THE BULLETIN

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

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

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

The decisions are presented in the following way:

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

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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“The former Yugoslav Republic of Macedonia” ....
....S. Petrovski
Turkey .... B. Sözen
Ukraine........................V. Ivaschenko / O. Kravchenko
United Kingdom .... K. Schiemann / N. De Marco
United States of America .. F. Lorson / S. Rider / P. Krug

European Court of Human Rights... S. Naismith
Court of Justice of the European Communities .... Ph. Singer

Strasbourg, March 2004

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There was no relevant constitutional case-law during the reference period 1 May 2003 – 31 August 2003 for the following countries:

Argentina, Bosnia and Herzegovina, Canada, Finland (Supreme Administrative Court), Sweden (Supreme Court).

Précis of important decisions of the reference period 1 May 2003 – 31 August 2003 will be published in the next edition, *Bulletin* 2003/2 for the following countries:

Estonia, Hungary, Korea, Russia.

Albania
Constitutional Court

Statistical data
1 January 2002 – 31 December 2002

Number of decisions: 243

Types of decisions
- final decisions: 46
- inadmissible: 197
- referred back for incomplete file: 0

Final decisions on admissible applications
- appeal dismissed: 21
- appeal upheld: 18
- interpretation: 3
- declined for adjudication: 4
- appeal withdrawn: 0

Effects
- *ex tunc*: 3
- *ex nunc*: 43
- *erga omnes*: 15
- *inter partes*: 31
- immediate: 31
- deferred: 0

Proceedings initiated by
- President of the Republic: 1
- Prime Minister: 3
- Group of 1/5th of the Deputies: 2
- Head of High State Control: 0
- ordinary courts: 2
- People's Advocate: 0
- local government bodies: 1
- religious communities: 0
- political parties, associations and other organisations: 17
- individuals: 215
- Constitutional Court judge: 1

Types of provisions reviewed
- Constitution (interpretation): 3
- laws: 8
- international treaties: 1
- decrees of the Cabinet of Ministers: 3
- judicial decisions: 218
- other administrative acts: 10

Types of litigation
- fair trial: 213
- conflict of powers/jurisdiction: 3
- electoral disputes: 0
- constitutionality of political parties: 0
- impeachment: 0
- constitutionality of acts of the executive: 0
- constitutionality of laws: 8
- interpretation of the Constitution: 3
- constitutionality of international treaties: 1
- end of office of a constitutional judge: 1

Type of review
- concrete review: 228
- abstract review: 15
- preventive review *(a priori)*: 1
- *a posteriori* review: 242

Important decisions

Identification: ALB-2003-1-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 02.04.2003 / **e)** 9 / **f)** Constitutionality of the law / **g)** *Fletorja Zyrtare* (Official Gazette), 24/03, 739 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
3.19 **General Principles** – Margin of appreciation.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.39 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, payment, obligation, right of appeal.

Headnotes:

The obligation of a taxpayer to pay a tax assessment before he or she can lodge an appeal against that assessment is proportional and does not infringe the right of appeal.

Summary:

At the request of the Supreme Court, the Constitutional Court reviewed the provisions of the Value Added Tax Law, where payment of a tax assessment is required even when a taxpayer lodges an appeal against that assessment. The Constitutional Court came to the conclusion that the provisions in question did not infringe the constitutional principle of appeal against an administrative act or the relation between the restriction imposed on the taxpayer's right of appeal and the situation dictating it. In its opinion, the restriction on the right to appeal the Value Added Tax Law did not exceed the limitations provided for by the European Convention of Human Rights.

In a request, the Supreme Court raised doubts as to the constitutionality of the provisions of Articles 41.4, 42.5 and 43.1 of the Value Added Tax Law. Those provisions require a taxpayer receiving a VAT assessment to pay it in full, even though he or she intends to lodge an appeal against that tax assessment. According to the impugned provision, the highest body with which the appeal could be lodged (the General Taxation Office) would not examine that appeal unless the taxpayer had already paid the VAT assessment in advance. In its request, the Supreme Court put forward that the provisions of the law in question restricted the right of appeal and, in this way, infringed upon Article 42 of the Constitution and Article 6 ECHR. According to the Supreme Court, that restriction was not dictated either by the public interest or the protection of the rights of others. Consequently, it exceeded the limitations provided for by Convention.

After examining the case, the Constitutional Court found that the provisions of the law in question did not hinder an appeal against the tax assessment, as long as the right of appeal was exercised after the assessment had been paid. A certain degree of restriction was imposed on the right of appeal, i.e. the right of appeal could only be exercised after the taxpayer had paid the tax assessment. The restriction would fall within the framework of restrictions foreseen by Article 17 of the Constitution if that restriction were in proportion to the situation that had dictated it and did not exceed the limitations provided by the European Convention of the Human Rights. According to the Constitutional Court, the preliminary payment of the tax assessment was necessary because of the difficulties faced by the state bodies in collecting the taxes of some taxpayers. The Constitutional Court found the restriction in question justified because its purpose was to enable the state to collect the tax owed to it in advance and return the tax in cases in which a court decision annulled the administrative act of the tax bodies.

The Constitutional Court also reached the conclusion that the restriction on the right of appeal did not exceed the limitations provided by the Convention, as Article 1.2 Protocol 1 ECHR recognised the states' rights to lay down laws for securing the payment of taxes, and gave the states the necessary space for evaluating the effective ways and means for realising this purpose.

For these reasons, the Constitutional Court did not find the aforementioned provisions unconstitutional and decided to reject the application.

Languages:

Albanian.

Identification: ALB-2003-1-002

a) Albania / **b)** Constitutional Court / **c)** / **d)** 17.04.2003 / **e)** 15 / **f)** Constitutionality of the law / **g)** *Fletorja Zyrtare* (Official Gazette), 26/03, 844 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.1.4.2 **Constitutional Justice** – Constitutional jurisdiction – Relations with other Institutions – Legislative bodies.
1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other Institutions – Courts.
1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.
1.6.6 **Constitutional Justice** – Effects – Execution.
1.6.7 **Constitutional Justice** – Effects – Influence on State organs.
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.
3.16 **General Principles** – Proportionality.
3.22 **General Principles** – Prohibition of arbitrariness.
4.7.7 **Institutions** – Judicial bodies – Supreme court.
5.2 **Fundamental Rights** – Equality.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.

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

Keywords of the alphabetical index:

Constitution, violation, substantial / Constitutional Court, decision, binding effect / Constitutional Court, decision, disregard / Criminal procedure / Defence, effective / Remedy, effective / Lawyer, appointment / Lawyer, right of choice / Supreme Court, jurisdiction / Trial, *in absentia*, lawyer, appointment.

Headnotes:

A criminal legislative provision that provides for the exercise of the right to a defence by the advocate of an accused tried *in absentia* only where the advocate has in his or her possession a power of attorney granted by the accused is incompatible with the Constitution and international agreements. Otherwise, an accused tried *in absentia* would be denied the right to a defence, thereby infringing upon the constitutional principles and the principles guaranteed by the international agreements ratified by the Albanian state.

Summary:

At the request of the Albanian Helsinki Committee, the Constitutional Court examined a provision of the Criminal Procedure Code allowing for the exercise of the right of appeal by the advocate of an accused tried *in absentia* only where the advocate has in his or her possession a power of attorney granted by the accused. The Court found that provision unconstitutional on the ground that it denied an accused tried *in absentia* the exercise of two fundamental rights: the right to a defence and the right of appeal. Those rights are guaranteed by the Constitution and the international agreements whose implementation is compulsory for the Albanian state. Where an accused is tried *in absentia*, he or she is incapable of providing the advocate with a power of attorney. As a result, the accused does not have an effective possibility of exercising the right of appeal or even the right to a defence. According to the Constitutional Court, the guarantees of the right of effective appeal found in the Constitution, the European Convention on Human Rights and other international agreements put the legislative body under the obligation not to hinder the individual in the exercise of such a right and to provide the individual with all the necessary means for its effective exercise. The restriction imposed by the impugned provision did not fulfil the requirements foreseen by the above-mentioned legal instruments, and it ran contrary to them.

The Constitutional Court found that the creation of a situation where an accused tried *in absentia* may not appeal against a court decision puts the parties in an unequal position. The principle of equality before the law should not be understood as an exclusion of arbitrariness only during the implementation phase, but also, and first of all, during the adoption phase of laws that prevent inequality. The Constitutional Court considered that the principles of proportionality and equality should have been taken into consideration by the lawmaker because of the risks that might otherwise arise of a partial adjudication of the case and a rendering of an unjust decision. Such a decision would violate the individual's right and would have an effect on the foundations of the rule of law.

Regarding that issue, the Constitutional Court has expressed its opinion before, more specifically, in its Decision no. 17 of 17 April 2000 and Decision no. 5 of 7 February 2001, in which it annulled two decisions of the United Chambers of the Supreme Court on the grounds that the court trials had been unfairly conducted and the constitutional principles guaranteeing the individual's rights and freedoms had been infringed. In its previous decisions, Constitutional Court found that the Supreme Court had erred in its interpretation of the law when it had imposed restrictions on the rights of appeal and defence of an accused tried *in absentia*. Moreover, the Constitutional Court has expressed that its decisions are binding on all state bodies and should be implemented by them in such a way so as to be reflected in the practice of ordinary courts and in the compilation of legislative and rule-making acts by the competent bodies. It was those very decisions that were not taken into consideration by the Assembly during the amendment of the Criminal Procedure Code. The Constitutional Court did not have doubts as to the authority and will of the legislature to pass laws, amend and add to them, but the Court did insist that legislation should not be contrary to the Constitution and ratified international agreements. As the Constitutional Court decisions had been based on the Constitution and international agreements, the Assembly should have acted in conformity with them.

The Constitutional Court found the provision, which stated that the right of appeal by the advocate of an accused tried *in absentia* could only be exercised when the advocate was in possession of power of attorney granted by the accused, unconstitutional. For these reasons, it decided to annul that provision of the law.

Supplementary information:

The Constitutional Court has expressed that same opinion in two of its previous decisions, both of which were disregarded by the legislative body when drafting the provision in question.

Cross-references:

- Decision no. 17 of 17.04.2000, *Bulletin* 2000/1 [ALB-2000-1-003];
- Decision no. 5 of 07.02.2001, *Bulletin* 2001/1 [ALB-2001-1-001].

Languages:

Albanian.

Armenia
Constitutional Court

Statistical data

1 January 2003 − 30 April 2003

- 11 referrals made, 11 cases heard and 11 decisions delivered, including:
  - 9 cases concerning the conformity of international treaties with the Constitution. All the international treaties were declared compatible with the Constitution.
  - 2 cases concerning electoral disputes:
    - 1 electoral dispute concerning the results of first round of the presidential elections held on 19 February 2003;
    - 1 electoral dispute concerning results of the elections for President of the Republic of Armenia held on 5 March 2003.

Important decisions

Identification: ARM-2003-1-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 16.04.2003 / **e)** DCC-412 / **f)** On the dispute on the results of the elections for President of the Republic of Armenia held on 5 March 2003 / **g)** *Tegekagir* (Official Gazette) / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.21 **General Principles** – Equality.
4.9.8 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.
4.9.9.3 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Voting.
4.9.9.6 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Casting of votes.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of assembly.
5.3.38.3 **Fundamental Rights** – Civil and political rights – Electoral rights – Freedom of voting.

Keywords of the alphabetical index:

Election, presidential / Election, candidate, proxy / Election, unfair.

Headnotes:

Equal opportunity for candidates is closely connected to the formation of voters' opinions and assumes the neutrality of state bodies regarding the election process, specifically, the pre-election campaign and the media coverage. However, based on international legal standards, the principle, according to which the pre-election campaign must be just and fair, may not be interpreted in such a way as to exclude the freedom of speech and the right to receive information.

Each proxy of a candidate is a legal subject in some specific relationships and has rights and responsibilities only within the framework of those relationships. The Electoral Code was created on the basis of the presumption of reasonability and assumes that a proxy follows the work of an election commission on voting day in a given precinct. That proxy, not being directly legally connected to election processes in other precincts or constituencies, may not challenge results of other precincts or constituencies, much less dozens of them.

Voter lists filled in and already signed by voters are considered one of the elements of secrecy of the ballot and may not be published. However, this does not assume that voter lists may not be examined during checks performed in accordance with an order prescribed by the law.

Summary:

A candidate for President of Armenia applied to the Constitutional Court to have the elections for the President held on 5 March 2003 declared invalid. The applicant argued that in the course of preparation, organisation, execution and summarisation of the results of the elections, key principles of the electoral right laid down by the Constitution had been violated. In particular, the applicant alleged the following infringements of the Electoral Code.

In the course of the pre-election campaign, the principle of equality had been violated, and the candidates had not had been provided with conditions of free and fair competition for conducting the pre-election campaign. A number of proxies had been held in administrative detention for participation in unauthorised meetings and demonstrations.

A number of cases of one person voting instead of another, as well as open voting and ballot stuffing took place.

The applicant's proxies had been deprived of the opportunity to conduct an accurate monitoring of the election, in particular they faced obstacles in realising their right to request the checking of the conformity of precinct protocols with the results of elections.

The respondent, the Central Electoral Commission, challenged the applicant's allegations and argued the following.

In the course of the pre-election campaign, the principle of equality had been guaranteed by providing the candidates with equal rates of payable airtime, equal amounts of free airtime and equal extent of press coverage.

The allegation of the violation of the rights of persons who made requests for checks, was not true, since some requests had not been made within the time-limits provided by the law, and others had been made by persons who were not entitled to do so.

Concerning those issues, the Constitutional Court stated that it was obvious that each proxy was a legal subject in some specific relationships and had rights and responsibilities only within the framework of those relationships. The Electoral Code had been created on the basis of the presumption of reasonability and assumes that a proxy follows the work of an election commission on voting day in a given precinct. That proxy, not being directly legally connected to election processes in other precincts or constituencies, may not challenge the results of other precincts or constituencies, much less dozens of them.

Regarding the applicant's allegation as to the administrative detention of proxies for participation in unauthorised meetings and demonstrations, the Constitutional Court held that the administrative detentions for participation in unauthorised meetings and demonstrations were an interference with the right of freedom of peaceful assembly set out in Article 11 ECHR.

The Constitutional Court found that the provision to receive copies of documents set out in Article 30 of the Electoral Code referred to session protocols and protected the legal position approved in October 2002 by the Council of Europe's Venice Commission's Plenary Session, in accordance to which voter lists filled in and already signed by voters are considered one of the elements of secrecy of the ballot and may not be published. However, that does not assume

that voter lists may not be examined during checks performed in accordance with an order prescribed by the law.

Based on the results of the investigation of the case, the Constitutional Court decided that during the 2003 Presidential Election, in individual precincts, in particular during the voting and the vote count, violations had occurred that were not compatible with future democratic developments of the country. Those violations were incompatible with, in particular, the obligations undertaken by Armenia under Article 21 of the Universal Declaration of Human Rights, Article 3 Protocol 1 ECHR and Article 25 of the International Covenant on Civil and Political Rights.

The Constitutional Court decided, in order to assess the impact of the unreliable results on the overall results of elections, to reduce the total difference in votes cast for candidates by the number of votes cast for the candidate who received more votes in such precincts.

The Constitutional Court also decided that in order to identify all persons who committed election fraud and violations and to hold them accountable as prescribed by the law, the Constitutional Court would make materials available to the Office of Prosecutor General for the purpose of its undertaking a complex investigation and informing the Constitutional Court and the public of the results of its investigation.

Considering the actual difference in votes for Presidential candidates in the 5 March 2003 election results, the impact thereon of the size of discrepancies and the results recognised to be unreliable in an examination of the case by the court and assessing the impact of duly legally formulated and proven electoral violations of a qualitative nature of the realisation of active and passive electoral rights, the Court upheld the Central Electoral Commission's Decision on the election of the Armenian President.

Languages:

Armenian, English, French (translation by the Court).

Austria
Constitutional Court

Statistical data

Session of the Constitutional Court during March 2003

- Financial claims (Article 137 B-VG): 1
- Conflicts of jurisdiction (Article 138.1 B-VG): 2
- Review of regulations (Article 139 B-VG): 62
- Review of laws (Article 140 B-VG): 69
- Challenge of elections (Article 141 B-VG): 3
- Complaints against administrative decrees (Article 144 B-VG): 396
  (208 refused to be examined)

Important decisions

Identification: AUT-2003-1-001

a) Austria / **b)** Constitutional Court / **c)** / **d)** 13.03.2003 / **e)** G 368-371/02, V 81-84/02 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.2.4 **Constitutional Justice** – Types of claim – Initiation *ex officio* by the body of constitutional jurisdiction.
1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
1.3.5.7 **Constitutional Justice** – Jurisdiction – The subject of review – Quasi-legislative regulations.
1.5.4.4.1 **Constitutional Justice** – Decisions – Types – Annulment – Consequential annulment.
2.3.6 **Sources of Constitutional Law** – Techniques of review – Historical interpretation.
3.4 **General Principles** – Separation of powers.
3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
3.13 **General Principles** – Legality.
3.15 **General Principles** – Publication of laws.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Publication, complete, rule / Regulation, retroactive effect / Law, wording, change of text / Law, rectification, *errata* / Law, republication / Government, law-making process, participation.

Headnotes:

The rectification of *errata* in the wording of a federal law published by the Federal Chancellor in the Federal Law Gazette is to be classified as a regulation within the meaning of Article 139.1 of the Constitution. It has retroactive effect as from the day of publication of the statute that has been rectified.

Aside from clerical or other obvious errors, any difference between the published text (which is alone decisive for the legal binding force) and the text of the law as adopted by Parliament may be considered as *errata* in so far as the intended contents of the law are not changed. The rectification of the previously published incorrect wording of a law going beyond this understanding of *errata* by also changing the contents of a statute breaches the constitutional rule of the complete publication of a law (Article 49.1 of the Constitution).

An ordinary law that also authorizes the rectification of errors in a statute's contents lacks a constitutional basis. A statute extending the rights of the executive (the Federal Chancellor) to participate in the law-making process as granted by the Constitution violates the principle of separation of powers.

Moreover, such a statute also contradicts the rule of law as a citizen can no longer rely on published laws and thus act accordingly.

Summary:

Due to several complaints by patients who had to go to an outpatient department for therapy and were therefore charged a fee *(Ambulanzgebühr)*, on 29 June 2002 the Court decided to initiate an *ex officio* review of § 135.a of the General Social Security Act *(Allgemeines Sozialversicherungsgesetz*; *ASVG)*.

On 6 August 2002 the Federal Chancellor published a rectification of *errata*, thus correcting § 135.a.3 *ASVG* in a such way that the whole second sentence was republished. Actually an essential part of this second sentence, which had been adopted as such by Parliament, authenticated by the Federal President and countersigned by the Federal Chancellor, had not been previously published and was inserted into the text of the law.

That caused the Court to initiate another two *ex officio* reviews (11 October 2002): the first on the constitutionality of § 2.a.2 of the Law on the Federal Law Gazette *(Bundesgesetzblattgesetz*; *BGBlG)* and the second on the legality of the rectification of *errata* in question.

While § 2.a.1 *BGBlG* authorized the Federal Chancellor to rectify *errata*, sub-paragraph 2 set out a definition according to which every deviation of the published wording of a law from the original text (as adopted in Parliament) and regardless of a change in a norm's contents is to be seen as *"errata"*.

After a thorough historical analysis of the legislation on the publication of laws and the possibilities of correcting errors as well as an analysis of its established case-law on these legal questions, the Court annulled the norms under review for the above mentioned reasons.

Moreover, the Court held that pursuant to Article 24 of the Constitution, legislation is the "main function" of the National and the Federal Council (Parliament). Some organs of the executive, such as the Federal President, the Chancellor and the Government, may participate in the legal process, but only as far as they are authorized to do so by the Constitution. It is therefore not for the ordinary legislator to develop or extend that participation at will.

A rectification of *errata*, which is a regulation with a retroactive effect, that is capable of also changing a law's contents would result in an inexplicable contradiction of the republication of a law as laid down in the Constitution itself (Article 49.a of the Constitution): the Federal Chancellor is empowered to republish a law and on this occasion to rectify only obsolete terminology and to adjust outdated spelling or other minor discrepancies, while the binding effect of a republication is *ex nunc (sic!)*.

Apart from the violation of both the principle of the separation of powers and that of the rule of law the Court found that the retroactivity of a law is a prerogative of the legislator. These powers must not be transferred to an organ of the executive by the ordinary legislator without an explicit constitutional basis.

Not only did the Court annul § 2.a.2 *BGBlG* and parts of the Federal Chancellor's rectifying regulation, it also consequently declared § 135.a *ASVG* to be unconstitutional (Judgment of the same day, G 218/02 *et al.*).

Languages:

German.

Azerbaijan
Constitutional Court

Important decisions

Identification: AZE-2003-1-001

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 31.01.2003 / **e)** 1/1 / **f)** / **g)** *Azerbaycan* (Official Gazette); *Azerbaycan Respublikasi Konstitusiya Mehkemesinin Melumati* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.
5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
5.3.8 **Fundamental Rights** – Civil and political rights – Right to a nationality.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.

Keywords of the alphabetical index:

Identity card, refusal to deliver / Residence, registration / Residence, discrimination / Fundamental right, exercise.

Headnotes:

The receipt of a national identity card of the Azerbaijan Republic by way of the procedure laid down by legislation should be considered the right of each citizen. An illegal refusal to issue an identity card to a citizen should be considered a restriction on the right to citizenship and other constitutional rights deriving from it.

The registration of persons who do not have a place of residence should be ensured by the bodies of the local executive. The bodies should ensure that those citizens are issued identity cards by registering them in special places, as is done in other states.

Summary:

The complainant alleged that when he had attempted to have his old Soviet passport replaced by a national identity card, the Passport Registration Department of

the Ministry of Internal Affairs (hereinafter: the PRD), relying on the legislation in force, had refused to grant him an identity card on the ground that the complainant lacked a place of residence, thereby violating his civil and other rights.

The PRD claimed that it had acted in accordance with the relevant provisions of Article 5 of the Law “On Registration of Place of Residence and Stay” and those on the “Description of the Identity Card” approved by the Law “On the Approval of the Specimen of the Identity Card of the Citizen of the Azerbaijan Republic”.

The Constitutional Court noted the following: “Everyone from the moment of birth possesses inviolable and inalienable rights and liberties. Rights and liberties envisage also everyone's responsibility and obligations to the society and other persons” (Article 24 of the Constitution).

The right of citizenship as well as the right to free movement and the right to choose a place of residence are among the most important rights and freedoms of a human being. “A person having political and legal relations with the Azerbaijan Republic and also mutual rights and obligations shall be a citizen of the Azerbaijan Republic” (Article 52 of the Constitution).

Citizenship is the basis for relations between a person and society. The fact that citizenship is the main ground for the legal status of a person in a state make this matter clear and definite. Citizenship is a civil connection that allows a person to enjoy various rights and freedoms. The State must protect and take care of its citizens.

Citizenship is proved by the following documents: birth certificate, national identity card and passport (Article 6 of the Law “On Citizenship”). The birth certificate affirms the fact of birth from the legal point of view and contains important information concerning the birth. This document is to be considered of primary importance for the approval of the right to citizenship. This document constitutes the grounds for recognising as citizens persons who were born on the territory, of parents who are citizens of the Azerbaijan Republic or of one parent who is a citizen of Azerbaijan Republic in accordance with Article 52 of the Constitution.

It is clear that a national identity card is the most important document for the enjoyment of a citizen’s civil rights. Unlike other documents certifying citizenship, the national identity card contains the most detailed information of its holder. The inclusion of such information in the document serves to identify the holder and to distinguish him/her from other citizens. This document creates the conditions for its holder to enjoy the constitutional rights that derive from citizenship rights. In order to enjoy those rights, each citizen must have an identity card.

Everyone legally being on the territory of the Azerbaijan Republic may travel without restrictions, choose the place of residence and travel abroad (Article 28.3 of the Constitution).

Undoubtedly, the right to move freely and the right to choose freely the place of residence are also set out in international legal documents, particularly in Article 12 of the International Covenant on Civil and Political Rights and Article 2 Protocol 4 ECHR. According to the provisions of the Constitution, the right to move freely and the right to choose freely the place of residence are derived from a person’s right to freedom. The content of the broad meaning of freedom includes the possibility of free movement.

A place of residence is a dwelling such as a house, an apartment, a place serving as official living quarters, a hostel, a home for old people or disabled persons or another similar dwelling where a person permanently or primarily lives as an owner, on a contractual basis, a lease or another basis provided for in the legislation (Article 2 of the Law “On Registration on Place of Residence and Stay”).

A place of stay shall be a place where a person lives temporarily, i.e. a hotel, a resort, a holiday home, a pension, a camping-site, a tourist centre, a hospital or any other similar institution.

As it is clear from the provisions of the law, the legislature does not restrict the definition of a person’s place of residence and/or place of stay, and pays particular attention to the necessity of registering at the chosen place of permanent or temporary stay by way of the procedure set out in the legislation.

Citizens of the Azerbaijan Republic, foreigners and stateless persons (hereinafter referred to as persons) should be registered at the place of residence and place of stay (Article 1 of the Law “On Registration on Place of Residence and Stay”). The aim of such registration is the creation of proper conditions for registering persons living in Azerbaijan Republic, as well as the fulfilment by those persons of their duties with respect to other persons, the state and the society, and the implementation of human rights and freedoms (social security, pensions, military draft, execution of court decisions, etc.).

Not issuing an identity card to citizens without a place of residence may result in a violation of the right to

citizenship and other constitutional rights deriving from it, in particular, the right to take part in the political life of society and state (Article 54 of the Constitution), the right to take part in governing the state (Article 55 of the Constitution), electoral right (Article 56 of the Constitution), the right to education (Article 42 of the Constitution) and the right to lodge an application (Article 57 of the Constitution).

Under no circumstances may a citizen of the Azerbaijan Republic be deprived of the citizenship of the Azerbaijan Republic (Article 53.1 of the Constitution). A refusal to issue an identity card to citizens without a place of residence may be considered a violation of the right to equality. The state guarantees the equality of the rights and liberties of everyone, irrespective of race, nationality, religion, language, sex, origin, financial position, occupation, political conviction and membership in political parties, trade unions and other public organizations. The rights and freedoms of a person and citizen cannot be restricted due to race, nationality, religion, language, sex, origin, conviction, political and social attributes (Article 25.3 of the Constitution).

Not issuing an identity card to citizens without a place of residence may be understood as a violation of the provisions of Article 71.1 and 71.2 of the Constitution. According to those provisions, the protection of a citizen's rights and freedoms envisaged in the Constitution is an obligation of the Legislature, Executive and Judiciary. No one may restrict the rights and freedoms of a person and citizen.

For these reasons, the Constitutional Court held that the provisions of the legislation concerning the registration of all persons who live within the Azerbaijan Republic and those persons' fulfilment of their obligations with respect to other persons, the state and the society should be implemented.

Languages:

Azeri (original), Russian, English (translation by the Court).

Identification: AZE-2003-1-002

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 25.02.2003 / **e)** 1/2 / **f)** / **g)** *Azerbaycan* (Official Gazette); *Azerbaycan Respublikasi Konstitusiya Mehkemesinin Melumati* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Civil procedure, guarantee / Appeal, individual, right.

Headnotes:

The constitutionally guaranteed right to apply to a court may be understood as the right to apply to a court of any instance. Consequently, Article 359 of the Civil Procedure Code, which sets out that there is a general right of appeal against court decisions except for “disputes where the amount of a claim does not exceed an amount equal to 100 minimum monthly salaries or disputes especially provided for by legislation”, does not conform to the Constitution.

Summary:

The Supreme Court applied to the Constitutional Court for a review of the conformity of the provisions of Article 359 of the Civil Procedure Code to Articles 25.1, 26.1, 60.1, 71.1 and 71.2 of the Constitution, alleging that those provisions restricted the right of natural and legal persons to a legal defence. The provisions of Article 359 state that no appeal lies from “disputes where the amount of a claim does not exceed an amount equal to 100 minimum monthly salaries or disputes especially provided for by legislation”.

It is clear from an analysis of the Civil Procedure Code that the legislature, in its attempt to regulate the right to apply to the courts of higher instance (appeal and cassation courts), laid down a specific order to be observed for the examination of cases in court instances. According to the rules and provisions laid down by the Code, the grounds of appeal against acts of first instance courts on civil cases are to be lodged with the court of appeal, and the grounds of

appeal against the latter's acts are to be lodged with the court of cassation.

The provisions of the Article 359 of the Civil Procedure Code, which set out that "... except for disputes where the amount of a claim does not exceed an amount equal to 100 minimum monthly salaries or disputes specially provided for in legislation", read in conjunction with the relevant articles of that Code, deprive a party of the right to lodge a complaint against the decisions of a court on such cases.

According to the Constitution, everyone has the right to defend his/her rights and freedoms by means not prohibited by legislation. The State is to ensure the protection of human rights and freedoms (Article 26).

The provisions of the Constitution (Articles 25, 26, 60 and 71), which have the aim of protecting human rights and freedoms, ensuring the equality before the court and law and safeguarding the right to apply to a court, are of particular importance.

The Constitution secures a legal defence not only in the courts of first instance but also in the courts of appeal and cassation. The right to apply to every level of court derives from the right to a legal defence. The existence of that right in a democratic society is reflected in the Constitution and legislation of the State.

The right to a legal defence in civil cases not only allows for the initiation of court proceedings but it is also a State guarantee of the due formation, composition and course of the proceedings. Depending on the will of parties, the course of the proceedings in the courts of first, appeal and cassation instance is to be continued until the possibilities of a legal defence are exhausted.

Articles 71.1 and 72.2 of the Constitution set out that the Legislature, Executive and Judiciary are to respect and protect the human rights and freedoms enshrined in the Constitution.

The restoring of a person's rights by the means of a fair trial has been enshrined in a number of international law acts including Article 14 of the International Covenant on Civil and Political Rights, Articles 8 and 10 of the Universal Declaration on Human Rights, Articles 6 and 13 ECHR and Article 4 of the resolution on Basic Principles of Judicial Independence.

All natural and legal persons are entitled to a legal defence by way of the procedure laid down by legislation in order to protect and ensure the rights, freedoms and interests that are protected by legislation and in order to secure and ensure the observation of such rights, freedoms and interests guaranteed by legislation (Article 4.1 of the Civil Procedure Code).

The Constitutional Court concluded that the provisions of Article 359 of the Civil Procedure Code reading "except for disputes where an amount of a claim does not exceed an amount equal to 100 minimum monthly salaries or disputes specially provided for in legislation" contradicted Articles 25.1, 26, 60.1, 71.1 and 71.2 of the Constitution as well as the above-mentioned rules of international law and restricted the full and effective implementation of rights and freedoms by citizens in a court.

Languages:

Azeri (original), Russian, English (translation by the Court).

Identification: AZE-2003-1-003

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 25.03.2003 / **e)** 1/4 / **f)** / **g)** *Azerbaycan* (Official Gazette); *Azerbaycan Respublikasi Konstitusiya Mehkemesinin Melumati* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to participate in the administration of justice.

Keywords of the alphabetical index:

Civil Procedure, Code / Counsel, objection.

Headnotes:

The right to legal protection of the rights and freedoms of persons (Article 60 of the Constitution) and the right to obtain qualified legal assistance

(Article 61 of the Constitution) imply that a party in civil proceedings must have a comprehensive right to object against his or her representative.

Summary:

In a petition, the Supreme Court asked for a constitutional review of Article 71.4 of the Civil Procedure Code as to its conformity with Articles 26.1 and 71.2 of the Constitution, asserting that it restricted the protection of human rights and freedoms.

Constitutional Court noted that the Civil Procedure Code enabled a person to enforce his/her rights and freedoms directly or by means of his/her representative.

Any natural or legal person has the right to lodge a claim with the court personally or by means of a duly appointed representative (Article 69.1 of the Civil Procedure Code).

Representation in court means one person acting in the interests of another within the competences granted by or on behalf of the represented person with a view to obtaining the decision that is the most suitable for the latter as well as assisting in the enforcement of his/her rights, prevention of the violation of his/her rights during the trial and helping in the administration of fair trials in civil cases.

Not all participants, but only the parties to a civil case and third persons, who file or do not file separate claims concerning the dispute in question, may take part in a case by means of a representative.

The need for representation in a court arises in various circumstances. In this connection, some parties concerned do not have the capacity to bring civil proceedings (minor persons and persons who are considered incapable by a court) and cannot personally represent themselves; consequently, their rights are protected by representatives. Where legal persons cannot be parties to a case personally, they can enforce their procedural rights and fulfil their duties by means of a representative.

Representation in a court is connected with the wish of the parties concerned to obtain highly qualified legal assistance in order to protect their rights and freedoms in court. This is based on the requirements of the Constitution.

Article 61.1 of the Constitution states that every person shall have the right to obtain qualified legal assistance.

However, some provisions of the Civil Procedure Code impede the enjoyment of above-mentioned constitutional rights and freedoms of citizens.

Article 19 of the Civil Procedure Code sets out the grounds for and circumstances in which it is inadmissible for a judge to hear a case and those for and in which an objection may be raised against him/her. An objection may be raised against a judge where he/she is one of the parties, if he/she is or was a direct relative of any of the persons participating in the case or of their representatives, or if there is or was any family relationship between him/her and such person or representative (Article 19.2.2 of the Code).

Article 20 of the Code sets out the grounds for raising an objection against an expert, specialist, interpreter or court clerk.

An analysis of above-mentioned articles of Civil Procedure Code indicates that an objection against a representative may be raised only on the grounds set out in Articles 19.2.2, 19.2.3, 20.2.1 and 20.2.2 of that Code.

The meaning of Article 19.2.2 and 19.2.3 shows that where a representative is one of the parties or if he/she was or is a direct relative of any of the parties concerned or of any party's representative, or where he/she is directly or indirectly interested in the outcome of trial, or any other circumstances exist giving rise to doubts as to his/her impartiality and fairness, such circumstances are the basis on which the parties concerned may raise an objection against a representative.

Article 20.2.1 and 20.2.2 of the Civil Procedure Code provides for other circumstances that may be the grounds for raising an objection against a representative; those are: where he/she is or was in the employment of or in any other kind of position of subordination to the parties concerned or their representatives; and where he/she carried out an inspection, the materials of which were used as the grounds for application to the court or are used in course of hearing of this civil case.

Clearly, the grounds stated in Articles 19.2.2, 19.2.3, 20.2.1 and 20.2.2 of the Civil Procedure Code directly relate to the expression of the will of parties concerned as to the participation in a trial of a person as representative.

The Constitutional Court concluded that according to Article 71.4 of the Civil Procedure Code, the application of the grounds for and the circumstances that must exist for an objection to be raised against a representative, set out in Articles 19, 20 of that Code, did not conform to the right to legal protection of the rights and freedoms of persons (Article 60 of the Constitution) and the right to obtain qualified legal assistance (Article 61 of the Constitution).

Languages:

Azeri (original), Russian, English (translation by the Court).

Belgium
Court of Arbitration

Important decisions

Identification: BEL-2003-1-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 08.01.2003 / **e)** 1/2003 / **f)** / **g)** *Moniteur belge* (Official Gazette), 03.02.2003 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
4.5.2.4 **Institutions** – Legislative bodies – Powers – Negative incompetence.
4.6.3 **Institutions** – Executive bodies – Application of laws.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2 **Fundamental Rights** – Equality.
5.4.1 **Fundamental Rights** – Economic, social and cultural rights – Freedom to teach.
5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

Education, private, subsidy / Education, teacher training / Education, authorisation.

Headnotes:

If the principle of freedom of education (Article 24.1 of the Constitution) is to be put into practice, education authorities which are not directly answerable to the Community (the federated entity responsible for educational affairs) must be entitled, under certain conditions, to apply to the Community for subsidies. The right to subsidies is restricted both by the fact that the Community may make subsidies subject to public interest requirements, for example the need for a high standard of education and to observe the rules governing pupil numbers, and by the need for balanced allocation of available financial resources to the Community's different tasks.

Freedom of education therefore has limits, and it is possible for the authority responsible for issuing decrees to impose conditions with regard to funding and subsidies which restrict this freedom. Such measures cannot in themselves be considered a violation of the principle of freedom of education, though this would be the case if the specific limits placed on freedom of education were inappropriate or disproportionate to the objectives pursued.

There is no disproportionate infringement of schools' freedom to dispense education if existing measures give these institutions substantial freedom in applying the rules laid down by the relevant Community body on grounds of public interest.

Summary:

Several *Hautes Écoles* (teacher training colleges) and the secretariat-general for Catholic education in the French- and German-speaking communities asked the Court of Arbitration to set aside a French Community binding decree which defines the initial training of primary and lower secondary school teachers. They accused the French Community of disregarding several provisions of Article 24 of the Constitution, which sets out the rules governing educational matters, in particular freedom of education and equality between pupils or students, parents, teaching staff and institutions.

The Court observed in the instant case that the legislative body sought to match teaching activities with the required skills, and ensure the homogeneity and logical progression of, and a professional approach to, teacher training, and emphasis on team work. It also endeavoured to ensure that trainee teachers gained practical experience as soon as possible and that links were forged with other training institutions.

The Court accepted that those objectives were in the public interest because they were aimed at ensuring quality and uniformity in the training of primary and lower secondary school teachers. The measures taken were in keeping with those objectives and were not contrary to the proportionality rule because they allowed for substantial freedom in the application of the rules laid down by the competent authority.

Nor was the decree contrary to the constitutional rules of equality and non-discrimination with regard to education (Article 24.4 of the Constitution) because there were objective differences between institutions responsible for the training of primary and lower secondary school teachers on the one hand and those responsible for training upper secondary school teachers on the other hand. One difference was that the latter training was intended for candidates with a university degree or equivalent qualification. The second difference concerned the type of pupils that these teachers would be qualified to teach: primary and lower secondary school teachers, as a rule, taught children of between six and fifteen years of age (primary education and lower secondary education) whereas upper secondary school teachers as a rule taught adolescents between fifteen and eighteen years of age (upper secondary school education). Owing to these objective differences between trainee primary and lower secondary school teachers on the one hand and trainee upper secondary school teachers on the other and between the institutions which trained the two groups, it did not seem unreasonable that the competent body should not lay down the same legal rules for their training.

Finally, the Court dismissed the claim that the principle of a fair distribution of powers between the legislative body and the government had been infringed (Article 24.5 of the Constitution). The Constitution reflected a commitment to giving the competent authority responsibility for deciding on fundamental aspects of the organisation, recognition and subsidising of education but did not stipulate that other authorities could not be authorised to organise education under certain conditions. Such authorisation could only concern the application of the principles which the legislative body itself had adopted. The government could not, by granting such authorisation, compensate for the lack of clarity in these principles or elaborate on insufficiently detailed rules. Any delegation of power in the case in question remained within limits which were compatible with the provisions of the Constitution.

Languages:

French, Dutch, German.

Identification: BEL-2003-1-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 22.01.2003 / **e)** 11/2003 / **f)** / **g)** *Moniteur belge* (Official Gazette), 25.03.2003 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.20 **General Principles** – Reasonableness.
5.2 **Fundamental Rights** – Equality.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Bankruptcy / Bankrupt, convicted person, discharge.

Headnotes:

With regard to bankrupt persons convicted of certain offences, it is clearly disproportionate and, consequently, contrary to the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), to automatically rule out, for an indefinite period of time and without any possibility of judicial review, any discharge measure which would, by cancelling their debts, have enabled them to resume their activities.

Summary:

In two joined cases, preliminary points of law were brought before the Court with regard to the compatibility of (former) Article 81 of the Law of 8 August 1997 on bankruptcy with the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

Article 81 rules out the possibility of discharging bankrupt persons if they have been convicted of certain offences listed in that article, for example theft and fraud. Discharge is a discretionary measure enabling bankrupt persons “to resume their activities, by cancelling their debts” and giving them a second chance. If the law does not set any conditions or criteria for discharge, the courts have a wide discretion. However, a criminal conviction on one of the grounds set out in Article 81 of the Law on bankruptcy automatically rules out the possibility of a discharge for an indefinite period of time and makes it impossible for the courts to make exceptions. The Court was asked to consider whether this was discriminatory.

The Court first drew attention to its working methods in reviewing compliance with the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) and cited the following ground, which is given in a large number of judgments and is very similar to the wording used by the European Court of Human Rights with regard to Article 14 ECHR:

> “The constitutional rules of equality and non-discrimination do not preclude the right to treat groups of persons differently if such difference in treatment is based on objective criteria and can be reasonably justified.
>
> The existence of such justification must be determined in the light of the purpose and effects of the contested measure and the nature of the principles in question; the equality principle is infringed if the means used are disproportionate to the intended purpose.”

The Court held that the difference in treatment between those bankrupt persons who could and those who could no longer be discharged was based on objective criteria, i.e. whether or not they had been convicted of one of the offences listed in Article 81 of the Law on bankruptcy. The Court noted that this criterion was relevant with regard to the objective set out in the law: the offences listed were always punishable acts which showed that the perpetrator could not be trusted to carry out certain business activities.

Finally the Court considered whether the measure was clearly disproportionate to the objective. It found that the bankrupt persons concerned were automatically excluded from the possibility of a discharge, without the courts having the opportunity to verify whether the person concerned might in future be a sufficiently trustworthy business partner or to examine the background to the case. In the Court's opinion, that exceeded what was necessary to attain the objective pursued: giving the courts a certain degree of discretion in the matter, requiring them where necessary to give specific grounds for their decision, did not appear to be incompatible with the objectives pursued by the legislator. The Court therefore found that there had been a violation of the constitutional principle of equality.

Supplementary information:

Following the above-mentioned Judgment (no. 11/2003), the Court was able, in Judgment no. 39/2003, to answer a similar question raised at a later date by means of preliminary proceedings (www.arbitrage.be).

Languages:

French, Dutch, German.

Identification: BEL-2003-1-003

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 25.03.2003 / **e)** 35/2003 / **f)** / **g)** *Moniteur belge* (Official Gazette), 15.04.2003 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.3 **Constitutional Justice** – Jurisdiction.
3.3.1 **General Principles** – Democracy – Representative democracy.
3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
4.8.1 **Institutions** – Federalism, regionalism and local self-government – Federal entities.
4.8.2 **Institutions** – Federalism, regionalism and local self-government – Regions and provinces.
4.8.6.1 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Deliberative assembly.
4.8.8.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Principles and methods.
4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.
4.9.9.8 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Counting of votes.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.2.2.10 **Fundamental Rights** – Equality – Criteria of distinction – Language.
5.3.38 **Fundamental Rights** – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Election, list, joining of lists / Political party, non-democratic / Municipality, differential treatment.

Headnotes:

The Court, in principle, is not competent to express a view on the composition or functioning of Parliament.

The federal parliament, by special majority, may, without altering the Constitution, transfer powers to the regions in relation to subordinate authorities.

Neither a difference in treatment as between municipalities nor identical treatment of municipalities with regard to arrangements for such transfer of powers, depending on the language position in the particular municipality, is contrary to the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

Allowing parties to join their lists so as to pool their remaining votes for allocation of seats in elections is not discriminatory.

In the bilingual Brussels-Capital Region a ratio is permissible for election of members to the region council (72 French-speakers to 17 Dutch-speakers). This interference with the principle of proportional representation is not disproportionate in terms of the aim pursued, which is to enable representatives of the smaller language group to perform their work, thus preserving normal democratic functioning of the institutional machinery.

Members of a representative body must, as a rule, be elected by the citizens affected by that body's decisions. Attempting to prevent a "non-democratic" party's causing institutional paralysis is not adequate justification for bringing in, contrary to the aforementioned principle, a number of non-elected candidates on the basis of election results in another constituency.

Summary:

The three laws of 13 July 2001 had taken federalisation of Belgium a stage further, with gradual transfer of powers from the federal authority to the federated entities. Under those laws, it was no longer the federal authority but the regions (the Flemish Region, the Walloon Region and the Brussels-Capital Region) which were competent to regulate the composition, election, organisation, powers and functioning of subordinate authorities (mainly the municipalities and provinces).

Leaving aside the many admissibility issues, a large number of applications seeking annulment of those laws had been lodged by individuals and associations.

A first question was whether the impugned laws had been passed by a validly composed Senate and by the required special majority (two thirds). The Court could check that a piece of legislation had been enacted by the special majority but was not competent to consider the internal functioning of a legislative assembly or whether the legislation under challenge had been adopted by an unlawfully composed legislative assembly.

A further question was whether the powers in relation to subordinate authorities could be transferred to the regions without a constitutional amendment, given that Articles 41 and 162.1 of the Constitution, dealing with subordinate authorities, referred only to "laws" (that is, acts of the federal parliament), and not "decrees" (acts of the Flemish Region or the Walloon Region) or "orders" (acts of the Brussels-Capital Region). The word "law", as found in Article 162.1, antedated the introduction of communities and regions and meant only that it was Parliament – and not the executive – which was competent to lay down the basic principles regarding subordinate authorities. Thus, according to the Court, it was perfectly permissible for rule-making in relation to subordinate authorities to be transferred to the regions without any constitutional amendment.

The question then arose whether transfer of powers in relation to subordinate authorities discriminated against some municipalities, given the special rules, mainly concerning language. The special rules were contained in a law of 9 August 1988 which had sought to pacify relations between the Flemish and French communities as a whole. The aims of the so-called "Pacification" Law – to achieve a balance between the communities and preserve a higher public interest – justified differences of treatment between municipalities. Not applying the restriction in question to other municipalities with language arrangements and applying still other rules to municipalities in the bilingual Brussels-Capital Region were likewise justified and did not interfere with the basic principles of the Belgian legal system.

The appellants had further argued that municipalities must be treated identically, except in matters governed by the special rules contained in the impugned law itself. After examining the preparatory materials relating to the Law, the Court held that the provision did not preclude according different treatment, in a specific measure, to categories of municipalities whose circumstances were essentially different, and nor did it prevent those municipalities from relying on the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) if they were treated identically without reasonable justification.

Complaints had also been made about the arrangement whereby, in elections, parties could join together their lists (the system involved pooling parties' remaining votes and applying the D'Hondt system to allocate seats, in the present case in the Brussels-Capital Region council). The Court drew attention to Article 3 Protocol 1 ECHR and the relevant case-law of the European Court of Human Rights. The pooling arrangement was not discriminatory provided it did not have disproportionate effects.

Complaints had likewise been lodged to the ratio for apportionment of seats in the Brussels-Capital Region council (72 French-speakers to 17 Dutch-speakers – for previous elections the proportion had been 64 to 11) in that a "French-speaking" seat would require more votes (5,086) than a "Dutch-speaking" seat (3,562). The Court held that this special arrangement was not discriminatory. A pre-set figure for representation of a group which, numerically, was in the minority was not, in principle, contrary to Article 3 Protocol 1 ECHR. The increase in the number of seats was intended to solve the problem of Dutch-speakers' representation in the Brussels-Capital Region council: with, as previously, only 11 of the 75 seats, Dutch-speaking members had had great difficulty in performing their work properly. The Court pointed out that the policy aim was to achieve a balance between federal Belgium's communities and regions. The Brussels-Capital Region was a bilingual one, a circumstance which justified its having institutional mechanisms and bodies of its own (in Belgium as a whole Dutch-speakers were in the majority, whereas in Brussels French-speakers were). In the particular case, the Court held that the interference with the principle of proportional representation was not disproportionate in terms of the aim pursued, which was to enable representatives of the smaller language group to perform their duties, thereby preserving normal democratic functioning of the institutions.

Another measure challenged had been the five extra members accorded to the Dutch-speaking group in the Brussels-Capital Region council for performing the functions of the Flemish Community Committee (a body which had cultural, educational and welfare responsibilities in respect of the Brussels-Capital City Flemish community). The extra five members were to be elected from non-elected candidates who had been on Dutch-speaking lists in the elections to the Brussels-Capital Region council, on the basis of the results of each of the lists in the elections to the Flemish Parliament (both the Dutch-speaking region and Dutch-speakers in the Brussels-Capital bilingual region were to be represented). The Court annulled that measure on the ground that it unjustifiably broke the rule that members of a representative body had to be elected by the citizens affected by that body's decisions. The argument that the measure was necessary to prevent a "non-democratic" party's causing institutional paralysis was not sufficient justification: even though radical measures might be permissible to prevent political freedoms which made democracy vulnerable from being used to destroy democracy, such measures must be

confined to protecting the democratic nature of the system of government and must not be discriminatory.

For lack of space we leave out various other grounds of appeal, all of which were dismissed.

Supplementary information:

See also Judgment no. 36/2003 of 27 March 2003 (www.arbitrage.be) with regard to the ratio of French-speakers to Dutch-speakers in the Brussels-Capital Region council (the appeals were dismissed).

Languages:

French, Dutch, German.

Identification: BEL-2003-1-004

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 30.04.2003 / **e)** 51/2003 / **f)** / **g)** *Moniteur belge* (Official Gazette), 12.06.2003 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

4.8.8.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Principles and methods.
4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.
5.2 **Fundamental Rights** – Equality.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.
5.5.1 **Fundamental Rights** – Collective rights – Right to the environment.

Keywords of the alphabetical index:

Airport, noise / Airport, nearby resident, protection / Noise, pollution, reduction.

Headnotes:

Noise caused by aircraft may infringe the right to respect for private and family life (Article 22 of the Constitution and Article 8 ECHR) of residents living near an airport.

In performing their functions, regions (entities of the federal state) must guarantee respect for private life notwithstanding the federal parliament's powers under Article 22.1 of the Constitution to lay down, in general, how and in what cases that basic right may be restricted.

None of the reports by various specialists had found that residents living alongside an airport could occupy their homes without excessive interference with their private lives when subjected to noise of between 65 and 70 dB (A). Those residents therefore could not be treated differently from residents of an area in which 70 dB (A) was exceeded.

Summary:

The Court determined appeals seeking annulment of two anti-noise decrees of the Walloon Region.

Several residents alongside Liège-Bierset airport (in zone B of the noise-exposure plan) complained of undue noise from night flights out of the airport. They requested that the house-purchase procedure applied to residents of zone A of the noise-exposure plan be applied to them also on the ground that both sets of residents were subjected to identical noise levels and therefore there could not be a difference in their legal treatment.

The appellants firstly alleged a violation of the jurisdiction of the federal parliament, which alone could make exceptions to the right to a healthy environment, and that the powers of communities and regions extended only to protecting that right. The Court noted that the regional council's objective was to protect residents living alongside airports from the noise of airport operations. It had accordingly exercised environment-protection and anti-noise powers and powers with regard to airport and airfield facilities and operation, and was required to guarantee respect for private life under Article 22.2 of the Constitution.

In general, although, under Article 22, only the federal parliament could lay down how and in what cases the right to respect for private and family life could be restricted, that power related only to general restrictions of that right, in whatever field. An interference with private and family life which fell under the regulations on a specific matter came within the jurisdiction of the parliament or council competent to regulate that matter.

The Court dismissed the complaint that the legislative body issuing the decree had no jurisdiction in the matter. In its statement of reasons concerning Article 22 of the Constitution, it noted that the constitutional draftsman had sought to make that article consistent with Article 8 ECHR, and it referred to the European Court of Human Rights judgments of 21 February 1990 in *Powell and Rayner v. United Kingdom* and 2 October 2001 in *Hatton v. United Kingdom.*

The other grounds of appeal all related to breach of the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken together with other constitutional or treaty provisions.

The appellants' first criticism related to the criterion which the decree-issuing legislative body had adopted for delimiting the areas in the noise-exposure plan. "Ldn" was not, it was argued, a suitable criterion for evaluating the noise pollution created by an airport which mainly operated at night, and discriminated against residents in zone B compared with residents in zone A by treating them differently, whereas both sets of residents were subjected to identical noise peaks.

The Court dismissed that ground of appeal. In addition to taking into account noise peaks, the total number of aircraft and aircraft overflight time, "Ldn" took into account the volume of nighttime traffic, applying a penalty of 10 dB (A) for each nighttime flight. It was not unreasonable to use average air-traffic noise as a criterion since Bierset airport was due for development and there would be as much daytime as nighttime traffic. Contrary to the residents' contention, noise peaks were in fact taken into account in that, for zone B, the decree laid down a maximum for noise produced on the ground, together with penalties for exceeding the maximum.

