions that must be met in order for decisions to be in conformity with the Constitution" (I. US 303/01, not yet published). In the view of the Constitutional Court, the reasons given in the complainant's case were not sufficient. The statement that the complainant was a foreign citizen is insufficient. It was necessary to indicate a specific threat supported by

facts (II. US 347/96, file 9). The fact that the complainant could leave the Czech Republic any time also did not constitute sufficient reasons for taking him into preventive custody.

Freedom of movement is guaranteed by the Constitution and because of this right, the grounds for taking a person into custody cannot be assumed to exist without further substantiation (I. US 645/99, file 18). The reasons given in the decision challenged were not based on specific facts that would constitutionally justify taking the complainant into custody, and the presumptions of ordinary courts could not satisfy the requirement that necessary indication be given of the grounds for custody (III. US 188/96, file 16).

The statement of the District Court that the prosecution of the complainant was in its initial stages of investigation made no difference to this conclusion. Such a statement could not replace a statement of the specific facts providing grounds for preventive custody; this applied particularly to a situation where, contrary to the conclusions of the ordinary court of first instance, no reasons for the penal custody were found by the court of appeal. Even though the complainant was released from custody on bail, this made no difference to the matter. The decision by which the complainant was released on bail was based on an unconstitutional conclusion that there were still grounds for custody. The Constitutional Court therefore quashed the challenged decision.

#### *Cross-references:*

- Decision of 10.12.1997 (II. US 347/96);
- Decision of 26.09.1996 (III. US 18/96);
- Decision III. US 188/96;
- Decision of 21.06.2000 (I. US 645/99);
- Decision of 23.10.2001 (I. US 303/01).

#### *Languages:*

Czech.



#### *Identification: CZE-2002-2-006*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 18.06.2002 / **e)** Pl. US 7/02 / **f)** Courts independence – Law on Courts / **g)** *Sbírka zákonů České Republiky* (Official Gazette), no. 349/02 / **h)** CODICES (Czech).

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

1.6.5.4 **Constitutional Justice** – Effects – Temporal effect – Postponement of temporal effect.  
 3.4 **General Principles** – Separation of powers.  
 4.7.4.1.5 **Institutions** – Judicial bodies – Organisation – Members – Status.

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

Judge, duties, qualifications / Judge, incompatibility / Court, administration / Judicial Academy.

#### *Headnotes:*

The Czech Republic recognises the principles inherent in a democratic state, based on respect for the rights and freedoms of human beings and citizens in a democratic society. People are the source of state power. State power is exercised through legislative, executive and judicial bodies and may be effectively implemented only if the performance of these organs meets certain conditions.

The state has an obligation to ensure the real independence of the courts. Such independence is a specific and indispensable attribute of judicial power. According to the Constitution, independent courts exercise judicial power on behalf of the Republic. When performing their office, judges are independent and no one may endanger their impartiality. The principle of the independence of the courts is unconditional, thus eliminating a possibility of encroachment by the executive power.

The principle of the incompatibility of certain posts cannot be circumvented by adopting a solution under which a judge, during his or her term of office in other functions, is temporarily suspended from his or her functions as a judge. An immanent feature of such posts is their continuity.

#### *Summary:*

The President of the Republic applied to the Constitutional Court for the abrogation of certain provisions of the Law on Courts, Judges, Assessors and Public Administration of the Courts (“the Law”).

The Parliament and Senate expressed their opinions of the motion. Both institutions left the decision regarding the constitutionality to be made by the Constitutional Court.

The Constitutional Court stated that the Law had been passed in due form and issued within the authorities and in accordance with the procedural requirements laid down the Constitution. The motion essentially concerned three areas: assessment of the professional competence of judges; the public administration of the courts; and the compulsory enrolment of judges in specialised education conducted by the Judicial Academy. The constitutional system has embedded the principle of separated powers. The principle of the independence of the courts excludes the possibility of intervention by the executive branch of power.

With respect to the assessment of the professional competence of judges, the Law grants this competence to individual bodies involved in the public administration of courts (the Ministry of Justice; relevant Councils of barristers and solicitors; presiding judges). The Constitutional Court has dealt with the issue of judicial independence several times already (Pl. US 13/99, file 15; Pl. US 18/99, file 19; Pl. US 41/00, file 21). The purpose of the relevant guarantees is to place judges in the position required by their role in the process of impartial and fair judicial decision-making, and in which they are bound only by the legal order and their knowledge and conscience. The guarantees also include the principles of incompatibility of posts, unlimited terms of office, non-transferability and irremovability.

Besides his or her moral integrity, it is a prerequisite of proper performance of this office that a judge be professionally competent. Any and all professional requirements should be met prior to the judge's appointment. A person who is insufficiently professionally competent or provides no guarantees of his or her further self-education should not become a judge. After his or her appointment, the judge must be independent and impartial. The subsequent and repeated assessment of the professional competence of a judge, which may even result in the judge's removal from office, contradicts the constitutional guarantees of judicial independence. The aim of these legal regulations is legitimate. It does not, however, respect the principles of the separation of powers and the independence of the judiciary. All the provisions regarding the assessment of professional competence were therefore declared null and void.

The Court also based its findings on the principle of the separation of powers in its assessment of the obligation imposed on judges to complete regular

educational sessions at the Judicial Academy, which was established by law as an organ of the state and is controlled by the Ministry of Justice. Its directors and members of the Council Board are appointed and dismissed by the Minister of Justice. The Law also provides for professional education by the Supreme Court, but this provision is currently inapplicable. Thus, the method of education and the definition of its content remain in fact in the hands of the executive power. At the same time, the protection of the rights of citizens against arbitrariness or unauthorised interventions of the state is a function of the judiciary. Leaving open a possibility for the executive to influence the character of this protection through its role in the education of judges could lead to a limitation of judicial independence, in so far as the proposed system may introduce a sense of dependency or reduce a judge's sense of responsibility in the process of actual decision-making.

Working as a judge requires continuous professional education. This is also stipulated in international documents. Judges are responsible for their own professional level. Each judge must be committed to just, impartial and predictable decision-making, built on perfect knowledge of legal regulations and case-law. Judicial independence is connected with individual judges' responsibility. The responsibility for and guarantee of this commitment are borne by the judicial power itself. The establishment of the Judicial Academy is not without grounds. It is, however, only one of the possible sources of education that may be freely selected by the judge. All provisions of the law requiring judges to follow education in the Judicial Academy and provisions linked to this requirement in terms of their content were declared null and void.

The last area of provisions challenged concerned the rules governing the public administration of courts. According to the Constitution, the position of a judge is not compatible with that of President of the Republic, Member of Parliament, or any post in the state administration. If the Constitution stipulates that the position of a judge is incompatible with any post in the state administration, and under the Law certain of the latter activities must also include activities performed by presiding judges and their deputies, then the provision is in contradiction with the Constitution. The Constitutional Court abrogated the relevant provisions for formal reasons only. This did not imply that the management and administration of courts should be committed to persons other than those delegated from the ranks of judges. However, the law cannot allow the possibility of judges acting in bodies exercising executive and legislative powers.

Thus, the membership of judges in advisory bodies of a ministry, for example, is in contradiction with the principle of the separation of powers. Personal and extra-judicial links arising through such activity increase the likelihood of a possible conflict of interests and put the impartiality of judges in doubt. The posts of presiding judges and their deputies should be considered as career advancements for judges. Presiding judges and their deputies should only be able to be removed for reasons provided for by law and in disciplinary proceedings. In a number of advanced countries of Europe (for example Austria, Germany, Ireland, Italy, the Netherlands, Norway, Portugal, Sweden and the United Kingdom) presiding judges also perform administrative activities. Under the current legislative scheme, the Ministry of Justice is the central authority of the state administration of courts and the judicial power itself does not have a representative body at its own level. The possibility of the judicial power being indirectly influenced by the executive power therefore cannot be excluded. The Constitutional Court has not yet addressed the issue of the administration of the courts. This is a task for the legislature, which should consistently respect the separation of state powers.

The Constitutional Court ruled that this part of the judgment should not take effect until 1 July 2003.

#### *Supplementary information:*

In a joint, partially dissenting opinion some judges indicated that provisions not contradicting the Constitution had also been abrogated. By this abrogation, the court had imposed constitutional limits based on mere legislation, not provisions of the Constitution. However, in a state governed by the rule of law the judicial power must be able to co-operate sensibly with the legislative and executive powers.

The finding as to the interpretation of the provision concerning the incompatibility of the position of a judge with any post in state administration also went too far. The court only focused on the language and did not consider the will of the legislature, which confirmed the legal status quo of the judicial administration in 2000. A judge cannot be prohibited from maintaining any personal or extra-judicial social links made outside the causal relation of his or her decision-making. This also applies to the temporary assignment of a judge to work with a ministry or his or her acting in advisory bodies or for the executive or legislative powers. As to the education of judges, the finding also exceeded the limits of a mere assessment of constitutionality. The fact that such education should be provided by the Judicial Academy, which

has certain links to the executive power, cannot entail real endangerment of judges' independence. The challenged provision allowed for education in a number of educational institutions. Moreover, the assessment of judges' professional competence should not be a reason for a judge's removal, but should motivate judges to enhance their professional competence. In a certain specific case the professional competence of a judge can give rise, at the same time, to a disciplinary offence. The compulsory education of judges does not contradict the constitutional principle of independence of courts and judges despite the fact that this education is organised by the Ministry of Justice. Judges are not bound by legal opinions pronounced in the Judicial Academy. They must not deflect from established and generally recognised case-law.

The motion to abrogate provisions stipulating that presiding judges and their deputies also, besides their decision-making activities, undertake the public administration of the courts, should have been rejected. The fact that the administration of the court is performed by the presiding judge and his or her deputy (i.e. by judges) does not contradict the principle of the independence of courts and judges or the principle of the separation of powers.

Temporary assignment of a judge to work with a ministry is also not in contradiction with the Constitution. Its purpose is to take advantage of the judge's experience. The activity involved is consultation. This office is limited to the term of one year and is subject to the approval of the relevant judge.

#### *Cross-references:*

- Decision of 15.09.1999 (Pl. US 13/99), *Bulletin* 2000/1 [CZE-2000-1-001];
- Pl. US 18/99;
- Pl. US 41/00.

#### *Languages:*

Czech.



*Identification: CZE-2002-2-007*

a) Czech Republic / b) Constitutional Court / c) Third Chamber / d) 11.07.2002 / e) III. US 701/01 / f) extremely dangerous recidivism / g) / h) CODICES (Czech).

*Keywords of the systematic thesaurus:*

3.18 **General Principles** – General interest.

3.19 **General Principles** – Margin of appreciation.

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

*Keywords of the alphabetical index:*

Crime, elements / Crime, qualification / Recidivism, dangerous, concept.

*Headnotes:*

The material elements of particularly dangerous recidivism are generally linked to the material conception of a crime as defined in the Criminal Code. The court should consider whether the repeated commission of an extremely serious premeditated crime significantly increases the degree of danger posed to society in the later crime. The conclusion of an ordinary court that an offender committed a crime as an extremely dangerous recidivist must be convincingly proved and justified. The finding has a significant influence on the qualification of the crime, with an impact on the type and duration of the sentence imposed. Amongst the material elements of extremely dangerous recidivism it is necessary to assess carefully the specific degree of danger to society involved in both the crime of which the offender was previously convicted and the crime being judged in the instant case.

*Summary:*

The complainant was sentenced for a crime of bodily harm which, in the court's assessment, he committed as an extremely dangerous recidivist. His appeal against the judgment of the District Court was overruled. In his constitutional complaint he argued that he had been deprived of the right to a fair trial. In their statement, the Regional Court and the Regional Public Prosecutor referred to the reasons and contents given in the challenged ruling. The Constitutional Court found the constitutional complaint admissible.

The court of first instance sentenced the complainant as an extremely dangerous recidivist. The Criminal Code defines an extremely dangerous recidivist as a

person who repeatedly commits a particularly serious premeditated crime, even though he or she has already been sentenced for the same or another particularly serious premeditated crime, if this fact, due to its seriousness, and particularly in view of the period of time having elapsed since the last sentencing, significantly increases the degree of danger posed to society by the crime. In the instant case, the complainant had once before been sentenced for a particularly serious premeditated crime. He had started serving the sentence in 1978 and finished in 1990. He later committed acts that were found by the ordinary courts to constitute a double act of attempted bodily harm, in 1994, i.e. sixteen years after he had committed the previous crime and four years after finishing his sentence. No objections were raised as to his personality. The complainant was assessed by a medical expert, a psychiatrist, as a person with a simplex personality and under average intellect; he was illiterate, but capable of recognising the meaning and purpose of criminal proceedings. The motive of his action was jealousy. The conduct for which he was sentenced was only attempted, not actually carried to completion. The long period of time that had elapsed from the previous, single conviction had to be emphasised as well as the complainant's quite trouble-free conduct and the assessment of his personality, his personal profile, his character and mental features, the consequences of his conduct, the motives for and manner of committing the crime, and the level of his criminal activities. In the given matter, the material elements of extremely dangerous recidivism were not present. The reasons given by both ordinary courts regarding the decision to characterise his acts as extremely dangerous recidivism were only formal in nature. Both courts had simply referred to certain facts without clarifying in any way the legal implications of these facts. The courts had not met the legal standard for providing grounds for their decisions. The practice of the ordinary courts had deviated from legal standards to the extent that it had infringed the complainant's right to a fair trial and overstepped the boundaries of unconstitutionality.

The objections of the complainant regarding the evidence and time relations were, however, rejected. The ordinary courts had handled these in an adequate manner.

Nor had the right for defence been breached. A defence counsel was assigned to the complainant at the time preceding the essential part of the criminal proceedings held thereafter. The complainant could actually and effectively have led his defence through the defence counsel. As to the question of prejudice, the complainant had raised it in the main trial held on 3 November 1997, and the court had ruled on it at the time. No prejudice was found. The complainant

lodged a complaint against the ruling, which the Regional Court rejected as it was lodged out of time. The complaint was thus rejected for formal reasons, even though the conditions for hearing it on the merits were otherwise met. According to law, ordinary courts make rulings regarding issues that may modify the course or method of proceedings, or regarding issues related to the actual matter at hand, provided they do not substantially influence the decision regarding facts in issue. Otherwise the ordinary courts make a decision (not a mere ruling) actually concerning the facts in issue. Some rulings can have and usually do have procedural or other consequences for the accused. By its course of action, the court denied the complainant's right to a decision. The complainant could have lodged a constitutional complaint against this ruling already in 1997. However, he had only raised the objection in the present constitutional complaint. Despite the error of the appeal court, the Constitutional Court rejected this objection. The Constitutional Court nonetheless quashed the challenged decisions for the reasons given above concerning the right to a fair trial.

#### *Languages:*

Czech.



#### *Identification:* CZE-2002-2-008

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 13.08.2002 / **e)** Pl. US 1/02 / **f)** Law on regions / **g)** / **h)** CODICES (Czech).

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

1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.  
 3.12 **General Principles** – Clarity and precision of legal provisions.  
 3.22 **General Principles** – Prohibition of arbitrariness.  
 4.10.8 **Institutions** – Public finances – State assets.  
 5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

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

Property, public, transfer, conditions, procedure / Property, administration, limitations / Region, authority / Property, title.

#### *Headnotes:*

The impugned provision of the Law on Regions, still in force, contravenes the Constitution since it does not contain any legal definition that would establish the conditions of management of property acquired from the state by regions, and thereby leaves absolute freedom or discretion to the state authorities to determine such conditions. It makes it possible for the new owners (regions) to see their rights arising under Article 11 of the Charter of Fundamental Rights and Freedoms restricted in a manner that does not preserve the meaning and substance of these rights.

#### *Summary:*

The fifth bench of the High Court, Administrative Division, in Prague submitted a motion to the Constitutional Court seeking the abrogation of Section 19-1 of the Law on Regions. The claimant was conducting proceedings concerning the action in administrative law of the Pilsen Region against the Ministry of Education, Youth and Physical Education. The Region sought the annulment of the administrative act by which the Ministry had transferred the ownership of specified pre-school facilities, schools and school establishments. The region argued that the conditions imposed by the Ministry interfered with the region's enjoyment of title to property and its right of autonomy. The Ministry acknowledged that the conditions were restrictive. According to the Ministry, however, the law had not been breached.

The High Court in Prague suspended the proceedings before it and referred the matter to the Constitutional Court with a motion for the abrogation of the provision in question. The claimant's argument was that the region managed its property independently. The state could only interfere with the right of autonomy if the law required it, and only in the manner provided for by law. The provisions in question led to a situation where decisions were not foreseeable, and was not in conformity with the principle of equality.

The Constitutional Court invited the Chamber of Deputies and the Senate to submit their views. According to the Chamber, the state of the law would not be improved if the challenged provision were abrogated. Moreover, the law had been enacted and promulgated in the constitutionally prescribed manner

and fell within the bounds of the constitutional powers of parliament. The claimant, however, sought the abrogation of the provision according to which the state had the right, upon the transfer, free of charge, to the region of chattels, rights and real estate, and upon the financial involvement of the region in the acquisition of such property, to reserve to itself the definition of conditions for the further management and handling of this property.

When making decisions on the abrogation of laws the Constitutional Court ascertains whether or not the impugned provisions are in compliance with the constitutional order. It only considers the motion on the merits if the law, other legal regulation or specific provisions do not cease to have effect before the end of the proceedings. Should such a situation arise, the Court discontinues the proceedings. The Law on Regions was itself repeatedly amended. For the motion assessed, the amendment introduced by the law published in the *Collection of Laws* on 4 June 2002 was essential. This amendment was to become effective as of 1 January 2003. As of the day of the Court's judgment, however, the challenged provision remained valid and effective. The motion was therefore permissible. In its finding "Pl. US 33/2000", the Court expressed the view that if the referring court submits, pursuant to Article 95.2 of the Constitution, a law that is no longer valid, it is sufficient for the Constitutional Court to deliver a statement on the constitutionality of such a law.

One of the basic attributes of autonomy is the right of self-governing units to manage their property independently, on their own account and under their own responsibility.

Ownership includes the right to maintain possession of a thing, use it and enjoy its fruits, and the right to manage it, amongst which the possibility of management may be considered as of prime importance. In some cases the ownership right is restricted in such a way that a self-governing region becomes the administrator of another person's property, rather than its owner. There is no legal definition determining the conditions of managing acquired assets, thus leaving absolute freedom or discretion to the state authorities to determine such conditions. This means it is possible to proceed differently in identical cases. The decision of state authorities is not foreseeable. This can seriously violate the equality of self-governing entities. In this case the procedure of the state is essentially different from the procedure used when transferring property rights to towns which acquired the property through the direct operation of the law. The law did not stipulate any other conditions for the

management of the property acquired in this way by towns.

Apart from the above objections, the challenged provision raises doubts in the sphere of legal theory and established legal terminology. It places the transfer of property by operation of law and the conveyance of property under the same regime. The transfer of property takes place by operation of law, independently of the will of the entity concerned. The law solely, not an executive body, lays down the conditions for managing such property. The law does not stipulate conditions related to the transfer. It only modifies the formalities concerning future administrative decisions. Making a restitution claim, when the region becomes an obligor, can be considered as the only restriction in this respect. The conveyance of title, on the other hand, is made on the basis of a contract, and it is possible to negotiate other conditions in this bilateral act. The confusion of terms used in the law is followed by the provision on sanctions, which makes no distinctions. A sanction would only be considered if obligations or conditions imposed during the 'ex lege' transfer of the property are violated. If the region, as a public corporation, enters into a property conveyance contract with the state, the sanctions can be agreed in the contract. It seems that the Government was aware of the above problems. The legislator abrogated the whole section. It can be assumed that it was aware of the fact that the section did not comply with constitutional requirements – foreseeability, sufficient clarity and precision.

The provision did not provide sufficient protection against arbitrariness or coercion by the state power, thus enabling the ownership rights of new owners to be restricted in a way that would alter their meaning and substance, and as such it was in conflict with the Charter. The state of the law as indicated would also not be in compliance with the European Charter of Local Self-Government, which was incorporated in the legal order of the Czech Republic with effect as of 1 September 1999. According to Article 8 of the European Charter of Local Self-Government, any administrative supervision over autonomous communities may be carried out only as stipulated by the Constitution or by law.

The Constitutional Court also considered the abrogation of the subsequent paragraphs. In its finding "Pl. US 15/01" it adopted the view that such a procedure was possible even when it fell outside the scope of the motion before the Court. As the amendment to the law were to become effective as of 1 January 2003, the Court only quashed the provision challenged.

*Cross-references:*

- Decision of 10.01.2001 (Pl. US 33/2000);
- Decision of 31.10.2001 (Pl. US 15/01).

*Languages:*

Czech.

*Identification: CZE-2002-2-009*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 13.08.2002 / **e)** Pl. US 3/02 / **f)** Penalty – Construction law V / **g)** / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 3.19 **General Principles** – Margin of appreciation.
- 3.20 **General Principles** – Reasonableness.
- 5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
- 5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

*Keywords of the alphabetical index:*

Penalty, fine, excessive / Penalty, minimum, calculation criteria / Construction law.

*Headnotes:*

A minimum penalty determined by the law should be set so that it enables the proprietary and personal standing of an offender to be taken into consideration, at least to a certain extent. The penalty imposed, even if it is the minimum amount, should not cause the offender to become bankrupt and should not lead to the result that a business activity would lose any meaning for several years.

*Summary:*

A bench of the Regional Court filed a motion seeking the abrogation of part of Section 106 of the Construction Law on the grounds that it was unconstitutional. The Regional Court was dealing

with a case where a penalty according to the Construction Law was imposed on a natural person transacting business. According to the Regional Court, the sanction was inappropriate. The Chamber of Deputies and the Senate expressed their views regarding the motion. The Ministry of Local Development argued against the motion. It further indicated that it did not monitor any summarised data regarding the numbers and amounts of penalties imposed under the relevant provision, but it provided the data available from Prague and Liberec. In 2001, the Municipality of Prague, as a body of appeal, dealt with 12 cases of violations of the challenged provision. In Liberec, no penalty had been imposed on the basis of the challenged provision. The Ministry of Finance also expressed its views on the motion, particularly with respect to the income tax of natural persons and corporate bodies for 2000.

The law had been enacted and promulgated in the constitutionally prescribed manner and fell within the bounds of the constitutional powers of parliament. The only issue was the constitutionality of the sanctions imposed by the legislator. This nonetheless required an assessment of the constitutionality of a provision laying down a legal obligation.

Using a construction that has not received the official 'Certificate of Practical Completion', or using it in contradiction with such a certificate, represents, from the point of view of public interest, a considerable hazard to society. In defining a minimum penalty, the legislator was pursuing a legitimate aim. A 'just penalty' means a penalty imposed in compliance with the law in a trial that meets the standards of a fair trial. In its assessment, the Constitutional Court also took into consideration whether the challenged provision introduced violations of the Constitution other than those raised in the motion, or whether a relevant international obligation had been violated.

Basic rights or freedoms can be interfered with if there is a conflict between them or if there is a conflict with another constitutionally protected value that does not have the nature of a basic right or freedom (Pl. US 15/96; file 6, no. 99). The purpose of the interference is assessed in relation to the means used. The principle of proportionality serves as a measure. This principle includes three criteria for assessing the permissibility of the restriction: the measure taken must serve a legitimate aim, the restriction must be strictly necessary in a democratic society and the measure taken must be proportionate to the aim sought to be achieved. A penalty may represent an interference in a basic right: the right to own property. However, no provisions concerning penalties are laid down in the Charter on Fundamental Rights and



Freedoms. According to Article 1 Protocol 1 ECHR, a state “may enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”. If a penalty interferes significantly with the proprietary standing of an individual, it may be considered that it interferes with the constitutional and legal order. The purpose of the legal amendment in question was to prevent breaches of construction regulations. A legitimate objective may be achieved by increasing penalties. However, the interference in the present case is not entirely in conformity with the principle of necessity.

A general failure by individuals to obey a specific legal norm may be attributed to insufficient penalties or insufficient enforcement activities by public authorities. If the legislator considers the penalties insufficient, it can adopt appropriate measures. In this respect, the maximum and minimum penalties must be distinguished. If the maximum amount is insufficient, the law may be unenforceable. On the other hand, a non-existent or excessively low minimum penalty will not be responsible for general non-observance of a norm unless it is accompanied by ineffective performance of the state administration at the level of both prevention and punishment. By improving the performance of the state administration, results identical to or better than those attained by increasing the minimum penalty can be achieved.

An interference in basic rights and freedoms occurs if a penalty imposed interferes significantly with proprietary relationships. The degree of harm arising from this interference must be taken into account in examining whether the penalty is proportionate to the aim sought to be achieved. The minimum penalty set by the legislator restricts the decision-making discretion of the relevant administrative body. It may prevent the taking into account not only of the gravity of specific illegal acts, but also of the economic situation of the entity found responsible for them. In a given case, the penalty may be seen as extremely unjust. It is therefore necessary to determine the rules the legislator must follow when setting the minimum penalty. Interference in ownership rights in the present context means a forfeiture of property on the basis of penalties that essentially changes the proprietary relationships of the entity affected. Penalties that are such as to induce bankruptcy are inadmissible. In principle, such a penalty would represent the most severe interference in property rights and may bring about a breach of Article 26.1 of the Charter (the right to engage in enterprise and other economic activity).

The conclusion that an interference in property rights is serious may also stretch to include cases in which the penalty exceeds possible revenues to such an extent that transacting business becomes virtually pointless. If this involves natural persons such as entrepreneurs, this may mean the threat of a serious impact not only on the offender, but also on other members of his or her household. The impugned minimum penalty represents an interference in the proprietary standing of an individual to such a degree that it entails, at the same time, an interference in an ownership right. Such interference does not comply with the principle of necessity, and therefore any further examination based on whether it is proportionate to the aim sought to be achieved is unnecessary. In spite of this, the Constitutional Court has also reviewed the latter issue.

The measure is not proportionate to the aim of protecting the public interest. The protection of ownership rights in the system of basic rights and freedoms is one of the most important ones. The present interference in that right threatens the very economic existence of a large number of entities. The existence of a negative phenomenon (of non-observance of the law) cannot be disputed. However, the information provided by the Ministry of Local Development does not indicate that construction regulations are likely to be breached to a considerable extent. The illegal acts described do not represent a serious problem involving the whole of society. The interference in basic rights and freedoms caused by the penalties in question was and is unjustifiable. For some entities, the maximum penalty could be negligible in relation to their business, but for others even the lowest possible penalty may entail their bankruptcy. People are free and equal in their dignity as well as rights.

From a formal point of view, the impugned provision treats all entities in the same way, but it hinders the taking into account of differences in the proprietary standing of entities. Not every *de facto* inequality represents an interference in basic rights and freedoms. According to the finding in case Pl. US 4/95 (publ. no. 29), “an inequality in social relationships, if it is to affect basic human rights, must reach such a degree that it impairs, in some way, the very essence of equality. This usually occurs if the breach of equality is connected with a breach of another basic right (for example the right to own property, some political rights), and the like”. Even here the inequality, in principle, is social and it is necessary to examine whether the interference involved is considerable. Each case of determining a minimum penalty may represent a certain inequality; not each of them, inequality in a constitutional and legal sense.

The Court has already dealt with the degree and proportionality of the interference, and the above conclusions are also applicable here. The impugned provision is incompatible with the principle of a state governed by the rule of law and therefore the Court abrogated it.

*Cross-references:*

- Decision of 07.06.1995 (Pl. US 4/95);
- Decision of 09.10.1996 (Pl. US 15/96).

*Supplementary information:*

See *Collection of Judgments, Rulings and Resolutions of the Constitutional Court* – file 6, no. 99.

*Languages:*

Czech.



## Estonia

### Supreme Court

### Important decisions

*Identification:* EST-2002-2-004

**a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 10.05.2002 / **e)** 3-4-1-3-02 / **f)** Petition of Tallinn Circuit Court to declare Section 20.2 of National Opera Act invalid / **g)** *Riigi Teataja III* (Official Gazette), 2002, 14, Article 157 / **h)** CODICES (Estonian, English).

*Keywords of the systematic thesaurus:*

- 3.4 **General Principles** – Separation of powers.
- 3.9 **General Principles** – Rule of law.
- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 4.5.8 **Institutions** – Legislative bodies – Relations with judicial bodies.
- 4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

*Keywords of the alphabetical index:*

Lease, termination, grounds / Lease, premature termination.

*Headnotes:*

If it is not possible to identify the aims pursued in enacting legislation that restricts a fundamental right, the court cannot determine whether the restrictions were necessary in a democratic society and whether or not the restrictions distorted the nature of the right. A restriction of a fundamental right the aim of which cannot be ascertained is unconstitutional.

*Summary:*

A private limited company and the legal predecessor of the National Opera, Theatre Estonia, had concluded a commercial lease contract, according to which some rooms located in the building of Theatre

Estonia were commercially leased to the private limited company until 31 December 2018. The National Opera Act provided for premature termination of commercial lease contracts concluded by Theatre Estonia. Other contracts in private law remained in force.



The lessee contested the termination of the contract and sought to have Sections 20.2 and 21 of the National Opera Act ("the Act") declared unconstitutional. The private limited company argued that the provisions of the Act were in conflict with Articles 3, 10, 11, 13, 32 and 102 of the Constitution. Tallinn City Court dismissed the action, but the decision was overruled by the Tallinn Circuit Court. The circuit court found that the legislator is competent to legislate as to the grounds on which commercial lease contracts may be terminated before the prescribed time. A concrete commercial lease contract, however, may be terminated only by the courts. The circuit court held that Section 20.2 of the Act was in contradiction with Article 146 of the Constitution (providing that justice shall be administered solely by the courts) and declared it unconstitutional. Constitutional review proceedings were initiated before the Supreme Court.

Since Theatre Estonia had already attempted to terminate the contract with the commercial lessee a few years earlier, but had lost the case against the lessee in court, the question arose whether the intent of the legislator had been to revise the judicial decision unfavourable to Theatre Estonia. The Supreme Court did not find indisputable evidence to confirm that this was the case, and consequently did not find that there had been a breach of Article 146 of the Constitution.

The Constitutional Review Chamber, however, examined whether the premature termination of commercial lease contracts complied with Article 31 of the Constitution, providing for the right to engage in commercial activities. The Court attempted to apply the test of proportionality. It proved impossible, however, to apply even the first step of the test, since the reasons for the premature termination of the commercial lease contracts could not be determined. The parliament (*Riigikogu*) did not present an explanation of these reasons in its written submission; nor did the representative of the parliament provide an explanation at the hearing. Therefore, the Court could not determine whether the restriction on the right to engage in commercial activities was necessary in a democratic society and whether the nature of that freedom was distorted due to the provision in question. The Court invalidated the impugned provision of the Act.

#### *Languages:*

Estonian, English (translation by the Court).

#### *Identification: EST-2002-2-005*

**a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 12.06.2002 / **e)** 3-4-1-6-02 / **f)** Petition of Tallinn Administrative Court to review the constitutionality of the second sentence of Section 18.8 of Value Added Tax Act (in the wording in force from 01.01.2000 to 01.01.2002) / **g)** *Riigi Teataja III* (Official Gazette), 2002, 18, Article 202 / **h)** CODICES (Estonian, English).

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

3.16 **General Principles** – Proportionality.  
4.10.7 **Institutions** – Public finances – Taxation.  
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.  
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

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

Tax, value added / Tax, fraud / Payment, cash.

#### *Headnotes:*

The prohibition on deducting value added tax when the taxable value of goods or services is high and the payment for them is made in cash disproportionately restricts the freedom of enterprise.

#### *Summary:*

A private limited company, Gizmo, filed a complaint with an administrative court requesting the repeal of an order of the Tax Board. Tallinn Administrative Court partially invalidated the order and declared unconstitutional the second sentence of Section 18.8 of the Value Added Tax Act ("the Act") in the wording in force from 1 January 2000 until 1 January 2002. This provision permitted the deduction of value added tax if the taxable value of goods or services per transaction exceeded 50,000 kroons only where the payment for the goods or services was carried out in full through a credit institution, either by a bank transfer or a cash payment made to the bank account of the seller. By the decision of the administrative court constitutional review proceedings were initiated with the Supreme Court.

The Constitutional Review Chamber of the Supreme Court found that the freedom of enterprise (Article 31 of the Constitution) had been restricted by the contested provision of the Act.



The Supreme Court further found that the restriction of the freedom of enterprise was disproportionate. The legislative intent was to prevent and detect tax fraud. The provision in question, however, was unsuitable for that purpose. Section 18.8 of the Act did not prevent the commission of a tax fraud. A purchaser who pays an invoice has no obligation to check – and usually no possibility of checking – whether the seller will pay the value added tax as shown in the invoice. If the seller has behaved in good faith, there is no ground to restrict his or her right to deduct the value added tax. Also, the seller might avoid paying the value added tax even where the purchaser pays by bank transfer, or where the purchaser does not make the payment at all.

Section 18.8 was found to be in contradiction with the principle of the accrual method of calculation of value added tax. As the right to deduct value added tax does not depend on the fact of paying the invoice, then in the case of non-payment of the invoice the value added tax may be deducted, but if the invoice is paid in cash, the value added tax may not be deducted.

The Supreme Court could not annul the disputed provision, since by the time of judgment, the Act had been replaced by a new Value Added Tax Act. The Court therefore declared the disputed provision of the Act unconstitutional.

#### *Supplementary information:*

This case was almost identical with the case dealt with in Decision 3-4-1-1-02 of 6 March 2002, *Bulletin* 2002/1 [EST-2002-1-001]. They both concerned the same provision of the Value Added Tax Act. There were two different cases, however, because at the different times when the disputes were raised the wording of the provision in force was slightly different.

#### *Cross-references:*

- Decision 3-4-1-1-02 of 06.03.2002, *Bulletin* 2002/1 [EST-2002-1-001].

#### *Languages:*

Estonian, English (translation by the Court).

#### *Identification: EST-2002-2-006*

**a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 15.07.2002 / **e)** 3-4-1-7-02 / **f)** Petition of the Legal Chancellor to declare Sections 31.1, 32.1 and 33.2.1 of Local Government Council Elections Act partly invalid / **g)** *Riigi Teataja III* (Official Gazette), 2002, 22, Article 251 / **h)** CODICES (Estonian, English).

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

2.1.1.4.11 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Charter of Local Self-Government of 1985.  
 3.3.1 **General Principles** – Democracy – Representative democracy.  
 3.18 **General Principles** – General interest.  
 4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.  
 4.9.3 **Institutions** – Elections and instruments of direct democracy – Electoral system.  
 4.9.5 **Institutions** – Elections and instruments of direct democracy – Eligibility.  
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.  
 5.3.39 **Fundamental Rights** – Civil and political rights – Electoral rights.  
 5.3.39.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

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

Deputy, political responsibility / Election, electoral list, non-party / Election, candidate, requirements / Municipality, election.

#### *Headnotes:*

The exclusion of lists of citizens' electoral coalitions (lists where the candidates belong to a grouping that does not represent a formally constituted political party) from standing for election in local elections may disproportionately restrict the right to present candidates, to stand for election and to vote. Rules preventing persons and groups enjoying real support among the voters from standing for election may result in the formation of representative bodies that are not sufficiently representative.

### Summary:

The Parliament (*Riigikogu*) adopted a new Local Government Council Elections Act ("the Act") on 27 March 2002, according to which party lists and individual candidates could run for office in local councils. Under the previous Act of 1996, lists of citizens' electoral coalitions (non-party lists) could also participate in the elections.

The President of the Republic promulgated the Act, and it became effective on 6 May 2002. On 21 May 2002 the Legal Chancellor proposed that the Parliament bring the Act into conformity with the Constitution. The Legal Chancellor considered that the Act was unconstitutional, since it disproportionately restricted the freedom of election and universal and equal suffrage. The Parliament did not accept the proposal of the Legal Chancellor. The Legal Chancellor then applied to the Supreme Court for a declaration that Sections 31.1, 32.1 and 33.2.1 of the Act were invalid to the extent that they did not enable persons with the right to stand for election to participate in local elections on non-party lists.

The representative of the Parliament argued at the hearing that the proposal the Legal Chancellor had submitted to the Parliament and the proposal submitted to the Supreme Court differed from each other. In the former the Legal Chancellor claimed that the whole Act was unconstitutional. In the latter, specific provisions of the Act were disputed. Also, several new lines of reasoning were alleged to have been inserted to the proposal submitted to the Court.

The Supreme Court rejected the assertion of the representative of the Parliament. It considered the differences in the proposals of the Legal Chancellor not to be of a substantial nature. On the basis of the minutes of the Parliament, the Supreme Court concluded that the members of Parliament had understood which provision of the Act the Legal Chancellor considered unconstitutional. The members of Parliament had discussed the proposal and voted on that.

The Supreme Court considered the aim of the amendments to the electoral legislation – to increase the political accountability of the persons elected to local government councils – a legitimate one. The means – exclusion of non-party lists – could also be legitimate. However, in the present legal and social context it is unconstitutional to prohibit non-party lists of candidates.

The Court observed that Article 156 of the Constitution not only guarantees the right to vote, but also the right to stand for election and the right

to present candidates. The principles provided for by Article 156.1 of the Constitution ("the elections shall be general, uniform and direct") apply for all the subjective rights named above.

With reference to the European Charter of Local Self-Government, the Supreme Court noted that local governments must be formed in a democratic way. Democracy does not mean that subjective electoral rights cannot be restricted in a reasonable manner. For example, a monetary deposit or a certain number of support signatures may be required so as to discourage candidates who are not serious from running in the elections. The restrictions, however, must not prevent persons and groups who have real support from running as candidates. Such restrictions would violate the right to stand for election and the right to vote and present candidates, and would prejudice the foundations of local government through the fact that the representative body would not be sufficiently representative.

The Supreme Court analysed whether the restriction imposed by the Act was capable of prejudicing the representative quality of local government councils. In doing so, the Court observed that 768 lists of candidates took part in the previous local elections in 1999. These lists included 570 non-party lists, 180 party lists, and 18 lists of party election coalitions. In 120 local governments out of 247, only non-party lists were presented. Individual candidates were not able to compete with the lists of the candidates.

In 1999, non-party lists won 78% of the seats in local government councils. In most of the local governments – with the exception of the bigger cities – both the candidates and the voters preferred non-party lists. Concerning the coming elections, the Supreme Court noted that the practice of the parties in power of designing electoral rules advantageous for themselves shortly before the elections cannot be considered democratic. The time-span between the enactment of the Act and the beginning of registration of candidates for the 2002 local elections was about three months – a period too short to establish new political parties (instead of rather informal non-party lists). Therefore, there would be no realistic alternative to the lists of the existing nation-wide parties. Moreover, due to the requirement that there be at least 1000 members to establish a political party, it would be impossible to establish local political parties in most of the local government areas. An alternative would be to run as a candidate in the elections on a political party list as a non-party candidate, or as a member of another political party. Electoral law does not preclude this, but in such cases it is the political party that decides on the right to stand for election.

The Supreme Court concluded that the Local Government Council Elections Act disproportionately restricted the right to present candidates, to stand for election and to vote, and was therefore in conflict with Article 156.1 of the Constitution read in conjunction with Article 11 of the Constitution, to the extent that it did not enable participation of non-party lists in local elections.

According to the Constitutional Review Court Procedure Act the Legal Chancellor requested the Supreme Court to declare the Local Government Council Elections Act partly invalid. The Supreme Court, however, observed that invalidating the contested provisions of the Act would not cause the norms concerning non-party lists to be re-enacted. The Supreme Court did not invalidate the disputed provisions. It merely declared the Act unconstitutional to the extent that it did not allow non-party lists to participate in local elections.

#### *Supplementary information:*

The Parliament subsequently amended the Local Government Council Elections Act and provided for participation of non-party lists in the 2002 local elections. According to the amendments, however, non-party lists will be not able to participate in local elections from the year 2005.

#### *Cross-references:*

- Decision 3-4-1-7-98 of 04.11.1998, *Bulletin* 1998/3 [EST-1998-3-007].

#### *Languages:*

Estonian, English (translation by the Court).



## France

### Constitutional Council

#### Important decisions

*Identification:* FRA-2002-2-004

**a)** France / **b)** Constitutional Council / **c)** / **d)** 24.04.2002 / **e)** / **f)** Decision of 24 April 2002 declaring the results of the first round of the presidential election and decision of 8 May 2002 proclaiming the results of the presidential election / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 25.04.2002, 7369 (decision of 24.04.2002); *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 10.05.2002, 9084 (decision of 08.05.2002) / **h)** CODICES (French).

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

1.3.4.5.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Presidential elections.  
 4.9.9.1 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Polling stations.  
 4.9.9.2 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Polling booths.  
 4.9.9.3 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Voting.  
 4.9.9.4 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Identity checks on voters.  
 4.9.9.7 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Method of voting.  
 4.9.9.8 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Counting of votes.  
 4.9.9.9 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Electoral reports.

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

Election, candidate, representative / Election, ballot, dignity / Election, mock “decontamination” equipment / Election, Constitutional Council, representative / Election, sham.

*Headnotes:*

A polling station's results are subject to cancellation where:

- no check on voters' identities is made at the polling station when they vote, despite the fact that a candidate's representative has drawn attention to this matter;
- many voters are permitted to vote without using a polling booth and not all voters' identities are checked, despite observations made by the Constitutional Council's judicial representative;
- counting of votes at the polling station is not carried out under the conditions laid down in the Electoral Code, despite observations made by the Constitutional Council's judicial representative;
- significant, unexplained discrepancies exist between figures shown in the official record of results and in the counting sheets, in particular between the total number of ballot papers and the vote count, as this prevents the Constitutional Council from verifying the proper conduct of the electoral process.

Where the presiding officer of a polling station and his or her assistants impede the Constitutional Council's judicial representative on the spot from performing his or her duties and fail to include his or her written observations in the official record sent to the Counting Board, this amounts to hindering the Constitutional Council from exercising its supervisory role and constitutes a ground for cancelling all votes cast at the polling station concerned.

Making mock "decontamination" equipment available to voters and organising a sham election in which voters are invited to vote for a candidate not standing in the second round is incompatible with the dignity of the ballot and breaches the secrecy of the vote and voters' freedom. Such action cannot but lead to cancellation of all votes cast at the polling station of the municipality concerned.

*Summary:*

Articles 7 and 58 of the Constitution of 4 October 1958 and Section 3 of the State Authorities Act on Election of the President of the Republic by Universal Suffrage gave the Constitutional Council a key role in verifying the proper conduct of presidential elections. This included drawing up a list of candidates, after checking the nomination forms submitted to the Council, since the regulations required each candidate to obtain "500 supporting signatures" of duly authorised elected representatives (numbering about 41,000 in France). The Council was also required to ensure that other

conditions (age, non-deprivation of civic rights, etc) were met and that candidates' consent had been obtained. During the election itself (which comprised two rounds), the Constitutional Council served as the national vote counting office and determined the final results after examining voters' complaints noted in the official records, observations by the *département* Counting Boards, reports by its own representatives (2,000 members of the judiciary), appeals by the government's representatives (one such appeal was lodged after the second round), and any direct appeals by candidates (none in respect of the 2002 presidential elections). In the two rounds (held on 21 April and 5 May 2002) only a few polling stations' returns were cancelled. These partial cancellations did not invalidate the result of the election. After proclaiming the results, the Constitutional Council examined candidates' campaign accounts. Rejection of those accounts did not affect the result of the ballot itself. However, it did disqualify the candidate concerned from any reimbursement of campaign expenses by the state.

*Languages:*

French.

*Identification:* FRA-2002-2-005

**a)** France / **b)** Constitutional Council / **c)** / **d)** 22.08.2002 / **e)** 2002-460 DC / **f)** Outline and Programme Act on Internal Security / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 30.08.2002, 14411 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

3.13 **General Principles** – Legality.

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

*Keywords of the alphabetical index:*

Law, ordinary, scope / Organic law, early application / Law, appended report, legislative status / Internal security.

*Headnotes:*

Provisions of an ordinary law which amend an Organic law are unconstitutional. This is the case with early application, under the Programme Act on Internal Security, of the provisions of the Organic law of 1 August 2001 relating to the budget.

Policy guidelines set out in a report appended to a law do not belong to any category of legislation provided for under the Constitution, nor do they have the legislative status attaching to the law itself. Legislative or regulatory measures implementing the policies in question may, depending on the circumstances, be referred to the Constitutional Council or appealed against in the administrative courts.

*Summary:*

By providing for the inclusion in financial legislation (the Finance Act – budget – and the Settlement Act – budgetary execution) of “performance objectives” assigned to the police and the *gendarmerie nationale* and of results achieved compared with the objectives, the Outline and Programme Act on Internal Security entailed early application of certain provisions of the Organic law of August 2001 relating to the budget. This did not come within Parliament’s ordinary lawmaking powers.

The Act on Internal Security approved the internal security policy guidelines set out in a report appended to it. As the *Conseil d’État* had done with regard to other appendices to legislation, the Constitutional Council held that appended reports, merely setting objectives, were devoid of legislative status.

*Languages:*

French.

*Identification:* FRA-2002-2-006

**a)** France / **b)** Constitutional Council / **c)** / **d)** 29.08.2002 / **e)** 2002-461 DC / **f)** Outline and Programme Act on Justice / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 10.09.2002, 4953 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

3.16 **General Principles** – Proportionality.  
 4.5.2 **Institutions** – Legislative bodies – Powers.  
 5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.  
 5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.  
 5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.

*Keywords of the alphabetical index:*

Minor, criminal liability / Minor, detention, closed educational centre / Educational rehabilitation / Electronic tagging / Legislation, appended report, legislative status.

*Headnotes:*

The diminished criminal liability of minors on grounds of age is a fundamental principle recognised in the laws of the French Republic, as is the need for educational rehabilitation of juvenile delinquents through measures suited to their age and character, decided by a specialist court or under an appropriate procedure. This fundamental principle does not rule out the application of penalties or enforcement measures, although preference should be given to educational measures proper, wherever possible.

The provisions concerning placement of minors in a closed educational centre do not breach Articles 8 and 9 or the constitutional principles specific to the juvenile courts system, in view of the procedural and substantive conditions that continue to apply to pre-trial detention.

Given the guarantees surrounding such proceedings, early trial is not incompatible with either the principles of criminal procedure (the right to a fair trial and the presumption of innocence) or the principle that penalties must be necessary, nor does it breach Article 66 of the Constitution, which makes the judiciary the guardian of personal freedom, or the principles of constitutional justice of relevance to minors.

Parliament may adopt new measures aimed at achieving or reconciling objectives of a constitutional nature at any time within its field of jurisdiction, and it is for Parliament to assess their expediency. However, this power must not be exercised in such a way as to deprive certain constitutional requirements of legal safeguards.



In particular, Parliament may lay down rules of criminal procedure which differ according to the facts of a case, the circumstances and the persons to whom they apply, on condition that such differences do not result from unwarranted discrimination and that all persons coming before the courts are afforded the same guarantees, not least as regards the right to a fair trial, which entails in particular a just and fair procedure. Similarly, electronic tagging, which in some cases makes it possible to avoid pre-trial detention and, moreover, cannot be implemented without the consent of the person concerned, does not constitute excessive interference with personal freedom or violate the presumption of innocence.

Policy guidelines set out in a report appended to a law do not belong to any category of legislation provided for under the Constitution, nor do they have legislative status (on this question, see also Decision no. 2002-460 DC [FRA-2002-2-005]).

### Summary:

More than sixty members of the National Assembly and more than sixty members of the Senate had referred the Outline and Programme Act on Justice, finally passed by Parliament on 3 August 2002, to the Constitutional Council. The latter held the challenged provisions to be in conformity with the Constitution, subject to a number of reservations concerning their interpretation. Among the very varied provisions challenged, the Constitutional Council deemed that new enforcement measures introduced for use by the juvenile courts did not breach the constitutional requirements specific to juvenile justice. The Council upheld the two principles that minors' criminal liability must be diminished on grounds of age and that an effort must be made to rehabilitate juvenile delinquents through appropriate educational measures. In view of the substantive and procedural conditions applicable, the Constitutional Council held that the challenged measures, in particular placement in a closed educational centre, were not incompatible with these principles. Simplified trial procedure for certain offences (violations of the highway code) was not in breach of constitutional requirements.

Lastly, regarding assessment and policy outline reports, the Council gave a ruling consistent with its Decision no. 2002-460 DC [FRA-2002-2-005].

### Languages:

French.



## Georgia Constitutional Court

### Important decisions

*Identification:* GEO-2002-2-002

**a)** Georgia / **b)** Constitutional Court / **c)** Second Chamber / **d)** 23.04.2002 / **e)** 2/1/130 / **f)** Guram Shamanidi v. Ministry of Internal Affairs of Georgia and Ministry of Tax Revenue of Georgia / **g)** *Sakanonmdeblo matsne* (Official Gazette) / **h)**.

*Keywords of the systematic thesaurus:*

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

3.13 **General Principles** – Legality.

4.8.2 **Institutions** – Federalism, regionalism and local self-government – Regions and provinces.

4.10.7 **Institutions** – Public finances – Taxation.

5.2 **Fundamental Rights** – Equality.

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

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

*Keywords of the alphabetical index:*

Customs, clearance / Car, registration, number / Region, autonomous, duty to comply with state law.

*Headnotes:*

The requirement that Georgian citizens obtain customs clearance for vehicles transferred by them to the territory of Georgia from another country is not unconstitutional in its application to vehicles transferred from the former Autonomous Region of South Ossetia and having South Ossetian registration numbers and documents.

*Summary:*

The Customs Code of Georgia regulates customs clearance requirements pertaining to vehicles transferred by Georgian citizens to the territory of Georgia from another country. According to Article 1 of the Code, "a single customs policy constituting part of the single domestic and foreign policy ... shall be

implemented throughout Georgia". According to Article 82 of the Code, "Unless the customs clearance of a vehicle has been completed, the use and/or disposal of the vehicle in question are prohibited". Article 77 of the Code provides that "as a rule customs clearance is conducted by the Ministry of Tax Revenue at the fixed place and time, within the customs territory...". The registration of vehicles in Georgian territory is regulated by Article 9 of the Georgian Law of 28 May 1999 on Traffic Safety. According to this Law, the Ministry of Internal Affairs of Georgia undertakes the mandatory registration of vehicles. According to Article 1 of the Constitution and the Law of the Republic of Georgia of 11 December 1990 on The Dissolution of the Autonomous Region of Republic of South Ossetia, Tskhinvali region as a territorial unit is considered to be a part of Georgian territory. Accordingly, so-called South Ossetian car registration numbers and registration documents are unlawful and incompatible with Georgian legislation. Article 122 of the Administrative Code of Georgia prohibits the driving of cars with registration numbers incompatible with Georgian legislation.

The claimant challenged the constitutionality of the joint Order of 10 February 2000 of the Minister of Internal Affairs and the Minister of Tax Revenue on the Regulation of the use of vehicles transferred from the former Autonomous Region of South Ossetia. Pursuant to this Order, if a person living permanently in Tskhinvali region decides to live temporarily in another part of the territory of Georgia for more than 72 hours, he or she must temporarily register his or her car with the Ministry of Internal Affairs of Georgia.

The claimant was refused permission to register temporarily the car that he was driving on the territory of Georgia on the basis of a power of attorney, on the grounds that he was not owner of the car in question.

The claimant argued that the Order was in conflict with Articles 12.1, 12.2, 12.3, 13.1, 13.2 and 13.3 of the Constitution (on citizenship), as Georgian citizens living in the territory of Tskhinvali Region did not enjoy the same rights as those living in other parts of the territory of Georgia.

The claimant also alleged that the Order was incompatible with Article 14 of the Constitution, which provides that "every human being is equal before the law regardless of ... [their] place of residence".

Furthermore, the claimant asserted that the Order violated the right to freedom of movement guaranteed under Article 22.1 and 22.2 of the Constitution.

The claimant considered that the Order was also incompatible with Article 40.1, 40.2 and 40.3 of the Constitution, which provide that:

"Each individual is considered innocent until proven guilty through the due process of law;

No individual is obliged to prove his/her innocence. To prove an accusation is the duty of the prosecutor;

The decision to institute criminal proceedings against a person, the bill of indictment and the conviction should be based only upon reliable evidence. Any accusation not proven in accordance with procedures established by law must be decided in favour of the defendant."

The claimant argued that by virtue of the Order he was considered to be guilty and the action of driving the car in question was regarded as an administrative offence.

The claimant furthermore argued that the Order was in conflict with Article 42.5 of the Constitution, which provides that, "No one may be held criminally responsible for an action that did not constitute a criminal offence at the time it was committed. A law that does not mitigate or abrogate responsibility has no retroactive force". The claimant argued that the Order had retroactive force inasmuch as it obliged him to obtain customs clearance in respect of the car, which had been transferred to him by virtue of power of attorney before the adoption of the Order.

In its consideration of the case on the merits, the Chamber found no violation of Articles 12.1, 12.2, 12.3, 13.1 and 13.2 of the Constitution. The Chamber ruled that the Order restricted the temporary registration only of those vehicles having registration numbers incompatible with Georgian legislation. In so far as the above-mentioned articles of the Constitution concerned substantially different issues, the Order could not be deemed to be contrary to the Constitution.

With regard to the temporary registration of vehicles with South Ossetian registration numbers owned by persons living permanently in the territory of Tskhinvali region, it should be noted that the operation of Georgian legislation had been temporarily suspended in the territory of so-called South Ossetia and the vehicles in question registered in violation of Georgian legislation by the self-proclaimed, illegitimate, so-called Republic of South Ossetia. of persons living territory of Tskhinvali region was not restricted, temporary registration of the vehicles in question had

established. This could not be regarded as a violation of Article 22.1 of the Constitution, which provides that everyone lawfully within the territory of Georgia has the rights to freedom of movement and to the free choice of their place of residence within the territory of the country, nor with Article 14 of the Constitution.

The Chamber found against the claimant concerning the violation his rights under Article 40.1, 40.2 and 40.3 of the Constitution, since every Georgian citizen had a duty to comply with Georgian legislation on the territory of Georgia where Georgian legislation operates.

As mentioned above, the claimant argued that the new Order had retroactive force and obliged him again to obtain customs clearance of a car belonging to a person living permanently in the territory of Tskhinvali region that was owned by him temporarily. The Chamber found no violation of Article 42.5 of the Constitution in so far as Georgian legislation did not lay down a requirement to obtain customs clearance repeatedly. Customs clearance and registration requirements laid down by the so-called Republic of South Ossetia in violation of Georgian legislation were not deemed to be lawful requirements in legal terms.

#### *Languages:*

Georgian, English (translation by the Court).



## Hungary Constitutional Court

### Statistical data

1 June 2002 – 30 September 2002

- Decisions by the plenary Court published in the Official Gazette: 5
- Decisions by chambers published in the Official Gazette: 11
- Number of other decisions by the plenary Court: 16
- Number of other decisions by chambers: 13
- Number of other (procedural) orders: 30

Total number of decisions: 75

### Important decisions

*Identification:* HUN-2002-2-003

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 19.07.2002 / **e)** 35/2002 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2002/100 / **h)**.

*Keywords of the systematic thesaurus:*

- 3.18 **General Principles** – General interest.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.12 **Fundamental Rights** – Civil and political rights – Security of the person.
- 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
- 5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

*Keywords of the alphabetical index:*

Data, personal, collecting, processing / Video surveillance, sport events / Remedy, effective / Sports, Arbitration Tribunal / Consumer, protection.

*Headnotes:*

The purpose of the surveillance of sports events required by the Sports Act is to protect the safety of spectators and their assets and to avoid racist behaviour and violence, and therefore to protect human dignity and physical integrity. Although the video surveillance of sports events infringes the right to self-determination with respect to information of those who attend matches and games, it does not follow that this is an unnecessary and disproportionate limitation of this fundamental right.

*Summary:*

The petitioner sought constitutional review of certain provisions of the Sports Act on the grounds that they violated the right to the protection of personal data under Article 59 of the Constitution and the right to a fair trial and legal remedy under Article 57 of the Constitution.

Under the Sports Act, the organisers of various sports events should carry out surveillance in order to ensure public safety and the security of people's assets. According to Article 85.4 of the Sports Act, the pictures thus recorded can be forwarded to those affected by the pictures, certain state organs, and organisers who arrange similar sports events. The Court held that although there are sufficient guarantees concerning data processing by state organs, legal provisions regarding the collection and processing of personal data of private actors, such as the organisers of such sports events, are missing from the Hungarian legal system.

Referring to its Decision no. 15/1991, the Court emphasised that personal data may only be processed for a definite and legally justified purpose, to which every stage of the process had to conform. Therefore, the requirement under Article 85.4 of the Sports Act that data be supplied to private organisations and persons arranging similar sports events without a valid, legally justified purpose was insufficient to permit the forwarding of personal data. The scope of data collection and processing was too wide, since it was permitted to process data not only of those who were excluded from participating in sports events, but of everyone who attended the sports event. The aim of Article 85.4 of the Act was to avoid a remote and indirect danger. Under this provision, collecting personal data was not only the means, but became an end in itself.

The Court also reviewed the constitutionality of Article 82.5 of the Sports Act, under which a person who is excluded from access to sports events can

appeal against this decision to the Sports Arbitration Tribunal or to the Consumer Protection Authority. According to the petitioners, this provision infringed the right to a fair trial and more specifically the right to a legal remedy.

As concerned the proceedings of the Sports Arbitration Tribunal, the Court held that such proceedings require an agreement by the two parties to submit their dispute to arbitration. In the current case this means that the organiser, who issued the order excluding the other party from access to matches and stadia, can decide whether to take their dispute to arbitration. Such a proceeding does not in the Court's opinion constitute an effective legal remedy in a constitutional sense.

Concerning proceedings of the Consumer Protection Authority, the Court emphasised that under Article 82.5 of the Sports Act this proceeding is an alternative: it is up to the parties whether they choose this means of legal enforcement, and the relevant substantive and procedural provisions are missing from the Sports Act. As a consequence of this, the provision of the Sports Act on the proceedings of the Sports Arbitration Tribunal and the Consumer Protection Authority violated the right to a legal remedy.

*Supplementary information:*

One of the Justices attached a concurring opinion to the judgment. Justice Harmathy emphasised that the Constitutional Court should have examined the challenged provisions of the Sports Act in the light of the right to privacy and not data protection.

Justices Kiss and Kukorelli in their separate opinion pointed out that the Court should have taken into account the whole concept of the Sports Act concerning the surveillance of sports events and the human rights apprehensions which that strategy engender. Second, the Court should have examined the constitutionality of the Act from the viewpoint that it requires private-sector actors to collect personal information, including information that law enforcement can use in gathering evidence of criminality.

*Languages:*

Hungarian.



# Israel

## Supreme Court

### Important decisions

*Identification:* ISR-2002-2-003

**a)** Israel / **b)** Supreme Court / **c)** High Court of Justice / **d)** 03.09.2002 / **e)** HCJ 7015/02; 7019/02 / **f)** Ajuri v. IDF Commander in Judaea and Samaria / **g)** Not yet published (in Hebrew); to be published in [2002] IsrLR 1 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.  
 3.9 **General Principles** – Rule of law.  
 3.13 **General Principles** – Legality.  
 3.16 **General Principles** – Proportionality.  
 3.17 **General Principles** – Weighing of interests.  
 3.19 **General Principles** – Margin of appreciation.  
 3.24 **General Principles** – Loyalty to the State.  
 4.7.11 **Institutions** – Judicial bodies – Military courts.  
 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.  
 5.1.4 **Fundamental Rights** – General questions – Emergency situations.  
 5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.  
 5.3.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.  
 5.3.13.2.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts – *Habeas corpus*.  
 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.

*Keywords of the alphabetical index:*

Danger, community / Residence, place, assignment / Terrorist, act, support / Terrorist, family member / Geneva Convention of 1949, Protection of Civilian Persons in Time of War / Hague Convention, fourth , respecting the Laws and Customs of War on Land, 1907.

*Headnotes:*

Although every person has a basic right to retain his place of residence and to prevent a change of that place of residence, international law itself – in Article 78 of the Fourth Geneva Convention – recognises that there are circumstances in which this right may be overridden by other interests, namely “imperative reasons of security”.

In the circumstances of the case, the preconditions set out in Article 78 of the Fourth Geneva Convention allowing someone's place of residence to be assigned were fulfilled, as Judaea and Samaria and the Gaza Strip should be regarded as one territory subject to a belligerent occupation. Therefore, the case did not involve a transfer of a person outside the area subject to the belligerent occupation.

Furthermore, although the Israeli Defence Forces (IDF) Commander has broad discretion in deciding to assign someone's place of residence, this is not absolute discretion. An essential condition for exercising this authority is the existence of a reasonable possibility that the person himself presents a real danger, and that assigning his place of residence will help to avert this danger. The residence of an innocent relative who does not present a danger cannot be assigned, even if it is proved that assigning his residence may deter others from carrying out terrorists acts. The residence of someone who no longer presents a danger cannot be assigned. The decision to assign someone's place of residence may be made only on the basis of clear and convincing evidence. It must be proportionate. One must also examine, in each case, whether it is not possible, instead of assigning someone's place of residence, to file a criminal indictment against that person, which will avert the danger that assigned residence is intended to avert.

*Summary:*

The Supreme Court, with an expanded bench of nine judges, passed judgment on two petitions concerning orders made by the IDF Commander in Judaea and Samaria (hereinafter: the IDF Commander) against three petitioners. According to the orders, the place of residence of the petitioners – residents of Judaea and Samaria – would be assigned to the Gaza Strip, for a period of two years. The reason behind the orders was said to be the danger presented by the petitioners because of their involvement in terrorist activities, mainly in their help to family members who were involved in terrorism and carried out many terrorist attacks. Assigning their place of residence was intended to avert this danger.

The Supreme Court, in its judgment written by President A. Barak, all members of the bench concurring, ruled that the IDF Commander was indeed competent to make orders to assign residence. The Court pointed out that the basic framework for examining the legality of the actions of the IDF Commander can be found in the provisions of international law and the laws that apply to belligerent occupation. Within this framework, the Court found that the circumstances of the case should not be regarded as a deportation or a forcible transfer (within the meaning of Article 49 of the Fourth Geneva Convention) but as assigned residence, which is permitted under Article 78 of that Convention.

Article 78 of the Convention begins:

“If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.”

The Court further held that in the circumstances of the case, the preconditions set out in Article 78 of the Convention, allowing someone's place of residence to be assigned, were fulfilled. It further held that the requirements of the Convention were fulfilled both with regard to an appeals procedure (which was indeed held before the Appeals Board) and with regard to a reconsideration of the decisions (which in the circumstances of the case was to be held every six months).

Against this background, the Supreme Court proceeded to consider the principles governing the IDF Commander's discretion in making assigned residence orders under Article 78 of the Fourth Geneva Convention.

The Supreme Court held that if it is proved that a person presents a real danger to the security of the area, it is permissible also to take into account considerations of deterring others. When the condition of a person presenting a danger exists, it was held that it was justified to take into account – when deciding whether to assign his place of residence – the impact of this measure in deterring others from carrying out terrorist acts and helping those carrying out terrorist acts. This consideration could also be taken into account, for example, when choosing between internment and assigned residence. This result, the Court said, “is required by the harsh reality in which the State of Israel and the territory are situated, in that they are exposed to an inhuman phenomenon of “human bombs” that is engulfing the area”. In this respect, the Court accepted the position of the IDF Commander that

assigned residence is an effective measure in the struggle against the plague of suicide bombers.

Against this background, the Court examined the three cases before it. It ruled that the IDF commander has the authority in principle to assign residence under international law. The Court decided not to intervene in the decision of the IDF Commander to assign the residence of two of the petitioners: Amtassar Muhammed Ahmed Ajuri, who was found to have helped her terrorist brother Ahmed Ajuri directly, *inter alia*, by sewing explosive belts; and Kipah Mahmad Ahmed Ajuri, who was found to have helped his brother (the terrorist Ahmed Ajuri), *inter alia*, by helping him to subsist in a hide-out apartment and by acting as look-out when his brother and members of his group moved two explosive charges from one place to another. With regard to these petitioners, the Court found that it had been proved that they were involved in terrorism to such an extent that they presented a reasonable possibility of a real danger, which would be averted if they were removed from their place of residence, and that therefore there was no reason to intervene in the decision of the IDF Commander to assign their residence.

The Court, however, ruled that the measure of assigned residence could not be adopted with regard to the third petitioner, Abed Alnasser Mustafa Ahmed Asida – the brother of the terrorist Nasser A-Din Asida. The reason for this was that even though it was proved that this petitioner knew of the deeds of his terrorist brother, his involvement amounted merely to lending his brother a car and giving him clean clothes and food at his home, and no connection had been established between the petitioner's acts and the terrorist activity of his brother. It was therefore held that there was an inadequate basis for determining the petitioner to be sufficiently dangerous to justify assigning residence in his case.

In the result, then, the petitions of two of the petitioners against the assigned residence orders made against them were dismissed, and the petition of one petitioner was granted, since it was held that his residence could not be assigned on the basis of the evidence against him and the law.

At the end of its judgment, the Court stated:

“The State of Israel is undergoing a difficult period. Terror is hurting its residents. Human life is trampled upon. Hundreds have been killed. Thousands have been injured. The Arab population in Judaea and Samaria and the Gaza Strip is also suffering unbearably. All of this is because of acts of murder, killing and

destruction perpetrated by terrorists... The State is doing all that it can in order to protect its citizens and ensure the security of the region. These measures are limited. The restrictions are, first and foremost, military-operational ones. It is difficult to fight against persons who are prepared to turn themselves into living bombs. These restrictions are also normative. The State of Israel is a freedom-seeking democracy. It is a defensive democracy acting within the framework of its right to self-defence – a right recognized by the charter of the United Nations... not every effective measure is also a lawful measure... Indeed, the position of the State of Israel is a difficult one. Also our role as judges is not easy. We are doing all we can to balance properly between human rights and the security of the area. In this balance, human rights cannot receive complete protection, as if there were no terror, and State security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy. It is expensive, but worthwhile. It strengthens the State. It provides a reason for its struggle..." (paragraph 41 of the judgment).

#### Languages:

Hebrew, English (translation by the Court).



## Italy

### Constitutional Court

#### Important decisions

*Identification:* ITA-2002-2-001

**a)** Italy / **b)** Constitutional Court / **c)** / **d)** 01.03.2002 / **e)** 85/2002 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette) / **h)** CODICES (Italian).

*Keywords of the systematic thesaurus:*

1.4.10.7 **Constitutional Justice** – Procedure – Interlocutory proceedings – Request for a preliminary ruling by the Court of Justice of the European Communities.

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

2.2.1.6.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Primary Community legislation and domestic non-constitutional legal instruments.

3.26 **General Principles** – Principles of Community law.

5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

*Keywords of the alphabetical index:*

Business, foreign, European Union / Betting, collection, prohibition / Service, provision.

*Headnotes:*

The Court found that an application submitted by a judge, who had asked for a ruling on the constitutional validity of certain provisions of law, and who then asked the Court of Justice of the European Communities for a preliminary ruling as to whether those same provisions were compatible with Articles 43 to 55 of the EC Treaty, was inadmissible.

*Summary:*

The referring judge had questioned the constitutional validity of a law which punishes any person who accepts and collects bets on the State's territory, including persons acting for foreign business

concerns based in other Community countries, where their activities are lawful. He held that this law violated, *inter alia*, the freedom of establishment and the freedom to provide transfrontier services guaranteed by Articles 43 to 55 of the EC Treaty. It also violated Article 11 of the Constitution, which obliged the State to respect Community law.

The judge had also asked the Court of Justice of the European Communities for a preliminary ruling, under Article 234 of the EC Treaty, as to whether the law which he had referred to the Constitutional Court was, or was not, compatible with Articles 43 to 55 of the EC Treaty, which guarantees all nationals of EU states the right to set up business offices (registered or branch) in any EU state without discrimination on grounds of nationality, and to offer their services freely on other states' markets.

The Court found that the contradictory content of the order applying for a constitutional ruling rendered the application itself inadmissible. It referred to its Judgment no. 170 of 1984, in which it had declared that, to be valid in Italian law, a rule must not be incompatible with Community law. This being so, the judge in question could not refer a rule of domestic law to the Constitutional Court and simultaneously ask the Court of Justice for a ruling on its compatibility with Community law. The fact that he had asked the Court of Justice for a preliminary ruling showed that he had doubts concerning the applicability of the rule of law in question. He could not raise the question of its constitutional validity until these doubts had been resolved.

#### *Languages:*

Italian.



#### *Identification:* ITA-2002-2-002

**a)** Italy / **b)** Constitutional Court / **c)** / **d)** 10.04.2002 / **e)** 106/2002 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette) / **h)** CODICES (Italian).

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

1.3.4.3 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between central government and federal or regional entities.

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

3.1 **General Principles** – Sovereignty.

3.3 **General Principles** – Democracy.

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

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

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

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

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

Regional council, title / Parliament, supreme representative body / Region, autonomous, powers / Region, political status.

#### *Headnotes:*

The fact that the functions of the Regional Councils and the National Parliament are substantively the same in their respective areas of responsibility does not justify use of the term “parliament” to denote the former. Apart from the fact that the original authors of the Constitution were aware of the similarity of their functions, and none the less chose to give them different titles, the authors of the constitutional amendments of 1999 and 2001, which increased the regions' autonomy, saw no need to introduce the term “parliament” to denote their legislative bodies.

In fact, under Article 67 of the Constitution, parliament is the whole country's representative political forum, which means that its functions are unique, and that the same term cannot be used to denote the regions' legislative assemblies.

#### *Summary:*

The Regional Council of Liguria had decided that the words “Parliament of Liguria” would appear on all its official acts after the words “Regional Council”. It had also sent a recommendation to the special commission responsible for drafting the text defining the region's new status, asking it to take account of this new title in its work. The Government appealed to the Constitutional Court, alleging conflict of authority and arguing that the Council's decision encroached on state prerogatives.



The Court granted the appeal. It noted, first of all, that Article 55 of the Constitution reserved the title “Parliament” for the two chambers which together constituted the national parliament, i.e. the Senate and the Chamber of Deputies, and that Article 121 applied the term “Regional Council” to the body which exercised the legislative powers and other functions assigned to the region by the Constitution and the law. At the same time, this text-based argument needed the support of other, system-based arguments. In this connection, the state's representatives emphasised that the term “parliament” was reserved for national legislative assemblies because sovereignty chiefly found expression in those assemblies. The Court objected, however, that the idea of sovereignty's residing solely in parliament could not be accepted today, since – insofar as sovereignty belonged to the people (Article 1 of the Constitution) – it penetrated the state's entire constitutional structure in different forms and ways, and was therefore present, too, in those autonomous regional bodies which the authors of the Constitution envisaged as one of the forms in which the principles of democracy and popular sovereignty were expressed.

The changes made in Chapter V of the Constitution, “Regions, provinces, municipalities”, by Constitutional Act no. 3 of 2001 had also reinforced the system of regional autonomy: the new Article 114, which named territorial authorities, alongside the state, as constituent parts of the Republic, was proof of their shared origin and basis in the principles of democracy and popular sovereignty.

However, under Article 67 of the Constitution, parliament was the nation's representative political forum – which conferred a unique character on its functions and made it impossible to use the same term to denote the regions' legislative assemblies.

Articles 55 (on Parliament) and 121 (on the Regional Councils) thus stood in the way of the Regional Councils' being called “parliaments”.

The Constitutional Court accordingly set aside the decision of the Regional Council of Liguria to use the title “parliament”.

#### *Languages:*

Italian.



#### *Identification:* ITA-2002-2-003

**a)** Italy / **b)** Constitutional Court / **c)** / **d)** 24.04.2002 / **e)** 155/2002 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette) / **h)** CODICES (Italian).

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

2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.  
 3.3.3 **General Principles** – Democracy – Pluralist democracy.  
 3.17 **General Principles** – Weighing of interests.  
 3.18 **General Principles** – General interest.  
 3.21 **General Principles** – Equality.  
 3.25 **General Principles** – Market economy.  
 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.  
 5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.  
 5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.  
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

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

Media, local, television, legal system / Media, political party, air-time / Media, legislation, election period.

#### *Headnotes:*

In accordance with the law on equal access to the means of information during election and referendum campaigns and for political communication purposes, certain television programmes, such as political discussions, round tables, one-to-one debates, candidate profiles and political programmes, must respect the adversarial principle and “equality of arms”, to ensure that all political protagonists have equal access to the means of political communication. These obligations concern the organisation of programmes and not freedom of expression, apart from the programme presenter's duty to remain neutral and impartial.

The rules in question represent a reasonable compromise between protection of the general constitutional interest in informing the public and the freedom of expression of individual television channels.

These rules do not suppress the various channels' political identities, since they do not apply to their news programmes outside election periods. At other times, every channel is free to manifest its own political identity.

### Summary:

The Regional Administrative Court of Lazio had raised a series of questions concerning the constitutional validity of the law on equal access to means of information during election and referendum campaigns and for political communication purposes (Act no. 28 of 2000). A first question concerned those sections of the Act which, by obliging television channels to ensure equality between the various political parties in all “political information” programmes, allegedly prevented those same channels from expressing their own political identities, thus violating Articles 3 and 21 of the Constitution, which guarantee freedom of the information media. A further objection, raised under Article 3 of the Constitution (principle of equality), focused on a section of the Act which imposed certain restrictions on election propaganda on television, but not in the press, thus allegedly violating the principle of equality by discriminating against television companies. A final question concerned arrangements for refunding – during election campaigns – of the costs incurred by local TV stations which transmitted party political broadcasts, whereas national channels were obliged to do this entirely at their own expense. The referring judge complained that this violated Article 42 of the Constitution, since it amounted to expropriation, without compensation, of private space on television.

The Constitutional Court noted that Act no. 223 of 1990, regulating public and private broadcasting, had laid down the principle that the broadcasting of radio and television programmes was in the general interest. This meant that pluralism, objectivity, comprehensiveness and impartiality of information were the basic principles of the radio and television broadcasting system, and must be respected by all the public and private corporations which formed part of it.

The Constitutional Court had developed these principles in its case-law, declaring that the right to information protected by Article 21 of the Constitution, on which the democratic system was based, required that pluralism, objectivity and continuity of information sources be assured.

TV broadcasting – which comprised both public and private sectors – was regulated by a licensing system, from which various obligations relating to such broadcasting (whatever the subject) derived. For example, local private stations were required to devote a minimum number of hours per week to community issues, while national private stations must broadcast for at least twelve hours a day, and have daily news programmes. The licensing system offered ways of reconciling free speech and free enterprise.

The obligation to carry party political broadcasts on an “equal representation” basis applied to arrangements for showing them, and not to their content; it was the latter which was guaranteed by Article 21 of the Constitution.

The legal rules in question were rendered even more necessary by the fact that the mere coexistence of different (public and private) information sources, which ensured “external” pluralism, was not enough to satisfy the requirement that the process of forming the voters' political opinions must be genuinely impartial, since one operator (Mr Berlusconi's Media Group – *ed.*) dominated the private TV sector, and the number of channels was limited. This was why it was essential to ensure maximum pluralism of party political broadcasts.

The Constitutional Court also stressed that there was no discrimination against television, as compared with the press, since the two sectors were subject to different legal systems, which could not be compared. In the press sector, there was nothing to stop newcomers from entering the market and competing with established concerns, but the availability of frequencies was limited in the television sector – and this made licensing necessary. Moreover, the impact of television was such that rules were needed to ensure that voters' minds were not made up for them.

Concerning the last question, the Court noted that “self-management” of party political broadcasts by the national private channels was an aspect of freedom of choice, and that channels based their choices on criteria connected with their programming policies. Moreover, the limited resources of local channels justified partial coverage of their costs by the state.

### Cross-references:

- On television, see Judgments nos. 225 of 1974, 148 of 1981, 826 of 1988, 112 of 1993 and 420 of 1994 (*Bulletin* 1994/3 [ITA-1994-3-018]).

### Languages:

Italian.



## Kazakhstan Constitutional Council

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### Decisions adopted by the Constitutional Council of the Republic of Kazakhstan in 2002

The Constitutional Council examined seven applications and two petitions in 2002.

Three laws adopted by the Republic's Parliament were examined for compatibility with the Constitution. In particular, the Council examined the Law "On political parties", which allows citizens to exercise their constitutional right to form political parties. This right derives from the general provisions of the Constitution concerning the recognition of ideological and political diversity in Kazakhstan, and citizens' right to freedom of association. The law deals in detail with the conditions and procedure for setting up and operating political parties, and for establishing their public-law status. The Law "On political parties" was found to be compatible with the Republic's Constitution.

Also examined for compatibility with the Constitution was the Law "On introducing amendments and addenda to certain legislative acts of the Republic of Kazakhstan in matters relating to freedom of worship and the activities of religious associations". On examining the application, the Council concluded that the law was not compatible with the Kazakh Constitution. It violated Article 14 of the Constitution on equality for all before the law, which implies that all religions and religious associations are equal before the law and prohibits treating some religions and religious associations more favourably than others. The law also violated the constitutional right of everyone to freely disseminate information by any means not prohibited by law.

The law "On introducing amendments and addenda to certain legislative acts of the Republic of Kazakhstan in matters relating to prosecutorial supervision" was examined and found to be compatible with the Republic's Constitution.

The Council gave an official interpretation of the constitutional provision on the justice system in Kazakhstan as regards the examination of disputes by arbitration courts. The Council held that applying to an arbitration court did not constitute, for individuals and legal entities, exercise of the constitutional right to judicial protection of their rights and freedoms. The examination of disputes by arbitration courts did not

qualify as "justice", which in Kazakhstan could be administered only by a state court. The conclusion by parties of a civil-law agreement to refer a dispute for arbitration did not preclude this dispute from being subsequently examined by Kazakh courts of law, in accordance with the procedure laid down in existing legislation.

Petitions were lodged by the Supreme Court and the Prosecutor General's Office in connection with this Constitutional Council ruling. The petitioners asked for interpretation of certain provisions of the Council's finding on arbitration courts. The Constitutional Council gave a further ruling, in which it answered all the questions asked.



# Latvia

## Constitutional Court

### Statistical data

1 May 2002 – 30 August 2002

Number of judgments: 3

### Important decisions

*Identification:* LAT-2002-2-005

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 04.06.2002 / **e)** 2001-16-01 / **f)** On the compliance of the requirement of recognition of qualifications by the Faculty of Law of the University of Latvia, incorporated into the Law on the Public Prosecutor's Office (Part 1, Article 33), the Law on Barristers (Article 14.3) and the Law on Solicitors (Article 90.3), with Articles 91 and 106 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 84, 05.06.2002 / **h)** CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

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

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

4.6.8.1 **Institutions** – Executive bodies – Sectoral decentralisation – Universities.

5.2.1.2 **Fundamental Rights** – Equality – Scope of application – Employment.

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

*Keywords of the alphabetical index:*

Education, higher, system / Diploma, recognition / University, state, private / Profession, admission.

*Headnotes:*

The obligation to secure the approval of the Faculty of Law of the University of Latvia in order to obtain recognition of the degrees awarded by other educational institutions – which is required for admission to professional activity in certain

professions – is unconstitutional inasmuch as it replicates the function of the Cabinet of Ministers to approve and certify academic programs and qualifications.

This situation creates inequality between academic institutions and consequently discriminates against graduates of other academic institutions in their right of access to certain professions.

*Summary:*

The State Human Rights Bureau challenged the compliance of the requirement, incorporated in three Laws – on Barristers (Article 14.3), on Solicitors (Article 90.3) and on the Public Prosecutor's Office (Part 1, Article 33) – regarding the academic credentials necessary for entry into practice in the relevant professions. Essentially, the disputed clauses required candidates to hold an advanced academic degree in law from the Faculty of Law of the University of Latvia or other academic institution, the latter degree being subject to approval by the Faculty of Law.

Upon examination of the historic roots of the requirement it was found that originally it had been well justified, as from 1918 there was a single academic institution (the Faculty of Law of the University of Latvia) awarding degrees in law and monitoring the compliance of foreign academic degrees with national standards for the legal profession.

Furthermore, the Court found that in the current educational system of Latvia, the assessment of standards of academic education has been delegated to the Cabinet of Ministers, which has the exclusive right to accredit academic institutions, specific courses and qualification requirements. Since 1991 a number of state-funded and private academic institutions have begun running accredited courses in legal sciences leading (upon graduation) to the award of a degree in law, extending the method of study also to distance-learning modules and courses.

However, graduates from academic institutions other than the Faculty of Law of the University of Latvia still had to secure the Faculty's approval of their qualification in order to gain access to the professions regulated by the above-mentioned laws.

The Court found that the process of approval of diplomas lacked transparency, openness and strict criteria and provided no avenues of appeal. This practice was deemed discriminatory in respect of graduates with law degrees from other accredited academic institutions and was thus a violation of the

fundamental right, guaranteed by the Constitution, to choose one's profession and occupation freely, according to one's abilities and qualifications, without discrimination of any kind.

The Constitutional Court held that, whereas the challenged requirements were legitimate and justified at the time of their enactment, they could not be justified any longer. They were therefore declared null and void.

#### Languages:

Latvian, English (translation by the Court).