The appellants further challenged the relevance of the 70 dB (A) maximum set for distinguishing zone A from zone B in the noise-exposure plan, given that specialist scientific studies described as unbearable any noise exceeding 66 dB (A) when "Ldn" was used as the indicator.

The Court noted that none of the reports by the different experts established that residents living alongside Bierset airport could occupy their houses without unreasonable disturbance to their private lives. Soundproofing could reduce the noise levels sufficiently to remove the danger to residents' health but they would still be unable to leave doors or windows open.

Consequently, in the Court's view, residents in zone B, in terms of their right to respect for private and family life, were essentially in exactly the same predicament as those in zone A, with the result that the difference in treatment which the appellants had complained of could not reasonably be justified. The Court consequently upheld the ground of appeal.

Languages:

French, Dutch, German.

Bulgaria
Constitutional Court

Statistical data
1 January 2003 – 30 April 2003

Number of decisions: 5

Important decisions

Identification: BUL-2003-1-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 04.02.2003 / **e)** 01/03 / **f)** / **g)** / *Darzhaven vestnik* (Official Gazette), 13, 11.02.2003 / **h)**.

Keywords of the systematic thesaurus:

4.5.2.1 **Institutions** – Legislative bodies – Powers – Competences with respect to international agreements.
4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.

Keywords of the alphabetical index:

International treaty / Army, use within the country / Army, intervention abroad.

Headnotes:

1. The troops of a political or military alliance of the member states of this alliance and those of allied states in pursuance of an international political or military treaty which has been ratified, has been published in the Official Gazette and has come into force for the Republic of Bulgaria are not foreign troops within the meaning of Article 84.11 of the Constitution, when their crossing of national territory or their deployment on national territory is linked to the performance of alliance commitments.

2. A decision of the National Assembly concerning the deployment and use of Bulgarian armed forces outside the country, the deployment of allied troops on national territory or their crossing of national territory, in pursuance of Article 84.11 of the Constitution, is not necessary where this is in performance of alliance commitments deriving from an international political or military treaty which has been ratified, has been published in the Official Gazette and has come into force for the Republic of Bulgaria.

3. A decision of the National Assembly is not necessary for each specific case when, in a law adopted for this purpose, an exhaustive definition is given of the objectives of, and the procedure and conditions for, the honouring by the Bulgarian Party of the commitments deriving for it from an international military or political treaty which has been ratified, has been published in the Official Gazette and has come into force, and which provides for Bulgarian armed forces to be deployed outside the country and for allied troops to be deployed on national territory or to cross national territory.

Summary:

The procedure was opened on referral by the President of the Republic, who requested a binding interpretation of Article 84.11 of the Constitution, in conjunction with Article 85.1.1 of the Constitution. The aim of the interpretation was to clarify the relationship which exists between two powers of the National Assembly, namely responsibility for approving the deployment and use of Bulgarian armed forces outside the country, as well as the deployment of allied troops in, or their crossing of, national territory, and responsibility for ratifying in a law those international political and military treaties in pursuance of which the Republic of Bulgaria has entered into alliance commitments relating to the aforementioned acts.

In order to give this binding interpretation of the Constitution, the Court had to provide answers to the three questions below:

- Can allied troops in pursuance of an international treaty concluded with Bulgaria be considered to be foreign troops, within the meaning of Article 84.11 of the Constitution, who threaten the country's sovereignty, security, independence and territorial integrity?

- Is National Assembly approval necessary in pursuance of Article 84.11 of the Constitution? In practice, Article 85.1.1 of the Constitution specifies that the National Assembly shall ratify by law international treaties. These thereby become an integral part of the country's domestic law, but they specifically regulate the procedure, conditions and duration of neither the deployment on national

territory of allied troops or of their crossing of national territory, nor the deployment of Bulgarian armed forces outside the country in the context of the honouring of alliance commitments.

- In view of the foregoing, is it necessary for the National Assembly to give approval for each specific case?

The Constitutional Court, having taken into account the considerations of the Council of Ministers, the Minister for Foreign Affairs, the Minister for Defence and the Bulgarian Army Staff, which are parties to this case, unanimously provided the interpretation of the constitutional provisions concerned as set out in the above headnotes.

Languages:

Bulgarian.

Croatia
Constitutional Court

Important decisions

Identification: CRO-2003-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 16.01.2003 / **e)** U-II-994/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 14/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.3.5.10 **Constitutional Justice** – Jurisdiction – The subject of review – Rules issued by the executive.
3.13 **General Principles** – Legality.
3.15 **General Principles** – Publication of laws.

Keywords of the alphabetical index:

Minister, law-making power / Ordinance, entry into force.

Headnotes:

Bylaws (i.e. regulations other than laws) of a general binding nature that produce legal effects must be published in the Official Gazette before they enter into force.

Summary:

The Constitutional Court examined a request for initiating proceedings to review the constitutionality and legality of the Ordinance on the Provision of Housing of 29 May 2001 (hereinafter: “the Ordinance”) on the ground that its publication did not comply with the provisions of Article 89.1 of the Constitution.

The Minister of Defence had issued the Ordinance by virtue of the powers set out in Article 1 of the Regulations on the Provision of Housing for High-Ranking Officials, Active Military Personnel, Military Officials and Military Staff of the Ministry of Defence and the Armed Forces of the Republic of Croatia (hereinafter: “the Regulations”) issued by the Government of the Republic of Croatia on 25 November 1999.

Pursuant to Article 42 of the Constitutional Act on the Constitutional Court, the Court received a response from the Ministry of Defence stating that it had drawn up the Final List of Housing Needs of its employees and the employees of the Armed Forces for 2002 on the basis of requests for meeting the housing needs and in compliance with the provisions of the Ordinance. The list had been drawn up and prepared for publication in a special edition of *Vojni Vijesnik*, the official gazette of the Ministry of Defence, but it had not been published because of delay in the reorganisation process of the Ministry of Defence and the Armed Forces of the Republic of Croatia.

On the basis of Article 128.1 and 128.2 of the Constitution, the Constitutional Court has the jurisdiction to make decisions on the conformity of laws with the Constitution and on the conformity of other regulations with the Constitution and laws. The term "other regulations" within the meaning of the constitutional provisions cited above implies regulations issued by a competent governmental body acting within its legal authority for the purpose of implementing a law, i.e. regulations that organise relations in an abstract manner and are usually addressed to an indefinite group of addressees, and are issued by the bodies of local and regional self-government or by other legal entities having public authority acting within their powers as set out in the Constitution and law.

In assessing its jurisdiction to undertake a constitutional-judicial review in the case before it, the Constitutional Court found that the Ordinance fell into the category of "other regulations", i.e. regulations whose conformity with the Constitution and law fell within the jurisdiction of the Constitutional Court pursuant to Articles 17 and 18.4 of the Law on the System of the State Administration (hereinafter: the "LSSA").

The Minister of Defence had issued the Ordinance in accordance with his powers to issue such an ordinance, as set out in the provisions of Articles 1 and 2 of the Regulations.

Article 17 LSSA sets out that ministers may, *inter alia*, issue ordinances for implementing laws and other regulations when they are explicitly authorised to do so, within the limits of the authorisation. Pursuant to the provisions of Article 18.4 LSSA, the ordinances are to be published in the Official Gazette *(Narodne novine)* and enter into force no earlier than eight days after the day of their publication, unless the regulations exceptionally state that the ordinances are to enter into force on the date of publication due to especially important reasons.

After examining the Ordinance, the Constitutional Court found that the impugned instrument in the case was an implementing instrument. As Article 1 of the Special Ordinance had set out the standards for providing housing, the manner of acquiring funds, and the manner and procedures for determining and satisfying housing needs of persons covered by the Ordinance, the Constitutional Court found that the Ordinance was addressed to an indefinite and very wide group of people and was binding on the addressees.

Finding that the Ordinance fell into the category of "other regulations" and that the Court had the jurisdiction to review it, the Court examined whether Article 45 of the Ordinance stating "[t]his Ordinance enters into force on the day of its publication in the *Vojni Vjesnik"* complied with the Constitution and laws. The contents of the Ordinance that produced legal effects had not been published in the Official Gazette *(Narodne novine)*, contrary to the explicit provisions of Article 18.4 LSSA.

That did not comply with the provisions of Article 89.1 of the Constitution stating that before entering into force, laws and other regulations of state authorities are to be published in *Narodne novine*, the official gazette of the Republic of Croatia. It also amounted to a violation of the constitutional principle in Article 5.1 of the Constitution providing that regulations have to comply with the Constitution and law.

Therefore, pursuant to Article 43 of the Constitutional Act, the Constitutional Court initiated proceedings to review the constitutionality and legality, and found the Ordinance in breach of the constitutional principles in Articles 5.1 and 89.1 of the Constitution, as well as Article 18.4 LSSA. Pursuant to Article 55.1 and 55.2 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, the Court annulled (repealed) the Ordinance in full.

Cross-references:

- 023-03/01-02/02 of 29.05.2001, published in *Vojni vjesnik*, issued by the Minister of Defence;
- *Narodne novine* (Official Gazette), no. 133/99;
- *Narodne novine* (Official Gazette), nos. 75/93, 48/99, 15/00, 127/00, 59/01.

Languages:

Croatian, English.

Identification: CRO-2003-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 16.01.2003 / **e)** U-III-1136/1997 / **f)** / **g)** *Narodne novine* (Official Gazette), 20/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Proceedings, administrative / Claim, ancillary / Expenses, refunding / Economy, principle.

Headnotes:

In administrative proceedings, a decision on an ancillary claim in some administrative fields may be made on the basis of explicit regulations. A party need not make a claim, provided that the party requests that that decision be made on the basis of the principle of economy and that no legal provision exists barring such a decision.

Summary:

In administrative proceedings, a right to compensation of expenses for medication was recognised; however, a subsequent claim seeking default interest under Article 277.1 of the Law on Obligations (hereinafter: the "LO") was rejected.

The Administrative Court rejected the action on the following grounds: in accordance with the provisions of Articles 80 and 81 of the Health Insurance Law, bodies of the Croatian Health Insurance Bureau had subject-matter competence in administrative proceedings, which meant that, pursuant to the provisions of the Law on General Administrative Procedure and a decision of the Constitutional Court, competence only over the rights set out in the Health Insurance Law, whereas, in accordance with the provisions of the Law on Obligations, municipal and county courts had subject-matter jurisdiction over issues concerning payment of default interest (Article 16 of the Judicial Act).

The applicant lodged a constitutional complaint alleging a violation of the provisions of Articles 2, 14.2 and 19.1 of the Constitution on the basis that the claim for payment of default interest was only an ancillary claim, which was inseparable from the main claim in the administrative proceedings. She further claimed that the grounds for the Administrative Court's judgment indicated that administrative bodies would only be authorised to apply laws from their own narrow field. That, she stated, would be absurd and contrary to the basic principle of legality of Article 4 of the Law on General Administrative Procedure providing that administrative proceedings did not exclude the application of any valid applicable legal rule, including the Law on Obligations. The applicant also pointed out that in the Croatian legal system, which also included administrative bodies, the main issue and ancillary claims were determined in one decision. As a result, the grounds for the judgment of the Administrative Court were contrary to both the specific legal rules and the spirit of the entire legal system.

After examining the constitutional complaint, the Constitutional Court found that the applicant had not claimed payment of default interest in the administrative proceedings. On the contrary, she brought an action in the Administrative Court seeking payment of default interest only after her right to compensation for expenses for medication had been recognised. The applicant should have claimed payment of default interest in her originating administrative claim for compensation of expenses for medication (Article 186.1 of the Law on Civil Procedure).

Unlike the case prescribed by the provisions of Article 25.8 of the Law on Expropriation, the Health Insurance Law does not explicitly state that a decision concerning its application must also include default interest as a matter of law, even in a case where a party does not make a specific claim. The Constitutional Court held that the applicant's constitutional right of equality before the law had not been violated in the impugned decision of the Administrative Court on the ground that the applicant failed to raise the issue of default interest in the first set of administrative proceedings.

In reference to the grounds for the impugned judgment of the Administrative Court, i.e. that decisions in administrative proceedings could only be made on the rights set out in the law regulating that particular administrative field, while issues such as payment of default interest fell within the jurisdiction of municipal and county courts, the Constitutional Court pointed out that decisions on default interest could be made in administrative proceedings in some

administrative fields on the basis of explicit regulations, even though a party did not make a claim. This was the scheme of regulation, for example, in the above-mentioned provisions of Article 25.8 of the Law on Expropriation.

The Constitutional Court found that the Administrative Court had erred in its view. The Constitutional Court held that the case before it was an exception to the legal rule on which the Administrative Court had based its judgment because the ancillary claims were to be decided in the same proceedings and by the same body as the main claim. On the contrary, it would be legally illogical and uneconomical to determine the main claim in one set of legal proceedings (administrative) and the ancillary claim in another set (civil). The conclusion arose from the application of the principle of economy prescribed in Article 13 of the Law on General Administrative Procedure as a basic principle of that procedure, and from the fact that no regulation barred the delivery in the same set of administrative proceedings of a decision on an ancillary claim arising out of a realised claim that was the main issue in the administrative proceedings.

The Constitutional Court did not find a violation of the constitutional right set out in Article 14.2 of the Constitution (right to equality before the law). The provisions of Article 3 of the Constitution (highest values of constitutional order) and Article 19.2 of the Constitution (principle of legality in the work of public administration) did not contain constitutional rights of individuals. The Court, therefore, dismissed the constitutional complaint.

Cross-references:

- *Narodne novine* (Official Gazette), nos. 53/91, 73/91, 111/93, 3/94, 107/95, 7/96, 112/99 and 88/01;
- *Narodne novine* (Official Gazette), nos. 75/93 and 55/96);
- *Narodne novine* (Official Gazette), nos. 53/91 and 103/96;
- *Narodne novine* (Official Gazette), nos. 3/94 and 100/96, 115/97, 131/97, 129/00 and 67/01;
- *Narodne novine* (Official Gazette), nos. 53/91, 91/92 and 112/99;
- *Narodne novine* (Official Gazette), nos. 75/93 and 55/95;
- *Narodne novine* (Official Gazette), nos. 9/04, 35/94, 112/00 and 114/01.

Languages:

Croatian, English.

Identification: CRO-2003-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.01.2003 / **e)** U-IIIA-1100/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 16/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.7.7 **Institutions** – Judicial bodies – Supreme court.
5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Trial within reasonable time, meaning / Compensation, determination.

Headnotes:

For determining the length of proceedings in a matter, the revision proceedings in the Supreme Court of the Republic of Croatia may not as a rule be treated as a separate and individual case with respect to Article 63 of the Constitutional Act, except where the decision on revision quashes the final lower court judgments, and the case is referred back for rehearing.

The amount of just compensation for a violation of a constitutional right (length of proceedings) may be affected, aside from the circumstances that are usually considered, by the short time-limit set for a lower court to deliver a new judgment, which is the most effective way of achieving the purpose of judicial proceedings.

Summary:

Relying on the provisions of Article 59a of the then Constitutional Act on the Constitutional Court, foreign citizens lodged a constitutional complaint concerning the unreasonable length of the proceedings pending at that time in the Supreme Court of the Republic of

Croatia. The applicants had applied to that Court for judicial revision *(revizija)* of a final judgment of a lower court.

Article 59a of the Constitutional Act on the Constitutional Court was amended by the Constitutional Act on Revisions and Amendments of the Constitutional Act on the Constitutional Court. Consequently, the Constitutional Court applies the provisions of the new Article 63 of the Constitutional Act when considering a violation of the constitutional right of the applicant set out in Article 29.1 of the Constitution.

In accordance with Article 69.2 of the Constitutional Act, a response by the Supreme Court of the Republic of Croatia was sought during the proceedings in the Constitutional Court. The Supreme Court confirmed the facts established above in its response. It went on to state that the case had been assigned to a legal officer and a decision would be delivered very soon, as cases for revision dating back to 1997 that were not urgent were being examined at the time.

The response stated that the mere failure to deliver a decision by 2002 on a case lodged in 1997 did not amount to a situation covered by Article 63 of the Constitutional Act because the delay did not result from the Supreme Court's inactivity. On the contrary, the Supreme Court had delivered decisions on a greater number of cases than that of the cases that had been outstanding (The Supreme Court also included a statistical report of cases filed with the Supreme Court with its response). The delay was the result of well-known objective facts, such as a large number of pending cases and a great inflow of new ones. That being so, the cases were being considered and determined by chronological order, with the exception of urgent cases, which had priority.

After considering the claims of the constitutional complaint as well as the response and ruling on the judicial revision by the Supreme Court, the Constitutional Court held that there were valid grounds for allowing the proceedings in accordance with the provisions of Article 63 of the Constitutional Act.

The Constitutional Court found that the civil action had begun on 2 February 1990 with the complaint brought by the applicant as plaintiff, that the first-instance (repealing) judgment had been delivered on 20 December 1994 and had been affirmed by the second-instance judgment on 12 June 1996.

The application for judicial revision of the final judgment had been filed on 9 October 1997 and forwarded to the Supreme Court of the Republic of Croatia on an undetermined date in 1997. The Supreme Court made a ruling on 26 June 2002, that is to say, after the constitutional court proceedings had been instituted, in which it quashed the disputed rulings of the lower courts and referred the case back to the first-instance court for rehearing.

At the time the decision of the Constitutional Court was delivered, the case in the new first-instance proceedings had not yet been assigned to a judge and a date had not yet been set for a hearing.

The total length of the first-instance and second-instance proceedings had been 6 years, 4 months and 6 days. The revision proceedings up to the time the constitutional complaint was lodged had lasted for 4 years, 8 months and 1 day. Taking into account the date on which the Law on Ratification of the Convention entered into force (5 November 1997), the proceedings had lasted 4 years, 6 months and 11 days.

However, due to the special legal nature of judicial revision proceedings, the Constitutional Court held that the length of the entire judicial proceedings had to be exceptionally examined in the case. That emerged from the fact that judicial revision is an extraordinary legal remedy in civil actions. It may be lodged – under conditions and for the reasons prescribed by law – only against a final judicial decision delivered on the merits of the case on the rights and obligations of the parties.

Therefore, an application for judicial revision does not preclude the finality of the judgment on the rights and obligations of the parties that has already been delivered in the civil proceedings on the merits of the case. For this reason, the length of revision proceedings before the Supreme Court may not, as a rule, be treated as a separate and individual case with respect to Article 63 of the Constitutional Act. Civil proceedings are considered final in the legal order of the Republic of Croatia, regardless of the potential right of the party to apply to the Supreme Court for judicial revision.

In applying Article 63 of the Constitutional Act, the Constitutional Court must take into consideration the specific nature of revision proceedings. These fall within the jurisdiction of the highest court of the land for the purpose of, *inter alia*, protecting the principle of the finality of a judicial decision, which is important for the principle of legal security in the Republic of Croatia.

Pursuant to Article 63, the Constitutional Court based its decision on the fact that in the case in question the Supreme Court had quashed, by its decision on revision, the judgments rendering the judicial

proceedings final of the first and second instance courts from 1994 and 1996 respectively and had referred the entire case back to the court of first instance for rehearing.

The facts that the civil proceedings in that civil matter had been going on since 1990 and that in 2002 the entire case had been referred back to the trial court for rehearing lent support to the finding of the Constitutional Court that it was, in the case in question, extremely important to consider the entire length of proceedings. The Constitutional Court found it unreasonably long.

The Constitutional Court found that the applicants in the complaint had not contributed to the length of proceedings. On the contrary, they had tried to speed them up by sending a substantial number of rush notes to the Municipal Court in P. in order to expedite delivery of the application for judicial revision to the relevant court, that is to say, the Supreme Court of the Republic of Croatia, so that it could deliver a decision on the revision more quickly.

The course of the judicial proceedings did not indicate that it was a complex judicial case.

The Constitutional Court held that organizational problems of any court or of the judicial system as a whole did not amount to a justifiable reason for failing to deliver a judicial decision within a reasonable time, which was in compliance with the examples from the case-law of the European Court of Human Rights (see e.g. judgments *Bucholz v. Germany* of 6 May 1981; *M. Guincho v. Portugal* of 10 July 1984; *Union Alimentaria Sanders SA v. Spain* of 7 July 1989; *Brigandi v. Italy* of 19 February 1991, etc.).

The Constitutional Court held that for all the above-mentioned reasons, the applicants' constitutional right to have an independent and impartial court established by law determine their rights and obligations within a reasonable time, as guaranteed by the provision of Article 29.1 of the Constitution, had been violated.

When deciding on compensation for the violation of the constitutional right to have judgment delivered within in a reasonable time, the Constitutional Court as a rule considers the period from the date on which the European Convention entered into force in the Republic of Croatia, and depending on the specific circumstances of the individual case, may also exceptionally take into account an unreasonably long period of complete judicial inactivity prior to 5 November 1997. Therefore, when deciding on the sum of compensation, in accordance with Article 63.3 of the Constitutional Act, the Constitutional Court took all circumstances of the case into account and also bore in mind the economic and social conditions in the Republic of Croatia.

In accordance with Article 63.2 of the Constitutional Act, the Constitutional Court may also set a time-limit for delivering judgment in every case. In this case the amount of compensation was also affected by the short time-limit set for the Municipal Court in P. to deliver the judgment, which was the most effective way of achieving the purpose of judicial proceedings.

The constitutional complaint was allowed, and the first instance court ordered that the time-limit for delivering the new judgment was to be no longer than six months, counting from the date of publication of its decision in the Official Gazette *(Narodne novine)*. The applicants were awarded just compensation as a result of the violation of the constitutional right set out in Article 29.1 of the Constitution, in the amount of 2.500 kuna each, payable from the state budget within 3 months from the day on which the applicants submitted a request for its payment.

Cross-references:

- *Narodne novine* (Official Gazette), no. 99/99);
- *Narodne novine* (Official Gazette), no. 29/02 and 49/09 – cleared text.

Languages:

Croatian, English.

Identification: CRO-2003-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 23.01.2003 / **e)** U-III-322/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 21/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.3.4 **Institutions** – Languages – Minority language(s).
4.8.2 **Institutions** – Federalism, regionalism and local self-government – Regions and provinces.
4.8.8.3 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Supervision.

5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.37 **Fundamental Rights** – Civil and political rights – Linguistic freedom.
5.3.42 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Language, minority, official use by the administrative authorities / County, self-government.

Headnotes:

The Constitutional Law on the Rights of National Minorities provides for the introduction of the equal official use of the language and script used by national minority members on the territory of a unit of local self-government, under specific prescribed circumstances.

Under Article 133 of the Constitution, municipalities and towns are units of local self-government, while counties are units of regional self-government.

Summary:

Claiming a violation of the provisions of Articles 12.2 and 19.2 of the Constitution, Pazin in Istarska County, represented by the County Prefect, lodged a constitutional complaint against a ruling by the Administrative Court, rulings by administrative bodies on administrative supervision and the conclusions of the Administrative Inspectorate, in which, according to the applicant's claims, its right as a legal entity and a unit of local self-government to display a nameplate in Italian on the official seat of county bodies had been denied.

The Administrative Court had found the applicant's claim inadmissible on the ground that the claim had been filed against an act that could not be described as an “administrative act” as defined by the Law on Administrative Lawsuits (hereinafter: the “LAL”). Pursuant to the provisions of Article 6 LAL, administrative proceedings may be initiated only against an “administrative act”.

The provisions of Article 12.2 of the Constitution set out that in individual local units, another language and the Cyrillic or another script may be introduced into official use along with the Croatian language and the Latin script under conditions prescribed by law. The provisions of Article 19.2 of the Constitution guarantee judicial review of individual decisions made by administrative agencies and other bodies vested with public authority.

The applicant claimed that violations of those constitutional provisions had taken place as no legal protection against a decision of the Ministry of Public Administration could be sought either before an ordinary court or before the Administrative Court of the Republic of Croatia. The Administrative Court's finding (that the decision in question was not an administrative act) was challenged by the applicant on the ground that the decision determined a concrete right of a concrete legal entity. Furthermore, the applicant challenged the carrying out of administrative inspections in the supervision of the lawfulness of the county prefect’s performance of tasks of public administration and self-government. The applicant claimed that under the provisions of the Law on Local Self-Government and Administration (hereinafter: the “LLSGA”), only the Government of the Republic of Croatia was entitled to carry out such supervision. To that end, the applicant claimed that the administrative bodies had acted in a way that was contrary to the rights to use the Croatian and Italian languages on the territory of the Republic of Croatia that had been acquired on the basis of international treaties and the legal order of the predecessor state.

According to the Ministry of Public Administration's response to the complaint, under Article 7.2 of the Constitutional Law on Human Rights, the right to the official use of a minority language together with Croatian belonged only to a minority having a majority population in a municipality. According to the Ministry, that right was not granted to counties, which was the reason displaying nameplates in Italian on the Istarska County building in Pazin was not legally justified. Furthermore, the impugned decision stated that the County, which was a unit of local administration and self-government under the constitutional provisions valid at that time, could not rely on Article 8 of that Constitutional Law, by virtue of which only units of local self-government could claim the right to the official use of two or more languages or scripts. The Ministry of Public Administration pointed out that the decision of the Constitutional Court no. U-II-433/1994 of 2 February 1995 (Official Gazette, *Narodne novine*, no. 9/95) likewise annulled (repealed) the provisions of the Istarska County Statute relating to the equal use of the Italian language and script at the county level.

As to the impugned ruling of the Administrative Court of the Republic of Croatia, the Constitutional Court found that the orders issued during inspectorial supervision were administrative acts, which derived from their legal characteristics (specific, authoritative, with a specific content and form, with immediate legal effect and made on the basis of a law).

However, from a constitutional point of view, the Constitutional Court concluded that an error in the finding of the legal nature of the impugned ministerial decision was not relevant in the case in question for determining the violation of constitutional rights, since at the time the impugned administrative acts were issued (1998), a county was a unit of local administration and self-government under Articles 1 and 5.1 of the LLSGA.

The conclusion also derived from the Law on the System of State Administration (hereinafter: the "LSSA"), which is the general regulation on administrative or inspectorial supervision. Article 19 LSSA provides that authorized administrative bodies supervise the application of laws, regulations, as well as the lawfulness of work and activities, *inter alia*, of the bodies of units of local self-government and administration. This supervision is carried out in accordance with special regulations (Article 23 LSSA): in the case in question, the Law on Administrative Inspection. In accordance with the provisions of Article 34 of the Law on Administrative Inspection, no other legal protection is provided against the second-instance decision of the relevant ministry, as an appeal by way of legal remedies does not lie from that decision.

According to Article 133 of the Constitution, units of local self-government are municipalities and towns, whereas counties are units of regional self-government. The same provision exists in Article 3.2 of the Law on Local and Regional Self-Government.

The Constitutional Act on Human Rights (hereinafter: the "CAHR") ceased to be in force when the Constitutional Act on the Rights of National Minorities entered into force, that is to say, on the day of its publication: 13 December 2002.

According to the provisions of Article 12 of the Constitutional Act on the Rights of National Minorities, the equal official use of the language and script used by national minority members is introduced on the territory of a unit of local self-government where the members of a certain national minority form at least one-third of the population of the unit (paragraph 1); the equal official use of language and script used by national minority members is also introduced when it is provided for by the international treaties that form a constituent part of the internal legal order of the Republic of Croatia under the Constitution of Croatia, and when so prescribed by a statute of a unit of local self-government in accordance with the provisions of a special law on the use of languages and scripts of national minorities in Croatia (paragraph 2).

The Constitutional Court found that the applicant's constitutional rights had not been violated; therefore, it dismissed the constitutional complaint.

Cross-references:

- *Narodne novine* (Official Gazette), nos. 53/91, 9/92 and 77/92;
- *Narodne novine* (Official Gazette), nos. 90/92, 94/93, 117/93, 5/97, 12/99, 128/99 and 33/01;
- *Narodne novine* (Official Gazette), nos. 75/93, 48/99, 15/00, 127/00 and 59/01;
- *Narodne novine* (Official Gazette), nos. 65/91, 27/92, 34/92 – cleared text, 68/95, 51/00 and 105/00 – cleared text.

Languages:

Croatian, English.

Identification: CRO-2003-1-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 26.02.2003 / **e)** U-I-949/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 36/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.
5.2 **Fundamental Rights** – Equality.
5.3.35.3 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Social law.
5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Pension, privilege / Parliament, member, pension / Social security, contribution, condition, equality / Social security, system.

Headnotes:

Regulations governing parliamentary pensions that differ from those governing general pensions are based on the special legal position of members of the

Parliament. The rights of the members, along with their duties and responsibilities, must thus be adjusted to reflect the special features of their position and the general social conditions; therefore, a departure from the general rules of the pension insurance system is allowed in accordance with this framework.

Summary:

The Constitutional Court rejected the proposals of two applicants on the grounds that they referred to laws that were no longer in force and for failing to meet the requirements for the application of Article 56.1 of the Constitutional Act on the Constitutional Court (hereinafter: the "Constitutional Act"). According to that provision, the Constitutional Court may review the constitutionality of a law, and the constitutionality and legality of another regulation or some of their provisions, even though they are no longer in legal force, if no more than a year has elapsed between the day on which they had ceased to be in force and the day on which the request or proposal to institute proceedings was lodged. Article 128.1.3 of the Constitution contains an identical provision.

The Court examined proposals lodged under Article 56.1 of the Constitutional Act to review the constitutionality of laws that were no longer in force.

The applicants claimed that the legal regulation of the acquisition of parliamentary pensions was unconstitutional, and argued that the legal provisions that enabled members of the Croatian Parliament to acquire pensions under conditions different (more favourable) from those of all other insurance beneficiaries were not in accordance with the constitutional principles of equality, social justice and the rule of law (Article 3 of the Constitution), the principle of constitutionality (Article 5.1 of the Constitution) and equality of all before the law (Article 14.2 of the Constitution). In the reasons for their proposals, the applicants also pointed out the following: it was an abuse of the office of member of Parliament; it was an unjustified introduction of special criteria for acquiring the right to a parliamentary pension which differed from those of other citizens governed by the general regulations of pension insurance; the impugned provisions created a greater discrepancy in the sum of pensions; it was a grave affront to human rights and fundamental freedoms; it was a matter of acquiring privileges that were not based on the Constitution; it was a matter of inequality before the law leading to inequality of all citizens in the same legal position – that of pensioner; the rights granted to members after their term had expired, namely, compensation for salary, the parliamentary lump sum and free public transport were unjustified and disproportionate when compared to the rights of, for example, the unemployed; and parliamentary pensions should be determined the same way as pensions for all other employees in the Republic of Croatia.

While challenging the constitutionality of Articles 8, 13 and 15 of the Law on the Rights of Members of the Croatian Parliament (hereinafter: the "LRD-MCP"), one of the applicants pointed out, in particular, the retroactive effect of the provisions of Article 15 of that law. Its provisions on acquiring a right to a parliamentary pension in principle applied to all members of Parliament on and after 8 October 1991, and to former Croatian delegates in the Federal Council and Council of Republics and Provinces of the Assembly of the Socialist Federative Republic of Yugoslavia in the period from 30 May 1990 to 8 October 1991.

The applicants, in a supplement to their proposal, challenged the constitutionality of the provisions of Section VI LRDMCP, entitled "Parliamentary Pensions" containing Articles 8 to 17. They stated that those provisions were in breach of the principles of equality, social justice and equal legal status of members of the same social categories. Although accepting the need for members of Parliament, as elected representatives of the people, to have a right to remuneration appropriate to their level of engagement and responsibility while they were performing their duties, they considered it unacceptable for member privileges to be extended to a time when former members should be in the same legal position as all other pensioners.

The applicants also substantiated the unconstitutionality of those legal provisions by comparing them to the provisions of other laws, such as the Law on Rights and Duties of State Officials, the Law on Retirement Insurance and the Law on the Highest Pension.

Having examined the proposals as well as the provisions of the impugned laws, the Constitutional Court found that there were no constitutionally relevant grounds to initiate proceedings for a constitutional review of those provisions for the reason that they did not conflict with the Constitution.

The provisions relevant for those proceedings are found in Articles 2.4.1, 3, 5.1, 14.2, 56.1, 74.2 and 128.1.1 of the Constitution.

The right to a pension belongs to the sphere of rights to social security of employees and their family members. According to the provisions of Article 56.1 of the Constitution, the right to social security is secured under the conditions prescribed by law. The rights of members of Parliament to a pension are

therefore regulated by law, taking into account the provision of Article 74.2 of the Constitution.

In accordance with the constitutional powers of the Croatian Parliament to regulate independently legal relations in the Republic of Croatia, that legislative body enacted the conditions for acquiring, and the manner and procedure for obtaining a parliamentary pension in the Law on the Rights of Members, and in other laws and regulations issued on the basis of laws.

In its examination of the constitutionality of legal provisions regulating the parliamentary pension, the Court started from the view that the legal position of a member of Parliament, while performing the duties of member, has special features.

The special legal position of member of Parliament derives from provisions of the Constitution which determine that power shall derive from the people and belong to the people, and the people shall exercise this power by election of its representatives (Article 1.2 and 1.3 of the Constitution); that the Parliament is the representative body of the people and is vested with legislative power in the Republic of Croatia (Article 70 of the Constitution); that members of the Parliament shall be elected for a term of four years (Article 72.1 of the Constitution) and shall enjoy immunity (Article 75.1 of the Constitution).

In the view of the Constitutional Court, the difference between the regulations governing parliamentary pensions and those governing general pensions was grounded on the special legal position of members arising from the way in which they acquired their office, the duties of members and the legal nature of their office, the increased responsibility in performing their duties, the public nature of the work, the limited term of office, the incompatibility with any other work, the abandoning of their previous profession, etc. The rights of members, along with their responsibilities and duties, must be adjusted to reflect these special features and the general social conditions; therefore, a departure from the general rules of the retirement insurance system is allowed in accordance with this framework.

Regarding the arguments on the retroactive effect of Article 15 of the impugned Law being unconstitutional, the Court found that it referred to the retroactive effect of an individual provision of law, which was in compliance with the provisions of Article 89 of the Constitution.

The Court did not examine the applicants' claims that the legal provisions mentioned above were incompatible with the provisions of other laws, in particular, the Law on Retirement Insurance and the Law on Highest Pension, because, in accordance with the jurisdiction granted to it by the Constitution (Article 128.1.1 of the Constitution), the Constitutional Court delivers judgments only on the conformity of laws with the Constitution, not on the conformity of two or more laws with each other.

Languages:

Croatian, English.

Czech Republic

Constitutional Court

Statistical data

1 January 2003 – 30 April 2003

- Judgments of the Plenum: 7
- Judgments of panels: 56
- Other decisions of the Plenum: 3
- Other decisions of panels: 886
- Other procedural decisions: 53
- Total: 1005

Important decisions

Identification: CZE-2003-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 16.01.2003 / **e)** III. ÚS 671/02 / **f)** Publicly-funded public institution / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.2 **Constitutional Justice** – Types of claim.
2.3.5 **Sources of Constitutional Law** – Techniques of review – Logical interpretation.
2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.
2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.
3.22 **General Principles** – Prohibition of arbitrariness.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Law, interpretation / Institution, publicly-funded, definition / Information, duty to provide.

Headnotes:

The linguistic, systematic and teleological interpretation method indicates that entities under the obligation to provide information and referred to as “publicly-funded public institutions” include, aside from Czech TV and Czech Radio, all the entities meeting the applicable definition of the term. The Constitutional Court leaves the definition of the term of “publicly-funded public institutions” to the discretion of the ordinary court conducting the proceedings after a cassation award is delivered.

The constitutional complaint proceedings may be subdivided into cases involving competition between norms of ordinary law, competition between interpretation alternatives and cases of arbitrary application of ordinary law.

Summary:

The complainant sought the setting aside of a court resolution that terminated proceedings for the review of a decision of the *Všeobecná zdravotní pojištovna Ceské republiky* (General Health Insurance Company of the Czech Republic, “VZP”) declining to provide information pursuant to the Act on Free Access to Information. The complainant complained that the term “publicly-funded public institution” was interpreted incorrectly.

The complainant had requested information from VZP, but VZP refused the request. An appeal to the director of VZP's district branch had been unsuccessful. The complainant applied to an ordinary court, which terminated proceedings. The court concluded that the obligation ensuing from the aforesaid act could not be applied to VZP.

The Municipal Court referred to its opinion in the impugned ruling.

The Constitutional Court found no reason to assess the constitutionality of the substantive and procedural law applied.

The Act on Free Access to Information distinguishes between two groups of entities under the obligation to furnish information: the first group comprises bodies of state administration, bodies of local self-government and publicly-funded public institutions that are obliged, pursuant to the said Act, to provide information regarding their powers and scope of operations; the second group comprises entities to which the law entrusts decisions on rights, legally-protected interests or obligations of individuals and legal entities in public administration – such information is to be provided solely to the extent of their decision-making activities.

VZP decides on rights and obligations of individuals and legal entities in the area of public administration, and the information in question falls under the

information duty. The information requested by the complainant does not fall into that category.

Entities under the obligation to furnish information also include publicly-funded public institutions under an obligation to provide information relating to their powers and scope of operations. The interpretation of the relevant provisions by the party to the proceedings does not allow for the inclusion of VZP under the application of this term. The argument put forward is that the interpretation of the term in question is inferred from the Explanatory report on the proposed amendment to the Act on Czech TV.

The floor manager (member of Parliament who is responsible for getting a Bill through the Assembly) presenting the outline of the proposed amendment to the Act argued that there was a need for a general regulation of the matter in the Act on Free Access to Information, instead of the regulation of access to information in separate acts, in particular, the Act on Czech TV and the Act on Czech Radio.

While the Explanatory report is a compulsory part of a Bill, it does not form part of an adopted Act and is, as such, not legally binding. The Constitutional Court commented on its importance in interpretation in a ruling in Pl. ÚS-st.-1/96: "The meaning and purpose of an Act may be derived in particular from authentic documents showing the will and intents of the law-giver; such authentic documents include the Statement of Basis and Purpose submitted together with a Bill (the legislature's consent to the outline of the Bill may merely serve to create a presumption that the legislature was in agreement with the underlying reasons)."

The floor manager declared that the proposed amendment was necessary because of the need to adopt a provision of law more general than the specific provision of law in the Act on Czech TV and the Act on Czech Radio. No express reference to Czech TV and Czech Radio as entities under an obligation was made; rather, the general term "publicly-funded public institutions" was coined. The scope of that term may only be defined by an interpretation of the definition elements of the category of entities defined as such. The Constitutional Court referred to Gustav Radbruch's thesis: "The legislator's will is not an interpretation method but rather an interpretation goal, and expression for the a priori necessity to have an interpretation of the entire legal order that would not be contrary to the system. One may thus note as the legislator's will something that was never present as a conscious will of the drafter of the act. The interpreting party may understand the law better than its author, the law itself may be wiser than its creator – it needs to be wiser than its author."

It may be inferred from a comparison of the wording of the Act and the Explanatory report that the legislature's intent was to include Czech TV and Czech Radio among the entities under an obligation to provide information and referred to as "publicly-funded public institutions". "Publicly-funded public institutions" include Czech TV and Czech Radio and any other entities falling under the definition of the term of "publicly-funded public institutions".

From the perspective of constitutional law, conditions need to be defined under which an incorrect application of ordinary law by ordinary courts results in a violation of fundamental rights and freedoms. The constitutional complaint procedure involves three types of assessments by the Constitutional Court of the decision-making of ordinary courts.

1. It assesses whether a norm of ordinary law applied in the matter and pursuing a certain constitutionally protected purpose acquires a justified preference, from the perspective of the proportionality principle, over another norm of ordinary law pursuing a different constitutionally protected purpose (III. ÚS 256/01).

2. There is no competition between the potential application of multiple norms of ordinary law. This is to resolve the issue of acceptance of one of the several alternatives of interpretation of a particular norm of ordinary law (II. ÚS 22/94, III. ÚS 114/1994).

3. Cases of arbitrary application of a norm of ordinary law by the ordinary court lacking a meaningful reason, or perhaps in conjunction with a constitutionally protected purpose (III. ÚS 84/94, III. ÚS 166/95, I. ÚS 401/98, II. ÚS 252/99, I. ÚS 129/2000, I. ÚS 549/2000, III. ÚS 74/02).

The interpretation undertaken by the court strongly contradicts the content of commonly applied interpretation methods. The decision in question could be classified as an arbitrary application of ordinary law. The Constitutional Court set aside the impugned ruling.

Languages:

Czech.

Identification: CZE-2003-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 05.02.2003 / **e)** Pl. ÚS 34/02 / **f)** Local self-government / **g)** *Sbírka zákonů* (Official Gazette), no. 53/2003 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.6.2 **General Principles** – Structure of the State – Regional State.
4.8.2 **Institutions** – Federalism, regionalism and local self-government – Regions and provinces.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
4.8.8.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Principles and methods.
5.3.5.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Prohibition of forced or compulsory labour.

Keywords of the alphabetical index:

Local self-government, staff, restriction / Employee, forced transfer.

Headnotes:

Local self-administration is an expression of the right and ability of local bodies to regulate and manage certain public affairs as may fall under their province and as may be in the local population's interest. Decisions on the powers and province of territorial self-administration are always political. The Constitution expressly relies on self-governed regions having a certain share in the exercise of public power pursuant to an authorisation under the law. The uniform exercise of public power delegated to municipalities, cities and regions is an accepted principle that has never been challenged.

The Charter of Local Self-Government does not guarantee full freedom to territorial self-administration. Laws and regulations may provide for the range of matters covered by territorial self-administration in greater detail.

Statutory restrictions and instructions regarding the powers and ambit of territorial self-government are admissible. Such rules are incapable of completely disabling local self-government. The individual provisions of law may be fairly stringent and restrictive where there are important and justifiable grounds therefore.

To preserve continuity of employment with the new employer, it is crucial that the kind of work, remuneration, place of performance and hours remain unchanged. The privatisation of the Czech economy was accompanied by changes in employers' legal forms. In such cases, continuity of employment was never referred to as the imposition of forced labour. The transfer by the public authorities of state officials to self-governed units represents a less substantial change.

An authoritative imposition of exercise of public power on territorial self-governed units, including the transfer of staff, is compatible with the Constitution.

Summary:

A group of senators applied for the striking down of certain provisions of the Act providing for transfer of employment of employees, that is to say, district clerks.

The House of Deputies and the Senate commented on the proposal.

The Act in question had been adopted and promulgated within the scope set out by the Constitution and in a constitutional manner.

The group of senators argued as follows:

1. violation of the right to self-administration,
2. forced labour on the part of an employee transferred by the authorities, and
3. unclear and legally inadequately founded decision on transfer.

As to the alleged violation of the right to self-administration, the Constitutional Court recalled that local self-government is an indispensable component in the development of democracy. It is guaranteed unequivocally under the Constitution.

The Constitution establishes legal personality of self-governed territories, and they own property and manage their activities according to their own budgets. The Constitution affirms the democratic nature of self-government as guaranteed by elected representative bodies. The Constitution also presupposes a uniform regulation of self-administration in the form of a legal framework. The legislators define public matters managed by local or regional civic communities.

Statutory restrictions and instructions regarding the powers and ambit of territorial self-government are admissible. This is a transitory measure. Regions,

authorised cities and municipalities are making room for a gradual change of staff according to their plan through re-organisation. While that restricts the autonomy of municipalities, cities and regions to determine the number of staff in their respective offices, it is a lawful restriction. The provision on the transfer of employers works as a *lex specialis* with respect to provisions of Acts on local self-government.

A transfer of officials from district offices being closed down to regions and authorised cities and municipalities does constitute a certain interference with the assets of the self-governed territorial unit. Municipalities, cities and regions have a legal personality separate from that of the State, own property and conduct their activities on their own budgets. A detailed statutory regulation of economic activities of local governments is admissible; however, self-government is not tantamount to sovereignty of local communities.

Czech local self-government is not fully economically independent in other areas as well (taxes). Great differences in the property held by regions, municipalities and cities were brought about by transfers of a portion of State property. The economic activities of cities, municipalities and regions are substantially affected by subsidies and investments made by the State.

Comparable statutory limitations and restrictions of the province of self-governed territorial units can be found in all European countries. The Charter respects this fact and set out only the principles for sources of territorial self-government. The Charter does not address the financing of the exercise of state administration by local self-governments.

The stringent statutory provisions on financial contributions may be interpreted in a manner in accordance with the Constitution as provisions guaranteeing an outlay of funds towards the delegated exercise of state administration. However, a more detailed legislative provision appears to be desirable.

As to the complaint concerning forced labour on the part of a transferred employee, the Constitutional Court stated that the legal order provides for an automatic preservation of employment (the demise of an employer who is an individual, sale of business, bankruptcy). The underlying reason for such provision is to protect the employee against the threat of unemployment and to protect the proprietary interests of the new employer.

With such a situation in mind, employees need to be advised or trade unions consulted. This is confirmed by the common practice whereby an employee transfers to another employer without express consent thereof not only in the Czech Republic but also in West European countries.

An employee may hand in his/her notice without providing a reason therefore. The notice period is two months.

Nor does the ESLP case-law provide support for the senators' position. The treaty on forced or imposed labour targets practices of slavery, feudalism and serfdom. The German Federal Constitutional Court did not deliver an adverse opinion on the German provision of law that is comparable to ours.

In the case at hand, the type of work and remuneration remain the same. In some cases, employees will need to relocate. That can be resolved by changing the place of performance of work. Employees who were against the transfer could have handed in their notices. The fact that district offices would be abolished as of 31 December 2002 has been known for a sufficiently long period of time. The Ministry of Interior envisaged redundancy notices as one of the options. The status of officials formerly employed by the abolished district offices is protected by constitutional or international standards.

It is true that the law does not expressly address every single issue. If the agenda were to be drawn up with a view to the specific situation of individual territories, inequality might ensue. Nonetheless, an intervention by the Constitutional Court would appear to be premature.

The decision on a transfer of an employee by the public authorities is subject to judicial review.

An imposition of the exercise of public power on territorial self-governed units, including the transfer of staff, is compatible with the Constitution. The method of funding of the exercise of public power by self-governed territories does not jeopardise the autonomy of such self-governed units pursuant to the Constitution and the Charter of Local Self-Government. The transfer of staff members of the abolished district offices cannot be viewed as forced labour. The legal tools chosen to this end are acceptable from a constitutional perspective.

Languages:

Czech.

Identification: CZE-2003-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 11.03.2003 / **e)** II. ÚS 237/02 / **f)** Party to the proceedings / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
3.22 **General Principles** – Prohibition of arbitrariness.
4.7.2 **Institutions** – Judicial bodies – Procedure.
4.7.9 **Institutions** – Judicial bodies – Administrative courts.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.

Keywords of the alphabetical index:

Customs, authority, decision / Administrative act, judicial review / Administrative proceedings, parties.

Headnotes:

The fact whether the complainant acted in his/her own name or for and on behalf of the represented person was crucial to the decision in question, and cannot be deemed to constitute a manifest error in writing or calculation, or any other manifest error. Typos or errors in sums may constitute a manifest error. The content of the decision cannot be amended. Such an approach would give rise to substantiated doubts as to whether the customs authority concerned decided correctly, would imply arbitrariness of its decision and is clearly contrary to the principle of legal certainty inherent in the term of a “state governed by rule of law”.

The administrative court ought to have addressed the complainant's objections in relation to the preceding administrative decisions. To accept the opinion that the identification of the principal debtor was resolved with final effect even before the customs authorities rendered their decisions on the assessment of customs debts of the complainant would result in unforeseeable consequences for all persons incorrectly reported in customs declarations as customs agents.

Summary:

The complainant lodged a constitutional complaint contesting decisions rendered by the regional court, customs directorate and customs office. He claims a violation of his fundamental rights.

The Customs Authority assessed duty and VAT payable by the complainant. The complainant argued in an appeal that he had complied with his obligations under the applicable provisions of the Customs Act, and that his compliance had been confirmed by the Customs Authority. The appeal was dismissed. The complainant applied to a regional court that dismissed his motion.

The regional court argued for the dismissal of the complaint, as the complainant raised identical objections therein.

The customs directorate argued for the dismissal the complaint, as the directorate had proceeded in accordance with the law.

The customs office stated that customs bodies involved in the customs procedure had acted in conformity with the relevant provisions of the Customs Act.

The power of attorney granted to a driver shows that he is the respective company's employee and is authorised to conduct customs services business related to import and export of goods. It did not indicate that the complainant would be authorised to represent the company directly and would thus act in his own name.

The Constitutional Court does not interfere with the decision-making of ordinary courts. It does not assume the right of review and supervision of their activities, provided that the courts act in accordance with the substance of Chapter Five of the Charter. Interpretation of legal regulations by ordinary courts may be so extreme at times that it exceeds the defined boundaries and interferes with one of the fundamental rights guaranteed by the Constitution, as occurred in the case in question.

In the case at instance, the question is whether the administrative court ought to examine the lawfulness of administrative decisions. The Court assesses the legality of an administrative decision if such decision was binding and whether a special procedure may govern its review.

The initial administrative decisions were decisions of release of the goods into the proposed direct transit

regime by virtue of confirmation of TCP's by customs authorities. The decisions in question do not give grounds and information regarding remedies. Customs procedure is also governed by the principle that all first-instance decisions of the relevant customs authority may be appealed. Therefore, a due remedy could be sought even in the case of the confirmed TCP's.

The complainant acted in his capacity as employee and did not consider himself a party to the customs proceedings. Therefore, he did not avail himself of a remedy. Financial consequences only affected the complainant after subsequent decisions were delivered.

The customs directorate altered the grounds for their decisions.

The tax administrator amends or cancels upon request or *ex officio* a tax liability assessed by virtue of a decision where a manifest error in calculation, writing or otherwise has occurred in the assessment of the tax liability, in particular where the assessment concerns one and the same kind of tax and taxpayer. This provision may be applied only in cases of manifest error in data, adequately substantiated by findings establishing the correct information. The actual factual findings or their analysis that served to establish the obligation to pay the customs debt cannot be changed.

According to the amended decision, the customs directorate had a power of attorney at its disposal and clearly subsequently changed its legal analysis of the instrument to make it conform to its decision. Therefore, this was not a case of making the original decision compliant with the evidence. The fact whether the complainant acted in his own name or on behalf and for the benefit of the person he represented was crucial to the decision. The content of the decision cannot be changed. Such an approach would amount to arbitrariness of decision and is contrary to the principle of legal certainty. The impugned decisions of the customs directorate are not subject to review.

The proceedings from which the impugned ruling resulted was not fair. The Constitutional Court cannot accept an exercise of state power that clearly ignores a requirement taken for granted in a state governed by rule of law, i.e., that the purpose of the law is to yield a fair decision. The administrative court did not give sufficient consideration to the objections raised by the complainant, and paid insufficient attention in particular to the fact that the complainant was not a *de facto* party to the customs proceedings. The Constitutional Court quashed the contested decisions.

Languages:

Czech.

Identification: CZE-2003-1-004

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 12.03.2003 / **e)** Pl. ÚS 38/01 / **f)** Tender offer for shares / **g)** *Sbírka zákonů* (Official Gazette), no. 87/2003 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
3.20 **General Principles** – Reasonableness.
3.22 **General Principles** – Prohibition of arbitrariness.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Share, offer to buy, obligatory.

Headnotes:

The equality principle does not guarantee the equality of everyone to everyone else. One group cannot be granted preference over another without a good reason.

Everyone is entitled to own property (including shares), and all owners' titles have the same content and enjoy the same protection under the law. Ownership imposes certain obligations and must not be used to the detriment of other parties' rights or contrary to general interests protected by law. A forced restriction of ownership is possible where it is required by the public interest, but only pursuant to the law and subject to compensation. Any other approach would be in conflict with the constitutional order of the Czech Republic, in particular in cases where it does not respect the principle of the minimisation of interference with fundamental rights in the form of their potential

restriction, while maximising the preservation of the substance of the fundamental right.

Summary:

A group of senators applied to the Constitutional Court for the annulment of a provision in the Commercial Code regarding mandatory tender offers for shares.

The House of Deputies and the Senate, the government and the Securities Commission commented on the application.

The Act in question had been duly passed and properly issued under the provisions of the Constitution.