#### Identification: LAT-2002-2-006

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 20.06.2002 / **e)** 2001-17-0106 / **f)** On the compliance of Articles 279 (Part 2) and 280 (Part I, paragraph 4) of the Latvian Administrative Offences Code, in the parts determining that a court ruling on the decision of an official on imposing administrative punishment is final, and of Article 239 (Part 4) of the Latvian Civil Procedure Code, with Articles 89, 91 and 92 of the Constitution and Article 6 of the European Convention on Human Rights / **g)** *Latvijas Vestnesis* (Official Gazette), 95, 26.06.2002 / **h)** CODICES (Latvian, English).

#### Keywords of the systematic thesaurus:

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

1.6.5.1 **Constitutional Justice** – Effects – Temporal effect – Retrospective effect (*ex tunc*).

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

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

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

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

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

#### Keywords of the alphabetical index:

Administrative proceedings / Case, administrative, classification / Sanction, administrative, appeal.

#### Headnotes:

The nature of an administrative offence has a crucial impact on the right of appeal. Whereas there are cases where appeals may be barred – mainly cases (involving taxation or immigration, for example) where the primary objective is to protect public rights – cases including elements of a criminal offence must include the possibility of an appeal.

In administrative cases involving civil rights, parties shall enjoy the right to appeal according to the procedure generally applicable in cases of civil litigation.

#### Summary:

Two individuals challenged legal provisions under which there was no possibility of making an appeal in administrative law cases, on the grounds that these provisions were contrary to the constitutional rights to fair trial (Article 92 of the Constitution), equality before the courts (Article 91 of the Constitution) and (under Article 89 of the Constitution) the recognition and protection of rights guaranteed under binding provisions of international instruments, namely Article 6 ECHR and Article 2 Protocol 7 ECHR.

The administrative law currently in force in Latvia is based on the former Soviet legislative acts: in particular, the relevant chapters of the Civil Procedure Code (1963) and Administrative Offences Code (1984), which do not make any provision for appeals. The new Administrative Procedure Code, including guaranteed rights of appeal, will enter into force on 1 July 2003. In the meantime all administrative cases continue to be heard without distinction as to their nature.

Current judicial practice in other post-soviet countries varies. In Lithuania a separate judicial procedure was established in 1999, whereas in the same year the Constitutional Courts of Russia and Azerbaijan examined breaches of human rights arising out of the lack of an appeals procedure in administrative cases. In all of these cases the right of appeal was extended to administrative cases.

Upon review of administrative procedures in general, and the two cases before it in particular, the Court found that there does not at present exist, under the law in force, a classification of administrative cases

leading to different appeals procedures. The same procedure is applied in cases involving private and public rights, as well as in cases involving elements of a criminal offence. The latter clearly fall within the scope of protection afforded by the European Convention on Human Rights and Protocol 7 ECHR as well as the national Constitution.

Therefore, the Court held the challenged provisions – Articles 279 (Part 2) and 280 (Part 1, paragraph 4) of the Administrative Offences Code, and Article 239 (Part 4) of the Civil Procedure Code – to be null and void in so far as the administrative sanction ordered at first instance was declared to be final. These provisions contravened Articles 89 and 92 of the Constitution and Article 2 Protocol 7 ECHR.

The Court ruled that appeals in administrative cases were to be reviewed by courts of general jurisdiction, applying the principle of procedural analogy and considering the appeal as newly revealed circumstances in the case. The procedure thus established is to be applied until the above-mentioned new Code enters into force.

Furthermore, the Court found that the claimants had suffered violations of their rights. In their cases the right to appeal should be extended retroactively and their cases reviewed on the merits by the competent court of higher instance.

#### *Languages:*

Latvian, English (translation by the Court).



## Liechtenstein State Council

### Important decisions

*Identification:* LIE-2002-2-002

**a)** Liechtenstein / **b)** State Council / **c)** / **d)** 24.06.2002 / **e)** StGH 2001/49 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

3.10 **General Principles** – Certainty of the law.  
3.12 **General Principles** – Clarity and precision of legal provisions.  
3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.

*Keywords of the alphabetical index:*

Sanction, penal, administrative.

*Headnotes:*

In accordance with Article 33.2 of the Constitution, the principle that criminal penalties must be provided for by law also applies in administrative penal law.

The provisions of the Trade and Industry Act (*Gewerbegesetz*), which is the subject of the proceedings, are too wide-ranging and vague for any ordinary citizen to use as a guide for his/her behaviour and to realise, even partially, the consequences of failure to comply with them.

If a piece of legislation provides for penal sanctions but fails to specify the facts which would be deemed to constitute infringements of this legislation, it contravenes the principle of *nulla poena sine lege certa* (“no punishment without law”) implied by the legality principle.

The fact that the law must indicate what kind of behaviour is subject to a given penalty, and what kind is not, also promotes the essential aim of the legality principle, in the light of Article 7 ECHR, that is to say to enable the citizen to recognise clearly what kind of behaviour is punishable.

*Summary:*

In the context of a legislative review procedure in accordance with Article 28.2 StGH (State Council Act), the State Council verified the constitutionality of Articles 38 and 39 of the Trade and Industry Act, which set out the penalties for infringement of the said Act. Article 39.1 and 39.2, second sentence, of the Trade and Industry Act was declared unconstitutional in the light of the legality principle, and it was decided that these provisions would be repealed six months later.

*Languages:*

German.



## Lithuania

### Constitutional Court

#### Statistical data

1 May 2002 – 31 August 2002

Number of decisions: 7

All cases concerned *ex post facto*, abstract review.

The main content of the cases was the following:

- On the return of real property in kind: 1
- On nationalisation: 1
- On levies for the construction, repair and maintenance of public roads: 1
- On the state pension of the President of the Republic and the promulgation of laws: 1
- On soldiers' right to appeal to a court: 1
- On the hierarchy of legal acts: 1

All final decisions of the Constitutional Court were published in the *Valstybės Žinios* (Official Gazette).

#### Important decisions

*Identification:* LTU-2002-2-008

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 10.05.2002 / **e)** 15/2000 / **f)** On return of real property in kind / **g)** *Valstybės Žinios* (Official Gazette), 48-1867, 14.05.2002 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

- 3.13 **General Principles** – Legality.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 5.2 **Fundamental Rights** – Equality.
- 5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

*Keywords of the alphabetical index:*

Land, regulation for use / Property, restitution, in kind, conditions / Compensation.

*Headnotes:*

Where the law provides that existing real property (including land) is not to be returned to the former owners in kind, but the right of ownership is to be restored in another manner established by law, it is acceptable that real property that is necessary for the needs of society is not returned in kind. The “needs of society” means either the interests of the whole of society or of part of society, which the state is obliged, in the exercise of its functions, to guarantee and satisfy. They are always concrete and clearly expressed needs for particular property which would not be satisfied if the property were returned to its former owners.

Land which is not returned to the former owners due to the needs of society is purchased by the state, and the owners are compensated in the manner and in accordance with the procedure specified by law. In laying down the manner of and procedure for compensation of owners for land purchased by the state, the law must strike an appropriate balance between the legitimate interests of the individual and society.

A provision that the land allotted to scientific and educational establishments shall be purchased by the state means that this land is not subject to be returned to former owners and that in the land allotted to scientific and educational establishments there may be no plots designated for non-public needs, such as the construction of private dwellings, as this would mean that such land was not necessary for the scientific and educational establishment in question.

*Summary:*

The petitioner – the Panevežys Regional Court – applied to the Constitutional Court for a determination of the question whether Government Resolution no. 649 (of 25 August 1993) on the Status of Land Used by the Lithuanian Academy of Agriculture and the Approval of the Zoning Scheme for Its Use, Government Resolution no. 294 (of 19 April 1994) on the Partial Amendment of Resolution no. 649 of 25 August 1993, and Government Resolution no. 350 (of 9 March 1995) on the Supplementation of Resolution no. 649 (of 25 August 1993) on the Status of Land Used by the Lithuanian Academy of Agriculture and the Approval of the Zoning Scheme of Its Use were in compliance with Article 23 of the Constitution, Article 12.8 of the Law on the Restoration of the Ownership Rights of Citizens to Existing Real Property (wording of 13 May 1999) and Article 13.4 of the Law on Land Reform (wording of 15 July 1993).

The petitioner raised the following arguments: the Lithuanian Academy of Agriculture (“the LAA”) had been allotted some land for its educational-production base. Certain citizens filed applications to restore their rights of ownership to land by the return of a portion of the land allotted to the LAA. These ownership rights were not restored and the land was not returned to the former owners. The plots of land to which they requested the restoration of their ownership rights were allotted to other individuals for building private houses by Order no. 56-kb of the Rector of the LAA, dated 12 March 1992, and the Decision on the Allotment of Land Plots for Building Dwelling-Houses of the Noreikiškes Countryside District Council of the Kaunas District, dated 13 March 1992. The privatisation of these land plots was later authorised by Government Resolution no. 350 of 9 March 1995.

In the opinion of the petitioner, it was permissible to allot land to the LAA for educational and scientific needs only, and it was only this land that the state was permitted to buy out. The petitioner questioned whether Government Resolution no. 649 of 25 August 1993, which designated as land subject to being bought out by the state the land used by the LAA, and approved the zoning scheme for the use of this land; also whether Government Resolution no. 294 of 19 April 1994, under which a portion of the land plots allotted to the LAA were left in the State Land Fund due to which the area of the land used by the LAA was specified; and whether Government Resolution no. 350 of 9 March 1995, which permitted the privatisation of the land plots allotted for building private dwelling-houses, were in compliance with Article 12.8 of the Law on the Restoration of the Ownership Rights of Citizens to Existing Real Property (wording of 13 May 1999), Article 13.4 of the Law on Land Reform and Article 23 of the Constitution.

The Court recalled its ruling of 27 May 1994 (*Bulletin* 1994/2 [LTU-1994-2-008]), in which it emphasised that:

“...the preliminary purchase of land for the future construction of residential houses in accordance with settlement-development projects, for common use by residents or for other public needs, may not be considered to be a purchase based on public interest.

The buying out of land in rural settlements in the context of development projects allows for the possibility of privatising it later, i.e. other persons will be allowed to acquire the land. This would mean, however, the violation of the right of former owners to the restoration of their land.”



Thus the Court ruled that the disputed norms were to some extent in conflict with Article 23 of the Constitution, Article 12.5 of the Law on the Procedure and Conditions for the Restoration of the Ownership Rights of Citizens to Existing Real Property (wording of 15 July 1993), Article 12.8 of the Law on the Restoration of the Ownership Rights of Citizens to Existing Real Property (wording of 13 May 1999). Government Resolution no. 350 was also in conflict Article 13.4 of the Law on Land Reform (wording of 15 July 1993).

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2002-2-009

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 27.05.2002 / **e)** 19/2000 / **f)** On nationalisation / **g)** *Valstybės Žinios* (Official Gazette), 53-2093, 29.05.2002 / **h)** CODICES (English).

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

4.10.8 **Institutions** – Public finances – State assets.  
5.3.37.2 **Fundamental Rights** – Civil and political rights – Right to property – Nationalisation.

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

Property, holder, guarantees / Organisation, paramilitary.

#### *Headnotes:*

The provisions of Article 23 of the Constitution, which constitute a whole, reveal the essence of the constitutional protection of ownership rights. The said provisions guarantee the protection of property for all its owners, i.e. natural persons, legal persons, local governments and the state. The principle of inviolability of property established in this article of the Constitution also means that the owner is guaranteed the right to demand that other persons or entities do not infringe his rights of ownership. The legislature has a duty to enact laws protecting ownership rights against any unlawful encroachment upon them. The Constitution guarantees that no one may seize property in an arbitrary manner and on an illegal basis.

#### *Summary:*

The petitioner – the Alytus Local District Court – applied to the Constitutional Court requesting it to determine whether certain legal acts regulating property held by the former voluntary society for cooperation with the army, air force and navy (DOSAAF) were in compliance with the Constitution. In the petitioner's opinion, the property of DOSAAF as a public organisation had been nationalised.

The Court emphasised that DOSAAF was established by a Resolution of 20 August 1951 adopted by the USSR Council of Ministers, i.e. it was established by a state act. It was commissioned to increase the USSR defence capacity, the might of the Soviet Army, Air Force and Navy, to prepare young people for service in the Soviet Army and Navy, to educate its members in the spirit of selfless devotion to the Communist Party and love to the Soviet Army etc.

The Court found that DOSAAF used to be a paramilitary state organisation which was created in Lithuania by a foreign state and which used to support occupation troops.

Thus the Court recognised that the Lithuanian property held by DOSAAF was the property of the State of Lithuania and ruled that the challenged acts were in compliance with the Constitution.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2002-2-010

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 03.06.2002 / **e)** 28/2000 / **f)** On levies for the construction, repair and maintenance of public roads / **g)** *Valstybės Žinios* (Official Gazette), 55-2199, 07.06.2002 / **h)** CODICES (English).

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

3.4 **General Principles** – Separation of powers.  
3.13 **General Principles** – Legality.  
4.6.2 **Institutions** – Executive bodies – Powers.

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

*Keywords of the alphabetical index:*

Taxation, deductions, determination / Government, exceeding of powers.

*Headnotes:*

Article 67.15 of the Constitution provides that the parliament (*Seimas*) shall “establish state taxes and other obligatory payments”.

This constitutional provision must be read together with the provisions of Article 127.3 of the Constitution, according to which “taxes, other budgetary payments, and dues shall be established by the laws of the Republic of Lithuania”. Thus, in accordance with the Constitution, only the parliament may establish state taxes and other obligatory payments, and this may be done only by law.

State taxes and other obligatory payments are monetary sums owed by legal subjects to the state. The constitutional requirement that state taxes and other obligatory payments be laid down only by law is an important guarantee of the protection of individuals' rights. A law establishing taxes and other obligatory payments must define such essential elements of a tax or other obligatory payment as the persons or entities required to pay it, its object, the amount due, any exemptions and the terms of payment.

The Constitutional Court has more than once held in its rulings that if the Constitution directly defines the powers of a certain public institution, no other institution may take over these powers, while the former institution may not delegate or renounce its powers. Such powers may not be altered or limited by law. Therefore, the parliament may not delegate its constitutional powers to establish state taxes and other obligatory payments to another institution, including the government. Neither the government nor any other institution may take over such powers.

*Summary:*

The petitioner – the Kaunas City District Court – applied to the Constitutional Court seeking a decision as to whether Government Resolution no. 99 on Levies for the Construction, Repair and Maintenance of Public Roads of 23 February 1993 was in compliance with Article 67.15 of the Constitution. The petitioner maintained that Article 67.15 of the Constitution provides that the *Seimas* establishes

state taxes and other obligatory payments; however, levies imposed for the construction, repair and maintenance of public roads were established by a government resolution.

The Constitutional Court emphasised that according to the Constitution, only the parliament may establish state taxes and other obligatory payments, and this may only be done by a law. The government resolution at issue had established a monetary obligation towards the state, i.e. levies payable for the construction, repair and maintenance of public roads. The same resolution also determined the persons and entities subject to pay such levies and the object and amounts of the levies. Therefore, in the opinion of the Court, “levies for the construction, repair and maintenance of public roads” must be considered as obligatory payments in the sense of Article 67.15 of the Constitution. In accordance with the Constitution, however, only a law adopted by the parliament ought to have established such payments and their essential elements.

On these grounds, the Court ruled that the government resolution at issue was in conflict with Article 67.15 of the Constitution.

*Languages:*

Lithuanian, English (translation by the Court).



*Identification:* LTU-2002-2-011

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 19.06.2002 / **e)** 29/2000 / **f)** On the state pension of the President of the Republic and the promulgation of laws / **g)** *Valstybės Žinios* (Official Gazette), 62-2515, 21.06.2002 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

President, status, finances / President, pension, calculation / Law, promulgation.

### Headnotes:

I. Under the Constitution, the legal status of the President of the Republic as Head of State is different from that of other state officials.

Article 90 of the Constitution provides that the President of the Republic shall have a residence and that the financing of the President of the Republic and of the President's residence shall be provided for by law. These constitutional provisions also mean that the activities of the President of the Republic are financed by the state and the material and social guarantees attaching to the position of the President of the Republic are guaranteed by the state. The funds necessary for this must be provided for in the state budget, and the financing of the President of the Republic and of the President's residence must be regulated by law. Under the Constitution, the legislature is not permitted to create a legal scheme that would deny the special legal status of the President of the Republic, which is different from that of other state officials, and which might create legal pre-conditions allowing any other person to be equated with the President of the Republic, who is Head of State.

The provisions of Article 90 of the Constitution presuppose that an integral part of the financing of the President of the Republic and one of the social guarantees to which the Head of State is entitled is the pension of the President of the Republic. In accordance with the Constitution, the legislature has a duty to establish the amount of this pension, conditions for its granting and payment that are in line with the dignity of the President of the Republic as the Head of State and his or her particular, exceptional legal status. The provisions of Article 90 of the Constitution also mean that the legislature is prohibited from enacting provisions under which a person who has not been elected President of the Republic might receive the pension of the President of the Republic.

II. Article 7.2 of the Constitution provides that: "Only laws which are promulgated shall be valid". The signing and official publication of laws, i.e. the promulgation of laws, is the final stage of the legislative process. The signing and official publication of laws is a necessary condition that must be satisfied before they can enter into force.

Under the Constitution, a law that has not been signed by the official indicated in the Constitution may not be officially promulgated and come into force. Furthermore, a law that has been signed by an official who does not enjoy the relevant constitutional powers may not be officially promulgated and may not come into force.

### Summary:

The petitioners – a group of members of the parliament (*Seimas*) – applied to the Constitutional Court requesting a determination as whether the Law Amending and Supplementing Articles 7, 11 and 15 of the Law on State Pensions was in compliance with Articles 71 and 90 of the Constitution.

In the opinion of the petitioners, under Article 71.2 of the Constitution, in the event that a law enacted by the parliament is not returned to parliament or signed by the President of the Republic within the established time-limit, the law shall enter into force when it has been signed and officially promulgated by the Chairperson of the parliament. The petitioners maintained that neither the Constitution, nor the Statute of the Parliament, nor the law provide that a law may enter into force after it has been signed by a Deputy Chairperson of the parliament. Meanwhile, the law at issue was signed and officially promulgated by the First Deputy Chairperson of the parliament.

By Article 1 of the Law Amending and Supplementing Articles 7, 11 and 15 of the Law on State Pensions, Article 7.4 of the Law on State Pensions was amended to read as follows: "The state pension of the President of the Republic shall be granted and paid, in accordance with the Law on the President of the Republic of Lithuania, to the Chairman of the Supreme Council-Reconstituent *Seimas* after he leaves state service". The petitioners argued that, under Article 90 of the Constitution, the financing of the President of the Republic and of the President's residence shall be established by law, and that in order to implement this constitutional provision, a special Law on the President of the Republic of Lithuania was adopted. In the opinion of the petitioners, the Law on the President of the Republic of Lithuania provided only for the financing of the activities and social guarantees of the President of the Republic. Therefore this law could not be applied with respect to persons who had not been elected President of the Republic.

The Court emphasised that the status of the Chairman of the Supreme Council that operated from 1990 to 1992 was not identical with the status of the President of the Republic as Head of State, as laid down in the 1992 Constitution. Under the Constitution, the post of the Chairman of the Supreme Council was different from the institution of the President of the Republic as Head of State.

The Court also upheld the petitioners' arguments concerning the legality of the promulgation of laws. In addition, the Court *ex officio* investigated the question whether some provisions of the Law on State

Pensions (wording of 13 June 2000) and the Law on the President of the Republic of Lithuania were in compliance with the Constitution.

The Court ruled that:

1. Article 7.4 of the Law on State Pensions (wording of 13 June 2000) was in conflict with Articles 77.1 and 90 of the Constitution.
2. The Law Amending and Supplementing Articles 7, 11 and 15 of the Law on State Pensions was in conflict with Article 71.2 of the Constitution.
3. Article 7.1 of the Law on State Pensions, insofar as it linked the establishment of the pension of the President of the Republic with the departure from state service of a former President of the Republic, was in conflict with Article 77.1 of the Constitution.
4. Article 20.2 of the Law on the President of the Republic of Lithuania, insofar as it linked the establishment of the pension of the President of the Republic with the departure from state service of a former President of the Republic, was in conflict with Article 77.1 of the Constitution.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2002-2-012

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 02.07.2002 / **e)** 32/2000 / **f)** On soldiers' right to appeal to court / **g)** *Valstybės Žinios* (Official Gazette), 69-2832, 05.07.2002 / **h)** CODICES (English).

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

3.20 **General Principles** – Reasonableness.  
 4.5.2 **Institutions** – Legislative bodies – Powers.  
 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 **Fundamental Rights** – Equality.

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

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

Army, military service, dismissal / Dismissal, right to appeal, extra-judicial dispute-settlement procedure.

#### *Headnotes:*

Under the Constitution, the law must provide for the possibility for all disputes concerning violations of the rights or freedoms of individuals to be decided in court. An out-of-court dispute settlement procedure may also be provided for. However, it is not permissible to provide for a system that denies the right of an individual who considers that his rights or freedoms are being violated to defend his rights and freedoms in court.

In its ruling of 8 May 2000, the Constitutional Court held that an individual's right to seek the protection by the courts of a violated right is guaranteed regardless of the legal status of the person and that the protection of the courts must extend to an individual's violated rights and legitimate interests irrespective of whether these rights are directly established in the Constitution.

In accordance with Article 109.1 of the Constitution, in the Republic of Lithuania, the courts shall have the exclusive right to administer justice. This article must be read together with Article 30.1 of the Constitution, which guarantees the right of any person to appeal to a court concerning the protection of his or her violated rights. It must also be read together with the constitutionally enshrined principle of a state governed by the rule of law and with the inherent right of individuals to justice.

#### *Summary:*

The petitioner – the Higher Administrative Court – applied to the Constitutional Court seeking a determination whether Article 48.2 of the Law on the Organisation of the National Defence System and Military Service (“the Law”) was in compliance with Articles 30.1 and 109.1 of the Constitution. Article 48.2 of the Law provided that, in cases of dismissal from professional or voluntary military service based on the provisions of Article 38.1 or 38.2.10 and 38.2.12 of the Law, when the service contract with the professional or voluntary soldier had to be terminated, an appeal could be lodged with a court only insofar as it concerned a violation of the procedure for dismissal laid down by law. In the opinion of the petitioner, the

impugned provision restricted the right of individuals, enshrined in Article 30.1 of the Constitution, to appeal to a court, and was in breach of Article 109.1 of the Constitution, under which, in the Republic of Lithuania, the courts shall have the exclusive right to administer justice.

The Constitutional Court emphasised that organisational relations within the national defence system and military service have their own peculiarities. Taking account of these peculiarities, it is permissible to establish by law various means of resolving disputes regarding violations of rights and freedoms, including out-of-court procedures for the settlement of such disputes. However, the peculiarities of the organisational relations within the national defence system and military service could not justify the denial of the constitutional right of individuals to appeal to a court to defend their rights and freedoms.

The Court found that under Article 48.2 of the Law, soldiers were prohibited from appealing to a court concerning the reasonableness of their dismissal from military service. This constituted a violation of the constitutional right of individuals to appeal to a court. The Court further held that the right of persons to justice was infringed and the opportunities of courts to administer justice were restricted. Thus Article 109.1 of the Constitution and the constitutionally enshrined principle of a state governed by the rule of law were violated.

The Court ruled that the impugned provision was in conflict with Articles 30.1 and 109.1 of the Constitution and the constitutional principle of a state governed by the rule of law.

#### *Cross-references:*

- Ruling of 08.05.2000 (Cases nos. 12/99, 27/99, 29/99, 1/2000, 2/2000), *Bulletin* 2000/2 [LTU-2000-2-005].

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2002-2-013

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 21.08.2002 / **e)** 43/01 / **f)** On the hierarchy of legal acts / **g)** *Valstybės Žinios* (Official Gazette), 82-3529, 23.08.2002 / **h)** CODICES (English).

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

2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources.

3.13 **General Principles** – Legality.

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

Premises, state, transfer for shares / Government, exceeding of powers.

#### *Headnotes:*

Rules laid down by law may be implemented by regulations or other sub-statutory legal acts. However, such acts may not replace the law itself or create new legal rules of a general character that would compete with the provisions laid down by law. Otherwise, the principle of the supremacy of laws over sub-statutory acts, which is enshrined in the Constitution, would be breached.

Government resolutions are sub-statutory legal acts. They may not contain any legal rules that compete with those laid down by law.

#### *Summary:*

The petitioner – the Supreme Administrative Court of Lithuania – applied to the Constitutional Court seeking a determination as to whether the provisions of Article 3 of the Procedure for the Transfer of Buildings or Premises Owned by State or Local Governments for Shares (wording of 4 February 1999), which was approved by Government Resolution no. 120 on the Procedure for the Transfer of Buildings or Premises Owned by State or Local Governments for Shares of 4 February 1999, were in compliance with Article 20.5 of the Law on the Possession, Use and Disposal of State-Owned and Municipal Property (wording of 12 May 1998). Article 3 of the Procedure stated that the premises may not be transferred for shares if the enterprises specified in Article 1 of the Procedure were in arrears with rent payments or with respect to the State Budget. Article 3 (wording of 14 April 2000) also stated that the premises may not be transferred for shares if the enterprises pointed out in Article 1 of the Procedure were in arrears with rent payments, or

with respect to the State Budget (local government budget) or the State Social Insurance Fund Budget.

The Constitutional Court emphasised that provisions laid down by law may be implemented by sub-statutory legal acts. However, such acts may not replace the law itself or create new legal rules of a general character that would compete with the rules laid down by law. The Court held that Article 3 of the Procedure (wordings of 4 February 1999 and 14 April 2000) established additional conditions applicable to enterprises, which had not been provided for in the Law.

The Court ruled that the challenged provisions were in conflict with Article 20.5 of the Law on the Possession, Use and Disposal of State-Owned and Municipal Property (wording of 12 May 1998).

#### *Languages:*

Lithuanian, English (translation by the Court).



## Norway Supreme Court

### Important decisions

*Identification:* NOR-2002-2-001

**a)** Norway / **b)** Supreme Court / **c)** Plenary / **d)** 03.05.2002 / **e)** 2000/770 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2002, 497 / **h)** CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Surtax, additional / Tax, evasion, grossly negligent.

*Headnotes:*

Additional (60%) surtax cannot be imposed on a taxpayer for having provided incorrect or incomplete information to the tax authorities in circumstances where he has already been prosecuted in criminal proceedings for tax evasion for the same conduct, cf. Article 4.1 Protocol 7 ECHR.

*Summary:*

On 14 June 1995, A. was convicted in the District Court and sentenced to 18 months' imprisonment for failing to declare to the tax authorities taxable income of NOK 5 278 611 for 1989-1991, and taxable capital of approximately NOK 8 million for 1989-1992. He was acquitted of similar charges for 1988. The judgment became final on 18 October 1995. Following a preliminary finding of 11 May 1995, the Tax Assessment Board decided to amend A.'s tax assessment. In this decision, A.'s income for 1988-1991 was increased by approximately NOK 27.7 million, and his capital for 1989-1993 was increased by approximately NOK 8.3 million. In addition, a further surtax of 60% was imposed on the grounds that A, in the view

of the Tax Assessment Board, had been “at the least, grossly negligent” when submitting his tax assessment statement and had provided “incorrect/incomplete information”, as a result of which too little tax had been levied against A.

A. appealed against the decision of the Tax Assessment Board to the Tax Appeals Board, but was not successful. Thereafter, A. brought an action in the ordinary courts challenging the validity of the decision. During the course of the appeal proceedings, the State withdrew the amended tax assessment for 1992. The Court of Appeal reduced the increase of income for 1988 and 1989. In all other respects, however, the Court of Appeal found in favour of the State. A. appealed against the judgment of the Court of Appeal to the Supreme Court. In this appeal, A. contended for the first time that the imposition of 60% surtax for conduct that was covered by the previous criminal prosecution constituted a violation of Article 4.1 Protocol 7 ECHR.

The Supreme Court referred to a plenary hearing the question of whether a criminal prosecution precludes the imposition of additional surtax for the years covered by the criminal proceedings. A.'s challenge to the remainder of the Tax Assessment Board's decision was dealt with in the ordinary manner by a chamber of the Supreme Court, which, in a judgment of 30 August 2001, dismissed A.'s appeal and upheld the judgment of the Court of Appeal.

In a judgment of 3 May 2002, the Supreme Court sitting in plenary session found unanimously that a final conviction or acquittal in criminal proceedings precludes the subsequent imposition of additional (60%) surtax.

The Supreme Court recalled that in order for the prohibition against the repetition of criminal proceedings to be applicable, the prosecutions in both cases must first relate to the same conduct. Second, there must be no material difference in the conditions of the criminal provisions in question – that is, they must not differ from each other in their essential elements. This assessment must primarily be made by comparing the description of the offence in the two provisions.

The Supreme Court found further that the description of the offence in Chapter 12 of the Tax Assessment Act, pursuant to which A. had been charged, was the same as the description of the offence in Section 10-2 of the same Act, pursuant to which additional surtax was imposed. Furthermore, the subjective requirements were the same – intent or gross negligence (cf. Sections 12-1.1 and 10-4.1 of the Tax Assessment Act). Thus, the Supreme Court found beyond doubt that the decision imposing additional surtax for 1988

to 1991 related to the same conduct as the criminal proceedings, and pronounced judgment repealing the additional surtax that had been imposed on A. for 1988 to 1991.

Notwithstanding that A. had lost that part of the action that was determined by the Supreme Court in its judgment of 30 August 2001, meaning that he had partly won and partly lost the case, he was awarded costs for the part of the case that related to the issue of whether the imposition of additional surtax constituted a violation of Article 4.1 Protocol 7 ECHR, cf. Section 174.2 of the Civil Procedure Act and Article 13 ECHR.

#### *Cross-references:*

- Decision of the Supreme Court of 03.05.2002 (2001/527).

#### *Languages:*

Norwegian.



#### *Identification:* NOR-2002-2-002

**a)** Norway / **b)** Supreme Court / **c)** Plenary / **d)** 03.05.2002 / **e)** 2001/890 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2002, 509 / **h)** CODICES (Norwegian).

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

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.  
 2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.  
 4.10.7 **Institutions** – Public finances – Taxation.  
 5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.  
 5.3.40 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

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

Charge, criminal, notion / Tax, surtax, ordinary.

*Headnotes:*

The imposition of ordinary (30%) surtax pursuant to Section 10-2 of the Tax Assessment Act (cf. the first sentence of Section 10-4.1 of the Act), constitutes a "criminal charge" in the terms of Article 6.1 ECHR.

*Summary:*

The application to the Supreme Court concerned the submission of evidence in a case of judicial review of a tax assessment decision. The tax authorities amended a taxpayer's tax assessment, having found that his dealings with two ships were not undertaken in the course of business as he had claimed, and he was imposed a surtax of 30%. The taxpayer filed an action with the District Court. In his points of claim, he cited three witnesses who would be called to give testimony and submitted five documents as evidence. The State objected to the submission of this evidence on the grounds that it constituted fresh information which the taxpayer had had both reason and opportunity to submit earlier. The District Court found some of the evidence inadmissible, and the Court of Appeal upheld the District Court's decision. The decision of the Court of Appeal was appealed to the Supreme Court, which decided that the case in its entirety should be determined by the Supreme Court sitting in plenary session.

The main issue in the case was whether the imposition of ordinary – 30% – surtax in accordance with Section 10-2 of the Tax Assessment Act (cf. the first sentence of Section 10-4.1 of the Act) constitutes a "criminal charge" against the taxpayer in the terms of Article 6 ECHR. The parties agreed that the evidence in question could not be precluded if the case fell within the scope of Article 6.1 ECHR.

A majority of the Supreme Court – nine of 13 justices – found that the imposition of ordinary surtax fell within the scope of Article 6.1 ECHR. The Court recalled that tax cases did not ordinarily fall within the ambit of Article 6.1 ECHR. However, following the decision of the Supreme Court of 23 June 2000, (*Bulletin* 2000/2 [NOR-2000-2-002]) Norwegian additional surtax was deemed to fall within Article 6.1 ECHR. In that decision, however, the Supreme Court had reserved judgment as to how ordinary surtax must be viewed in relation to Article 6.1 ECHR.

Ordinary surtax is imposed almost automatically where a taxpayer has provided incorrect or incomplete information to the tax authorities. According to Section 10-3.a and 10-3.b of the Tax Assessment Act, exemption from ordinary surtax may be granted only where the error in the tax assessment form is

obviously an arithmetical error or misprint, or where the circumstances of the taxpayer must be deemed to be pardonable due to illness, old age, inexperience or another reason for which he cannot be blamed.

The Court referred to a number of decisions of the European Court of Human Rights, in which three criteria are cited in order to determine whether a penalty imposed by an administrative authority is to be deemed to constitute a criminal charge: the classification of the penalty in domestic law, the nature of the offence and the content and seriousness of the penalty. In particular, the Supreme Court referred to the European Court of Human Rights' judgments of 8 June 1976 in *Engel v. Netherlands*, 21 February 1984 in *Öztürk v. Germany*, 24 February 1994 in *Bendenoun v. France* and 24 September 1997 in *Garyfallou AEBE v. Greece*.

The Supreme Court recalled that ordinary surtax is not a criminal sanction in Norwegian law. However, the question had to be determined on the basis of a full assessment of the second and third criteria as these had been developed by the European Court. The nature of the offence indicated quite strongly that ordinary surtax constitutes a criminal charge. A particularly important consideration was the close connection between additional surtax and criminal sanctions based on the same conduct. The Court also attached weight to the fact that additional surtax could amount to an extremely large amount of money. The fact that a prison sentence could not be imposed, whether instead of or in the case of a failure to pay ordinary surtax, was not decisive.

*Cross-references:*

- Decision of the Supreme Court of 23.06.2000, *Bulletin* 2000/2 [NOR-2000-2-002];
- *Engel v. Netherlands*, 08.06.1976, no. 5100/71, *Special Bulletin ECHR* [ECH-1976-S-001];
- *Öztürk v. Germany*, 21.02.1984, no. 08544/79, *Special Bulletin ECHR* [ECH-1984-S-001];
- *Bendenoun v. France*, 24.02.1994, no. 12547/86, *Special Bulletin ECHR* [ECH-1994-1-004];
- *Garyfallou AEBE v. Greece*, 24.09.1997, no. 18996/91.

*Languages:*

Norwegian.





*Identification:* NOR-2002-2-003

**a)** Norway / **b)** Supreme Court / **c)** Plenary / **d)** 03.05.2002 / **e)** 2001/1527 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2002, 557 / **h)** CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

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

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

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

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

*Keywords of the alphabetical index:*

Surtax, additional / Criminal proceedings / Tax, evasion, grossly negligent / *Ne bis in idem*, requirements.

*Headnotes:*

The prohibition against the repetition of criminal proceedings in Article 4.1 Protocol 7 ECHR precludes criminal proceedings in circumstances where a final decision on additional surtax has been imposed for the same conduct.

*Summary:*

A. and B. were imposed additional (60%) surtax for failing to declare the taxable gain upon the redemption of share options. Criminal proceedings were subsequently brought against both A. and B. In the course of these proceedings, A. and B. contended that the criminal prosecution must be dismissed by virtue of the prohibition against the repetition of criminal proceedings in Article 4.1 Protocol 7 ECHR.

The case was referred by the tax authorities to the Central Authority for the Investigation of Serious Economic and Environmental Crime (ØKOKRIM). Both A. and B. were charged with gross tax evasion before the tax authorities had decided to impose additional surtax. They were indicted on 5 December 2000 for breach of Section 12-1.1.a of the Tax Assessment Act (cf. Section 12-2 of the Act) for having failed to declare in their tax assessment forms etc. taxable gains upon the redemption/exercise of share options. A. and B. contended that the criminal proceedings must be

dismissed by virtue of the prohibition on conducting criminal proceedings twice for the same conduct in Article 4.1 Protocol 7 ECHR. The District Court dismissed the criminal proceedings. However, the Court of Appeal overruled the decision of the District Court and found that the prosecutions could proceed.

A majority of the Supreme Court (8 justices) found that the prohibition on the repetition of criminal proceedings in Article 4.1 Protocol 7 ECHR precludes carrying out criminal proceedings in circumstances where a final decision on additional surtax has been imposed for the same conduct. The majority thereby arrived at a different conclusion than that expressed by a unanimous Supreme Court sitting in plenary in a judgment of 23 June 2000, (*Bulletin* 2000/2 [NOR-2000-2-002]) and by the Appeals Selection Committee of the Supreme Court in a decision of 19 January 2001, (*Bulletin* 2001/1 [NOR-2001-1-001]).

The majority stated that the application of Article 4.1 Protocol 7 ECHR presupposes that there is no material difference between the conditions in the two penal provisions in question. The description of the offence in Section 10-2.1 of the Tax Assessment Act was identical to that in Section 12-1.1.a of the same Act. The majority also pointed out that the subjective requirements for breach of both provisions were the same.

Furthermore, the Court held that Article 4.1 Protocol 7 ECHR imposes requirements concerning the character and content of the proceedings and the sanction. A criminal conviction precludes a subsequent criminal prosecution for the same conduct. This must apply equally to the imposition of additional surtax, which, according to a plenary decision of the Supreme Court of 23 June 2000, is deemed to be a criminal charge within the meaning of Article 6 ECHR. Proceedings leading to a criminal charge must, as a general rule, be deemed to be criminal proceedings (cf. Article 4.1 Protocol 7 ECHR). Additional surtax is clearly a criminal sanction, and a person on whom additional surtax is imposed must be deemed to have been “punished for an offence” in “criminal proceedings”.

In the view of the majority, the same applies where a criminal prosecution is instigated after additional surtax has been imposed on a taxpayer for the same conduct. There are no grounds for asserting that the decision that triggers off the prohibition in Article 4.1 Protocol 7 ECHR must be made in a case that is deemed to be a criminal case pursuant to domestic law. Such a finding would be contrary to the intentions of the provision, which is to protect against

further proceedings where a final decision has been reached (cf. the decision of the European Court of Human Rights of 29 May 2001 in *Franz Fischer v. Austria*). In this judgment, the European Court of Human Rights stated explicitly that the order in which the respective proceedings are conducted – whether the administrative decision or the criminal judgment comes first – is irrelevant. In the opinion of the majority of the Supreme Court, weight could not be attached to the fact that the administrative proceedings in the *Fischer* case were a kind of criminal proceedings in Austrian law. No reference is made to this issue in that judgment, nor was the decision in other respects based on a premise that the two proceedings were criminal proceedings.

In the view of the majority, there was no support in the European Court of Human Rights' admissibility decision of 30 May 2000 in *R.T. v. Switzerland* for the view that the prohibition in Article 4.1 Protocol 7 ECHR shall not apply if the new proceedings are commenced before the first decision has become final.

A minority of the Supreme Court (5 justices) found that the prosecutions against A. and B. could proceed. In their view, the wording of Article 4.1 Protocol 7 ECHR, its purpose and its *travaux préparatoires* denoted that a final conviction or acquittal for a criminal act would only preclude subsequent criminal proceedings if such a decision of conviction or acquittal was reached following proceedings that were criminal proceedings in the law of the state in question.

In the view of the minority, statements in the *Fischer* case to the effect that the order in which the respective proceedings are conducted is irrelevant must be understood in the light of the facts of the case in question, and the distinction in Austrian law between administrative criminal proceedings and penal criminal proceedings. The Austrian State had not argued that decisions in administrative criminal cases fell outside the scope of Article 4.1 Protocol 7 ECHR. The Austrian state's argument was that the provisions pursuant to which Fischer was convicted in the subsequent penal criminal proceedings were more extensive than the penal provision upon which the administrative decision was based. In Austrian law, both administrative criminal proceedings and penal criminal proceedings are characterised as criminal proceedings. The statement regarding the irrelevance of the order in which the respective proceedings is conducted related to the relationship between the breaches, and not to the form which the proceedings had taken.

#### Cross-references:

- Decision of the Supreme Court of 03.05.2002 (2000/770);
- Judgment of the Supreme Court of 23.06.2000 (*Bulletin* 2000/2 [NOR-2000-2-002]);
- Decision of the Supreme Court of 19.01.2001 (*Bulletin* 2001/1 [NOR-2001-1-001]);
- *Franz Fischer v. Austria*, 29.05.2001, no. 37950/97;
- *R.T. v. Switzerland*, 30.05.2000, no. 31982/96.

#### Languages:

Norwegian.