Since 1 July 1996 the “obligation to make a tender offer for shares” has applied. That institute has been amended several times. That obligation does not apply to institutions listed by the legislators – the Czech Republic, state organizations, the National Property Fund of the Czech Republic, the Land Fund of the Czech Republic, municipalities, self-governing territories, the Czech National Bank, the Czech Consolidation Agency and other persons to whom shares may have been transferred or who acquired them in connection with the privatisation of the State's property.

From a constitutional law perspective, it is apparent that there are entities that are subject to the mandatory tender offer obligation, and entities that are not. Such an inequality may have in particular a financial impact on the execution of a specific business transaction, including an impact on the status of the minority shareholder.

The issue of equality had been adjudicated by the Constitutional Court of the Czech and Slovak Federal Republic, and its judgment serves as a precedent for the Constitutional Court. The Constitutional Court refuses to view equality in absolute terms. It stresses in its judgments that it is a relative principle and seeks the rectification of unjustified differences. The State may decide, in order to fulfil some of its functions, to grant a certain group of persons fewer privileges or a status different from that of another group, although those groups may be in comparable positions. The legislative body must provide objective and rational reasons for its decision. If the law serves to benefit one group, while imposing excessive obligations on another, it may do so only with reference to public values.

Shareholders must make an offer for shares, while the state is not under the obligation to do so. Minority shareholders must receive such an offer, while the entities listed do not. The inequality of positions is apparent.

The House of Deputies argued that in the sale of securities, there was a social interest in having public-law institutions, corporations and certain other persons excluded.

The Constitutional Court did not comment on the matter with a view to the economic or political aspects. Constitutional law aspects are always decisive. Public interest (the transformation of the national economy into a standard market economy as found in EU member states and the raising of funds for public budgets) competes with the interest of a group of citizens (minority shareholders seeking an equal opportunity to make use of their shares). Those owners do not have equal rights and opportunities to dispose of their property to the same extent as other owners in a comparable position, and are thus restricted.

A restriction cannot be outweighed by a public interest declared to be such by a party to the proceedings. The Czech Republic is a sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and citizens. Public interest cannot outweigh an individual's interest in owning property, or the principle that all owners' titles have the same legal content and enjoy the same protection.

During the process of change in society that took place after November 1989, the securities market was formed. Each shareholder was convinced that he/she would be able to decide on the shares he/she owns. If the state granted certain *de facto* (as well as *de iure*) advantages to a certain group of shareholders at a particular stage, it could not do so at the expense of another group of citizens – minority shareholders.

The restriction of the contractual freedom of minority shareholders does not constitute a drastic interference with their property, although damage cannot be excluded. If the legislator introduces into the legal order the institute of mandatory tender offer, its consequences ought to be the same for all categories of shareholders.

In cases of mandatory tender offers, there are no exemptions for entities that acquired shares in other companies in the process of denationalisation (in countries such as the U.K., Netherlands, France and Belgium). The same applies to Slovenia, except for cases where the company's registered capital does not exceed one million Slovenian tolars. The

legislator failed to maintain an equal approach to all the entities that may be involved. Instead, the legislator created different groups that may dispose of their property differently. The constitutional principle of equality is interpreted by the Constitutional Court in its case-law from two different points of view (Pl. ÚS 16/93, Pl. ÚS 36/93, Pl ÚS 5/95, Pl ÚS 9/95, Pl. ÚS 33/96, Pl. ÚS 9/99, Pl. ÚS 18/01). Firstly, there is the requirement of the exclusion of arbitrariness in the legislator's differentiation between the various groups and their rights, and secondly, the requirement of the acceptability of grounds for such differentiation under constitutional law. The Constitutional Court found no reason that would reasonably explain the unequal treatment of different groups of shareholders. The legislator further failed to justify the procedure resulting in the aforesaid inequality.

The Constitutional Court concluded that the consequences of the impugned provision give rise to unfounded inequality between entities taking part in the process, and annulled the provision.

Languages:

Czech.

Identification: CZE-2003-1-005

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 26.03.2003 / **e)** Pl. ÚS 42/02 / **f)** Freedom of conscience / **g)** *Sbírka zákonů* (Official Gazette), no. 106/2003 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other Institutions – Courts.
1.3.5.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law – Laws and other rules in force before the entry into force of the Constitution.
2.1.1.4.2 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Universal Declaration of Human Rights of 1948.
2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.
4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.

Keywords of the alphabetical index:

Conscientious objection, religious grounds / Old law, interpretation.

Headnotes:

Freedom of conscience is manifested in decisions made by an individual in particular situations. Aside from its correlation to the norm, conscience involves the personal experience of an unconditional obligation.

Freedom of conscience is one of the “fundamental absolute rights” that cannot be restricted by ordinary law. Where a legal norm is in conflict with the specific freedom of conscience being asserted, it must be considered whether the assertion of freedom of conscience will not interfere with the fundamental freedoms of third parties, or whether the assertion of freedom of conscience is not precluded by other values of principles contained in the constitutional order of the Czech Republic.

In a democratic legal state, “old law” cannot be interpreted in accordance with current case law. When evaluating the lawfulness of the original decision, the fundamental rights and principles that are entrenched in the Czech constitutional order and have been interfered with by the contested decision need to be taken into account. If the principle of legal continuity is not to have a destructive effect on the Czech constitutional statehood, one must to insist consistently on the discontinuity of values in the application of “old law” and ensure that such approach is reflected in court rulings.

Summary:

The complainant lodged a constitutional complaint challenging a Supreme Court decision dismissing his complaint against a breach of the law.

The complainant was sentenced in 1954 for avoiding mandatory military service: objection to mandatory military service on religious grounds.

The Supreme Court panels hold two different opinions. The first panel was of the opinion that to sentence a person for the criminal act of avoiding mandatory service could not be deemed incompatible with democratic and legal principles. The second

panel was of the opinion that that was not a criminal act. When the matter was brought before the grand tribunal, the former opinion prevailed.

According to the Minister of Justice, a violation of the law occurred.

The constitutional complaint satisfies all the formal requirements and was filed in a timely manner.

In proceedings regarding a complaint against a violation of the law, the Supreme Court looks to the factual and legal status at the time when the contested ruling was rendered. New facts and evidence are not allowed.

The interpretation of criminal law norms, where the consequences interfere with the personal sphere of the person concerned, must take into account the current and applicable constitutive values and principles of the legal state, as expressed in the constitutional order of the Czech Republic. Any understanding of continuity with “old law” must be restricted in that way and discontinued in terms of values (Pl. ÚS 19/93).

The Constitutional Court referred to the European Court of Human Rights decision in *Streletz, Kessler, Krenz v. the Federal Republic of Germany*, and the opinion of Judge Levits. The Constitutional Court identified in particular with the following comment made by Judge Levits: “ … [t]he interpretation and application of the law depend on the general political order, in which law functions as a sub-system. … [t]he question whether, after a change of political order from a socialist to a democratic one, it is legitimate to apply the “old” law, set by the previous non-democratic regime, according to the approach to interpretation and application of the law which is inherent in the new democratic order. … Democratic States can allow their institutions to apply the law – even previous law, … only in a manner which is inherent in the democratic political order. … Using any other method of applying the law … would damage the very core of the *“ordre public”* of a democratic State. … [t]he interpretation and application of … legal norms according to socialist or other non-democratic methodology … should from the standpoint of a democratic system be considered wrong.”

Freedom of conscience has a constitutive importance for a democratic legal state respecting the idea of respect for the rights of man and citizens. Totalitarian political regimes on the other hand attempt to suppress the freedom of the individual's conscience, using repressive criminal enforcement policy in the process. This is shown by developments in the Czech Republic – the 1920 Constitution did not presuppose the possibility of limiting by law the freedom of conscience, expressly laid down by the Constitution. The 1948 Constitution declared freedom of conscience. The same did not constitute a ground on which the satisfaction of a civic obligation could be denied. The 1960 Constitution made absolutely no reference to the freedom of conscience.

Freedom of conscience is not interchangeable with the freedom of faith or freedom of religion. A decision dictated by one's conscience is always specific because it deals with specific behaviour in a specific situation. The situation is individualised by time, place and specific circumstances. What is essential is that a serious, moral decision regarding good and evil is involved that the individual experiences as a binding obligation or an unconditional order to act in a certain fashion.

The specific moral character and its relation to personal moral truthfulness or authenticity that lend the decision its unconditionality, determine the difference between a decision made by reference to political or ideological motivation, and one made by reference to a state of mind.

The freedom of conscience cannot be limited by an ordinary law. Each act of law expresses public interest by formulating the moral conviction of the parliamentary majority. The conflict between an individual's conscience and a particular legal norm creates no prejudice to its binding effect. Freedom of conscience may affect its enforceability in relation to those who are against it. Where the legal norm is in conflict with a specific freedom of conscience being asserted, it needs to be considered whether such decision would not interfere with third party fundamental rights, or whether the assertion of such freedom of conscience is not precluded by other values or principles contained in the constitutional order of the Czech Republic as a whole.

Only the Supreme Court decides whether a violation of the law occurred. The Constitutional Court determines whether the interpretation of statutory provisions chosen by the court infringes the complainant's fundamental rights and freedoms.

The constitutional complaint is well-founded because the impugned decision of the Supreme Court neglected to consider, to an appropriate extent, the complainant's fundamental right to the freedom of conscience.

The Constitutional Court has already adjudicated on the conflict of the obligation to report for mandatory military service and fundamental rights, which arises from the conflict of the said duty and freedom of religion (II. ÚS 285/97; II. ÚS 187/2000). The

Constitutional Court examined the relationship of the impugned decisions and the freedom of conscience. According to the Court, one may refuse to report for mandatory military service for reasons unrelated to religious faith.

The Supreme Court failed to take into account Article 15.1 of the Charter. The fact that the "9 May Constitution" denied the nature of an absolute right to the freedom of conscience was a result of the very nature of the political regime installed in February 1948. The new restriction of the freedom of conscience disrupted the continuity of perception of the freedom of conscience as an absolute right, as protected by the 1920 Constitution. The constitutional construction of freedom of conscience adopted after the February coup deviates in terms of legal philosophy from the developments in the area of fundamental rights that commenced with the Nuremberg trials and continued by the adoption of the Universal Declaration of Human Rights.

The Supreme Court's interpretation was found to be restrictive. Consequently, the Constitutional Court did not consider the issue of its conflict with other fundamental freedoms. The contested ruling was quashed.

Cross-references:

European Court of Human Rights

- Case *Streletz, Kessler, Krenz v. the Federal Republic of Germany*, no. 34044/96, 35532/97, 44801/98 of 22.03.2001, *Bulletin* 2001/1 [ECH-2001-1-002].

Languages:

Czech.

Denmark
High Court

Important decisions

Identification: DEN-2003-1-001

a) Denmark / **b)** High Court / **c)** / **d)** 27.03.2002 / **e)** / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen* 2002, 1393; CODICES (Danish).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Criminal law / Expulsion, foreigner, under criminal procedure / Burglary.

Headnotes:

Having regard to the extensive and serious crimes committed and the strong relations maintained with the country of origin, the permanent expulsion of a 40-year-old Yugoslav national, who had been living in Denmark since he was 12 years old, does not contravene the principle of proportionality in Article 8 ECHR.

Summary:

The appellant, a 40-year-old Yugoslav national, had been living in Denmark since he was 12 years old. He had finished his education in Denmark, and during the last couple of years he had had a permanent cleaning job. His parents, his sister and his sister's family were also living in Denmark. The appellant was not married and had no children. He had a Yugoslav girlfriend, who also lived in Denmark. The appellant spoke Serbian, and in 1985 and 1986 he had visited Yugoslavia for 4 and 3 months respectively. His family owned real property in Yugoslavia and frequently stayed there. It appeared from the telephone conversations, to which the police had listened in, that the appellant was planning to send

considerable amounts of money to Yugoslavia and to invest in real property. It also appeared that he owned a large amount of goods in Yugoslavia.

In this case, the appellant was sentenced to 4 years of imprisonment for 52 cases of burglary and 7 cases of handling of stolen goods for a total amount of approximately 10,2 million Danish kroner.

The appellant had previously been convicted 4 times for, *inter alia*, serious offences against property. Consequently, from 1990 to 1999 he had received convictions sentencing him to imprisonment for a total of approximately 5 years.

The District Court found that he should not be expelled from Denmark. The majority (2 judges) noted that he had lived in Denmark for many years. Therefore, the expulsion contravened the principle of proportionality in Article 8 ECHR.

The High Court found that the appellant should be permanently expelled from Denmark. The majority (5 judges) noted that the appellant's primary attachment to Denmark consisted in the facts that he came to Denmark at the age of 12 years and that he had lived in Denmark for approximately 23 years. Nevertheless, he had maintained his attachment to Yugoslavia. For those reasons and considering his extensive and serious crimes, the majority found that expulsion did not contravene the principle of proportionality in Article 8 ECHR.

A minority of 1 judge took into account that the appellant had lived in Demark for approximately 23 years, that he had finished his education in Denmark and that his closest family and his girlfriend lived in Denmark. The minority considered that, taken as a whole, the appellant's attachment to Denmark was so strong that expulsion – irrespective of his former and past crimes – contravened Article 8 ECHR. The minority took into special account that the appellant was not convicted for cases of drug offences or offences dangerous to persons.

Cross-references:

The Danish Supreme Court has delivered five judgements concerning expulsion, which have been reported as precis in the *Bulletin* 1999/1 [DEN-1999-1-002] and [DEN-1999-1-003]; *Bulletin* 1999/3 [DEN-1999-3-007] and [DEN-1999-3-009] and *Bulletin* 2000/1 [DEN-2000-1-001].

Languages:

Danish.

France
Constitutional Council

Important decisions

Identification: FRA-2003-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 13.01.2003 / **e)** 2002-465 DC / **f)** Law relating to wages, working time and job creation / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 18.01.2003, 1084 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.10 **General Principles** – Certainty of the law.
5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Employment, collective agreement / Employment, overtime / Employee, rest.

Headnotes:

The so-called "preferential" principle, whereby a collective agreement can only improve workers' conditions in relation to existing statutory or contractual provisions, does not rank as constitutional law.

The new law applies annual overtime quotas previously negotiated to safeguard employees' rest periods.

Section 16 of the new law merely confirms previous agreements, some of whose clauses were not compatible with the legislation then applicable but are so now. Such confirmation applies only to the future. This section does not lend the relevant agreements any effects that their negotiators would not have wished to lend them (in accordance with freedom of contact).

Summary:

The law on wages, working time and job creation, passed on 19 December 2002, is based on a three-point strategy: convergence of the different statutory minimum wages created by the "Aubry 2" Act [FRA-2000-1-001]; reduction of constraints on overtime; and lowering of costs in the interests of employment.

Two provisions of this law were referred to the Constitutional Council by over sixty members of the National Assembly. Presented during the debate as measures to increase legal certainty, these provisions concerned agreements concluded under previous legislation. The first related to the so-called "preferential" principle, whereby a collective agreement can only improve workers' conditions in relation to existing statutory or wider contractual provisions. The second concerned freedom of contract inasmuch as, according to Constitutional Council case-law (in particular [FRA-1998-2-004], [FRA-2000-1-001] and [FRA-2000-3-014]), parliament can challenge the structure of legally concluded agreements only where there are sufficient grounds of public interest. In this particular case the impugned provision of Section 16 provides a legal basis for "agreements" that anticipated the law in question by containing clauses contrary to previous provisions but in accordance with the new law. The Council found that this provision legally confirmed these agreements only for the future. Subject to this reservation, the impugned provisions were in accordance with the Constitution.

Cross-references:

See Decisions:

- no. 98-401 DC of 10.06.1998, Outline Law on reduction in working hours (*Bulletin* 1998/2 [FRA-1998-2-004]);
- no. 99-423 DC of 13.01.2000, Law on the negotiated reduction of working time (*Bulletin* 2000/1 [FRA-2000-1-001]);
- no. 2000-436 DC of 07.12.2000, Solidarity and Urban Renewal Act (*Bulletin* 2000/3 [FRA-2000-3-014]).

Languages:

French.

Identification: FRA-2003-1-002

a) France / **b)** Constitutional Council / **c)** / **d)** 20.02.2003 / **e)** 2003-466 DC / **f)** Organic law on magistrates / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 27.02.2003, 3480 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
4.7.4.1 **Institutions** – Judicial bodies – Organisation – Members.
4.7.4.1.1 **Institutions** – Judicial bodies – Organisation – Members – Qualifications.
4.7.4.1.2 **Institutions** – Judicial bodies – Organisation – Members – Appointment.
4.7.4.1.6 **Institutions** – Judicial bodies – Organisation – Members – Status.
4.7.13 **Institutions** – Judicial bodies – Other courts.

Keywords of the alphabetical index:

Magistrate, status, recruitment.

Headnotes:

The transfer of jurisdiction to a new type of court consisting of lay judges is not contrary to the Constitution if it relates to a limited share of the powers conferred on the ordinary courts and if appropriate statutory guarantees are provided.

Although they perform functions usually assigned to the ordinary courts and have the same rights and duties as the latter, magistrates do not for all that belong to the judiciary.

It is contrary to the Constitution to recruit to the office of magistrate persons having had managerial or supervisory posts in the social or economic field where such persons do not have the necessary legal knowledge.

With regard to candidates with legal qualifications or experience, their legal competence and their capacity to hold the office of magistrate must be strictly appraised, which may mean that not all vacancies are filled each year.

The office of magistrate is not incompatible with another activity, but combination is strictly monitored in order that it may not adversely affect the exercise of legal office.

Summary:

Under Article 61.2 of the Constitution, which makes its jurisdiction mandatory for organic laws, the Constitutional Council was required to express an opinion on the organic law on magistrates. When in summer 2002 the Outline Justice Act [FRA-2002-2-003] was referred to it, the Constitutional Council issued an important reservation stating that these magistrates courts could be set up only after promulgation of a statute law providing safeguards concerning the independence and capacities appropriate to these magistrates' functions.

This law is designed to transfer a “limited share” of the jurisdiction of ordinary courts, for minor cases, to a new type of court consisting of lay judges.

Cross-references:

See Decision no. 2002-461 DC of 29.08.2002, Outline Justice Act (*Bulletin* 2002/2 [FRA-2002-2-006]).

Languages:

French.

Identification: FRA-2003-1-003

a) France / **b)** Constitutional Council / **c)** / **d)** 13.03.2003 / **e)** 2003-467 DC / **f)** Internal Security Act / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 19.03.2003, 4789 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.17 **General Principles** – Weighing of interests.
5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.

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

Keywords of the alphabetical index:

Internal security / Police, file, access / Minor, computer data, use / Residence, permit, issue, renewal / Soliciting / Begging.

Headnotes:

Administrative measures likely to affect the exercise of freedoms guaranteed under the Constitution must be justified by the need to protect public order.

An administrative decision entailing an evaluation of human behaviour cannot be based exclusively on consultation of automatically processed data providing a definition of the profile or personality of the person concerned (Section 2 of the Data Processing, Files and Freedoms Act of 6 January 1978, amended).

Access to police files in connection with the issue or renewal of a residence permit cannot interfere with an alien's right to lead a normal family life.

The retention period for computer data on minors must reconcile the need to identify offenders with the moral and educational rehabilitation of juvenile delinquents.

The option of carrying out medical or blood tests on a sex offender without the latter's consent will be at the discretion of the judicial authorities (which may not, depending on the nature of the offence, allow the victim's request for such a test).

With regard to penalties for soliciting, the fact that the offender may have been acting under threat or duress must be taken into consideration.

For the offences of organising begging and of illegal occupation of land by persons of no fixed abode, the court must, in accordance with the rights of the defence, apply the general rules of criminal law, which specify that, on the one hand, "There can be no offence in the absence of an intent to commit it" and, on the other, "A person is not criminally liable who can establish that he believed he could legitimately carry out the act because of a mistake of law that he was not in a position to avoid".

Withdrawal of a temporary residence permit from an alien liable to criminal prosecution can apply only to aliens actually having committed the offences charged and not simply suspected of having committed them. This provision applies without prejudice to the right to a normal family life.

The offence of insulting the national flag or national anthem during public events organised or regulated by the public authorities must be understood as referring to public events of a sporting, recreational or cultural nature taking place in spaces subject to health and safety rules owing to the number of people that they can accommodate.

Summary:

The Internal Security Act implements general principles appearing in Schedule I of the Internal Security Outline Act of 29 August 2002. This schedule was held by the Constitutional Council, in Decision 2002-460 DC of 22 August 2002 [FRA-2002-2-005], to be devoid of legislative scope.

The law in question, which gives legislative scope to this schedule, contains a wide range of measures strengthening the powers of the administrative authorities and law-enforcement officers, as well as the officers under their control, and creating new offences.

The Constitutional Council, to which the case had been referred by over sixty members of the Senate and over sixty members of the National Assembly, found the provisions in question (some twenty sections) to be in accordance with the Constitution. However, it appended to its decision a number of rules of interpretation.

Cross-references:

See Decision no. 2002-460 DC of 22.08.2002, Internal Security Outline Act (*Bulletin* 2002/2 [FRA-2002-2-005]).

Languages:

French.

Identification: FRA-2003-1-004

a) France / **b)** Constitutional Council / **c)** / **d)** 26.03.2003 / **e)** 2003-469 DC / **f)** Constitutional law on decentralised organisation of the Republic / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 29.03.2003, 5570 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Constitution, revision.

Headnotes:

The jurisdiction of the Constitutional Council is strictly defined by the Constitution and it is unable to rule on cases other than those expressly specified by these provisions.

Under Article 61 of the Constitution, Article 89 of the Constitution or any other article, the Constitutional Council does not have jurisdiction to rule on a revision of the Constitution.

Summary:

Called upon for the first time to rule on a "constitutional law" (on decentralised organisation of the Republic) passed by a joint meeting of the National Assembly and the Senate under the procedure laid down in Article 89 of the Constitution, the Constitutional Council declined jurisdiction.

This decision complements the 1962 precedent (Decision 62-20 DC of 6 November 1962) concerning the law on the election of the President of the Republic by direct universal suffrage, in which the Council refused to exercise jurisdiction with regard to a revised referendum act (another possibility anticipated by Article 89 of the Constitution).

Cross-references:

See Decision no. 62-20 DC of 06.11.1962, law on the election of the President of the Republic by direct universal suffrage, adopted by referendum on 28.10.1962.

Languages:

French.

Identification: FRA-2003-1-005

a) France / **b)** Constitutional Council / **c)** / **d)** 03.04.2003 / **e)** 2003-468 DC / **f)** Law on the election of regional councillors, election of representatives to the European Parliament, and public aid for political parties / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 12.04.2003, 6493 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.3.3 **General Principles** – Democracy – Pluralist democracy.
3.12 **General Principles** – Clarity and precision of legal provisions.
4.5.6.4 **Institutions** – Legislative bodies – Law-making procedure – Right of amendment.
4.6.2 **Institutions** – Executive bodies – Powers.
4.9 **Institutions** – Elections and instruments of direct democracy.
4.9.7.3 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Registration of parties and candidates.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
5.3.38 **Fundamental Rights** – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Bill, amendment / *Conseil d'État*, consultation / Regional Council, election / Regional Council, gender parity.

Headnotes:

Under Article 39 of the Constitution, the Council of Ministers passed a bill after consulting the *Conseil d'État* on the main issues raised by the text. A provision inserted in the bill by the Council of Ministers amending the text on a fundamental point

which had not been discussed by the *Conseil d'État* is procedurally flawed.

Generally speaking, although parliament is entitled, when laying down electoral rules for regional councils, to introduce measures conducive to the formation of a stable and consistent majority, it can do so only with due regard for pluralism of ideas and opinions, which is one of the foundations of democracy.

If the complexity of the law is justified by reasons that parliament may hold to be in the public interest, it is up to the competent authorities to take the necessary steps to inform voters and candidates of voting procedures in order to ensure the intelligibility of the law and to respect the principle of fair elections.

The Corsican Assembly and the regional councils are in exactly the same position in terms of the objective enshrined in Article 3.5 of the Constitution, according to which, "Statutes shall promote equal access by women and men to elective offices."

Summary:

The law on the election of regional councils, election of representatives to the European Parliament, and public aid for political parties, passed on 12 March 2003, has been the subject of two referrals, one by over sixty members of the National Assembly and the other by over sixty members of the Senate.

Under Article 39.2 of the Constitution, "Government bills shall be discussed in the Council of Ministers after consultation with the *Conseil d'État* and shall be introduced in one of the two assemblies". In the case in point, by replacing the condition of obtaining at least 10% of the total votes cast in the first ballot by a threshold of 10% of the number of registered voters for access to the second ballot, the Council of Ministers had taken a decision on an issue that was different in nature from what had been submitted to the *Conseil d'État*, since the 10% threshold of registered voters had not been mentioned at any time during the consultation of the *Conseil d'État*. The applicants consequently had good grounds for arguing that this provision of the bill had been adopted under an irregular procedure. On account of this censure, the Constitutional Council did not have to rule on the other objections to the 10% threshold of registered voters, for example concerning the threat posed to pluralism.

The system of allocating elected representatives on a list to "*département* subdivisions" was challenged as being too complex and undermining the intelligibility of the law and the fairness of elections. The Constitutional Council held that if this complexity was justified on public-interest grounds, appropriate information should be provided on this measure both for the lists and for the voters. Thus, if the voter was to be properly informed, the ballot paper for each list must include the name of the list as well as the name of the candidate heading it and break down the names of all the candidates on the list in accordance with the corresponding *département* subdivisions.

Regarding the election of the Corsican Assembly, the Constitutional Council found that there were no local circumstances or public-interest grounds to justify any difference in treatment between this assembly and the regional councils. It therefore drew parliament's attention to the need to bring the election of the Corsican Assembly into line with election of the regional councils with regard to parity between male and female candidates.

Cross-references:

See Decision no. 2000-429 DC of 30.05.2000, law promoting equal access of women and men to electoral mandates and elected offices (*Bulletin* 2000/2 [FRA-2000-2-006]).

Languages:

French.

Identification: FRA-2003-1-006

a) France / **b)** Constitutional Council / **c)** / **d)** 09.04.2003 / **e)** 2003-470 DC / **f)** Resolution amending the Rules of Procedure of the National Assembly / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 15.04.2003, 6692 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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.

Keywords of the alphabetical index:

National Assembly, prominent figures, hearing / Treaty, ratification, amendment, reservation.

Headnotes:

The hearing of prominent figures allowed to address the National Assembly, insofar as it is not followed by a vote, is not contrary to the Constitution.

A parliamentary assembly is free to determine, through its rules of procedure, its arrangements for examining, debating and voting on legislation, in line with certain parliamentary procedures, provided that they comply with the rules of legislative procedure ranking as constitutional law.

In the ratification procedure for treaties and international agreements laid down in Article 52 of the Constitution, the only power conferred upon parliament is to authorise or refuse ratification. The new wording of the Rules of Procedure submitted to the Constitutional Council, by removing the previous phrase according to which no amendments could be moved, cannot be interpreted as giving parliament the power to make authorisation to ratify a treaty or approve an international agreement subject to reservations, conditions or interpretative statements.

Summary:

As provided for in Article 61.2 of the Constitution, which stipulates that the rules of procedure for the assemblies shall be submitted to the Constitutional Council before their adoption, the President of the National Assembly referred to the Constitutional Council a resolution for the amendment of the Assembly's rules of procedure.

The proposed amendments, which are to form part of a broader reform of the Rules of Procedure, confirm existing practices. They provided the Constitutional Council with an opportunity to clarify the above-mentioned points.

Languages:

French.

Identification: FRA-2003-1-007

a) France / **b)** Constitutional Council / **c)** / **d)** 24.04.2003 / **e)** 2003-471 DC / **f)** Classroom Assistants Act / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 01-02.05.2003, 7641 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.
5.2.1.2 **Fundamental Rights** – Equality – Scope of application – Employment.
5.2.2.5 **Fundamental Rights** – Equality – Criteria of distinction – Social origin.

Keywords of the alphabetical index:

Education, state / Education, classroom assistant, recruitment.

Headnotes:

It is not a breach of the principle of equality for the head teachers of state schools to undertake direct recruitment of “classroom assistants” provided that the necessary appropriations for their pay are allocated between schools by the Ministry of Education according to rational and objective criteria relating to these schools' requirements.

Giving preference to students receiving grants, in the case of equal abilities, does not constitute a violation of Article 6 of the 1789 Declaration, according to which, “All citizens [...] are equally admissible to all high offices, public positions and employments, according to their capacities and without other distinction than that of their virtues and talents”.

Summary:

The Classroom Assistants Act enables state schools to recruit contract staff known as “classroom assistants” to assist teaching staff in lower and upper secondary schools. It replaces the system of supervisors (*“surveillants”*) and youth employment contracts established by the previous legislature.

The case referred to the Constitutional Council concerned violations of the principle of equality. The Constitutional Council endorsed the provisions in question, subject to certain reservations.

Languages:

French.

Germany
Federal Constitutional Court

Important decisions

Identification: GER-2003-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** Fourth Chamber of the Second Panel / **d)** 12.12.2000 / **e)** 2 BvR 1290/99 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2001, 1848 *Europäische Grundrechte-Zeitschrift* 2001, 76; CODICES (German).

Keywords of the systematic thesaurus:

2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
2.1.2 **Sources of Constitutional Law** – Categories – Unwritten rules.
3.9 **General Principles** – Rule of law.
3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
3.22 **General Principles** – Prohibition of arbitrariness.
4.7.1.2 **Institutions** – Judicial bodies – Jurisdiction – Universal jurisdiction.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

Keywords of the alphabetical index:

Genocide / Agreement, international, applicability.

Headnotes:

The provisions of § 6.1 of the German Criminal Code *(Strafgesetzbuch)* are in accordance with the provisions of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the provisions of the latter do not restrict the obligation to prevent and to punish genocide that was subsequently undertaken by each of the signatory states as to a specific territory.

The crimes pursuant to §§ 211 (murder) and 212 (manslaughter) of the German Criminal Code that are committed in conjunction with an act of genocide pursuant to § 220a.1.1 of the German Criminal Code are covered by the principle of universal jurisdiction.

Summary:

I.1. The complainant, a Bosnian Serb, had been arrested in Germany. The Higher Regional Court *(Oberlandesgericht)* Düsseldorf convicted him of genocide committed in Bosnia and Herzegovina and sentenced him to imprisonment for life. The Federal Court of Justice *(Bundesgerichtshof)* affirmed the decision.

2. The complainant lodged a constitutional complaint alleging a violation of his fundamental procedural rights (Article 101.1.2, read in conjunction with Article 100.2 of the Basic Law); a violation of his right to a fair trial pursuant to Article 2.1 of the Basic Law, taken in conjunction with the principle of the rule of law; a violation of Article 103.1 of the Basic Law (right to a hearing in court); and a violation of his rights under Article 3.1 of the Basic Law (equality before the law) and Article 103.2 of the Basic Law (prohibition of *ex post facto* laws). Apart from that, he alleged that there had been a violation of the right to one's lawful judge. According to the complainant, the courts of original and appellate jurisdiction were not competent to decide on their own on the existence and the contents of a general rule of international law that could be contrary to the application of § 6 of the German Criminal Code. They should have referred that question to the Federal Constitutional Court. The complainant further argued that Article 103.2 of the Basic Law had been violated because the courts of original and appellate jurisdiction had given the concept "intent of destroying" *(Zerstörungsabsicht)* set out in § 220a of the German Criminal Code an interpretation that was different from the meaning of physical and biological annihilation and could not be based on the wording of § 220a of the German Criminal Code.

II. The Fourth Chamber of the Second Panel did not admit the constitutional complaint for decision; its reasoning was essentially as follows.

1. The competent courts were not under the obligation to obtain a preliminary decision from the Federal Constitutional Court on the question whether genocide can be punished pursuant to the German Criminal Code. No obligation to refer the question to the Federal Constitutional Court pursuant to Article 100.2 of the Basic Law exists; the precondition of such an obligation is that there are doubts as to the applicability of general international law. The competent courts, however, did not use general international law as a basis for their sentence, but the law established by international treaties.

2. The competent courts' interpretation regarding the territorial scope of application of the provisions on genocide pursuant to the principle of world jurisdiction kept within the bounds of that which constitutes a possible interpretation of both the German and the international-law statutes and was therefore constitutionally unobjectionable. The same applies to the assumption, on which the sentences were based, that concurrent jurisdiction of the German courts and the International Criminal Tribunal for the former Yugoslavia exists for acts of genocide in Bosnia and Herzegovina.

3. In the Chamber's opinion, the interpretation of § 220a of the German Criminal Code was also constitutionally unobjectionable. In particular, there was no violation of Article 103.2 of the Basic Law. It follows from that article that courts are prohibited from substantiating the imposition of sentences by way of analogy with existing statutory definitions of crimes. The possible meaning of a term determines the ultimate boundary of judicial interpretation.

The competent courts' interpretation according to which the elements of the crime of genocide protected a legal interest lying beyond that of the individual, namely the social existence of a group, was not objectionable in this respect. From the meaning of the words themselves, it can be concluded that the intent of destroying that is required by § 220a of the German Criminal Code has a broader meaning than the physical and biological annihilation of the group. This conclusion is also supported by the fact that the law, in § 220a.1.3 of the German Criminal Code, complements "destruction" with the special attribute *"körperlich"* (bodily). Apart from this, § 220a.1.4 of the German Criminal Code, by penalising the imposition of measures that are intended to prevent births within the group, establishes a special case of biological annihilation of a group. This means that the wording of the statute does not conclusively establish that the actor must have the intent to physically annihilate a substantial number of the members of a group.

4. Whether the jurisdiction of the Federal Republic of Germany can cover acts taking place outside of Germany must also ultimately be measured against the principle of the rule of law. The fact that the applicable international law acquires special importance in this context is commensurate with this approach. In the interpretation of § 220a, the elements of the crime of genocide as they exist in international law, which are established by Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, Article 4 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 2 of the Statute of the International Criminal Tribunal for Rwanda and Article 6 of the Rome Statute of the International Criminal Court, must be taken into account. In the Chamber's opinion, the competent courts' interpretation of § 220a of the German Criminal Code lay within the bounds of the possible interpretation of the international-law elements of the crime of genocide.

Languages:

German.

Identification: GER-2003-1-002

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 20.12.2000 / **e)** 2 BvR 668/00, 2 BvR 849/00 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
5.2.2.5 **Fundamental Rights** – Equality – Criteria of distinction – Social origin.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Prisoner, private visit, supervision / Legal aid, purpose.

Headnotes:

1. The legal aid system should avoid a situation where a party to an action is prevented solely for economic reasons from having recourse to a court.

2. The legal remedy sought or the defending of an action by a party showing financial need is rendered unreasonably difficult where the requirements placed on that party's chances of success are so excessive that the purpose of legal aid, which is to achieve a large degree of similarity in the treatment of parties showing financial need as to their recourse to a court, is clearly defeated.

Summary:

I. The complainant, a prisoner, applied for a visitor's pass for a penfriend. The prison granted the application subject to the proviso that the visit be placed under visual and audio surveillance. The complainant lodged an appeal with the prison against the order establishing the audio surveillance.

In a letter of 13 January 2000, the complainant lodged an application with the competent court for legal aid for an application, which had not yet been lodged, to suspend temporarily the execution of the order establishing the audio surveillance of the visit. With his application for legal aid, the complainant enclosed a declaration about his personal and financial circumstances.

The Ministry of Justice rejected the appeal against the order of the prison in an order that was served on the prisoner on 29 February 2000.

The complainant then, in an application that was received by the competent Regional Court *(Landgericht)* on 10 March 2000, applied for legal aid in the main action, i.e. an application for a judicial decision pursuant to § 109 of the Prison Act *(Strafvollzugsgesetz)* against the audio surveillance of the visit, without bringing the main action itself at that time.

The Regional Court dismissed the application for legal aid on the ground that the complainant had failed to lodge an application for a judicial decision within the time-limit of two weeks (cf. § 112.1.2 of the Prison Act) after having been with served the order rejecting his appeal. The court held that the application was inadmissible at that time because the time-limit had expired. Therefore the application for legal aid also had no chance of success.

The complainant challenged that decision in a constitutional complaint alleging a violation of his fundamental rights under Article 3.1 of the Basic Law (principle of equality before the law), taken in conjunction with Article 20.3 of the Basic Law (principle of the rule of law) and Article 19.4 of the Basic Law (recourse to a court).

II. The Third Chamber of the Second Panel allowed the constitutional complaint and granted the relief sought; it stated that the requirements placed by the Regional Court on the chances of success of the action had been so excessive that the purpose of legal aid had clearly been defeated.

The Chamber's reasoning was essentially as follows.

The Regional Court's Chamber responsible for the execution of sentences had rejected the application for legal aid on the ground that the legal remedy sought had no chances of success because the complainant had failed to lodge the application in the main action within the time-limit pursuant to § 112.1 of the Prison Act.

That reasoning defeats the purpose of legal aid that is enshrined in the Constitution. According to the competent courts' established case-law, a complainant who applies for legal aid within the time-limit is regarded, in any event, as being prevented from lodging the application in the main action without any fault on his or her part as long as he or she under the circumstances could not reasonably expect that his or her application for legal aid would be rejected due to a lack of financial need. In such cases, an application for the grant of legal aid that has been filed in time is the basis on which the situation of the complainant is restored to the status quo ante. Exceptions from this are only possible where under procedural law the institution of proceedings does not carry a risk of costs for the person affected; that was not the case. In the interest of the protection of public confidence, which is enshrined in the Constitution, the competent courts are, in any event, prevented from departing from the above-mentioned case-law at the expense of the person affected if he or she did not have to expect such change in case-law.

When assessing the chances of success of the legal remedy sought by the complainant, the Regional Court should have considered the possibility of a restoration of the *status quo ante*. This is general judicial practice. It is not apparent that the complainant would be barred from having the status quo ante restored. He had lodged his applications for legal aid, in which he had enclosed a declaration about his personal and economic circumstances, within the time-limit for such applications. There is no evidence that the complainant could be denied having the status quo ante restored for other reasons. By failing to consider the possibility of the status quo ante being restored, the court placed requirements upon the application of a party showing financial need that were so excessive as to violate the guarantee of equal legal protection that is guaranteed by Article 3.1 of the Basic Law, read in conjunction with Article 20.3 of the Basic Law.

Languages:

German.

Identification: GER-2003-1-003

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 27.12.2000 / **e)** 2 BvR 2205/99 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.22 **General Principles** – Prohibition of arbitrariness.
5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
5.3.11 **Fundamental Rights** – Civil and political rights – Right of asylum.

Keywords of the alphabetical index:

Asylum, relative protection / Refugee, recognized / Convention Relating to the Status of Refugees / Expulsion, procedure / Expulsion, to a state other than the state of origin.

Headnotes:

The recognition of refugee status, which only provides relative protection, does not preclude the issuing of a notice announcing deportation.

In the case of a refugee with refugee status pursuant to § 51.1 of the Aliens Act, a notice announcing deportation to a third state in which he would be under threat of being transferred to the persecuting state is excluded.

Summary:

I. The complainant, an Iraqi national who had been living in Syria since the age of eight years and who had also married his wife, a Jordanian national, there, was granted protection from deportation to Iraq pursuant to § 51.1 of the German Aliens Act *(Ausländergesetz)*. At the same time, however, he was notified of his deportation to Jordan. The complainant challenged the notice announcing his deportation to Jordan. After exhausting all avenues of recourse to the courts without success, the complainant lodged a constitutional complaint alleging a violation of Article 3.1 of the Basic Law (equality before the law) and Article 3.3 of the Basic Law (prohibition of discrimination), Article 25 of the Basic Law (applicability of international law, taken in conjunction with Articles 32 and 33 of the Convention Relating to the Status of Refugees) and Article 103.1 of the Basic Law (right to a hearing in court). He claimed that as a refugee recognised under the terms of the Convention Relating to the Status of Refugees, he could not be placed under the protection of the Jordanian state.

II. The First Chamber of the Second Panel did not admit the constitutional complaint for decision and gave, essentially, the following reasons.

The competent courts' decisions were not based on an interpretation and application of § 34 of the German Asylum Procedure Act *(Asylverfahrensgesetz),* together with § 51.1 and § 50.4 of the Aliens Act, thereby infringing Article 3.1 of the Basic Law. Rather, the complainant erred in his understanding of the relation between the imposition of the prohibition of deportation pursuant to § 51.1 of the Aliens Act and the notice announcing deportation pursuant to § 34 of the Asylum Procedure Act. The latter is issued pursuant to § 34.1.1 of the Asylum Procedure Act and pursuant to the provisions of §§ 50 and 51.4 of the Aliens Act where the alien is not recognised as a person entitled to asylum and where he does not have a residence permit *(Aufenthaltsgenehmigung)*. That was the complainant's case. The fact that the complainant had, in the interim, been issued a refugee passport and had been granted authorization to reside based on exceptional grounds *(Aufenthaltsbefugnis)* pursuant to § 70.1 of the Asylum Procedure Act was not contrary to the notice announcing deportation.

Pursuant to § 50.3.2 of the Aliens Act, the notice announcing deportation must specify the state to which the alien may not be deported (in the case in question: Iraq), and, pursuant to § 51.4.2 of the Aliens Act, it must specify the state to which the alien may be deported (in the case in question: Jordan). The statutory duty to specify the states has the effect of strengthening legal protection. Its purpose is to give the refugee at an early stage of deportation an effective possibility of investigating the question whether the possible state of destination will respect the deportee's status as a political refugee after deportation and, in particular, the prohibition of expulsion or return (*"refoulement")* that is enshrined in Article 33 of the Convention Relating to the Status of Refugees so that the refugee may have recourse to a court, if needed. Article 33.1 of the Convention Relating to the Status of Refugees and § 51.1 of the Aliens Act, with an almost identical wording, prohibit "expel[ling] or return[ing] (*"refouler"*) an alien to a state where his life or freedom would be threatened.

That includes also giving the alien sufficient protection against being deported to such a state by his original state of destination.

The competent courts had come to the conclusion that that threat did not exist in Jordan in the complainant's case. By alleging the opposite in his constitutional complaint, the complainant merely substituted his own evaluation of the evidence for that of the competent courts, without alleging that the competent courts' evaluation of evidence constituted an infringement of the Constitution and without substantiating that allegation, in particular with a view to the prohibition of arbitrariness set out in Article 3.1 of the Basic Law.

The fact that the complainant, contrary to other persons having refugee status, was notified of his deportation to Jordan was also based on a valid ground: in his case, a deportation to Jordan could be considered due to his wife's Jordanian nationality, whereas in other cases of recognition of refugees pursuant to § 51.1 of the Aliens Act, no possible state of destination could normally be determined.

Languages:

German.

Identification: GER-2003-1-004

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 20.12.2002 / **e)** 1 BvR 2305/02 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2003, 418; CODICES (German).

Keywords of the systematic thesaurus:

1.4.4 **Constitutional Justice** – Procedure – Exhaustion of remedies.
1.4.10 **Constitutional Justice** – Procedure – Interlocutory proceedings.
1.4.10.7 **Constitutional Justice** – Procedure – Interlocutory proceedings – Request for a preliminary ruling by the Court of Justice of the European Communities.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.20 **General Principles** – Reasonableness.
4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.
5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.36 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Injunction, restraining order, temporary and permanent / Subsidiarity.

Headnotes:

There is a requirement to exhaust all remedies in the main action where the nature of the alleged violation of the constitution provides an opportunity to remedy the constitutional gravamen there. That can generally be assumed where the constitutional complaint alleges violations of the constitution that refer to the main action.

Summary:

I. In August 1998 the federal government issued an ordinance that, *inter alia*, obliged retailers to take back single-use packaging for beverages. The ordinance, however, was not enforced.

In 2000 three complainants, enterprises distributing beverages in single-use packaging, brought an action, still pending, for a declaratory judgment that they would also not be obliged to take back single-use packaging in the future. When the federal government announced in July 2002 that it would enforce the ordinance from 1 January 2003 onwards, the complainants at first sought interim relief in the competent courts. When they were unsuccessful there, they made a motion for an interim injunction by way of a constitutional complaint alleging a violation of their fundamental rights under Article 1 of the Basic Law (commitment of state authorities to the rule of law), Article 2 of the Basic Law (personal freedom to act), Article 12.1 of the Basic Law (freedom of occupation), Article 14.1 of the Basic Law (protection of ownership) and Article 19.4.1 of the Basic Law (guarantee of recourse to a court).

II. The First Chamber of the First Panel decided on 20 December 2002 not to admit the constitutional complaint for decision; the Chamber gave, essentially, the following reasons.

1. The constitutional complaint was partly inadmissible because not all legal remedies had been exhausted. Admittedly, the requirement of subsidiarity under § 90.2.1 of the Federal Constitutional Court Act *(Bundesverfassungsgerichtsgesetz)* does not prescribe that the legal remedies in a main action have to be exhausted in all cases. What it does prescribe, however, is that a complainant, beyond the requirement of the exhaustion of all legal remedies in a narrower sense, must first of all make use of all possibilities at his or her disposal to have the alleged violation of the constitution remedied. In the case in question, the alleged violations could be dealt with in the main action, which could not be deemed to have no prospects of success. The complainants themselves had made reference to other proceedings that had been successful on the merits or had been referred to the Court of Justice of the European Communities pursuant to Article 234 EC.

The complainants alleged that recourse to courts other than the Federal Constitutional Court would entail a serious and unavoidable disadvantage under the terms of § 90.2.1 of the Federal Constitutional Court Act but they did not conclusively justify the allegation. Instead, the constitutional complaint gave the incorrect impression that the enforcement of the compulsory deposit would force retailers either to give up their businesses or commit regulatory offences carrying administrative penalties. The constitutional complaint did not in any way adequately show the manner by which specific problems resulting from the new legal situation could have been resolved under specific circumstances and at what cost (one possible solution, for instance, would have been to sell the beverages in question in returnable packaging only or to temporarily take beverages in single-use packaging out of the product line).

2. As for the allegation in the constitutional complaint that the decision itself not to grant an interim injunction amounted to a violation of Articles 12.1, 14.1, 19.4, 101.2 and 103.1 of the Basic Law, not all legal remedies need be exhausted in the main action. But also in the cases such as the one in question, § 90.2.1 of the Federal Constitutional Court Act requires that the alleged violations of fundamental rights also be brought before the competent courts. Where this is not done, a complainant has not exhausted all available possibilities to have the alleged violation of the Constitution remedied.

The Chamber held that to the extent that that had been done, the constitutional complaints were unfounded.

There was no violation of the freedom to engage in an occupation or to practise a profession, i.e. of the fundamental right guaranteed in Article 12.1 of the Basic Law. Generally, the competent courts' decisions can only be reviewed by the Federal Constitutional Court as to whether they are based on a fundamentally erroneous view of the meaning of a fundamental right, in particular concerning the scope of protection that it awards, for instance, in a case where the competent court completely fails to consider a fundamental right that must be taken into account. The Higher Administrative Court, however, had recognised the encroachment upon the freedom to engage in an occupation or to practise a profession that the compulsory deposit constituted and had dealt with it in its weighing of consequences.

The right to property, protected as a fundamental right by Article 14.1 of the Basic Law, was also not violated. The allegation that the introduction of the compulsory deposit would necessarily result in the closure of the complainants' businesses and therefore directly encroach upon their continued existence was remote and had not been sufficiently substantiated by the complainants.

The guarantee of recourse to a court under Article 19.4.1 of the Basic Law had not been violated. Interim relief is indicated where failure to grant it would entail a serious and unreasonable disadvantage for the complainant that could not be otherwise avoided and that could not be subsequently remedied by the decision in the main action. The Higher Regional Court had stated and had given reasons why the disadvantage for the complainants did not reach the degree of seriousness required to outweigh the public interest in an immediate introduction of the compulsory deposit. It could not be established that in this context the right to effective legal protection, guaranteed as a fundamental right, had been violated.

Admittedly, the competent courts had not referred the action to the Court of Justice of the European Communities pursuant to Article 234 of the Treaty Establishing the European Community. That, however, did not mean that the complainants had been removed from the jurisdiction of their lawful judge (Article 101.1.2 of the Basic Law). Article 101.1.2 of the Basic Law only provides protection from objectively arbitrary non-observance of the duty to refer a case to the competent court. The Higher Administrative Court had stated, in an understandable manner and with reference to the relevant case-law and literature, why a referral to the Court of Justice of the European Communities had not come into question in the particular case, and in any event, it had not taken an arbitrary decision.

Languages:

German.

Identification: GER-2003-1-005

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 05.02.2003 / **e)** 2 BvR 29/03 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.16 **General Principles** – Proportionality.
4.7.2 **Institutions** – Judicial bodies – Procedure.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Criminal procedure, guarantees / Proceedings, duration, influence on the assessment of punishment.

Headnotes:

In general, the principle of proportionality urges a review at every stage of the proceedings as to whether the means of prosecution and punishment employed for the protection of legal interests are still in adequate proportion to the restrictions of fundamental rights produced for the person affected. In a case of an excessive duration of proceedings, which is not in accordance with the principle of the rule of law, the principle of proportionality entails the obligation to review carefully whether the state can still prosecute the person affected, and if so, with which means.

A delay in the proceedings that is contrary to the principle of the rule of law must affect the assessment of punishment. In exceptional cases, it may even result in a discontinuance of the proceedings or in a stay in the proceedings that can be directly derived from the Basic Law's principle of the rule of law.

Summary:

I. The complainant was sentenced in a decision, from which an appeal did not lie, to a cumulative term of four years and six months' imprisonment for aiding and abetting *(Beihilfe)* fraud in repeated cases. The history of the trial was as follows. In May 1994 the public prosecutor had brought the charge. In June 1995 the Oldenburg Regional Court *(Landgericht)* had found the charges admissible, and the case had proceeded to trial. The trial had begun on 7 August 1995. Due to changes in the plan of assignment of court cases, the proceedings had been assigned to a different criminal division of the Regional Court in early 1996. There, the proceedings had begun anew on 17 May 1996. After 103 days of trial, the proceedings ended with the passing of the sentences on 22 May 1998.

The appellate proceedings before the Federal Court of Justice *(Bundesgerichtshof)* ended on 14 July 2000 with the delivery of a decision that overturned the matter in part and referred it back to the Oldenburg Regional Court. The new proceedings in that court ended with the complainant's conviction on 18 December 2001. Another set of appellate proceedings was dismissed as inadmissible by the Federal Court of Justice in an order dated 7 November 2002.

The complainant brought a constitutional complaint alleging that the proceedings had been unconstitutionally delayed, and that the delay had not been taken into account in the sentences. He alleged a violation of his rights under Article 2.1 of the Basic Law (right to the free development of one's personality), Article 19.4 of the Basic Law (guarantee of recourse to law), Article 20.3 of the Basic Law (principle of the rule of law) and Article 101.1 of the Basic Law (right to the jurisdiction of one's lawful judge).

II. The Third Chamber of the Second Panel did not admit the constitutional complaint for decision; it gave, essentially, the following reasons.

1. The principle of the rule of law enshrined in the Basic Law requires that criminal proceedings be brought to a close within a reasonable time. A considerable delay in the proceedings for which the judicial authorities are responsible violates the right of an accused to a fair trial in accordance with the rule of law under Article 2.1 of the Basic Law, read in conjunction with Article 20.3 of the Basic Law. Whether the duration of proceedings is still reasonable must be assessed according to the circumstances of the individual case. In doing so, the delays in the proceedings for which the judicial authorities are responsible are to be taken into account first, then the total duration of the proceedings, the seriousness of the offence with which the accused is charged, the scope and the difficulties of the subject-matter of the case and the burden that the delay in the proceedings constitutes for the accused. As a general rule, the delays in the

proceedings caused by the accused himself may not be used to substantiate the Court's finding that the rights of the accused have been violated by an excessive duration of the proceedings.

2. An excessively long trial can place considerable additional burdens on the accused. With an increasing delay in the proceedings, those burdens, the consequences of which can be equivalent to those of the penalty itself, conflict with the principle, which is itself derived from the principle of the rule of law, prescribing that punishment must be proportionate and in adequate proportion to the perpetrator's guilt.

3. Alone from the requirement set out in Article 6.1.1 ECHR that proceedings must take place within a reasonable time, it is obvious that the competent courts, in their application of criminal law and the law of criminal procedure, must draw the requisite conclusions from a delay in the proceedings, must explicitly state so in the case of a violation of the requirement of reasonable time and must ascertain in detail the extent to which this requirement has been taken into account. Moreover, that same procedure is required from the point of view of the importance of proceedings taking place within a reasonable time prescribed by the Basic Law's principle of the rule of law.

4. The Oldenburg Regional Court reviewed all stages of the proceedings including the final merger of sentences. The considerations stated in the grounds for the decision about the maximum time allowed to the judicial authorities for the different actions at different stages of the original proceedings on the basis of their scope and difficulty were justifiable. Those considerations did not give rise to the fear that the Regional Court could have misjudged the meaning or the scope of the complainant’s claim to his entitlement to have the proceedings be concluded within a reasonable time.

The unconstitutionally excessive duration of 26 months in all of the proceedings found by the Regional Court had been taken into account in the impugned decision as a ground for mitigation of punishment in its own right, apart from the considerable interval between perpetration and conviction, and the burden that had been placed on the complainant by the long overall duration of the proceedings. Apart from this, the Regional Court had precisely set out the extent of the reduction in the sentence by determining what the adequate sentence would have been with and without taking into account the infringement of the obligation to ensure that proceedings take place within a reasonable time (a cumulative term of four years and six months as compared to a fictitious cumulative term of seven years and nine months).

Languages:

German.

Israel
Supreme Court

Statistical data
1 January 2003 – 30 April 2003

During the months of January through April 2003, 4 039 cases were opened and 3 777 were closed. The Court handed down decisions in 1 727 civil cases, 1 320 criminal cases and 730 administrative and constitutional cases. 6 147 cases are still pending in the Court.

Important decisions

Identification: ISR-2003-1-001

a) Israel / **b)** Supreme Court / **c)** Panel / **d)** 25.07.2002 / **e)** H.C.J. 4112/99 / **f)** Adalla v. Tel Aviv Jaffa Municipality / **g)** 56(1) IsrSC 393 / **h)**.

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
4.3.1 **Institutions** – Languages – Official language(s).
4.3.4 **Institutions** – Languages – Minority language(s).
5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.
5.3.42 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Language, minority, municipality, imposition of use / Language, co-official / Sign, use of language.

Headnotes:

Hebrew and Arabic are the official languages of the State of Israel. Hebrew is the primary language of the State of Israel, as that language that represents the Jewish character of the state.

There is a right to the freedom of language, especially in a location where a significant minority group resides.

Municipalities have a duty to post signs in Arabic as well as in Hebrew, in places where there are significant Arab minorities.

Summary:

The petitioners sought a declaration that four respondent municipalities were under an obligation to post all signs within their municipal boundaries in both Arabic and Hebrew. The petitioners noted that the existing signs in these municipalities are posted only in Hebrew and claimed that this situation discriminated against the Arab minority in each of the respondent cities. The petitioners also contended that the existing situation was in contradiction to the status of Arabic as one of the official languages of the State of Israel.

The Court granted the petition and declared that all the respondent municipalities are under an obligation to post all signs within their precincts in both Arabic and Hebrew. The Court noted that its decision was based on striking a balance between the relevant interests. These interests included the status of Hebrew as the primary language of the State of Israel, as the language that represents the Jewish character of the state. The Court also noted that using a single language served the interests of national unity. Other important interests included the right to freedom of language, especially in a location where a significant minority group resides, as well as the interest that street signs present correct and safe information.

President Barak held that the balance of all these factors necessitated that signs in Arabic also be posted in municipalities where there are significant Arab minorities. He emphasised that parallel Arabic writing would not impair Hebrew's status as the primary language in Israel, and would allow Arab residents proper access to the information presented by street signs. In this context, President Barak also noted that Arabic was the language of the largest minority in Israel. Justice Dorner joined the opinion of President Barak. Her opinion, however, was based on the status of Arabic as an official language in Israel. According to Justice Dorner, the official status of the Arabic language originates in law from the period of the British Mandate, is anchored in several Israeli statutes and draws strength from the language of Israel's Proclamation of Independence. This status, according to Justice, meant that the state was obligated to give its Arabic minority the opportunity to use the language throughout its daily life.

Justice Cheshin dissented. He asserted that, though Arabic was indeed an official language of the state, that status could not affirmatively put the respondent cities under an obligation to post all signs in Arabic.

Moreover, the Justice noted that the petitioners had not presented any evidence that Arab residents of the respondent municipalities were actually harmed by the lack of Arabic street signs.

Languages:

Hebrew, English.

Identification: ISR-2003-1-002

a) Israel / **b)** Supreme Court / **c)** Panel / **d)** 03.09.2002 / **e)** H.C.J 7015/02 / **f)** Ajuri v. IDF Commander / **g)** 56(6) IsrSC 352 / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
4.18 **Institutions** – State of emergency and emergency powers.
5.1.4 **Fundamental Rights** – General questions – Emergency situations.
5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.

Keywords of the alphabetical index:

Terrorism, fight / Residence, assigned / Geneva Convention of 1949.

Headnotes:

The framework for examining the legality of the actions of the Commander of the Israeli Defence Forces (IDF) can be found in the provisions of international law and the laws that apply to belligerent occupation.

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

An essential condition for assigning a person's residence 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. One cannot assign the residence of an innocent relative who does not present a danger, even if it is proved that assigning his residence may deter others from carrying out terrorists acts. One cannot assign the residence of someone who no longer presents a danger. Assigning someone's place of residence may be done only on the basis of clear and convincing administrative 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 Israeli Defence Force Commander in Judaea and Samaria (hereafter: the IDF Commander) issued an order 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 underlying the orders was 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, and assigning their place of residence would avert this danger.

In the judgment of the Supreme Court, which was written by the President A. Barak, with the agreement of all the members of the panel, it was decided that the IDF Commander was indeed competent to make orders to assign residence. The Court pointed out 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 Fourth Geneva 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 Fourth Geneva Convention allowing someone's place of residence to be assigned were fulfilled. Judaea and

Samaria and the Gaza Strip should be regarded as one territory subject to a belligerent occupation, and therefore the case did not involve a transfer of a person outside the area subject to the belligerent occupation. It further held that the requirements of the Convention were fulfilled both with regard to an appeal 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 Court emphasised that although the IDF Commander has broad discretion in deciding to assign someone's place of residence, it is not absolute discretion. It was held in that respect that 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 that danger.

The Supreme Court held further 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. It was held that where the condition of a person presenting a danger exists, it is justified to take into account – when deciding whether to assign his place of residence – the impact of that measure in deterring others from carrying out terrorist acts and helping those carrying out terrorist acts. That consideration could also be taken into account, for example, when choosing between internment and assigned residence. That result, the Court stated, is required by the harsh reality in which the State of Israel and the territory find themselves, 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 was decided, as stated, 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, it was found, had helped her terrorist brother Ahmed Ajuri directly, *inter alia*, by sewing explosive belts; and Kipah Mahmad Ahmed Ajuri, who, it was found, had helped his brother (the terrorist Ahmed Ajuri), *inter alia*, by helping him live 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 those petitioners, it was held that it had been proved that they were involved in terrorism to the extent required for them to present a reasonable possibility of a real danger, which would be averted if they were to be removed from their place of residence. Therefore, the Court found no reason to intervene in the decision of the IDF Commander to assign their residence.

It was however decided that with regard to the petitioner Abed Alnasser Mustafa Ahmed Asida – the brother of the terrorist Nasser A-Din Asida – the measure of assigned residence could not be adopted. The reason was that even though it was proved that the 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 the brother. It was therefore held that there was an inadequate basis for the finding that the petitioner had reached a sufficient level of danger for his residence to be assigned.

Languages:

Hebrew, English.

Identification: ISR-2003-1-003

a) Israel / **b)** Supreme Court / **c)** Panel / **d)** 16.01.2003 / **e)** H.C.J 212/03 / **f)** / **g)** 57(1) IsrSC 750 / **h)**.

Keywords of the systematic thesaurus:

1.2.2.4 **Constitutional Justice** – Types of claim – Claim by a private body or individual – Political parties.
1.3.4.5.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Parliamentary elections.
4.2.1 **Institutions** – State Symbols – Flag.
4.2.3 **Institutions** – State Symbols – National anthem.
4.9.1 **Institutions** – Elections and instruments of direct democracy – Electoral Commission.

4.9.8 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Election, campaign, access to media / Media, broadcasting, restrictions.

Headnotes:

The absence of a statutory grant may be a lacuna in the law, rather than a conscious decision by the legislature, and, as such, can be filled through judicial interpretation.

The applicable test for the constitutionality of prior restraint on speech is whether there is near certainty that if the expression in question were to occur, the public interest would suffer serious and substantial injury. This standard also applies to the decisions of the Central Elections Committee.

Summary:

The National Jewish Movement Herut is a political party that ran in Israel's recent national elections. During those elections, Herut wished to broadcast, over both radio and television, a commercial that superimposed Arabic words – words heavily laden with anti-Israel symbolism – over Israel's national anthem. In the television version of the commercial, those words were accompanied by a picture of an Israeli flag, waving above the Israeli parliament, gradually changing into a Palestinian flag.

In Israel, the Chairman of the Central Elections Committee has some statutory authority to bar the broadcast of election commercials. For example, the relevant law places explicit restrictions on the appearance of children, the Army and terror victims in political election commercials. The Chairman used this authority to disqualify Herut's commercial, asserting that the commercial could lead to incitement and provocation, and that it showed contempt towards Israel's flag and national anthem. Herut appealed the Chairman' decision to the Supreme Court.

In its petition, Herut presented several legal grounds for having the Chairman's decision quashed. First of all, Herut pointed out that the law contained no explicit provision that granted the Chairman authority to bar radio – as opposed to television – commercials. Second, Herut asserted that the law granted the Chairman the authority to intervene only on the basis of limited grounds in the content of election commercials. Third, Herut also asserted that the Chairman's decision violated Herut's right to free speech, a right protected by Israel's semi-constitutional Basic Law: Human Dignity and Liberty. In his counterclaim, the Chairman of the Elections Committee asserted that there was no statutory basis for the judicial review of his decision by the Supreme Court.

Despite its unanimous agreement on several of the arguments presented, the Court disagreed regarding whether to overturn the decision of the Chairman, with a majority of the sitting justices refusing to overturn his decision. Regarding Herut's first argument, the sitting panel of three Justices agreed that a proper interpretation of the law granted the Chairman the right to interfere in the content of radio election commercials, even though he was only explicitly granted the right to intervene in the content of television commercials. The Court considered the absence of a statutory grant to interfere in the content of radio broadcasts as a lacuna in the law, rather than a conscious decision by the legislature, and, as such, saw fit to fill that lacuna through judicial interpretation. Similarly, the Court also ruled that the Chairman's authority to intervene in the content of broadcasts extended beyond the grounds explicitly enumerated in the law. The Court asserted that such an interpretation was necessary for the proper regulation of election commercials. The Court also noted that, in the past, the Chairman has acted in accordance with that broader interpretation.

Similarly, the Court unanimously agreed that it had the jurisdiction to review the decision of the Chairman. Though the election law explicitly negated the authority of Israeli courts to review the decision of the Chairman, the Court asserted that the constitutional status of the arguments put forward were paramount to the ordinary status of the election law. As such, as the Supreme Court had authority to hear all constitutional actions, the Court held that it had jurisdiction to hear the case.

The Court, however, split regarding the question of whether the decision of the Chairman was an unreasonable violation of Herut's freedom of speech. Even here, the Court agreed that the applicable test for the constitutionality of a prior restraint on speech was whether there is near certainty that, if the expression in question were to occur, the public interest would suffer serious and substantial injury. The majority of the Court asserted that the Chairman's decision was a reasonable response to the possibility of provocation and incitement presented by the election commercial. In dissent,

one justice asserted that any such provocation and incitement presented by the commercial would be tolerable in a democratic society, and that there were no grounds for banning the commercial.

Languages:

Hebrew, English.

Identification: ISR-2003-1-004

a) Israel / **b)** Supreme Court / **c)** Panel / **d)** 22.01.2003 / **e)** CrimA 3854/02 / **f)** Anonymous v. District Psychiatric Board for Adults / **g)** 57 (1) IsrSC 900 / **h)**.

Keywords of the systematic thesaurus:

2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
3.20 **General Principles** – Reasonableness.
5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.
5.2.2.8 **Fundamental Rights** – Equality – Criteria of distinction – Physical or mental disability.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.

Keywords of the alphabetical index:

Mental disturbance, degree / Psychiatric report, use / Internment, psychiatric, duration.

Headnotes:

Holding a patient in commitment infringes his or her rights of liberty and dignity, guaranteed under the Israeli Basic Law: Human Dignity and Liberty. Such an infringement may be justified if it is intended for the protection of the accused as well as for the protection of the individual.

The law must provide for a reasonable balance between the patient's rights and the public interest.

Forced criminal commitment becomes unreasonable when its duration exceeds the amount of time the patient would have served in prison had he been convicted.

Summary:

After being charged with assault, the petitioner was found unfit to stand trial. He was criminally committed to a psychiatric institution. Under Israeli law, criminal commitment restricts the patient's liberty more than civil commitment. One of the ways it does so is that criminal commitment continues indefinitely until the District Psychiatric Board orders the discharge of the accused. The petitioner remained in criminal commitment in the psychiatric institution for several years, a period longer than his sentence would have been had he actually stood trial and been convicted.

The petitioner asserted, *inter alia*, that the arrangement was unconstitutional. He asserted that he could not be held in commitment indefinitely. The respondent countered that the nature of his mental illness required him to remain in commitment indefinitely. The respondent also asserted that the petitioner could not be held in civil commitment, as the civil system did not provide for adequate control and supervision.

The Court held for the petitioner. It held that forced criminal commitment becomes unreasonable where its duration exceeds the amount of time the patient would have served in prison had he or she been convicted. In reaching that judgment, the Court relied on comparative law from the United States, Canada and Australia.

In the holding, the Court stated that the court issuing the original criminal commitment order should, where the duration of criminal commitment becomes unreasonable, transfer the patient to civil commitment. The Court noted that the patient himself could approach the court, assert that the period of criminal commitment had become unreasonable and ask to be transferred to the civil track. However, the Court also held that the Attorney-General could act as proxy for the patient, if the patient did not approach the Court himself.

Languages:

Hebrew, English.

Identification: ISR-2003-1-005

a) Israel / **b)** Supreme Court / **c)** Panel / **d)** 23.01.2003 / **e)** H.C.J. 651/03 / **f)** Association for Civil Rights in Israel v. Chairman of the Central Elections Committee / **g)** 57(2) IsrSC 62 / **h)**.

Keywords of the systematic thesaurus:

1.2.2.2 **Constitutional Justice** – Types of claim – Claim by a private body or individual – Non-profit-making corporate body.
1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
3.18 **General Principles** – General interest.
4.9.1 **Institutions** – Elections and instruments of direct democracy – Electoral Commission.
4.9.8 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Election, campaign, restrictions / Flag, picture, use in electoral campaign / Public petitioner, special interest in bringing legal proceedings.

Headnotes:

The standing of public petitioners who have not themselves been injured has been recognised in several areas, including matters of a public nature that concern the rule of law, matters that concern the enforcement of constitutional principles or where judicial intervention is necessary to repair a substantial error in government operations.

Public petitioners have standing even if they are not joined by non-public petitioners with ordinary standing.

Due to the importance of regular and proper elections to the democratic process, the standing of a public petitioner should be recognised in the context of election law, despite the existence of specific individuals who have standing. This is true even if they are not joined by non-public petitioners.

Summary:

During elections for the Sixteenth Knesset (Parliament), the Chairman of the Central Elections Committee disqualified portions of the election campaign broadcasts of Ra'am and Balad, two parties running for election. Those portions were disqualified for including pictures of the Palestinian flag. The petitioner, the Association for Civil Rights in Israel, asserted that the disqualification of the portions constituted an infringement of the freedom of speech of Ra'am and Balad, as well as an infringement of the voters' right to view political messages uncensored. Ra'am and Balad did not themselves petition against the disqualification. However, they were added to the petition as respondents by the Court. The Attorney-General, as an *amicus curae*, contended that petitioner did not have standing to bring a petition, as it was not injured by the decision of the Chairman of the Elections Committee. Moreover, the injured respondents, Ra'am and Balad, could have brought the petitions themselves.

The Court held that the petitioner had standing as a public petitioner. In general, however, the standing of a public petitioner has not been recognized where there is a specific individual who has been injured and has ordinary standing.

The Court held that in the context of election law, the standing of a public petitioner should be recognised, despite the existence of specific individuals who have standing. The Court asserted that the extended right of standing should be recognised due to the importance of regular and proper elections to the democratic process. According to the Court, the regularity of the election process is the concern of the entire public and goes beyond the direct concern of the individual injured by government action. Moreover, the Court contended that all voters have an interest in receiving the political messages of the candidates. The voters' rights, therefore, are connected to those of the candidates running for election. As such, the Court held that a direct injury to a party may also constitute an injury to the voter and give rise to the latter's standing to bring his or her concern before the courts.

As to the merits of the petition, the Court observed that restrictions on speech are only justified where the expression at issue has the potential to cause substantial and severe harm to other protected interests. The Court held that under the circumstances, the appearance of the Palestinian flag in the broadcasts would not cause injury to viewers. The Court noted that the Palestinian flag could potentially be identified with groups involved in terrorist activities against Israeli civilians. Even so, the Court noted that

in both broadcasts, the Palestinian flag only appeared for a split-second. Moreover, the appearance of the flag was not accompanied by aggressive or hostile words. That being so, the Court held that the appearance of the Palestinian flag would not cause substantial and severe harm to the viewing public. The Court went on to quash the decision of the Chairman of the Central Elections Committee and permit the broadcast of the disqualified portions of the broadcasts.

Languages:

Hebrew.

Identification: ISR-2003-1-006

a) Israel / **b)** Supreme Court / **c)** Panel / **d)** 05.02.2003 / **e)** H.C.J. 3239/02 / **f)** Iad Ashak Mahmud Marab v. IDF Commander in the West Bank / **g)** 57(2) IsrSC 349 / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
4.18 **Institutions** – State of emergency and emergency powers.
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, rights of the defence and fair trial – Access to courts.
5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.
5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial within reasonable time.
5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.
5.3.13.23 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to be informed about the reasons of detention.
5.3.13.26 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel.

Keywords of the alphabetical index:

Terrorism, fight / Detention, duration / Detention, judicial review.

Headnotes:

A delicate balance must be struck between, on the one side, the liberty of the individual (who enjoys the presumption of innocence) and, on the other side, public peace and safety.

There must be an individual cause for detention against each specific detainee. However, it makes no difference whether that cause applies to an isolated individual or to that individual as part of a large group.

A judge is an “internal” part of the detention process. It is the judge that must determine whether there are sufficient investigative materials to support the continuation of the detention.

Detainees may be prevented from meeting with lawyers as long as there are significant security considerations in preventing such a meeting.

A lack of resources is not a sufficient reason for denying fundamental rights.

Summary:

In an attempt to combat rising Palestinian terrorism, the Israeli government decided to initiate an extensive military operation: Operation Defensive Wall. In the context of that operation, the Israeli Defence Forces (IDF) entered various areas of the West Bank with the intention of detaining wanted persons as well as members of several terrorist organisations. As of 5 May 2002, about 7 000 persons had been detained. Many of those persons were quickly released after initial screening and identification. Those who were not released after screening were moved to permanent detention facilities.

In the context of that operation, the IDF promulgated Order 1500, which provided that a detainee could be held up to 18 days without a judicial detention order. This period could be extended with a judicial detention order. Moreover, during the original 18-day period, there was to be no judicial review of the detention order, and the detainee could be prevented from meeting with a lawyer. Order 1500 also allowed

a detainee to be held for up to 8 days without being given an opportunity to challenge his detention.

Order 1500 was later amended by Order 1505, which shortened the initial 18-day period to 12 days. Order 1505 provided that a detainee could only be prevented from meeting with a lawyer for four days, not the 18 days provided for by Order 1500. Subsequently, Order 1518 shortened that period to 2 days. Order 1518 also provided that a detainee could be held up to 4 days without being given the opportunity to state his opinion, not 8 days as set out originally in Order 1500.

The petitioners, ten non-governmental organisations and detainees, asserted that Order 1500, as well as the subsequent amending Orders, were illegal under international and Israeli law. In their first claim, the petitioners asserted that international law only provided for two types of detention: either ordinary criminal detention or preventative internment. Both types of detention, according to the petitioners, had to be based on specific suspicions relating to an individual person. The petitioners asserted that, by contrast, those Orders set up a system of collective or mass detention, under which people could be held even though the authorities could not set out individualised suspicions against each detainee. In their second claim, the petitioners asserted that the Orders provided for an excessively long period before judicial intervention. In their third and fourth claims, the petitioners contested provisions of the Orders that prevented detainees from meeting with lawyers without being given a chance to challenge the situation.

The respondent asserted that all the Orders were legal under international law. Moreover, the respondent asserted that Palestinian terrorists had chosen to work from population centres. As such, it was often impossible to distinguish, in normal times as in combat situations, between members of terrorist organisations and innocent civilians. That being so, persons who were found at the sites of terrorist activity or combat under circumstances that gave rise to suspicion of their involvement in those activities were detained. The respondent asserted that the Orders were a reasonable response to the need to detain large numbers of people in the course of the fight against terrorism. Moreover, the State noted that as soon as the situation allowed, it had issued amended orders that significantly relaxed the original provisions of Order 1500.

The Court noted that with regard to detentions for security reasons, a delicate balance must be struck between, on the one side, the liberty of the individual (who enjoys the presumption of innocence) and, on the other side, public peace and safety. In that context, in response to the petitioners' first claim, the Court held for the respondents, stating that the Orders did not allow for the detention of persons without individualised reasons. Instead, the Order only allowed for detentions where there was an individual cause for detention against a specific detainee. It made, however, no difference whether that cause applied to an isolated individual or to that individual as part of a large group. The size of the group had no bearing on the matter. Rather, what mattered was the existence of circumstances that gave rise to the suspicion that the individual detainee presented a danger to security.

With regard to the petitioners' second claim, the Court held the Orders were illegal: judicial intervention could not be delayed for 18 days. According to the Court, appearing before a judge is an "internal" part of the detention process. It is the judge that must determine whether there are sufficient investigative materials to support the continuation of the detention. With regard to the petitioners' third claim, the Court held that the Orders were legal. Detainees could be prevented from meeting with lawyers as long as there were significant security considerations in preventing such a meeting, such as ensuring that lawyers were not brought into a combat zone, that they would not be exposed to injury and that they would not relay messages back to the combat zone. The Court emphasised, however, that such security considerations must be significant. Regarding the petitioners' fourth claim, the Court noted that the respondent had argued that a lack of resources prevented it from hearing the detainees' claims earlier. The Court rejected that argument and found for the petitioners on the ground that a lack of resources was not a sufficient reason for denying fundamental rights.

Languages:

Hebrew, English.

Italy
Constitutional Court

Important decisions

Identification: ITA-2003-1-001

a) Italy / **b)** Constitutional Court / **c)** / **d)** 13.03.2003 / **e)** 89/2003 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 13/02.04.2003 / **h)**.

Keywords of the systematic thesaurus:

4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.
5.2.1.2 **Fundamental Rights** – Equality – Scope of application – Employment.
5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.

Keywords of the alphabetical index:

Civil service, competitive examination / Civil service, proper functioning / Employee, temporary / Examination, competitive.

Headnotes:

Employment relations with government departments cannot be treated in the same way in all respects as relations with a private-sector employer.

The basic principle governing access to the civil service is that of the competitive examination, and this principle does not apply to private-sector employment (Article 97 of the Constitution). The existence of such a principle, which is designed to ensure the proper functioning and impartiality of government departments, fully justifies parliament's choosing, by law, to rule out the transformation of a fixed-term employment contract into a permanent employment contract and specifying that the sole consequences, if a government department breached binding provisions concerning the recruitment or employment of workers on permanent contracts, should take the form of compensation.

Summary:

The Pisa Court referred the issue of the constitutionality of a provision of the law governing employment relations with government departments to the Constitutional Court on the grounds that it made no provision for cases where government departments violated binding rules governing the recruitment and employment of workers on fixed-term contracts, that is the automatic establishment of permanent employment contracts with the workers concerned.

The referring Court considered that the provision in question was contrary to the principle of equality on the grounds that, although employment relations with government departments had evolved and become more privatised, the law had made no provision, in the case of public-sector workers – in the event of a violation of the binding rules governing the recruitment and employment of workers on fixed-term contracts – for the transformation of the fixed-term employment contract into a permanent employment contract, as in the case of private-sector workers.

The referring Court also criticised the fact that the provision in question was at variance with Article 97 of the Constitution, since the fact that it prevented public-sector workers recruited on fixed-term contracts from benefiting from a stable employment contract in the event of a violation of the rules governing employment contracts was liable to undermine their performance and therefore violated the principle of the proper functioning of government departments, provided for in that article.

The Court dismissed the appeal on the grounds that, although the 1993 reforms of public-sector employment had introduced a move towards the privatisation of employment relations with government departments, such relations nevertheless differed from those existing with a private employer, since the fundamental principle governing access to the civil service, that of the competitive examination, as provided for in Article 97.3 of the Constitution, meant that it was not possible to compare the situations brought before the lower court in this particular case.

Languages:

Italian.

Identification: ITA-2003-1-002

a) Italy / **b)** Constitutional Court / **c)** / **d)** 26.03.2003 / **e)** 104/2003 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 14/09.04.2003 / **h)**.

Keywords of the systematic thesaurus:

3.20 **General Principles** – Reasonableness.
5.2 **Fundamental Rights** – Equality.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to family life.
5.3.41 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Parental leave, duration / Child, adopted.

Headnotes:

Assuming that daily time off is no longer strictly related to the child's physical requirements but, like extended parental leave, meets the need to facilitate the child's arrival in the new family, the provision restricting them to the first year of the child's life instead of providing for their use during the child's first year in the new family breaches Article 3 of the Constitution in terms of both equality and reasonableness.

Summary:

The Constitutional Court was called on to rule on the constitutionality of a provision of the 2001 Consolidated Act bringing together the statutory provisions concerning maternity and paternity protection, which granted adoptive parents daily time off (a one-hour rest period afforded to working mothers twice in the working day, during which she could leave her place of work) solely during the child's first year of life, as was the case for natural parents.

The lower court considered that time off should be granted during the first year, calculated as from the time when the child joined the family, regardless of the child's age at the time. The lower court contended that the provision was contrary to Article 3 of the Constitution, both because it afforded the same treatment in different situations (adopted child and natural child), and because it seemed contrary to the principle of reasonableness.

The Court pointed out that the law that had introduced daily time off in the early 1950s had done so solely for breastfeeding purposes, with the result that it had been afforded solely to mothers who were breastfeeding their children, enabling them to use the "nursing rooms" made available at their place of work. Subsequently, with Law no. 1204 of 1971, time off had been granted regardless of whether the mother was breastfeeding: it was the mother-child relationship that was taken into account, with the result that working mothers were no longer obliged to use the "nursing rooms" or day nurseries provided by their employer.

Initially, these maternity protection measures had been introduced and applied in a social and cultural context in which, on the one hand, adoption, particularly of minors, was not widespread and, on the other, the father was still considered to play a secondary role in bringing up very young children in the family. It was for this reason that the law afforded overwhelming importance to biological motherhood. Over the years, however, the case-law had extended the benefits laid down for natural parents to adoptive parents.

In the 1970s, the reference framework had changed because of the introduction of a series of reforms (new family law, equality between men and women in respect of labour law, adoption of minors). Law 903 of 1977 afforded adoptive mothers the right to compulsory and optional leave from work, which had previously been granted only to natural mothers in the period preceding the birth of the child. Adoptive mothers could take advantage of this in the course of the first year of the child's presence in their new family. The law thus acknowledged the features that distinguished this situation from that of a child living with his or her natural parents.

The Constitutional Court has, on several occasions, ruled on the conformity with the Constitution of provisions governing arrangements introduced for maternity protection purposes, such as leave (extended parental leave) and daily time off work, extending them to working fathers and adoptive parents. These arrangements are no longer designed solely to protect the woman's health or meet the purely physiological needs of the child but, as is apparent from the grounds given for the Court's judgments, also to meet the child's emotional needs and contribute to the full development of his or her personality. To this end, account must be taken of the time when the child joins the adoptive family, rather than his or her age, in order to allow for the difficulties faced at that time, for a certain period, by both the child and the members of the adoptive family.

The provision referred to the Court concerns daily time off. It comes from a law that co-ordinated all the maternity and paternity protection legislation

concerning the parents of natural and adopted children, which provides that the date from which the duration of extended parental leave is calculated is that on which the child joins the family.

Consequently, the provision limiting the duration of parental leave to the first year of the child's life violates Article 3 of the Constitution in terms of both equality and reasonableness.

Languages:

Italian.

Japan
Supreme Court

Important decisions

Identification: JPN-2003-1-001

a) Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 24.03.1999 / **e)** (o) no. 1189/1993 / **f)** Judgement on the right of the suspect in criminal procedure to communicate with his/her defence counsel / **g)** *Minshu*, 53-3, 514 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.5.1.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Arrest.
5.3.13.23.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – Right not to incriminate oneself.
5.3.13.25 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to have adequate time and facilities for the preparation of the case.
5.3.13.26 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel.

Keywords of the alphabetical index:

Police custody, communication with lawyer, restriction.

Headnotes:

Article 39.1 of the Code of Criminal Procedure which allows investigating agencies to impose *ex-parte* restrictions on an interview between a suspect held in custody and his/her defence counsel, or a person who is to be defence counsel, does not contradict Article 34.1 of the Constitution which provides that no one shall be detained or confined without immediately being informed of the reason and immediately given the right to choose his/her defence counsel.

Article 39.1 of the Code of Criminal Procedure also does not contradict Article 37.3 of the Constitution which provides for the right to counsel at any time after indictment.

Finally, Article 39.1 of the Code of Criminal Procedure does not contradict Article 38.1 of the Constitution which provides for a prohibition against compulsory self-incrimination.

Summary:

The appellant brought a *Jokoku* Appeal against a judgement of Sendai High Court on a claim for reparation by the State. The appellants argued *inter alia* that Article 39.1 of the Code of Criminal Procedure was not in conformity with Articles 34, 37.3 and 38.1 of the Constitution.

The Court found that only the above-mentioned point concerning the constitutionality of Article 39.1 of the Code of Criminal Procedure was admissible, but it was not well-founded.

While emphasising the need to strike an appropriate balance between the need for the investigation such as interrogation, and the exercise of the right to consult and communicate with defence counsel, the Court held that Article 39.1 of the Code of Criminal Procedure did not contradict Article 34 of the Constitution for the reasons listed below:

1. restrictions on an interview etc. as set out in Article 39.3 of the Code of Criminal Procedure do not allow for a total denial of the request made by defence counsel for an interview etc., but only allow for the designation of a time which is different from the one proposed by defence counsel or for shortening an interview; therefore, the degree of restriction should be regarded as low;

2. designation by the investigating agency is possible only in cases where allowing an interview results in an obvious obstruction to the investigation, such as cases where the investigation agency is interrogating the suspect at the time defence counsel requests an interview; and

3. if these conditions are met and the place and time etc. of the interview etc. are to be designated, the investigating agency should designate a time which is as soon as possible upon consultation with defence counsel and take measures to ensure that the suspect is able to prepare the defence with his/her defence counsel.

Concerning Article 37 of the Constitution, the Court rejected the argument put forward by the appellant on the ground that Article 37 should be understood to provide for the rights of the accused after indictment in the light of the term “accused” which is used in the provision; therefore, it could not be understood to apply also to suspects before indictment.

Moreover, concerning Article 38.1 of the Constitution, the Court held that Article 39.3 of the Code of Criminal Procedure did not contradict the former on the ground that it is essentially for the legislature to determine the means by which the prohibition against compulsory self-incrimination is to be effectively enforced, and accordingly that the guarantee of the right of the suspect held in custody to consult and communicate with defence counsel cannot be automatically derived from the prohibition against compulsory self-incrimination set out in Article 38.1 of the Constitution.

Languages:

Japanese, English (translated by Sir Ernest Satow, Chair of Japanese Law, University College, University of London).

Latvia
Constitutional Court

Important decisions

Identification: LAT-2003-1-001

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 10.01.2003 / **e)** 2002-17-0103 / **f)** On the Compliance of Article 12 (Items 1 and 3 of the Second Part) of the Law "On Land Privatisation in Rural Regions" and Sub-Items 3.1, 3.2.2 and 3.3 of the Cabinet of Ministers 20 May 1997 Regulations no. 187 "The Procedure for the Compensation Repayment in Cash to Persons who Were Granted Compensation Certificates for the Former Landed Property in Rural Regions" with Articles 1, 91 and 105 of the Constitution *(Satversme)* of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), 4, 14.01.2003 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
5.2 **Fundamental Rights** – Equality.
5.3.36 **Fundamental Rights** – Civil and political rights – Right to property.
5.3.36.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.
5.3.36.2 **Fundamental Rights** – Civil and political rights – Right to property – Nationalisation.

Keywords of the alphabetical index:

Property, restitution, in kind / Property, reform.

Headnotes:

The fundamental principles of the land reform implemented in Latvia require the observation of the property rights of the parties concerned – that is to say, rights of the former landowners or their heirs and the interests of the existing owners of houses and buildings, users of the land and those of the state and local authorities.

Taking into consideration the economic and social situation in the State, the legislature granted additional rights to obtain compensation in cash of 28 *lats* per compensation certificate to specific categories of former landowners and their legitimate heirs. By granting additional rights as to the use of property to specific categories of persons, the State did not restrict the property rights of other persons. The principle of equality allows and even demands a different approach to persons in different circumstances and even to persons in the same circumstances, where there is an objective and reasonable justification for doing so.

Summary:

An applicant, the State Human Rights Bureau, applied to the Court for a declaration that the text of Article 12 (Items 1 and 3 of the second part) reading "up to 31 December 1992 have submitted a request to receive compensation" (henceforth: "the impugned legal rules") and the same text, incorporated into Items 3.1, 3.2.2, 3.2.3. and 3.3 of Regulations of the Cabinet of Ministers, were incompatible with Articles 91 and 105 of the Constitution.

The applicant argued that the impugned legal rules were discriminatory because they introduced a different approach to persons entitled to receive compensation. Moreover, the impugned rules were incompatible with Article 105 of the Constitution setting out the right to own property and providing for fair compensation in the event of expropriation.

The Court emphasised that the fundamental principles of the land reform implemented in Latvia required the observation of property rights of both categories of persons: the rights of the former land owners or their heirs, who owned land on 21 July 1940 as well as the interests of the existing owners of houses and buildings, users of the land and those of the state and local authorities. Before the principles mentioned in the Law could be implemented, the process of land reform had to be completed.

The Court noted that in compliance with the rules regulating the land reform, the former landowners or their heirs had been given the right of freely choosing whether they wished to receive land (with the exception of cases where it was impossible because of restrictions prescribed by law) or compensation for the land. Initially, the legislature had not envisaged the right of receiving compensation in cash. Subsequently, Article 12 was supplemented with the second part, which laid down the right of certain categories of persons to receive compensation in cash for their compensation certificates. As one of the criteria for receiving compensation in cash was the requirement, set out in the impugned Items, that the request for compensation had to be submitted by a certain date: 31 December 1992.

The Court pointed out that, taking into consideration the economic and social situation in the State, the legislature had granted additional rights to receive compensation in cash of 28 *lats* per compensation certificate to specific categories of the former landowners and their legitimate heirs. The persons, to whom the legislature granted the right to receive compensation in cash, were those who had suffered the most as a result of the land expropriation and during the period of Communist and Nazi occupation. Granting an additional privilege to certain groups of persons was based on the principle of fairness.

The Court did not agree with the applicant's view that the State had restricted the property rights of other persons by granting additional rights as to the use of property to specific categories of persons. During the land reform, certain persons could obtain and/or obtained property rights either to land or to state securities (compensation certificates). Consequently, the right to property did not include only the right to land.

The State did not restrict, violate or otherwise interfere with the rights of persons to landed property. On the contrary, by recognising the right of persons to the expropriated land, the State gave them the possibility of choosing either land or compensation certificates. Thus, the impugned legal rule did not restrict the property rights of those persons claiming compensation after 31 December 1992.

The Court found that there were no grounds to support the applicant's view that the impugned legal rules did not conform with the European Convention on Human Rights. The historical situation was the reason the State of Latvia made a reservation at the time it ratified the Convention in the 4 June 1997 Law "On 4 November 1950 European Convention on Human Rights and Fundamental Freedoms and Protocols 1, 2, 4, 7 and 11". In Article 1 of the Law, the Parliament determined that the provisions of Article 1 Protocol 1 ECHR were not to be applied to the property reform regulating restitution of property or compensating former owners or their heirs, whose property had been nationalised, confiscated, collectivised or otherwise unlawfully expropriated during the period of annexation by the USSR. That reservation means that when implementing the property reform, limitations on the rights of the former owners or the rights of other subjects in the public interest is admissible.

The Court reiterated that the principle of equality, enshrined in the first sentence of Article 91 of the Constitution, prohibited state institutions from passing legal rules, which without any reasonable justification, permitted a different approach to persons in the same and comparable circumstances.

The Court found that the persons, mentioned in the impugned legal rules, to whom compensation certificates have been granted were not in the same and comparable circumstances, as some of them have claimed compensation on or before 31 December 1992, while the others have done so only after that date. Consequently, the Court found that the persons were not in the same and comparable circumstances and the impugned rules did not violate the principle of equality.

The Court declared that the impugned rules were in conformity with Articles 91 and 105 of the Constitution.

Cross-references:

- Cf. decision in Case no. 09-02(98), *Bulletin* 1998/2 [LAT-1998-2-003];
- Cf. decision in Case no. 2001-07-0103.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2003-1-002

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 14.02.2003 / **e)** 2002-14-04 / **f)** "On the Compliance of the Cabinet of Ministers 8 August 2001 Decree no. 401 "On the Location of the Hazardous Waste Incineration Facility in Olaine" with Articles 111 and 115 of the Constitution *(Satversme)*, Articles 5 and 6 (Items 1-3) of the Waste Management Law, Articles 3 and 11 of the Law "On the Environmental Impact Assessment", Articles 14 and 17 (the First Part) of the Law on Pollution as well as Article 11 of the Law "On Environmental Protection"" / **g)** *Latvijas Vestnesis* (Official Gazette), 26, 18.02.2003 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.3 **General Principles** – Democracy.
5.5.1 **Fundamental Rights** – Collective rights – Right to the environment.

Keywords of the alphabetical index:

Environment, impact, assessment / Environment, risk, information / Waste, hazardous, incineration / Decision-making, public participation.

Headnotes:

Article 115 of the Constitution provides: "…[t]he State shall protect the right to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment". However, participation in the decision-making process concerning activities affecting the environment is not a public obligation but only a right.

At the time of the passing of the impugned decree, the facts that the specifications of the equipment did not conform to some of the standards set out in the regulations and that there were shortcomings in the public participation phase in the environmental impact assessment process do not amount to a sufficient reason to declare the impugned decree unlawful and null and void, on the ground that when the impugned act was passed, the government's main objective was not to take a decision on the conformity of the equipment's specifications with the standards set out in the normative rules but to determine the optimal location of the facility.

Summary:

When implementing the State Investment Program, the Ministry of Environmental Protection and Regional Development (henceforth: "MEPRD") made an offer to several local authorities to locate a hazardous waste incineration facility (henceforth: "incineration facility") on their administrative territories. In order to realise the project and after considering the points of view of the local authorities, a decision was taken to assess the potential impact on the environment (henceforth: "EIA") of the alternative sites for the incineration facility in such cities as Liepaja and Olaine as well as Rudbarzi, Cenas and Krustpils pagasts (small rural districts). The MEPRD, as the initiator of the project, entrusted the stock company "BAO" with carrying out the tasks connected with the EIA process. In its final report on the environmental impact, the State Assessment Bureau of Impact on the Environment recommended locating the incineration facility in Krustpils pagasts, Olaine or Liepaja.

The Olaine City Dome (Council) agreed to the location of the incineration equipment on the site of the city boiler house on condition that the MEPRD would take into consideration and fulfil several preconditions concerning the city environment and infrastructure.

The Cabinet of Ministers passed the impugned decree, confirming the site of the boiler house in Olaine as the location of the incineration facility.

The applicant, a group of 20 deputies of the 7th. *Saeima,* alleged that the impugned decree did not comply with Article 111 of the Constitution and with several laws. It pointed out that the area of Olaine was a polluted one; consequently, one more potential polluter should not be added to that area.

The Court emphasised that in accordance with Article 115 of the Constitution, the State had to protect the right in question by providing information about environmental conditions and by promoting the preservation and improvement of the environment. The Court stated that firstly, Article 115 of the Constitution put the State under a duty to create and ensure an efficient system of environmental protection. Secondly, it endowed the individual with the right to obtain information on the environment and participate in the process of adopting decisions on environmental issues.

Management of hazardous waste is one of the most important undertakings carried out under the Latvian Environmental Protection System. Normative rules regulating the management of hazardous waste envisage several complicated procedures during the process of installation and operation of the incineration facility. Consequently, the Constitutional Court assessed not only the impugned decree itself but also the other activities connected with the installation of the incineration facility: the significance of the final report and conclusion at the time the impugned decree had been passed as well as the preconditions for bringing the incineration facility into operation.

The Court found that, on the one hand, the applicant's point of view was well-grounded in that public discussion had been carried out in form only and that public opinion had not been ascertained in the EIA process. On the other hand, participation in the decision-making process concerning activities affecting the environment was not a public obligation but only a right.

The Court noted that at the time of the adoption of the impugned decree, Latvia had signed the Aarhus Convention, and even though it had not ratified it, the government of Latvia had expressed its political will to observe the Convention's guidelines on environmental protection.

Even though the initial public participation and discussion of the report of the working group had taken place, the public was ineffectively involved in the EIA process. Consequently, in order to avoid a situation where public participation takes place in form only and to ensure adequate public participation, the Constitutional Court drew the attention of the Cabinet of Ministers to the need to assess the effectiveness of Regulation no. 213 (regarding the right to public participation in decision-making, guaranteed in the Law "On Environmental Protection", Article 115 of the Constitution and the Aarhus Convention).

The Court found that the MEPRD did not carry out its obligations in good faith. As the government had received neither complete information about the conformity of the specifications of the facility with the standards set out in the normative rules nor the negative public opinion regarding the project, the Constitutional Court held that, when taking the decision on the draft of the impugned decree, the Cabinet of Ministers could not evaluate the aspects from every point of view.

However, taking into consideration that the Greater Riga Regional Environmental Board had been authorized to grant permits for operating facilities only where the prospective emissions conform to the standards set out in the normative rules, the Constitutional Court held that at the time the impugned decree had been adopted, the facts that the specifications of the equipment had not conformed to some standards set out in the regulations and that there had been shortcomings in public participation in the environmental impact assessment process, did not amount to a sufficient reason to declare the impugned decree unlawful and null and void.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2003-1-003

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 05.03.2003 / **e)** 2002-18-01 / **f)** On the Compliance of Article 2, Item 2 of the *Saeima* Election Law with Articles 6, 8 and 91 of the Constitution *(Satversme)* of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), 36, 06.03.2003 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.3.1 **General Principles** – Democracy – Representative democracy.
3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.
5.3.38.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Election, principle / Detainee, rights / Criminal procedure, security measure / Vote, prohibition.

Headnotes:

The impugned legislative provision, which provides that persons suspected of or accused of a crime, or awaiting trial where they have been arrested for reasons of security shall not be entitled to vote, is contrary to the general principle of elections enshrined in Article 6 of the Constitution and the concept "full-fledged" incorporated into Article 8 of the Constitution. In the current democracy, the impugned provision does not have a legitimate aim, and the loss of individual rights it creates is not proportionate with the public benefit.

Security measures aim at elucidating the truth in the criminal matters and other circumstances that are listed in the Criminal Procedure Code but such measures do not cover the undermining the democratic system or other aims that could be regarded as the basis for restrictions of the right to vote or expression of the free will. The fact that a person is arrested, namely, that the fundamental rights of a person that are laid down by Article 94 of the Constitution, are restricted does not mean that other fundamental rights of the person shall be restricted too.

Summary:

An applicant filed a constitutional claim challenging Article 2.2 of the Parliament Elections Law (henceforth: "the impugned legislative provision") for failure to comply with Articles 6, 8 and 91 of the Constitution, as the impugned provision denied the right to vote to persons suspected of or accused of a crime or awaiting trial where such persons had been arrested.

During the 1998 elections for the 7th. *Saeima*, the applicant had been an accused; during the 2002 elections for the 8th. *Saeima,* he had been awaiting trial. He had been arrested for reasons of security. In accordance with the impugned provision, he had been denied the active right to vote in those two elections. In 1998 he had been a candidate for the 7th. *Saeima*; in 2002, for the 8th. *Saeima*.

The Court emphasised that election rights were considered to be the most important of the political rights. Articles 6 and 8 of the Constitution set out the principles of the Latvian electoral system and the notion of a person having the right to vote. Elections to the Parliament are dealt with in the provisions of the Parliamentary Election Law. Consequently, the principle of general elections and the notion of a full-fledged person used in the Constitution are to be interpreted as being read in conjunction with Article 2 of that Law.

Legal issues concerning elections are regulated by several international legal instruments, binding on Latvia. Those instruments lay down the basic principles of the electoral rights to be observed by the Member States; however, the creation of a specific electoral system and the regulation of the organisation falls within the powers of the legislature of every state. The contemporary election systems of states allow and envisage restrictions on the right to vote, which are connected with:

- age;
- citizenship; and
- other qualifications.

However, the restrictions shall be:

- determined by law;
- justified by the legitimate aim; and
- proportionate to that aim.

In order to assess whether the impugned legal provision complied with the provisions of the Constitution, it had to be ascertained whether the restrictions in question were in conformity with those criteria.

The Court noted that it could be seen from the verbatim reports of the Parliamentary Debates on the Parliamentary Election Draft Law that the impugned provision had been adopted from previous texts of the law, without analysing its appropriateness in a democratic society and without taking into consideration the development of the right to vote in a democratic state.

The Court found that it followed from both the Constitution and the international instruments binding on Latvia that election rights were not absolute and could, in specific cases, be restricted. The legislature was authorized to establish the restrictions that it considered necessary, adequate and proportionate in a democratic society. The Court had to ascertain whether it was permissible to exclude persons detained as a security measure from the category of "persons, enjoying full rights of citizenship" mentioned in the Constitution.

The Court emphasised that the presumption of innocence was set out in the Constitution, the international legal instruments binding on Latvia and the laws. Any restriction imposed on a person who had been arrested but not convicted had to be commensurate with the principle of the presumption of innocence. Only the restrictions that were necessary for carrying out criminal procedural activities or for maintaining order and security at the place of detention should be permitted, as persons should be presumed innocent until proven guilty.

The Court held that the restrictions should be commensurate with the legislature's aim in implementing those restrictions. In its written reply, the Parliament did not give adequate reasons to support that by denying persons arrested for security reasons the right to vote, the gain of the society would be greater than the restrictions on individual rights.

Moreover, the Court noted that no Member State of the European Union restricted the right to vote of persons arrested for security reasons; Latvia's different procedure might cause difficulties in Latvia's joining the voting procedure of the European Parliament. Besides, such or similar restriction on the right to vote cannot be found in any other European Union Candidate State.

The Court declared that Article 2.2 of the Parliamentary Election Law did not conform with Articles 6 and 8 of the Constitution and it was null and void as from the day of publication of the judgment.

Cross-references:

- Cf. decision in Case no. 2002-08-01;
- Cf. decision in Case no. 2002-04-03;
- *Mathieu - Mohin and Clerfayt case*, The European Court of Human Rights Judgment of 02.03.1987.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2003-1-004

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 25.03.2003 / **e)** 2002-12-01 / **f)** On the Compliance of Article 12 (Item 3 of the first part) of the Law "On Land Reform in the Cities of the Republic of Latvia" with Articles 1 and 105 of the Constitution *(Satversme)* of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), 47, 26.03.2003 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
5.3.36 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Property, restoration, land / Fairness, principle / Good governance, principle / Executive, regulation, reasonable time.

Headnotes:

The principle of proportionality and the principle of fairness, which follows from Article 1 of the Constitution *(Satversme)*, do not require Latvia to restore property rights to land to all former owners or their heirs or to compensate its full value during the land reform.

However, when implementing the land reform, the limitations laid down by the legislature on a person's reacquisition of land that he or she formerly owned must correspond to a legitimate aim and be proportionate to that aim.

The limitations, which are set out in the impugned provision, on the restitution of property rights to land with objects affixed to it (buildings, fixtures and constructions) used for education, culture and science are to be considered proportionate only where the executive has carried out all the tasks it is required to carry out concerning objects of state significance laid down by the Law.

Summary:

The impugned provision provides that one of the exceptions, set out in Article 12 of the Law "On Land Reform in the Cities of the Republic of Latvia", to restoring the property rights to a plot of land to the former owners or their heirs is where public objects (buildings, fixtures and constructions) are located on that land.

The applicants, Dzintars Abuls and Velta Lazda, are the heirs of the former owner of the plot of land where a building with state cultural significance – Riga Film Studio – is located. They argued that the impugned provision infringed their rights laid down by Article 105 of the Constitution and also violated Article 1 of the Constitution.

The Court emphasised that during the occupation of Latvia, the occupation government had illegally and without remuneration alienated the property of the Latvian people. The Republic of Latvia had neither the ability nor the duty to compensate fully all the losses that had been inflicted on persons by the occupational government. As the consequences of the occupation are a burden on Latvian society as a whole, it is not possible to eliminate them fully. The principle of fairness requires taking into consideration not only the interests of the former landowners and their heirs but also those of other members of society and the public interest as a whole.

The applicants argued that property rights were automatically restored to the former owners or their heirs at the moment when all acts that had been adopted since 21 July 1940 lost validity. The Court found that argument unfounded and that, on the contrary, property rights to land are restored by a decision of the competent institutions, after examining each individual application.

The Court found that when implementing the land reform, the limitations that had been placed by the legislature on a former owner's reacquisition of land had to correspond to a legitimate aim and be proportionate to that aim. In the case under consideration, the legitimate aim of not returning the land amounted to a compromise, in keeping with the public interest by striking a balance between the rights and interests of the former owners and those of society and its members.

On the one hand, the benefit obtained by society from the undisrupted functioning of objects connected with the engineering, technical and transportation infrastructure having state or municipal significance – streets, bridges, tunnels, roads junctions, railway lines and ports as well as objects of such a nature to be especially protected by the state – and objects having state educational, cultural and scientific significance and national sport centres, is much greater than the limitations placed on the former owners and their heirs.

However, on the other hand, a fair balance between a former landowner or his/her heirs and society may be struck only in cases where the above-mentioned object (specific buildings, fixtures and constructions), the land occupied by it, as well as the land that is needed for maintenance of that object, are clearly and precisely identified and specified. Otherwise, when the impugned provision is applied, there is a possibility of arbitrary action. That would, of course, run contrary to the principle of a state based on the rule of law.

As regards the part of the impugned provision dealing with objects serving an educational, cultural or scientific purpose and sport centres that have acquired the status of state significance, it can only be applied where it complies with the law that lists the objects mentioned above. The Law "On Objects of Education, Culture, Science and Sport Centres of State Significance" lists the objects, indicates their addresses, but does not estimate the size of the area occupied by the concrete buildings and/or constructions or the land area (or boundaries) necessary for the maintenance of the object. In accordance with the Law, the task of specifying educational, cultural and scientific objects was delegated to the executive power. Therefore, a legal basis for applying the impugned provision could arise only when the executive power had carried out the duty imposed on it by the legislature.

The Court emphasised that the principle of good government, which follows from Article 1 of the Constitution, also incorporates fair implementation of procedures in a reasonable time and other provisions, the objective of which is to ensure the observation of human rights by the state administration. In failing to execute the duty assigned by the legislature in due time, the executive power did not observe the above principle.