# Poland

## Constitutional Tribunal

### Statistical data

1 May 2002 – 31 August 2002

#### I. Constitutional review

Decisions:

- Cases decided on their merits: 31
- Cases discontinued: 2

Types of review:

- *Ex post facto* review: 32
- Preliminary review: 1
- Abstract reviews (Article 22 of the Constitutional Tribunal Act): 28
- Courts referrals (points of law), Article 25 of the Constitutional Tribunal Act: 5

Challenged normative acts:

- Cases concerning the constitutionality of statutes: 28
- Cases on the legality of other normative acts under the Constitution and statutes: 5

Decisions:

- The statutes in question to be wholly or partly unconstitutional (or subordinate legislation to violate the provisions of superior laws and the Constitution): 8
- Upholding the constitutionality of the provision in question: 27

Precedent decisions: 2

#### II. Universally binding interpretation of laws

- Resolutions issued under Article 13 of the Constitutional Tribunal Act: 34
- Motions requesting such interpretation rejected: 1

## Important decisions

*Identification:* POL-2002-2-011

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 24.10.2001 / **e)** SK 22/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 129, item 14471; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 7, item 216 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

1.3.5.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law – Laws and other rules in force before the entry into force of the Constitution.

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

3.21 **General Principles** – Equality.

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

*Keywords of the alphabetical index:*

Expropriation, restitution, conditions / Real estate / Agriculture.

*Headnotes:*

It is not inconsistent with the constitutional equality rule that certain provisions of the Trading in Real Properties Act exclude the possibility of using the provisions of the Act governing the return of expropriated real property, in so far as the property was not used for a purpose described in a decision on the expropriation of real properties taken over for the benefit of the State Treasury under a Polish National Liberation Committee Instruction on Agricultural Reform dated 6 June 1944.

*Summary:*

The Tribunal examined the case as a result of a constitutional claim.

The impugned provisions of the Trading in Real Properties Act laid down the rules on the return of expropriated real property to real properties taken over or acquired under five different acts enumerated therein. The Tribunal noted that the impugned provisions included an exhaustive list of such acts, which excluded any possibility of their being interpreted more broadly and also precluded their application by analogy in the present case.

The Tribunal recalled that the equality rule means that all subjects of legal norms having the same “relevant feature” must be treated in accordance with the same rules, without any differentiation, whether favourable or discriminatory.

The Tribunal compared the functions, nature and scope of the Polish National Liberation Committee (PNLC) Instruction on Agricultural Reform with the functions, nature and scope of the five acts covered by the impugned provisions of the Act. The Tribunal came to the following conclusions: the purpose of the Instruction was to bring about a complete change in ownership structures and social relationships in agriculture, whereas the purpose of the acts listed in the impugned provisions was to regulate the transformation of agricultural areas into built-up areas. The Instruction had been designed as an act of revolution, which rejected any references to the binding legal system. The acts referred to in the challenged provisions, on the other hand, formed part of the legal system of the Polish People’s Republic. The scope of the Instruction extended to all larger real properties, whereas the acts listed in the Trading in Real Properties Act covered only some large real properties – specifically, those connected with construction processes.

The lack of similarities in the situations regulated by the Instruction, on the one hand, and the above-mentioned acts, on the other, meant that the equality rule could not be used here as a basis for appraising the provisions set down in the latter. It is obvious that the equality rule does not prevent the legislator from treating different situations in different ways.

#### *Cross-references:*

- Decision of 09.03.1998 (U 7/97);
- Decision of 03.10.2000 (K 33/99).

#### *Languages:*

Polish.



#### *Identification: POL-2002-2-012*

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 04.12.2001 / **e)** SK 18/00 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 145, item 1638; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 8, item 256 / **h)** CODICES (Polish).

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

3.10 **General Principles** – Certainty of the law.  
 4.6.10.1.2 **Institutions** – Executive bodies – Liability – Legal liability – Civil liability.  
 5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

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

State treasury / Liability, state, principle.

#### *Headnotes:*

Provisions of the Civil Code limiting the liability of the State Treasury for damages caused by holders of public office as a result of the adoption of a judgment or a decision to situations in which there was a breach of the law in connection with the adoption of the said judgment or decision and where this breach has been the object of criminal or disciplinary proceedings and the fault of the perpetrator has been confirmed in a criminal or disciplinary judgment or acknowledged by an organ superior to the perpetrator are in breach of the constitutional guarantee that everyone will be compensated for damage caused by unlawful actions of the public authorities.

#### *Summary:*

The Tribunal examined the case as a result of joint constitutional claims.

The challenged provisions prescribe the scope of State Treasury liability for so called “acts of authority” (judgments and decisions). The Tribunal noted that the regulation in question constituted a significant exception to the general rule on liability of the State Treasury laid down in the Constitution. It subjects the granting of compensation to the existence of established unlawfulness or misconduct of the holder of public office.

The basis of the constitutional provisions relating to the liability of the State Treasury is to make such liability independent of any fault of the official.

Therefore, comparing the conditions attaching to State Treasury liability as provided for in the Civil Code, requiring established unlawfulness or misconduct of an official in the adoption of a judgment or decision, with the provisions of the above-mentioned constitutional guarantee, leads to the conclusion that there is an inconsistency, which can be removed only by the elimination of the challenged provisions from the legal system.

The Tribunal emphasised that as a result of the striking down of the impugned provisions of the Civil Code, the liability of the State Treasury for damage caused by a holder of public office as a result of the adoption of a judgment or decision will be established on the basis of the general rules of liability provided for in the Civil Code.

#### *Supplementary information:*

- BIENIEK Gerard: Odpowiedzialność Skarbu Państwa za szkody wyrządzone przez funkcjonariuszy po wyroku Trybunału Konstytucyjnego z dnia 4 grudnia 2001. Przegląd Sądowy 2002 nr 4 s. 3-25;
- HACZKOWSKA Monika, Państwo i Prawo 2002 nr 8 s. 100-105.

See also:

- AMBROZIEWICZ Piotr: Najwyższy jak Trybunał. 418 Kodeksu cywilnego est mort, vive 417! [Odpowiedzialność Skarbu Państwa za działania funkcjonariuszy państwowych]. Gazeta Sądowa 2002 nr 4 s. 14;
- KARASEK Iwona: Odpowiedzialność Skarbu Państwa za funkcjonariuszy po wyroku TK z dnia 4 grudnia 2001 r., SK 18/00. Transformacje Prawa Prywatnego 2002 nr 1-2 s. 93-112;
- LIPSKA Ludwika: Odpowiedzialność funkcjonariusza państwowego. Monitor Podatkowy 2002 nr 7 s. 47-49.

#### *Cross-references:*

- Decision of 31.01.2001 (P 4/99).

#### *Languages:*

Polish.



#### *Identification:* POL-2002-2-013

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 29.01.2002 / **e)** K 19/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 10, item 107; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, Series A, no. 1, item 1 / **h)** CODICES (Polish).

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

3.18 **General Principles** – General interest.  
 4.10 **Institutions** – Public finances.  
 5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.  
 5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.

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

Bank, Management Board, members, appointment / Indictment, criminal.

#### *Headnotes:*

Provisions of the Banking Act providing that the Bank Supervision Committee must refuse to appoint as members of the management board of a bank persons against whom criminal proceedings or proceedings concerning the proceeds of crime have been instigated are not in conflict with the presumption of innocence provided for in the Constitution.

#### *Summary:*

The Tribunal examined the case as a result of a motion filed by the Ombudsman.

The Tribunal emphasised that the Bank Supervision Committee is an authority which, on the basis of the relevant provisions of the Banking Act, is competent, *inter alia*, to lay down the rules of operation of banks, supervise banks in their application of the law and carry out periodic reviews of the financial situation of banks. The Committee's responsibilities cover, in particular, the screening of persons proposed for appointment to crucial posts in banks and the appointment of the persons who can be guaranteed to perform their future tasks best. Refusal to appoint a particular person to a particular post cannot therefore, regardless of the grounds of the refusal, be treated as amounting to punishment of such a person.

In the Tribunal's opinion, the presumption of innocence cannot be understood so broadly as to limit or even exclude supervision of institutions that are based on public confidence. Banks are certainly among such institutions. The Tribunal rejected the argument that the refusal to appoint a person as a member of a management board of a bank amounted to a sanction or could be compared with criminal punishment. In the Tribunal's opinion, in the provisions in question, the legislator had merely limited the possibility of holding a particular post in a particular work place for a specific period of time. In so doing, the legislator had been guided by the aim of protecting the interests of banks' clients.

In the Tribunal's opinion, the legislator was right in assuming that the persons against whom criminal or proceedings concerning the proceeds of crime are under way should not be appointed to posts that carry with them high social prestige. Refusal to appoint a person to the management board of a bank does not in any way limit the freedom of the candidate to apply for another form of employment. The Tribunal emphasised that the scope of the presumption of innocence cannot be understood so broadly that it would limit the freedom to decide who should hold posts in institutions based on public confidence and connected with high levels of responsibility and social prestige.

#### *Cross-references:*

- Decision of 21.11.2000 (K 4/00).

#### *Languages:*

Polish.



#### *Identification:* POL-2002-2-014

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 19.02.2002 / **e)** U 3/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 19, item 197; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, Series A, no. 1, item 3 / **h)** CODICES (Polish).

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

3.13 **General Principles** – Legality.

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

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

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

Pharmacy, data, transfer / Medicines / Health service / Patient, personal data, right to consent.

#### *Headnotes:*

The provisions of an Ordinance of the Health Minister concerning the procedure and method of transfer as well as the scope of data transferred, by pharmacies, to the national health services, concerning trade in medicines and medical materials reimbursed through social insurance, together with the appendix to the Ordinance, are not incompatible with the right of a person to decide independently on the disclosure of personal information, which is laid down in the Constitution.

#### *Summary:*

The Tribunal examined the case as a result of a motion filed by the Chief Pharmacists' Committee.

The provisions of the Ordinance in question provided that data, including in particular patients' identification numbers, the code of additional rights of patients and the code of rights of patients suffering from diseases specified in certain provisions of the Social Insurance Act, must be transmitted by pharmacies to the national health services in connection with the trade in medicines and medical materials reimbursed through social insurance.

The Tribunal stated that the information sent by pharmacies to the national health services included "sensitive" data concerning the state of health of patients. This included, in particular, information on medicine sold to a patient. However, the patient's identification number did not itself constitute "sensitive" data covered by the provisions of the Protection of Personal Data Act.

The Tribunal also noted that the obligation to transmit data to the national health services had been introduced by the provisions of a legislative act. The act also described, in a general way, the scope of the data to be transmitted by pharmacies to the national health services. Such data may also include personal

information. However, this concerned only information with respect to which the relevant legislation provided an authorisation for its transmission. It was left for the Ordinance to set down in detail which elements of the information in a prescription should be transmitted.

In the Tribunal's opinion, the constitutional principle of legality did not exclude the possibility that a detailed list of the kind of personal data to be transmitted to another body may be set down in an ordinance if the legislative act on which the ordinance was based stated the permissible scope of such a transmission. The provisions at issue did not concern matters that must be regulated by legislation. The imposition on pharmacies of an obligation to transmit to the national health services data provided for in the Ordinance in question fell within the limits laid down by legislation. As a result, in the Tribunal's opinion, there were no grounds to decide that the impugned provisions were contrary to the relevant provisions of the Constitution.

#### *Cross-references:*

- Decision of 19.05.1998 (U 5/97).

#### *Languages:*

Polish.



#### *Identification:* POL-2002-2-015

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 20.02.2002 / **e)** K 39/00 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 18, item 184; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, Series A, no. 1, item 4 / **h)** CODICES (Polish).

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

4.5.2 **Institutions** – Legislative bodies – Powers.  
 4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.  
 4.10.8 **Institutions** – Public finances – State assets.  
 5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.  
 5.4.7 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

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

Real estate, local government, disposal / Usufruct, permanent, conditions.

#### *Headnotes:*

Provisions of the Act amending the Employees' Allotments Act imposing an obligation on municipalities and the State Treasury to grant a perpetual usufructuary right in favour of the Polish Association of Allotment Holders constituted an infringement of the property rights of local self-government units provided for in the Constitution.

#### *Summary:*

The Tribunal examined the case at the request of a municipality.

The Tribunal noted that the impugned provisions contained wording that amounted to unconstitutional interference in the property rights of local self-government units and consequently also an interference in the possibility of earning revenues from the real properties that were the subjects of their property rights.

The breach of the property right by the impugned provisions consisted, in the Tribunal's opinion, of the following elements: first, the existence of an obligation to dispose of a property in a certain manner, independently of the will of the owner; second, the preferential transfer, without compensation, of real property owned by a local self-government unit into perpetual usufructuary rights; third, the creation of a possibility of trading in these rights without the owner's permission; fourth, limiting a municipality's right to decide on questions of local land use; fifth, the creation of evident burdens on units of local self-government in cases of expropriation of the perpetual usufructuary rights.

Furthermore, the Tribunal found that the wording adopted in the impugned provision resulted in a limitation on the freedom to form legal relationships between parties to an agreement on the granting of a perpetual usufructuary right, since the legislator determined that the perpetual usufructuary right was to be granted free of charge and with no obligation to pay an annual fee. This constituted a significant deviation from the rules concerning this issue provided for in the acts protecting the rights of an entity granting a perpetual usufructuary right to third parties.

*Supplementary information:*

One dissenting opinion was handed down (Judge Bogdan Zdziennicki).

*Cross-references:*

- Decision of 09.01.1996 (K 18/95);
- Decision of 20.11.1996 (K 27/95).

*Languages:*

Polish.

*Identification:* POL-2002-2-016

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 27.05.2002 / **e)** K 20/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 78, item 716; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, Series A, no. 3, item 34 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
- 5.3.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.

*Keywords of the alphabetical index:*

Registry office, certificate / Citizen, residence / Identity card.

*Headnotes:*

Provisions of the Registration of Citizens and Identity Cards Act requiring a person applying for registration of his or her permanent or temporary residence lasting more than two months to show the relevant authority a confirmation of his or her right to stay in the premises in which he or she was applying to be registered, in the form of a written statement of the administrator of a building, were incompatible with the

freedom to move within the territory of Poland and the freedom to choose a place of domicile or residence guaranteed by the Constitution.

*Summary:*

The Tribunal examined the case upon a motion filed by the Ombudsman.

The Tribunal noted that the obligation to register one's residence was created to enable public authorities to carry out their functions properly. Possession of information as to individuals' place of domicile or residence enabled certain tasks of government and local self-government bodies to be performed. The purpose of the obligation to register was to ensure that proper evidence was provided by citizens. It had to be stressed that the registration of citizens, consisting of the registration of their place of residence, served to protect the rights of the interested parties themselves (for example, thanks to the registration of their residence, it was possible to find a person in cases of succession of property in favour of such a person) as well as to protect the rights of third persons (for example, creditors in cases where a debtor moved without notice).

The Tribunal concluded, however, that the legislator had created an excessive burden with regard to the enforcement of the obligation to register. In the Tribunal's opinion, the adoption of a general assumption that made the confirmation of certain rights conditional on the statement of an administrator of a building constituted too great an interference from the point of view of the enforcement of rights of building administrators and people who wished to register their residence in a given flat or other premises. The analysed provisions went too far in protecting the rights of third parties, in particular owners of buildings, since they forced a person who wished to comply with the obligation to register his or her residence to participate in a time-consuming and expensive court procedure in order to receive "supplementary" confirmation of the right to reside in a given flat or other premises.

*Cross-references:*

- Decision of 12.01.1999 (P 2/98);
- Decision of 12.01.2000 (P 11/98).

*Languages:*

Polish.





*Identification:* POL-2002-2-017

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 29.05.2002 / **e)** P 1/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 78, item 717; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, Series A, no. 3, item 36 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Decree, issue, content / Lawyer, fee, scale / Legal adviser, fee.

*Headnotes:*

Provisions of the Barristers Act and Solicitors Act authorising the Minister of Justice to issue a regulation governing fees for barristers' and solicitors' services were not in conformity with constitutional requirements concerning the statutory delegation of the power to issue a regulation since they did not lay down guidelines as to the contents of such a regulation.

*Summary:*

The Tribunal examined the case as a result of joint referrals by courts.

The Constitution lays down requirements that must be met wherever a delegation of powers to issue secondary legislation, in particular regulations, is made. Such an authorisation must be contained in a statute and for the purpose of implementing the statute. In accordance with Article 92 of the Constitution, the authorisation must furthermore include details as to its subject (it must "specify the organ appropriate to issue [the] regulation"), as to its object (it must specify "the scope of matters to be regulated") and as to its content (it must lay down "guidelines as to the provisions" of such a regulation).

The Tribunal noted that the challenged provisions of the Barristers Act and Solicitors Act specified the subject authorised to issue the relevant regulation

and the issues to be regulated therein. In the Tribunal's opinion the requirements concerning the details as to the subject and object of the authorisation had therefore been met. The authorisation in question did not, however, include any guidelines as to the content of the regulation.

The Tribunal stated that it was also not possible to find such guidelines in other acts relating to barristers' and solicitors' professional associations, since the only provisions regulating the question of fees were the impugned provisions of the Barristers Act and the Solicitors Act.

*Cross-references:*

- Decision of 28.06.1999 (K 34/99);
- Decision of 26.10.1999 (K 12/99);
- Decision of 09.11.1999 (K 28/98);
- Decision of 17.10.2000 (K 16/99).

*Languages:*

Polish.



*Identification:* POL-2002-2-018

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 11.06.2002 / **e)** SK 5/02 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

- 3.19 **General Principles** – Margin of appreciation.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 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.
- 5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.
- 5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to participate in the administration of justice.

*Keywords of the alphabetical index:*

Court case, concept, definition / Detention, lawfulness / Alcoholism, preventive measures.

*Headnotes:*

Provisions of the Sober Upbringing and Prevention of Alcoholism Act, in so far as they do not guarantee a person arrested in a sober room the right to participate in a court hearing at which an appeal concerning the legal grounds (reasons) for their arrest as well as the lawfulness of the arrest itself (in procedural terms) are considered, are contrary to the Constitution since they breach the rules on procedural safeguards and fair trial.

*Summary:*

The Tribunal examined the case as a result of a constitutional claim.

The Tribunal recalled that the scope of the right of access to the courts, from the perspective of the subject of that right, is described by the notion of a "case". (In accordance with Article 41.2 and 41.3 of the Constitution, "Anyone deprived of liberty, except by sentence of a court, shall have the right to appeal to a court for immediate decision upon the lawfulness of such deprivation...Every detained person shall be informed, immediately and in a manner comprehensible to him, of the reasons for such detention. The person shall, within 48 hours of detention, be given over to a court for consideration of the case..." Furthermore, under Article 45.1 of the Constitution, "Everyone shall have the right to a fair and public hearing of his case...before a competent, impartial and independent court.") The Tribunal emphasised that the implementation of the constitutional guarantee of the right of access to the courts covers every situation – irrespective of detailed procedural provisions – in which it is necessary to decide on the rights of a subject and where the nature of the relations in question meant that the other party to the relationship was prohibited from making an arbitrary decision on the situation of the subject. A dispute as to the legal grounds for the arrest as well as the lawfulness of the arrest itself constitute the "case" within the meaning of the provisions of the Constitution.

In the Tribunal's opinion, a particular understanding of personal freedom, which is one of the fundamental human rights, and the need to create guarantees preventing a breach of the law through the arrest of an individual in a sober room should be taken into account in the case in question. In the Tribunal's

opinion, the provisions at issue do not contain sufficient guarantees of the right to be heard, which is connected with the right to participate in a court hearing, and as a consequence, they breach the requirement that court proceedings be conducted in accordance with the rules on procedural safeguards and fair trial laid down in the Constitution.

*Cross-references:*

- Decision of 10.05.2000 (K 21/99).

*Languages:*

Polish.

*Identification:* POL-2002-2-019

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 12.06.2002 / **e)** P 13/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 84, item 764; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, Series A, no. 4, item 42 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

4.7.13 **Institutions** – Judicial bodies – Other courts.  
 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.  
 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.

*Keywords of the alphabetical index:*

Competition, protection / Competition, judicial proceeding / Cassation, instance.

*Headnotes:*

Provisions of the Civil Procedure Code exhaustively enumerating the types of judgments which could be adopted by the Antimonopoly Court in proceedings concerning protection of competition, where these judgments constituted both first instance judgments and appeal judgments, thus removing the possibility

of reviewing judgments issued by the Antimonopoly Court in the first instance, were not in conformity with the constitutional right to a double degree of jurisdiction.

### Summary:

The Tribunal examined the case as the result of a referral of a District Court in Warsaw – Antimonopoly Court.

The Tribunal noted that the provisions in question included an exhaustive list of the types of judgments that could be adopted by the Antimonopoly Court in proceedings concerning the protection of competition. In some situations the Court decided on the rights and obligations of the parties to the proceedings as the first, rather than the second, instance. In these cases, in the Tribunal's opinion, the provisions at issue breached the rule of procedural fairness, which referred to the constitutional right of access to the courts. This breach resulted, *inter alia*, from the lack of any possibility of quashing a judgment or referring it for a new decision. In this way the party to the proceedings has been deprived of a possibility of defending its rights in proceedings at second instance.

The Tribunal referred to earlier judgments in which it had emphasised that "the constitutional right to appeal from judgments and decisions issued at first instance is a significant element of so-called procedural fairness". The Tribunal also recalled that this rule was implemented by the establishment of a model of justice in which decisions and judgments could be reviewed by an authority of a higher instance. Since there was no doubt that the proceedings before the Antimonopoly Court should be treated as first instance proceedings, there was also no doubt that the provisions of the Civil Procedure Code, in so far as they related to proceedings concerning the protection of competition, did not grant ordinary means of appeal.

### Cross-references:

- Decision of 27.06.1995 (K 4/94);
- Decision of 08.12.1998 (K 41/97);
- Decision of 16.11.1999 (SK 11/99).

### Languages:

Polish.



### Identification: POL-2002-2-020

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 25.06.2002 / **e)** K 45/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 100, item 923; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, Series A, no. 4, item 46 / **h)** CODICES (Polish).

### Keywords of the systematic thesaurus:

- 3.5 **General Principles** – Social State.
- 3.11 **General Principles** – Vested and/or acquired rights.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.

### Keywords of the alphabetical index:

Employment, job-creating measure, protection / Disabled person, right / Tax, amount, calculation / Enterprise, owner, specific benefits.

### Headnotes:

Provisions of the Act amending the VAT and Excise Act that changed the rules of calculation of the amount of VAT and excise to be returned to businesses classed as protected jobs enterprises, before three years had elapsed, infringed the rules on the protection of vested and acquired rights provided for in the Constitution, in so far as they did not lay down interim provisions necessary to protect the interests of people running protected jobs enterprises, who – placing their confidence in the existing provisions of law – commenced long-term investments for the benefit of persons with disabilities employed in their enterprises.

### Summary:

The Tribunal examined the case as a result of a motion of the Polish Organisation of Employers of Persons with Disabilities.

The Tribunal stated that as a consequence of the impugned provisions the allowances available to people running protected jobs enterprises decreased and the moment at which such amounts become

available to these persons was delayed. The rule on the protection of vested rights grants protection to individuals in situations in which they have commenced a particular investment on the basis of existing provisions of law.

This protection would be more definite in nature in the present case where the employer could list the time-frames within which it had had been possible to perform certain investments according to the settled rules.

In the Tribunal's opinion, the changes introduced to the relevant legislation were based on values provided for under the Constitution. The legislator, in fulfilling certain aims, could validly have introduced changes that were to the detriment of people running protected jobs enterprises. Such interference in a sphere of vested or acquired rights should have been connected, however, with the introduction of appropriate interim provisions, which would have taken into account the interests of individuals able to prove in proceedings before the relevant authority that they had begun performance of the investments giving rise to the vested or acquired right. The lack of any relevant provisions of law that would have met the above-mentioned requirements created the grounds for recognising an infringement of the rule of the protection of vested or acquired rights.

#### Cross-references:

- Decision of 14.06.2000 (P 3/00);
- Decision of 07.02.2001 (K 27/00).

#### Languages:

Polish.



## Portugal Constitutional Court

### Statistical data

1 May 2002 – 31 August 2002

Total: 166 judgments, of which:

- Preventive review: 1 judgment
- Abstract *ex post facto* review: 9 judgments
- Appeals: 115 judgments
- Complaints: 34 judgments
- Electoral disputes: 3 judgments
- Political parties and coalitions: 4 judgments
- Political parties' accounts: 3 judgments

### Important decisions

*Identification:* POR-2002-2-003

**a)** Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 29.05.2002 / **e)** 241/02 / **f)** / **g)** *Diário da República* (Official Gazette), 168 (Serie II), 23.07.2002 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

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

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

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

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.

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

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

*Keywords of the alphabetical index:*

E-mail, confidentiality / Defamation, via Internet / Evidence, admissibility / Evidence, unlawfully obtained / Telecommunication, inviolability / Telecommunication, confidentiality, regulations.

*Headnotes:*

The Constitution establishes a series of rights protecting citizens' privacy.

The confidential nature of communications, guaranteed by Article 34.1 of the Constitution, includes not only the content of telecommunications, but also information such as the type, time, duration and frequency of use.

However, the guarantee of the inviolability of telecommunications is not an absolute one; there is provision for exceptions in cases "laid down by law" (Article 34.4). The Constitution has limited such cases to those "relating to criminal procedure". Under the current legislation, even in criminal proceedings, interference with telecommunications is authorised only in cases where the nature of the crime in question falls under the category of crimes whose seriousness is in the fundamental interest of social peace, of such a nature which is in the fundamental interest of social peace, that the interference is warranted. Furthermore, the prohibition on interference with telecommunications covers not only tapping, intercepting or monitoring communications, but also any associated information, in particular the type of information provided by the telecommunications operators of the case in question.

The regulations governing authorisation for interference in telecommunications are unconstitutional if permitted even in proceedings concerning a labour dispute – information on usage data and itemised bills for the telephone line are requested by virtue of a court decision, since this violates the basic right to respect for privacy and the guarantees of the confidentiality of (and not interference in) telecommunications, established by Articles 26.2, 34.1 and 34.4 of the Constitution.

*Summary:*

A company dismissed one of its employees because the latter had brought the firm into disrepute by means of an e-mail circulating on the Internet. The employee in question appealed to the courts and the firm asked for information to be supplied from the telecommunications operators. The court acceded to this request and the telecommunications operators

supplied information on the communications made. This information showed (i) that the employee was the subscriber to the line from which the e-mail concerned had been sent and that he was the owner of the computer which had access to Internet services, and (ii) the times, recipients and length of the calls made (itemised bill). In the light of this information and other evidence submitted, the court ruled that the employee had indeed been the author of the message in question and that given that it had brought the firm into disrepute, the dismissal had been legitimate.

The employee appealed to the Constitutional Court maintaining that the information provided by the telecommunications operators was protected by an obligation of confidentiality and that it could not be taken into account as it constituted prohibited evidence. The firm replied that the evidence had been obtained with the authority of a court decision and in accordance with the law, and was therefore admissible.

The Constitutional Court pointed out that Article 26.1 of the Constitution recognised the "right to the protection of privacy"; Article 34 guaranteed the inviolability of the "privacy of [an individual's] correspondence and other means of private communication" (Article 34.1) and prohibited any "interference (...) with correspondence or telecommunications (...), except in cases laid down by the law relating to criminal procedure" (Article 34.4); and, with regard to guarantees in criminal proceedings, Article 32.8 stated that "evidence is of no effect if it is obtained by (...) wrongful interference with private life, the home, correspondence or telecommunications".

The Court held that what was at issue was not merely the confidentiality of personal data supplied to telecommunications operators which they "interpret or elucidate" (render intelligible) – i.e. that it was not the special confidential relationship between the user and telecommunications operators to which an exception could be made by means of a court decision, rather the issue was the inviolability itself of telecommunications. Accordingly, dispensation from confidentiality could never justify an order to provide information contained in the computer systems of telecommunications operators, particularly in a civil case.

In the same way as in a criminal trial, in which defence of the dignity of the accused through the prohibition of evidence obtained by a breach of fundamental rights will always limit the verification of material facts, in a civil trial too, the obtaining of evidence by means of personal data stored on the computer systems of telecommunications operators – data concerning communications made or with regard to which the user had requested confidentiality – violates the right

to respect for privacy and the inviolability of telecommunications.

*Languages:*

Portuguese.



*Identification:* POR-2002-2-004

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 11.06.2002 / **e)** 254/02 / **f)** / **g)** *Diário da República* (Official Gazette), 146 (Serie I-A), 27.06.2002, 5028-5044 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

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

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

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

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

*Keywords of the alphabetical index:*

Independent administrative authority, powers / Media, freedom / Media, Supreme communication authority / Media, public broadcaster, administrative board, executive committee, membership / Media, independence from the government / Media, public sector / Media, public service, television.

*Headnotes:*

The freedom of the press (Article 38.4 of the Constitution) presupposes the independence of the media, in general, in relation to the political power (in particular the government), i.e. equal treatment regardless of the editorial line taken, the prohibition of any discriminatory allocation of public aid, and the independence of the media in relation to the economic power. Article 38.4 of the Constitution indicates a number of ways of achieving that aim, which may be summarised in three principles: the principle of transparency, the principle of speciality and the principle of pluralism.

The constitutional requirement to have control mechanisms in respect to the media structure in the public sector may relate to both (i) the administrative and financial organisation of companies, in order to ensure the independence and absence of any functional subordination of the relevant administrative organs, and (ii) the internal structure of those media companies in order to prevent the government, public administration and all other public powers from interfering in the content and programming of the public service.

*Summary:*

The President of the Republic requested an anticipatory review of the constitutionality of a regulation approved by parliament to be promulgated in the form of a law. This regulation dispensed with the power of the “Advisory Council” to issue a binding opinion on the membership of the administrative body of the licensed public service television corporation (RTP). The power in question was replaced by one to issue an opinion of a non-binding nature on the appointment and dismissal of directors responsible for programming and information. The question at issue was whether this amendment violated the guarantee of the independence of the media in the public sector, established by Article 38.6 of the Constitution.

The arguments put forward by the President of the Republic were, first of all, the constitutional guarantee of the freedom and independence of the media in relation to the political and economic power; second, the fact that the independence of the public service media in relation to the government was an institutional guarantee to which the system of the protection of rights, freedoms and guarantees applied; third, the fact that the power in question of the “Advisory Council” was, if not exclusive, at least the primary regulatory expression of this institutional guarantee; and, finally, the fact that the reason behind the legislative initiative in question had been the political context, shaped by the circumstances, content, scope and consequences of a negative opinion recently issued by the “Advisory Council”. In view of the fact that the said legislative initiative limited the institutional guarantee of the independence of the public sector media, it would be legitimate only if it were proportionate, appropriate, required and necessary for the pursuit of another interest protected by the Constitution.

Article 38.6 of the Constitution sets out specific requirements for the independence of the mass media in the public sector in addition to the requirements relating to mass media (referred to in Article 39.1 and 39.4) and the requirement explicitly concerns the

public mass media (referred to in Article 39.5). The first specific requirement concerns independence from “the Government, the Public Service and other public bodies” (first part of Article 38.6). In this context, this means that a company must be so organised as to ensure that the public sector media can act independently of any of the aforementioned institutions. The second requirement is ideological pluralism expressed in the need to “guarantee opportunities for the expression of, and challenge to, different lines of opinion” (second part of Article 38.6).

The Constitution and the law rely on several legal arrangements to guarantee the independence of the media in the public sector; the procedure for appointing the independent authority responsible for ensuring the right to information and the freedom of the press; the drawing up of the rules concerning the membership of the managing bodies; the laying down of conditions of ineligibility and incompatibilities; limitation of the number of terms of office or inadmissibility of re-election; limitation of the power to dismiss members of the administrative body.

The Court found that the regulation in question dispensed with the power of the “Advisory Council” to issue a binding opinion on the membership of the RTP administrative body, replacing it with the power to issue a non-binding opinion on the appointment and dismissal of the directors responsible for programming and information. However, it had not inaugurated any other arrangement in the public service television structure to protect, either directly or indirectly, the latter's independence in relation to the government, the public service and other public bodies. Accordingly, the Court found that the regulation was contrary to the Constitution in that it violated the guarantee of the independence of the media in the public sector, established by Article 38.6 of the Constitution.

#### *Supplementary information:*

The “Advisory Council” is a body provided by the Broadcasting Act and the articles of association of RTP, the public television broadcaster. It comprises 34 representatives from different political, trade union and civil society backgrounds. Basically, its responsibility is to take a position on the licensing contract, the plans and general foundations of the RTP's activities and, in addition, to issue an ex-ante binding opinion on the membership of the RTP administrative body.

Six judges found that the regulation in question was contrary to the Constitution, whereas the other five found that it was in conformity with the Constitution. Moreover, this was a unique piece of case-law insofar

as the Court, in ruling on a request for anticipatory review, was also ruling, without entering into details, on the value of legislative amendments accepted by the Constitution.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2002-2-005

**a)** Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 19.06.2002 / **e)** 275/02 / **f)** / **g)** *Diário da República* (Official Gazette), 169 (Serie II), 24.07.2002, 12896-12902 / **h)** CODICES (Portuguese).

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

2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.  
 3.16 **General Principles** – Proportionality.  
 3.18 **General Principles** – General interest.  
 3.20 **General Principles** – Reasonableness.  
 3.22 **General Principles** – Prohibition of arbitrariness.  
 5.2.2.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.  
 5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.  
 5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

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

Cohabitation, surviving partner, pension / Cohabitation, surviving partner, compensation for non-pecuniary damage / Family, protection, constitutional / Compensation, a means of encouraging marriage.

#### *Headnotes:*

The use of the arrangements for “compensating” for the pain and suffering caused by the death of a victim to a person who lived with that victim in the same way as husband and wife, as a means of pursuing possible political objectives of encouraging families based on marriage is not appropriate or acceptable from the point of view of either the constitutional recognition of the protection of the family or human dignity; the Court

therefore found the rule to be unconstitutional as it violated Article 36.1 of the Constitution, combined with the principle of proportionality.

If one followed the line of reasoning that, in order to be eligible for compensation for the non-pecuniary damage caused by death, there can be no reasonable foundation for making a distinction between married and cohabiting couples, the rule should immediately have been declared contrary to the Constitution for violating the principle of equality. The view must be taken that there is no reasonable ground to justify not only the difference in treatment (which should be regarded as genuinely arbitrary), but also the difference based on a criterion which cannot be relevant in view of the intended legal effect. Accordingly, the existence of a matrimonial link as opposed to stable and continuous cohabitation is not in itself a reasonable ground for ruling out compensation for the partner of the victim of a murder for the suffering and pain caused by the death.

#### *Summary:*

The appeal concerned the constitutionality of the rule contained in Article 496.2 of the Civil Code, which states that a person cohabiting with another who dies as a result of a crime, is not on this count eligible for compensation for non-pecuniary damage. This applies therefore exclusively to the direct non-pecuniary damage resulting, for the person cohabiting with the victim, from the latter's death. In the event of death, the Civil Code explicitly provides for the right to "compensation for the non-pecuniary damage" sustained not only by the victim but also by the non-judicially separated spouse of the victim, and the latter's children or other descendants (and only, if there are none, by the parents or other ascendants, or by the brothers and sisters or nephews and nieces representing them).

The fact is that the way this provision has been interpreted has meant that a person who has been living in a stable and lasting relationship with the victim in the same way as husband and wife has been excluded from the possibility of obtaining compensation for the non-pecuniary damage suffered on account of the death of the victim. Under this line of reasoning, the list of possible beneficiaries of compensation is limited and excludes others such as the person who had been living with the victim of a murder from obtaining compensation for the non-pecuniary damage caused by the death, even though, under the general rules, such persons would be entitled to compensation. The decision to exclude a woman who had been living with the victim from obtaining "compensation for non-pecuniary damage" has been based on that reasoning.

The aim of the appeal was therefore to review the constitutionality of Article 496.2 of the Civil Code, under which in the event of the death of the victim of a crime, a person who had been co-habiting with the victim in a stable and lasting relationship, in the same way as husband and wife, was not entitled to "compensation for non-pecuniary damage" sustained personally.

Article 36 of the Constitution protects the family as a basic component of society, treating it separately from the question of marriage. Accordingly, it protects a social reality not necessarily based on marriage – a family not founded on marriage. This constitutional distinction between family and marriage which seems to reflect an acknowledgement of the concept of the family as being much broader than one based on marriage – which may be termed marital family – has already been referred to in the Court's case-law (Judgment 690/98). The European Union's Charter of Fundamental Rights also establishes, separately, the "right to marry and the right to found a family" (Article 9).

The Constitution, having acknowledged the right to found a family not necessarily based on marriage, recognises that "the family, as a basic component of society, has the right to protection by the community and the state and to the creation of all the conditions that permit the personal fulfilment of its members" (Article 67.1). Even if the view were taken that this distinction and rule do not oblige the legislature to recognise and protect, in general, cohabitation in a stable and lasting relationship, in the same way as husband and wife, and the family founded on such an arrangement, under the same conditions as a family founded on marriage. The conclusion must nevertheless be drawn that there is a duty not to leave unprotected, without reasonable grounds, a family not based on marriage – i.e. at least with regard to the aspects of the legal order directly linked to the protection of its members, and that any policies to encourage families based on marriage as a means to this end are unacceptable.

#### *Supplementary information:*

The constitutional framework of the question to be analysed in this appeal to the Constitutional Court must be distinguished from that of the decisions of the Court on rules providing for difference of treatment between married couples and cohabiting couples which, in application of the constitutional prohibition on discrimination against children born out of wedlock (Article 36.4 of the Constitution), concluded that the said rules were unconstitutional.



One such example was Judgment no. 359/91 on the constitutionality of a rule which made it impossible to apply by analogy the rule on the judicial granting of the right to be provided with a main residence for cohabiting families with children not yet of age. Bearing in mind the fact that the rule in question explicitly referred to the “children’s interests” as one of the criteria to be considered by the courts in cases concerning the allocation of housing in the event of divorce, the Court decided that the rule in question was unconstitutional as it violated the principle of non-discrimination against children born out of wedlock. A further example was Judgment no. 286/99, in which rules which did not attach any priority in the placement of teachers to those who had children not yet of age and who were not married but cohabited with partners as husband and wife, together with the said children were declared to be unconstitutional. The Court ruled that attaching priority to people in this category also concerned the interest of the children and, accordingly, excluding unmarried parents from this right would be discrimination between children born in and out of wedlock.

#### *Languages:*

Portuguese.



## Romania

### Constitutional Court

#### Important decisions

*Identification:* ROM-2002-2-004

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 16.04.2002 / **e)** 129/2002 / **f)** Decision on an objection alleging the unconstitutionality of the provisions of Article 206 of the Penal Code / **g)** *Monitorul Oficial al României* (Official Gazette), 399/2002 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

2.1.1.4.6 **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.

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

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

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

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

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

*Keywords of the alphabetical index:*

Libel through the press / Criminal law / Facts, material, concerning others.

*Headnotes:*

The provisions of Article 206 of the Penal Code which define defamatory acts as offences against the dignity of the individual are meant to safeguard other people’s rights and freedoms and are not a violation of freedom of expression. This text concerns the punishment not of value judgments but of specific material facts about or ascribed to a person.

The inviolability of freedom of expression stipulated in Article 30.1 of the Constitution does not justify injury to the individual's dignity and right to a personal image. Freedom of expression is not an absolute freedom; it may have restrictions placed on it, provided that they are necessary for safeguarding the rights and freedoms of others.

The limits to freedom of expression must be established by law and must be necessary to ensure respect for the rights of others or protection of national security, law and order, public health or public morality.

### Summary:

The Constitutional Court had before it an objection alleging that the provisions of Article 206 of the Penal Code were unconstitutional.

In the statement of grounds for the objection, Article 206 of the Penal Code was alleged to infringe Articles 11.2 and 20 of the Constitution, in conjunction with the provisions of Article 10.1 ECHR and of Article 19.1.2 of the International Covenant on Civil and Political Rights. The objecting party asked the Court, also having regard to the provisions of Article 30 of the Constitution, to find the provisions of Article 206 of the Penal Code unconstitutional, at least in part from the angle of criminalising journalists' value judgments.

In its examination of the objection alleging unconstitutionality, the Court found that under the provisions of Article 206 of the Penal Code the legislator defined acts of defamation as punishable offences against human dignity, an essential value set forth in Article 1.3 of the Constitution. The impugned statute prescribes criminal sanctions for words, deeds and any other means whereby a person's honour or reputation is damaged, or for any statement or allegation in public of specific facts which, if true, would expose the person concerned to a criminal, administrative or disciplinary penalty or to public opprobrium, but not for value judgments.

The Court held that Article 206 of the Penal Code concerned punishment not for value judgments but for specific material facts about or ascribed to a person.

The Constitutional Court also found that not even the allegation of a violation of Article 10.1 ECHR was founded, because Article 10.2 ECHR requires that a measure restricting freedom be prescribed by law and necessary in a democratic society. In the cases relied on by the objecting party, *Dalban v. Romania*, and *Constantinescu v. Romania*, the European Court of

Human Rights, having regard to the above criteria, held that the provisions of Article 206 of the Romanian Penal Code were not such as to infringe the provisions of Article 10 of the Convention.