When the part of the impugned provision dealing with objects having state educational, cultural and scientific significance is applied, the former landowners and their heirs are not guaranteed adequate protection against arbitrary interference in their rights, and the limitations on the restitution of property rights become disproportionate with the legitimate aim and conflict with Articles 1 and 105 of the Constitution.

The Court declared that the part of the impugned provision dealing with objects connected with education, culture and science complied with Articles 1 and 105 of the Constitution, only if the government, in accordance with Article 7 of the Law "On Objects of Education, Culture, Science and Sport Centres", has specified the area of land occupied by the objects and necessary for their maintenance before 1 May 2003. As to the applicants, the limitations on the restitution of property rights envisaged in the impugned provision, read together with Article 4.26 of the Law "On Objects of Education, Culture, Science and Sport Centres of State Significance" did not conform with Articles 1 and 105 of the Constitution and were null and void as of 4 January 1996.

Cross-references:

- Cf. decision in Case no. 09-02(98), *Bulletin* 1998/2 [LAT-1998-2-003];
- Cf. decision in Case no. 2000-03-01, *Bulletin* 2000/3 [LAT-2000-3-004];
- Cf. decision in Case no. 2002-01-03;
- Judgment of the Republic of Lithuania Constitutional Court of 20.06.1995 in Case no. 25/94, *Bulletin* 1995/2 [LTU 1995-2-006];
- Judgment of the Czech Republic Constitutional Court of 22.09.1998 in case Pl. US 1/98, *Bulletin* 1998/3 [CZE 1998-3-013].

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2003-1-005

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 23.04.2003 / **e)** 2002-20-0103 / **f)** On the Compliance of Article 11 (the Fifth part) of the Law "On State Secrets" and the Cabinet of Ministers 25 June 1997 Regulations "List of Objects of State Secrets" (Chapter XIV, Item 3) with Article 92 of the Constitution *(Satversme)* of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official

Gazette), 62, 24.04.2003 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.9 **General Principles** – Rule of law.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
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:

Secret, state / State security / Hearing, right / Justice, principle.

Headnotes:

It is especially important to consider alternative procedures by which a person may protect his/her rights to the highest degree possible, where the right to have a case reviewed in a fair court is denied. A state based on the rule of law may set up a well thought-out mechanism to take into consideration the interests of every person subject to clearance for access to state secrets and, at the same time, also take into consideration the interests of state security when reaching a decision on issuing a special permit. The principle of justice requires that a person subject to such clearance enjoys the right of expressing his/her viewpoint and being heard before a refusal to grant the special permit is issued.

The impugned provisions shall be interpreted in compliance with the Constitution and, in each particular case, to ensure as much as possible the realisation of the right to a hearing. If the impugned provisions are interpreted that way, they comply with Article 92 of the Constitution.

Summary:

The Law "On State Secrets" lists the cases where access to state secrets is prohibited. Where the issue of granting special permits to specific persons is decided, those persons shall be checked according to the procedure laid down in the Law on State Security Institutions; the institutions shall examine and reach a conclusion as to the effectiveness of the restrictions. The impugned provisions of that Law set out that a decision refusing the grant of a special permit or reducing a special permit category may be appealed to the Director of the Constitutional Defence Bureau (henceforth: the "CDB"). The decision of the Director of the CDB may be appealed to the Procurator General, whose decision shall be final and not subject to appeal.

The impugned provisions of the Cabinet of Ministers Regulations no. 226 "List of Items subject to State Secrets" provide that the following items shall be considered subject to State secret: "specific record-keeping documents, materials of security clearance, deeds of conveyance and destruction of the objects of State secrets"; they also set out the levels of secrecy of state secrets: "extremely secret, secret and confidential".

The person filing the constitutional claim, Andris Ternovskis, was appointed Head of the Jelgava Border Guard Structural Unit on 27 February 1997. On 15 January 1999 the CDB adopted a decision to refuse the request of A. Ternovskis for a special permit for access to state secrets. On that basis, he was dismissed from his post and retired from the Border Guard service due to unsuitability for service.

The ordinary courts rejected the request of A. Ternovskis for reinstatement in the post of Head of Jelgava Border Guard Structural Unit. In a judgment, the Senate of the Supreme Court emphasised that A. Ternovskis could not be reinstated in that post, which required a special permit for access to state secrets, on the ground that the CDB Director had not granted that permit and the decision had not been annulled.

In his constitutional claim, A. Ternovskis pointed out that the impugned provisions denied him the possibility of having his cased reviewed in an objective and independent court and were not in conformity with Article 92 of the Constitution.

The Constitutional Court emphasised that the first sentence of Article 92 of the Constitution provided: "everyone has the right to defend their rights and lawful interests in a fair court"; however, it did not mean that a person is guaranteed the right of adjudicating any issue that he or she finds important in a court. The person has the right of protecting only his or her "rights and lawful interests" in a fair court.

The Court considered that it could not be concluded that a person "has the right and lawful interest" to acquire information that (in compliance with the law) has been recognised to be a state secret.

On the other hand, the Court held that the right to freely choose employment enshrined in Article 106 of the Constitution meant also the right to keep the post. However, the rights set out in Article 106 of the Constitution might be subject to restrictions. State security requires that access to state secrets should be granted only to persons, whose personal characteristics show no risk that a state secret might be revealed. On the one hand, those restrictions are needed in a democratic society as they strike a reasonable balance between the public interests and interests of an individual. On the other hand, restrictions with regard to any particular person are permissible only where the refusal to grant the special permit is well-founded.

The impugned provisions restricted the fundamental rights that are incorporated into Article 92 of the Constitution. However, those fundamental rights may be restricted to protect other values that are guaranteed in the Constitution *(Satversme)*.

When assessing whether those restrictions were needed in a democratic society, the Court took into consideration that by allowing a person subject to security clearance to acquaint himself/herself with all the materials, the identity of the operative employees might be revealed, and as a result, those employees would not be able to do their duty. In such a case, the harm to state interests would be much greater than the limitation to the rights of a person.

The impugned provisions had to be interpreted in compliance with the Constitution and, in each particular case, to ensure (as much as possible) the realisation of the right to be heard. If the legal provisions were interpreted that way, the restriction on the right of a person was proportionate to the legitimate aim – the protection of state security.

The Court declared that the impugned provisions complied with Article 92 of the Constitution.

Cross-references:

- Cf. decisions in Cases no. 04-02(99), *Bulletin* 1999/2 [LAT-1999-2-002]; no. 2002-08-01; no. 2002-04-03, *Bulletin* 2002/3 [LAT-2002-3-008].

In the decision the Court referred to the German Federal Constitutional Court, 08.07.1997, judgment in Case no. 1 BvR 1934/93, *BVerfGE* 96, 189 and to the following judgements of the European Court of Human Rights:

- *Golder v. the United Kingdom*, 21.02.1975, *Special Bulletin ECHR* [ECH-1975-S-001]; Vol. 18, *Series A of the Publications of the Court*;
- *Fogarty v. the United Kingdom*;
- *Leander v. Sweden*, 26.03.1987, *Special Bulletin ECHR* [ECH-1987-S-002]; Vol. 116, *Series A of the Publications of the Court*.

Languages:

Latvian, English (translation by the Court).

Liechtenstein
State Council

Important decisions

Identification: LIE-2003-1-001

a) Liechtenstein / **b)** State Council / **c)** / **d)** 14.04.2003 / **e)** StGH 2002/84 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Age, limit / Family, send for, right / Child, right to control and care / Immigration.

Headnotes:

The fundamental, important, primary and indisputable rules must be laid down in law and cannot be merely specified in regulations. In order to assess the importance of a legal rule, there is a need, *inter alia*, to effect a specific investigation into whether the rule concerned essentially infringes fundamental rights.

The age limit of 16 set in Article 84.1.b of the Code on the movement of persons *(Personenverkehrsordnung – PVO)*, as a condition for family reunification where children are concerned, constitutes a serious infringement of the fundamental right to family life under Article 8 ECHR. This rule also has to be defined as not indisputable, since it conflicts with the legislative principle which declares the age of majority to be 18. Thus, in order to meet the requirement of a legal basis, it ought to have been set out at the legislative level, and not merely in a regulation.

Summary:

Having obtained an annual residence permit, the applicant had lodged an application for family reunification in respect of his son, who had not yet reached the age of majority, but was already over 16. On the basis of Article 84.1.b of the Code on the movement of persons *(Personenverkehrsordnung – PVO)*, which set as 16 the age limit for family reunification in respect of children, this application was dismissed by the lowest court. Following a constitutional appeal to the *Staatsgerichtshof*, and an attached application for review of the constitutionality of the rules, the *Staatsgerichtshof* declared void on the ground of unconstitutionality the part of this rule which set an age limit of 16 for minor children for the purposes of family reunification.

Languages:

German.

Identification: LIE-2003-1-002

a) Liechtenstein / **b)** State Council / **c)** / **d)** 14.04.2003 / **e)** StGH 2002/87 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.1.2.2 **Sources of Constitutional Law** – Categories – Unwritten rules – General Principles of law.
3.10 **General Principles** – Certainty of the law.
3.22 **General Principles** – Prohibition of arbitrariness.
5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Citizens of the European Union and non-citizens with similar status.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.

Keywords of the alphabetical index:

Good faith, assurance given by the authority / Good faith, protection / Legitimate trust, protection / European Economic Area, discrimination, foreigners.

Headnotes:

The constitutional principle of trust is the corollary of the unwritten principle of prohibition of abuses of right. A situation defined as trust presupposes the existence of specific information issued by the authorities in the sense of a concrete declaration. Furthermore, the citizen concerned must have taken steps on which there can be no going back without causing damage. Exceptionally, an explicit declaration by the authorities will not be necessary to create a situation of trust where, bearing all the circumstances in mind, the conduct of the authorities as a whole may be interpreted as a specific affirmation. In the presence of a situation of qualified trust, this trust must, in principle, be protected, even when the information or the conduct equivalent to it conflicts with the law in force.

Summary:

In these proceedings, the question arose of whether the applicant, a foreign national, was entitled, notwithstanding the lack of evidence of a concrete declaration by the authorities, to assume that he could retain his previous status of holder of a short-term residence permit and, as a result, the possibility connected with it of establishing his domicile (in Liechtenstein), when his status had just changed from that of employee to that of self-employed worker. In practice, various circumstances made it possible to believe that this was the case. The applicant had, in perfectly good faith, based his actions on the principle that he could retain his status where domicile was concerned. He had taken advice from the responsible authority, but had not been informed about this unusual case. It is by no means obvious that the status of holder of a short-term residence permit is lost by anyone moving into self-employment, nor does this in any case fail to raise a problem in the light of the principle of non-discrimination laid down by the applicable law in the European Economic Area. The applicant had had his belief further reinforced by the fact that the authorisation given to him to carry out an occupation stated that the applicant's domicile was in the country. The *Staatsgerichtshof* concluded that, because of the situation of trust which needed to be protected, the applicant was entitled to be issued with a residence permit, entailing the setting aside of the disputed decision.

Languages:

German.

Lithuania
Constitutional Court

Statistical data
1 January 2003 – 30 April 2003

Number of decisions: 5 final decisions and 1 from last year.

On 24 December 2002 the Constitutional Court adopted a ruling that was published and came into force only in February 2003.

All cases – *ex post facto* review and abstract review.

All final decisions of the Constitutional Court were published in the Lithuanian *Valstybės Žinios* (Official Gazette).

Important decisions

Identification: LTU-2003-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 24.12.2002 / **e)** 49/2000 / **f)** On the competence of the self-government institutions / **g)** *Valstybės Žinios* (Official Gazette), 19-828, 25.02.2003 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.8.4 **Institutions** – Federalism, regionalism and local self-government – Basic principles.
4.8.6.2 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Executive.
4.8.8.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Principles and methods.

Keywords of the alphabetical index:

Municipality, council, member, mandate / Self-government, executive body, establishment, competences.

Headnotes:

The same persons may not discharge the functions in the implementation of state power and at the same time be members of municipal councils, through which the right of self-government is implemented. The Constitution consolidates the principle of prohibition of a double mandate. Moreover, in order for the proper discharge of their functions as set out in the Constitution, the Constitution grants a special legal status to the President of the Republic, members of the Parliament *(Seimas)*, members of the Government and judges, which, *inter alia* includes the restrictions on work, remuneration and political activities, as well as a special procedure of removal from office or revocation of a mandate and/or immunities: inviolability of the person and a special procedure regarding criminal and/or administrative liability. Under the Constitution, members of municipal councils do not enjoy the aforesaid immunities. Persons enjoying such immunities and state officials who control or supervise municipal councils may not be members of municipal councils. Under the Constitution, members of municipal councils may not be unequal in their legal status.

The Constitution consolidates the principle of the supremacy of the municipal councils with respect to the executive bodies. The municipal councils have the powers to control the executive bodies that are set up by and accountable to them. Thus, under the Constitution, the executive bodies accountable to municipal councils may not be formed from among members of the municipal councils that set them up. Under the Constitution, persons who have the tasks of the implementation of state power and state officials who control or supervise the activities of municipal councils may not be officials or employees of the aforesaid executive bodies.

Under the Constitution, a legal regulation is not permitted in which a decision on the issues attributed *expressis verbis* by the Constitution to the municipality could be adopted not by municipal councils but by the executive bodies set up by and accountable to them.

Summary:

The petitioner – a group of members of the Parliament *(Seimas)* of the Republic of Lithuania – applied to the Constitutional Court requesting an examination of whether some provisions of the Law amending the Law on Local Self-Government (the Law) were in conflict with the Constitution.

The petitioner argued that Article 3.3 of that Law used the term "municipal institutions", which under Article 3 of the said Law, means the municipal council and the municipal board. The petitioner stated that Article 119.3 of the Constitution uses the term "self-government institutions", but not "municipal institutions". In the opinion of the petitioner, that Law should have used the term used in the Constitution. Consequently, the municipal council and the municipal board should have been referred to as self-government institutions but not municipal institutions.

The petitioner also argued that it was settled that the functions of the municipality were grouped into independent (Item 1) and assigned (independent-limited) (Item 2) functions under Article 5.1 of the 12 October 2000 Law amending the Law on Local Self-Government. The petitioner stated that municipalities discharged freely and independently, in accordance with the Constitution, all their functions defined in the Constitution and laws; consequently, the functions of municipalities could not be independent-limited.

The petitioner maintained that Article 18.1 of the Law amending the Law on Local Self-Government provided that for the term of its mandate, the municipal council was to form a municipal board from among its members and fix the number of members of the board. Under Article 3.3 of the same Law, the municipal board was to be an executive institution. According to the petitioner, the municipal board could not be formed using members of the municipal council, since they would be accountable and subordinate to themselves. That would be in conflict with the principles of separation of powers (institutions), subordination and accountability set out in the Constitution.

The petitioner argued: the powers of the municipal board were limited by the Constitution; the municipal board could only directly implement the decisions of the municipal council; and the municipal council was not permitted to grant powers, by law, to the municipal board to adopt decisions which were binding on the community or to adopt decisions in the interests of the community. Therefore, the petitioner questioned whether Items 2, 3, 4, 8, and 15 of Article 19.1 of the Law amending the Law on Local Self-Government were in accordance with Articles 5.2, 119.1 and 119.4 of the Constitution.

The petitioner was of the opinion that the functions of the municipal council (i.e. the representative institution) and the municipal board (i.e. an executive institution) were separate ones under Article 119.1 and 119.4 of the Constitution, the principle of separation of powers being set out in that article of the Constitution. Article 5.2 of the Constitution provides that the scope of power be limited by the

Constitution. Therefore, the petitioner questioned whether the provision "the mayor of the municipality shall be an executive institution" of Article 3.3 of the Law amending the Law on Local Self-Government, the provisions of Item 1 of Article 21.1 of the same Law, which regulate the activity of the mayor in the capacity of the head of the municipal board, as well as Items 5, 6, 7, 9, 12, 14, 15, 16, 17, and 18 of Article 21.1 of that Law were in accordance with Articles 5.2, 119.1 and 119.4 of the Constitution.

The Constitutional Court recalled that the Constitution distinguishes two systems of public authority: state administration and local self-government. State administration is implemented through organs of state power as well as other state bodies set out in the Constitution and laws. The right of self-government is implemented through self-government organs-municipal councils. Municipal councils set up bodies that are accountable to them. The constitutional principles upon which the organisation of state power and self-government are based only overlap in part.

Under the Constitution, the organisation of state power and its activity are based on the principle of separation of powers. The Constitution consolidates the principle of supremacy of municipal councils in regard to the executive bodies that are accountable to the former. Constitutional principles of separation of state powers and of accountability of executive bodies to the representative ones are not identical in their content and application to a corresponding sphere. The relations between municipal councils and their executive bodies are based on the constitutional principles of the accountability of executive bodies to the representative ones and the supremacy of municipal councils over the executive bodies accountable to them; however, they are not based on the principle of separation of powers.

Therefore, the Constitutional Court ruled that:

1. Article 3.3 and 3.4 (wording of 12 October 2000), Item 2 of Article 5.1 (wording of 14 January 2002); Items 2, 3, 4, 8 and 15 of Article 19.1 (wording of 12 October 2000); and Item 5 (wording of 12 October 2000), Item 6 (wordings of 12 October 2000 and 25 September 2001), Items 7, 9 and 12 (wording of 12 October 2000), Item 14 (wordings of 12 October 2000 and 8 November 2001), Items 15, 16, 17, and 18 (wordings of 12 October 2000) of Article 21.1 of the Republic of Lithuania Law on Local Self-Government are not in conflict with the Constitution.

2. Article 18.1 (wording of 12 October 2000) of the Republic of Lithuania Law on Local Self-Government to the extent that it provides that the municipal board is to be made up of members chosen from the members of the municipal council conflicts with Article 119.1 and 119.4 of the Constitution.

3. Item 1 (wording of 12 October 2000) of Article 21.1 of the Republic of Lithuania Law on Local Self-Government to the extent that it provides that the mayor shall determine and draw up agendas for the municipal council sittings and submit draft decisions of the municipal council, convene sittings of the municipal council and chair them, coordinate the activities of committees and commissions of the municipal council, sign decisions of the municipal council and the minutes of the sittings of the council that he has chaired, conflicts with Articles 5.2, 119.1 and 119.4 of the Constitution.

Moreover, the Constitutional Court declared the following two laws unconstitutional: the Republic of Lithuania Constitutional Law on the Procedure of the Application of the Law amending Article 119 of the Constitution and the Lithuanian Law on the Entering the Constitutional Law on the Procedure of the Application of the Law amending Article 119 of the Constitution into the List of Constitutional Laws.

Supplementary information:

On 25 February 2003 the Constitutional Court ruled that this ruling be officially published in the official gazette *"Valstybės Žinios".* It was the first time in its history that the Constitutional Court ruled that one of its rulings be published in the official gazette. It did so for the reason that the ruling could harm the political life of Lithuania if it would take effect after its expeditious delivery.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2003-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 24.01.2003 / **e)** 20/01 / **f)** On the procedure of dismissal from office of the Prosecutor General / **g)**

Valstybės Žinios (Official Gazette), 10-366, 29.01.2003 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.10 **General Principles** – Certainty of the law.
4.5.8 **Institutions** – Legislative bodies – Relations with judicial bodies.
4.7.4.3.2 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel – Appointment.
4.7.4.3.5 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel – End of office.

Keywords of the alphabetical index:

Prosecutor, dismissal / State institution, head, dismissal, nature of the legal act.

Headnotes:

Where a law provides for other entities appointing the Prosecutor General, a change in the procedure of appointment of the Prosecutor General does not, under the Constitution, amount to a ground for dismissal of the Prosecutor General who was appointed for the term provided for by law, as that ground is not one that disqualifies the Prosecutor General from holding office in general. The Court also stressed that the impugned legal regulation creates preconditions for legal uncertainty in the system of the prosecutor's office and for a violation of the independence of prosecutors in discharging the functions set out for them in the Constitution.

Under the Constitution, a legal act whereby the head of a state institution provided for by the law, who has been appointed by the Parliament, is dismissed, is always an individual legal act; therefore, the form of such a legal act is not that of a law but a different one, i.e. a sub-statutory act of the Parliament. Article 70.2 of the Constitution provides that such legal acts of the Parliament are to be signed by the President of the Parliament. Such legal acts enter into force the day following the publication thereof, unless they themselves set out another procedure of entry into force. The Constitution does not permit a dismissal by a law of the head of a state institution provided for by law, who was appointed by the Parliament, as a legal situation would occur where the Parliament, which enjoys the constitutional powers to dismiss such a head of a state institution, would not be able to do so alone. The reason is that any law, including one dismissing such a head of a state institution, is to be submitted to the President of the Republic for signing and promulgation. The President of the Republic may decide not to sign such a law and could refer it back to the Parliament together with relevant reasons for reconsideration. A law reconsidered by the Parliament would be deemed adopted only if the amendments and supplements presented by the President of the Republic were adopted, or if more than half of all the members of the Parliament voted in favour of the law.

If such a head of a state institution is dismissed by a law, the powers of the Parliament which are established in Item 5 of Article 67 of the Constitution to dismiss such heads of state institutions would be restricted and the constitutional principle of separations of powers would be violated.

Summary:

The petitioner – the Vilnius Regional Administrative Court – applied to the Constitutional Court seeking a determination of whether Articles 1 and 2 of the 28 November 2000 Lithuanian Law amending Article 11 of the Law on the Prosecutor's Office were in conflict with the constitutional principle of a state governed by the rule of law and the provisions of Articles 5, 67 and 75 of the Constitution. The petitioner argued that Article 11.3 of the Law on the Prosecutor's Office (wording of 13 March 1997) provided that the Prosecutor General be appointed for a seven-year term and dismissed by the Parliament *(Seimas)* upon proposal of the Parliament Committee on Legal Affairs. The candidatures of the Prosecutor General were in the past proposed to the Parliament Committee on Legal Affairs by the President of the Supreme Court of Lithuania and the Minister of Justice. That procedure for the appointment and dismissal of the Prosecutor General was changed by Article 1 of the Law amending Article 11 of the Law on the Prosecutor's Office: it was thereafter established that the Prosecutor General be appointed for a seven-year term and dismissed by the President of the Republic upon approval of the Parliament. Article 2 entitled “The Procedure of the Implementation of this Law” of that Law provides that from the day of entry into force of the Law, the term of office of the Prosecutor General appointed by the Parliament shall be terminated and he shall temporarily hold the office of Prosecutor General until a new Prosecutor General is appointed under the procedure established by law. The petitioner pointed out that Article 75 of the Constitution provides that officials appointed or elected by the Parliament (with the exception of persons mentioned in Article 74 of the Constitution) are to be dismissed from office when the Parliament, by a majority vote of all its members, expresses no-confidence in them. The petitioner maintained that the Prosecutor General was not mentioned in Article 74 of the Constitution. In the opinion of the petitioner, the 28 November 2000 Law

amending Article 11 of the Law on the Prosecutor's Office was in conflict with the constitutional principle of a state governed by the rule of law and the provisions of Articles 5, 67 and 75 of the Constitution.

The Constitutional Court stressed that the provision of Article 118.3 of the Constitution setting out that the procedure for the appointment of prosecutors and their status must be established by law means, *inter alia,* that the legislator has the powers to establish by law the entities who appoint and dismiss prosecutors; to establish the term of office of prosecutors; and to set out the grounds and procedure for their dismissal from office. When doing so, the Parliament *(Seimas)* is bound by the Constitution, including the principle of a state governed by the rule of law entrenched therein, which implies legal certainty, stability and protection of legitimate expectations. Once having established the term of office of the Prosecutor General, the legislator does not have the right to put forward for any grounds of dismissal of the Prosecutor General from office before the expiry of the term of his office. Under the Constitution, the only grounds for dismissal that may put forward by the legislator are those for which the Prosecutor General may not hold office in general (e.g. due to such legal facts as the age set out in the law, transfer to another place of work, loss of the citizenship of the Republic of Lithuania). For those grounds, on the basis of Item 5 of Article 67 of the Constitution, the Parliament may dismiss a Prosecutor General who has been appointed by the Parliament according to the law.

Moreover, under Item 5 of Article 67 of the Constitution, the Parliament is to establish the state institutions provided for by law and appoint and dismiss their heads. This item, *inter alia,* means that the Parliament has the powers to provide for the state institutions in the law and to appoint and dismiss the heads of such institutions. Under Item 5 of Article 67 of the Constitution, the Parliament may dismiss the heads of the state institutions that are provided for in laws only upon the grounds of dismissal established in the Constitution and/or laws and in accordance with the dismissal procedure laid down by the Constitution and/or laws. When dismissing the heads of the state institutions provided for in the laws, whom it appointed itself, the Parliament must use the grounds as a basis that are set out in laws and follow the procedure set out in laws that do not conflict with the Constitution. Otherwise, Item 5 of Article 67 of the Constitution would be violated.

The Constitutional Court noted that the term of office of the Prosecutor General had been terminated by a law. However, a legal act dismissing the head of a state institution provided for by the law, who has been appointed by the Parliament, is always an individual legal act; therefore the form of such a legal act is not that of a law but a different one, i.e. a sub-statutory act of the Parliament.

The Court also emphasised that the impugned provisions did not deny or restrict the right of the Parliament entrenched in Article 75 of the Constitution to express no-confidence, by majority vote of all members of the Parliament, in an official appointed or elected by the Parliament.

The Constitutional Court ruled that the impugned provisions were in conflict with Item 2 of Article 5 and Item 5 of Article 67 of the Constitution, as well as the constitutional principle of a state governed by the rule of law.

Languages:

Lithuanian, English (translation by the Court).

Moldova
Constitutional Court

Important decisions

Identification: MDA-2003-1-001

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 18.02.2003 / **e)** 6 / **f)** Constitutional review of specific provisions of Law no. 461-XV of 30 July 2001 on the market in petroleum products, as amended by Law no. 930- XV of 22 March 2002, and of specific provisions of Governmental Decree no. 1027 of 1 October 2001 on measures to implement the Law on the market in petroleum products / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.25 **General Principles** – Market economy.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.10.2 **Institutions** – Public finances – Budget.
4.10.7 **Institutions** – Public finances – Taxation.
5.3.36.3 **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:

Energy, sector, control, state / Petroleum, products, transport, importation / Importation, licence.

Headnotes:

Parliament, the supreme representative organ and sole legislative authority of the State, with a view to ensuring the economic security of the country, is entitled to regulate the organisational, legal and economic framework for the importation, transport, storage and commercialisation on the domestic markets of petroleum products as strategic commodities, to decide on the status of the subjects involved in such relations, and to establish special regulations on their activities.

Summary:

A group of Members of Parliament brought an application for the consideration of this case, which involved reviewing the constitutionality of specific provisions of Law no. 461-XV of 30 July 2001 on the market in petroleum products, as amended by Law no. 930-XV of 22 March 2002. The amendments in question concerned Article 10 on financial guarantees for the National Energy Regulating Agency, as well as Articles 13.1 and 13.3.a setting out the special conditions for issuing licences for the import and retail of the main petroleum products. It also amended specified provisions of Governmental Decree no. 1027 of 1 October 2001 on measures to implement the Law on the market in petroleum products: Article 3.2 governing means of transport for imported petroleum products (by rail, road and sea) and Articles 4.a and 4.b governing the issuing to economic operators of licences for importing petroleum products, on production of documents certifying that they own or rent depots for storing petroleum products with a capacity of at least 5000 m³, with available capital equivalent to at least US$ 750 000.

The applicants considered that the aforementioned provisions infringed the principles of the equality of economic operators, free trade, entrepreneurial activity, and the protection of fair competition and of private property, and are therefore incompatible with Articles 58.2, 126.2 and 132 of the Constitution and the Law on entrepreneurial activities and enterprises, as well as with the restriction of monopolies and the development of competition.

According to the provisions of Article 8 of the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects signed in Lisbon on 17 December 1994, in order to achieve the objectives set out in conformity with Article 5 of the said Protocol, each Contracting Party must develop, implement and regularly update energy efficiency programmes tailored to its specific situation. The Protocol also provides for the establishment, at the appropriate levels, of bodies specialising in the energy efficiency field, with the requisite resources and staffing to design and implement the corresponding policies.

In the Republic of Moldova, this body is the National Energy Regulating Agency (ANRE).

Chapter II of Law no. 461-XV sets out the attributions of the administrative authorities on the market in petroleum products. The Law also provides that State regulation of the market in petroleum products is the prerogative of the ANRE and of the mandated administrative authorities, in accordance with this Law and other statutory texts. The Agency conducts a unitary, state policy on the market in petroleum products, issuing licences and regulating and supervising operators in this market in accordance

with the aforementioned Law and other statutory texts (Article 6).

According to the provisions of Law no. 461-XV, expenditure for the Agency's activities on the market in petroleum products is covered by adjustment payments, the amount of which is fixed in accordance with the estimated volumes of imported primary petroleum products and liquid gas as indicated by the licence-holders. Those payments are used to maintain the National Energy Regulating Agency's budget.

The adjustment payment is an annual payment, established and approved in respect of all petroleum product importers in accordance with the relevant legal provisions,.

Adjustment payments, like all payments deriving from economic relations between the State and the economic operators or natural and legal persons, or between economic operators, are separate from the types of transactions governed by tax legislation and therefore do not enter into the compulsory payment category, which embraces taxes and other levies provided for under Article 6 of the Fiscal Code.

Adjustment payments, taxes and other charges are levied without any consideration or equivalent counter-performance. However, adjustment payments are applicable exclusively to licence-holders, the amounts being fixed annually according to specific estimates. Adjustment payments are included in the cost of the imported petroleum products rather than being deducted from the economic operators' income.

Article 3.2 of Law no. 461-XV explicitly provides for equal rights for all participants in the market in petroleum products, regardless of the type of property or legal form of organisation in question.

In order to guarantee national energy security, the Government is legally responsible for establishing the specific conditions for the activities of petroleum product importers on the market in petroleum products (petroleum depots, minimum volume requirement, level of capital, etc.) (Article 13.1 of Law no. 461-XV).

In order to enforce Law no. 461-XV the Government issued Decree no. 1322 of 29 November 2001 laying down the criteria for entitlement to a petroleum product import licence.

The Court stressed that the Government adopted this Decree with a view to protecting citizens and society from the uncontrolled import and sale of petroleum products in the country, creating the conditions for retail of petroleum products on the domestic market and reliable supplies of high-quality petroleum products to consumers, developing fair competition and protecting the rights and legitimate interests of consumers.

Article 3.2 of Governmental Decree no. 1027 of 1 October 2001 provides that primary petroleum product imports should be transported by rail, road and sea. Importation of primary petroleum products by sea must be effected solely via the Giurgilesti customs office, and that of petroleum products by road via the Leuseni customs office.

The applicants contended that those provisions were incompatible with the Constitution and certain international agreements, and that they consequently constituted interference with the activities of the Republic's economic operators.

The Court held that in order to guarantee the country's economic security the State is required to introduce legal, economic and organisational mechanisms to regulate the import, transport, storage and marketing of petroleum products on the domestic market as strategic commodities that are essential to the vitality and smooth functioning of the major national economic branches (energy, industry, agriculture and transport), in accordance with the law.

Exercising its jurisdiction of constitutional review, the Constitutional Court declared constitutional the provisions challenged by the group of Members of Parliament.

Dissenting opinion

Judge Mircea Iuga dissented. He stated that the wording of the impugned provisions of Law no. 461-XV of 30 July 2001 on the market in petroleum products as amended by Law no. 930-XV of 22 March 2002 and the provisions of Governmental Decree no. 1027 of 1 October 2001 on measures to implement the Law on the market in petroleum products was unconstitutional.

Those provisions infringed Articles 58, 130 and 132 of the Constitution, which provide that with the exception of financial impositions provided for by the Constitution and the legislation in the field, any other labour conscriptions or payments in the field of public expenditures are prohibited.

Languages:

Romanian, Russian.

Identification: MDA-2003-1-002

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 03.03.2003 / **e)** 6a / **f)** Inadmissibility of an application by a group of Members of Parliament / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.4.5.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Referenda and other consultations.
1.3.5.9 **Constitutional Justice** – Jurisdiction – The subject of review – Parliamentary rules.
1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

Keywords of the alphabetical index:

Constitutional appeal, content / Referendum, initiative.

Headnotes:

The Constitutional Court holds exclusive jurisdiction over constitutional matters. Appeals submitted to the Court must include the grounds for appeal, the subjet-matter and the relief sought, as well as the circumstances upon which the request for relief is based.

The Constitutional Court only considers laws and statutes currently in force.

Summary:

The Constitutional Court considered an application lodged by a group of Members of Parliament concerning the unconstitutionality of the rejection by Parliament of draft Decree no. 2946 of 26 December 2002 on the holding of a national legislative referendum.

On 26 December 2002 the plenary session of Parliament considered Central Electoral Commission Decision no. 1960 of 29 July 2002 on the implementation of a national legislative referendum on the amendment to the Electoral Code, the report by the Legal Commission for nominations and immunities, and draft Parliamentary Decree no. 2946 on the holding of the national legislative referendum.

According to the applicants, the Parliamentary rejection of draft Decree no. 2946 was tantamount to rejecting the people's request for a national legislative referendum, and consequently infringed the provisions of Article 39.1 of the Constitution.

According to Articles 134 and 135.1 of the Constitution, Article 31.1 of the Law on the Constitutional Court, and Articles 4.3, 6.1 and 6.2 of the Code of Constitutional Jurisdiction, the Constitutional Court, being the sole body with Constitutional jurisdiction in the Republic of Moldova, examines only the matters falling under its jurisdiction, i.e. exclusively legal matters, review of the constitutionality of laws and Parliamentary Decrees (when requested to do so), Presidential Decrees, Governmental decisions and orders, as well as any international treaties to which the Republic of Moldova is party.

In pursuance of constitutional and legislative provisions, the current laws and statutes listed in Article 135 of the Constitution may be subjected to constitutional review.

In accordance with Article 39 of the Code of Constitutional Jurisdiction, applications and references must state grounds and must meet the requirements set out in the Code of Constitutional Jurisdiction.

It emerged from the content of the application that the applicants were in fact requesting examination of a non-existent legal or statutory text. In considering the draft Decree, Parliament did not state its opinion on the problems addressed in the draft text and gave no legal decision rejecting it.

Exercising its jurisdiction over constitutional matters, the Court declared the application by the group of Members of Parliament inadmissible.

Dissenting opinion

During the consideration of the case, the President of the Constitutional Court expressed a dissenting opinion, stating that the application had been wrongly declared inadmissible.

The President of the Court considered that the Constitutional Court should examine the constitutionality of the text on the grounds that its substance was a matter of constitutional jurisdiction. That possibility is provided for in Article 6.2 of the Code of Constitutional

Jurisdiction, which lays down that the Constitutional Court must itself decide on the limits of it jurisdiction. The Court should agree to consider the application, taking account of the legal nature of the inaction of Parliament. The conclusion to be drawn from Parliament's attitude was that MPs had decided not to act contrary to the provisions of the law. Parliament's decision constituted a legal act that took the particular form of inaction. That legal act, adopted by a central organ of the State and having a coercive, general and mandatory character, may be considered as a prescriptive act. The foregoing comments might be taken as meaning that the act by Parliament, being a prescriptive legal act, could be reviewed by the Constitutional Court.

Languages:

Romanian, Russian.

Norway
Supreme Court

Statistical data

1 January 2003 – 31 December 2003

The number of decisions of the Supreme Court in the year 2003 was 185 (78 civil cases and 107 penal cases).

The Appeals Selection Committee delivered decisions on 725 civil cases and 902 penal cases, of those 60 civil cases and 94 penal cases were passed on to the Supreme Court.

Important decisions

Identification: NOR-2003-1-001

a) Norway / **b)** Supreme Court / **c)** / **d)** 28.02.2003 / **e)** 2002/1024 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2003, 264 / **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.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

Keywords of the alphabetical index:

Unemployment benefit, exclusion / Criminal proceedings.

Headnotes:

Exclusion from the right to claim unemployment benefits pursuant to Chapter 4 of the National Insurance Act on the grounds that the applicant had provided false or incomplete information to the employment office was deemed to be punishment pursuant to Article 4.1 Protocol 7 ECHR.

Summary:

An administrative order was issued excluding A. from claiming unemployment benefits pursuant to Chapter 4 of the National Insurance Act. The question in the case was whether such an order is a bar to the subsequent initiation of criminal proceedings founded on the same circumstances upon which the exclusion was based, see the *ne bis in idem* principle in Article 4.1 Protocol 7 ECHR.

The employment authorities issued an order requiring A. to repay unemployment benefit that had been paid wrongly out (see Section 35 of the Employment Act 1947). At the same time, A. was excluded from claiming unemployment benefits for 18 months pursuant to Section 36 of the Act, on the grounds that he had given incorrect information to the employment office about the amount of paid employment he had, and on that basis he had been granted and received unemployment benefit to which he was not entitled.

A. was charged with fraud pursuant to Sections 270 and 271 of the Criminal Code. During the trial, the District Court ordered that the proceedings at that time be restricted to the matter of exclusion from benefits. The District Court upheld the order, and A.'s appeal was dismissed by the Court of Appeal.

A. appealed to the Appeals Selection Committee of the Supreme Court, which decided to grant leave for the case to be heard by the Supreme Court. The Chief Justice decided that the proceedings should take place in accordance with the procedural rules relating to appeals against judgments.

The Supreme Court found in favour of A., and quashed the decisions of the District Court and the Court of Appeal. The Supreme Court held that exclusion from employment benefits was punishment within the terms of Article 4.1 Protocol 7 ECHR. The penalty was imposed as a result of a criminal act, cf. Section 40 of the Employment Act 1947 which provides that a person who provides false or incomplete information to the Labour Directorate may be liable to criminal proceedings. The purpose of the sanction was predominantly penal, and the sanction had clearly penal characteristics. Further, the Supreme Court held that the charge of fraud brought pursuant to the Criminal Code Sections 270 and 271 was based on the same conduct as the order issued pursuant to the Employment Act 1947. Referring to the plenary decision of the Supreme Court reported in *Rt* 2002, page 497, and *Bulletin* 2002/2 [NOR-2002-2-001], the Supreme Court stated that the determination of whether two sets of proceedings were based on the same conduct must primarily be based on a comparison of the description of the offences in the two statutory provisions in question, and that there must be no material difference in the conditions of the provisions – they must not differ from each other in their essential elements.

Due to the limitations on the competence of the Supreme Court imposed by Section 388.3 of the Civil Procedure Act, the Court was prevented from considering an alternative submission from the prosecuting authority that the criminal charge differed from the administrative order both in time and scope to such an extent that it could not constitute a bar to criminal proceedings relating to the part of excessively paid employment benefit that was not covered by the order. The same limitation on the competence of the Supreme Court also prevented the Court from making an order of dismissal.

Cross-references:

- Decision of the Supreme Court of 03.05.2002, *Bulletin* 2002/2 [NOR-2002-2-001].

Languages:

Norwegian.

Identification: NOR-2003-1-002

a) Norway / **b)** Supreme Court / **c)** / **d)** 04.03.2003 / **e)** 2002/1046 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2003, 301 / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.

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

Keywords of the alphabetical index:

Effective remedy, right / ECHR, application, manifestly unfounded, threshold, binding force for national court.

Headnotes:

A declaratory judgment establishing that a breach of Article 8 ECHR has taken place can be given notwithstanding that the breach has been brought to an end. However, the right to an effective remedy before a national authority set out in Article 13 ECHR applies only where there is an “arguable claim”. This restriction also applies in Norwegian law.

Summary:

The case concerns the right to judicial review of a decision taken by the child welfare authority to carry out investigations pursuant to Section 4.3.1 of the Child Welfare Act in order to determine whether there were grounds for implementing measures pursuant to the Act. The District Court found that the decision was a step in the child welfare authority's preparatory proceedings and which therefore did not give rise to a separate right of action. The majority of the Court of Appeal agreed with this, whilst the minority was of the view that the applicant was entitled to apply for judicial review of the question of whether Article 8 ECHR – the right to respect for private and family life – had been breached. The decision of the Court of Appeal, which was made by way of interlocutory order, was appealed. The Supreme Court decided that the appeal proceedings should take place in accordance with the procedural rules relating to appeals against judgments.

The Supreme Court made a finding of fact that the investigation proceedings had been closed after the appeal had been filed. Thus, the appellant no longer had any justifiable legal interest in a decision being delivered, cf. Section 54 of the Civil Procedure Act. The Supreme Court also agreed with the majority of the Court of Appeal that the investigation proceedings could not be the subject of a separate legal action. Pursuant to traditional Norwegian procedural law, the action had to be dismissed. Furthermore, that would not be contrary to the provisions of Article 6.1 ECHR relating to the right of access to the courts.

However, Article 13 ECHR provides that everyone who believes that there has been a violation of their rights and freedoms as set out in the Convention – in the particular case potentially Article 8 ECHR – shall have an effective remedy before a national authority. Since there was no procedure for bringing complaints against the child welfare authority's investigation procedure to a higher administrative authority, any review would have to take place before the courts.

The Supreme Court agreed with the parties that the question as to whether there had been a breach of Article 8 ECHR could be the subject of a declaratory judgment, notwithstanding that the breach had been brought to an end. The doubt that was raised in the case reported in *Rt* 1994, page 1244 (women's prison case – not summarised in the *Bulletin*) concerning the right to a declaratory judgment establishing a breach, has since been clarified by the Human Rights Act, in particular Section 3 which provides that in the event of conflict, the Convention shall have precedence over other legislation. However, under the case-law of the European Court of Human Rights, Article 13 ECHR confers a right to judicial review only in circumstances where there is an arguable claim. Furthermore, Article 35.3 ECHR provides that an application can be dismissed if the Court considers it to be manifestly unfounded. The limitations in Section 54 of the Civil Procedure Act on the right to bring a legal action have clearly been curtailed by the incorporation of the European Convention into Norwegian law. The question then arises as to whether the limitations in the Convention must also apply in Norwegian law.

A majority of the Supreme Court – four justices – answered this question in the affirmative. Section 54 of the Civil Procedure Act consolidates – and at the same time limits – the right to initiate proceedings for a declaratory judgment in the courts. In the absence of statutory regulation, the amendments implied by the Convention to the statutory conditions for bringing legal proceedings are no more than a consequence of the Convention and its incorporation into Norwegian law. However, the Court did not take a stance as to whether the threshold for dismissing an action should be as low as in the European Court. There were a number of good arguments for adopting a more lenient dismissal practice in the national courts.

The majority of the Supreme Court also found that the investigation proceedings that were initiated by the child welfare authority constituted an interference with the applicant's right to respect for her private and family life in the terms of Article 8.1 ECHR. However, the majority also found that the interference was clearly justified within the terms of Article 8.2 ECHR.

Accordingly, the majority dismissed the appeal and upheld the decision of the Court of Appeal.

A minority of the Supreme Court held that the courts were obliged to hear the action. When an application is made for a declaratory judgment establishing that a breach of the Convention has taken place, the question as to whether it shall be heard or dismissed is governed by the rules of civil procedure in Norwegian law. Accordingly, an application cannot be summarily dismissed on the grounds that the allegation of breach of the Convention is obviously unfounded.

Languages:

Norwegian.

Identification: NOR-2003-1-003

a) Norway / **b)** Supreme Court / **c)** / **d)** 21.03.2003 / **e)** 2002/854 / **f)** / **g)**) *Norsk Retstidende* (Official Gazette), 2003, 375 / **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.
5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

Keywords of the alphabetical index:

Deportation / Country of origin, unknown / Refugee, identity, refusal to disclose.

Headnotes:

An essential element when determining whether a deportation order constituted a violation of Article 3 ECHR is that the deportee himself could bring to an end the situation that he claimed constituted the violation by providing the necessary information.

Summary:

A. was granted a residence and work permit in Norway in 1988. In 1994, he was sentenced to four years' imprisonment for aggravated drug offences, and a deportation order was issued later the same year. On the basis of information provided by A., an attempt was made to deport him to Uganda, which refused to accept him. After fresh information was obtained indicating that he originated from Ghana, attempts were made to deport him to that country in 1997 and 1998, but that country, too, refused to accept him.

A. then filed an action against the State, which was represented by the Immigration Board, claiming that his situation in Norway constituted a violation of Article 3 ECHR which prohibits inhuman or degrading treatment, and that the 1994 deportation order should be revoked. The District Court found in favour of A., but the Court of Appeal overruled the judgment of the District Court and found in favour of the State.

The Supreme Court upheld the judgment of the Court of Appeal. Since his release from prison in 1996, A. had been living in considerable uncertainty concerning his future fate. He had been denied the right to seek work and lived on social benefits. He had also been denied the right to marry. The Supreme Court noted that these denials, taken as a whole, were not so onerous that they constituted a violation of Article 3 ECHR.

There was clear evidence to indicate that A. was from Ghana, which A. himself denied. The fact that it was up to A. himself to bring an end to the situation that he claimed constituted a violation of Article 3 ECHR was a particularly significant element in the Court's consideration of whether there was indeed a violation. There were no other grounds for revoking or invalidating the deportation order.

Languages:

Norwegian.

Poland
Constitutional Tribunal

Statistical data
1 January 2003 – 30 April 2003

I. Constitutional review

Decisions:
- Cases decided on their merits: 13
- Cases discontinued: 3

Types of review:
- *Ex post facto* review: 15
- Preliminary review: 1
- Abstract reviews (Article 22 of the Constitutional Tribunal Act): 14
- Courts referrals (points of law), Article 25 of the Constitutional Tribunal Act: 2

Challenged normative acts:
- Cases concerning the constitutionality of statutes: 14
- Cases on the legality of other normative acts under the Constitution and statutes: 2

Decisions:
- The statutes in question to be wholly or partly unconstitutional (or subordinate legislation to violate the provisions of superior laws and the Constitution): 6
- Upholding the constitutionality of the provision in question: 8

Precedent decisions: 2

II. Universally binding interpretation of laws

- Resolutions issued under Article 13 of the Constitutional Tribunal Act: 15
- Motions requesting such interpretation rejected: 1

Important decisions

Identification: POL-2003-1-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 09.09.2002 / **e)** K 43/01 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 5, item 69 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

1.4.5.1 **Constitutional Justice** – Procedure – Originating document – Decision to act.
1.4.10.4 **Constitutional Justice** – Procedure – Interlocutory proceedings – Discontinuance of proceedings.

Keywords of the alphabetical index:

Application, withdrawal / Proceedings, discontinuance.

Headnotes:

According to the provisions of the Act on the Constitutional Tribunal, an applicant may withdraw a motion, a referral or a claim whenever he or she wishes before the start of the hearing. The right to withdraw a motion before the start of the hearing is subject to a decision that is taken freely by the applicant, and it is one of the signs of the corresponding principle that governs proceedings before the Constitutional Tribunal.

Withdrawal of a motion before the hearing is not subject to the Tribunal's review; consequently, the proceedings must be discontinued upon such withdrawal.

Summary:

The Tribunal examined a case that originated in an application filed by the Supreme Council of Nurses and Midwives.

The Tribunal discontinued the above-mentioned proceedings in which the applicant sought a declaration of the incompatibility of an Act (i.e. the Act concerning the system of negotiation of average remuneration increases and amending other laws) with provisions of the Constitution.

Cross-references:

- Decision of 04.03.1999 (SK 16/98);

- Decision of 08.03.2000 (K 32/98).

Languages:

Polish.

Identification: POL-2003-1-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 09.10.2002 / **e)** K 37/01 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 5, item 71 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.

Keywords of the alphabetical index:

Proceedings, dismissal.

Headnotes:

A motion to the Tribunal may be brought by national bodies of trade unions, national bodies of employer organisations and organisations of professionals, where a particular normative act concerns matters covered by their scope of activities.

A right to initiate the constitutional control of normative acts should be an instrument that aids a particular entity in the execution of its tasks.

Summary:

The Tribunal examined a case that originated in a motion filed by the Confederation of Private Employers.

The Tribunal dismissed the proceedings, which sought the examination of the compatibility with the Constitution of the provisions of the Labour Code concerning negotiation and conclusion of trade collective agreements by federations and confedera-tions of employer and employee organisation.

A motion brought by one of the above-mentioned bodies is subject to preliminary recognition in a closed session. The purpose of such recognition is to determine whether the motion meets the formal criteria enabling its further examination.

In the Tribunals' opinion, the activities of the applicant, which is a confederation of private employers, did not fall within the scope of the provisions in question concerning the rights of trade unions. Consequently, the proceedings had to be dismissed.

Cross-references:

- Decision of 21.11.2001(K 31/01);
- Decision of 20.03.2002 (K 42/01).

Languages:

Polish.

Identification: POL-2003-1-003

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 15.10.2002 / **e)** SK 6/02 / **f)** / **g)** *Dziennik Ustaw Rzeczyposplitej Polskiej* (Official Gazette), 2002, no. 178, item 1486; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 5, item 65 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Delivery, presumption / Civil proceedings, dispatch, advice.

Headnotes:

The provisions of the Code of Civil Procedure permitting an additional method of notification by delivering a notice of dispatch to the place of the

addressee's domicile is in accordance with the constitutional right to a defence in civil proceedings.

The institution of additional methods of notification cannot be treated as a breach of the right to a court, where it is used properly. However, that requires a non-restrictive approach in assessing the defendant's fault in failing to meet a deadline and in weighing the evidence of the reasons the defendant failed to pick up the notice.

Summary:

The Tribunal examined a case brought before it in a constitutional claim.

The Tribunal stated that the additional method of notification provided for in the impugned provisions of the Code entails a presumption of notification. The purpose of those provisions is to ensure the expedition of civil proceedings and respect for the economy of the proceedings. However, at the same time, it aims to protect the rights of both parties to the proceedings before a court, to a consideration of their case by the court and to a defence of their interests.

The impugned provisions, which provide for a presumption of notification, have the particular purpose of protecting a plaintiff and his or her right to the enforcement of the court's decisions.

Cross-references:

- Decision of 23.06.1997 (K 3/97), *Bulletin* 1997/2 [POL-1997-2-015];
- Decision of 28.08.2000 (Ts 92/00).

Languages:

Polish.

Identification: POL-2003-1-004

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 22.10.2002 / **e)** SK 39/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 178, item 1487; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 5, item 66 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
5.3.39 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Usufruct, right, perpetual / Tax, deduction.

Headnotes:

The provisions of the Income Tax Act providing for tax deductions for purchasers of a property right but not for purchasers of a perpetual usufruct right are not in accordance with the constitutional equality rule.

Summary:

The Tribunal examined a case brought before it in a constitutional claim.

In the Tribunal's opinion, in the context of the tax deductions in the impugned provisions, a property right and a perpetual usufruct right have a common relevant feature: government aid to housing built for leasing purposes. The normative content of the impugned provisions shows that the term "purchase of a plot" is interpreted exclusively as the purchase of a "property right to a plot".

The Tribunal stated that, in accordance with the equality rule, the right to the tax deduction should have been granted to those purchasers of plots who could not only show an intention of purchase but a realistic ability to use the land for building housing for leasing purposes. Not only purchasers of a property right to land, but also purchasers of a perpetual usufruct right to whom the land has been granted for the purpose of building housing (where that purpose has been mentioned in the agreement on the perpetual usufruct), should be included in the category of taxpayers entitled to the deduction.

Cross-references:

- Decision of 31.01.2001 (P 4/99) *Bulletin* 2001/1 [POL-2001-1-006];
- Decision of 11.12.2001 (SK 16/00).

Languages:

Polish.

Identification: POL-2003-1-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 12.11.2002 / **e)** SK 40/01 / **f)** / **g)** *Dziennik Ustaw Rzeczyposplitej Polskiej* (Official Gazette), 2002, no. 194, item 1641; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 6, item 81 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
5.3.30.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Civil status, register, additional mention.

Headnotes:

The information gathered in the civil-status registers should be treated as private data, which are, to a certain extent, sensitive and concern an intimate sphere that is covered by special protection.

While there is a public interest that is connected with the proper functioning of civil-status registers and points at a need to protect the rights of the people whose data are gathered in the civil-status records, it must be acknowledged that the rules creating those registers fully comply with the condition of “necessity”.

Summary:

The Tribunal examined the case brought before it in a constitutional claim.

There are provisions in the Civil-Status Records Act providing that where subsequent to the preparation of a record, an event influencing the record’s content or validity takes place, changes arising from that event should be included in the record in the form of an additional mention. Those provisions are in accordance with the constitutional right to the protection of private data.

Records on civil status are evidence registers. Their evidentiary nature does not mean, however, that the entries in the records do not have any significant legal effects. They constitute conclusive evidence of the events mentioned therein. Their inconsistency with a real legal situation may only be proved in proceedings on the invalidation or rectification of a record.

Cross-references:

- Decision of 24.06.1997 (K 21/96), *Bulletin* 1997/2 [POL-1997-2-016];
- Decision of 19.06.1992 (U 6/92).

Languages:

Polish.

Identification: POL-2003-1-006

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 20.11.2002 / **e)** K 41/02 / **f)** / **g)** *Monitor Polski* (Official Gazette), 2002, no. 56, item 763; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 6, item 83 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Clarity and precision of legal provisions.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.
5.3.39 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, foreseeability.

Headnotes:

The introduction of unclear and ambiguous tax provisions that do not allow a citizen to foresee the

consequences of his tax declaration violates the Constitution.

Summary:

The Tribunal examined a case that originated in a motion filed by the President of Poland.

The provisions of the Act regarding the single taxation of undisclosed revenues and amending the Tax Regulation Act and the Criminal Fiscal Code that introduce an institution commonly known as a “tax pardon” are not in accordance with the constitutional rule of law.

The preciseness and unequivocal nature of the terms used in the impugned Act are of significant importance, since that Act provides that the taxpayer do the calculations himself or herself, and any mistakes, even those arising out of misunderstanding the content of the provisions, are subject to a criminal sanction for filing a false tax declaration.

The Tribunal stated that the subjective scope of the tax is subject to major reservations. Firstly, it is not clear who are the addressees of the Act. Secondly, it seems to be obvious that it introduces unjustified differences among its potential addressees. The lack of a final description of a matter subject to the tax and, in particular, a method of calculating expenditures that would – in addition to the assets declared – have an impact on the amount of the burden, is obviously not in accordance with the rule of law.

The Tribunal noted that the inaccurate aspect of the single tax derives from a lack of a proper description of a matter subject to the tax and is intensified when a description of its purposes is considered. All that leads to a situation where nearly every tax declaration may be described as false depending on the criteria used by a particular tax office.

Cross-references:

- Decision of 22.05.2002 (K 6/02), *Bulletin* 2002/3 [POL-2002-3-028];
- Decision of 16.01.1996 (W 12/94);
- Decision of 10.10.1998 (K 39/97), *Bulletin* 1998/3 [POL-1998-3-018].

Languages:

Polish.

Identification: POL-2003-1-007

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 02.12.2002 / **e)** SK 20/01 / **f)** / **g)** *Dziennik Ustaw Rzeczyposplitej Polskiej* (Official Gazette), 2002, n° 208, item 1778; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 7, item 89 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.11 **General Principles** – Vested and/or acquired rights.
3.22 **General Principles** – Prohibition of arbitrariness.

Keywords of the alphabetical index:

Real estate, value / Qualification, requirement.

Headnotes:

The provisions of the Act on the real estate market, which provide that persons with higher education who have completed a course on the valuation of real estate before the Act came into force may apply for qualifications in the valuation of real estate on condition that they successfully complete an additional course, are in accordance with the constitutional rule of the protection of acquired rights.

Summary:

The Tribunal examined a case brought before it in a constitutional claim.

The Tribunal emphasised that the rule of the protection of acquired rights prohibits an arbitrary limitation or abolition of subjective rights granted to private persons. A rule protecting acquired rights does not however mean that those rights still continue to exist. In the Tribunal's opinion, a legislature wishing to interfere with acquired rights should first introduce legal resolutions limiting the negative effects of the interference to a minimum and allowing the parties concerned to adjust to the new situation. In particular, that could be done by the introduction of an appropriate *vacation legis* or introduction of temporary provisions, which would allow the addresses of the legal norms to adjust to the new rules.

In the Tribunal's opinion, the provisions in question meet the above-mentioned criteria, since they enable the persons concerned to obtain their qualifications within a reasonable period of time. The legislature does not therefore deprive the persons valuating real estate under the previous law of the opportunity to continue their activities but requires the fulfilment of certain conditions.

Cross-references:

- Decision of 12.12.2000 (SK 9/00);
- Decision of 30.09.1992 (W 5/92);
- Decision of 19.03.2001 (K 32/00).

Languages:

Polish.

Identification: POL-2003-1-008

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 03.12.2002 / **e)** P 13/02 / **f)** / **g)** *Dziennik Ustaw Rzeczyposplitej Polskiej* (Official Gazette), 2002, no. 205, item 1741; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 7, item 90 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.12 **General Principles** – Clarity and precision of legal provisions.
4.10.7 **Institutions** – Public finances – Taxation.

Keywords of the alphabetical index:

Tax law, interpretation / Release, calculation.

Headnotes:

The provisions of the Act on the taxation of natural persons, which set out a method of calculating the amount of a tax release called the “major construction release”, are in accordance with the constitutional rule of law.

Summary:

The Tribunal examined a case brought before it in a referral by the Highest Administrative Court.

The Tribunal shared the view that the introduction of unclear and ambiguous provisions violates the Constitution. In the Tribunal's opinion, where the vagueness of the provisions is so great as to lend itself to various interpretations, and where that vagueness cannot be cured by the normal means used to cure ambiguity in the application of the law, those provisions may be declared not to be in accordance with the Constitution.

The deprivation of particular provisions of their binding force because of ambiguity should be treated as an extreme measure to be used only when other methods, in particular, an interpretation by the courts, are insufficient.

In the Tribunal's opinion, it was not the rule itself in the provisions in question that was unclear, but its application in relation to particular facts. The vagueness and differences in the interpretation of the provisions in question do not exceed the level that would justify their total elimination from the legal order, as would be the consequences of a declaration of their not being in accordance with the Constitution.

Cross-references:

- Decision of 21.03.2001 (K 24/00), *Bulletin* 2001/2 [POL-2001-2-012];
- Decision of 30.10.2001 (K 33/00), *Bulletin* 2002/1 [POL-2002-1-007].

Languages:

Polish.

Identification: POL-2003-1-009

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 10.12.2002 / **e)** P 6/02 / **f)** / **g)** *Dziennik Ustaw Rzeczyposplitej Polskiej* (Official Gazette), 2002, no. 214, item 1816; *Orzecznictwo Trybunału*

Konstytucyjnego Zbiór Urzędowy (Official Digest), 2002/A, no. 7, item 91 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.
4.10.7 **Institutions** – Public finances – Taxation.

Keywords of the alphabetical index:

Public utility, roads, parking place / Fee, imposition.

Headnotes:

The provisions in the Act on public roads constitute the basis on which some ordinances are issued. To the extent that those provisions authorise the Council of the Ministers to set out detailed rules on the introduction of fees for parking spaces on public roads and appoint a body authorised to set those fees in the form of an ordinance, they are not in accordance with the constitutional rule that all significant elements of a relationship where the subjects must pay public duties to the State must be provided for in the form of an Act.

Summary:

The Tribunal examined the case referred to it by the Supreme Administrative Court in Warsaw.

The Tribunal recalled that the matter in the motion must be reviewed on the basis that the imposition of taxes and other public duties, the specification of subjects and objects of taxation, as well as tax rates, rules on granting exemptions and refunds and categories of subjects exempt from taxation are to be provided for in the form of an Act.

In the case in question, the fees are subject to review. The fees amount to public revenues and a kind of public duty. The fees are collected in connection with clearly defined services and activities of the public authorities performed in interest of particular subjects.

The provisions in question not only authorise the Council of Ministers to set out the rules on introduction of the fees for parking spaces on public roads but also give it a right to introduce new fiscal charges.

Cross-references:

- Decision of 16.06.1998 (U 9/97);
- Decision of 01.09.1998 (U 1/98), *Bulletin* 1998/3 [POL-1998-3-015];
- Decision of 09.02.1999 (U 4/98).

Languages:

Polish.

Identification: POL-2003-1-010

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 11.12.2002 / **e)** SK 27/01 / **f)** / **g)** *Dziennik Ustaw Rzeczyposplitej Polskiej* (Official Gazette), 2002, no. 219, item 1849; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 7, item 93 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Clarity and precision of legal provisions.
4.7.2 **Institutions** – Judicial bodies – Procedure.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Prohibition of *reformatio in peius*.

Keywords of the alphabetical index:

Civil proceedings / Judge, exclusion, procedure.

Headnotes:

The provisions of the Code of Civil Procedure providing that an applicant who files a motion in bad faith for the exclusion of a judge shall be subject to a pay a fine of 500 PLN (approx. 120 EURO) are not in accordance with the constitutional rule of a right to a court.

Summary:

The Tribunal examined the constitutional claim brought before it.

The Tribunal recalled that according to the Constitution, everyone has a right to a fair and public hearing held by a competent, impartial and independent court without undue delay. Two issues are raised in the constitutional claim: firstly, that the legislature uses an indefinite term: “bad faith”; secondly, that the provisions introduce consequenc-

es that are automatic and too repressive for a party introducing a motion for the exclusion of a judge.

In the Tribunal's decisions to date, the legislature's use of indefinite terms does not amount to a breach of the constitutional rules and values. Often, the only reasonable solution in introducing a new legal rule is to use an indefinite term.

In the Tribunal's opinion, the applicant's comments as to the excessive repression inherent in the provisions in question are fully justifiable. The legislature should have ensured that the consequences of the motion would be such as not to limit the initiative of the parties to the proceedings, not to give rise to the impression that the risk connected with a motion challenging the impartiality of the judge is too great and unjustifiable. In the Tribunal's opinion, the adopted mechanism, because of its repressive nature, constitutes a threat to the enforcement of the constitutional right to a court.

Cross-references:

- Decision of 16.03.1999 (SK 19/98), *Bulletin* 1999/1 [POL-1999-1-007];
- Decision of 06.11.1991 (W 2/91).

Languages:

Polish.

Identification: POL-2003-1-011

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 17.12.2002 / **e)** U 3/02 / **f)** / **g)** *Dziennik Ustaw Rzeczyposplitej Polskiej* (Official Gazette), 2003, no. 1, item 13; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 7, item 95 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.
4.10.7 **Institutions** – Public finances – Taxation.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.

Keywords of the alphabetical index:

Passport, fee / Fee, exception / Student, fee, exemption, equality.

Headnotes:

The provisions of the Ordinance of the Council of Ministers on passport fees are not in accordance with the constitutional rule of equality to the extent that those provisions deny a 50% discount to students who are not studying in a daily system and pupils other than those in daily schools.

Summary:

The Tribunal examined the constitutional claim brought before it.

The Tribunal noted that the legislature, within its discretionary powers and limits created by law, has a right to introduce exceptions to the rule of the universality of passport fees. However, while introducing such exceptions, the legislature is bound by the constitutional rules and rights. Therefore, it should take into account whether exempting certain categories of persons from fiscal obligations or granting such a category certain privileges does not result in a breach of the provisions of the Constitution, in particular, the equality rule.

In the Tribunal's opinion, the resolution that denies a 50% discount on passport fees to students who are not studying in a daily system and pupils other than those in daily schools is not in accordance with the constitutional rule of equality. Where any exceptions are introduced in the legal system (discounts, privileges, exemptions), such exceptions should encompass all persons with the common relevant factor.

Cross-references:

- Decision of 12.10.2000 (K 1/00).

Languages:

Polish.

Identification: POL-2003-1-012

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 19.12.2002 / **e)** K 33/02 / **f)** / **g)** *Dziennik Ustaw Rzeczyposplitej Polskiej* (Official Gazette), 2003, no. 1, item 15; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 7, item 97 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Real estate, value / Compensation / Fiction, legal, prohibition.

Headnotes:

The provisions of the Act on the real property market, to the extent that they exclude the possibility of taking into account the value of real property located abroad as a result of the territorial changes in connection with the Second World War in the value of agricultural real property owned by the State Treasury, are not in accordance with the rule of a citizen’s trust in the State and law.

Summary:

The Tribunal examined the case brought before it in a motion filed by the Ombudsman.

The rule of a citizen’s trust in the State and the law means that there is a need to protect and respect rights already acquired. However, at the same time, that rule prohibits the legislature from creating legal constructions that cannot be enforced and amount to legal fiction. That prohibition also relates to constructions introducing the fiction of the protection of pecuniary interests that are functionally connected with a part of an introduced right.

In fact, only provisions should be introduced that give persons not only legal protection but also give them expectations as to how enforcement of those provisions may influence their legal position in particular legal situations.

The mechanism created regarding persons who have been deprived of their property as a result of territorial changes creates justified expectations in the interested persons that the problem will be finally resolved in the future in a way that will take into account interests of all persons who have a right to compensation.

The Tribunal's position as to a breach of the rule of a citizen’s trust in the State and the law is strengthened by the fact that there is a lack of alternative forms of compensation in the legal system.

Cross-references:

- Decision of 12.01.1999 (P 2/98), *Bulletin* 1999/1 [POL-1999-1-002];
- Decision of 02.03.1993 (K 9/92).

Languages:

Polish.

Portugal
Constitutional Court

Statistical data
1 January 2003 – 30 April 2003

Total: 227 judgments, of which:

- Preventive review: 13 judgments
- Abstract *ex post facto* review: 10 judgments
- Appeals: 143 judgments
- Complaints: 55 judgments
- Political parties and coalitions: 4 judgments
- Declarations of assets and revenue: 1 judgment
- Political parties' accounts: 1 judgment

Important decisions

Identification: POR-2003-1-001

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 19.02.2003 / **e)** 107/03 / **f)** / **g)** *Diário da República* (Official Gazette), 95 (Serie II), 23.04.2003, 6214-6215 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
4.6.2 **Institutions** – Executive bodies – Powers.
4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
4.8.8.3 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Supervision.

Keywords of the alphabetical index:

Camping, opening, closing / Administrative supervision.

Headnotes:

The legal provision which confers on the Directorate-General for Tourism the power to order the closure of a municipal campsite on the ground that it is operating without prior authorisation is confined to regulating a power of the State itself. This power does not constitute a mere control of the lawfulness of administrative decisions adopted by the local authority (particular to the supervisory powers).

The intervention of the State, within the framework of its power to authorise the "operation" of campsites (including those set up at the initiative of local authorities) – is attributed to the Central Administration – is the consequence of a constitutional requirement. This represents the competing intervention of the State (pursuing the general interest) and of the local authorities (the latter in the administration of what also constitutes a local interest).

Summary:

The question of constitutionality is whether the attribution to a body of the Central Administration (the Directorate-General for Tourism) of the power to authorise the operation of municipal campsites and to decide that they must be closed down when they are operating without such prior authorisation is contrary to the principle of local autonomy (Article 6 of the Constitution), to the principle of administrative decentralisation (Article 237.1 of the Constitution) or to the limits on the administrative control of local authorities (Article 234.1 of the Constitution).

The Constitutional Court held, as regards the power to authorise the operation of municipal campsites and to decide that they must be closed down when they are operating without such prior authorisation, that the legal regime applying to campsites reflects a balanced form of the division of powers between the central power and the local power in the area of the defence of general and local interests. The autonomous responsibility to administer the interests proper to the local community is the essential content of the guarantee of autonomous administration, which is therefore not affected.

Languages:

Portuguese.

Identification: POR-2003-1-002

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 11.03.2003 / **e)** 131/03 / **f)** / **g)** *Diário da República*

(Official Gazette), 80 (Serie I-A), 04.04.2003, 2223-2231 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.1 **General Principles** – Sovereignty.
3.6.1 **General Principles** – Structure of the State – Unitary State.
4.5.2.4 **Institutions** – Legislative bodies – Powers – Negative incompetence.
4.8.5 **Institutions** – Federalism, regionalism and local self-government – Definition of geographical boundaries.
4.8.8 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers.

Keywords of the alphabetical index:

Defence, national / Public domain, maritime, administration / Waters, territorial / Legislation, sphere.

Headnotes:

It is for legislation (the exclusive competence of Parliament, according to Article 165.1.v of the Constitution) to define the assets which constitute the public domain of the State, the public domain of the autonomous regions and the public domain of the local authorities, and also the rules applicable thereto, the conditions of use and the limits (Article 84.2 of the Constitution), entailing not only the delimitation of certain assets *vis-à-vis* the exterior (public maritime domain, etc.), but also *vis-à-vis* adjoining private property.

It is a necessary consequence of the fact that it is impossible to transfer the assets of the public maritime domain of the State that it is impossible to transfer the powers inherent in the "ownership" *(dominialidade)*, that is to say, those necessary to its conservation, delimitation and defence, so that these assets continue to be capable of attaining the public-interest aims which justified their allocation to the public domain.

The organs of the regional governments are not competent in matters relating to the internal or external security of the State, and legislation cannot delegate to the autonomous regions powers proper to the sovereignty. The law reserves to the Government of the Republic, in particular, the spheres of external relations, defence and the administration of air and maritime space. Thus, functions such as those of national defence, the control of airspace and the public maritime domain cannot be transferred to the regions. That is to say, the autonomy of the regions does not encroach upon the sovereignty of the State, and all powers regarded as constitutionally necessary to the unitary functioning of the system must for that purpose be reserved to the State apparatus.

Summary:

The President of the Republic brought an action for preventive review of the constitutionality of a number of provisions of a Decree of the Parliament which amends, as regards the autonomous regions, the statutory definition of the delimitation of the width of the sea shore and also of the shores of navigable or floatable waters subject to the jurisdiction of the maritime or port authorities. According to the measure in question, all powers over the public water domain which were formerly attributed to the State would, at present, in the autonomous regions, be within the competence of the regional self-government organs. Being of the view that the maritime public domain is by nature of crucial interest to the national defence, the President of the Republic asked the Constitutional Court whether such decentralisation of powers is contrary to the principle of a unitary State.

The Constitutional Court observed that in Portugal the public maritime domain includes, in addition to territorial waters, with their contiguous sea beds and assets (Articles 5.1 and 84.1.a of the Constitution), inshore maritime waters and, in addition, other tidal waters, and also their respective beds and shores, provided that the land belongs to the State. Territorial waters, together with their beds, inshore maritime waters, with their beds and shores, and the continental shelf are regarded, for the purposes of the property of the State, as forming an integral part of the public domain of the State.

The public maritime domain as defined by law must include the strips of land, classified in law as shores, adjacent to the sea or to other tidal waters. The problem of shores comes within the context of the public water domain, which refers to public waters and includes the public maritime domain, the public river domain, the public lake domain and also other waters. It includes, moreover, not only the waters but also land which concerns or which may concern the full production or the defence of the public interest of those waters, such as, for example, the beds and shores.

The Court held that in so far as Parliament left the determination of the limits of the shores to the detailed "deliberation" of the different regional governments, but failed to lay down substantial criteria, it failed to establish criteria for the definition of the limits of those shores, which is constitutionally unacceptable. Consequently, the measure in question

infringes the principle of the domain reserved for the law that follows from the combined provisions of Articles 165.1.v and 84.2 of the Constitution.

The Court also concluded that the transfer of certain assets, in particular those which incorporate the public maritime domain, a public domain of the State, to the regional governments is impossible, owing in particular to the principle of the unity of the State and the latter's obligation to guarantee the national defence. Thus, the rule allowing a transfer of the powers of the State inherent in the "ownership" of the land in the public maritime domain to the organs of the regional governments infringes the principle of the unity of the State and of the State's obligation to guarantee the national defence.

Languages:

Portuguese.

Identification: POR-2003-1-003

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 03.04.2003 / **e)** 185/03 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

1.3 **Constitutional Justice** – Jurisdiction.
3.16 **General Principles** – Proportionality.
3.20 **General Principles** – Reasonableness.
4.5.10 **Institutions** – Legislative bodies – Political parties.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.26 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Political party, democratic functioning / Political party, activist, sanction / Political party, deliberations.

Headnotes:

Although political parties must respect the rights of their members, participation in a political party entails, above all, acceptance of and obedience to the statutes of that party. In the context of that commitment, a member implicitly agrees, as a member of the party, that the exercise of his rights will be limited by the provisions of the rules of the statutes (on the assumption that those rules ensure democracy in the internal administration and the functioning of the party).

The acts of the organs of parties which, probably consistently with the statutes, apply disciplinary measures which infringe the constitutionally protected rights of activists are subject to review by the Constitutional Court. Once the lawfulness of the restriction has been accepted, it cannot be disproportionate, inadequate or excessive. This is all the more true when the rules of the statutes on penalties are expressed in general terms whose integration calls for a political evaluation which the Court must not (or cannot) review, save in cases of abuse and within the limit placed on the limitation or restriction of the fundamental rights of citizens.

It is not for the Constitutional Court to adjudicate on the merits of penalties applied by a political party in the context of the general provisions of its statutes, but only to review their reasonableness and proportionality.

Summary:

Article 103-D of the Law on the Constitutional Court – under which three activists of the Portuguese Communist Party (PCP), on whom the sanctions of suspension from activity within the party and expulsion had been imposed, brought this action – was introduced as a result of the constitutional revision of 1997, which brought within the sphere of Article 51 of the Constitution the rules establishing the "principles" of the organisation and functioning of political parties (Article 51.5 of the Constitution) and which provide that a law is to determine the rules on financing, particularly as regards the conditions and limits of public financing, and also the requirements to make public details of the assets and the accounts of those parties (Article 51.6 of the Constitution). In the context of that constitutional revision, the rule was extended in order to confer on the Constitutional Court jurisdiction to "hear actions challenging the election and deliberations of the organs of the political parties which, in accordance with the law, may be the subject of an appeal". Article 103-D of the Law on the Constitutional Court also regulated appeals challenging the deliberations of the organs of the political parties brought by activists in the following cases:

- in the event of decisions imposing penalties taken by the party organs in disciplinary proceedings against an activist and decisions of those organs

that directly and personally affect the activist's right to participate in the activities of the party;
- in the event of deliberations of the organs of parties based on a serious breach of essential rules concerning the competence or democratic functioning of the party.

These are rules which regulate the object and basis of the challenge and at the same time its legitimacy. As regards legitimacy, whereas in the first case the challenge can be brought only by the activist on whom the penalty was imposed or whose rights to participate in the activities of the party were directly and personally impaired, in the second case legitimacy is conferred on every activist. Furthermore, whereas in the first case the challenge may be brought "on the basis of the illegality or violation of a rule of the statutes", in the second case it is admissible only where it is "based on a serious breach of rules essential for the competence or the democratic functioning of the party".

Extending the democratic principle to the structure of political parties has inevitably led to conflict between, on the one hand, the constitutional principles of transparency, democratic organisation and administration and the participation of all members of the political party and, on the other, the individual rights, freedoms and guarantees in respect of freedom of expression, the right of assembly, the right to demonstrate and the right of citizens to participate in politics via political parties. Although it is true that the "iron law of oligarchy" (Robert Michels) is no longer in force in the political parties of modern democracies, it is equally true that the functioning of modern mass parties continues to demand strict internal discipline. Accordingly, conflicts may arise between the individual interests of members and the interests of the collective organisation, since the latter will always defend its own unity in the interests of efficiently competing for power. It is therefore necessary to ascertain to what extent the restrictions placed on these rights are lawful, at least within the limits prescribed by the statutes.

Legal writers are not unanimous in defining the internal conditions which are necessary in order for internal democracy to be regarded as guaranteed in a particular party. Although writers agree on the minimum conditions (which include a guarantee of being able to express one's views freely within the party), the right to express critical opinions outside the party is not regarded as a necessary condition, especially since the unity of the political party (although based on diversity and the exchange of views within the party) is one of the first conditions of the efficiency of the party, the public expression of opinions which are critical of the party leadership, made outside the party (particularly in the media), will inevitably call that unity into question.

In this specific case, the Court held that the judgment which the Communist Party (PCP) passed on the *"animus"* of the activists was not arbitrary, since the activists were seeking to strengthen a "movement" which they directed and promoted, by virtue of their dominant position within the organs of the party, on the margin of the internal structure of the party, for the purpose of making fundamental amendments to the statutes and functioning of the PCP. The argument that the confirmed action of the activists undermined the image of the party, of its functioning, of its managing organs and of its political line was also considered plausible.

The Court concluded that, in the light of the gravity and the possible harmful effects (for the political party) of their conduct, the actual penalties imposed on the above-mentioned activists did not exceed the limits of rationality and proportionality.

Supplementary information:

This is the first time that the Constitutional Court has examined the substantive question in the context of its new jurisdiction to hear appeals against decisions of the organs of political parties. See, on the same case involving the three activists of the PCP, the procedural issue considered in Judgment 421/02 of 15.10.2002, published in *Bulletin* 2002/3 [POR-2002-3-007].

Languages:

Portuguese.

Identification: POR-2003-1-004

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 09.04.2003 / **e)** 195/03 / **f)** / **g)** *Diário da República* (Official Gazette), 118 (Serie II), 22.05.2003, 7797-7803 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.20 **General Principles** – Reasonableness.

5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
5.2.2.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.
5.3.31.2 **Fundamental Rights** – Civil and political rights – Right to family life – Succession.

Keywords of the alphabetical index:

Cohabitation / Pension, survivor's, conditions / Family, constitutional protection.

Headnotes:

A cohabitee is not an heir and is only entitled to a “maintenance allowance”. Although it is true that the basis and the nature of entitlement to a survivor's pension and to a “maintenance allowance” are distinct, there is a clear parallel between the situation as regards succession of a cohabiting partner – reduced to the right to claim a “maintenance allowance” from the estate – and the situation arising under the relevant rule, as regards the condition necessary to be awarded a survivor's pension. However, that difference in treatment cannot be regarded either as being without reasonable basis or arbitrary or as being based on a criterion which is insignificant, in the light of the intended legal effect: the legislature treats the situation of a married couple more favourably, not only because of the political objectives of providing an incentive to marry, but also as a consequence of the lack of a legal link, entailing rights and duties and a special dissolution procedure, between cohabitees.

Summary:

Cohabitation, owing to its duration and to other circumstances (for example, the fact that the couple have children together), resembles the typical situation of spouses, but the requirement of a minimum life together of two years may be legally significant from the aspect of a number of legal effects. Furthermore, the question is whether cohabitation of more than two years, in conditions comparable to those of spouses, may be treated differently from marriage, as regards the grant of a survivor's pension under the social security scheme.

There are important differences that the legislature may regard as significant between the situation of two persons who are married and who have therefore voluntarily chosen to alter the legal status of their relationship – by a contract between two persons of different sex who claim to constitute a family by living together – and the situation of two persons who (although living together for more than two years “in conditions comparable to those of a married couple”) have chosen to maintain *de facto* the relationship between them, without legally assuming and acquiring the obligations and rights associated with marriage.

What is at issue is the rule that the grant of a survivor's pension, in the event of the death of the beneficiary of social security, to a cohabitee depends, in particular, not only on that person's having lived with the deceased for more than two years, in conditions comparable to those of a married couple, but also on fact that he or she is unable to obtain a “maintenance allowance” from certain members of the deceased's family.

This different legal treatment cannot be regarded as being without any significant constitutional basis, and it is therefore impossible to conclude that the rule infringes the principle of equality laid down in Article 13 of the Constitution. It cannot be claimed, therefore, that this restriction of the right to a survivor's pension has as its consequence a breach of the duty not to leave unprotected, without reasonable ground, the family whose basis is not marriage – that is to say, at least as regards the points of the legal scheme which oppose the protection of its members and which cannot be accepted as an instrument of what may be policies of encouraging the family based on marriage.

In support of the argument that the rule is unconstitutional, it was expressly claimed that there was a violation of Article 26 of the Constitution, which establishes “other personal rights”, that is to say, “rights to personal identity, to the development of personality, to civil capacity, to citizenship, to good name and to reputation, to image, to express views, to the protection of the intimacy of private and family life and to legal protection against any form of discrimination”. None the less, the Court considered that the above-mentioned Article 26 is relevant only in so far as ensures the right “to legal protection against any form of discrimination” and that, for the purpose of evaluating the rule at issue, this constitutional parameter is, *a fortiori*, made subject to the requirements of the principle of equality, enshrined in Article 13 of the Constitution.

The constitutional context of this question is different from that recognised in the context of decisions pronounced on rules which made provision for a difference in treatment between married persons and cohabiting persons and which, in application of the constitutional prohibition on discrimination against children born out of wedlock (Article 36.4 of the Constitution), gave rise to a finding of unconstitutionality. In this case, the Court held that the rule in issue,

in the part specifying that the grant of a survivor's pension in the event of the death of the beneficiary of social security, to the person cohabiting with the beneficiary, depends not only on cohabitation for more than two years, in conditions comparable with those of a married couple, but also on the fact that he or she was unable to obtain a “maintenance allowance” from certain members of the deceased's family, was not unconstitutional.

Supplementary information:

See, on the constitutional case-law on the rules on “cohabitation”, Judgment 275/02 of 19.06.2002, published in *Bulletin* 2002/2 [POR-2002-2-005].

Languages:

Portuguese.

Romania
Constitutional Court

Important decisions

Identification: ROM-2003-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 27.02.2003 / **e)** 86/2003 / **f)** Decision on the application challenging the constitutionality of the provisions of Section 8 of Law no. 543/2002 on remission of certain penalties and lifting of certain measures and sanctions / **g)** *Monitorul Oficial al României* (Official Gazette), 207/31.03.2003 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.4.1.3 **Institutions** – Head of State – Powers – Relations with judicial bodies.
4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.
5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.35.1 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Pardon, collective, application criteria / Amnesty, criteria.

Headnotes:

Pardon, as a collective measure of clemency, granted by an organic law, must be applicable to all persons who, being in similar positions, may obtain release from penalty.

The laying down by the law on pardons of certain random requirements governing the use of clemency which are extraneous to the conduct of the sentenced person, viz. the existence of a final judicial ruling delivered up to the date of publication of the law in Romania's Official Gazette *(Monitorul Oficial)*, Part I, is contrary to the principle of equality before the law safeguarded by Article 16.1 of the Constitution.

Summary:

The Constitutional Court had before it a reference on a preliminary objection, on grounds of unconstitutionality as to the provisions of Section 8 of law no. 543/2002 on remission of certain penalties and lifting of certain measures and sanctions.

In the statement of reasons for the preliminary objection, it was alleged that the impugned provisions, which introduced "the principle of discrimination between citizens according to the procedural stage they are at", impeded free access to justice and the right to a defence, and infringed the principle that nobody must be placed at a disadvantage by appealing and the principle of non-retroactiveness of the law, excepting the most favourable criminal law.

The persons raising the preliminary objection considered that the application of the law on pardons was also in patent contradiction with the case-law of the European Court of Human Rights regarding the interpretation of the principle of equality before the law.

On examining the objection, the Court held that it was founded, reasoning as follows.

A pardon is a measure of clemency consisting in the sentenced person's release from all or part of the execution of the penalty imposed, or in commuting the sentence to a lighter one. From the standpoint of the persons to whom it is applied, it is individual, in which case it is granted by the President of Romania in accordance with Article 94.d of the Constitution, or collective, in which case it is conferred by Parliament through the enactment of an organic law in accordance with the provisions of Article 72.3.g of the Constitution.

Another essential difference between the two forms of pardon is the reason for granting it. With individual pardon, the President of Romania usually has humanitarian motives in view, whereas the dominant considerations in collective pardon are to implement a social and criminal justice policy vis-à-vis a specific category of persons convicted of offences that do not present a high social risk where the culprits have given serious indications of reform, and to reduce the number of prisoners in custody.

Collective pardon, through a legislative enactment of general application, lays the groundwork for rectifying the social behaviour of a whole category of convicted persons. The law granting pardon is impersonal, unlike the decree of the President of Romania, applying to one or more designated persons. The ambit of the law is determined by the fixing of certain objective criteria, which falls within the exclusive powers of the legislature, subject to the provisions of the Constitution and the generally valid principles of law.

Law no. 543/2002 confers the benefit of pardon on persons sentenced to up to 5 years' imprisonment, including persons whose penalty was a criminal fine, and minors held in reformatories.

The criterion on which collective pardon is granted, set out in Section 8, viz. the existence of a final judicial ruling delivered up to the date of publication of the law in Romania's Official Gazette *(Monitorul Oficial)*, Part I, is determined by a series of factors that cannot be predicted or connected with the sentenced person as an individual.

The Court found that laying down such a criterion was inconsistent with the principle of equality before the law set out in Article 16.1 of the Constitution, which, in equal circumstances, forbids any difference in the legal treatment of persons. As a law, the act whereby pardon was granted must apply to all persons who, being in similar circumstances, could qualify for remission of sentence.

The circumstances in which certain categories of persons were placed must be differentiated in essence if difference in legal treatment were to be justified, and any such difference must be founded on an objective, rational criterion. This solution was also consistent with the case-law of the European Court of Human Rights (case of *Marckx v. Belgium*, 1979).

Regarding the effect of the act of collective clemency, all offenders having committed the same class of offences prior to the date of the law's entry into force were held to be in exactly the same position, as the date of their conviction was of no significance for prescribing differentiated legal treatment, as that would depend on factors unrelated to the offenders' procedural conduct.

The objective criterion on which the benefit of collective pardon was granted could be determined only by the fact that the punishable offence was committed in the period up to the date when the act governing pardon took effect, or else up to a different and earlier date, legally established, such as, for example, the date on which the bill for the law was proposed. This conclusion was also dictated by the principle of the non-retroactiveness of criminal law, governed by Article 10 of the Criminal Code.

Section 8 of law no. 543/2002 did not comply with this principle, however.

In the earlier legislation in this field, the legislature's consistent intent had been that the recipients of the pardon were to be persons having committed criminal acts prior to the publication of the law, irrespective of when the judgment convicting them became final.

The Court found that the fact of referring to the date when this judicial decision became final, this being the date prescribed in the impugned statute, was conducive to discrimination between persons who, though in an objectively identical position, received different legal treatment, which was contrary to the provisions of Article 16.1 of the Constitution.

Cross-references:

- Decision no. 86 of 27.02.2003 was delivered by a majority of votes. By government emergency Order no. 18 of 02.04.2003, published in the Official Gazette *(Monitorul Oficial)* of Romania, Part I, no. 224 of 03.04.2003, Section 8 of Law no. 543/2002 was amended in conformity with the findings made by the Constitutional Court in Decision no. 86/2003.
- Case of *Marckx v. Belgium*, 13.06.1979, *Special Bulletin ECHR* [ECH-1979-S-002]; Vol. 31, Series A of the Publications of the Court.

Languages:

French.

Slovenia
Constitutional Court

Statistical data
1 January 2003 – 30 April 2003

The Constitutional Court held 28 sessions (14 plenary and 14 in chambers) during this period. There were 462 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 795 unresolved cases in the field of human rights protection (denoted Up- in the Constitutional Court Register) from the previous year at the start of the period (1 January 2003). The Constitutional Court accepted 102 new U- and 302 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 107 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court made:
  - 38 decisions and
  - 69 rulings;
- 34 cases (U-) cases joined to the above-mentioned cases for common treatment and adjudication.

Accordingly the total number of U- cases resolved was 141.

In the same period, the Constitutional Court resolved 260 (Up-) cases in the field of the protection of human rights and fundamental freedoms (14 decisions issued by the Plenary Court, 246 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 – Slovenian translation);
- since September 1998 in the database and/or Bulletin of the Association of Constitutional Courts using the French language (A.C.C.P.U.F.);
- since August 1995 on the Internet, full text in Slovenian as well as in English http://www.us-rs.si; http://www.us-rs.com (mirror);
- since 2000 in the JUS-INFO legal information system on the Internet, full text in Slovenian, available through http://www.ius-software.si; and
- in the CODICES database of the Venice Commission.

Important decisions

Identification: SLO-2003-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 06.02.2003 / **e)** U-I-225/02 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), 60/02 and 16/03 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
3.9 **General Principles** – Rule of law.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.
5.2 **Fundamental Rights** – Equality.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.36.4 **Fundamental Rights** – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Privatisation, evaluation methods / Shareholder, rights.

Headnotes:

Article 11.4 of the Ownership Transformation of Insurance Companies Act is inconsistent with the Constitution, insofar as it deprives the persons entitled to participate in the privatisation and the known shareholders of the right to file an action against a decision taken by the Government and thereby enforce their rights.

The Constitutional Court may not enter into an evaluation of the selection of a method of determining the percentage of non-nominal capital in the entire capital of insurance companies. The legislature was empowered to select and prescribe one method from the methods of valuation that are recognized in practice and applied by the profession in valuation. The legislature has therefore a broad field of discretion. Certainly, it may not act arbitrarily and may not follow an illegitimate (unconstitutional) goal.

Summary:

The Union of Financial Organisations of Slovenia (hereinafter the Union) questioned the constitutionality of the provisions of Article 1, in conjunction with Article 2.2.4, and Article 19 of the Ownership Transformation of Insurance Companies Act (hereinafter – ZLPZ-1), as they excluded employees or former workers employed at insurance companies from the category of persons entitled to participate in the privatisation and included the joint consumption fund in the capital (Article 19 ZLPZ-1). The joint consumption fund consists of the funds set aside by an enterprise under the socialist system for its workers such as holiday allowance, recreation allowance, etc.

Other petitioners asserted that the prescribed method of determining the percentage of non-nominal capital (i.e. the capital in the enterprise that was part of social property under the socialist system, the exact amount of which remains unknown until privatisation takes place) in the overall capital of the insurance company (Article 3.1 in conjunction with Article 2.2.3 and 2.2.4) and the manner of adjusting the percentage of non-nominal capital in light of the distribution of profits (Article 3.2 in conjunction with Article 4, in particular with the provision in its second paragraph) were inconsistent with Article 14.2 of the Constitution

(equality before the law), Article 33 of the Constitution (the right to private property) and with Article 155 of the Constitution (prohibition of retroactive effect of legal acts). They asserted that the prescribed method did not treat both sources of capital equally, but gave priority to non-nominal capital in comparison with share capital.

The petitioners also alleged that Article 11.4 was inconsistent with Article 23 of the Constitution (the right to judicial protection) and Article 25 of the Constitution (the right to legal remedies), as it deprived the persons entitled to participate in the privatisation as well as the known shareholders of the right to participate in the procedure and thereby ensure their rights. Article 11.4 sets out that an insurance company may seek legal remedies on behalf of known shareholders against a Government decision, whereas a guardian (i.e. the Compensation Company) is to be appointed on behalf persons entitled to participate in the privatisation.

The Constitutional Court considered that the provisions in the ZLPZ-1 regulating the method of determining the amount of non-nominal capital at the time of its mixing with share capital, did not violate the principle of trust in the law and did not interfere with the ownership right of the known shareholders in such a manner as to have retroactively interfered with their shareholder rights. The percentage of the non-nominal capital in the total capital of insurance companies is determined according to the balance on a base day. That is not inconsistent with the Constitution, but is vital to ensure the equal treatment of both types of capital and to ensure the rights of the persons who are foreseeably entitled.

The Court also stated that the determination of the amount or the percentage of non-nominal capital and the determination of the method of its adjustment in light of a dividend warrant, as set out in ZLPZ-1, did not treat both types of capital unequally and did not interfere with the shareholder rights of the known shareholders.

The statutory regulation of the adjustment of the percentages of nominal and non-nominal capital where share capital is increased with a new portion of capital does not retroactively interfere with the shareholder rights of the known shareholders, and thus it does not violate the right to private property.

The mere fact that the ZLPZ-1 introduced two different methods of adjustment of the ratio of non-nominal to nominal capital for two different periods does not by itself violate the constitutional principle of equality before the law.

The provisions of the ZLPZ-1 guaranteeing that shareholder rights will be bound to the actual shares in the nominal (share) capital are not inconsistent with the Constitution. The guarantee of such a situation, in fact, amounts to a guarantee of equal rights for both types of capital and does not interfere with the rights of the known shareholders.

Appointing a guardian for non-nominal social capital (i.e. the capital in the enterprise that was part of social property under the socialist system) is not inconsistent with the Constitution.

The regulation providing that only the premiums paid in due time are to be considered for the calculation of the expected entitlements of an entitled person is not inconsistent with the Constitution.

The regulation, by which the legislature has enabled entitled persons to carry out the transformation of ownership of recently obtained property, amounts to an expected entitlement – that is to say, a right to the transformation of property of a part of the non-nominal social capital and not a property right to that part. Therefore, the regulation of the method of realising an expected entitlement does not violate the constitutional right to property.

The fact that ownership transformation of social capital was completed provided the legislature with the basis to regulate the procedure of transformation of ownership in a way that was different from the procedure used in the Ownership Transformation of Companies Act or other acts.

The legislature is not under an obligation to regulate a subsequent transformation of ownership of the social capital effected on the basis of the provision of Article 123.a of the Basic Scheme of Non-Life and Life Insurance Act in the same manner that it regulated another situation in Articles 48 to 51 of the Act Concluding Ownership Transformation and Privatisation of Legal Entities Owned by the Development Corporation of Slovenia, as the factual situation is not the same.

The provision of the Ownership Transformation of Insurance Companies Act that does not guarantee judicial protection or a legal remedy to each of the known shareholders interferes with the constitutional right to judicial protection and is thus inconsistent with the provision of Article 23.1 of the Constitution.

The National Assembly must remedy the above-mentioned unconstitutionality within ninety days from the promulgation of this decision in the Official Gazette of the Republic of Slovenia. Until that unconstitutionality is remedied, each of the known

shareholders has the right to file an action against a decision taken by the Government.

Supplementary information:

The Court decision summarised above refers to the ownership transformation of insurance companies; the relevant terminology refers to that area of law. Some terms are explained below.

1. "Non-nominal": Non-nominal capital should be distinguished from nominal capital, in that nominal capital means capital that can be expressed in numbers (private capital), whereas non-nominal capital means social capital in enterprises, the exact amount of which is still unknown as it has not been privatised yet.

2. "Social capital": Under the socialist system, i.e. what was called the self-management system, the capital of enterprises was part of social property. There were no individual owners; it was formally owned by the whole society, with the workers and managers working in an enterprise being only the "managers" of such social capital. With the introduction of several reforms at the end of the socialist era, new investments in the form of private capital began to be mixed with the existing social capital, thus constituting what is called mixed ownership. Finally, the ownership transformation of enterprises resulted in complete privatisation, and the end of the concept of social capital.

Legal norms referred to:

- Articles 2, 14.2 and 33 of the Constitution;
- Articles 21, 40.2 and 48 of the Constitutional Court Act.

Cross-references:

By an order of the Constitutional Court cases nos. U-I-219/02, dated 06.06.2002, U-I-231/02, U-I-232/02, U-I-233/02, U-I-240/02, U-I-242/02, U-I-243/02, U-I-226/02, dated 20.06.2002, and U-I-280, dated 22.01.2003, were joined for joint consideration and decision-making.

Languages:

Slovenian, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-2003-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 11.03.2003 / **e)** CCT 20/2002 / **f)** Andrew Lionel Phillips and Another v. The Director of Public Prosecutions and Others / **g)** / **h)** 2003 (4) *Butterworths Constitutional Law Reports* 357 (CC); CODICES (English).

Keywords of the systematic thesaurus:

1.4.9 **Constitutional Justice** – Procedure – Parties.
3.4 **General Principles** – Separation of powers.
3.16 **General Principles** – Proportionality.
4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.4.22 **Fundamental Rights** – Economic, social and cultural rights – Artistic freedom.

Keywords of the alphabetical index:

Censorship / Alcohol, liquor, consumption / Nude dancing, prohibition.

Headnotes:

The principle of the separation of powers requires the executive to make submissions to the Court on either why a challenged law is constitutional or conversely why it believes the law is indefensible.

The state's failure to advance evidence or argument in justification of the limitation of a fundamental right does not exempt the Court from the obligation to conduct the justification analysis.

Though the state has a valid interest in reducing the negative consequences of liquor consumption, that interest cannot justify a sweeping curtailment of expression at all types of licensed premises, particularly not at licensed theaters, because these

venues are crucial to the free exchange of ideas protected by the Constitution.

Summary:

The holder of a liquor licence who was hosting striptease performances on his premises was charged with contravening Section 160.d of the Liquor Act 21 of 1989. This section makes it an offence for the holder of an on-consumption licence to allow any person:

i. to perform an offensive, indecent or obscene act; or
ii. who is not clothed or not properly clothed, to perform or to appear, on a part of the licensed premises where entertainment of any nature is presented or to which the public has access.

The Johannesburg High Court declared the section unconstitutional on the ground that it infringed the freedom of expression guaranteed by Section 16 of the Constitution. The licence holder applied for confirmation of this order.

Writing for the majority, Justice Yacoob held that the prohibition encompasses all entertainment of any description. It covers theatres and other venues which host plays and concerts that may be serious works of art and communicate thoughts and ideas essential for positive social development. The section therefore limited the freedom of artistic creativity and the freedom to receive and impart information or ideas protected by Section 16 of the Constitution.

In considering whether this limitation was justified in an open and democratic society based on human dignity, equality and freedom, the majority took into account that liquor has a negative effect on the behaviour of consumers. The state therefore has a legitimate interest in minimising the harm that could be caused.

However, the prohibition was held to be insufficiently tailored because it was applicable to all establishments where liquor was legally sold including hotels, restaurants, theatres, clubs and sports grounds. The application of the section was not restricted to bars or public houses.

The majority expressed its concern that the section applies to theatres whose core function was to realise protected freedom of expression. The provision controls the kind of entertainment that may be provided at licensed theatres instead of controlling behaviour at these places. The majority accordingly held that, although the position may have been different if the section applied to a more limited category of premises, the provision as it stood should be declared unconstitutional.

In a concurring judgment, Justice Ncgobo expressed doubt as to whether the freedom of artistic creativity guaranteed by the Constitution included nude dancing for the primary purpose of stimulating liquor sales. However, because the prohibition brought into its reach theatrical performances, it limited too substantially the freedom of expression guaranteed by the Constitution.

In another concurring judgment, Justice Sachs explored the difficulties in determining the limits of freedom of expression in this context. In his view, the scope of the practical problems involved created doubt about whether even a narrower prohibition which excluded theaters, but included bars would be constitutional.

In a dissenting judgment, Justice Madala concluded that freedom of expression was not unjustifiably limited. He held that the law does not prohibit artistic expression that involves nudity. The law merely requires that if people are performing while “not clothed” or “not properly clothed”, the owner of the liquor license is to ensure that no liquor is served that particular day. In addition, Justice Madala found that, given the potential dangers that arise when drunkenness and nudity are combined, it is both reasonable and justifiable for the legislature to require theatres to refrain from selling liquor when such performances are being held. Justice Madala also found that that the phrases “not clothed” or “not properly clothed” were not overly vague as the applicant had contended. He accordingly concluded that the section was constitutionally valid.

In the result, the High Court's judgment of constitutional invalidity was confirmed.

Cross-references:

- *Moise v. Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae),* 2001 (4) *South African Law Reports* 491 (CC); 2001 (8) *Butterworths Constitutional Law Reports* 765 (CC); *Bulletin* 2001/2 [RSA-2001-2-009];
- *Islamic Unity Convention v. Independent Broadcasting Authority and Others* 2002 (4) *South African Law Reports 294* (CC); 2002 (5) *Butterworths Constitutional Law Reports* 433 (CC).

Languages:

English.

Identification: RSA-2003-1-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 28.03.2003 / **e)** CCT 46/2002 / **f)** J and B v. Director General: Department of Home Affairs and Others / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.2.2.11 **Fundamental Rights** – Equality – Criteria of distinction – Sexual orientation.
5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to family life – Descent.

Keywords of the alphabetical index:

Insemination, artificial / Child, parental rights / Homosexuality, family life / Child, born out of wedlock.

Headnotes:

A statute which permits heterosexual married couples to become the legal parents of children born from artificial insemination but which does not extend that same right to same-sex permanent life partners infringes the right to equality. It is unfairly discriminatory, based solely on the sexual orientation of the couple, and cannot be justified.

Summary:

This case concerns the constitutionality of certain provisions of the Children's Status Act 82 of 1987 (the Status Act), which, among other things, defines the status of children conceived by artificial insemination. Section 5 of the Status Act provides that where a heterosexual married couple use the gamete or gametes (i.e. sperm or ovum) of another person to conceive a child through artificial insemination, that child will be considered the legitimate child of the married couple.

The two applicants have been involved in a permanent same-sex life partnership since 1995. In August 2001, the second applicant gave birth to twins who were conceived by artificial insemination. The sperm was from an anonymous donor, and the ova were from the first applicant. Both applicants sought to register as parents of the twins. However, the current regulations only provide for the registration of one male and one female parent. As a result, only the second applicant, as "birth-mother", was able to register.

The applicants sought relief in the Durban High Court, arguing, among other things, that Section 5 of the Status Act is unconstitutional because it unfairly discriminates on the basis of sexual orientation by legitimating children born as a result of artificial insemination to heterosexual married couples but not those born to same-sex permanent life partners. The High Court declared the section unconstitutional on the ground that it unfairly discriminates on the basis of sexual orientation in violation of the right to equality.

Writing for a unanimous Court, Justice Goldstone found that Section 5 of the Status Act unfairly discriminates between married persons and the applicants as permanent same-sex life partners. The Court confirmed that the section is inconsistent with the Constitution and ordered that it should be read to provide the same status to children born from artificial insemination to same-sex permanent life partners as it currently provides to such children born to heterosexual married couples.

In response to arguments raised by the respondents, the Court refused to accede to the request from the government to read in words which would make the section of application to unmarried heterosexual permanent life partners as that was not in issue in the application before the Court. The Court also refused to suspend the order, as requested by government, as the constitutional defect could be cured immediately without creating a lacuna in the law or a potential disruption of the administration of justice.

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* 86 (CC); *Bulletin* 2000/1[RSA-2000-1-001];
- *Satchwell v. President of the Republic of South Africa and Another* 2002 (6) *South African Law Reports* 1 (CC); 2002 (9) *Butterworths Constitutional Law Reports* 986 (CC);

- *Du Toit and Another v. Minister for Welfare and Population Development and Others* 2003 (2) *South African Law Reports* 198 (CC); 2002 (10) *Butterworths Constitutional Law Reports* 1006 (CC).

Languages:

English.

Identification: RSA-2003-1-003

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 03.04.2003 / **e)** CCT 27/2002 / **f)** Gabriel Ntleli Swartbooi and Seventeen Others v. Lilian Ray Brink and Others / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.8.6.2 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Executive.

Keywords of the alphabetical index:

Municipality, local councillor, immunity / Court fee, payment.

Headnotes:

Liability of members of a local council, acting in a representative capacity, for costs should not be determined according to common law rules that provide for personal liability for costs of people whose actions are motivated by malice or amount to improper conduct. Instead the Constitution prescribes that Section 28.1.b of the Local Government: Municipal Structures Act 117 of 1998 applies; this statute exempts municipal councillors from being personaly liable to civil proceedings for conduct during deliberations of the full council (as distinct from a meeting of any of its committees) in the course of the legitimate business of that council.

In conformity with the principle of separation of powers, courts have the power to set aside legislative and executive decisions that are inconsistent with the Constitution. They cannot attempt by their orders to punish municipal councillors and thereby influence what members of these bodies might or might not do.

Summary:

The appellants, elected municipal councillors, challenged a decision of the Bloemfontein High Court in which they were ordered personally to pay the costs of a court case in which two council decisions had been set aside. The council decisions concerned a request that two councillors recuse themselves from deliberations based on suspicion of corruption, and the subsequent suspension of one of the councillors. In imposing the punitive costs order on the appellants, the councillors who supported these decisions, the High Court had relied mainly on what it considered to be their incompetent, malicious and to a degree racist conduct. The appellants asked this Court to set aside the punitive costs order.

Justice Yacoob on behalf of a unanimous Court, held that Section 28.1.b of the Local Government: Municipal Structures Act 117 of 1998 applied to the case. This law was passed as a result of Section 161 of the Constitution which reads, "[p]rovincial legislation within the framework of national legislation may provide for privileges and immunities of Municipal Councils and their members". It exempts municipal councillors from, amongst other things, being liable to civil proceedings for anything that they have said in, produced before or submitted to the council. The Court found that the High Court incorrectly applied the common law rule, which provides that people acting in a representative capacity who act improperly or are motivated by malice may be personally liable to pay legal costs arising out of their conduct. The rule was not applicable in this case, because the statutory privilege of municipal councillors shielded them from personal liability. This privilege covers the conduct of members of a municipal council that constitutes participation in deliberations of the council.