The Court thus concluded that the provisions of Article 206 of the Penal Code concerning libel were not contrary to Article 30 of the Constitution (freedom of expression) or to the provisions of international human rights instruments.

Nor did the Court accept the argument that Articles 19.1 and 19.2 of the International Covenant on Civil and Political rights had not been observed, considering that Article 19.3 thereof expressly prescribes the limits to freedom of expression.

### Cross-references:

European Court of Human Rights:

- Case *Dalban v. Romania*, 28.09.1999, *Reports of judgments and decisions* 1999-VI;
- Case *Constantinescu v. Romania*, 27.06.2000, *Reports of judgments and decisions* 2000-VIII.

### Languages:

French.



### Identification: ROM-2002-2-005

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 06.06.2002 / **e)** 164/2002 / **f)** Decision on an objection alleging the unconstitutionality of the provisions of Section 11.3 of government Order no. 65/1994 on the organisation of public and chartered accountancy, amended and supplemented by government Order no. 89/1998, approved with amendments and additions by Act no. 186/1999 / **g)** *Monitorul Oficial al României* (Official Gazette), 495/2002 / **h)** CODICES (French).

### Keywords of the systematic thesaurus:

1.3.5.10 **Constitutional Justice** – Jurisdiction – The subject of review – Rules issued by the executive.  
2.1.1.4.7 **Sources of Constitutional Law** – Categories – Written rules – International instruments

– International Covenant on Economic, Social and Cultural Rights of 1966.

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

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

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

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

*Keywords of the alphabetical index:*

Accountant, public, status / Profession, independent, conditions, incompatibilities / Occupation, choice.

*Headnotes:*

The possibility for public accountants and chartered accountants to choose between the status of a member of an independent profession, in which situation they must comply with the restrictions prescribed by the rules governing such status, or that of an employee, in which position they may no longer engage in their activity as public or chartered accountants and members of this profession, does not constitute a restriction on the exercise of the right to work but carries incompatibilities which are meant to ensure the normal, independent and proper pursuit of certain chartered professions.

Indeed, regulation of the conditions governing pursuit of an occupation and the fact of establishing certain incompatibilities do not constitute a restriction on the right to work.

*Summary:*

The Constitutional Court had before it an objection alleging the unconstitutionality of Section 11.3 of government Order no. 65/1994 on the organisation of public and chartered accountancy.

In the statement of grounds for the objection alleging unconstitutionality, it was submitted that the statutory provisions at issue infringed the provisions of Article 38.1 of the Constitution, which relate to the right to work, because public accountants are not able to perform their functions as conferred by this professional status as long as they engage in any salaried activity outside the Romanian expert accountants and authorised accountants body (C.E.C.C.A.).

In its examination of the objection alleging unconstitutionality, the Court found that the legal instrument provided that public accountants and chartered accountants could opt either to discharge the

functions conferred by this status within the professional body of public accountants and chartered accountants of Romania, or to engage in any other salaried activity outside the profession or in any business activity, not to be pursued concurrently with accounting activity.

The Constitutional Court found that the impugned statute complied with Article 38.1 of the Constitution and Article 6.1 of the International Covenant on Economic, Social and Cultural Rights, the occupational categories in question being able to earn their living through freely chosen or accepted work. The restrictions provided for by the statute were merely conditions applicable to persons wishing to acquire the status of a public accountant or chartered accountant, similar to the conditions regarding education or length of service, not a restriction of certain constitutional rights.

Moreover, similar provisions were also made in some other regulatory acts governing the organisation of other independent professions, for instance those of barrister, notary or bailiff.

*Languages:*

French.



# Russia

## Constitutional Court

### Statistical data

1 January 2002 – 31 August 2002

Total number of decisions: 14

Categories of cases:

- Rulings: 14
- Opinions: 0

Categories of cases:

- Interpretation of the Constitution: 0
- Conformity with the Constitution of acts of state bodies: 14
- Conformity with the Constitution of international treaties: 0
- Conflicts of jurisdiction: 0
- Observance of a prescribed procedure for charging the President with high treason or other grave offence: 0

Types of claim:

- Claims by state bodies: 3
- Individual complaints: 10
- Referral by a court: 5  
(Some cases were joined)

### Important decisions

*Identification:* RUS-2002-2-001

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 15.01.2002 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 22.01.2002 / **h)** CODICES (Russian).

*Keywords of the systematic thesaurus:*

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

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

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

3.16 **General Principles** – Proportionality.

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

4.9.1 **Institutions** – Elections and instruments of direct democracy – Electoral Commission.

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

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

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

*Keywords of the alphabetical index:*

Election, candidate, independent / Election, registration, rejection, illegal, evaluation / Election, electoral Commission, decision, annulment / Election, invalidity / Constitution, direct application.

*Headnotes:*

It is not in accordance with the Constitution to restrict the powers of the Constitutional Court to quash decisions by the Electoral Commission to only those cases when the refusal to register a candidate might have an influence on the genuineness of the results of the expression of the voters' will. It is virtually impossible to prove such an influence in practice, which results in a denial of effective judicial protection of the electoral rights of the citizens.

*Summary:*

The Constitutional Court examined the constitutionality of several provisions of federal laws with respect to fundamental guarantees of citizens' electoral rights and with respect to the election of deputies in the State Duma (Lower Chamber) of the Federal Assembly. These provisions authorised the Court to annul the decisions of the electoral commission on the polling stations' report and results of the vote in an electoral constituency in cases of an illegal refusal to register a candidate. However, the decision of the commission could only be annulled if it was impossible genuinely to determine the results of the expression of voters' will.

The case was initiated by an individual complaint of a citizen, whose registration as a candidate for the State Duma was refused by an electoral commission in the 1999 elections. An appeal before different levels of ordinary courts against this decision was launched, but all the courts, including the Supreme Court, refused to admit the applicant's appeal, reasoning that the illegal rejection of a registration did not have an effect on the authenticity of the results of the free expression of the voters' will.

In the appeal lodged with the Constitutional Court, the applicant declared that if the registration is rejected it is in principle impossible to define the free expression of the voters' will during elections. Consequently, the challenged provisions exclude the exercise of the right to be elected, which is in conflict with Article 32.2 of the Constitution and international instruments concerning human rights.

The Constitutional Court noted that, in accordance with the Constitution, citizens have the right to vote for and to be elected to bodies of state power and to local self-government bodies. Democratic and genuinely free elections entail, in particular, the right of all individuals who fulfil the requirements laid down by law to participate in elections as candidates and the right of other persons to express their position *vis-à-vis* these candidates by casting their vote in favour or against them. The unlawful denial of the right to stand for election could alter the free nature of elections for the candidates, as well as for the voters whose freedom of expression of will would be limited because they would be deprived of the right to vote for all candidates legally proposed to them.

The protection of electoral rights, including judicial protection, must be effective whether the violation of the right to be elected is discovered before the vote or at a later stage. The annulment of election results must not be excluded in order to ensure genuinely free elections.

However, the disputed provisions imply that the exercise of electoral rights during elections is sufficient, in itself, to allow notable violations of the rights of some candidates and voters to be ignored. This approach does not correspond to the provisions laid down in Articles 17 and 55 of the Constitution, which imply that the objective to guarantee the rights of a third party can only impose a proportional limitation of rights established by federal law.

In the case of the applicant, the electoral commission of the constituency and the courts based their decision on the fact that the disputed provision provides for the possibility of annulment of electoral results only when the violation of electoral rights has a proven influence on the genuineness of the results of the free expression of voters' will. However, such proof is practically impossible to obtain if a candidate's registration is unlawfully refused. Accordingly, the courts do not focus on the guarantee of the existence of the conditions of a truly free expression of the voters' will, but are rather concerned with a formal verification of characteristics such as the authenticity of ballot papers, correct voting procedures and correct ballot count.

Therefore, the expression used in the Law, "the genuineness of the results of the free expression of voters' will", enables authorities applying this law to ignore questions as to the influence of notable violations discovered on whether an adequate reflection of the true voters' will had been achieved. This practice does not ensure the effective judicial protection of citizens' electoral rights and consequently is contrary to the Constitution.

Since the recognition of the legal acts examined in the present case as being contrary to the Constitution creates a gap in the legislation, the Constitution must be directly applied. The courts must find adequate ways and procedures to protect active and passive electoral rights and should not limit themselves to simply acknowledging that a violation of electoral rights has occurred due to the unlawful refusal to register a candidate.

The principle of proportionality requires the implementation of a procedure of restitution or compensation in each case of violation of electoral rights. Provided a legal basis exists, the Court has the right to recognise the impossibility of organising new elections with the purpose of restoring citizens' rights to stand for election. In any case, the negative consequences resulting from unlawful acts (or omissions) of the electoral commissions should be offset and the good standing of the citizen restored by means of recognition of and compensation for damage caused to them on the basis of Article 53 of the Constitution.

To guarantee the appropriate reinstatement of violated electoral rights, additional legislative measures that would prevent the unjustified rejection of a candidate's registration or the annulment of a previous registration should be instituted. Such measures may include, in particular, giving reasons for the rejection or defining the relevant powers of electoral commissions and their responsibilities. In addition, judicial procedures should be improved in order to restore, in due time, passive electoral rights, and adequate compensatory mechanisms should be set up to restore violated rights resulting from the unlawful rejection of a candidate's registration.

#### *Languages:*

Russian.



*Identification:* RUS-2002-2-002

a) Russia / b) Constitutional Court / c) / d) 19.02.2002 / e) / f) / g) *Rossiyskaya Gazeta* (Official Gazette), 06.03.2002 / h) CODICES (Russian).

*Keywords of the systematic thesaurus:*

3.18 **General Principles** – General interest.

3.21 **General Principles** – Equality.

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

4.7.4.1.4 **Institutions** – Judicial bodies – Organisation – Members – End of office.

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

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

*Keywords of the alphabetical index:*

Judge, pension, allowance, conditions / Judge, pension, calculation / Judge, seniority / Legal profession, definition / European Charter on the Statute for Judges of 1998.

*Headnotes:*

The right of a judge to a lifetime monthly allowance after voluntary or forced retirement depends on his or her seniority when he or she reaches the age limit and does not depend on the date when he or she retired. Before reaching the required age, a person who ceases service as a judge has the right to exercise another paid professional activity.

The seniority necessary for legal professionals in State organisations in order to be eligible for a monthly lifetime allowance includes the period of service as a State notary.

*Summary:*

The Constitutional Court examined the constitutionality of several provisions of federal legislation concerning the status of retired judges. These provisions established that the allocation of a monthly lifetime allowance was only applicable to retirees who had served as judges. Other disputed provisions stated that the calculation of seniority with respect to service as a judge before all of the retirement allowances were awarded did not include the period when the person served as State notary.

The examination of the case was initiated following complaints from several retired judges who believed

that these provisions violated the constitutional right to social security as well as principles of equality and justice.

The Constitutional Court noted that the independence of judges enshrined in Article 120 of the Constitution was ensured in particular by the judges' right to retire as well as by granting to judges at state expense a financial and social allowance that was in accordance with their high status. Identical provisions are included in the European Charter on the Statute for Judges (1998).

Basic standards of federal legislation link the right of judges to a lifetime monthly allowance only to their seniority as judges, but do not take into consideration the date on which they retired. However, additional regulations applied from 1992-1995 gave rise to ambiguity with respect to the interpretation of the right to a lifetime monthly allowance for judges having retired before reaching the age of 50 (for women) or 55 (for men). In practice, it has been linked with attaining the above-mentioned age.

However, this ambiguity in the regulation can be overcome by interpreting the constitutional meaning of the basic provisions of the legislation in question.

The interpretation of these standards in compliance with the Constitution is as follows: judges who terminated their service because they had reached the end of their term of office as judges, or retired for reasons compatible with their status as judges, are equally eligible for lifetime monthly allowances, if they held office as a judge for at least ten years and if, even if this occurred after they left this office, they have reached the age of 50 (for women) or 55 (for men). Before reaching this age a person who terminates their service as judge may take on another paid professional activity.

As for the period served as a State notary, the Court observed the following: in laying down the rules for calculating seniority to establish the monthly lifetime allowance for judges at the time of starting retirement, the legislator included fairly and lawfully the period of service as a judge, as well as periods served in other legal professions in state organisations. Subsequently, in regulating such matters in detail, it specifically indicated that this seniority includes periods served in the courts or judicial bodies, including as a prosecutor, investigating judge or lawyer.

However, this standard had been interpreted in various ways in practice, leading to discrepancies with respect to legal professions taken or not taken into account. Notably, seniority acquired in serving as

a State notary with a university-level legal background was sometimes omitted.

The Court decided that such a limitation could not be recognised as arising from Article 55.3 of the Constitution, especially since the service of State notaries is performed on behalf of the State and serves to protect citizens' rights and freedoms and their legitimate interests to maintain public order and the correct functioning of justice. Law enforcement bodies are not entitled to attribute different meanings to disputed provisions, as this would lead to differences in the status of judges who had previously worked in state organisations depending on their functions (including work as a notary) and as a consequence this would lead to discrimination and, concretely, to deprivation and to a weakening of the guarantee of the independence judges, which entails the right to a monthly lifetime allowance upon retirement.

#### *Languages:*

Russian.



#### *Identification:* RUS-2002-2-003

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 14.03.2002 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 21.03.2002 / **h)** CODICES (Russian).

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

- 1.6.5.3 **Constitutional Justice** – Effects – Temporal effect – *Ex nunc* effect.
- 1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
- 3.9 **General Principles** – Rule of law.
- 4.7.4.3 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel.
- 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
- 5.3.5.1.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Arrest.
- 5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.

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

Arrest, warrant / Judgment, guarantees / Detention, maximum length / Constitution, transitional provisions.

#### *Headnotes:*

Keeping persons in custody, the arrest or provisional detention of a person for a period of more than 48 hours without a trial as prescribed by the Code of Criminal Procedure do not comply with the Constitution.

#### *Summary:*

The examination of the case was initiated on the basis of complaints of several citizens against the provisions of the Code of Criminal Procedure of the RSFSR, according to which the restriction of the liberty and personal inviolability of persons suspected of committing a crime for a period of 48 hours with the authorisation of the prosecutor but in the absence of a judgment is admissible. The applicants considered that these provisions were contrary to Article 22.2 of the Constitution, according to which arrest, custody and provisional detention are only allowed upon a court judgment and according to which a person cannot remain in custody for more than 48 hours unless a court judgment is delivered.

The Constitutional Court noted first of all that the right to liberty and personal inviolability enshrined in the Constitution is a fundamental human right. Specific constitutional guarantees in the sphere of criminal procedure for the judicial protection of this right have direct effect and consequently define the meaning, contents and application of the relevant provisions of criminal procedural legislation.

The Constitution of 1993 states in the chapter on Concluding and Interim Provisions that until such time as the criminal procedural legislation of the Russian Federation has been brought into line with the provisions of the Constitution, the previous rules for arrest, detention and holding in custody of persons suspected of committing a crime shall be preserved. The Constitution imposes on the legislative body an obligation to introduce the necessary modifications in the legislation during this transitional period without specifying the duration of this transitional period.

The interim nature of arrest, provisional detention and custody procedures under the legislation previously in force was confirmed by the Federal Law of 1998 on the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Additional Protocols to the Convention. Referring to Article 5.3 and 5.4 ECHR this law limited the

application of the clauses to the period necessary to introduce the required modifications in the legislation.



If a right derives directly from the Constitution and the passing of a law is necessary to guarantee its authority, such a law must be adopted as soon as possible. The Constitutional Court has repeatedly stressed that since the adoption of the Constitution a significant time period has passed, sufficient for the legislative body to have enacted new legislation on criminal procedure so as to harmonise it with the Constitution. As this has not been done, the constitutional value of the interim provisions of the Constitution has changed. In other words, the interim regulations acquire in reality a permanent effect and thus violate both the right guaranteed by Article 22 of the Constitution and the principle of the direct effect of the rights and freedoms of humans and citizens. This amounts to a refusal to implement the guaranteed mechanism of judicial protection of established rights and freedoms, in particular by Article 9.3 of the International Covenant of Civil and Political Rights and by Article 5.3 ECHR.

Furthermore, the Constitutional Court observed that a new Code of Criminal Procedure was adopted on 18 December 2001. Under its provisions only a court is competent to rule on custody matters. However, in accordance with the Federal Law on the Entry into Force of the Code of Criminal Procedure, its provisions shall enter into force as of 1 January 2004; until then the prosecutor will make the decisions on the matter, as was previously the case.

It is to be noted that since the previous procedure will be maintained until the aforementioned date, the legal requirement under the Concluding and Interim Provisions chapter of the Constitution was applied in a strictly formal fashion by the legislative body, thereby violating the real meaning of this provision.

The Constitutional Court found that the challenged provisions of the Code of Criminal Procedure of the RSFSR were not in conformity with the Constitution and thus were inapplicable as of 1 July 2002.

The Federal Assembly must take steps immediately to introduce modifications and ensure the enforcement, as of 1 July 2002, of legal standards, introducing a judicial procedure upon arrest or remand in custody or the provisional detention of a suspected person for a period exceeding 48 hours.

#### *Languages:*

Russian.

#### *Identification:* RUS-2002-2-004

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 04.04.2002 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 17.04.2002 / **h)** CODICES (Russian).

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

- 3.4 **General Principles** – Separation of powers.
- 3.6 **General Principles** – Federal State.
- 3.13 **General Principles** – Legality.
- 4.4.1.1 **Institutions** – Head of State – Powers – Relations with legislative bodies.
- 4.4.1.2 **Institutions** – Head of State – Powers – Relations with the executive powers.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 4.6.10.2 **Institutions** – Executive bodies – Liability – Political responsibility.
- 4.8.1 **Institutions** – Federalism, regionalism and local self-government – Federal entities.
- 4.8.6.2 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Executive.
- 4.8.8 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers.

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

Constitution, federal, prevalence / Federal law, derogatory force / Federation, entities, implementation of court judgements / Responsibility, constitutional / Parliament, regional, dissolution order / Governor, dismissal.

#### *Headnotes:*

Where the entities of the Federation fail to implement court judgments as to the unconstitutionality or illegality of legislative acts adopted by them, federal enforcement measures shall be taken with respect to such entities.

#### *Summary:*

The Constitutional Court examined the constitutionality of several provisions of the Federal Law on General Principles governing the Organisation of the Legislative (Representative) and Executive Bodies of the State Power of the Russian Federation Entities. These provisions lay down federal enforcement measures to be taken where court orders finding that



normative acts adopted by the entities of the Federation are not in conformity with the Constitution or federal laws are not implemented.

The examination of the case was initiated on the basis of submissions from the State Assembly of the Sakha Republic (Yakutia) and the Council of the Adygei Republic. The applicants challenged the power of the federal parliament to regulate the relevant subject matters, arguing that such regulation was not provided for in the Constitution and therefore was contrary to the Constitution.

The Constitutional Court noted that the need for adequate measures of federal enforcement with in order to protect the Constitution, to guarantee the primacy of the Constitution and its direct effect as well as the superiority of federal laws, based on the Constitution, within the entire territory of the Federation, was derived directly from the foundations of the constitutional order of the Federation. It was for this purpose that well-balanced and reciprocal obligations were established between the Federation and its entities. As a consequence, the federal legislator had a right and a duty to establish a control mechanism ensuring effective enforcement by the bodies of state power of the entities of the Federation of their constitutional obligation to respect the Constitution and federal laws and to prevent the adoption of laws and other legislative acts that were contrary to the Constitution. The application of negative legal consequences, including federal enforcement measures, to the bodies of State power of the entities of the Federation, should not be excluded, in cases where the entities failed to fulfil this obligation.

Based on the principle of separation of the legislative, executive and judicial powers, the Constitution enshrined the prerogatives of the judiciary to ensure the primacy and the direct effect of the Constitution and the federal laws over the entire territory of the Federation, including laying down the bases for federal enforcement measures. As such measures must be based on definitive findings of unconstitutionality or illegality of legislative acts of the entities of the Federation, the verification of the above-mentioned acts by the Constitutional Court is necessary, including in cases where of other competent courts have handed down decisions, before such measures can be taken.

The challenged provisions of the law aim to ensure that the judgements of the federal Courts are executed in cases where legislative acts contrary to the Constitution and to federal laws have been adopted. The court judgments also establish the foundations for the federal enforcement measures. Such judgments are therefore required, especially where a conflict

found by the Court has not been remedied, in other words the Court's judgment has not been executed. A court decision may, in all cases, be sought by a public body or official of the relevant entity of the Federation. This may be done at any stage of the law enforcement procedure by filing a claim with a competent court (including the Constitutional Court) for the protection of the rights and legitimate interests of the entities of the Federation.

The failure of a body of state power of an entity of the Federation to comply with a federal judgment amounts to the expression in a court judgment of a refusal to recognise the primacy of the Constitution and amounts to this body usurping the powers and sovereign rights of the Federation. Such actions lead in practice to the loss of this body's legitimacy and therefore taking the corresponding federal enforcement measures accords with the objective of protecting the Constitution, which is realised particularly by means of judicial constitutional proceedings.

At the same time, federal enforcement, including the early termination of the powers of the bodies of state power of the relevant entity of the Federation, cannot be considered as an act that violates the constitutional status of the entities of the Federation and their institutions, since in this case stability is ensured by holding new elections for the relevant organs of state power.

The Constitutional Court found that none of the challenged provisions were contrary to the Constitution, including the following provisions:

- On early termination of the powers (dissolution) of the legislative (representative) body of state power of the entity of the Federation and on the conditions of dismissal of a high-ranking public official (head of the higher executive body of state power) of the entity of the Federation. The Court noted that the process of implementing the federal enforcement measures, which ends in the adoption of a federal law (a presidential decree in the case of a state official), includes the Court decision finding non-conformity with the Constitution and federal laws of the legislative act of the entity of the Federation, as well as the Court decision confirming a failure to execute the initial judicial order, and finding that the intervention of federal powers is necessary to ensure such execution. However, such a federal enforcement measure may only be carried out if the illegal legislative act entailed serious violations of human rights and freedoms, or posed a threat to territorial unity and integrity, national security, defence capability or the legal and economic unity of the Federation;

- On the termination of office of a higher executive body of state power of the entity of the Federation as the result of the dismissal by the President of the Federation of a higher state official (head of the higher executive body of the state power) of the entity of the Federation, as such provisions are aimed at enabling the newly elected higher state official freely to set up the body he or she now heads;
- On the suspension, by the President of the Federation and following a proposal of the Public Prosecutor including reasons, of the higher state official (head of the higher executive body of the state power) of the entity of the Federation from the office if he or she is accused of a serious or very serious crime. This does not exclude the lodging of an appeal against the presidential decree before the Supreme Court, in the context of the criminal proceedings;
- On the possibility of the early termination of the powers of the legislative (representative) body of state power of the entity of the Federation following the decision of a higher state official (head of the higher executive body of the state power) of the entity of the Federation, and the possibility of the dismissal of such a higher state official following a vote of no confidence by this legislative (representative) body, as well as the possibility of the adoption of a vote by the body of state power of confidence or no confidence in the heads of the bodies of executive power of the entity of the Federation, in whose appointment the legislative (representative) body of the state power of the entity of the Federation was involved.

#### *Languages:*

Russian.



#### *Identification:* RUS-2002-2-005

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 12.04.2002 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 25.04.2002 / **h)** CODICES (Russian).

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

3.3 **General Principles** – Democracy.  
 3.4 **General Principles** – Separation of powers.  
 4.5.2 **Institutions** – Legislative bodies – Powers.  
 4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.  
 4.8.6.1 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Deliberative assembly.

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

Federation, entities, members of parliament, status / Immunity, parliamentary, waiver / Immunity, limits.

#### *Headnotes:*

The inviolability of the members of parliament of the entities of the Russian Federation extends solely to activities directly connected to the exercise of the parliamentary office. The decision of the parliament to withdraw legal proceedings against a member has no legal value.

#### *Summary:*

The Constitutional Court examined the constitutionality of the provisions of the Federal Law on the General Principles governing the Organisation of Legislative (Representative) and Executive Bodies of State Power of the Entities of the Federation concerning the inviolability of members of parliament of the entities of the Federation.

The Constitutional Court noted that Russia is a democratic federal State governed by the rule of law with a republican form of government. The federal parliament and the parliaments of the entities of the Federation are the people's representative bodies; they interpret the will and interests of the people of Russia and the people of the entity of the Federation respectively and exercise legislative power. The special status of the parliament ensures separation of powers and independence of its members. Members are bound solely by the Constitution and their conscience (principle of the free mandate).

The guarantees ensuring the free exercise of competences during parliamentary members' term of office include the public law institution of parliamentary immunity, which is intended to protect members of parliament against illegal interference with activities related to their office. Such interference includes attempts by the bodies of executive power to pressure a parliamentary member by imposing or threatening to

impose criminal proceedings or administrative liability on the member.

The Constitution provides for the inviolability (parliamentary immunity) of the members of the Federal Assembly as well as the inviolability of the President of the Russian Federation and of judges. However, the inviolability of the members of the parliaments of the entities of the Federation is not expressly provided for in the Constitution. This does not mean, however, that personal guarantees of members of parliament cannot be established by law. The legislator did not breach the provisions of the Constitution by introducing the principle of the inviolability of the members of parliament of the entities of the Federation.

The Court also noted that parliamentary immunity requires the protection of members of parliament while they are in office (in the exercise of the functions or, performance of the duties of the members of parliament). A member is not liable for actions performed in the exercise of his or her office. Such actions include opinions expressed, speeches made in the parliament, positions taken when voting, documents drafted at the member's own initiative, the maintenance of indispensable contacts with state bodies and state officials, as well as other necessary actions related to the status of a parliamentary member. However, parliamentary inviolability does not provide grounds for the release from liability for criminal and administrative offences not related to the member's status.

The special procedure laid down for the criminal and administrative prosecution of a member of parliament is an important element of inviolability. In accordance with the Constitution, criminal legislation and proceedings fall within the jurisdiction of the Federation while administrative legislation and proceedings fall within the joint jurisdiction of the Federation and its entities. In consequence, while recognising the principle of the inviolability of members of parliament of the entities of the Federation, the legislature cannot release the members of parliament from criminal and administrative liability; however, it can set out special conditions for imposing such liability.

According to the Constitution, the courts shall administer justice. Only a court is competent to rule in cases concerning criminal and administrative proceedings, which are based on the principle of the equality before the law of all citizens. The introduction by law of a condition requiring the agreement of the parliament of the entity of Federation in order to initiate legal proceedings against a member, to place them under arrest or to apply other coercive measures

would mean the exclusion of the prerogatives of the judiciary and the attribution of judicial powers to the parliament, which is inadmissible according to the spirit of the Constitution.

In this case, the legislator must provide for proceedings of a more complex nature, for example the participation of a prosecutor of a higher level in decisions and the requirement of the consent of a Court in order to proceed with the relevant procedural acts. The legislative body could also provide for the right of the parliament of the entity of the Federation to make a decision disagreeing with the initiation of criminal or administrative proceedings against a member of the parliament if there is evidence that the proceedings were initiated to prevent the exercise of parliamentary powers by a member and to influence his or her actions. However, the decision of the parliament relating to this issue shall not have the weight of a preliminary ruling excluding judicial supervision.

The impugned provisions of the law prohibit criminal and administrative proceedings against a member of parliament, the implementation of other criminal and administrative procedural measures and the transfer of a case to a court without the consent of the parliament of the entity of the Federation, which is in effect granted full discretionary powers in such matters, in breach of the Constitution. The parliament of the entity of the Russian Federation should participate in the procedure of waiving the immunity of a member only for actions performed by him or her in the exercise of his or her office. Granting the right to initiate criminal or administrative proceedings to the parliament, which is neither a prosecution body nor a judicial body, is incompatible with the objectives of the irremovability of members of parliament. It is all the more unacceptable when consent is required in order to transfer a case to court, or to allow its examination by a court.

#### *Languages:*

Russian.



**Identification:** RUS-2002-2-006

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 17.07.2002 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 31.07.2002 / **h)** CODICES (Russian).

**Keywords of the systematic thesaurus:**

- 3.9 **General Principles** – Rule of law.  
 3.12 **General Principles** – Clarity and precision of legal provisions.  
 3.18 **General Principles** – General interest.  
 3.22 **General Principles** – Prohibition of arbitrariness.  
 4.7.7 **Institutions** – Judicial bodies – Supreme court.  
 5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Prohibition of *reformatio in peius*.  
 5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

**Keywords of the alphabetical index:**

*Res iudicata*, setting aside, conditions / Judicial error / Sentence, cumulative.

**Headnotes:**

A final and binding judgment can only be set aside (*reformatio in peius* for a convicted or released person) on the grounds of one-sided or incomplete preliminary investigation where there are new or recently disclosed facts or where a serious judicial error was made. The failure to combine the sentence imposed under the new judgment with the non-served part of the sentence resulting from the previous judgment is considered to be a serious judicial error.

**Summary:**

The Constitutional Court examined the constitutionality of certain provisions of the criminal law and criminal procedural law as well as legislation relating to the *Prokuratura*. These provisions allow for the setting aside or reversal of a final and binding judgment of acquittal, in supervisory proceedings, upon appeal by the prosecutor, on the grounds of one-sided or incomplete preliminary investigation as well as inconsistency of the court's findings with the facts of the case.

The examination of the case was based on an appeal by several citizens as well as by the request of a city court.

The Constitutional Court noted that in the country's legal system, the possibility of setting aside court

judgments was based on Article 126 of the Constitution, according to which the Supreme Court, acting as a higher instance court in criminal cases, undertakes the judicial supervision of court activities concerning the common law and the provisions of several federal constitutional laws on court powers with respect to the examination of criminal cases through the mechanism of supervisory proceedings.

In accordance with the Constitution, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights, a judicial decision shall be set aside if a new or recently disclosed fact clearly proves that a judicial error has been made. Pursuant to provisions of these instruments, the legal rules governing the participants in criminal proceedings cannot be arbitrarily modified, including with respect to persons concerning whom a final judgment has been delivered. *Reformatio in peius* for a convicted (or acquitted) person, in cases where a judgment that has become final and binding is set aside, is generally not permissible.

Likewise, Article 4.2 Protocol 7 ECHR has established that the right not to be judged or punished twice does not prevent the reopening of a case in accordance with the law and criminal procedure of a State if new or recently disclosed facts that have come to light or a serious error in the previous proceedings are of such a nature as to have affected the judgment.

This provision and the provision of Article 55.3 of the Constitution state that the legislative body has a right to lay down procedures governing the setting aside of a judgment that has become final and binding and to determine in which cases such a setting aside of a judgment (including through supervisory proceedings) and reopening of the case on the basis of new or newly disclosed facts are possible. Exceptions to the general rule of prohibition of *reformatio in peius* are only acceptable as an extreme measure in cases where failure to correct a judicial error could alter the very meaning of the judgment as a measure of justice and disturb the necessary balance of constitutionally protected values, including the legitimate rights and interests of convicted persons and victims.

However, the bases for the examination of a judgment which has become final and binding, as provided for by the impugned provisions, go beyond this framework. They are not formulated in a clear and precise manner and do not exclude the arbitrary application of law. Consequently the principles of adversarial proceedings and equality of the parties' rights, as well as the principle of the presumption of innocence, are violated.

The provision according to which, where a one-sided or incomplete investigation or preliminary investigation is found to have occurred, the supervising court has the power to order a fresh investigation is also contrary to the principles of criminal procedure, as it illegally creates possibilities for the accusing party to prove the guilt of the accused even after the relevant judgment has become final and binding. For this reason, the supervising court cannot overturn a judgment of acquittal that has become final and binding, on the grounds that the judgment may be unjustified, if no errors were committed in the prior proceedings that fit the criteria spelt out in Article 4.2 Protocol 7 ECHR. Accordingly, the prosecutor cannot raise the question of the setting aside of such a judgment before the supervising court on grounds that fall short of these criteria.

The Constitutional Court also examined the constitutionality of a provision of the criminal law providing that if a convicted person committed a new crime after a sentence had been delivered against them but before they had finished serving the sentence, the Court should add to the sentence imposed in the new judgment the part of the previous sentence that remained unserved, either in full or in part. This provision serves as grounds to grant the supervising court the power to set aside the judgment for a period of one year after the judgment has become final and binding and open new legal proceedings in order to correct such a violation by the court of first instance.

The Court found that the legislative body must provide procedural means for the correction of such serious judicial errors, even after the relevant judgment has become final and binding. The contrary would imply that an unlawful exception would be made to the judgment delivered regarding the previous case, which would be incompatible with the principles of criminal law, and contrary to the very conception of justice, and for this reason would be impermissible in a state governed by the rule of law. The impugned provision aims to exclude the creation of a long period in which the judgment may be set aside, and as such does not disturb the balance of constitutionally protected values.

#### Languages:

Russian.



## Slovakia

### Constitutional Court

#### Statistical data

1 May 2002 – 31 August 2002

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 2
- Decisions on the merits by the panels of the Court: 24
- Number of other decisions by the plenum: 2
- Number of other decisions by the panels: 149

#### Important decisions

*Identification:* SVK-2002-2-003

**a)** Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 10.07.2002 / **e)** I. US 56/01 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

*Keywords of the systematic thesaurus:*

- 3.9 **General Principles** – Rule of law.  
 3.16 **General Principles** – Proportionality.  
 4.13 **Institutions** – Independent administrative authorities.  
 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.

*Keywords of the alphabetical index:*

Anti-trust, procedure / Penalty, administrative, fine / Penalty, application, conditions.

*Headnotes:*

A penalty imposed in administrative proceedings must be proportionate to a legitimate aim. In order to be proportionate, it must be based on relevant and

sufficient reasons. In cases where the proceedings were already completed when the penalty was imposed, the reasons on which it was based must have been relevant and sufficient not only with respect to the party's failure to comply with the duty in question, but also with respect to the need to sanction such lack of compliance after the proceedings were completed.

### *Summary:*

The applicant, a business corporation, contested a penalty in the amount of 100 000 Slovak crowns (approximately 2 500 €) issued by the Antitrust Office for the applicant's failure to comply within a specific period with a duty imposed on it by the Antitrust Office. The applicant originally lodged a complaint with the Antitrust Office, alleging abuse by its competitor of dominant market share. The Antitrust Office demanded that the applicant provide relevant statistical data documenting its allegations, and set a deadline, which the applicant failed to meet. Subsequently, the Antitrust Office imposed a penalty in the amount of 100 000 Slovak crowns, as provided for by the relevant procedural law. Two weeks later, the applicant provided the requisite data and appealed the decision to the Head of the Antitrust Office. The Head of the Office annulled the decision and returned the matter to the lower instance, which, however, again imposed the same penalty. Upon a new appeal from the applicant, the Head of the Office confirmed the penalty. The applicant therefore alleged that there had been a breach of Article 46.1 of the Constitution, which provides that everyone has the right to seek the protection of their lawful interests through the courts or other competent authorities of the Slovak Republic.

The Constitutional Court held that the final result in the case depended on whether the penalty imposed conformed with the principles of legality and proportionality inherent in Article 1 of the Constitution, i.e. the principle of the rule of law. The proportionality of the penalty with respect to the legitimate interest of ensuring rapid and efficient proceedings in turn depended on whether its imposition was based on relevant and sufficient grounds. The Court held that since the penalty in the present case was imposed when the proceedings were already completed, the relevance and sufficiency of the grounds on which it was based had to be examined not only with respect to the need to sanction a failure to comply with the particular procedural obligation in question, but also with respect to whether it was necessary to impose a penalty following completion of the proceedings. The Court therefore examined whether the applicant's failure to comply had had an impact, and if so, to what degree, on the outcome of the proceedings.

The Court found that the Antitrust Office had not taken into account the data provided by the applicant after the deadline had passed and that this information had therefore been irrelevant to the administrative proceedings. The applicant's failure to comply with the duty thus had not affected the outcome of the proceedings. From the point of view of the final result in the proceedings, the imposition of a penalty had not had a substantial impact on the proceedings and its effect on their efficiency could not be attributed the level of importance suggested by the Office. The Court concluded that it had not found reasons for the imposition of a penalty that it could deem relevant and sufficient. It thus held that the penalty had been unwarranted and had been imposed in breach of the right to judicial and other legal protection.

### *Languages:*

Slovak.



### *Identification: SVK-2002-2-004*

**a)** Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 10.07.2002 / **e)** II. US 112/02 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

### *Keywords of the systematic thesaurus:*

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

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

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

### *Keywords of the alphabetical index:*

Crime, suspicion / Detention, order, reason / Detention, lawfulness / Evidence, duty to give / Evidence, obtained unlawfully.

*Headnotes:*

The guarantees against unlawful deprivation of liberty – contained both in Article 17.5 of the Constitution and Article 5.1 ECHR – do not require that the reasonable suspicion on the basis of which a person is taken into custody must be grounded in evidence documenting the guilt of such a person. The same applies even if evidence is obtained unlawfully.

*Summary:*

The petitioner argued that he had been taken into custody partly on the basis of evidence that did not show that he was guilty of the relevant criminal act and partly on the basis of evidence that had been gathered in an unlawful manner. He argued that his rights as set forth by both Article 17 of the Constitution and Article 5 ECHR had been violated because these provisions subject the government to a duty to provide evidence that not only proves a detainee's guilt at the moment of his being taken into custody but was also obtained in full compliance with the law.

The Court first examined whether it is the duty of the authorities to provide grounds for a detention order that go so far as to prove the detainee's participation in the criminal act of which he is accused. It came to the conclusion that it suffices for the authorities to provide grounds for the suspicion that the detainee committed the crime for which he is being prosecuted. Relying on the relevant case of the European Court of Human Rights, the Constitutional Court also held that even though Article 5.1.c ECHR requires "reasonable suspicion" as a necessary component of the guarantees against arbitrary detention or custody, this requirement is met if there are facts or information that could allow an impartial observer to conclude that the accused might have committed the crime. Therefore, evidence documenting the actual guilt of the accused is not required.

With respect to the applicant's argument that one of the contested detention orders was based on evidence (obtained through a search of premises) that had been gathered in conflict with the relevant provisions of the Criminal Procedure Code, the Court limited itself to stating that its legal conclusions on the matter of allegedly insufficient evidence also fully applied to the question of allegedly illegal obtaining of evidence. The Court stated that unlawful conduct by the relevant law-enforcement agencies, including obtaining evidence unlawfully, had no bearing on the grounds for detention, although it might be relevant to the actual proceedings in court.

*Languages:*

Slovak.



## Slovenia Constitutional Court

### Statistical data

1 May 2002 – 31 August 2002

The Constitutional Court held 19 sessions (10 plenary and 9 in chambers) during this period. There were 429 unresolved cases in the field of the protection of constitutionality and legality (denoted by the prefix "U" in the Constitutional Court Register) and 715 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 May 2002). The Constitutional Court accepted 113 new U and 269 Up new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 66 U cases in the field of the protection of constitutionality and legality, in which the Plenary Court made:
  - 28 decisions and
  - 38 rulings;
- 12 U cases joined to the above-mentioned cases for common treatment and adjudication.

Accordingly the total number of U cases resolved was 78.

In the same period, the Constitutional Court resolved 137 Up cases in the field of the protection of human rights and fundamental freedoms (12 decisions issued by the Plenary Court, 125 decisions issued by a Chamber of three judges).

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas the rulings of the Constitutional Court are not generally published in an official bulletin, but are handed over to the participants in the proceedings.

However, all decisions and rulings are published and submitted to users:

- in an official annual collection (Slovenian full-text versions, including dissenting/ concurring opinions, and English abstracts);

- in the *Pravna Praksa* (Legal Practice Journal) (Slovenian abstracts, with the full-text version of the dissenting/concurring opinions);
- since 1 January 1987 via the on-line STAIRS database (Slovenian and English full-text versions);
- since June 1999 on CD-ROM (complete Slovenian full text versions from 1990 onwards, 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 in Slovenian as well as in English at <http://www.us-rs.si>);
- since 2000 in the JUS-INFO legal information system on the Internet (full text in Slovenian, available at <http://www.us-rs.si>);
- in the CODICES database of the Venice Commission.

### Important decisions

*Identification:* SLO-2002-2-004

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 10.07.2002 / **e)** U-I-392/98 / **f)** / **g)** *Uradni list RS* (Official Gazette), 65/02 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (Slovenian).

*Keywords of the systematic thesaurus:*

- 3.5 **General Principles** – Social State.
- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
- 5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.



*Keywords of the alphabetical index:*

Insurance, pension and disability, calculation / Retroactivity, exceptional circumstances / Privatisation, payment, salary portion / Shareholder, employee.