In making its cost order the High Court had relied on a report by the speaker of the council and the statements made and votes tendered by various council members in support of the resolutions. All of this conduct was integral to deliberations of the council and to its legitimate business. It did not matter whether the decisions taken after the deliberations were administrative, executive or legislative, or even whether they were unlawful. The purpose of Section 28.1.b is to encourage vigorous and open debate in the process of decision making. This is

fundamental to democracy. Any curtailment of that debate would compromise democracy. Since the Constitution explicitly delegates administrative and executive power to municipalities in addition to legislative power, the statutory privilege of municipal councillors must extend to all types of action. This is the case despite the fact that prior to the new constitutional dispensation, privileges and immunities under the rubric of parliamentary privilege, covered only legislative action. There may be conduct that is so at odds with the values of the Constitution that neither the Constitution nor the legislature could conceivably have contemplated its protection but it was unnecessary to decide that issue in this case.

The High Court was also motivated by the perception that the costs order against the appellants might serve to ensure that members of the council would consider their decisions more carefully in the future. This reasoning evinces an intention to teach municipal councillors a lesson, which trenches upon the separation of powers.

Had Section 28 been applied by the High Court, the correct conclusion would have been that the appellants' conduct, however serious it may have been, did not deprive the appellants of the benefits of their Section 28.1.b immunity. Therefore the costs order made against the appellants was set aside and the municipal council was ordered to pay the costs of the case in the High Court.

Cross-references:

- *Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) *South African Law Reports* 374 (CC); 1998 (12) *Butterworths Constitutional Law Reports* 1458 (CC); *Bulletin* 1999/1 [RSA-1999-1-001];
- *Poovalingam v. Rajbansi* 1992 (1) *South African Law Reports* 283 (A);
- *Church of Scientology of California v. Johnson-Smith* [1972] 1 All ER QBD 378.

Languages:

English.

Identification: RSA-2003-1-004

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 03.04.2003 / **e)** CCT 44/2002 / **f)** National Director of Public Prosecutions and Another v. Yasien Mac Mohamed N.O. and Others / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Crime, organised, special measures / Order, judicial / Seizure, asset.

Headnotes:

A cardinal principle of the right to a fair hearing is that persons affected by a court order must be given an opportunity to answer the case against themselves before a court order is made affecting their rights. For this principle to be excluded in a particular statute, it has to be excluded either expressly or by clear, necessary implication.

Summary:

The Prevention of Organised Crime Act 121 of 1998 (the Act) is an act intended to fight organised crime by stripping its organisers of the fruits and instruments of their criminality. In terms of the Act, the Johannesburg High Court granted preservation and seizure orders in respect of two buildings pursuant to an application made without notice to any party by the National Director of Public Prosecutions (the National Director). The National Director then launched an application for the forfeiture of the two buildings. In resisting this application, the respondents challenged the constitutional validity of provisions of the Act. The High Court upheld the challenge and declared Section 38 of the Act unconstitutional on the ground that it violated the Section 34 right to a fair hearing in that it prevented an affected person from being given an opportunity to be

heard. It also found that the section unjustifiably constituted an arbitrary deprivation of property as well as a violation of the right to privacy.

The National Director appealed to the Constitutional Court contending that a reasonable and unstrained construction of the section did not preclude the High Court, in appropriate cases, from making a temporary preservation order calling on interested parties to show cause why the order should not be made final. This would allow the affected parties to be heard.

Justice Ackermann, writing for a unanimous Court, reaffirmed the correct approach to be taken when a statutory provision is capable of more than one reasonable construction. The Court held that if one construction leads to constitutional invalidity but another not, the latter construction must be preferred to the former, provided that such construction is reasonable and not strained.

Applying this approach, the Court found, contrary to the High Court, that Section 38 on its proper construction did not exclude the normal procedural powers of the High Court. A cardinal principle of the right to a fair hearing is that persons affected by a court order must be given an opportunity to answer the case against them before a court order is made. For this principle to be excluded in a particular statute, such statute had to exclude it either expressly or by clear, necessary implication. The Court found that the section, properly interpreted, did not exclude such principle.

Although the Court held that the section, so interpreted, might still limit the right to a fair hearing for a brief period of time, it found that even if this constituted a limitation, it was still fully justified under Section 36 of the Constitution because it was the slightest limitation possible under the circumstances and an essential one for the achievement of the very important purpose for which the Act was designed.

With regard to the findings of the High Court based on the rights to privacy and property, the Constitutional Court held that since no argument was presented in support of these findings and the High Court's conclusion on the constitutionality of Section 38 had been rejected, the said findings of unconstitutionality of the section on these grounds fell away.

The Court therefore upheld the appeal and declined to confirm the declaration of constitutional invalidity made by the High Court.

Supplementary information:

This matter first came before the Constitutional Court in May 2002 in the case of *National Director of Public Prosecutions and Another v. Mohamed NO and Others* 2002 (4) *South African Law Reports* 843 (CC); 2002 (9) *Butterworths Constitutional Law Reports* 970 (CC). In dealing with the matter, the Court set aside the High Court's declaration of invalidity on the grounds that:

i. the High Court's order of notional severance was not a competent order to remedy constitutional invalidity caused by an omission; and
ii. the High Court had erred by dealing solely with the constitutional attack against Section 38 and by failing to deal with all the relief sought.

The Court accordingly referred the matter back to the High Court to be dealt with in the light of its judgment.

Cross-references:

- *Bernstein and Others v. Bester and Others NNO* 1996 (2) *South African Law Reports* 751 (CC); 1996 (4) *Butterworths Constitutional Law Reports* 449 (CC); *Bulletin* 1996/1 [RSA-1996-1-002];
- *De Beer NO v. North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) *South African Law Reports* 429 (CC); 2001 (11) *Butterworths Constitutional Law Reports* 1109 (CC); *Bulletin* 2001/3 [RSA-2001-3-013];
- *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];
- *Investigating Directorate: Serious Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd and Others: in re Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others* 2001 (1) *South African Law Reports* 545 (CC); 2000 (10) *Butterworths Constitutional Law Reports* 1079 (CC); *Bulletin* 2000/2 [RSA-2000-2-011];
- *NUMSA and Others v. Bader Bop (Pty) Ltd and Another* 2003 (2) *Butterworths Constitutional Law Reports* 182 (CC).

Languages:

English.

Switzerland
Federal Court

Important decisions

Identification: SUI-2003-1-001

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 28.03.2002 / **e)** 2P.207/2000 / **f)** Association Suisse des Annonceurs et al. v. Grand Council of the Canton of Geneva / **g)** *Arrêts du Tribunal fédéral suisse* (Official Digest), 128 I 295 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.3.2.3 **Constitutional Justice** – Jurisdiction – Type of review – Abstract review.
1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.
5.2 **Fundamental Rights** – Equality.
5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
5.3.36.3 **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:

Advertising, tobacco, ban / Advertising, alcohol, ban / Property, public, use for advertising / Health, public, protection.

Headnotes:

Article 8 of the Federal Constitution (Right to Equality), Article 16 of the Federal Constitution (Freedom of Opinion and Information), Article 17 of the Federal Constitution (Freedom of the Media), Article 26 of the Federal Constitution (Right to Property), Article 27 of the Federal Constitution (Economic Freedom), Article 36 of the Federal Constitution (Limitations of Fundamental Rights), Article 49.1 of the Federal Constitution (Supremacy of Federal Law), Article 93 of the Federal Constitution (Radio and Television), Article 105 of the Federal Constitution (Alcohol), Article 118.2.a of the Federal Constitution (Protection of Health); Articles 2 and 3 of the Federal Law on the Domestic Market; the Genevan Law of 9 June 2000 on advertisements; and *in abstracto* review of legislative provisions.

The Genevan legislation prohibiting advertising of tobacco and beverages containing over 15% alcohol by volume in cantonal public areas and in private areas visible from such public areas does not violate:

- the principle of the supremacy of Federal Law in respect either of the legislative powers of the Confederation in matters of alcohol, foodstuffs and radio and television broadcasting (point 3) or of the Law on the Domestic Market (point 4);
- the freedom of the press or freedom of opinion and information, to the extent that advertising for commercial purposes falls within the scope of the protection of these freedoms (point 5a);
- economic freedom (point 5b);
- the right to property (point 6);
- or the principle of equal treatment and the prohibition of arbitrariness (point 7).

Compatibility with the right to property and economic freedom of the cantonal provisions making advertisements posted in private areas visible from the public area subject to supervision by the public authorities (point 8), and of the rule prohibiting the installation of advertisements on blind walls of buildings (point 9).

Summary:

The Grand Council of the Republic and Canton of Geneva adopted an Advertising Practices Act. That law regulates in detail the display of all forms of advertising visible from public property, together with the procedure to be followed. In particular, it bans all outdoor advertising, in whatever form, for tobacco and alcohol over 15% by volume on public property and on private property visible from public property; the same applies to the interior and surroundings of public buildings and public places as well as property belonging to the state, municipalities, public authorities and charitable trusts. The law is designed to improve road safety, to conserve sites, prevent unsightliness and maintain public order; it is also aimed at protecting the health of the population, particularly young people, from the risks of overconsumption of alcohol and tobacco.

Various advertising associations and companies responded by lodging a Constitutional complaint citing a number of violations of the Federal Constitution and asking the Federal Court to strike down various provisions of the cantonal law. The Federal Court recognised the applicants' complaint as legitimate in an abstract review of regulations, on the grounds that their legally protected interests were currently or potentially affected by the provisions at issue. It nevertheless declared the complaint inadmissible.

The applicants asserted firstly that the cantonal law was contrary to the principle of the supremacy of federal law guaranteed by Article 49 of the Federal Constitution. This constitutional principle precludes adoption or enforcement of cantonal rules that evade federal law or are not consistent with its spirit or meaning, for example in their objective or methods, or which encroach on matters that the federal parliament has exhaustively regulated. The protection of public health to which the impugned law relates is in principle the responsibility of the cantons. The fact that the constitution reserves certain powers to the Confederation in this field is not a determining factor. In particular, the Confederation has the power to legislate on alcohol and use of foodstuffs. To that end, federal law has introduced a string of preventive measures to combat alcoholism and smoking. Those powers do not however, rule out broader cantonal regulations along the same lines in the area of health policy. It cannot therefore be said that the cantonal law violates the principle of the overriding force of federal law.

Furthermore, the cantonal regulations are not incompatible with the Domestic Market Act. Under this law, any person is entitled to offer goods and services anywhere in Switzerland if the business in question has been authorised in the canton where it has its head office. Open market access is admittedly restricted by the impugned regulations. However, the latter do not in themselves prevent all advertising for alcohol or tobacco but introduce a ban whose scope is limited and which is in keeping with the proportionality principle. It follows that the regulations at issue do not conflict with the Federal Domestic Market Act.

The applicants also argued a violation of economic freedom and the right to property. The former encompasses the right to advertise, and the latter includes the possibility of making full use of private land. These freedoms are not absolute and can be subject to restrictions, provided that the latter have an adequate legal basis, are justified by an overriding public interest and satisfy the proportionality principle.

The impugned law constitutes an adequate legal basis for restricting fundamental rights. Protecting the health of the population in general and young people in particular is of sufficient public concern to warrant the measures taken by the cantonal parliament. As regards the proportionality principle, it must be accepted that a restriction on advertising is a measure capable of limiting alcohol and tobacco consumption. Extension of the disputed restriction to some private land is justified in order to avoid advertising being put up there in full public view. The impugned law does not ban other forms of advertising or the marketing of the products concerned. It is therefore not disproportionate and does not violate the fundamental freedoms cited.

The allegation of unequal treatment is also unfounded. A general-scope regulation conflicts with the principle of equality within the meaning of Article 8 of the Federal Constitution if it establishes legal distinctions which cannot reasonably be justified in the light of the de facto situation to be regulated or if it fails to make the necessary distinctions in view of the circumstances. In this respect, roadside advertising is not comparable to media advertising. The former is continually aimed at an unlimited circle of people, whereas the latter is targeted, reaching those categories of the public for which the relevant medium is intended.

In other respects, the distinction between advertising of spirits and advertising of light alcoholic beverages is objectively tenable. Central-government action aimed solely at limiting demand for spirits cannot be held to conflict with the principle of equal treatment.

With regard to the provisions implementing the advertising restrictions, the Geneva parliament opted for a licensing policy for advertising practices, having ruled out a system of advertising monopoly on public and private property that was found to be disproportionate in recent decisions of the Federal Court. The obligation to obtain a licence, the granting of which is subject to compliance with rules of substantive law, is sufficient to satisfy public-interest objectives and respects the proportionality principle.

Languages:

French.

Identification: SUI-2003-1-002

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 07.11.2002 / **e)** 2P.297/2001 / **f)** V. et al. v. Grand Council of the Canton of Bern / **g)** *Arrêts du Tribunal fédéral suisse* (Official Digest), 129 I 12 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

School, state, compulsory / Child, protection / School, disciplinary exclusion, temporary.

Headnotes:

Article 19 of the Federal Constitution (Right to Primary Education), Article 36 of the Federal Constitution (Limitations of Fundamental Rights) and Article 62 of the Federal Constitution (Education); Article 29.2 of the Constitution of the Canton of Bern (Cst./BE); fundamental social rights; disciplinary exclusion from school.

Article 19 of the Federal Constitution lays down the right to free primary education corresponding to the personal abilities of individual children and the development of their personalities in state schools for a minimum nine years' compulsory schooling (point 4).

Article 29.2 of the Constitution of the Canton of Bern not only extends this right to all schools during the period of compulsory schooling, but also provides for a broader right of the child to protection, assistance and support (point 5).

Where limitations are imposed on fundamental social rights, Article 36 of the Federal Constitution must be applied by analogy to the determination of whether the conditions are fulfilled for the legally founded existence of an overriding public or private interest and proportionality (points 6-9).

In principle, the territorial authority must make the appropriate arrangements for excluded schoolchildren to be taught by qualified persons or public institutions, at least until the end of the period of compulsory schooling (point 9.5).

The scale of measures set out in Article 28 of the Law on compulsory Schooling of the Canton of Bern, which lays down the supreme sanction *(ultima ratio)* of temporary (partial or total) exclusion from school for a maximum twelve weeks per school year, can be interpreted in a manner consistent with the Constitution (point 10).

Summary:

The Grand Council of the Canton of Bern has amended its Compulsory Education Act, in particular by adding to Section 28 on discipline and disciplinary action. In addition to the teachers' right to take against offending pupils the disciplinary measures necessary for the proper functioning of the school, the school board may order the partial or total exclusion, for a maximum of twelve weeks, of any pupils whose behaviour is seriously disruptive.

Lodging a Constitutional complaint, a number of parents asked the Federal Court, on their own behalf and on behalf of their children, to strike down the cantonal provision allowing children to be expelled. They argued a breach of Article 19 of the Federal Constitution, which guarantees the right to a free and adequate basic education and cited Article 29.2 of the Constitution of the Canton of Bern which sets out a child's right to protection, assistance and supervision as well as the right to a free education consistent with a child’s individual abilities. The Federal Court dismissed the Constitutional complaint, accepting, in an abstract review of the regulations, that the provision at issue could be applied in accordance with the Constitution.

Article 19 of the Federal Constitution establishes a fundamental social right; it provides an entitlement to a service rendered by the state. The purpose of basic education is to permit a child's personal development and fulfilment as well as to promote equal opportunity. The cantons have wide discretion in the education that they provide, but they are required to guarantee an appropriate education for each individual. The provision in the cantonal constitution goes beyond federal constitutional law, guaranteeing a child's right to protection, assistance and supervision.

The scope of a social right is determined in the light of its actual substance. The conditions set out in Article 36 of the Federal Constitution enabling fundamental rights to be restricted do not apply to social rights. A court is nevertheless required to take into account the interests at stake, both public and

private, as well as the proportionality principle in a case relating to social rights.

Disciplinary exclusion from a school for an indefinite period would be in breach of the constitutional right to an adequate basic education. Disciplinary exclusion from a school for a definite period has to be evaluated on the basis of the following elements:

It is very much in the public interest that schools should ensure that teaching takes place unhampered and that a climate conducive to the pupils' development is created. That public interest takes precedence over the individual interests of some pupils and justifies certain disciplinary restrictions. Consideration of pupils' individual interests is also limited by the interests of other pupils, who are entitled to an adequate basic education. It cannot be maintained that excluding a disruptive pupil is not a way of attaining the desired aim, that is, restoring the climate of the school. However, it is important that less serious disciplinary measures are taken first and that exclusion remains a last resort. The provision of the cantonal constitution cited also grants the right to assistance and supervision for a child of school age.

The impugned legislation provides for disciplinary measures varying in severity. Teachers take the requisite measures for the school to function smoothly. If necessary, the school may inform the school board and seek advice from a specialist service in order, if appropriate, to take action such as transferring the pupil to another class, another school, or a school in another municipality. In the case of serious or repeated breaches of discipline a pupil will receive a reprimand or a threat of exclusion. The disciplinary system therefore provides for a pupil's exclusion only as a last resort. The period of exclusion is determined on a case-by-case basis; a twelve-week suspension will therefore be decided only in extreme cases. In view of the body of provisions relating to disciplinary measures, the impugned legislation cannot be criticised in terms of the proportionality principle.

In the event of exclusion, parents must make provision for an appropriate activity for their child, if necessary with support from a specialist service and the aid of the education authority, while the school must prepare in good time for the pupil's reinstatement. These obligations are consistent with parents' duties within the meaning of the Civil Code and take account of a child's right to assistance and supervision from the state. The impugned provisions cannot therefore be interpreted as meaning that it is solely the parents' responsibility to look after pupils during the exclusion period.

In short, the new provision of the Compulsory Education Act is not incompatible with the right to an adequate basic education and can be enforced in specific cases in accordance with constitutional requirements.

Languages:

German.

Identification: SUI-2003-1-003

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 13.11.2002 / **e)** 1P.396/2002 / **f)** X. v. Public Prosecutor's Office and Cantonal Court of the Canton of Aargau / **g)** *Arrêts du Tribunal fédéral suisse* (Official Digest), 129 I 85 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.
5.3.13.7 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right of access to the file.
5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.

Keywords of the alphabetical index:

Telephone, tapping, evidence, use / Communication, recording, translation / Evidence, use.

Headnotes:

Article 29.2 of the Federal Constitution (right to be heard) and Article 32.2 of the Federal Constitution (right of the accused person to be informed of the charges against him/her); Article 6.3 ECHR; and the constitutional requirements relating to the judicial use of tapped telephone conversations conducted in foreign languages.

The Federal Law on the Surveillance of Postal Correspondence and Telecommunications, which is not yet applicable to the instant case, the corresponding

order, and the Aargau Code of Criminal Procedure contain no provisions on the form in which information on tapped telephone communications in foreign languages should be submitted in court (point 3).

The rights of the defence deriving from the right to be heard, as an element of the safeguard on a fair trial, call for a description of the manner in which evidence is taken (in the instant case, the German transcripts of telephone communications in a foreign language) to be included in the case file (points 4.1-4.3).

Accused persons may confine themselves to disputing the validity of a piece of evidence, without having previously demanded the cure of the defect on which they are basing their claim (in the instant case, communication of the name of the individual having transcribed the tapped telephone calls; point 4.4).

Summary:

X. was sentenced to eleven years in prison for serious drug-trafficking offences. The Cantonal Court of the Canton of Aargau confirmed the substance of the conviction in appeal proceedings. In finding X. guilty it took into consideration various pieces of evidence, in particular the transcripts of telephone communications. X. lodged a Constitutional complaint asking for the cantonal decision to be set aside on the grounds that he had not had due process of law. Not knowing who had recorded the telephone conversations in Albanian and who had translated them into German, he had been unable to comment on this piece of evidence. The Federal Court accepted the Constitutional complaint and set aside the impugned judgment.

The cantonal Code of Criminal Procedure does not provide either for precise provisions concerning the form in which telephone-tapping of conversations or the requirements the person who translates the conversation should fulfil. It is thus necessary to refer to the procedural rules indicated in the Constitution and the European Convention on Human Rights. The right to be heard requires that a defendant, for the purposes of effective defence, have access to the case-file and be able to inspect the evidence constituting the basis of a judgement; this means, amongst other things, that the file must be complete and it must be clear how the evidence has been obtained, in order that the defendant may verify it and challenge it formally or substantively. However, in this specific case, the procedures and formalities used to produce the telephone-tapping transcripts are not clear from the case-file. In particular, it is not known whether the telephone-tapping recordings were reproduced in Albanian and translated into German afterwards, the identity of the person(s) employed (official, or private translator) and whether the latter was/were informed of the criminal consequences of a false statement or an inaccurate translation within the meaning of Article 307 of the Criminal Code.

Since the methods of establishing evidence were not clarified, the applicant was unable to challenge the records and was consequently prevented from defending himself effectively.

Languages:

German.

Identification: SUI-2003-1-004

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 13.01.2003 / **e)** 2P.245/2002 et 2P.246/2002 / **f)** X. v. Sentence Enforcement Office and Ministry of Justice and Home Affairs of the Canton of Zurich / **g)** *Arrêts du Tribunal fédéral suisse* (Official Digest), 129 I 74 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Sentence, serving, compulsory labour / Prisoner, religious service, attendance, prohibition / Holiday, religious, prisoner.

Headnotes:

Article 15 of the Federal Constitution, Article 9 ECHR and Article 18 of Covenant on Economic, Social and Cultural Rights; freedom of conscience and belief during sentence enforcement.

Freedom of religion as a essential element of the freedom of conscience and belief. Exercise of the freedom of religion during sentence enforcement; limitations on participation in a religious service (point 4).

Conditions under which a prisoner can be released from the obligation to work (Article 37.1.2 of the Swiss Penal Code) during religious festivals (points 5 and 6).

Summary:

X. was charged with murder and rape. During the criminal proceedings, by way of advance enforcement of the sentence, he was transferred to Pöschwies prison in the canton of Zurich, where he was placed for a three-month period in the section for prisoners at risk of absconding. He is a member of the Orthodox Church.

X. asked to attend the Orthodox Church Easter ceremony that was to be held in the worship and meditation area of the prison's social centre. Given the conditions of X's imprisonment, the prison governor turned down his request. He offered a visit by a clergyman, which, owing to misunderstandings, did not take place. X., after having appealed in vain to the Ministry of Justice and Home Affairs of the Canton of Zurich, lodged a Constitutional complaint with the Federal Court, citing a violation of his freedom of religion and conscience guaranteed under the provisions of the Federal Constitution, the European Convention on Human Rights, and the UN International Covenant on Civil and Political Rights.

Subsequently X. refused to work in the prison on certain days on the grounds that those days were official Orthodox religious holidays devoted to prayer. Because of that refusal, X. had been subject to disciplinary measures taken by the prison governor. His appeal to the Ministry of Justice and Home Affairs was dismissed. X. responded by lodging a second Constitutional complaint asking the Federal Court to set aside the decision of the Ministry of Justice and Home Affairs.

The Federal Court dismissed both complaints. Regarding the first, the Federal Court found that freedom of worship formed part of freedom of religion and conscience within the meaning of Article 15 of the Federal Constitution, the European Convention on Human Rights and the UN International Covenant on Civil and Political Rights. Prisoners may invoke freedom of religion and conscience while serving their sentences. The authorities must ensure that prisoners can attend religious services. However, that freedom is not absolute and may be restricted. To comply with the Constitution, the restrictions must have an adequate legal basis, be justified by an overriding public interest and satisfy the proportionality principle.

Advance enforcement of the sentence was governed by cantonal law; Zurich law constituted an adequate legal basis for limiting freedom of religion and conscience. A legal basis existed not only for deprivation of freedom as such but also for the isolation of prisoners likely to abscond and presenting a risk to prison staff and other prisoners. Sentence enforcement and the proper functioning of prison life demand certain restrictions, including freedom of worship. Account may be taken of the danger that the defendant will abscond and of the need for isolation.

The exclusion from corporate worship cannot be considered disproportionate. The applicant could have had a visit from a clergyman and did not risk being expelled from the Orthodox Church for having failed to take part in the Easter celebration.

Regarding the second Constitutional complaint, the Federal Court noted that freedom of religion and conscience also covered observance of religious holidays. Under the relevant provisions, prisoners are required to perform the work allocated to them. To guarantee the smooth running of the prison and ensure calm among its four hundred prisoners, the latter are not free to choose the days on which they will be exempted from work on religious grounds. The Orthodox religion did not prohibit work on the holidays cited. The applicant could request pastoral care from a clergyman and devote himself to prayer outside working hours. The obligation to work on those days as well did not ultimately seem either disproportionate or contrary to the principle of equal treatment. It could not be compared to the release of Muslim prisoners for weekly prayers on Friday evenings and bore no relation to the general exemption from school on Saturdays for religious reasons.

Languages:

German.

Turkey
Constitutional Court

Important decisions

Identification: TUR-2003-1-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 04.12.1996 / **e)** K 1996/45 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 25069, 04.04.2003 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.4.1 **Institutions** – Executive bodies – Composition – Appointment of members.
4.6.10 **Institutions** – Executive bodies – Liability.

Keywords of the alphabetical index:

Decree, ministerial, validity / Decree, signature, joint / Council of ministers, co-chair, powers / Council of ministers, rules of procedure / Official, high, appointment, procedure.

Headnotes:

Where, in the absence of a prohibitive constitutional rule, the legislative power regulates a subject on the basis of its general power to legislate, it does not mean that the legislative power is using a power that does not emanate from the Constitution. The requirement of the joint signatures of the Prime Minister and the minister concerned as well as the Deputy Prime Minister on decrees is therefore not unconstitutional, even though no provision deals with the matter in the Constitution. This requirement does not revoke the responsibilities of the Prime Minister and the minister concerned, which derive from the Constitution.

Summary:

The main opposition party (at the material time, the Motherland Party) brought an action in the Constitutional Court seeking the annulment of Supplementary Article 1 of the Law 2451. The Law 2451 regulates the procedure for appointments to the ministries. Supplementary Article 1 states that where the Council of Ministers (the Cabinet) is made up of ministers coming from more than one political party, the requirement of a joint signature under that Law means the signature of the Prime Minister and the Deputy Prime Minister whose party has the most deputies in the Parliament.

Moreover, this rule is applicable to the appointments under other laws requiring the signature of the Prime Minister.

In Turkey, in the event that the Council of Ministers is made up of ministers coming from more than one political party, the presidents of the political parties other than the Prime Minister's party become deputy prime ministers. Where the Council of Ministers is made up of two political parties, the appointments to the ministries are signed by the Prime Minister and the president of the other political party. Where there are more than two political parties in power other than that of the Prime Minister, the president of the party having the most deputies in the Parliament is the Deputy Prime Minister responsible for signing the appointments.

The last paragraph of Article 6 of the Constitution provides: "…[t]he right to exercise sovereignty shall not be delegated to any individual, group or class. No person or agency shall exercise any State authority which does not emanate from the Constitution", and Article 8 states: "…[e]xecutive power and function shall be exercised and carried out by the President of the Republic and the Council of Ministers in conformity with the Constitution and the laws". The executive power is made up of two structures. On the one hand, the Council of Ministers executes the Government programme, and it has a political nature. On the other hand, the administration carries out administrative matters and activities, and it has a technical nature.

The appointment of deputy prime ministers, with the tasks of ensuring co-ordination within the Council of Ministers and assisting the Prime Minister, had been regulated for the first time by the Law 4951 in 1946. Article 4 of the Law 3046 (amended by the Law 4060 in 1994) envisaged that two ministers, at most, could act as deputy prime ministers.

Article 113 of the Constitution, which regulates ministers and the formation of ministries, contains no rule concerning a "deputy prime ministry" or its responsibilities. Where there is no rule in the Constitution on a subject, it falls to the legislative power to regulate that subject within the framework of the Constitutional principles. The legislative body set up the office of deputy prime minister on the basis of its existence in some countries governed by the

parliamentary system. The Deputy Prime Minister is one of the members of the Council of Ministers.

Consequently, the Constitutional Court found that the impugned provision was not contrary to Article 6 of the Constitution.

Article 105 of the Constitution states: "[a]ll Presidential decrees except those which the President of the Republic is empowered to enact by himself without the signatures of the Prime Minister and the minister concerned, in accordance with the provisions of the Constitution and other laws, shall be signed by the Prime Minister, and the ministers concerned. The Prime Minister and the ministers concerned shall be accountable for these decrees". It is thus emphasised that the responsibility of the executive power, made up by the Council of Ministers and the President, belongs to the Prime Minister and to the ministers. The purpose of that provision is to set out the responsibilities of the Prime Minister and ministers. In this article, there is a prohibition on decrees being signed by a minister other than the Prime Minister and the minister concerned. The impugned rule does not revoke the competence and the responsibility of the Prime Minister and the minister concerned.

Where there is no prohibiting or ordering rule in the Constitution on a subject, a discretionary power is given to the Parliament. Therefore, the Constitutional Court found that for the reason that it promoted the smooth functioning of coalition governments, the rule requiring the joint signature of the Deputy Prime Minister as well as the Prime Minister and the minister concerned for presidential decrees was not contrary to Article 105 of the Constitution.

Article 112 of the Constitution regulates the Functions and Political Responsibilities of the Council of Ministers. According to that Article, the Prime Minister "shall ensure co-operation among the ministers, and supervise the implementation of the government's general policy".

When the competence set out in Article 112 of the Constitution is taken into account, it is doubtless that the Prime Minister is placed in a position superior to that of the ministers from the legal and political point of view. The office of Deputy Prime Minister is not dealt with in the Constitution. The Court noted that office of Deputy Prime Minister had arisen out of the needs of the country, as in the case in other countries with a parliamentary system, and had been created in order to assist the Prime Minister.

Where competences are given to a minister who is also a member of the Council of Ministers and to the Deputy Prime Minister over some appointments, transfers and dismissals of high ranking public officials, it does not preclude the existence of the Prime Minister's competence over ministers. Consequently, the Constitutional Court found that the impugned rule was not contrary to the Constitution and that the objection had to be rejected.

Languages:

Turkish.

Identification: TUR-2003-1-002

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 05.06.1997 / **e)** K 1997/53 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 25069, 04.04.2003 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Media, press, functions / Media, newspaper, distribution, obligation / Media, seller, activity.

Headnotes:

In order to safeguard the right to receive information, some requirements may be introduced concerning the distributors and the sellers of periodical and non-periodical publications. Where the rules on the subject are not obeyed, the imposition of a heavy fine is not unconstitutional. However, suspension of the activities of the sellers of printed materials is contrary to the Constitution.

Summary:

The main opposition party (at the material time, the Motherland Party) applied to the Constitutional Court seeking the annulment of some provisions of the Law 4202 amending the Press Law (5680).

The first sentence of Supplementary Article 7 of the Law provides that the individuals and corporations dealing with the distribution of periodical and non-periodical publications are under an obligation to distribute them if the owners of such publications demand their distribution, provided that they are paid an amount not exceeding the amount paid by the other owners of such publications. According to the second sentence of the Article, persons who do not comply with that rule shall be penalised with a heavy fine not exceeding the total value of such publications that remain undistributed.

Article 28 of the Constitution regulates freedom of press, and the third paragraph of the article (now, the second paragraph) states: "…[t]he state shall take the necessary measures to ensure freedom of the press and freedom of information".

Freedom of press encompasses the right to receive information, to express ideas, to comment and to criticise as well as the right of publication and distribution. It is natural for the State to take the necessary measures to safeguard the rights of the distribution of printed materials.

On the other hand, Article 48.1 of the Constitution states: "…[e]veryone has the freedom to work and conclude contracts in the field of his/her choice. The establishment of private enterprises is free". These freedoms may only be restricted by law and with the aim of public interest. The restrictions made on the basis of Article 13 of the Constitution must not be contrary to the requirements of a democratic society, and they must not be used for the aims other than the ones prescribed.

The restrictions in the first and the second sentences of Supplementary Article 7 are directed at the necessary measures to be taken by a State under Article 28 of the Constitution. This arrangement aims at ensuring individuals the right to receive information, and there is no contradiction with the requirements of a democratic society.

Article 18 of the Constitution provides that no one shall be forced to work and that forced labour is prohibited. The individuals and corporations dealing with the distribution of periodical and non-periodical publications are not forced to work under the impugned provisions. Since the delivery of such publications constitutes one of the features of the right of the press and the right to receive information, the obligation of the distribution of such publications is an arrangement that serves the purpose of the public interest.

Moreover, Article 38 of the Constitution sets out the principle of the legality of punishment. As to the provision in the second sentence, it cannot be said that it is uncertain, since it clearly indicates that those who prevent the distribution of the publications shall be liable to pay a heavy fine.

The third sentence of Supplementary Article 7 of the Law provides that if the act mentioned in the first sentence is repeatedly committed, the heavy fine mentioned above shall be doubled, and the activities of the individual or corporate body distributors shall be stopped.

As to repetition, the main opposition party claimed that the kind of activity covered and the period of such repetition are not indicated in the sentence, and it is contrary to the principle of *ne bis in idem*. According to the Constitutional Court, the details of the repetition were not indicated in the Article. However, Article 10 of the Criminal Code states: "the provisions of this Code shall be applied to special criminal laws provided that their provisions are not contrary to the provisions of the Criminal Code". Consequently, there is no doubt that the provisions of the Criminal Code relating to repetition are to be applied to the impugned provision. Therefore, the Constitutional Court found that the request had to be rejected.

As to the suspension of the activities of the distributors, such suspension is in conflict with the aim of ensuring that individuals receive information, as it is the obligation of the distributors to distribute the periodical and non-periodical publications. Since such punishment is not appropriate for the aim pursued, it cannot be asserted that this kind of punishment is an obligation that could be envisaged. Without considering the aim pursued, the introduction of this kind of punishment may pave the way for an imbalance between aims and means. To restrict excessively the right to receive information, even for a limited period of time, is incompatible with the requirements of a democratic society.

Consequently, the Constitutional Court found that the part of the statement reading: "... their activities shall be suspended up to three months" was contrary to the Constitution and had to be annulled.

According to Supplementary Article 8.1 of the Law, it is obligatory for periodical and non-periodical publications to be offered for sale in sales agencies. If sales agencies do not comply with that requirement,

they shall be closed down for three days by the order of the governor. If the action is repeated, that period shall be extended to at least three months.

The administrative sanctions may be applied by the administrative authorities on the basis of administrative rules and without referring the matter to a judicial authority. Suspension, prohibition and stopping of activities are all sanctions by which precautionary measures are applied.

According to Article 13 of the Constitution, fundamental rights and freedoms may only be restricted for the reasons referred to in the article; they may not be contrary to the requirements of a democratic social order; and they may not be used for the aims other than those prescribed (before the October 2001 amendments). Suspension of the sales agencies injures the essence of the right to receive information. The impugned rule seeks to safeguard the right to receive information. Consequently, the suspension of sales agencies in certain conditions is a contradiction.

In some places the sellers of the periodical and non-periodical publications are kiosks, groceries, etc. On the ground that the suspension of these kinds of places of business was contrary to Article 48 of the Constitution (Freedom to Work and Conclude Contracts) and Article 5 of the Constitution (Fundamental Aims and Duties of the State), the Court decided to annul the provision mentioned above.

The Supplementary Article 8.2 provides that individuals who obstruct or hinder the presentation for sale of the periodical and non-periodical publications by means of threat, by tricks of trade or by other means shall be sanctioned.

An objection was raised that these acts were sanctioned in the Criminal Code, and it was not logical to have a law punishing individuals for the same acts.

In the Criminal Code, the acts such as threats, tricks of trade and etc. are deemed to be crimes. There is no rule preventing the Parliament from introducing these kinds of amendments for such acts.

Therefore, the objection was rejected.

Languages:

Turkish.

Identification: TUR-2003-1-003

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 17.11.1998 / **e)** K 1998/70 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24994, 15.01.2003 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.
5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.
5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.
5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Incapacity, occupational, temporary / Illness / Insurance, social, allowance, duration period.

Headnotes:

The principle of the social state governed by the rule of law provided in Article 2 of the Constitution means that the State has the duty to deal with the social conditions and welfare of its citizens and to provide a minimum of standard of living. The limitation on the period of receiving benefits for inability to work is contrary to the Constitution insofar as, from the point of view of social security, there is no difference between an illness caused by working conditions and other kinds of illnesses.

Summary:

The 10th Chamber of the Court of Cassation applied to the Constitutional Court alleging that Article 37.1 of the Law on Social Security was contrary to the Constitution. According to the alleged provision, benefits for inability to work were limited to 18 months. That is to say, where a worker is temporarily unable to work because of an illness caused by working conditions, his or her benefits for inability to work are paid only for 18 months. Even though the illness lasts for more than 18 months, the benefits are not paid under the provisions of the Law on Social Security.

According to Article 11 of the Law on Social Security, where a worker is unable to work because of an illness caused by working conditions, there is no time-limit for receiving benefits for inability to work. On the

other hand, where a worker is unable to work because of an illness other than one caused by working conditions, the benefits are granted for 18 months. The Constitutional Court noted that whether a worker was unable to work either because of an ordinary illness or an illness caused by working conditions, he/she would not receive his/her wage. Whatever the reason, there was no difference between the two kinds of workers with illnesses, since both groups of workers were unable to work. Consequently, it was contrary to Article 10 of the Constitution, i.e. the principle of equality.

Moreover, Article 17.1 of the Constitution provides: "…[e]veryone has the right to life and the right to protect and develop his material and spiritual entity". A duty was imposed on the State to remove all kinds of obstacles to these rights. The State should protect the weak in society against the powerful. For that reason, regulations on social security must not contain any provisions that considerably harm or abolish "the right to protect and develop his material and spiritual entity".

Under the impugned provision, the benefits for the temporary inability to work are limited to 18 months, even though a worker is still undergoing treatment. At the end of that period, the benefits are cut off. That kind of limitation is not compatible with "the requirements of the democratic order of the society" as set out in Articles 13 and 17 of the Constitution.

According to Article 60 of the Constitution "Everyone has the right to social security. The state shall take the necessary measures and establish the organisation for the provision of social security." This provision is aimed at providing a minimum and humanitarian standard of living against social risks such as senility, maternity, accident, disability and illness. Social security is one of the most fundamental means of ensuring the happiness of the individual within the society. In modern times, the social state governed by the rule of law is under the obligation to protect individuals against social risks and to ensure the individuals can look forward confidently. One of the institutions founded to accomplish these duties is the Institution of the Social Security; it has the duty of administering the social security system.

Since the right to social security set out in Article 60 of the Constitution is related to the right to protect and develop the material and spiritual entity of individual, the State must not adopt or implement any rules that restrict or abolish the right to live.

Under the impugned provision, the benefits for the temporary inability to work are cut off after 18 months. Consequently, while a worker enjoys the benefits of health insurance, he/she is deprived of the financial support that would enable him/her to continue living. It is clear that Article 11 of the Law on Social Security interrupts the right to social security and leaves the worker without any security in his/her life.

For these reasons, the Constitutional Court found that the impugned provision was in conflict with Articles 2, 10, 13, 17 and 60 of the Constitution and that it should be annulled.

Languages:

Turkish.

Identification: TUR-2003-1-004

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 12.11.2002 / **e)** K 2002/104 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 25063, 29.03.2003 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
5.2 **Fundamental Rights** – Equality.
5.3.12 **Fundamental Rights** – Civil and political rights – Security of the person.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Independence.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Family, constitutional protection / Violence, domestic, injunction / Measure, warning, obligation for court.

Headnotes:

In order to protect the family in society, the Parliament may take the necessary measures against violence within the family.

It is not unconstitutional to oblige a court to warn a spouse at fault to comply with the measures taken by the judge and to warn him/her that if he/she does not do so, he/she shall be subject to a detention order and imprisonment.

Summary:

The Gülyalý Peace Court brought an action in the Constitutional Court alleging that the provisions of Article 1.1 and 1.2 of the Law on the Protection of The Family (4320) were contrary to the Constitution.

Article 1.1 of the Law 4320 states that where one of the spouses, children or other members of the family living in the same home reports that he/she was subjected to violence within the family, the judge shall take one or more of the measures listed in the article. According to that article, the measures may be directed against one of the spouses, but not against the children or other members of the family.

Article 1.2. of that Law provides that the measures taken by the judge may not exceed 6 months. The spouse is to be informed that if he/she does not comply with the terms of the injunction(s), he/she shall be detained and shall be sentenced to three-to-six months' imprisonment.

The Peace Court alleged that the article did not provide for an injunction if the violence came from the children or other members of the family. According to that Court, that was contrary to the equality principle set out in Article 10 of the Constitution.

The reasoning of the article is: "... it is beyond doubt that the idea of the family protection is first of all to form families within the meaning of the Civil Code ... The family is a sacred basis from the point of national life. Therefore, the State shall protect the welfare and peace of the family".

Article 41 of the Constitution stresses that the family is the foundation of the Turkish society. That same article provides that the state must take the necessary measures and establish the necessary organisation to ensure the peace and welfare of the family. That article, whose aim is to ensure the constitutional guarantee of the family, imposes on the State some duties related to the family. Those duties concern the improvement and the development of conditions within the family. The aim is to protect the unity and the integrity of the family consisting of the spouses and children. Consequently, the Law 4320 constitutes one of the regulations provided for by Article 41 of the Constitution.

Since the responsibilities and duties of the spouses differ from those of other members of the family, an equal comparison cannot be made between them. Moreover, the Parliament may at any time take the necessary measures against the violent acts of other members of the family.

Consequently, the Constitutional Court found that Article 1.1 was not contrary to Article 10 of the Constitution and the request had to be rejected.

Secondly, Article 1.2 of the Law 4320 states that the spouse at fault is to be informed that if he/she does not comply with the measures taken by the judge, he/she shall be detained and sentenced to imprisonment. The Peace Court alleged that that provision was contrary to Article 138.2 of the Constitution.

Article 138.2 of the Constitution states: "…[n]o organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, make recommendations or suggestions".

Since in the Turkish legal system, detention is a preventive measure, a judge uses his/her discretionary power on the subject, after taking into account the provisions of the Criminal Procedure Code.

The sentence "the spouse at fault shall be warned that he/she shall be detained and sentenced to imprisonment in case he/she acts against the measures" in Article 1.2 amounts to a special warning regulation. The spouse is informed that if he/she does not comply with the order aimed at preventing violence within the family, the consequences of his/her behaviour will come into effect.

Where the public prosecutor subsequently requests that the spouse at fault be detained, the judge freely evaluates whether the necessary general or special conditions for detention exist. Therefore, the impugned provision is not contrary to the principle of the separation of powers or to Article 138 of the Constitution. The Constitutional Court unanimously rejected the request.

Languages:

Turkish.

Ukraine
Constitutional Court

Important decisions

Identification: UKR-2003-1-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 16.01.2003 / **e)** 1-rp/2003 / **f)** Constitutionality of the provisions of the Constitution of the Autonomous Republic of Crimea and the Law of Ukraine "On approval of the Constitution of the Autonomous Republic of Crimea" (case on the Constitution of the Autonomous Republic of Crimea) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 5/2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.8 **General Principles** – Territorial principles.
4.8.5 **Institutions** – Federalism, regionalism and local self-government – Definition of geographical boundaries.
4.8.7 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects.
4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.

Keywords of the alphabetical index:

Territorial unit, autonomous, status / Symbol.

Headnotes:

The Autonomous Republic of Crimea is an inseparable constituent part of Ukraine. The status of the Autonomous Republic of Crimea characterises it as an administrative/territorial unit, a constituent part of Ukraine. Any territorial changes of the Autonomous Republic of Crimea are only possible where they are done in accordance with the Constitution of Ukraine and the laws of Ukraine on a decision of the Parliament of Ukraine *(Verkhovna Rada)*.

Summary:

The Constitution of Ukraine lays down the status of the Autonomous Republic of Crimea.

According to the laws of Ukraine, the Autonomous Republic of Crimea has a right to its own symbols. The symbols of the Autonomous Republic of Crimea are not the state symbols.

The Budget Code of Ukraine provides for the independence of the budget of the Autonomous Republic of Crimea, the drawing up of which shall be done taking into account the Law of Ukraine "On approval of the Constitution of the Autonomous Republic of Crimea".

The provisions of the Constitution of the Autonomous Republic of Crimea on the territory of the Autonomous Republic of Crimea (the name of Chapter 2 and Article 7.1 and 7.2), on the symbols of the Autonomous Republic of Crimea (Article 8.1 of the Constitution of the Autonomous Republic of Crimea), on the transfer to the budget of the Autonomous Republic of Crimea of taxes collected in the territory thereof (Article 18.1.13 and 18.1.14) and the provisions of Articles 1 and 2 of the Law of Ukraine "On approval of the Constitution of the Autonomous Republic of Crimea" comply with the Constitution of Ukraine.

Languages:

Ukrainian.

Identification: UKR-2003-1-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 28.01.2003 / **e)** 2-rp/2003 / **f)** Official interpretation of the provisions contained in Article 106.1.15 of the Constitution (case on the powers of the President of Ukraine to reorganise the central bodies of executive power) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 6/2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.1.2 **Institutions** – Head of State – Powers – Relations with the executive powers.
4.6.4.1 **Institutions** – Executive bodies – Composition – Appointment of members.

Keywords of the alphabetical index:

Executive body, reorganisation.

Headnotes:

The provisions contained in Article 106.1.15 of the Constitution shall be understood in such a way that when exercising the powers of reorganising the ministries and other central bodies of the executive power, the President of Ukraine on proposal of the Prime Minister of Ukraine, acting within the limits of funding envisaged for the maintenance of bodies of the executive power, may reorganise ministries and other central bodies of the executive power set out in the Constitution, without changing the name of those bodies and their core assignment following from the name.

Summary:

Separate treatment in the Constitution, whether directly or indirectly, of the names of the ministries and other central bodies of the executive power, fixes to a certain extent their core assignment. Therefore, the character of the activity of the relevant bodies is thereby determined to a certain extent.

Having specified the names of the individual ministries and other central bodies of executive power, the Constitution thereby provided for their existence and a certain stability of functioning.

The setting out in the Constitution, whether directly or indirectly, of the names of the ministries and other central bodies of the executive power predetermines the content of the powers of the President of Ukraine as to their reorganisation. Reorganisation of such bodies may not change their names and core assignment following from the names, as this would lead to changes in the mechanism laid down by the Constitution of the exercise of state power by individual state bodies or affect the scope of the constitutional powers of those bodies, in particular, the powers of the Parliament of Ukraine *(Verkhovna Rada)* as to granting consent to the appointment and dismissal of the officials specified in the Fundamental Law of Ukraine.

Languages:

Ukrainian.

Identification: UKR-2003-1-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 30.01.2003 / **e)** 3-rp/2003 / **f)** Constitutionality of the provisions contained in Articles 120.3, 234.6 and 236.3 of the Code of Criminal Procedure of Ukraine (case on consideration by the court of individual resolutions of investigator and prosecutor) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 6/2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.7.2 **Institutions** – Judicial bodies – Procedure.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Criminal investigation, preliminary, time-limit, extension / Investigating bodies, acts, appeal.

Headnotes:

The determination of the reasonable length of pre-trial investigation depends upon many factors, such as the scope and complexity of the case, number of investigatory acts, number of victims and witnesses, the need for expert examination and reports thereof, etc. However, in no event shall the length of pre-trial investigation go beyond the limits of necessity. Pre-trial investigation shall be completed in each case without infringement of the right to a fair trial and the right to an effective remedy set out in Articles 6 ECHR and 13 ECHR.

The constitutional right of individuals to judicial protection is restricted by the following: not permitting a court to examine a complaint on the resolution to initiate criminal proceedings against individuals at the stage of pre-trial investigation; adjournment of the review of such complaints by the court to the preliminary criminal proceedings or to the examination of the merits of the case; and the delay of judicial review.

Summary:

Article 120 of the Code of Criminal Procedure of Ukraine lays down a general rule that the pre-trial investigation should be completed within two months, and the extension of that length of time to six or more months is an exception to that rule. Respecting the

length of time for investigation is one of the conditions for the prompt and complete solving of crimes.

The provisions of Article 120.3 of the Code of Criminal Procedure providing for the possibility of continuing the pre-trial investigation beyond six months comply with the Constitution.

The provisions of Articles 234.6 and 236.3 of the Code of Criminal Procedure provide that a complaint on acts of investigators and prosecutors is to be examined by the court of the first instance at the preliminary examination of cases or at the examination on the merits.

Justice is in essence only recognised as such only where it complies with the requirements of integrity and provides for an effective enforcement of rights. The right to an effective remedy is set out in the International Covenant on Civil and Political Rights (Article 2) and in the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 13).

The right to judicial protection is a constitutional right. The provisions of Articles 234.6 and 236.3 of the Code of Criminal Procedure, by which a court is not permitted to examine the complaints on the resolutions of investigators and prosecutors to initiate criminal proceedings against individuals at the pre-trial investigation stage, restrict the constitutional right of individuals to judicial protection.

The provisions of Article 234.6 and 236.3 of the Code of Criminal Procedure, providing that complaints on acts of investigators and prosecutors shall be examined by the court of first instance at the preliminary examination of cases or at the examination on the merits, fail to comply with the Constitution.

Languages:

Ukrainian.

Identification: UKR-2003-1-004

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 27.02.2003 / **e)** 4-rp/2003 / **f)** Official interpretation of the provisions of Article 5 of the Law of Ukraine “On the status of veterans of military service and veterans of internal bodies and their social protection” (case on the veterans of internal bodies) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 11/2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.21 **General Principles** – Equality.
4.6.4.4 **Institutions** – Executive bodies – Composition – Status of members of executive bodies.
4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.

Keywords of the alphabetical index:

Internal security, body, veteran, status.

Headnotes:

The provisions of Article 5 of the Law of Ukraine “On the status of veterans of military service and veterans of internal bodies and their social protection” are to be understood in such a way that citizens of Ukraine are recognised as veterans of internal bodies upon fulfilment of the conditions laid down by the said article, irrespective of the time of their discharge or retirement from such bodies.

Summary:

Under the Law of Ukraine “On the status of veterans of military service and veterans of internal bodies and their social protection”, the status of veterans of internal bodies is not related to the time of dismissal of an individual from those bodies. The text of Article 5 of the Law shows that individuals are deemed to be veterans of internal bodies on fulfilment of the following conditions: citizenship of Ukraine; service without fault; at least 25 years of service in calendar terms or at least 30 years of service in preferential terms (out of which at least 20 years of service must be in calendar terms); discharge or retirement (a) according to the laws of Ukraine, (b) according to the laws of the former USSR, (or) according to the laws of the CIS countries. In those provisions, the expression “discharge or retirement according to the laws of the former USSR” explicitly addresses the issues under dispute. In the event of a discharge of an employee of an internal body after 1 January 2002, some laws of the former USSR may at times exclusively apply

for estimating the years of service (including those under preferential terms), whereas the act of discharge or retirement is to be based exclusively on the laws of Ukraine or (in individual cases) of the CIS countries. The interpretation of the provisions of Article 5 as relating to discharge or retirement according to the law of the former USSR shows that the legislator also meant those citizens dismissed from internal bodies before 1 January 2002. Therefore, the status of veteran of an internal body or internal bodies, on condition of fulfilling the rest of the above-mentioned conditions, is to be granted irrespective of the time when the employee of that body/those bodies was discharged or retired.

Moreover, the Constitutional Court came to the conclusion that referring to irreversibility of the past laws and other legal acts at the time of considering the recognition of Ukrainian citizens as veterans of internal bodies and granting them the relevant privileges was erroneous. If the conditions of Ukrainian citizenship, service without fault for at least 25 calendar years or 30 years in preferential terms (out of which at least 20 years must be service in calendar terms) and discharge or retirement according to the laws of Ukraine, the former USSR or the CIS countries had already been fulfilled at the time of the entry into force of the Law of Ukraine On amending the Law of Ukraine “On the status of the veterans of military service and their social protection”, i.e. as of 1 January 2002, unless otherwise specified by legislator, the persons fulfilling those conditions qualify under that Law.

Languages:

Ukrainian.