*Headnotes:*

A provision which excludes from the calculation of the basic pension insurance of an employee portions of earnings directly deducted from the employee's salary in order to purchase shares in the buyout of a company, and which therefore evaluates the earnings of such an insured person (shareholder) differently from the earnings of insured persons (shareholders) having purchased shares in some other manner, is arbitrary, since the Constitutional Court could not establish the specific public interest which would justify such a distinction.

*Summary:*

The petitioners challenged the constitutionality of Article 46.4 of the Pension and Disability Insurance Act (Official Gazette RS, nos. 12/92, 5/94, 7/96 and 54/98 – “ZPIZ92”), pursuant to which the portions of salaries and other income earned from employment used to purchase fully paid shares for the buyout of a company or to increase the equity capital of a company in the process of ownership transformation were *inter alia* not included in the calculation of the petitioners' basic pension. The petitioners asserted that in accordance with the Transformation of Company Ownership Act (“ZLPP”), they had voluntarily decided to participate in the purchase of shares and therefore surrendered a portion of their net salary. Otherwise they would have received this portion of their salary. Although all the pension contributions deriving from this portion of the salary were paid, the Pension and Disability Insurance Institute, on the basis of the challenged provision, did not include this portion of the salary into its calculation of the basic pension. However, if the amounts set aside for the purchase of shares had not been deducted and the petitioners had bought shares with cash after their salaries had been paid, the whole salary would have been included in the calculation of the basic pension. It was therefore alleged that, due to the challenged provision, the petitioners were not in the same position as those who had not decided to buy shares.

The right to private property (Article 33 of the Constitution) guarantees the owner a basis for the free management of their own affairs and for free and responsible control over their own destiny. This also holds for their salary.

To review the manner in which individuals manage their salary, as provided under the challenged Article 46.4 of ZPIZ92, does not mean a direct limitation is imposed on the means of disposing of property; however, it retroactively worsens an individual's material position with respect to pension insurance. The regulation of the purchase of shares according to the ZLPP, insofar as it explicitly defined the obligation of a company to pay pension contributions from a salary, did not leave any room for doubt that the portion of the salary used to purchase shares may also be included in the calculation of the basic pension.

If the challenged provision were in force at a time when the ZLPP was also in force, this might be a reason why more employees would not decide in favour of the discussed participation in the transformation of the ownership of their company. The ZLPP came into effect in December 1992, whereas the challenged regulation under ZPIZ92-B came into force in February 1996, a good three years later. As the ZPIZ92-B has only a prospective effect, it is not inconsistent with Article 155 of the Constitution, which prohibits the retroactive effect of legal acts. However, the challenged regulation was inconsistent with Article 2 of the Constitution and with the principle of maintaining confidence in the law, as one of the principles of a State governed by the rule of law, since it had not been proved that the detriment caused to the legal position of the insured persons who participate in a buyout would be to the benefit of a prevailing and legitimate public interest.

Pursuant to the above-mentioned principle, in cases of conflict between the above-mentioned principle and other constitutional principles or interests, the Court, using the method known as weighing of interests, reviews which of the constitutionally protected interests in an individual dispute must be given priority. In the present case, the constitutional principle of maintaining confidence in the law – meaning that it is particularly important whether the changes in the relevant legal area were relatively predictable and thus the affected persons could foresee them in advance – had to be weighed against the importance of a change, and the meaning of the existing legal position for a person under a given obligation had to be weighed against the public interest after the entry into force of a different regulation from the existing one. In both areas, changes of regulations were relatively frequent in the 1990s. However, it was characteristic of pensions that within the framework of the provision which listed the forms of income excluded from the basic pension calculation, the reasons for exclusion were always based on the purpose of the payment of the income. Therefore, the interference in the pension in the present case, based on the manner in which income had been spent (rather than earned), was surprising.

In the field of commercial law, where statutory regulations are confined or limited mostly to determining the rules governing the establishment of business companies, the provision governing the possible manner of paying for shares through direct deductions from an employee's salary before the salary is paid should constitute a relatively solid guarantee that this (directly deducted) portion of the salary will on the whole be treated equally to the rest of the salary.

The public interest in seeing an increase in the number of employee shareholders in the process of transformation of ownership of companies is indisputable. In order to justify a different evaluation of the earnings of insured persons (shareholders) having purchased shares through direct deductions from their salary from the evaluation of earnings of insured persons (shareholders) who purchased shares in some other manner, the public interest in such a measure should be specifically established during the legislative process. Stating that such differentiation allows for the possibility of a general decrease in the level of pensions for some pensions which would otherwise be disproportionably high is not convincing, as the calculation of disproportionably high pensions can also result from other causes. To treat income as having a different nature merely because of the manner in which that income was spent is contrary to the principle of the free exercise of the right to property. The particular and different regulation of salaries in cases where they were used to purchase shares in the buyout of a company was thus not shown to be in the public interest. Since there were no reasons to justify applying different rules to the basic pensions of insured persons who had participated in the buyout of a company pursuant to the ZLPP, the Court found the challenged provision to be arbitrary. Such arbitrariness is contrary to the principles of a State governed by the rule of law (Article 2 of the Constitution). The challenged regulation was thus inconsistent with the Constitution.

#### *Supplementary information:*

Legal norms referred to:

- Articles 1, 14, 50 and 155 of the Constitution;
- Article 47 of the Constitutional Court Act (ZUstS).

#### *Languages:*

Slovenian.



## South Africa Constitutional Court

### Important decisions

*Identification:* RSA-2002-2-006

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 16.05.2002 / **e)** CCT 19/2001 / **f)** First National Bank of SA Limited t/a Wesbank v. Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v. Minister of Finance / **g)** / **h)** 2002 (7) *Butterworths Constitutional Law Reports* 702 (CC); CODICES (English).

*Keywords of the systematic thesaurus:*

- 2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 3.25 **General Principles** – Market economy.
- 4.10 **Institutions** – Public finances.
- 4.10.7 **Institutions** – Public finances – Taxation.
- 5.1.1.5.2 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Public law.
- 5.3.37.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.
- 5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
- 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

*Keywords of the alphabetical index:*

Customs, property, confiscation / Debtor, goods of third parties / Property, of legal persons / Property, guarantee.

*Headnotes:*

The constitutional guarantee of property rights (Section 25 of the Constitution) aims to strike a proportionate balance between protecting existing private property rights and serving the public interest. The fact that an owner makes no or limited use of a corporeal movable is irrelevant to whether the object qualifies as constitutionally protected property.

“Arbitrary”, in the context of the prohibition on arbitrary deprivations of property in Section 25.1 of the Constitution, refers to a wider concept and broader controlling principle than an enquiry into mere rationality, but entails a less intrusive inquiry than the proportionality evaluation required by the limitation provisions of Section 36 of the Constitution. A deprivation was arbitrary if no sufficient reason for it existed or if it was procedurally unfair.

### *Summary:*

The Commissioner for the South African Revenue Services was authorised by Section 114 of the Customs and Excise Act 91 of 1964 to detain and sell certain goods detailed in the section in order to exact the payment of customs debts. Such goods included not only the goods of customs debtors but also the goods of third parties that were in the possession of customs debtors. The section empowered the Commissioner to detain and sell the goods without having to obtain a judgment or order from any court of law.

The appellant bank, First National Bank of South Africa (FNB), leased and sold certain motor vehicles to various customs debtors, reserving ownership in the vehicles until the contracts were performed in full. Acting in terms of Section 114, the Commissioner attached these vehicles with a view to selling them and recovering part of the customs debts owing by these customs debtors.

FNB challenged the constitutionality of Section 114 on three grounds. First, it contended that the sale of its goods would constitute an expropriation of property without compensation (which infringed on Section 25.2 of the Constitution) or an arbitrary deprivation of its property (which contravened Section 25.1). Secondly, it contended that the sale of its property without intervention of a court denied its right under Section 34 of the Constitution to have disputes settled before a court of law. Thirdly, it argued that its right to freedom of economic activity and trade, protected under Section 22 of the 1996 Constitution, had been infringed. The Cape High Court – the Court of first instance – dismissed these challenges. FNB appealed directly to the Constitutional Court, which upheld their appeal on the first ground and did not find it necessary to deal with the other two grounds.

Ackermann J, on behalf of a unanimous Court, held that although FNB was a company and not an individual person, it was entitled to invoke the guarantee of property rights provided by Section 25. Furthermore, this section has to be construed in an historical context of extensive and racially motivated dispossession of property.

The Court found it unnecessary to attempt a definition of property for the purposes of the constitutional guarantee but observed that ownership of a corporeal movable must – as must ownership of land – lie at the heart of the constitutional concept of property. As the detention and threatened sale of FNB’s vehicles clearly constituted a deprivation of property for the purpose of Section 25.1, the question was whether the deprivation was arbitrary. Having come to the conclusion that the deprivation was arbitrary, and could not be justified under the limitations clause (Section 36), it was unnecessary to consider whether it constituted an expropriation.

Ackermann J surveyed the approach followed in certain other jurisdictions to deprivations of property. This revealed broad support for an approach based on some concept of proportionality. It was clear that there are circumstances where it is permissible for legislation to deprive persons of property without payment of compensation. However, there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve.

The Court found that Section 114 permitted the total deprivation of a person’s property under circumstances where such person is not the customs debtor; has no connection with the transaction giving rise to the customs debt; where such property also has no connection with the customs debt; and where such person has not transacted with or placed the customs debtor in possession of the property under circumstances that have induced the Commissioner to act to her detriment in relation to the incurring of the customs debt. There was therefore no sufficient reason for depriving such persons of their property, and to that extent the deprivations sanctioned by Section 114 were arbitrary. Although the purpose of the section, namely to exact payment for customs debts, is extremely important, the benefit to the State of the coercive effect of Section 114 as it stood was minimal and the infringement of the property guarantee in Section 25 by Section 114 could therefore not be justified in terms of the limitations clause.

Accordingly, the Court declared Section 114 constitutionally invalid to the extent that it provided that the goods of persons other than the customs debtor referred to in the Section could be subjected to a statutory lien, detention and sale.

### *Supplementary information:*

This case was the first in which the property guarantee in the 1996 South African Constitution was comprehensively discussed by the Constitutional Court.

*Cross-references:*

- *Lawrence v. State and Another; Negal v. State and Another; Solberg v. State and Another*, 1997 (4) *South African Law Reports* 1176 (CC), 1997 (10) *Butterworths Constitutional Law Reports* 1348 (CC), *Bulletin* 1997/3 [RSA-1997-3-010];
- *First National Bank of SA Ltd t/a Wesbank v. Commissioner for the South African Revenue Service and Another*, 2001 (3) *South African Law Reports* 310 (C), 2001 (7) *Butterworths Constitutional Law Reports* 715 (C).

*Languages:*

English.

*Identification:* RSA-2002-2-007

**a)** South Africa / **b)** Supreme Court of Appeal / **c)** / **d)** 17.05.2002 / **e)** 384/2000 / **f)** Hamata and Another v. Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others / **g)** / **h)** 2002 (7) *Butterworths Constitutional Law Reports* 756 (SCA); CODICES (English).

*Keywords of the systematic thesaurus:*

- 1.3.5.13 **Constitutional Justice** – Jurisdiction – The subject of review – Administrative acts.
- 2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
- 2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
- 2.3.3 **Sources of Constitutional Law** – Techniques of review – Intention of the author of the enactment under review.
- 3.19 **General Principles** – Margin of appreciation.
- 5.1.2.2 **Fundamental Rights** – General questions – Effects – Horizontal effects.
- 5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Scope – Non-litigious administrative procedure.
- 5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

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

*Keywords of the alphabetical index:*

Common law, constitutional application / Defence Counsel, disciplinary proceedings / Legislative act, interpretation, implications.

*Headnotes:*

There is no absolute right to legal representation in proceedings before administrative or other quasi-judicial tribunals. Such proceedings must, however, be conducted in a procedurally fair manner.

Procedural fairness, depending on the circumstances of a specific case, may require that a party be entitled to legal representation. The domestic rules of administrative or other quasi-judicial tribunals should therefore be taken to provide for a residual discretion to allow for “outside” legal representation even if such representation has been explicitly excluded.

*Summary:*

The appellant – a journalism student at the Peninsula Technikon – co-authored an article in a national newspaper which alleged that prostitution was rife on the Technikon campus and that the Technikon authorities acquiesced in that situation. The Technikon charged him before its Internal Disciplinary Committee with “conduct calculated to bring discredit on the Technikon”, which was prohibited by its internal rules. The appellant sought to be defended at the hearing by his attorney, but the Committee informed him that its rules excluded “outside” representation. He had to defend himself or be assisted by a fellow student or a member of the Technikon staff. He refused to accept this and withdrew from the Committee’s proceedings. The Committee found him guilty and resolved to expel him from the Technikon. This decision was upheld by the internal appeal bodies provided for in the Technikon rules.

Having exhausted his internal remedies, the appellant took the decision on review to the Cape High Court. He challenged it on a number of grounds, but the High Court refused to set aside the decision. With leave of the Supreme Court of Appeal, he then appealed against the judgment of the High Court.

The Supreme Court of Appeal, in a unanimous judgment written by Marais JA, found it necessary only to deal with one ground of appeal, namely

whether the Internal Disciplinary Committee had a discretion to allow the appellant the right to legal representation of his choice and, if so, whether such discretion should have been exercised in his favour.

In evaluating this contention, the Court reaffirmed its previous decisions that the law did not confer a right to legal representation *in fora* other than courts of law. The Constitution only conferred such a right on persons accused of crimes. Neither the constitutional right to fair administrative action (Section 33 of the Constitution), nor the national legislation enacted to give effect to such right (the Promotion of Administrative Justice Act 3 of 2000) expressly provided for such a right. Instead, the Act affirmed the common-law position in Section 3.2.a, that fair administrative procedure depends on the circumstances of each case.

The rule in terms of which the Internal Disciplinary Committee refused the appellant legal representation provided that “[t]he student may conduct his/her own defence or may be assisted by any student or a member of staff of the Technikon”. This clearly intended an exclusion of outsiders – be they lawyers or lay-persons – from the domestic disciplinary procedures of the Technikon. The Technikon had a legitimate interest in keeping disciplinary proceedings “within the family”.

In line with the injunction in Section 39.2 of the Constitution that the common law be developed in accordance with the “spirit, purport and objects of the Constitution”, the Court held, however, that the presumptions of the common law relating to the interpretation of written instruments be supplemented with the presumption that conformity, rather than non-conformity, with the values of the Constitution was intended. The domestic rule of the Technikon was capable of an interpretation that the Internal Disciplinary Committee may exercise its discretion and permit a student to be represented by an outside lawyer despite any legal entitlement thereto. It should be so interpreted because there will be cases in which legal representation may be essential to procedurally fair administrative proceedings. A discretion to allow outside legal representation was therefore a constitutional imperative.

Having come to this conclusion, the Court found that the Internal Disciplinary Committee’s refusal even to consider the appellant’s request that he should be allowed outside legal representation fatally vitiated its proceedings. Its decision, and the decisions on appeal and review from that body, therefore had to be set aside. It was not necessary to consider whether the Committee should have granted such a request in the exercise of its discretion in the circumstances of this case. The Court indicated however that factors

such as the nature of the charges brought, the degree of factual or legal complexity attendant upon considering them, the potential seriousness of the consequences of an adverse finding, the availability of suitably qualified lawyers among the student or staff body, whether a legally trained person is presenting the case against the student, and any other factor relevant to fairness are to be considered in exercising such discretion.

#### Cross-references:

- *Hamata and Another v. Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others*, 2000 (4) *South African Law Reports* 621 (C).

#### Languages:

English.



#### Identification: RSA-2002-2-008

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 21.05.2002 / **e)** CCT 28/01 / **f)** S v. Walters and Others / **g)** / **h)** 2002 (7) *Butterworths Constitutional Law Reports* 663 (CC); CODICES (English).

#### Keywords of the systematic thesaurus:

- 1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
- 1.6.3.1 **Constitutional Justice** – Effects – Effect *erga omnes* – *Stare decisis*.
- 1.6.5.3 **Constitutional Justice** – Effects – Temporal effect – *Ex nunc* effect.
- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.
- 2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
- 3.17 **General Principles** – Weighing of interests.
- 3.20 **General Principles** – Reasonableness.
- 4.4.1 **Institutions** – Head of State – Powers.
- 4.4.1.1 **Institutions** – Head of State – Powers – Relations with legislative bodies.

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

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

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

5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.

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

*Keywords of the alphabetical index:*

Criminal justice, effectiveness / Firearm, use / Legislative act, entry into force / Supreme Court, decision, binding nature / Court, verification of the constitutionality of laws.

*Headnotes:*

The constitutional rights of dignity, life and physical integrity, balanced against the interests of effective criminal justice, prohibit the use of a firearm during an arrest unless the suspect:

- a. poses an immediate threat of serious bodily harm to the arrester or to someone else; or
- b. is reasonably suspected of having committed a serious crime involving or threatening such harm.

A trial judge is bound by the Supreme Court of Appeal (SCA) on issues of constitutional interpretation, despite the SCA not being the highest court on constitutional matters.

A trial judge should determine a constitutional issue only if and when it proves necessary for determining the guilt or innocence of the accused.

If an Act empowers the President to determine the date of commencement of that legislation, this power cannot be used to veto the legislation or to prevent its coming into force.

*Summary:*

Section 49 of the Criminal Procedure Act 51 of 1977 governs the use of force to carry out an arrest, Subsection 2 of which permits deadly force in certain circumstances. This latter provision was relied on as a defence by Mr Walters and his son when they were charged with murder in the High Court for having shot a suspect fleeing from their bakery one night. The prosecution argued that according to a reinterpretation of Section 49.1 by the Supreme Court of Appeal (SCA) the shooting was not authorised. In the

alternative, the prosecution challenged the section's constitutionality. The trial judge disagreed with the SCA decision, held that he was not bound to follow it and upheld the constitutional challenge to the extent that it relates to a fleeing suspect. He then adjourned the case pending confirmation by the Constitutional Court of the order of constitutional invalidity.

The accused and the prosecution took no part in the proceedings before the Constitutional Court. The Minister of Justice submitted argument that Section 49.2 was unconstitutionally wide and contended for the validity of a replacement of Section 49 that had already been adopted by Parliament but not yet put into operation. The National Commissioner of the Police Services, backed by the Minister of Safety and Security, intervened to support the section in its existing form, contending that it conformed to internationally accepted norms.

The judgment of Kriegler J for a unanimous court analysed the power to use force, including the use of a firearm, given by the section to persons lawfully carrying out an arrest. Because this power infringes the rights to life, human dignity and bodily integrity guaranteed in the Bill of Rights, the judgment examined the balance between these rights and the interests of effective criminal justice. Regarding the use of a firearm, the judgment endorsed the conclusion of the SCA that Section 49.1 must be interpreted as generally excluding the use of a firearm unless the suspect:

- a. poses an immediate threat of serious bodily harm to the arrester or to someone else; or
- b. is reasonably suspected of having committed a serious crime involving or threatening such harm.

Read in this way, Section 49.1 is constitutionally justifiable and the order by the trial court declaring it partially invalid was therefore not confirmed.

The Court found, however, that Section 49.2 authorised the use of deadly force for arrests in circumstances so wide as to be constitutionally unjustifiable, for example an arrest for a trivial offence like shoplifting or for a serious but non-violent one like fraud. This subsection was therefore struck down in its entirety. Because Section 49.1 covers the use of force generally and because the replacement section could be put into operation virtually immediately, the order of invalidation took effect immediately, but did not affect past conduct.

The judgment tabulated the following main points regarding the use of force by police officers and others in carrying out arrests:

The purpose of arrest is to bring before court for trial persons suspected of having committed offences. Arrest is not the only means of achieving this purpose, nor always the best and may never be used to punish a suspect. Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest and only the least degree of force reasonably necessary to carry out the arrest may be used. In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances. Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only. Ordinarily it is not permitted unless the suspect poses a threat of violence to the arrestor or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later. These limitations in no way detract from the rights of an arrestor attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person.

The judgment also concluded that the trial judge did not have the power to differ from the SCA on a question of constitutional interpretation. He should also have dealt with the constitutional issue only if and when it became necessary for his verdict. As the order of constitutional invalidity did not affect past conduct, the case was referred back for resumption and conclusion on the basis that Section 49.2 is constitutionally valid.

Lastly, the judgment considered the fact that the new Section 49, passed by Parliament in October 1998, had not yet been put into operation by the President. The Act containing the new section gave the President the power to fix the date of its implementation. This power could not lawfully be used to veto or otherwise block an enactment duly adopted by Parliament.

#### Cross-references:

- *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];
- *Govender v. Minister of Safety and Security*, 2001 (4) *South African Law Reports* 273 (SCA);
- *Tennessee v. Garner*, 471 *United States Reports* 1 (1985);

- *McCann and Others v. UK*, (1996) 21 *European Human Rights Reporter* 97, *Bulletin* 1995/3 [ECH-1995-3-016].

#### Languages:

English.



#### Identification: RSA-2002-2-009

a) South Africa / b) Supreme Court of Appeal / c) / d) 31.05.2002 / e) 327/01 / f) Ndhlovu and Others v. The State / g) / h) CODICES (English).

#### Keywords of the systematic thesaurus:

- 2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
- 2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
- 3.3 **General Principles** – Democracy.
- 3.17 **General Principles** – Weighing of interests.
- 3.21 **General Principles** – Equality.
- 4.7.8 **Institutions** – Judicial bodies – Ordinary courts.
- 5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
- 5.3.13.29 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to examine witnesses.

#### Keywords of the alphabetical index:

Evidence, hearsay, admissibility / Justice, principle / Robbery, armed.

#### Headnotes:

A statute which permits the admission of hearsay evidence when it is in the interests of justice, does not infringe upon an accused's right to a fair trial. The requirement that "the interests of justice" should compel the admission of hearsay must be interpreted in the light of the normative framework created by the Constitution. This means that the admission of hearsay evidence will only be in the interests of justice if stringent safeguards are met.

### Summary:

A forty year-old plumber was shot and killed during the robbery of his cell phone by four men. After receiving information from an informer detailing the names and addresses of the suspects, the police apprehended one of the perpetrators (accused 3). He was advised of his constitutional rights and elected to provide the police with additional information specifically regarding the crime committed by and the identity of the three other accused, one of whom had purchased the deceased's cell phone. The cell phone was retrieved from the accused and the murder weapon was found with another accused. Finally, accused 4 provided the police with a written statement incriminating himself and the three other accused.

At the trial, accused 3 and 4 denied making any statements to the police and all four denied committing the crime. The primary issue before the trial court was whether an accused's out of court statements incriminating a co-accused, if disavowed at the trial, could nevertheless be used in evidence against the latter. The defence sought to keep out the pre-trial statements (both oral and written) by challenging the constitutionality of Section 3 of the Law of Evidence Amendment Act 45 of 1988 (the Act). Section 3 of the Act describes the circumstances under which hearsay evidence will be admitted as evidence in a trial, with the main consideration being whether admitting the evidence is in the interest of justice. This provision expressly covers both civil and criminal proceedings. The appellants argued that these provisions were unconstitutional and that the trial court erred in invoking them. Section 3 of the Act prohibits the admission of hearsay evidence unless the interests of justice require its admission. Judge Goldstein, presiding over the trial, rejected the challenge to the constitutionality of the Act. He held that the statements made by accused 3 and 4 were admissible as having been made freely and voluntarily and found all four guilty of robbery and murder with aggravating circumstances. All but one of the accused appealed the decision of the trial court of allowing in the out of court statements.

The issue on appeal was the admissibility of these oral and written out of court statements, and whether that evidence – if admissible – supports the inference as to motive and conduct the trial court drew against the accused. The appellants argued that allowing the evidence violated the accused's right to a fair trial because they did not have the opportunity to cross-examine the original declarant in challenging the evidence. The court, however, rejected this argument stating that the right to a fair trial entrenched in the Bill of Rights does not guarantee an entitlement to subject all evidence to

cross-examination. There is a right, though subject to limitation under Section 36, to "challenge evidence". In particular, when hearsay is involved, the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability, but where the interest of justice require that the hearsay statement be admitted, the right to "challenge evidence" does not encompass the right to cross-examine the original declarant. The Court held that the provisions of the Act properly addressed these constitutional considerations.

During its analysis, the Court, in a unanimous judgment written by Cameron JA, first noted that the statutes' fundamental test, "the interest of justice", as well as the criteria it posits as relevant to that test should be interpreted in accordance to the values of the Constitution and the norms of the objective value system it embodies. While cautioning the use of hearsay evidence, the Court rejected a blanket ban on its use and reiterated certain safeguards that must be used in order to ensure that the accused fundamental right to a fair trial is protected. First, there is to be a limitation on the hearsay evidence submitted by the witness and this evidence is to be screened cautiously as not to allow in any inadmissible evidence. Second, hearsay evidence cannot be used against an unrepresented accused without first explaining the significance of the provisions. Third, the accused must be notified timeously of the intention to use hearsay evidence against him.

When considering the constitutionality of the statute, the Court recognised that pertaining to the admissibility of hearsay evidence, it has a legal duty to overrule an incorrect decision by a lower court and not to simply defer to the lower court's decision. In this case, the court highlighted how the evidence linked each accused to the other, as well as to the victim and the crime itself, thereby justifying the admittance of this evidence. In short, it was proper for the trial court to weigh the prejudice to the accused against the reliability of the hearsay in deciding whether the interests of justice required its admission. Finally, the court acknowledged that allowing this statutory exception is in keeping with developments in other democratic societies based on human dignity, equality and freedom.

### Cross-references:

- *S v. Ramavhale*, 1996 (1) *South African Criminal Reports* 639 (A).

### Languages:

English.





*Identification:* RSA-2002-2-010

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 11.06.2002 / **e)** CCT 21/2001 / **f)** Van Rooyen and Others v. The State and Others / **g)** / **h)** 2002 (5) *South African Law Reports* 246 (CC); 2002 (8) *Butterworths Constitutional Law Reports* 810 (CC); CODICES (English).

*Keywords of the systematic thesaurus:*

3.4 **General Principles** – Separation of powers.  
 4.5.2 **Institutions** – Legislative bodies – Powers.  
 4.5.8 **Institutions** – Legislative bodies – Relations with judicial bodies.  
 4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.  
 4.7.4.1.2 **Institutions** – Judicial bodies – Organisation – Members – Appointment.  
 4.7.4.1.4 **Institutions** – Judicial bodies – Organisation – Members – End of office.  
 4.7.4.1.5.2 **Institutions** – Judicial bodies – Organisation – Members – Status – Discipline.  
 4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.  
 5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Independence.

*Keywords of the alphabetical index:*

Judge, salary, guarantees / Judiciary, independence / Magistrates Commission, members / Magistrates Commission, powers.

*Headnotes:*

Individually, judicial officers must be free to act independently and impartially in dealing with the cases they hear and, at an institutional level, there must be structures to protect courts and judicial officers against external interference. These safeguards must include security of tenure and a basic degree of financial security.

Judicial independence can be achieved in a variety of ways and the mere fact that the legislation regulating the independence of lower courts differs from the constitutional provisions regulating higher courts is no reason for holding it to be unconstitutional. The test

for assessing judicial independence includes an objective element of appearance or perception.

*Summary:*

This judgment deals with the institutional independence and constitutional legitimacy of the South African magistracy in the light of certain statutory provisions applicable to magistrates.

The issue was raised when Mr Van Rooyen, Mr Tshabalala and Mr Themelaros challenged criminal proceedings against them, contending that magistrates do not comply with the standard of independence prescribed by the Constitution for the judiciary. They were supported by an organisation of magistrates. The High Court found that the control exercised over magistrates by the Minister of Justice impermissibly limited their judicial independence and declared a number of provisions of the Magistrates' Courts Act 32 of 1944, the Magistrates Act 90 of 1993 and the Regulations for Judicial Officers in the Lower Courts inconsistent with the Constitution and invalid.

In a unanimous judgment written by Chief Justice Chaskalson, the Constitutional Court discussed the principle of judicial independence in a constitutional democracy which recognises the doctrine of separation of powers. This was followed by an analysis of the composition, powers and duties of the Magistrates Commission, a body established under the Magistrates Act to play a major role in the control and supervision of the magistracy.

Finally, the judgment examined each of the enactments that were struck down by the High Court and the reasons given by that Court for their invalidation. In most instances the findings of the High Court were set aside; in some instances its orders were adapted by declaring unconstitutional and excising only the offending parts of the provisions; and the remaining invalidation orders were confirmed.

The Court held that in deciding whether a particular court lacks the institutional protection that it requires to function independently and impartially, it was relevant to have regard to the core protection given to all courts by the Constitution, to the functions that the particular court performed and to its place in the court hierarchy. Lower courts were, for instance, entitled to protection by the higher courts should their independence be threatened. The greater the protection given to the higher courts, the greater the protection all courts have.

The Court stressed that although judicial independence should be considered through the eyes of the reasonable, well-informed, thoughtful observer, this

observer had to be sensitive to the country's complex social realities, in touch with its evolving patterns of constitutional development and guided by the Constitution, its values and the distinction it draws between different courts. The Court also discussed the separation of powers and, in line with previous judgments, made it clear that a strict and complete separation was not required by the Constitution.

The Court held that the constitutionality of many of the challenged provisions depended on whether the Magistrates Commission was an independent body or subject to control by the Minister. The Act provides that the Commission is chaired by a High Court judge and includes magistrates, lawyers in private practice and parliamentarians. The Commission's objectives include ensuring that the appointment, promotion, transfer or discharge of, or disciplinary steps against, magistrates takes place without favour or prejudice and that no influencing or victimisation of magistrates takes place. Therefore, although the executive influenced the selection of the Commission's members, this body is an important safeguard of judicial independence. There was no reason to believe that its members would not discharge their duties with integrity. Moreover, the composition of the Commission resembles that of the Judicial Service Commission, created by the Constitution itself. There are also powerful constitutional and judicial safeguards in place to prevent interference with the Commission by the executive or the legislature. Thus, the Court concluded that the Magistrates Commission could and had to play an important part in protecting judicial independence.

With regard to the appointment of magistrates, the Court found that the mere fact that the executive and the legislature participate in the appointment process of magistrates was not inconsistent with judicial independence. The Constitution itself allows for the executive and the legislature to participate in the appointment of judges and this approach is followed by various other constitutional democracies. Likewise, there could be no constitutional objection to the appointment of acting or temporary magistrates for practical reasons although these appointees should not hold office at the discretion of the executive.

Regarding the removal of magistrates, the Court found that the grounds prescribed by the Magistrates Act were similar to those for the removal of judges in many other constitutional democracies. Similar grounds are given in the Constitution for the removal of members of other independent bodies. An investigation that may result in the removal of magistrates should, however, not be initiated by the Minister nor conducted by ministerial appointees.

That role should be vested in the Commission with the final decision as to removal vesting in Parliament.

With regard to fixing magistrates' salaries, it was held that the Magistrates Commission was an independent intermediary between magistrates and the legislature and the executive. Magistrates' salaries can only be reduced by Parliament and such reduction has to be justifiable, otherwise it can be set aside by the higher judiciary as inconsistent with judicial independence.

Finally, the Court supported the High Court's dismissal of the applications to set aside the criminal proceedings in the magistrates' courts. Although some aspects of the magistracy were inconsistent with institutional judicial independence, there was no reason to believe that the magistrates presiding would not administer justice impartially, independently and in accordance with the law.

#### Cross-references:

- *De Lange v. Smuts NO and Others*, 1998 (3) *South African Law Reports* 785 (CC), 1998 (7) *Butterworths Constitutional Law Reports* 779 (CC), *Bulletin* 1998/2 [RSA-1998-2-004];
- *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (4) *South African Law Reports* 744 (CC), 1996 (10) *Butterworths Constitutional Law Reports* 1253 (CC), *Bulletin* 1996/3 [RSA-1996-3-016];
- *Valente v. The Queen*, (1986) 24 *Dominion Law Reports* (4th) 161 (SCC).

#### Languages:

English.



#### Identification: RSA-2002-2-011

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 12.06.2002 / **e)** CCT 49/2001 / **f)** Singo v. The State / **g)** / **h)** 2002 (8) *Butterworths Constitutional Law Reports* 793 (CC); CODICES (English).

*Keywords of the systematic thesaurus:*

- 1.3.4.13 **Constitutional Justice** – Jurisdiction – Types of litigation – Universally binding interpretation of laws.
- 2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
- 2.1.3.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law.
- 3.18 **General Principles** – General interest.
- 3.20 **General Principles** – Reasonableness.
- 4.7.2 **Institutions** – Judicial bodies – Procedure.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.
- 5.3.13.23 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right not to incriminate oneself.

*Keywords of the alphabetical index:*

Defendant, burden of proof, reversal / Right to remain silent / Proceedings, summary, constitutionality.

*Headnotes:*

The rights to be presumed innocent and to remain silent are infringed by summary proceedings requiring an accused person to satisfy the court that his or her failure to appear in court previously, despite being warned to do so, was not due to his or her fault.

The right to be presumed innocent is not justifiable under Section 36 of the Constitution but the right to remain silent is justifiable under the section.

*Summary:*

In 1999, Mr Singo was convicted and sentenced in terms of Section 72.4 of the Criminal Procedure Act 51 of 1977. Section 72.4 of the Act provides for summary proceedings to deal with the situation where an accused person fails to appear at the trial or fails to attend and remain in attendance at court after being warned to do so. In terms of this provision, the accused person is required to satisfy the court that his failure to appear was not due to his fault. Where he fails to satisfy the court, he may be convicted and sentenced to a term of imprisonment or fined.

In an appeal to the High Court, Singo's conviction and sentence was set aside on the basis of an irregularity that had rendered the proceedings unfair. The Court also went on to consider the constitutional

validity of Section 72.4 and found the summary nature of the enquiry provided for in the section and the reverse onus contained in the section to be inconsistent with certain aspects of the fair trial provisions of Section 35.3 of the Constitution. It therefore declared the section invalid. The matter then came before the Constitutional Court for a confirmation of the declaration of invalidity.

In a unanimous decision, Ngcobo J found that the requirement that the accused must satisfy the court limits the right to be presumed innocent and the right to remain silent. This finding was based on the fact that in terms of the provisions of Section 72.4 an accused is obliged to speak failing which he or she may be convicted. In addition, a conviction may follow despite the existence of a reasonable doubt as to his innocence.

The Court found that the limitation on the right to remain silent is justifiable in terms of the limitations clause. The summary procedure was found to serve a useful purpose in that conduct that hinders the smooth running of the court's trial process is dealt with quickly and effectively. Furthermore, the reasons for non-compliance with the warning can best be supplied by the accused.

However, the Court found that the limitation on the right to be presumed innocent is not justifiable. The state could achieve its objective by merely requiring the accused to raise a reasonable doubt as to the question of fault thus avoiding the risk of a conviction despite the existence of a reasonable doubt.

The Court therefore found Section 72.4 to be inconsistent with the Constitution. However, the Court decided not to confirm the order of invalidity and made an order that the section be read as requiring the accused to raise a reasonable possibility that the failure to comply with the warning was not due to his or her fault.

*Cross-references:*

- *S v. Zuma*, 1995 (2) *South African Law Reports* 642 (CC), 1995 (4) *Butterworths Constitutional Law Reports* 401 (CC), *Bulletin* 1995/3 [RSA-1995-3-001].

*Languages:*

English.



**Identification:** RSA-2002-2-012

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 14.06.2002 / **e)** CCT 53/2001 / **f)** Khumalo and Others v. Holomisa / **g)** / **h)** 2002 (8) *Butterworths Constitutional Law Reports* 771 (CC); CODICES (English).

**Keywords of the systematic thesaurus:**

- 1.4.11.2 **Constitutional Justice** – Procedure – Hearing – Procedure.
- 2.1.2.1 **Sources of Constitutional Law** – Categories – Unwritten rules – Constitutional custom.
- 2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
- 2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.
- 3.10 **General Principles** – Certainty of the law.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 3.20 **General Principles** – Reasonableness.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

**Keywords of the alphabetical index:**

Defendant, burden of proof / Defamation, through press / Publisher, defamatory statement, reasonableness.

**Headnotes:**

The South African common-law rules of onus in the law of defamation, which do not require a plaintiff to allege that the defamatory statement in question is false, but require a defendant to prove truth if he relies on truth for the public benefit as a defence, strike the appropriate balance between the right to freedom of expression and the right to dignity.

**Summary:**

This case involved a well-known South African politician who sued the applicants in the High Court for defamation arising out of the publication of an article in a local newspaper. According to the South African common law of defamation, it is not necessary for a plaintiff to allege that the defamatory material was false to found a claim. In this case,

however, the newspaper and those responsible for the article (the applicants) asked the Court *a quo* to dismiss the claim as it was not asserted that the statements in the article were false. They argued that the common law needed to be developed in the light of the Constitution, in particular, the right to freedom of expression. The Court dismissed this argument and the applicants then approached the Constitutional Court.

The Constitutional Court held that, to succeed, the applicants needed to show that the common law rule was in breach of the Constitution. In the recent case of *National Media Ltd v. Bogoshi* 1998 (4) *South African Law Reports* 1196 (SCA), the Supreme Court of Appeal (the highest Court in non-constitutional matters) held that besides being able to establish that the contents of a defamatory statement were true and their publication to the benefit of the public, a publisher could avoid liability for defamation if it could establish that publication was nevertheless reasonable. This defence would hold even if the plaintiff could not prove that the statement was not true.

The applicants relied on Section 16 of the Constitution which entrenches the right to freedom of expression. The Court noted that this is an important right constitutive of democracy and individual freedom. The mass media have a particular role in the protection of freedom of expression – to ensure that individual citizens are able to receive and impart information and ideas. They are thus bearers of both constitutional rights and obligations. A further relevant constitutional consideration is the right to human dignity which accords value both to the personal sense of self-worth of individuals and to the public's estimation of that worth. The common law therefore needs to strike an appropriate balance between these two constitutional interests.

Requiring an injured party to prove a statement to be false means that he or she may not succeed even where the publication of the defamatory statement was not reasonable. Moreover, proving the falsehood of statements may often be difficult. O'Regan J, for a unanimous Court, held that the rule the applicants contended for would not strike an appropriate balance between conflicting constitutional interests. She found, however, that the defence of reasonableness developed in *Bogoshi's* case does establish an appropriate balance. The Court accordingly held that the applicants had not shown that the common law of defamation is inconsistent with the provisions of the Constitution and dismissed the appeal.

*Cross-references:*

- *National Media Ltd v. Bogoshi*, 1998 (4) *South African Law Reports* 1196 (SCA);
- *New York Times Co. v. Sullivan*, (1964) 376 US 254.

*Languages:*

English.

*Identification: RSA-2002-2-013*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 05.07.2002 / **e)** CCT 8/02 / **f)** Minister of Health and Others v. Treatment Action Campaign and Others / **g)** / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

- 1.1.4.3 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Executive bodies.
- 1.3 **Constitutional Justice** – Jurisdiction.
- 1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
- 3.4 **General Principles** – Separation of powers.
- 3.5 **General Principles** – Social State.
- 3.18 **General Principles** – General interest.
- 3.20 **General Principles** – Reasonableness.
- 3.23 **General Principles** – Equity.
- 5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.
- 5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

*Keywords of the alphabetical index:*

Constitutional jurisdiction, declaratory power / Constitutional jurisdiction, mandatory order / Government, policy, constitutionality / HIV (AIDS), treatment / HIV (AIDS), newborn child, transmission / Public health / World Health Organisation.

*Headnotes:*

A government policy concerning the prevention of mother to child transmission of HIV-AIDS that provides

for the distribution of antiretroviral drugs only to selected state hospitals around the country is unreasonable and infringes the right to health care of HIV-positive women and their babies born in the public health sector outside these pilot sites. Limiting the programme for the prevention of mother-to-child transmission of HIV to pilot sites for a research period before deciding whether to expand the programme nationally is, in the circumstances of the epidemic in South Africa, also unreasonable and in breach of this right.

Where state policy is challenged as being unconstitutional, a court is constitutionally obliged to consider whether the state has met its constitutional obligations. If the state has failed to do so, the court is obliged by the Constitution to declare such policy unconstitutional. Insofar as this constitutes an intrusion into the executive domain, that intrusion is mandated by the Constitution itself and does not amount to a breach of the separation of powers.

Although the Constitutional Court can supplement a declaratory order against the state with mandatory or supervisory injunctive orders, the use of such orders depends on the circumstances of each case and should only be used where necessary.

*Summary:*

The factual backdrop to the case was the HIV/AIDS crisis facing the country. A major method of transmitting the virus is by mothers to their babies at birth. The case concerned the government programme for reducing the risk of such transmission by using nevirapine, a powerful antiretroviral drug. Use of the drug for this purpose has been recommended by the World Health Organization and approved by the South African Medicines Control Council.

Two aspects of the government's HIV/AIDS policy were initially challenged in the High Court by the Treatment Action Campaign, a non-governmental organisation, as unreasonable and thus an infringement of the constitutional rights of HIV-positive pregnant women and their babies. The High Court upheld the applicants' challenge and ordered government to make nevirapine available in the public health sector.

On appeal to the Constitutional Court, government argued that the High Court had infringed the doctrine of separation of powers. It was further argued that the government decision to limit the supply of nevirapine to pilot sites for a research period and to defer expansion of the supply programme until the research period had expired was consistent with its obligations under the Constitution. The applicants supported the reasoning and order of the judge in the High Court.

Three *amici curiae* also argued in support of the High Court judgment.

The joint judgment by all the members of the Constitutional Court dealt with the public health care rights afforded to the individual by Section 27 of the Constitution and with the corresponding obligations imposed on the state progressively to realise these rights within available resources. The judgment analysed the nature and content of such socio-economic rights and obligations and reaffirmed the duty and power of the courts under the Constitution to consider whether the state's conduct in this regard had been reasonable. The Court also reaffirmed that, in exercising such power, courts do not trespass on the separation of powers or government's prerogative to formulate and implement policy, but perform the duty entrusted to them by the Constitution of giving effect to the Bill of Rights.

The main issues in question were the government's decisions:

- a. not to make nevirapine available outside the test sites during the research period and
- b. to defer devising and implementing a programme for nationwide expansion of such supply until the research period had expired.

The Court concluded that, notwithstanding disputed questions of fact and conflicting medical and related expert opinions, it was clear on the government's own showing that its policy was indeed deficient in these two respects. Government's programme was unreasonable in not enabling nevirapine to be made available outside its 18 test sites to try to save the lives of newborn babies of HIV-positive mothers who live out of reach of the sites and who cannot afford to obtain the drug in the private sector. On the one hand, the drug was available to government at no charge and its administration simple, efficacious, cost-effective and potentially life-saving. On the other, babies infected with the virus at birth are likely to die a lingering and painful death before their fifth birthdays. The policy restricted the supply of nevirapine irrespective of whether the requisite HIV-testing and counselling facilities were available or the medical personnel in charge called for its use, and thus infringed the right of HIV-positive mothers and their babies to the health care guaranteed by the Constitution. Secondly the Court considered the decision to adhere to this approach during the whole of the research period and only thereafter to consider expanding the programme for the supply of nevirapine and the accompanying package of public health services to the country at large. It found that this approach was unreasonable and infringed the rights of all those who would otherwise have had

access to this form of health care. The Court therefore made a declaratory order concerning these two infringements.

The Court also discussed the importance of children's rights (in Section 28) and the relative roles of the state and parents in providing indigent children in particular with urgent medical care.

In deciding whether to supplement the declaratory order by means of a mandatory or supervisory injunctive order, the Court held that there is judicial precedent for both components of such order. Although it was both appropriate and necessary to spell out in a mandatory order what government had to do to meet its constitutional obligations, an order requiring a report-back was not called for in this case. At the stage when the High Court made such an order, government was still relatively inflexible in its attitude to the supply of nevirapine and the formulation of a general programme. That position had changed materially during the course of the litigation. In any event, government had in the past been scrupulous in its compliance with orders of the Court and there was no reason to anticipate non-compliance in this instance.

#### Cross-references:

- *Soobramoney v. Minister of Health, KwaZulu-Natal*, 1998 (1) *South African Law Reports* 765 (CC), 1997 (12) *Butterworths Constitutional Law Reports* 1696 (CC);
- *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2001 (1) *South African Law Reports* 46 (CC), 2000 (11) *Butterworths Constitutional Law Reports* 1169 (CC), *Bulletin* 2000/3 [RSA-2000-3-015].

#### Languages:

English.



#### Identification: RSA-2002-2-014

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 25.07.2002 / **e)** CCT 45/01 / **f)** Satchwell v. The President and Another / **g)** / **h)** 2002 (9) *Butterworths Constitutional Law Reports* 986 (CC); CODICES (English).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Homosexuality, couple, reciprocal duties / Homosexuality, family life / Judge, life partner, right to benefits.

*Headnotes:*

A policy that benefits are accorded to spouses of judges but not to same-sex partners of judges who have undertaken a reciprocal duty of support, constitutes unfair discrimination on the basis of sexual orientation, and is therefore unconstitutional.

*Summary:*

The applicant, a judge of the High Court of South Africa, was involved in an intimate, committed, exclusive and permanent same-sex relationship since 1986. In South Africa, same-sex marriages are not recognised, hence the applicant does not enjoy the benefits accorded to married spouses.

In the Pretoria High Court, the applicant challenged the constitutional validity of the provisions of Sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 and the corresponding regulations for failing to extend certain benefits to the same-sex life partner of a judge. By according certain pension and travelling benefits to the spouse of married judges and not to the same-sex life partner of others, these provisions were found by the High Court unfairly to discriminate against the applicant on the basis of Section 9.3 of the Constitution which prohibits discrimination on the grounds of, *inter alia*, sexual orientation and marital status. The matter was then referred to the Constitutional Court in terms of Section 172.2 of the Constitution which states that an order of constitutional invalidity in the High Court has no force and effect unless it has been confirmed by the Constitutional Court.

In the Constitutional Court, the respondent accepted the discriminatory effect of the legislation, but argued that the High Court order was too narrow in that it served also to discriminate against other groups such as unmarried heterosexual permanent life partners. Madala J, on behalf of a unanimous Court, rejected the respondent's argument on the basis that in issue was the discrimination experienced by same-sex life partners involved in relationships similar in other

respects to marriage. He found that the impugned provisions unfairly and unjustifiably discriminated against same-sex life partners of judges on the basis of their sexual orientation. With regard to remedy, Madala J found that the High Court order of reading in the words "or partner in a permanent same-sex life partnership" into the impugned provisions omitted the requirement that such same-sex life partners share reciprocal duties of support. In the light of the reciprocal duties of support shared by spouses, the Court added the corresponding qualification to the High Court order that the benefits contained in the impugned provisions should accrue to same-sex partner of judges only where it can be shown that they have undertaken such reciprocal duties towards one another.

*Cross-references:*

- *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others*, 2000 (2) *South African Law Reports* 1 (CC), 2000 (1) *Butterworths Constitutional Law Reports* 39 (CC), *Bulletin* 2000/1 [RSA-2000-1-001].

*Languages:*

English.

*Identification: RSA-2002-2-015*

**a)** South Africa / **b)** Supreme Court of Appeal / **c)** / **d)** 22.08.2002 / **e)** 209/2001 / **f)** Minister of Safety and Security v. Van Duivenboden / **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.  
 1.5.5.1 **Constitutional Justice** – Decisions – Individual opinions of members – Concurring opinions.  
 2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.  
 3.9 **General Principles** – Rule of law.  
 3.18 **General Principles** – General interest.  
 3.20 **General Principles** – Reasonableness.

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

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

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

*Keywords of the alphabetical index:*

Firearm, fitness to possess / Firearm, use / Police, officer, negligent omissions / Police, officer, liability.

*Headnotes:*

A negligent omission is unlawful and therefore actionable if a legal duty exists to avoid negligently causing harm in the circumstances. Liability for such an omission exists if a reasonable person, in the position of the defendant, would have foreseen the harm and acted to avert it. Omissions are unlawful if they evoke moral indignation and the legal convictions of the community demand that they be so regarded. The State has a positive constitutional duty to act to protect of the rights contained in the Bill of Rights.

The State may be vicariously liable for the negligent conduct of police officers.

*Summary:*

Section 11 of the Arms and Ammunition Acts Amendment Act 117 of 1992 confers on the Commissioner of Police the power, upon receiving a statement made under oath, to declare a person unfit to possess any weapon, in certain circumstances. Mr Neil Brooks owned two firearms which he was licensed to possess in terms of Section 3.1 of the Arms and Ammunition Act 75 of 1969. On a number of occasions Brooks, after consuming alcohol, had been extremely violent. He had threatened to take not only his life but that of his wife and their two children. Police officers in the area where he lived were aware of these incidents. On two occasions he had threatened to shoot certain officers. Eventually, Brooks killed his child and his wife, and, in the process, injured his neighbour – the respondent, Mr Dirk Van Duivenboden – who was trying to stop him.

The respondent sought damages for the injuries he suffered against the State. The basis for his claim was that the police officers were negligent in failing to take the steps that were available in law to deprive Brooks of his firearms, notwithstanding that there were grounds for doing so. Van Duivenboden also alleged that their negligence was the cause of him being shot.

The matter was heard by the High Court in Cape Town, where the respondent's claim was dismissed with costs. Van Duivenboden appealed to the Full Bench of the High Court which reversed the decision. Special leave to appeal was then granted to the State to appeal to the Supreme Court of Appeal (SCA).

The majority of the SCA, in a judgment written by Nugent JA, held that negligent omissions are unlawful if there is a legal duty to prevent harm. This duty is determined by the legal convictions of the community. This is a question of legal policy which must be answered against the background of the norms and values of the particular society in which the principle is to be applied. Some of the norms and values against the background of which unlawfulness must be determined in this case, are embodied in the Constitution. The courts are enjoined by Section 39 of the Constitution to develop the common law in accordance with the Constitution.

The State is obliged by Section 7.2 of the Constitution not only to respect but also to protect, promote and fulfill the rights in the Bill of Rights. The State has a positive constitutional duty to act in the protection of the rights in the Bill of Rights. The breach of this duty does not mean that there will always be a claim for damages – whether there is such a claim will depend on the circumstances of each case. The negligent conduct of police officers is therefore actionable and the State is vicariously liable for the consequences of any such negligence if it is found to be unlawful.

The Court further held that in the circumstances of this case, the police officers were liable for their negligence, as it was reasonably foreseeable that harm might ensue if there was no enquiry into Brook's fitness to possess a firearm. A reasonable police officer would have taken steps to guard against such harm materialising.

On the question of causation, the Court held that a plaintiff is not required to establish the causal link with certainty but only to establish that the wrongful conduct was probably a cause of the loss. In the circumstances the negligence of the police officers was the cause of the harm suffered by the respondent. The Court dismissed the appeal with costs and upheld the decision of the Full Bench.

Marais JA, in a separate concurring judgment, disagreed with the majority on the role of the Constitution, and held that the Constitution should not be used to create liability under the Aquilian action (the general delictual action in South African law). Principles laid down by the common law are adequate to deal with the matter. He was, however in agreement with the rest of the majority decision.



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*Cross-references:*

- *Minister van Polisie v. Ewels*, 1975 (3) *South African Law Reports* 590 (A);
- *Carmichele v. The Minister of Safety and Security and Another*, 2001 (4) *South African Law Reports* 938 (CC), 2001 (10) *Butterworths Constitutional Law Reports* 995 (CC), *Bulletin* 2001/2 [RSA-2001-2-010].

*Languages:*

English.



## Sweden

### Supreme Court

### Supreme Administrative Court

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There was no relevant constitutional case-law during the reference period 1 May 2002 – 31 August 2002.



## “The Former Yugoslav Republic of Macedonia” Constitutional Court

### Important decisions

*Identification:* MKD-2002-2-004

**a)** “The Former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 10.07.2002 / **e)** U.br. 91/2002 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 59/2000 / **h)** CODICES (Macedonian).

*Keywords of the systematic thesaurus:*

1.1.4.3 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Executive bodies.

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.

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

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

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

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

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

*Keywords of the alphabetical index:*

Government, action, constitutionality / Government, prerogative.

*Headnotes:*

The Government is entitled to annul or repeal regulations or other acts of ministries, state administrative agencies and administrative organisations that are not in conformity with the Constitution, laws or other regulations made by the Assembly or the government. This competence is not considered to be an infringement of the competences of the Constitutional Court.

*Summary:*

An individual from Skopje lodged a petition to commence proceedings to review the constitutionality

of an article of the Law on the Government. The petitioner challenged the constitutionality of this Law on the grounds that only the Constitutional Court has a right and duty to annul or repeal regulations that are not in conformity with the Constitution, laws or other regulations enacted or issued by the Assembly or the government. In the petitioner's opinion, the impugned article violated Articles 8.1.3, 51, 91.1.5, 96, 110.2, 112.1 and 112.2 of the Constitution.

An analysis of the contents of the disputed article showed that the government competences it enumerates are different from those of the Constitutional Court.

In the Court's opinion, the government, as an executive body in the system of separated powers, has a right and duty to annul or repeal regulations or other acts of ministries, state administrative agencies and administrative organisations, in cases where those regulations are not in conformity with the Constitution or with laws or other regulations enacted or issued by the Assembly or the government. This authority derives from the constitutional power of the government to supervise and control the activities and work of administrative bodies (Article 91 of the Constitution). It remains within the context of the exercise of executive power, and by no means prevents the Constitutional Court from exercising its competences.

Accordingly, the Court dismissed the petition.

*Languages:*

Macedonian.



*Identification:* MKD-2002-2-005

**a)** “The Former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 17.07.2002 / **e)** U.br. 67/2002 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 4/2002 / **h)** CODICES (Macedonian).

*Keywords of the systematic thesaurus:*

4.6.10 **Institutions** – Executive bodies – Liability.

4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.

4.11 **Institutions** – Armed forces, police forces and secret services.

5.2 **Fundamental Rights** – Equality.

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:*

Damage, compensation / Public order, protection / State, duty to protect / Violence, public demonstration / Violence, public event.

*Headnotes:*

The protection of citizens against acts of violence or terror, public demonstrations or events aimed at undermining the constitutional order is a function which falls within the competence of the state, not within the competence of units of local self-government. Therefore the liability for damages resulting from death, physical injury or damage to or destruction of the property of a physical or legal entity, because of acts of violence or terror or acts committed during public demonstrations or events, cannot be the burden of the units of local self-government in which the damage has occurred, but must be the burden of the state, as previously established by the original text of the Law on Obligations.

*Summary:*

A lawyer from Skopje lodged a petition challenging the constitutionality of Article 3 of the Law Amending and Supplementing the Law on Obligations.

In making its decision the Court took into consideration Article 166.1 of the Law on Obligations. According to this provision, the state is liable for damages resulting from death, physical injury or damage to or destruction of the property of a physical or legal entity, because of acts of violence or terror or acts committed during public demonstrations or events. According to paragraph 2 of the same article, the organisers of, participants in, instigators of and aiders and abettors of acts of violence or terror or acts committed during public demonstrations or events that aim to undermine the constitutional order do not have the right to indemnity on these grounds. Furthermore, according to Article 166.3 of the Law, the state has the right and duty to seek compensation for the sum paid in damages from the person that caused the damage.

The impugned article of the amending law shifts the liability of the state to local self-government units.

Article 8.1.4 and 8.4.9 of the Constitution provides for the separation of powers between the legislative, executive and judicial branches on the one hand and local self-government bodies on the other, as one of the fundamental principles of the constitutional order of the Republic, and according to Article 9.2 of the Constitution all citizens are equal before the Constitution and the law.

Article 115.2 of the Constitution provides that municipalities are independent in exercising their powers as established by the Constitution and the law, and that supervision of the lawfulness of their work is carried out by the state. Article 115.3 of the Constitution provides that the state can by law entrust the execution of certain tasks to municipalities.

Article 122 of the Constitution provides that the armed forces protect the territorial integrity and independence of the Republic.

According to the list of competences of municipalities laid down in Article 22 of the Law on Local Self-Government, no such competences of local self-government bodies relate to protection against violence or terror, or protection to be ensured during public demonstrations or events. The Court also found that the allegedly unconstitutional provision included some elements of inequality of citizens, bearing in mind that, under this provision, the compensation that may be awarded for damages caused by the abovementioned actions depends on the financial capacities of the municipality where the damage has occurred. This means that, under the impugned provision, whether the citizen will be protected or adequately indemnified would depend on the financial capacities of the municipality, rather than its equal position on the territory of the Republic.

Bearing in mind all of the abovementioned provisions, the Court found that the impugned provision was unconstitutional and ordered the repeal of Article 3 of the Law Amending and Supplementing the Law on Obligations.

*Languages:*

Macedonian.



# Turkey

## Constitutional Court

### Important decisions

*Identification:* TUR-2002-2-004

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 24.11.1999 / **e)** K.1999/42 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24743, 02.05.2002 / **h)** CODICES (Turkish).

*Keywords of the systematic thesaurus:*

- 3.5 **General Principles** – Social State.
- 3.19 **General Principles** – Margin of appreciation.
- 3.21 **General Principles** – Equality.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 4.5.9 **Institutions** – Legislative bodies – Liability.

*Keywords of the alphabetical index:*

Criminal law / Criminal offence, sanction, balance / Family, protection / Marriage, religious, prior to civil marriage / Marriage, religious, recognition by the state.

*Headnotes:*

In view of the state's obligation to ensure the protection of family life and more particularly, the special protection of the civil law marriage system provided for in the Constitution, a penalty of imprisonment for the holding of a religious wedding before the official (civil law) wedding ceremony is not unconstitutional.

*Summary:*

The Orhangazi Magistrates' Court referred to the Constitutional Court the question whether Article 237.4 of the Turkish Criminal Code was incompatible with the Constitution. According to this provision, "if any man or woman holds a religious wedding ceremony prior to the conclusion of the civil marriage, he or she shall be liable to between two and six months' imprisonment". In accordance with the principle of equality, similar offences must be sanctioned with similar penalties under the criminal law.

The penalties imposed for offences committed must be balanced, in line with the existing social structure and the effect within society of such penalties.

However, parliament is bound to respect the Constitution and universal principles of law when legislating with respect to the penalties that may be imposed for a given offence.

Cohabitants may not be considered as having the same legal status as persons who have concluded a religious marriage with the intention of being married to each other. Thus, the rule in question, which treats people who have been married in a religious ceremony differently from cohabitants, is not contrary to the principle of equality enshrined in the Constitution.

Parliament has the discretionary power to determine which acts are deemed to be offences and what penalties shall be applied to these offences, provided that it acts within the limits of the Constitution and the general principles of the criminal law. In Turkey, the Civil Code formed one of the most important bodies of law in the passage to a contemporary, secular legal system. Under Article 174 of the Constitution, the system of civil law marriage is subject to special protection. Furthermore, Article 41 of the Constitution lays down provisions related to the protection of family life. Bearing these points in mind when examining the responsibility of the state, it can be seen that, in order to eliminate the negative effects of religious marriages in practice, it is not unconstitutional to impose penalties on persons arranging a religious wedding before the official marriage has been concluded.

Since the law does not prohibit the religious marriage from being concluded after the official marriage, the prohibition on holding a religious wedding before the official ceremony is not contrary to the Constitution. Thus Article 237.4 of the Criminal Code was found to be compatible with the Constitution.

*Supplementary information:*

In Turkey, two kinds of wedding ceremony are generally performed. First, there is an official wedding before the mayor or his or her authorised official. This is registered and the marriage is officially recognised. Second, there is a religious wedding ceremony before an imam or another person. The religious wedding is unofficial and religious marriage has no official force under the law.

*Languages:*

Turkish.



*Identification:* TUR-2002-2-005

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 19.07.2001 / **e)** K.2001/3 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24862, 31.08.2002 / **h)** CODICES (Turkish).

*Keywords of the systematic thesaurus:*

1.5.5.2 **Constitutional Justice** – Decisions – Individual opinions of members – Dissenting opinions.

*Keywords of the alphabetical index:*

Criminal law / Political party, membership, conditions / Political party, member, sentenced / Sentence, execution / Sentence, suspension, effects.

*Headnotes:*

If a person had served his or her sentence prior to the adoption of a new law that has suspended the execution and investigation of that kind of sentence, the effects of the served sentence cease to have effect.

*Summary:*

The Chief Public Prosecutor of the Republic sought an order from the Constitutional Court that the Renaissance Party be given an official warning, since Hasan Celal Güzel, a member of the Renaissance Party, had not been expelled from the Party in spite of his having been sentenced under Article 312.2 of the Turkish Criminal Code.

According to Article 11.b.5 of the Law on Political Parties (no.2820), a person sentenced under Article 312.2 of the Turkish Criminal Code may not be admitted as a member of a political party. Hasan Celal Güzel, a member of the Renaissance Party, was sentenced to imprisonment under Article 312.2 of the Criminal Code and was released on 16 December 2000.

Law no.4616, which came into force on 21 December 2002, suspended the execution of certain sentences provided that those sentences were imposed for acts committed in the form of expressions disseminated through means such as meetings, congresses, conferences, symposiums, open discussions and panels including means of mass communication. The acts for which Hasan Celal Güzel was sentenced are included amongst those for which sentences were suspended. Moreover, according to Article 2 of Law no. 4454 (another law on the suspension of sentences), if a sentence is

suspended and 3 years have passed without being convicted, the first conviction shall be deemed not to have been imposed. Under Law no. 4616, there is no provision that the subsidiary penalties shall not also be suspended. Thus, the subsidiary penalties deriving from the main sentence should also be suspended. If the conditions mentioned in Law no. 4454 exist, “the sentence [including the subsidiary penalties] shall be deemed not to have been imposed”.

For these reasons, that is taking into account the aim of suspended sentences, the indivisibility of such suspensions and the effects of the secondary sentences, Hasan Celal Güzel should be entitled to the benefit of the provisions of Laws nos. 4454 and 4616. Since there was therefore no obstacle to his remaining a member of the party, the request of the Chief Public Prosecutor was dismissed.

Dissenting opinions were handed down by Fulya Kantarcioglu, Ertugrul Ersoy, Tülay Tugcu and Ahmet Akyağın.

*Languages:*

Turkish.

*Identification:* TUR-2002-2-006

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 31.01.2002 / **e)** K.2002/24 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24789, 18.06.2002 / **h)** CODICES (Turkish).

*Keywords of the systematic thesaurus:*

1.3.5.9 **Constitutional Justice** – Jurisdiction – The subject of review – Parliamentary rules.

1.5.5.2 **Constitutional Justice** – Decisions – Individual opinions of members – Dissenting opinions.

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

3.3 **General Principles** – Democracy.

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

3.3.2 **General Principles** – Democracy – Direct democracy.

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

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

3.18 **General Principles** – General interest.

4.5.2.1 **Institutions** – Legislative bodies – Powers – Competences with respect to international agreements.

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

4.5.4.4 **Institutions** – Legislative bodies – Organisation – Committees.

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

*Keywords of the alphabetical index:*

Parliament, member, questions, speech, motions / Parliament, parliamentary group, questions, speech / Parliament, work / Parliament, debate, time-limit / Treaty, international.

*Headnotes:*

It is clear that limitless discussions and questions in the parliament prevent its proper functioning. However, excessive restrictions on questions and motions and on the period of time allotted for speeches before the parliament are unconstitutional.

*Summary:*

Certain amendments were made to the Rules of Procedure of the Turkish Grand National Assembly, containing a number of provisions restricting discussions and questions in the Assembly. A number of deputies (115) brought an action before the Constitutional Court in order to have these provisions annulled.

The amendment made to Article 60 of the Rules of Procedure of the Turkish Grand National Assembly provides that: "While debating draft bills and proposed laws in the Assembly, speeches made on behalf of political party groups, parliamentary commissions and the government are limited to twenty minutes and speeches made by deputies to 10 minutes." Before the amendment, as far as questions and answers were concerned, there were no restrictions. The time limit for questions and answers was restricted by the provisions of the amendment to ten minutes.

The Court recalled that deputies have a responsibility to ensure that political preferences and choices are respected by allowing for broad participation within the parliament in contemporary democracies. Thus, as regards the need to reflect the will of the parliament, the importance of questions and answers cannot be denied. Furthermore, it may be necessary to allow time for thorough questions and answers in the case of some complicated regulations, in order for

deputies not having sufficient information about the subject to understand them. Consequently, when debating draft bills and proposed laws, it is unacceptable to restrict question and answer time to only ten minutes and to prevent deputies from exercising their right to raise questions.

On these grounds, this provision was annulled.

As regards the amendment to Article 81.1.b of the Rules of Procedure, after draft bills and proposed laws have been debated, questions are asked and answers given. The impugned provision stipulates that "no question may be asked with respect to specific articles".

It is clear that limitless debate and endless questions hamper the functioning of the legislature. However, an absolute prohibition on asking questions about specific articles would prevent the deputies from exercising the powers laid down in Article 87 of the Constitution and from carrying out their duties.

The Court concluded that this amendment should also be annulled.

In conformity with Article 81.1.d of the Rules of Procedure as amended, articles concerning the implementation and date of entry into force of draft bills and proposed laws shall not be debated and no motion may be made on that subject.

In some cases it is necessary to debate the date of entry into force of a law or provisions regulating its implementation, since these provisions may be just as important as other articles of the draft bill or proposed law. Some restrictions may apply to such debates. However, an absolute prohibition on holding such debates may be incompatible with the principle of democracy.

The same provision further provided that specific articles of laws on the ratification of treaties concluded with foreign states and international organisations shall not be debated and no motions may be tabled with respect to such matters.

According to Article 90 of the Constitution, "the ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey, shall be subject to adoption by the Turkish Grand National Assembly by a law approving the ratification". This article thus gives the Assembly competence to ratify or not to ratify treaties. Where it is possible to make reservations under a given treaty, the Assembly has the competence to decide on such matters. It is clear that this competence may only be exercised through the holding of debates in the

Assembly. Moreover, the date of entry into force of the treaty may also be examined by the Assembly, by way of debates and motions.

Therefore, the above provision was found to be contrary to the Constitution.

Article 81.4 of the Rules of Procedure as amended provided that “Political party groups, the government and the committee are given five minutes to make their speeches”.

It cannot be denied that political parties play a major role in reflecting the will of the people through the legislative and executive branches of power. Under Article 68 of the Constitution, “political parties are indispensable elements of democratic political life”. Hence, the participation of political parties in the legislative process must be ensured. On the other hand, given the important roles they have to play, it is clear that the participation of the government and of the relevant committee must also be ensured. The Court found that five minutes was not enough time for these bodies to participate in the legislative process and to perform their duties appropriately.

This provision was therefore also annulled.

According to the last sentence of Article 87.1 of the amended Rules of Procedure, the government and the committee may table only one motion and deputies may table at most 3 motions, including motions concerning unconstitutionality.

The Court noted that contemporary democratic life requires that problems and any motions with respect to such problems must be debated between the government and the opposition. It is a requirement of democracy that a balance between these different viewpoints be achieved. The important point in the legislative process is that the real will of the parliament must be implemented after the debates. It is a reality that the motions tabled and debates held help to shape the will of the parliament. Restricting the number of motions that may be tabled limits some possibilities such as including or excluding some provisions, or adding new or even temporary provisions to a given law. If exercising the competences and duties of the members of the Parliament is made excessively difficult, the legislature may not function properly within the meaning of Article 87 of the Constitution.

This provision was therefore also considered to be contrary to the Constitution and was annulled.

Finally, Article 91 of the Rules of Procedure as amended provided that the procedure for debates on basic laws, on the Rules of Procedure and on

reconstruction laws related to the economic and technological development of the country was to be changed in certain ways.

In order to regulate the exercise of the competences and duties of the parliament, the Rules of Procedure must have certain characteristics: in particular, they must respect the requirement of certainty and they must be general, abstract and predictable. The concepts of “basic laws” and “laws on reconstruction that are directly related to economic and technological development” are not clear, and many laws may be included within these concepts. For such laws, the procedure to be followed by the parliament may not be clear in advance. If the procedures applicable to debates and voting are not known beforehand, objectivity will not be guaranteed. Thus, the impugned provision does not have the necessary characteristics mentioned above and may run counter to the principle of the rule of law.

This provision was found to infringe Articles 2 and 87 of the Constitution.

Members Fulya Kantarcioglu, Rüstü Sönmez and Enis Tunga issued dissenting opinions on different provisions.

#### *Languages:*

Turkish.



#### *Identification: TUR-2002-2-007*

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 20.03.2002 / **e)** K.2002/36 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24722, 01.06.2002 / **h)** CODICES (Turkish).

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

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

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

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

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

3.21 **General Principles** – Equality.

4.7.8.2 **Institutions** – Judicial bodies – Ordinary courts – Criminal courts.

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

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

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

*Keywords of the alphabetical index:*

Criminal Procedure, Code / Criminal procedure, guarantees / Indictment, essential elements, differentiation according to level of jurisdiction.

*Headnotes:*

The right of access to the courts as either plaintiff or defendant is guaranteed by the Constitution. Indictments submitted before all courts, without differentiation between the various types of courts, must indicate the nature and cause of the accusation against the accused. In such matters, differentiation between courts is unconstitutional.

*Summary:*

The Bolvadin Magistrates' Court referred to the Constitutional Court the question whether Article 163.4 of the Code of Criminal Procedure was unconstitutional. This provision stipulates that, in indictments prepared by the public prosecutor for cases within the competence of the Magistrates' Court, it is sufficient to indicate the identity of the accused, the law to be applied and the basic evidence in the case.

According to Article 36.1 of the Constitution, everyone has the right of access to the courts either as plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures. The concepts of justice and of the determination of a criminal charge are realised in practice by means of an indictment, defence and judgment. These three elements cannot be separated from each other. During the process of determining a criminal charge, it is beyond question that an accused must have an effective right of defence. In order for an accused to have a possibility of eliminating the suspicions raised against him, the right of defence must be able to be fully used. When the accused does not know the accusations against him, he is unable to defend himself sufficiently.

Article 6.3 ECHR provides that everyone charged with a criminal offence has the right to be informed promptly of the nature and cause of the accusation against him. Under the challenged provision, it is not necessary, in indictments submitted to the Magistrates' Court, to indicate the precise allegation against the accused and its legal nature, whereas indictments submitted to other criminal courts must include the precise accusation against accused, the legal elements of the alleged offence and the evidence. According to Article 13 of the Constitution, however, "fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence". The relevant article, Article 36 of the Constitution, does not contain any restrictions on the rights of the defence. For those reasons, the provision subject to review in the present case was annulled.

*Languages:*

Turkish.





# Ukraine

## Constitutional Court

### Important decisions

*Identification:* UKR-2002-2-008

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 07.05.2002 / **e)** 8-rp/2002 / **f)** Official interpretation of the provisions of Article 124.2 and 124.3 of the Constitution (case on jurisdiction over acts on appointment or dismissal of officials) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 20/2002 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

- 1.3 **Constitutional Justice** – Jurisdiction.
- 3.13 **General Principles** – Legality.
- 4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.
- 4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
- 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
- 5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Right of access to the public service.

*Keywords of the alphabetical index:*

Official, dismissal, grounds / Official, appointment / Judicial protection.

*Headnotes:*

The provision that the jurisdiction of the courts extends to all legal relations that arise in the state means that the jurisdiction of the Constitutional Court and courts of general jurisdiction shall include, in accordance with their respective competences, the settlement of issues of a legal nature, and in particular those arising in connection with the appointment and dismissal of individual officials by the President or the parliament (*Verkhovna Rada*), Article 124.2 of the Constitution).

The fact that a decision may be handed down by the Constitutional Court concerning the compliance with the Constitution of acts issued by the President and legal acts of the parliament does not rule out the

possibility of appealing to a court of general jurisdiction as to the legality of acts issued by the President or of parliamentary decrees of an individual nature on appointments to office or dismissals from office, except with respect to provisions of those acts having their basis in the constitutional and political responsibility of officials (Articles 115, 122, etc. of the Constitution).

Proceedings concerning the constitutionality of acts issued by the President or the parliament on the appointment or dismissal of officials are conducted by the Constitutional Court, in the form of constitutional proceedings, but, as to the legality of such acts, proceedings are conducted by courts of general jurisdiction in the form of the appropriate judicial proceedings (Article 124.2 of the Constitution).

The rules governing jurisdiction over such cases and the particularities of their examination by the courts at the relevant level are to be determined by procedural laws.

*Summary:*

A subject of the right to present a constitutional petition filed a petition requesting an official interpretation of the provisions contained in Article 124.2 and 124.3 of the Constitution, and in particular, whether courts of general jurisdiction have the right to commence proceedings and examine on their merits claims on recovering employment or on changes in the wording of the dismissal of members of the Cabinet of Ministers, heads of other central executive authorities and individuals who, in conformity with the Constitution, shall be appointed to office and dismissed from office by the President or the parliament.

The Court reasoned as follows. According to the Constitution, citizens are equal before the law (Article 24.1 of the Constitution) and enjoy the equal right of access to the civil service (Article 38.2 of the Constitution). Citizens are guaranteed protection from unlawful dismissal (Article 43.6 of the Constitution). Everyone is guaranteed the right to challenge in court the decisions, actions or omissions of bodies of state power, bodies of local self-government, officials and officers (Article 55.2 of the Constitution). Justice in Ukraine is administered exclusively by the courts, in the form appropriate to the case, including constitutional proceedings (Article 124 of the Constitution). Therefore, the fact that certain officials are appointed to or dismissed from office by the President or the parliament may not restrict their right to judicial protection.

The Constitution regulates the question of the political responsibility of the Cabinet of Ministers. The termination of the office of members of the Cabinet of Ministers or heads of other central executive bodies by the President, as stipulated in Article 106.1.10 of the Constitution, or the resignation of the Cabinet of Ministers as a result of the adoption of a resolution of no confidence as per Article 87 of the Constitution, mean that the relevant evaluation of the activities of the members of the Cabinet of Ministers and heads of other central executive authorities may both concern the legality of their activity and be political in nature. At the same time, the fact that the office of such individuals is terminated may create legal relations that are derived from political responsibility. Where issues of law arise, the said individuals shall not be deprived of the right to appeal to a court against certain provisions of the relevant acts, in particular as to changes to dates, the wording of dismissals, etc.

The legal regulation by the Constitution and special laws of the status, in particular, of the Prime Minister, members of the Cabinet of Ministers and other officials (Article 9.1 of the Law on Civil Service) means that they may be covered by the provisions of other laws with respect to relations that are not regulated by special laws.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2002-2-009

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 21.05.2002 / **e)** 9-rp/2002 / **f)** Compliance of the provisions of the Law on the High Council of Justice with the Constitution (case on the Law on the High Council of Justice) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 22/2002 / **h)** CODICES (Ukrainian).

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

3.4 **General Principles** – Separation of powers.  
 4.7.4.1.5.2 **Institutions** – Judicial bodies – Organisation – Members – Status – Discipline.  
 4.7.4.3.4 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel – Status.

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

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

Judge, aptitude, requirement / Judge, dismissal, procedure / Prosecutor, disciplinary responsibility / Oath, infringement.

#### *Headnotes:*

The provisions of the Law on the High Council of Justice, under which the High Council of Justice is a legal entity and has its own staff, as well as the provisions under which the High Council of Justice examines and decides on the dismissal of judges, and may impose penalties on them other than penalties provided for by law, including disciplinary sanctions against prosecutors, are in compliance with the Constitution of Ukraine.

The provisions of the Law whereby a national deputy of Ukraine and the Authorised Human Rights Representative of the parliament (*Verkhovna Rada*) may forward to the High Council of Justice a submission seeking the dismissal of a judge, and the provisions whereby such submissions may constitute sufficient grounds for opening disciplinary proceedings, are not in compliance with the Constitution of Ukraine.

The High Council of Justice cannot address a decision on the inaptitude of a judge to the authorities that elected the judge unless the decision has been made on the basis of an application for the judge's dismissal.

#### *Summary:*

The definition of the High Council of Justice as a state organ that, under the law, is a legal entity and has its own staff, is not contrary to the Constitution of Ukraine.

The High Council of Justice is not itself authorised to initiate, commence or perform disciplinary proceedings against prosecutors. It examines only appeals against decisions of other bodies initiating disciplinary proceedings against prosecutors.

Where an *ex officio* member of the High Council of Justice breaks his or her oath, the High Council of Justice shall make and communicate to the authority that elected or nominated such an individual its decision on the expediency of the continuation of the term of office of that person, since the Council cannot bring such officials to justice for the infringement of their oath.

The acquaintance of a member of the High Council of Justice, acting on the authorisation of the Chairman or Deputy Chairman of the High Council of Justice, with the findings of pending cases on the disciplinary responsibility of judges and prosecutors or the dismissal of judges for the infringement of their oath does not amount to a review of such cases on the merits and does not interfere with the process of administering justice. The law merely regulates the right of the High Council of Justice to exercise its constitutional authorities.

The possibility, on the one hand, for a people's deputy of Ukraine and the Authorised Human Rights Representative to apply to the High Council of Justice to open disciplinary proceedings against judges of the Supreme Court and judges of high-level specialised courts, and on the other hand, to propose that an application for the dismissal of such judges be admitted, violate the independence and immunity of judges and may become a reason for influence on judges that contradicts Article 126 of the Constitution.

The provision of the Law according to which the High Council of Justice may, on its own initiative, lodge submissions concerning the dismissal of judges from office with the authority that nominated or elected them, gives effect to the constitutional competences of the High Council of Justice and is consistent with the Constitution.

The provision of the Law according to which the High Council of Justice shall decide on breaches by judges and prosecutors of the requirements as to inaptitude is a constitutional competence of the Council. The lodging by the High Council of Justice of submissions on the dismissal of judges from office on the said basis gives effect to and implements the provisions of the Constitution as to the basis and procedures for deciding on questions as to the dismissal of judges from office in cases of breaches of the requirements as to inaptitude by such judges.

The provision of the Law according to which the High Council of Justice may impose sanctions on judges of the Supreme Court and judges of the higher specialised courts in the form of lowering the class of judges to which they belong based on their qualifications, or deciding on their inaptitude for office, is an exclusive constitutional authority of the High Council of Justice. Such decisions are grounds for lodging submissions to the parliament (*Verkhovna Rada*) on the dismissal of judges for the infringement of their oath. The adoption of decisions by the High Council of Justice on inaptitude of a judge for office does not contradict the Constitution.

The provision of the Law that the High Council of Justice may refer to the authority which elected the judge its decision on the inaptitude of a judge for such office extends the constitutional grounds for dismissal of judges from office and thus fails to comply with the Constitution.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2002-2-010

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 29.05.2002 / **e)** 10-rp/2002 / **f)** Official Interpretation of the provision of Article 49.3 of the Constitution “state and communal health protection institutions provide medical care free of charge” (case on free of charge medical care) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 23/2002 / **h)** CODICES (Ukrainian).

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

2.3.7 **Sources of Constitutional Law** – Techniques of review – Literal interpretation.  
3.18 **General Principles** – General interest.  
5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

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

Medical care, free, definition / Health, protection / Insurance, health, contribution.

#### *Headnotes:*

Article 49.3 of the Constitution, which provides that “state and communal health protection institutions provide medical care free of charge”, shall be understood to mean that state and communal health protection institutions shall provide medical care to every citizen irrespective of its scope and without prior, immediate or subsequent payment for such care.

The definition of the term “medical care”, the conditions of the introduction of medical insurance (including state medical insurance), the creation and use of voluntary medical funds, as well as the

procedures for granting medical services beyond medical care on a paid basis in state and public health institutions, and the list of such services, are to be laid down by law.

### *Summary:*

The term “free of charge” (as used in the text of Article 49 of the Constitution) has no independent meaning. Its content is determined by its context or by the logical interrelation between the expression and the words with which it is used. In the phrase “provide medical care free of charge” the last words, in the light of the whole of Article 49 of the Constitution, mean that an individual who receives medical care in state and public health institutions is not obliged to reimburse its cost either in the form of payments or in any other form, regardless of when such medical care is provided.

The content of the term “medical care” was specified by the Constitutional Court on the basis of grammatical analysis and through a study of relevant enactments. Linguistically, the word “care” means assistance, support (physical, material, moral, etc.) of something; protection of somebody, rescuing of someone in trouble; exercising a certain influence, leading to the necessary results, bringing ease, benefit, recovery; activities oriented towards the realisation of someone's demands or needs for something under individual circumstances. Legally, the term “medical care” is used in the preamble as well as Articles 4, 16, 25, 33, 37, 52, 58, 60 and 78 of the Legislative Principles on Health Protection (“the Principles”). Articles 33, 35, 58, 67, 68 and 77 of the Principles define the integral components of medical care (prompt, emergency, primary, specialised, strictly specialised etc.) with the relevant definitions given in special glossaries of definitions and terms of the World Health Organisation, recognised by the Principles (Article 3). The phrase “medical care free of charge” means that such assistance provided in state or public health institutions cannot give rise to a charge imposed on citizens in any form (cash or other): whether in the form of “voluntary contributions” to various medical funds or obligatory insurance payments (contributions), etc.

The Court held that Article 49.1 of the Constitution secures the right to medical insurance, that is, voluntary, rather than compulsory, medical insurance. The introduction of state medical insurance will not contradict the constitutional provision that “state and public health institutions provide medical care free of charge” if (and only if) the parties subject to such compulsory insurance payments or contributions are organisations, institutions, enterprises, other business entities, state foundations, etc. However, medical services beyond medical care (“secondary medical

services”, “paramedical services” under the terminology of the World Health Organisation) may be provided for citizens in the said institutions on a paid basis.

The Court considered that the provision of medical care free of charge by state and public health institutions did not rule out financing of this sector through the development of extra-budgetary mechanisms for raising additional funds, including the establishment of hospital cash departments (unions, foundations).

### *Languages:*

Ukrainian.



### *Identification: UKR-2002-2-011*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 13.06.2002 / **e)** 11-rp/2002 / **f)** Official interpretation of the first paragraph of Article 22.22.3 of the Law on Business Income Tax (case on the financing servicemen's residences) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 26/2002 / **h)** CODICES (Ukrainian).

### *Keywords of the systematic thesaurus:*

4.10.7 **Institutions** – Public finances – Taxation.  
5.4.12 **Fundamental Rights** – Economic, social and cultural rights – Right to housing.  
5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

### *Keywords of the alphabetical index:*

Military, housing, right, conditions / Residence / Taxation.

### *Headnotes:*

The provisions of the first paragraph of Article 22.22.3 of the Law on Business Income Tax concern only servicemen who have been discharged, have retired owing to ill health, age or seniority or have left service due to staff reduction measures.

*Summary:*

Analysis of Article 22 of the Law on Business Income Tax shows that the expression “participants in military operations in Afghanistan and armed conflicts in foreign countries” is not used to clarify (and thereby restrict) the meaning of the word “servicemen”. Thus, the term “servicemen” includes not only participants meeting this description but also other citizens having exercised similar duties.

The provision of Article 22 of the Law referring to persons “registered on the apartment register at their place of residence” has a clarificatory nature (and thus limits the scope of application of the article) and covers only “servicemen who have been discharged, have retired owing to ill health, age or seniority or have left service due to staff reduction measures”. The amendment of Article 22 of the Law, dated 19 October 1999, was intended to widen the circle of individuals covered by this Law, rather than to restrict the rights of servicemen to obtain housing for the amount of 1.5% of the business income tax charged to businesses as specified in the Law.

The state provides social protection for citizens serving in the Armed Forces of Ukraine. Housing relations in Ukraine, the procedure for registering citizens who need better housing, as well as the procedure for obtaining housing space, are regulated by the Housing Code of the Ukrainian SSR. According to this Code, citizens who need better housing may be registered at a place other than their place of residence. The laws in force on the procedure for providing servicemen of the Armed Forces of Ukraine with housing do not require them to be registered on the apartment register at their place of residence.

*Languages:*

Ukrainian.

*Identification: UKR-2002-2-012*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 18.06.2002 / **e)** 12-rp/2002 / **f)** Official interpretation of the provisions of Article 140.1 of the Constitution (case on association of territorial communities) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 26/2002 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Local self-government, definition / Territorial self-government, association and separation, regulation by law.

*Headnotes:*

The provisions of Article 140.1 of the Constitution set forth the following definitions:

- local self-government: “the right of a territorial community ... to independently resolve issues of local character within the limits of the Constitution and the laws of Ukraine”;
- territorial community: “residents of a village or a voluntary association of residents of several villages into one village community, residents of a settlement, and of a city”.

The above provisions establish no procedures for the association or separation of territorial communities.

The organisation of local self-government is not governed by the Constitution. In accordance with Article 146 of the Constitution, conditions and procedures for the association or separation of territorial communities, villages, settlements or cities, are laid down by law.

*Summary:*

The provisions of Article 140.1 of the Constitution define local self-government as the right of territorial communities – the primary subject of local self-government, the main holder of its functions and authorities – to resolve independently issues of a local character, within the limits of the Constitution

and the law, and define the term “territorial community” as the “residents of a village or a voluntary association of residents of several villages into one village community, residents of a settlement, and of a city”. They lay down no procedure for the association or separation of territorial communities.

Having established in Articles 140, 141, 142, 143, 144 and 145 of the Constitution the fundamental principles of the functioning of local self-government, its authorities and its material and financial basis, etc., the Constitution provides that other issues concerning the organisation of local self-government and the formation, operation and responsibilities of local self-government bodies are to be determined by law (Article 146 of the Constitution).

The Court proceeded from the fact that decisions on the issues of association or separation of territorial communities not defined in the provisions of the Constitution shall be made as determined by law. The association or separation of territorial communities, proceeding from the concept of “territorial authority” defined in Article 140.1 of the Constitution, shall be decided on taking into account the relevant declaration of will of the members of these territorial communities, which shall be expressed in conformity with the law.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2002-2-013

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 02.07.2002 / **e)** 13-rp/2002 / **f)** Official interpretation of the provisions of Article 12.1.1.1 of the Economic Procedure Code (case on appeals against acts in economic courts) / **g)** *Ophitsynyi Visnyk Ukrayiny* (Official Gazette), 32/2002 / **h)** CODICES (Ukrainian).

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

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

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

Act, invalidation / Commercial court.

#### *Headnotes:*

Financial courts have jurisdiction over cases concerning the invalidation of both normative and non-normative acts irrespective of the date of their adoption.

#### *Summary:*

The provisions of Article 58 of the Constitution on non-retroactivity of laws and other normative legal acts could not apply to Article 12.1.1.1 of the Code of Financial Procedure, which extended financial courts' jurisdiction over the cases, in particular, concerning disputes on invalidation of normative acts.

Under the Constitution, courts of general jurisdiction have competence over disputes on the validity of both normative and non-normative acts. As the provisions of the Constitution are directly applicable, so far amending Article 12 of the Code of Financial Procedure upon taking effect of the Constitution cannot be the ground for refusal in the examination of the case.

Financial courts being specialised courts belonging to the courts of general jurisdiction, shall examine the cases on invalidation of the effective normative and non-normative acts, irrespective of the date of their adoption.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2002-2-014

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 04.07.2002 / **e)** 14-rp/2002 / **f)** Compliance of Articles 3.1.1 and 4.6 of the Law “On the status of people's deputy of Ukraine” with the Constitution (case on compatibility of the offices of people's deputy of Ukraine and member of the Cabinet of Ministers of Ukraine) / **g)** *Ophitsynyi Visnyk Ukrayiny* (Official Gazette), 28/2002 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

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

4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.

*Keywords of the alphabetical index:*

Parliament, member, incompatibility / Parliament, member, work on permanent basis, definition.

*Headnotes:*

Article 3.1.1 of the Law on the Status of People's Deputies, providing that members of parliament shall have no right to be members of the Cabinet of Ministers or heads of central executive authorities, and Article 4.6 of the Law, providing that the powers of people's deputies shall be prematurely terminated in cases of infringement of the requirements laid down in Article 3.1 of the Law, are in compliance with the Constitution.

*Summary:*

According to Article 78.2 of the Constitution, people's deputies of Ukraine shall not hold another representative mandate or be members of the civil service; rules concerning the incompatibility of the office of a deputy with other types of activity are to be laid down by law (Article 78.3 of the Constitution).

Based on the provisions of Article 78 of the Constitution, Article 3.1 of the Law on the Status of Peoples Deputies ("the Law") laid down the list of activities that cannot be combined with the office of deputy.

Therefore, based on the provisions of Article 78.3 of the Constitution, the Court concluded that Article 3.1.1 of the Law was not contrary to the Constitution, since the prohibition on holding the position of people's deputy concurrently with a position as a member of the Cabinet of Ministers was laid down by law. It followed that the provisions of Article 4.6 of the Law were also constitutional, since, in conformity with Article 81.4 of the Constitution, in the event that a rule concerning the incompatibility of the mandate of deputy with other types of activity is not fulfilled, the authorities of the people's deputy are terminated prior to the expiration of his or her term on the basis of the law pursuant to a court decision.

Article 78.1 of the Constitution provides that people's deputies of Ukraine exercise their authority on a permanent basis: that is, throughout the deputy's

time in office, his or her activities in the parliament (*Verkhovna Rada*) shall be deemed professional work on a permanent basis. Article 120.1 of the Constitution states that members of the Cabinet of Ministers do not have the right to combine their official activity with other work, except teaching, scholarly and creative activity outside of working hours. The legal opinion of the Constitutional Court as to the meaning of the phrase "on a permanent basis" is affirmed in a number of decisions of the Court. This opinion is that any work which is to be performed "on a permanent basis" cannot be combined with the holding of an individual office with a state or local self-government authority that is also to be carried out on a permanent basis, in particular a position as the head of an executive authority. The combination of the office of deputy with activity as a local council member holding no managing office in the relevant council, where these competences are not exercised on a permanent basis, does not contradict the Constitution.

The systematic analysis of the Constitution shows that the Constitution does not allow for the office of people's deputy to be combined with the official activities of members of the Cabinet of Ministers, whether or not the latter are considered to be a category of civil servants.

*Languages:*

Ukrainian.

*Identification: UKR-2002-2-015*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 09.07.2002 / **e)** 15-rp/2002 / **f)** Official interpretation of Article 124.2 of the Constitution (case on prejudicial settlement of disputes) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 28/2002 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Dispute, settlement, out-of-court, compulsory / Judicial protection, right.

*Headnotes:*

The right of individuals of access to courts for settlement of disputes cannot be limited by the law or other enactments. The establishment by law, on the one hand, of a procedure for the out-of-court settlement of disputes or, on the other hand, of a contract for the declaration of the intent of the subjects of legal relations, is not a limitation of the jurisdiction of courts and the right to judicial protection.

*Summary:*

In financial and civil proceedings, courts of general jurisdiction apply procedural rules that provide for the compulsory out-of-court settlement of disputes. Compulsory out-of-court settlement of disputes, in the opinion of the applicant, violated his right to judicial protection.

Article 124.2 of the Constitution provides that "the jurisdiction of the courts extends to all legal relations that arise in the State". It therefore follows that everyone that is a party to a dispute may enjoy access to the courts. The above article and other provisions of the Constitution contain no clause providing that disputes will be admissible in the courts only following out-of-court settlement procedures. Access to judicial protection cannot be made dependent by the law or other legal acts on the prior recourse by the subject of legal relations to other means of legal protection, including out-of-court settlement of disputes.

Requiring the compulsory out-of-court settlement of disputes rules out the possibility of the claim being accepted for examination and adjudication by the courts. This violates the right of the individual to judicial protection. The possibility of recourse to out-of-court settlement of a dispute may, however, be an additional means of legal protection. This does not contradict the principle of the administration of justice exclusively by the courts. Proceeding from the need to improve the level of judicial protection, the state may encourage the settlement of legal disputes in out-of-court procedures; however, such practices are the right rather than the obligation of the individual demanding judicial protection. The right to judicial protection does not deprive the subjects of legal relations of the opportunity of having recourse to out-of-court settlement of

disputes. Such settlements may be made both on the basis of civil law agreements and in accordance with the declaration of intent of the parties.

The choice of a given means of legal protection, including out-of-court settlement of disputes, is the right rather than the obligation of the individual, who proceeds voluntarily, according to his or her own interests.

*Languages:*

Ukrainian.





# United Kingdom

## House of Lords

### Introduction

As has been noted previously, the United Kingdom does not have a specific constitutional court. Issues of constitutional significance, such as those relating to the Human Rights Act 1998 or the United Kingdom's obligations under international law can arise and are dealt with in the normal courts. In relation to the interpretation of certain commonwealth countries' constitutions and with respect to devolution issues (concerning the relationship of power between central government and various authorities in Scotland, Wales and Northern Ireland) the judicial board of the Privy Council represents the highest court in the jurisdiction. In relation to all other constitutional issues the judicial committee of the House of Lords is the highest court. Many cases of constitutional importance are also dealt with in lower courts, particularly the Court of Appeal, and also often in the High Court – the Court of first instance for judicial review. The précis we include in these bulletins, therefore, can come from a selection of different courts with varying levels of authority. Cases from courts below the House of Lords are sometimes selected because of their constitutional significance or interest, and because it is rare for a case to reach the House of Lords. If these cases are subsequently reviewed by a higher court we will notify the reader of this; otherwise they represent the law in respect of the matters they deal with.

In this *Bulletin* we have chosen to include a case from the Special Immigration Appeals Commission (SIAC), a specialist tribunal dealing with, amongst other matters, constitutional challenges to certain legislation or acts which the normal courts are unable to determine due to the sensitive nature of the matters involved. The decision summarised below ([GBR-2002-2-004]) deals with the United Kingdom's purported derogation from Article 5 ECHR with respect to the detention of foreign nationals suspected of involvement in international terrorism, in the aftermath of the events of 11 September 2001. It should be noted, however, that SIAC is a tribunal with the same powers as the High Court and parties can appeal against its decisions to the Court of Appeal.

### Important decisions

*Identification:* GBR-2002-2-002

**a)** United Kingdom / **b)** House of Lords / **c)** / **d)** 16.05.2002 / **e)** / **f)** R. (on the application of Morgan Grenfell & Co Ltd) v. Special Commissioner of Income Tax / **g)** [2002] *United Kingdom House of Lords* 21 / **h)** [2002] *2 Weekly Law Reports* 1299; CODICES (English).

*Keywords of the systematic thesaurus:*

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.1.2.2 **Sources of Constitutional Law** – Categories – Unwritten rules – General principles of law.
- 2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
- 5.3.13.28 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to counsel.
- 5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.
- 5.3.34.1 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Correspondence.

*Keywords of the alphabetical index:*

Lawyer, professional secrecy / Legal professional privilege / Tax, legal advice.

*Headnotes:*

An Act of Parliament purportedly entitling a tax inspector to demand to see a taxpayer's legal advice could not be so interpreted. Legal professional privilege was a fundamental human right in English common law (and under Article 8 ECHR) and unless a statute expressly or by necessary implication overrode such a right the court would not interpret it as doing so.

*Summary:*

MG openly marketed a tax avoidance scheme. An inspector of taxes asked to see documents relating to the legal advice MG had received from a senior barrister and from solicitors about the legality of the scheme. MG refused claiming the documents were protected by legal professional privilege. A Special Commissioner of taxes consented to the issue by the

inspector of a notice under Section 20.1 of the Taxes Management Act 1970 (“the Act”) requiring MG to deliver to the inspector documents in its possession that, in the inspector’s opinion, contained information relevant to its tax liability.

MG claimed judicial review of the Special Commissioner’s decision, asking the Court to quash the notice, the Court refused to quash the notice and the Court of Appeal upheld its decision. MG’s appeal to the judicial committee of the House of Lords was allowed for the following reasons.

Legal professional privilege is a fundamental human right long established in the English common law. It protects the confidentiality of legal advice and correspondence between lawyers and their clients. It was a necessary corollary of the right to obtain legal advice. It has also been held to be part of the right to privacy guaranteed by Article 8 ECHR.

The courts will construe general words in a statute, although literally capable of an unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so. An intention to override fundamental rights must be expressly stated in the statute or it must be the necessary implication of the words of the statute (the word “necessary” denoting more than the word “reasonably”).

The right to legal professional privilege is not expressly overridden by the words of the Act, nor is it the necessary implication of those words that the right is overridden. The argument advanced before the Court that legal professional privilege remains in respect of documents in the possession of the lawyer was irrational: the privilege was a single privilege for the benefit of the client, whether the relevant documents were in his hands or his lawyers.

The House of Lords therefore quashed the notice.

#### *Languages:*

English.



#### *Identification:* GBR-2002-2-003

**a)** United Kingdom / **b)** Court of Appeal / **c)** / **d)** 05.07.2002 / **e)** / **f)** Secretary of State for the Home Department v. Z. / **g)** [2002] EWCA Civ 952 / **h)**.

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

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.  
 2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.  
 3.19 **General Principles** – Margin of appreciation.  
 5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.  
 5.2.2.11 **Fundamental Rights** – Equality – Criteria of distinction – Sexual orientation.  
 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.  
 5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.  
 5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.  
 5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.  
 5.3.43 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

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

Expulsion / Homosexual, orientation / Immigration, procedure / Persecution, risk.

#### *Headnotes:*

The expulsion of a homosexual to a country where living the sort of sexual life which he would wish to live was subjected to various social and statutory inhibitions does not necessarily involve a breach of the homosexual’s rights under either Article 3 or 8 ECHR. However, it might do. It was a matter of judgment on the facts of each case.

#### *Summary:*

Z. had been in a homosexual relationship in Zimbabwe. Zimbabwe had laws which proscribed sodomy. He came to the United Kingdom. The Home Secretary sought to expel him. Z. claimed asylum. That claim was rejected. Z. also claimed that his return by the Home Secretary would infringe his rights under the European Convention on Human Rights.

This was accepted by the Immigration Appeal Tribunal. That Tribunal held that the European Court of Human Rights had ruled in Application no. 15070/89, *Modinos v. Cyprus* that the mere existence of laws proscribing sodomy even if not enforced always amounted to a breach of the right to private life of the persons concerned. The Home Secretary appealed to the Court of Appeal. The Court of Appeal held that this was a misreading of *Modinos*: it was necessary for the Tribunal to go further and examine whether there would be any possibility of prosecution and also to examine whether, why and in what circumstances any criminal investigation of Z's private life falling short of prosecution might be embarked upon by the Zimbabwean authorities.

Both parties sought to persuade the Court of Appeal to give general guidance to the Immigration Appeal Tribunal. Z. submitted that any inhibition of a person's private sex life amounted to conduct prohibited by Article 3 ECHR and that to expel a person to a country where he would be subjected to such treatment was itself a contravention of Z's human rights. The Court of Appeal rejected this stating that it was plain from the case law that absolute protection is not given against all interferences with private and family life. The European Court of Human Rights had indicated that the separation of a man from his family and his expulsion to another country would not normally involve inhuman or degrading treatment which is absolutely forbidden. It seemed to the Court that if this did not involve inhuman or degrading treatment then neither would the separation of a gay man from his partner. The Court did not consider that the mere existence of a law in the Destination State prohibiting particular types of sexual conduct in private amongst adults had the automatic result that an Expelling State which wished to expel a person who wished to indulge in that type of sexual conduct was breaching his rights under Article 3 ECHR.

Z. made alternative submissions under Article 8 ECHR. He submitted that any expulsion which deprived someone of his right to live a normal life with respect to his sexual identity had deprived him of dignity and in practice could not be justified. The Court held that since there was under Article 3 ECHR a class of cases where public policy considerations either never, or very seldom, justified an expulsion, it was better to work out the application of this concept in the context of Article 3 ECHR. Article 8 ECHR was manifestly supposed to involve a consideration of Article 8.2 ECHR. To create a subset of cases where Article 8.2 ECHR did not fall to be considered was not the best way of addressing the problem of flagrant breaches of Article 8 ECHR rights in the Destination State.

The Home Secretary submitted that the consequences of any expulsion would be too remote to attract the expelling country's liability. The Court rejected this stating that all causation and human rights questions were very fact sensitive and that it would be wrong to pronounce on the matter in the abstract. Similarly the Court refused to accept Z's submission that no immigration policy considerations could justify the return of an individual to a country where his expression of his sexual desires with another adult in private is in any way inhibited. The Court stated this was a difficult area. It had in mind States which had and enforced laws which inhibited someone from marrying or from founding a family of more than one child – for instance laws which prohibited marriages between persons of different races or laws which place at a severe disadvantage those who have more than one child. The Court considered that the law should be developed on a case-by-case basis in the light of the facts of a particular case rather than to rule on points in the abstract.

#### *Cross-references:*

- *Modinos v. Cyprus*, 22.04.1993, (1993) 16 E.H.R.R. 485.

#### *Languages:*

English.



#### *Identification:* GBR-2002-2-004

**a)** United Kingdom / **b)** Special Immigration Appeals Commission / **c)** / **d)** 30.07.2002 / **e)** / **f)** A. and others v. Secretary of State for the Home Department / **g)** SC/1-7/2002 / **h)**.

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

1.3.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – International treaties.  
 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.  
 2.1.1.4.7 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Economic, Social and Cultural Rights of 1966.

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

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

3.15 **General Principles** – Publication of laws.

4.7.12 **Institutions** – Judicial bodies – Special courts.

4.18 **Institutions** – State of emergency and emergency powers.

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

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

5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.

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

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.

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

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

Detention, without trial / Detention, unlawful / Derogation, European Convention on Human Rights / Evidence, undisclosed / Immigration / Terrorism.

#### *Headnotes:*

The Anti-terrorism, Crime and Security Act 2001 (the “2001 Act”) authorising the indefinite detention without trial of foreign nationals who were suspected of being international terrorists was incompatible with the Human Rights Act 1998 (the “HRA”), and the detention of nine foreign nationals under the Act was unlawful, because the powers were discriminatory and breached Article 14 ECHR.

Whilst the United Kingdom government had established that a state of emergency existed and were entitled to derogate from Article 5 ECHR for the purposes of detaining international terrorist suspects who posed a real threat to the safety of the nation, the HRA required the 2001 Act be given a restrictive interpretation.

#### *Summary:*

The 2001 Act was introduced following the terrorist attacks on the United States of America on 11 September 2001. It allowed for the Secretary of State for the Home Department (“the Minister”) to certify that an individual was a suspected international terrorist and then detain them without trial under immigration powers. Only non-British nationals could be detained this way, because the detention was under immigration legislation. However, in order to overcome the problem caused by the decision of the European Court of Human Rights in Application no. 22414/93, *Chahal v. United Kingdom*, that detention under immigration powers was only legitimate pursuant to Article 5.1.f ECHR where action was being taken with a view to deportation, the United Kingdom government derogated from Article 5 ECHR. The terms of the government’s derogation were contained in a *note verbale* addressed to the Council of Europe. Under the HRA it was also necessary for the Minister to make an order authorising derogation. This was done in the same terms as the *note verbale* (see Venice Commission *Bulletin* 2001/3, p. 551).

The 2001 Act also specified that any challenge to the legality of the Act or the detentions pursuant to it must take place in the Special Immigration Appeals Commission (“SIAC”) and not the normal courts. SIAC was entitled to receive and consider “closed material” (i.e. evidence not open to the public, the appellants or their legal representatives).

The nine appellants submitted that their detention and the 2001 Act breached Article 5 ECHR because there existed no public emergency threatening the life of the United Kingdom, that no other signatory to the European Convention on Human Rights had derogated from any obligation in it because of terrorist activities, and that in any event even if there was a public emergency the measures taken were more than were strictly necessary in the circumstances. They further alleged that the United Kingdom government’s derogation was limited to the terms of the *note verbale* and thus only derogated from Article 5 ECHR and that the 2001 Act was incompatible with Articles 3, 6 and 14 ECHR.

The Commission held that the government was justified in finding that there was a public emergency threatening the life of the nation. The European Court of Human Rights had determined that such a state existed where an exceptional situation of crises or emergency affects the whole population and constitutes a threat to the organised life of the community of which the state is composed. After 11 September such a threat existed in the United Kingdom. The authorities could not be expected to wait until they were aware of an imminent

attack before taking necessary steps to avoid it. A real risk that an attack would take place unless measures were taken to prevent it was enough to demonstrate that a public emergency existed. The United Kingdom was a prime target for those behind the attacks on 11 September, second only to the United States. If a similar attack took place on the United Kingdom it could take place without warning and threaten the life of the nation. The question whether other signatories of the European Convention on Human Rights had derogated from the European Convention on Human Rights was not material: the United Kingdom was under a greater threat from those responsible for the attacks on 11 September than other European nations.

The Commission did not find the measures taken were more than were strictly necessary. The fact that less intrusive measures might have had the same impact was not determinative. The Commission rejected the argument that the powers of detention went too far because the definition of terrorist under the 2001 Act was too wide: the HRA required a narrow definition, only those associated with al-Qaeda could be detained.

The diplomatic communications provided for in Article 15.3 ECHR and Article 4.3 of the International Covenant of Civil and Political Rights were directory not mandatory. According to the United Kingdom international law obligations under the European Convention on Human Rights or the International Covenant of Civil and Political Rights the derogation was not limited to the terms of the *note verbale* and thus only to Article 5 ECHR.

However, in national law the HRA did limit any derogation to the terms of the government's order. Hence, the derogation from the Convention was limited to Article 5 ECHR, and the appellants could succeed if they were able to demonstrate a breach of any of the other rights under the European Convention on Human Rights.

The appellants failed to show any breach of Articles 3 and 6 ECHR. However, the Commission did find a breach of Article 14 ECHR. The 2001 Act discriminated against foreign nationals. British nationals who were suspected of international terrorism could not be detained under its provisions. Such discrimination was not rational or justifiable: a provision entitling the Minister to detain suspected international terrorists should extend to all suspected international terrorists regardless of nationality.

The Commission therefore allowed the appellant's appeal and made an order declaring the impugned sections of the 2001 Act incompatible with Article 14 ECHR.

#### *Cross-references:*

- *Chahal v. United Kingdom*, 15.11.1996, (1997) 23 E.H.R.R. 413, *Bulletin* 1996/3 [ECH-1996-3-015].

#### *Languages:*

English.



# United States of America Supreme Court

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## Important decisions

*Identification:* USA-2002-2-005

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 24.06.2002 / **e)** 01-488 / **f)** Ring v. Arizona / **g)** 122 *Supreme Court Reporter* 2428 (2002) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.10 **General Principles** – Certainty of the law.  
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.  
5.3.13.9 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial by jury.

*Keywords of the alphabetical index:*

Circumstance, aggravating / Criminal proceeding, guarantees / Death penalty / Murder / Robbery, armed / Sentencing, discretion.

*Headnotes:*

Under the right to a jury trial guaranteed to criminal defendants in the Sixth Amendment to the Constitution, a defendant charged with an offence punishable by death, like any other criminal defendant, is entitled to a jury determination of any fact which the legislature has determined might result in an elevation of the maximum punishment.

Under the Sixth Amendment, the right to a jury trial in criminal cases prohibits a procedure that allows a sentencing judge, acting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.

*Summary:*

The laws of the State of Arizona prohibit imposition of the death penalty unless at least one statutorily-defined “aggravating circumstance” is found to exist beyond a reasonable doubt. Following a state court criminal proceeding in which the jury has found a

defendant guilty of a crime punishable by death, the statutory scheme requires the judge to conduct a separate sentencing hearing to determine the presence or absence of certain statutorily-enumerated aggravating or mitigating circumstances. The applicable statute requires the judge, acting alone without the jury, to make these factual determinations. The judge is authorised to sentence the defendant to death only if there is at least one aggravating circumstance and there are no mitigating circumstances sufficiently substantial to call for leniency.

The State of Arizona tried Timothy Ring for crimes stemming from an armoured car robbery in which the driver was killed. The jury found that Ring was innocent of the crime of premeditated murder, but it did find him guilty of the crime of felony murder occurring in the course of armed robbery.

At Ring's sentencing hearing, the trial judge noted that because Ring was convicted of felony murder, not premeditated murder, he would not be subject to the death penalty unless he had been the actual killer or a major participant in the armed robbery. Citing testimony by an accomplice to the armed robbery, offered only at the sentencing hearing, the trial judge concluded that Ring was the actual killer and that he was a major participant in the armed robbery. Finding the existence of two aggravating circumstances (murder committed for pecuniary gain and murder committed in an especially depraved manner) and no mitigating circumstances sufficient to call for leniency, the trial judge sentenced Ring to death.

Ring appealed his sentence of death to the Arizona Supreme Court, arguing that Arizona's sentencing scheme for crimes punishable by death violates the Sixth Amendment to the Constitution because it delegates to a judge a fact finding function that can elevate the defendant's maximum punishment. The Sixth Amendment states in relevant part that: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...”.

The Arizona Supreme Court preliminarily observed that the U.S. Supreme Court upheld Arizona's sentencing scheme in its 1990 decision in *Walton v. Arizona*, but that a 2000 U.S. Supreme Court decision, *Apprendi v. New Jersey*, raised questions about the continued viability of the *Walton* holding but did not overrule it. Considering itself bound by the *Walton* decision, the Arizona Supreme Court rejected Ring's Sixth Amendment argument. It went on to rule that the evidence in the case did not support the trial court judge's finding of the aggravated circumstance

of depravity, but upheld the trial court judge's other findings and affirmed the death sentence.

Reviewing the judgment of the Arizona Supreme Court, the U.S. Supreme Court found that the relevant holdings in the *Walton* and *Apprendi* cases were irreconcilable. In *Walton*, the Court ruled that the Sixth Amendment does not require that the specific findings authorising the imposition of the sentence of death be made by the jury and also that aggravating circumstances are only sentencing considerations, not elements of the offence. In *Apprendi*, the Court established the rule that if a State makes an increase in a defendant's authorised punishment contingent on the finding of a fact, that fact must be found by a jury beyond a reasonable doubt. Because of this apparent conflict, the Court overruled *Walton* to the extent that it conflicted with *Apprendi*. The Court noted that based exclusively on the jury's verdict finding Ring guilty of first-degree felony murder, life imprisonment is the maximum punishment he could have received. Because the judge's finding of aggravating circumstances functioned as the equivalent of elements of a greater offence, the Court ruled that the Sixth Amendment mandates that such a determination can only be made by a jury and found this aspect of Arizona's sentencing scheme unconstitutional. Therefore, the Court reversed the Arizona Supreme Court's judgment and remanded the case back to the State of Arizona for further proceedings.

#### Cross-references:

- *Walton v. Arizona*, 497 *United States Reporter* 639, 110 *Supreme Court Reporter* 3047, 111 *Lawyer's Edition Second* 511 (1990);
- *Apprendi v. New Jersey*, 530 *United States Reporter* 466, 120 *Supreme Court Reporter* 2348, 147 *Lawyer's Edition Second* 435 (2000).

#### Languages:

English.



#### Identification: USA-2002-2-006

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 27.06.2002 / **e)** 00-1751, 00-1777, 00-1779 / **f)** *Zelman v. Simmons-Harris* / **g)** 122 *Supreme Court Reporter* 2460 (2002) / **h)** CODICES (English).

#### Keywords of the systematic thesaurus:

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

#### Keywords of the alphabetical index:

Education, free choice / Education programme, government, financial assistance / School, religious / School, public, private.

#### Headnotes:

The Establishment Clause of the First Amendment to the Constitution prohibits the enactment of laws that have the purpose or the effect of advancing or inhibiting religion.

A governmental educational aid program will not violate the Establishment Clause of the First Amendment if its purpose is neutral as to religion and if it is made available to a broad class of persons who direct it to religious schools wholly as a result of their own genuine and independent choice.

In assessing whether a neutral government educational aid program has the prohibited effect of advancing religion, the actual number of participating schools that are religious and the number of students choosing religious schools are in themselves not relevant considerations.

#### Summary:

The Legislature of the State of Ohio in 1996 enacted a statute entitled the Pilot Project Scholarship Program (the "Program"). The Program was designed to provide educational choice to families with children in the public school district of the city of Cleveland, Ohio. Approximately 75,000 children, many of whom are from low-income families, are enrolled in the Cleveland school district.

The Program provides financial assistance, in the form of so-called "vouchers", to families in any Ohio school district that is or has been under a federal court order requiring supervision by the State of Ohio.

The Cleveland school district is the only district in the State to fall within this category. In 1995, a federal district court, citing serious problems of student performance, removed the Cleveland school district from local control and placed it under the supervision of the State of Ohio.

The Program provides two basic kinds of assistance to parents of children in a covered school district. First, it provides tuition funds for students in kindergarten through third grade, expanding each year through the eighth grade, to attend a participating public or private school that their parents have selected. Second, the Program provides funding for tutoring for students who choose to remain in a public school. The funds for tuition and tutoring are distributed to parents according to financial need, with highest priority and funding amounts given to low-income families.

Any private school, whether religious or non-religious, is eligible to participate in the Program if it satisfies certain statutory requirements. Also, public schools in neighbouring school districts can participate in the Program. Tuition aid is distributed directly to parents based upon their needs. The parents then use that money to enrol their children in the school of their choosing. All participating schools, whether public or private, are required to accept students eligible for the Program in accordance with rules and procedures established by the State.

In the 1999-2000 academic year, approximately 3,700 students participated in the Program, almost all of whom (96%) enrolled in religious schools. During the same year, 56 private schools participated in the Program, 46 (82%) of which had a religious affiliation.

A group of Ohio residents filed an action in U.S. District Court, seeking an injunction against operation of the Program. They claimed that the Program violates the Establishment Clause of the First Amendment to the U.S. Constitution. The Establishment Clause, which is applied to the States through the Fourteenth Amendment to the Constitution, states that the legislature "shall make no law respecting an establishment of religion..." Under the long-time case law of the U.S. Supreme Court, the Establishment Clause prohibits a State from enacting laws that have the purpose or effect of advancing or inhibiting religion.

The U.S. District Court ruled in favour of the plaintiffs. On appeal, the U.S. Court of Appeals affirmed the District Court's judgment, holding that the Program had the primary effect of advancing religion in violation of the Establishment Clause.

The U.S. Supreme Court reversed the decision of the Court of Appeals. The Court first concluded that the Program did not have the purpose of advancing religion, noting that the parties did not dispute that the Program was enacted for a valid non-religious purpose: to provide educational assistance to low-income families in a failing public school system. Therefore, the question presented to the Court was whether the Program had the effect of promoting or inhibiting religion. In this regard, the Court stated that its case law holds that a government aid program, neutral in purpose, will not violate the Establishment Clause if the aid is made available to a broad class of persons who direct it to religious schools wholly as a result of their own genuine and independent choice.

Applying this test to the circumstances of the instant case, the Court determined that the Program is one of true private choice and therefore does not violate the Establishment Clause. The Program, the Court stated, provides educational assistance to a broad class of citizens without regard to religion and permits all schools within the school district to participate. The only preference within the Program is that low-income families receive greater assistance and priority for admission. The Court noted that a religious school is only one of the options available under the Program to parents seeking quality education for their children. The fact that most of the private schools participating in the Program are religious, the Court concluded, is not relevant to the Establishment Clause inquiry. Instead, it merely reflects the fact that many private schools in U.S. cities are religious schools. As to the fact that the great majority of voucher recipients in the Program are enrolled in religious schools, the Court concluded that this also is not relevant under the Court's jurisprudence, which holds that the constitutionality of a neutral educational aid program cannot be determined by reference to the reasons why, in a particular area and at a particular time, the majority of private schools are religious or the majority of recipients choose religious schools.

#### *Supplementary information:*

Four of the nine justices dissented from the Court's judgment. Among their arguments, they stated that the decision represented an important departure from the Court's case law and that the wide range of choices made available to students was not relevant to the question of whether a State may pay tuition for students who wish to attend private schools that will provide them with a religious education.



*Cross-references:*

In citing its case law on the Establishment Clause, the Supreme Court made specific reference to its 1983 decision in the case of *Mueller v. Allen*, 463 *United States Reporter* 388, 103 *Supreme Court Reporter* 3062, 77 *Lawyer's Edition Second* 721.

*Languages:*

English.

*Identification:* USA-2002-2-007

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 27.06.2002 / **e)** 01-521 / **f)** Republican Party of Minnesota v. White / **g)** 122 *Supreme Court Reporter* 2528 (2002) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

4.7.4.1.3 **Institutions** – Judicial bodies – Organisation – Members – Election.

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

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

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

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

*Keywords of the alphabetical index:*

Judge, candidate, electoral campaign, freedom of expression / Scrutiny, strict.

*Headnotes:*

Speech about the qualifications of candidates for public office lies at the core of the free speech protections of the First Amendment to the Constitution.

It is not the function of government to select which topics are worth discussing in the course of an electoral campaign for public office.

Under the First Amendment, a content-based restriction on the speech of candidates for public office will be subject to a strict scrutiny test that requires the measure's proponent to show that it is narrowly tailored to serve a compelling state interest.

*Summary:*

The Constitution of the State of Minnesota provides that all state court judges must be selected on the basis of popular, non-partisan (without political party affiliation) elections. Since 1974, under what is known as the “announce clause”, candidates for judicial offices, including incumbent judges, are prohibited from stating their views on disputed legal or political issues. This prohibition was issued by the Minnesota Supreme Court in the form of an ethical rule, and candidates violating it are subject to a variety of potential sanctions, including suspension or permanent loss of one's license to practice law, or probation.

A Minnesota attorney, seeking to be a candidate for judicial office, challenged the constitutionality of the announce clause in federal court. The attorney, Gregory Wersal, alleged that the clause violated his rights of free speech under the First Amendment to the Constitution because it forced him to refrain from announcing his views on disputed issues during the electoral campaign. The First Amendment states in relevant part that the U.S. Congress “shall make no law... abridging the freedom of speech”, and is made applicable to the States by means of the due process clause of the Fourteenth Amendment to the Constitution. Other plaintiffs in the suit, including the Republican Party of Minnesota, alleged that the prohibition against Wersal made it impossible for them to learn his views and therefore to determine whether or not to support his candidacy.

The U.S. District Court, in a decision affirmed by the Court of Appeals, ruled that the announce clause did not violate the First Amendment. On review, the U.S. Supreme Court reversed the decision of the Court of Appeals. In so doing, the Supreme Court determined that the announce clause was subject to the test of strict scrutiny because it prohibits speech on the basis of its content and because it interferes with a category of speech that is at the core of First Amendment protections: speech about the qualifications of candidates for public office. Under the strict scrutiny test, a proponent of the measure in question bears the burden of proving that it is narrowly tailored to serve a compelling state interest.

The Court of Appeals had determined that the State of Minnesota had identified two interests that were sufficiently compelling to justify the announce clause: preserving the impartiality of the State's judiciary, and preserving the appearance of the impartiality of the State's judiciary. The Supreme Court examined three potentially applicable meanings of the term "impartiality" and found that the announce clause failed the strict scrutiny test under each. As to the first possible meaning – a lack of bias for or against either of the parties to a judicial proceeding – the Court concluded that the announce clause was not narrowly tailored to serve impartiality in this sense because it does not restrict speech for or against particular parties, but instead interfered with speech for or against particular issues. The Court acknowledged that a party taking a particular stand on a legal issue is likely to lose if that issue is central to the case in question; however, this would not be due to any bias by the judge against that party or favoritism toward the other party because any party taking that position would be likely to lose. The Court concluded that the second possible meaning – the absence of preconception in favour of or against a particular legal view – did not serve a compelling state interest because a judge's lack of predisposition regarding the relevant legal issues in a case has never been viewed as a necessary component of equal justice. Finally, the Court found that a third possible meaning of "impartiality" – the quality of maintaining an open mind to competing arguments on a particular issue – was underinclusive in that it allowed appreciable damage to that purportedly vital interest to remain unprohibited. In this regard, the Court rejected the argument that statements made in an electoral campaign, as opposed to statements that might have been made by a future candidate in other settings, are uniquely destructive of the quality of open-mindedness. In sum, the Court concluded that the announce clause could not survive strict scrutiny under any reasonable construction of the term "impartiality" and therefore found it invalid under the First Amendment.

*Supplementary information:*

Four of the Supreme Court's nine Justices dissented from the Court's judgment. In two dissenting opinions, the dissenting justices disagreed with the Court's decision because it insufficiently recognised the importance of judicial integrity, as reflected by judicial independence and impartiality, and mistakenly assumed that judicial candidates should have the same freedom to express themselves on matters of current public importance as do candidates for legislative and executive positions in which the office holders serve in representative capacities.

*Languages:*

English.



## **Systematic thesaurus \***

\* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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<sup>2</sup> E.g. Rules of procedure.  
<sup>3</sup> Including the conditions and manner of such appointment (election, nomination, etc).  
<sup>4</sup> Including the conditions and manner of such appointment (election, nomination, etc).  
<sup>5</sup> Vice-presidents, presidents of chambers or of sections, etc.  
<sup>6</sup> E.g. State Counsel, prosecutors, etc.  
<sup>7</sup> Registrars, assistants, auditors, general secretaries, researchers, etc.  
<sup>8</sup> E.g. assessors, office members.  
<sup>9</sup> Registrars, assistants, auditors, general secretaries, researchers, etc.  
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<sup>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).

<sup>17</sup> This keyword concerns decisions on the procedure and results of referenda and other consultations.

<sup>18</sup> This keyword concerns decisions preceding the referendum including its admissibility.

<sup>19</sup> Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3.)

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<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.

<sup>28</sup> Pleadings, final submissions, notes, etc.

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<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.

<sup>43</sup> Including compelling public interest.

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<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.

<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.

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<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.

<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.

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<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> Practices aiming at removing from civil service persons formerly involved with a totalitarian regime.

<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.

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<sup>74</sup> See also 3.6.

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<sup>76</sup> See also keywords 5.3.39 and 5.2.1.4.

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<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.

<sup>81</sup> Impartiality of electoral authorities, incidents, disturbances.

<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.

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<sup>87</sup>

E.g. Court of Auditors.

<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>

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<sup>93</sup>

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<sup>94</sup> Taxes and other duties towards the state.

<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.



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<sup>103</sup> Including the right to be present at hearing.

<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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