Identification: UKR-2003-1-005

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 05.03.2003 / **e)** 5-rp/2003 / **f)** Official interpretation of the provisions contained in Articles 86 and 89.2 of the Constitution of Ukraine, Articles 15.2 and 16.1 of the Law of Ukraine “On the status of the National Deputy of Ukraine” (case on applications of the National Deputy of Ukraine to the National Bank of Ukraine) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 12/2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.5.2.2 **Institutions** – Legislative bodies – Powers – Powers of enquiry.
4.10.5 **Institutions** – Public finances – Central bank.

Keywords of the alphabetical index:

Parliament, member, enquiry / Parliament, member, right to request information, conditions / Bank secret / Parliament, committee, enquiry.

Headnotes:

A National Deputy of Ukraine has a right, in matters connected with the activities of deputies to make an enquiry or send a deputy’s petition to the National Bank of Ukraine seeking information constituting a bank secret and information on matters covered by the activities of the National Bank of Ukraine.

The Committee of the Parliament of Ukraine *(Verkhovna Rada)* has a right to approach the National Bank of Ukraine for information constituting a bank secret, to take supervisory action and influence measures as to banks and individuals where such matters are connected with the legislative work, preparation and preliminary consideration of the matters referred to tin the powers of the Parliament.

The National Bank of Ukraine must act in compliance with the requirements of banking law and inform a National Deputy of Ukraine and the Committees of the Parliament about the results of its consideration of such enquiry or request.

Summary:

According to Article 86.1 of the Constitution, a National Deputy of Ukraine has the right to address an enquiry made during the sessions of the Parliament *(Verkhovna Rada)* to the addressees indicated in the first part of Article 86.1 and Article 85.1.34 of the Constitution. The content of the enquiry must be connected with the competence of the addressee.

The right to use a deputy’s petition is a constituent part of the powers of the National Deputies of Ukraine. A deputy’s petition has no imperative character and shall be made by the National Deputies of Ukraine independently. Under Article 19.3 of the Law of Ukraine “On the status of the National Deputy of Ukraine”, a National Deputy shall have the right to know any confidential or secret information on the matters connected with the activities of deputies.

The basis for an enquiry or a petition by a National Deputy on those matters may be a complaint or an application by a voter, information (documents) furnished by citizens and/or legal entities on an infringement of the banking law of Ukraine by banks and/or individuals, and capable of being checked by the National Bank of Ukraine.

Upon receipt of an enquiry or petition whose contents do not comply with the law or go beyond the scope of the competence of the addressee, the addressee shall not answer the enquiry or accept the suggestions.

As to matters under their supervision, the Committees of the Parliament have the right to address state bodies, institutions, establishments, organisations and companies irrespective of their ownership form. The committees of the Parliament have the right to approach, among others, the National Bank of Ukraine or officials thereof, with written suggestions to take certain actions, to give official explanations or to express an opinion on individual matters and, in particular, to furnish information constituting a bank secret.

In case of receipt of a petition from the committees of the Parliament by the National Bank of Ukraine or officials thereof, the latter shall consider it. At the same time, the official persons of the National Bank of Ukraine should act in accordance with the requirements laid down in the Law of Ukraine "On the National Bank of Ukraine", "On banks and banking activity" and give a written response with reasons on the results of its consideration, irrespective of whether the suggestions are accepted or not.

Languages:

Ukrainian.

Identification: UKR-2003-1-006

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.03.2003 / **e)** 6-rp/2003 / **f)** Compliance with the Constitution of Ukraine of exercising by the President of Ukraine of his right to veto enacted by the *Verkhovna Rada* of Ukraine Law of Ukraine "On making amendments to Article 98 of the Constitution of Ukraine" and suggestions thereto (case on the right to veto the Law on making amendments to the Constitution of Ukraine) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

1.1.4.1 **Constitutional Justice** – Constitutional jurisdiction – Relations with other Institutions – Head of State.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
4.4.1.1 **Institutions** – Head of State – Powers – Relations with legislative bodies.
4.5.6 **Institutions** – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Veto, presidential / Constitutional Court, jurisdiction, limit.

Headnotes:

The Constitution contains no reservations as to the impossibility of the President of Ukraine to exercise his right to veto any Law enacted by the Parliament *(Verkhovna Rada)*, including the Laws amending the Constitution.

The Constitution specifies no grounds or reasons on the basis of which the President of Ukraine may send back Laws to the Parliament for re-consideration, or requirements as to the contents of the suggestions of the Head of State to the Law. Reviewing the contents of the President's suggestions as to the Law upon his sending it to the Parliament back for re-consideration does not fall within the competences and jurisdiction of the Constitutional Court.

Summary:

The procedure for enactment by the Parliament *(Verkhovna Rada)* of Laws amending the Constitution of Ukraine, set out in Chapter XIII of the Fundamental Law of Ukraine, does not provide for a special procedure for the signing and the publication of such Laws.

At the same time, the Constitution contains no reservations as to the impossibility of the President's exercise of his right to veto any Law enacted by the Parliament, including those amending the Constitution, i.e. the President has a right to veto all those Laws. Those are the legal views stated in the Opinion of the Constitutional Court no. 1-v/2001 on 14 March 2001 (a

case on the amendment of Articles 84 and 85 of the Constitution and others).

Therefore, the provisions of Article 94 of the Constitution and those of Article 106.1.29 and 106.1.30 of the Constitution, which govern the procedure for signing and official publication of the Laws, the President's exercise of his veto right with a subsequent sending back for re-consideration to the Parliament of the Laws with written suggestions and reasons, and the procedure for the re-consideration of such Laws, also apply to the Laws enacted by the Parliament according to Chapter XIII of the Constitution.

The President may exercise his right to veto Laws enacted by the Parliament upon receipt of such Laws for signing at the relevant stages of the legislative process. That is a constitutional and legal form of participation of the President in the legislative process.

Signing or sending back the Laws to the Parliament for re-consideration is an exclusive constitutional right of the President. The President's exercise of the veto right, as enacted by the Parliament in the Law of Ukraine "On making amendments to Article 98 of the Constitution of Ukraine" by sending a Law back to the parliament for re-consideration, complies with the Constitution.

The constitutional proceedings in the case under review relating to the compliance with the Constitution of the contents of the President's suggestions to the Law of Ukraine "On making amendments to Article 98 of the Constitution of Ukraine" is dismissed on the basis of Article 45.3 of the Law of Ukraine "On the Constitutional Court of Ukraine" for lack of jurisdiction of the Constitutional Court to consider such matters.

Languages:

Ukrainian.

Identification: UKR-2003-1-007

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 10.04.2003 / **e)** 7-rp/2003 / **f)** Official interpretation of the provisions contained in Article 17.2 and 17.3 and Article 27.2 of the Law of Ukraine "On the status of the National Deputy of Ukraine" (case on guarantees of activities of national deputies of Ukraine) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.1.1 **Institutions** – Head of State – Powers – Relations with legislative bodies.
4.5.9 **Institutions** – Legislative bodies – Liability.
4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.

Keywords of the alphabetical index:

Parliament, member, access to governmental bodies / Parliament, member, administrative responsibility.

Headnotes:

An urgent reception is a previously agreed, extraordinary reception of a National Deputy of Ukraine concerning matters connected with the activities of deputies, which may not be postponed for a long period of time.

The urgent reception of a National Deputy of Ukraine does not apply to the President of Ukraine.

The right of the National Deputies of Ukraine to visit freely state and local self-government bodies and the right of unobstructed access to all companies, institutions, and organisations must be exercised in such a way as to take into account the special method of access to individual facilities, as established by the Law.

A National Deputy of Ukraine may, without consent of the Parliament *(Verkhovna Rada)*, be subject to administrative responsibility, unless that liability is connected with the detention or arrest of the National Deputy of Ukraine.

Summary:

The Constitution of Ukraine sets out an exhaustive list of the powers of the President. Consequently, the obligation to receive urgently the National Deputies of Ukraine concerning matters of the activities of the deputies may not be considered as an obligation (power) of the President.

A National Deputy may approach the President with a petition for an urgent reception, but the President has the sole discretion to make a decision.

According to Article 80 of the Constitution, the National Deputies cannot be held criminally liable, detained or arrested without the consent of the Parliament *(Verkhovna Rada).*

National Deputies are subject to administrative liability, unless that liability is connected with their detention or arrest.

Languages:

Ukrainian.

Identification: UKR-2003-1-008

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 10.04.2003 / **e)** 8-rp/2003 / **f)** Official interpretation of the provisions of Article 7.1 of the Civil Code of Ukrainian SSR (case on dissemination of information) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.29 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Information, dissemination / Appeal, individual, right.

Headnotes:

The provisions of Article 7.1 of the Civil Code including the term "disseminated the following information" are to be understood in a constitutional appeal in such a way that the inclusion of information in letters, applications and complaints to law enforcement bodies by an individual, in whose opinion officials or servants of those bodies in carrying out their duties violated the right of an individual, may not be deemed to be dissemination of information discrediting honour, dignity or business reputation or damaging the interests of those officials or servants.

Inclusion of deliberately false information in letters, applications and complaints to law enforcement bodies entails the liability laid down by the laws of Ukraine.

Summary:

Article 7.1 of the Civil Code provides that "a citizen or an organisation is entitled to a court declaration that information has not been proven, where information is invalid or false, discredits their honour, dignity or business reputation or damages their interests, unless the individual who disseminated such information, proves the validity thereof".

The opinion of the Constitutional Court is that citizens' appeals to law enforcement bodies, containing certain information on the failure to respect the laws by officials or servants, shall be transmitted or notified for the purpose of being checked by other officials lawfully authorised to do so rather than with the purpose of publicising such information. Therefore, such appeals, pursuant to Article 7.1 of the Civil Code, may not be deemed to be the dissemination of information that discredits honour, dignity or business reputation or damages the interests of officials or servants of law enforcement bodies.

At the same time, inclusion in the appeals to law enforcement bodies of deliberately false information shall entail disciplinary, civil, administrative or criminal liability in accordance with the laws of Ukraine.

Languages:

Ukrainian.

Identification: UKR-2003-1-009

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 17.04.2003 / **e)** 9-rp/2003 / **f)** Constitutionality of the provisions contained in Article 3.7 of the Law of Ukraine "On the elections of the deputies of the *Verkhovna Rada* of the Autonomous Republic of Crimea" (case on elections of the deputies of the *Verkhovna Rada* of the Autonomous Republic of Crimea) / **g)** / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.9.7.3 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Registration of parties and candidates.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.3.38.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Election, candidacy, restriction.

Headnotes:

The rights of the citizens of Ukraine set out in Article 38.1 of the Constitution, *inter alia*, to be elected to state and local self-government bodies, amount to, by implication, a right to be a candidate for elections upon fulfilment of the necessary conditions. By implication of Article 24.1 of the Constitution, all citizens shall be treated equally as to both that right and the other constitutional rights and freedoms.

Summary:

The Parliament *(Verkhovna Rada)* of the Autonomous Republic of Crimea petitioned the Constitutional Court seeking the consideration of the compliance with the Constitution of Ukraine of the provisions contained in Article 3.7 of the Law of Ukraine "On the elections of the deputies of the Parliament of the Autonomous Republic of Crimea", whereby servicemen of armed forces, frontier troops, department of state protection, civil defence forces, Security Service of Ukraine and other military units organised according to the laws of Ukraine, except for those fulfilling a term military service or alternative (military) service, privates and officers of internal bodies of Ukraine, judges and prosecutors, and civil servants may be registered as candidates for deputies, if at the time of registration they file with the district electoral commissions their personal undertaking to cease carrying out their service duties for the period of electoral campaign.

In the opinion of the Parliament of the Autonomous Republic of Crimea, the provisions of Article 3.7 of the Law violate the principle of equality of constitutional rights and freedoms of citizens, set out in Article 24.1 of the Constitution of Ukraine.

The Constitution of Ukraine set out the principles of electoral law of Ukraine: the elections to the state and local self-government bodies shall be free and shall be based on universal, equal, and direct electoral rights by secret vote; the voters shall be guaranteed the free declaration of their intent.

The provisions contained in Article 3.7 of the Law of Ukraine "On the elections of the deputies of the Parliament of the Autonomous Republic of Crimea", which restrict the freedom to be a candidate of servicemen of armed forces, frontier troops, department of state protection, and civil defence forces, Security Service of Ukraine and other military units organised according to the laws of Ukraine, except for those fulfilling a term military service or alternative (military) service, privates and officers of the internal bodies of Ukraine, judges and prosecutors and civil servants, do not comply with the Constitution of Ukraine.

Languages:

Ukrainian.

United Kingdom
House of Lords

Important decisions

Identification: GBR-2003-1-001

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 30.01.2003 / **e)** UKHL 1 / **f)** The Queen v. H. / **g)** [2003] 1 WLR 411 / **h)**.

Keywords of the systematic thesaurus:

5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.13.9 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial by jury.

Keywords of the alphabetical index:

European Convention of Human Rights, direct application / Criminal procedure / Defendant, unfit to stand trial.

Headnotes:

Where a defendant had been found unfit to stand trial a jury could go on to consider whether the defendant had committed the alleged acts. There was no determination of a criminal charge and therefore no breach of Article 6 ECHR.

Summary:

H. was charged with two offences of indecent assault on a 14-year-old girl. At the time of the alleged offences H. was 13 years old. Before his trial he was examined by psychiatrists who were of the opinion that he was unfit to stand trial. A jury was then empanelled to determine whether H. was fit to plead and stand trial under Section 4 of the Criminal Procedure (Insanity) Act 1964 (1964 Act). The jury found that H. was under a disability and therefore unfit to plead.

Following that determination, Section 4A of the 1964 Act requires that a jury determine, on the evidence available, whether the defendant committed the act or made the omission charged against him. Thus, at a further hearing a different jury, as directed by the judge, found that H. had done the acts alleged against him. H. was subsequently given an absolute discharge and his father was directed to register H. as a sex offender. H. appealed against the finding of the second jury, contending that the procedure followed was incompatible with Article 6 ECHR.

The House of Lords held that the Section 4A procedure did not have to comply with Article 6 ECHR because it did not involve the determination of a criminal charge. Their lordships noted that Section 4A of the 1964 Act was introduced in order to prevent the unnecessary detention of an individual. For example, prior to Section 4A, where a defendant had confessed to a murder and subsequently been found unfit to plead she had nevertheless been detained as potentially dangerous when that inference of risk was drawn from the commission of an act (the killing of an individual) that subsequent investigation had shown she did not commit.

Applying the case of *Engel v. The Netherlands*, European Court of Human Rights [1976] EHRR 647, the House of Lords held that:

i. domestic law did not treat the Section 4A procedure as involving the determination of a criminal charge,
ii. the Section 4A procedure lacked the features of a criminal process and
iii. the procedure could not be criminal because it could not result in the imposition of a penalty.

It was held, therefore, that under the Section 4A procedure the defendant was not charged with a criminal offence within Article 6 ECHR. In any event, it was held that the procedure, if properly conducted, was fair and compatible with the rights of the accused person.

Cross-references:

- Case *Engel and others v. the Netherlands*, 08.06.1976, *Special Bulletin ECHR* [ECH-1976-S-001]; Vol. 22, *Series A of the Publications of the Court*.

Languages:

English.

Identification: GBR-2003-1-002

a) United Kingdom / **b)** Court of Appeal / **c)** / **d)** 18.03.2003 / **e)** EWCA Civ 364 / **f)** The Queen (on the application of Q and Others) v. Secretary of State for the Home Department / **g)** / **h)**.

Keywords of the systematic thesaurus:

5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
5.3.11 **Fundamental Rights** – Civil and political rights – Right of asylum.
5.3.13.1.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Non-litigious administrative proceedings.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Asylum, seeker, financial support, refusal / Asylum, policy / Administrative procedure, proof / Asylum, request, immediate.

Headnotes:

Financial support could be withheld from those who did not claim asylum as soon as reasonably practicable upon entry to the United Kingdom if a fair procedure was in place to make such an assessment and if it did not leave the applicant destitute.

Summary:

Section 55 of the Nationality Immigration and Asylum Act 2002 (the 2002 Act) states that where an asylum seeker does not satisfy the Secretary of State that they had made a claim for asylum 'as soon as reasonably practicable' after entry into the United Kingdom then the Secretary of State may not arrange for or provide support to a person who later makes a claim for asylum. Section 55.5 states, however, that the refusal of support in such circumstances does not absolve the Secretary of State from fulfilling his obligations under the European Convention of Human Rights.

The applicants arrived in the United Kingdom and claimed asylum. They did not, however, claim asylum immediately upon entry. The applicants could not satisfy the Secretary of State that they had sought asylum as soon as reasonably practicable, thus no financial support for essential living needs or housing assistance was offered. The question therefore arose as to whether the Secretary of State could refuse to support the destitute without thereby subjecting them to inhuman or degrading treatment contrary to Article 3 ECHR or infringing their Article 8 ECHR (rights to the protection of private and family life).

The Court of Appeal held that the test as to whether an asylum seeker had claimed asylum 'as soon as reasonably practicable' was to be applied on the premise that the purpose of coming to the United Kingdom was to claim asylum, having regard to both the practical opportunity of claiming asylum and to the asylum seeker's personal circumstances.

The Court of Appeal held that in determining whether the applicant had sought asylum as soon as reasonably practicable the Secretary of State must act fairly. In the circumstances the system for making such determinations was not fair or fairly operated. This was because, amongst other things:

i. the purpose of the interview conducted by the Secretary of State with an asylum seeker upon an application for asylum was not explained,
ii. no regard was had to the applicants' state of mind upon arrival,
iii. fairness required that the Secretary of State ascertain the exact reasons why asylum was not claimed upon arrival; a standard questionnaire form was not sufficient,
iv. the applicant had not been given the opportunity to rebut any doubts as to his credibility.

The Court also held that the refusal of benefits to those who have not claimed asylum as soon as reasonably practicable could amount to inhuman or degrading treatment for the purposes of Article 3 ECHR. The inability of asylum seekers to obtain work except in limited circumstances coupled with the refusal of benefits and support in the 2002 Act amounted to a positive act of treatment. Therefore, if the Secretary of State was not satisfied that the applicant has sought asylum as soon as reasonably practicable it remained open to the applicant to claim support on the basis that it was necessary for the purpose of avoiding a breach of his rights under Article 3 ECHR or Article 8 ECHR. The Court held, however, that it was not unlawful for the Secretary of State to decline to provide support unless and until it was clear that charitable support had not been

provided and that the individual was incapable of fending for himself. The Secretary of State has not sought to appeal the decision.

Languages:

English.

Identification: GBR-2003-1-003

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 20.03.2003 / **e)** UKHL 14 / **f)** The Queen (Sivakumar) v. Secretary of State for the Home Department / **g)** [2003] 1 WLR 840 / **h)**.

Keywords of the systematic thesaurus:

5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
5.3.11 **Fundamental Rights** – Civil and political rights – Right of asylum.

Keywords of the alphabetical index:

Asylum, seeker, suspected terrorist / Asylum, request, assessment / Terrorism, asylum, exclusion / Torture, in police custody.

Headnotes:

Those assessing an asylum application should have regard to the cumulative effect of relevant facts surrounding the application, in particular any torture inflicted upon the applicant.

Summary:

The applicant ('S') was a Tamil from Jaffna which was the main centre in Sri Lanka for the activities of a terrorist organisation. S. was not a member of the organisation but on three occasions he was arrested by soldiers or police and severely tortured. S. then fled to the United Kingdom. The special adjudicator accepted the evidence of S. but nevertheless refused his application for asylum. The special adjudicator noted that the ill treatment that the applicant had received was not the result of any political opinions he might have been thought to hold, but of being suspected of involvement in terrorism. The special adjudicator concluded, therefore, that S. was not a refugee within the meaning of Article 1.A.2 of the Convention relating to the Status of Refugees and its Protocol.

The House of Lords held that not all acts of terrorism fall outside of the protection of the Convention; thus not all means of investigating suspected terrorist acts fall outside the protection of the Convention. Refugee status should be considered globally and proper regard should be had to the cumulative effect of the relevant facts. Particular weight should have been given to the extreme torture inflicted upon S.

Their lordships held that the special adjudicator had failed to consider whether the security services had mistreated S. for a reason additional to their suspicion that he was involved in a terrorist organisation. There was a reasonable likelihood that S. had been persecuted on grounds of race, membership of a particular social group or political opinion and that these potential grounds should, as a matter of law, also have been considered.

Languages:

English.

Identification: GBR-2003-1-004

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 20.03.2003 / **e)** UKHL 15 / **f)** Sepet and Bubul v. Secretary of State for the Home Department & United Nations High Commission for Refugees (Intervener) / **g)** [2003] 1 WLR 856 / **h)**.

Keywords of the systematic thesaurus:

5.3.11 **Fundamental Rights** – Civil and political rights – Right of asylum.
5.3.25 **Fundamental Rights** – Civil and political rights – National service.

Keywords of the alphabetical index:

Asylum, seeker / Asylum, request, refusal / Military service, duty / Military service, refusal.

Headnotes:

Potential imprisonment for refusing to undertake compulsory military service was not necessarily a sufficient basis upon which to afford refugee status to an applicant.

Summary:

The applicants were Turkish nationals of Kurdish origin who claimed asylum in the United Kingdom on the grounds that if they were returned to Turkey they would be required to undertake compulsory military service. Refusal to undertake military service could result in a prison sentence of between 6 months and 3 years.

The applicants did not claim, however, to have a conscientious objection to military service as such but objected to the policies of the then Turkish Government towards the Kurdish people. The applicants specifically objected to the possibility that, whilst serving with the Turkish army, they would be called upon to fight fellow Kurds. The Secretary of State therefore determined that the applicants were not refugees under Article 1.A.2 of the Convention relating to the Status of Refugees and its Protocol. That decision was upheld by the United Kingdom's special adjudicator, Immigration Appeal Tribunal and Court of Appeal and House of Lords.

The House of Lords held that on the particular facts the applicants were not entitled to asylum. The international instruments treated compulsory military service as an exception from the general prohibition on forced labour. Their lordships recognised that these instruments, like the European Convention on Human Rights, should be read as 'living documents' but held that there was no clear international consensus recognising a right to refuse to undertake military service on the grounds of conscience.

The House of Lords expressed the view that there was compelling support for the view that refugee status should be accorded to an individual who has refused to undertake compulsory military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses. Refugee status might also be afforded where someone was required to participate in a conflict condemned by the international community or where refusal to serve would earn a grossly excessive or disproportionate punishment. On the facts of this case, however, none of those categories applied.

Their lordships also held that in the circumstances the applicants were not being persecuted for a Convention reason. The fact that the applicants considered themselves to be persecuted on the grounds of their Kurdish ethnicity was irrelevant. What had to be considered was the reason operating in the mind of those who the applicants alleged were persecuting them. In the particular circumstances of the case anyone refusing to perform military service would be treated the same way whatever their personal reasons for refusing.

Languages:

English.

United States of America
Supreme Court

Important decisions

Identification: USA-2003-1-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 07.04.2003 / **e)** 01-1289 / **f)** State Farm Mutual Automobile Insurance Company v. Campbell / **g)** 123 *Supreme Court Reporter* 1513 (2003) / **h).**

Keywords of the systematic thesaurus:

3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
3.16 **General Principles** – Proportionality.
3.20 **General Principles** – Reasonableness.
3.22 **General Principles** – Prohibition of arbitrariness.
4.8.6.3 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Courts.
4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.
5.2 **Fundamental Rights** – Equality.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.36 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Damages, compensatory, amount / Damages, punitive, amount / Due process / Insurance, company / Civil proceedings / Damages, punitive, deterrence / Damages, punitive, retribution.

Headnotes:

The individual States possess discretion over the imposition of punitive damages in civil proceedings; however, the Federal Constitution places limitations on the amount of such awards, prohibiting imposition of grossly excessive or arbitrary punishments.

Courts reviewing punitive damages awards must insure that the measure of punishment is reasonable and proportionate to the amount of harm to the plaintiff and the amount of general damages recovered.

In reviewing punitive damages awards, courts must consider the degree of reprehensibility of the defendant's misconduct, the disparity between the actual or potential harm sustained by the plaintiff and the punitive damages award, and the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Summary:

In a civil proceeding in the State of Utah, the state court trial jury awarded 2.6 million U.S. dollars in compensatory damages and 145 million U.S. dollars in punitive damages to a husband and wife who had initiated a lawsuit against their automobile insurance company. The jury had earlier found the insurance company guilty of bad faith, fraud, and intentional infliction of emotional distress in connection with its handling of litigation against the husband and wife arising out of an automobile accident.

Compensatory damages and punitive damages serve different purposes. Whereas compensatory damages are intended to provide a plaintiff with relief from the tangible loss resulting from the defendant's wrongful conduct, punitive damages serve the broader public policy goals of deterrence and retribution.

While the individual States possess discretion over the imposition of punitive damages, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution places limitations on the amount of such awards, prohibiting imposition of grossly excessive or arbitrary punishments. Section One of the Fourteenth Amendment, in relevant part, prohibits the States from depriving any person of property “without due process of law”. In its case law, the U.S. Supreme Court has explained that these constitutional limitations protect elementary notions of fairness that dictate that a person receive fair notice not only of the conduct that will subject him or her to punishment, but also of the severity of the potential penalty. In addition, punitive damages serve the same purposes as criminal penalties, but defendants in civil proceedings do not receive the protections applicable in criminal proceedings.

In light of these concerns, the Supreme Court in *BMW of North America, Inc. v. Gore* (1996) set forth three guidelines for courts reviewing punitive damages awards to consider:

1. the degree of reprehensibility of the defendant's misconduct;
2. the disparity between the actual or potential harm sustained by the plaintiff and the punitive damages award; and

3. the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

In a later case, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001), the Court required appellate courts to conduct *de novo* (anew, without deference) review of trial courts' application of these guidelines.

In the instant case, the trial court reduced the jury award significantly, to one million U.S. dollars in compensatory damages and 25 million U.S. dollars in punitive damages. The Utah Supreme Court, applying the U.S. Supreme Court's three guidelines, reversed the trial court and reinstated the jury award.

On review of the Utah Supreme Court's decision, the U.S. Supreme Court ruled that it was error for the Utah Supreme Court to reinstate the punitive damages award. In finding the insurance company's conduct to be reprehensible, the Utah Supreme Court relied heavily on evidence that the insurer's unlawful acts were based on a company policy implemented on a widespread basis throughout the United States. However, the U.S. Supreme Court ruled that evidence of out-of-State conduct can not be used to punish a defendant for acts that were lawful in other jurisdictions. In addition, the Court stated, punitive damages could not be used to deter and punish conduct that was not related to the harm suffered by the plaintiffs. Applying its second guideline, the Court stated that it would not impose “rigid benchmarks” as to the permissible ratio of punitive damages to compensatory damages; however, courts must insure that the measure of punishment is reasonable and proportionate to the amount of harm to the plaintiff and the amount of general damages recovered. In the instant case, the Court recognized a presumption against an award with a 145-to-1 ratio. In regard to the third guideline, the Court concluded that the most relevant civil sanction available under Utah law would have been a 10,000 U.S. dollar fine for an act of fraud, and that such an amount is tiny compared to the punitive damages award. Therefore, the punitive damages award amounted to criminal sanctions, but without the protections to a defendant afforded in a criminal proceeding, and therefore could not be sustained.

In sum, the U.S. Supreme Court found the punitive damages award to be unreasonable and disproportionate, amounting to an arbitrary deprivation of the defendant's property. The Court therefore reversed the Utah Supreme Court's judgment and remanded the case back to the Utah courts for proper calculation of the amount of punitive damages.

Cross-references:

- *BMW of North America, Inc. v. Gore,* 517 *United States Reporter* 559, 116 *Supreme Court Reporter* 1589, 134 *Lawyer's Edition Second* 809 (1996);
- *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 *United States Reporter* 424, 121 *Supreme Court Reporter* 1678, 149 *Lawyer's Edition Second* 674 (2001).

Languages:

English.

Court of Justice of the European Communities and Court of First Instance

Important decisions

Identification: ECJ-2003-1-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 08.07.1999 / **e)** C-189/97 / **f)** European Parliament v. Council of the European Union / **g)** *European Court Reports*, I-4741 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.2.1.10 **Constitutional Justice** – Types of claim – Claim by a public body – Institutions of the European Union.
1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
4.17.1.1 **Institutions** – European Union – Institutional structure – European Parliament.
4.17.3 **Institutions** – European Union – Distribution of powers between Institutions of the Community.
4.17.4 **Institutions** – European Union – Legislative procedure.

Keywords of the alphabetical index:

European Parliament, capacity to bring action for annulment / European Parliament, safeguarding of its prerogatives / European Community, co-operation agreement, third country, budgetary implication.

Headnotes:

1. The European Parliament may bring an action before the Court for annulment of an act of the Council or the Commission provided that it does so in order to protect its prerogatives. That condition is satisfied where the Parliament indicates in an appropriate manner the substance of the prerogative to be safeguarded and how that prerogative is allegedly infringed.

By virtue of those criteria, an action founding on infringement of Article 190 of the EC Treaty (now Article 253 EC) is inadmissible where the Parliament, in alleging that the contested provisions are inadequately or incorrectly reasoned for the purposes of that article, fails to provide any relevant indication as to how that infringement, assuming that it has been committed, is such as to impair Parliamentary prerogatives. That is the position where the Parliament confines itself to arguing that the Council's amendment of the legal basis proposed by the Commission has affected the Parliament's powers, and fails to indicate how the mere fact that the contested regulation does not contain any specific reasoning in that respect could impair the Parliament's prerogatives.

2. In order to assess whether an agreement between the Community and a non-member country has important budgetary implications within the meaning of the second subparagraph of Article 228.3 of the EC Treaty (now, after amendment, Article 300.3.2 EC) and whether, accordingly, its conclusion requires the assent of the European Parliament, a comparison of the annual financial cost of the agreement with the overall Community budget scarcely appears significant, since appropriations allocated to external operations of the Community traditionally account for a marginal fraction of the Community budget.

However, comparison of the expenditure under an agreement with the amount of the appropriations designed to finance the Community's external operations offers a more appropriate means of assessing the financial importance which the agreement actually has for the Community. Where a sectoral agreement is involved, that analysis may be complemented by a comparison between the expenditure entailed by the agreement and the whole of the budgetary appropriations for the sector in question, taking the internal and external aspects together. However, since the sectors vary substantially in terms of their budgetary importance, that examination cannot result in the financial implications of an agreement being found to be important where they do not represent a significant share of the appropriations designed to finance the Community's external operations.

Summary:

The European Parliament brought an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for the annulment of Council Regulation no. 408/97 concerning the conclusion of an agreement on cooperation in the sea fisheries sector between the European Community and the Islamic Republic of Mauritania and laying down provisions for its implementation. In so far as it was based on Articles 43 and 228.3.2 of the EC Treaty

(now, after amendment, Articles 37 EC and 300.3.2 EC), the proposal for a regulation transmitted by the Commission should have been adopted after obtaining the Parliament's assent. However, taking the view that it needed to obtain a mere opinion, the Council replaced the basis proposed by the Commission with a reference to Article 43 of the EC Treaty in conjunction with Article 228.2 and 228.3.1 of the EC Treaty. The relevant committee of the Parliament approved the proposal for a regulation subject to a return to the legal basis proposed by the Commission, and the Parliament accordingly finally gave its assent to the adoption of the contested regulation. Nonetheless, disregarding the Parliament's opposition, the Council adopted Regulation no. 408/97 without returning to the basis proposed by the Commission. Claiming an infringement of its prerogatives, the Parliament then brought this action.

The Parliament raised two pleas in law in support of its action for annulment. It first maintained that the fisheries agreement with Mauritania had important budgetary implications for the Community. The contested regulation should accordingly have been concluded on the basis of Article 228.3.2 of the EC Treaty and should hence have been adopted with the Parliament's assent. It then noted that the Council had failed to state the reasons why it had changed the legal basis proposed by the Commission, in breach of Article 190 of the EC Treaty (now Article 253 EC). The Council, supported by the Spanish government, considered the action to be inadmissible in so far as it was based on infringement of Article 190 of the EC Treaty, since the Parliament had failed to provide any relevant indication as to how that infringement was such as to impair its prerogatives. It further argued that Article 228.3.1 of the EC Treaty constituted the appropriate legal basis for the adoption of the contested regulation, since the fisheries agreement in question did not have important budgetary implications within the meaning of Article 228.3.2 of the EC Treaty.

Ruling as to admissibility, the Court noted that the Parliament had confined itself to arguing that the Council's amendment of the legal basis proposed by the Commission had affected its powers, but had not, however, explained how the fact that the contested regulation did not contain any specific reasoning in that respect could in itself impair its prerogatives. It accordingly held the action to be inadmissible in so far as it was based on Article 190 of the EC Treaty.

On the merits, the Court sought to clarify the criteria to be taken into account to assess whether an agreement had important budgetary implications within the meaning of Article 228.3.2 of the EC Treaty. Applying those criteria to the case before it, it held that the fisheries agreement with Mauritania did not have such implications. The Council had accordingly been right to make Article 228.3.1 of the EC Treaty the basis for the contested regulation. The action was dismissed.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2003-1-002

a) European Union / **b)** Court of Justice of the European Communities / **c)** Third Chamber / **d)** 07.09.1999 / **e)** C-409/96 P-DEP / **f)** Commission of the European Communities v. Sveriges Betodlares Centralförening and Sven Åke Henrikson / **g)** *European Court Reports*, I-4939 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.4.9.3.3 **Constitutional Justice** – Procedure – Parties – Representation – Representation by persons other than lawyers or jurists.
1.4.14 **Constitutional Justice** – Procedure – Costs.

Keywords of the alphabetical index:

Institution, representation / Costs, expenses, reimbursement, conditions.

Headnotes:

When, in proceedings before the Court, an institution avails itself of the option open to it under Article 17.1 of the EC Statute of the Court of Justice to have recourse to the assistance of a lawyer or to appoint as an agent a person who is not a member of its staff, the remuneration of that lawyer or agent comes within the concept of 'expenses necessarily incurred by the parties for the purpose of the proceedings' within the meaning of Article 73.b of the Rules of Procedure, pursuant to which they may therefore be recovered. When, on the other hand, an institution thinks that its interests will be better served if it is represented by one of its officials, acting as agent, it cannot claim reimbursement under Article 73.b in respect of the

work performed by the agent in the course of the proceedings, that is to say, it cannot recover a portion of the remuneration payable to that official under the Staff Regulations. That remuneration constitutes the counterpart for the official's performance of his duties as a whole, which may include defence of the interests of the institution before the Court. Consequently, it cannot be regarded as having been disbursed 'for the purpose of the proceedings'. The position is different as regards expenses which are separable from the internal activity of an institution, such as travel and subsistence expenses necessarily incurred in connection with the proceedings.

Summary:

By an Order of 18 December 1997, *Sveriges Betodlares and Henrikson/Commission* [C-409/96 P, *European Court Reports* p. I-7531], the Court of Justice of the European Communities dismissed as clearly unfounded an appeal against the Court of First Instance's Order of 4 October 1996, *Sveriges Betodlares and Henrikson/Commission* [T-197/95, *European Court Reports* p. II-1283], and ordered the appellants to pay the costs. Wishing to be reimbursed for the remuneration paid to the official who had represented it, the Commission requested the Court to rule on the amount of recoverable costs pursuant to Article 74 of its Rules of Procedure. In support of its request, the Commission mainly argued that, contrary to the finding in the Order of 21 June 1979, *Dietz/Commission* [126/76 costs, *European Court Reports* p. 2131], the distinction between agents and lawyers drawn in Article 17 of the Statute (EC) of the Court of Justice meant that the institutions of the Community were necessarily represented by officials in their employ. The recoverable costs under Article 73.b of the Rules of Procedure, which included, *inter alia*, the remuneration of an agent, adviser or lawyer, should accordingly include the remuneration of the official acting as agent for the institution. The appellants, *Sveriges Betodlares Centralförening* and Mr Henrikson, who had been ordered to pay the costs, asked that the request be dismissed. There was no argument that might bear out the Commission's reasoning, since, like the member states, the Commission could indeed have itself represented by a lawyer. The Court concurred with the appellants, finding that the remuneration payable to the official representing an institution could not be regarded as part of the recoverable costs within the meaning of Article 73 of the Rules of Procedure. It accordingly dismissed the Commission's request.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2003-1-003

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 14.09.1999 / **e)** C-310/97 / **f)** Commission of the European Communities v. AssiDomään Kraft Products AB, Iggesunds Bruk AB, Korsnääs AB, MoDo Paper AB, Söödra Cell AB, Stora Kopparbergs Bergslags AB and Svenska Cellulosa AB / **g)** *European Court Reports*, I-5363 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
1.4.6.1 **Constitutional Justice** – Procedure – Grounds – Time-limits.
1.5.4.4 **Constitutional Justice** – Decisions – Types – Annulment.
1.6.1 **Constitutional Justice** – Effects – Scope.
1.6.9.2 **Constitutional Justice** – Effects – Consequences for other cases – Decided cases.
3.10 **General Principles** – Certainty of the law.

Keywords of the alphabetical index:

Judgment, annulling a measure, scope / European Commission, decision, review / Fine, reimbursement, conditions.

Headnotes:

1. Although, in cases where a measure has been annulled by the Community judicature, Article 176 of the EC Treaty (now Article 233 EC) requires the institution which had adopted that measure to ensure that any measure intended to replace it is not affected by the same irregularities as those identified in the judgment annulling the original measure, that provision does not mean that, at the request of parties to whom identical or similar decisions have been addressed, but who have not themselves brought proceedings, the institution must re-examine those decisions, allegedly affected by the same irregularity.

The scope of a judgment annulling a measure is limited in two respects:

- first, since it would be *ultra vires* for the Community judicature to rule *ultra petita*, the scope of the

annulment may not go further than that sought by the applicant;
- secondly, although the authority *erga omnes* exerted by an annulling judgment given by the Community judicature attaches to both the operative part and the *ratio decidendi*, it cannot entail annulment of a measure alleged to be vitiated by the same illegality, but which has not been challenged before the Community judicature.

2. A decision which has not been challenged by the addressee within the time-limit laid down by Article 173 of the EC Treaty (now, after amendment, Article 230 EC) becomes definitive as against him. The purpose of time-limits for bringing legal proceedings is to ensure legal certainty by preventing Community measures which produce legal effects from being called in question indefinitely. Where a number of similar individual decisions imposing fines have been adopted pursuant to a common procedure and where only some of the addressees have taken legal action and secured the annulment of those decisions, the principle of legal certainty precludes any need for the institution which adopted the decisions to re-examine, at the request of other addressees and in the light of the grounds of the annulling judgment, the legality of the unchallenged decisions and to determine, on the basis of that examination, whether the fines paid must be refunded.

Summary:

The Commission of the European Communities lodged an appeal against the judgment of the Court of First Instance in the case *AssiDomän Kraft Products and Others v. Commission* (T-227/95, *European Law Reports* p. II-1185), whereby that court had annulled the Commission's decision of 4 October 1995 rejecting a request made by *AssiDomän Kraft Products and Others* that it review, in the light of the Court's judgment of 31 March 1993 in the case *Ahlström Osakeyhtiö and Others v. Commission* (C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *European Law Reports* p. I-1307), the lawfulness of the Commission's Decision 85/202/EEC of 19 December 1984 relating to proceedings under Article 85 of the EC Treaty (IV/29.725 – wood pulp). By that decision the Commission had found that some of its 43 addressees had infringed Article 85.1 of the EC Treaty and had fined them. Only some of the addressees of the decision had lodged an application for its annulment, which the Court had allowed. In the light of the judgment annulling the decision, *AssiDomän Kraft Products and others* had asked the Commission, although they were not addressees of that judgment, to reconsider their legal position, contending in particular that they were in the same position as the other producers. The Commission had refused their request, and the applicants had lodged with the Court of First Instance an application for annulment of that refusal, founded on a single plea alleging that, by its decision to refuse their request for review, the Commission had disregarded the legal consequences of the Court's judgment and infringed Article 176.1 of the EC Treaty (now Article 233.1 EC), relating to the measures involved in executing a judgment of the Court of Justice. They argued that that provision required the Commission to take measures in regard not only of the parties to the proceedings, but also of other parties, and consequently to re-examine similar cases in the light of the annulling judgment. In this connection, the Court of First Instance held that the wording of Article 176 of the EC Treaty did not rule out the possibility that the consequences to be drawn from a judgment annulling a measure could go beyond the group of persons who had brought the action, and it accordingly annulled the Commission's decision of 4 October 1995 as vitiated by an error of law, in so far as it was based on the premises that the Commission was neither obliged nor even entitled to refund the fines paid by the respondents. The Commission appealed against that judgment, raising, in substance, the question whether, where several similar individual decisions imposing fines had been adopted pursuant to a common procedure and only some addressees had taken legal action and obtained annulment, the institution which adopted them must, at the request of the other addressees, re-examine the lawfulness of the unchallenged decisions in the light of the grounds of the annulling judgment and determine whether, on the basis of such re-examination, the fines paid must be refunded. The Court, clarifying the scope of Article 176 and relying on the principle of legal certainty and the time-limits for appealing laid down in Article 173 of the EC Treaty (now, after amendment, Article 230 EC), allowed the appeal and set aside the Court of First Instance's judgment. In accordance with the second sentence of Article 54.1 of the EC Statute of the Court of Justice, the Court itself gave final judgment in the matter, dismissing as unfounded the action for annulment lodged with the Court of First Instance by the respondents against the Commission's decision refusing their request for a re-examination in the light of the judgment in favour of other parties to the agreement in the wood pulp sector.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2003-1-004

a) European Union / **b)** Court of Justice of the European Communities / **c)** Sixth Chamber / **d)** 16.09.1999 / **e)** C-414/97 / **f)** Commission of the European Communities v. Kingdom of Spain / **g)** *European Court Reports*, I-5585 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.4.7 **Constitutional Justice** – Procedure – Documents lodged by the parties.
1.4.8.4 **Constitutional Justice** – Procedure – Preparation of the case for trial – Preliminary proceedings.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.

Keywords of the alphabetical index:

Member State, obligations, failure to fulfil / Pre-litigation procedure, pleas in law / Public security, protection measures, admissibility / Arm, munition, import.

Headnotes:

1. It would be contrary to the general principle of respect for the rights of the defence to require all pleas in law put forward by a Member State in its defence in proceedings under Article 169 of the EC Treaty (now Article 226 EC) be raised during the pre-litigation procedure. Once the subject-matter has been defined, the Member State has the right to raise all the pleas available to it in order to defend itself, there being no rule of procedure requiring it to put forward all the arguments in its defence during the pre-litigation procedure.

2. The only articles of the Treaty which provide for derogations in situations which may involve public safety are Articles 36, 48, 56, and 223 (now, after amendment, Articles 30 EC, 39 EC, 46 EC and 296 EC) and Article 224 (now Article 297 EC), which deal with exceptional and clearly defined cases and which, because of their limited character, do not lend themselves to a wide interpretation.

Accordingly, it is for the Member State which seeks to rely on those exceptions, in justification of its failure to fulfil obligations, to furnish evidence that the exemptions in question do not go beyond the limits of such cases.

Summary:

The Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by exempting from value added tax intra-community imports and acquisitions of arms, ammunition and equipment exclusively for military use, notwithstanding the provisions of the Sixth Directive 77/388 on the harmonisation of the laws of the member states relating to turnover taxes, as amended by Directive 91/680, the Kingdom of Spain had failed to fulfil its obligations under the EC Treaty.

In its defence, Spain argued that the national provisions at issue were in conformity with Article 223.1.b of the EC Treaty (which subsequently, following amendment, became Article 296.1.b EC), whereby member states may take the measures they consider necessary for the protection of the essential interests of their security which are connected with the production of or trade in arms, munitions and war material. For its part, the Commission maintained that the plea raised by the Kingdom of Spain in its defence had to be considered out of time since it had not been advanced at any point during the pre-litigation procedure.

The Court dismissed this argument put forward by the Commission. The general principle of respect for the rights of the defence precludes a member state being obliged to present all its defence arguments during the pre-litigation procedure. Nonetheless, the Court rejected this line of defence by Spain, on the grounds that it was for the member state which sought to rely on the exception provided for in Article 223 of the EC Treaty to furnish evidence that the measures it intended to adopt were indeed necessary for the protection of the essential interests of its security; this had not been done in the instant case. Accordingly, the Court found that Spain had failed to fulfil its obligations under the Sixth VAT Directive.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2003-1-005

a) European Union / **b)** Court of Justice of the European Communities / **c)** Fifth Chamber / **d)** 14.10.1999 / **e)** C-104/97 P / **f)** Atlanta AG and others v. Commission of the European Communities and Council of the European Union / **g)** *European Court Reports*, I-6983 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.4.6 **Constitutional Justice** – Procedure – Grounds.
5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.

Keywords of the alphabetical index:

Appeal, introduction of new pleas in law, admissibility / Damages, action, admissibility / European Community, non-contractual liability, conditions / World Trade Organisation, rules.

Headnotes:

1. In appeal proceedings, a plea in law is inadmissible where it is raised for the first time at the stage of the reply and is based on an element which is inescapably and directly linked to a plea in law raised by the appellant before the Court of First Instance but not put forward again on appeal. To admit such a plea would be tantamount to allowing the appellant to challenge for the first time at the stage of the reply the rejection by the Court of First Instance of a plea which it had raised before that court, whereas there was nothing to prevent it from putting forward that plea in its application to the Court of Justice.

2. In the context of an action for damages based on the Community's liability in respect of an unlawful act, a submission which changes the very basis on which the Community could be held liable – the plea of liability for a lawful legislative act – must be regarded as constituting a new plea in law which cannot be introduced in the course of proceedings. The fact that such a plea is also based on Article 215 of the EC Treaty (now Article 288 EC) does not make it any less a new plea in law.

3. In the context of a procedure for the adoption of a Community act based on an article of the Treaty, the only obligations of consultation incumbent on the Community legislature are those laid down in the article in question. No right to be heard prior to adoption of a legislative act can be deduced from Article 173.4 of the EC Treaty (now, after amendment, Article 230.4 EC); nor can the case-law providing for a right to be heard in the context of certain measures of direct and individual concern to the applicants be extended to apply to the context of a Community legislative procedure culminating in the enactment of legislation involving a choice of economic policy and applying to the generality of the traders concerned.

4. Although respect for fundamental rights is an obligation not only on the Community legislature but also on the authorities responsible for implementing the legislative acts adopted, a finding by the Court of Justice that a legislative act is valid in terms of fundamental rights covers also the case of the specific and individual application of such an act, so that the validity of the act cannot therefore be called into question when it is applied in specific cases.

5. Non-contractual liability on the part of the Community under Article 215.2 of the EC Treaty (now Article 288.2 EC) is subject to a number of conditions relating to the illegality of the conduct alleged against the Community institutions, actual damage and the existence of a causal link between the conduct of the institution and the damage complained of. If any one of those conditions is not satisfied, the entire action must be dismissed and it is unnecessary to consider the other conditions for non-contractual liability on the part of the Community.

Summary:

Atlanta AG, a company incorporated under German law, lodged an appeal pursuant to Article 49 of the EC Statute against the judgment of the Court of First Instance of 11 December 1996, *Atlanta and others/European Community* (T-521/93, *Reports* p. II-1707), in which the Court of First Instance had dismissed its action seeking an order requiring the European Community to pay compensation for damage alleged to have been incurred as a result of the adoption of Council Regulation (EEC) no. 404/93, on the common organisation of the market in bananas.

In support of its appeal, the appellant company submitted seven pleas in law. The first was based on a decision of the Dispute Settlement Body of the World Trade Organisation, subsequent to the lodging of the appeal, which established once and for all that essential parts of the common organisation of the market in bananas were incompatible with WTO law,

placing beyond doubt the illegality of the common organisation of the market under community law. However, this plea, raised for the first time at the stage of the reply, was deemed inadmissible by the Court as it was directly linked to the plea of breach of the provisions of GATT which the appellant had raised before that Court of First Instance, but which it had not repeated in its pleas on appeal. By its second plea, the appellant claimed that the Court of First Instance had wrongly dismissed as inadmissible, on the grounds that it was out of time, the plea of liability for a lawful legislative act. The Court also rejected this plea, on the grounds that it was in effect a new plea in law, which could not be introduced in the course of proceedings, since in its application to the Court of First Instance, the appellant had referred only to liability for an unlawful act.

By its third plea, the appellant asserted that the Court of First Instance had erred in finding that the right to be heard in an administrative procedure affecting a specific person could not be transposed to the context of a legislative process leading to the adoption of general laws. The Court agreed with the findings of the Court of First Instance, holding that the right to be heard prior to the adoption of a legislative act in cases where the act in question is of direct and individual concern to a specific person could not be extended to apply to the context of a legislative procedure culminating in the adoption of regulatory measures involving a choice of economic policy and applying to the generality of the traders concerned, which was indeed the case with the introduction of a common organisation of the markets in the banana sector.

Fourthly, the appellant maintained that the Court of First Instance, in upholding the validity of Regulation no. 404/93 in general and abstract terms in relation to the principle of non-discrimination and the principle of freedom to pursue an economic activity, should have concluded, in the context of the action for damages, that the application of that regulation to Atlanta's specific circumstances gave rise to an infringement of its rights. The Court, however, held that the validity of an act could not be called into question when it was applied in specific cases.

In its fifth plea, the appellant criticised the Court of First Instance for having failed to recognise an infringement of its legitimate expectation that its interests would be upheld when the common organisation of the markets was introduced. Dismissing this plea, the Court noted that the Court of First Instance had merely applied the established case-law whereby traders were not justified in having a legitimate expectation that an existing situation which was capable of being altered by the Community institutions in the exercise of their discretionary power would be maintained, particularly in the farming sector.

The Court, however, found that the appellant's sixth plea, to the effect that the Court of First Instance had failed to address one of its complaints, was well-founded, as can be seen from the grounds set out in the impugned judgment.

Lastly, with regard to the seventh plea, in which the appellant criticised the Court of First Instance for failing to examine all the conditions for liability for an unlawful act, even though these conditions had indeed been satisfied, the Court pointed out that if any one of the conditions for non-contractual liability on the part of the Community was not satisfied, this was sufficient grounds for dismissing an action for damages based on that liability.

As the sixth plea (that the Court of First Instance had failed to address one of the appellant's complaints) had been judged to be well-founded, the Court set aside, as it was obliged to do, the judgment of the Court of First Instance. Pursuant to Article 54.1 of the EC Statute of the Court of Justice, the Court itself was to give final judgment on the appeal, since the state of the proceedings so permitted. Accordingly, it examined the alleged unlawful delegation of powers from the Council to the Commission to define a crucial part of the common organisation of the markets in question, which the Court of First Instance had failed to examine, and concluded that the plea must be dismissed. This logically led to the dismissal of the entire appeal lodged by Atlanta.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2003-1-006

a) European Union / **b)** Court of First Instance / **c)** / **d)** 25.11.1999 / **e)** T-222/99 R / **f)** Jean-Claude Martinez and Charles de Gaulle v. European Parliament / **g)** *European Court Reports*, II-3397 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.4.2 **Constitutional Justice** – Procedure – Summary procedure.
1.4.10 **Justice constitutionnelle** – Procédure – Incidents de procédure.
4.5.4 **Institutions** – Legislative bodies – Organisation.
4.17.1.1 **Institutions** – Union européenne – Structure institutionnelle – Parlement européen.
5.2.2.9 **Fundamental Rights** – Equality – Criteria of distinction – Political opinions or affiliation.
5.3.28.1 **Droits fondamentaux** – Droits civils et politiques – Droit de participer à la vie publique – Droit aux activités politiques.

Keywords of the alphabetical index:

Annulment, action, admissibility / European Parliament, power of internal organisation / European Parliament, internal act, effects / Political group, constitution / *Fumus boni juris*.

Headnotes:

1. In principle the issue of the admissibility of the main application should not be examined in proceedings relating to an application for interim measures so as not to prejudge the substance of that case. Where, however, it is contended that the main application from which the application for interim measures is derived is manifestly inadmissible, it may prove necessary to establish the existence of certain factors which would justify the prima facie conclusion that the main application is admissible (see para 60).

2. Article 230.1 EC, which provides that the Court of Justice is to review, in particular, the legality of acts adopted by the European Parliament which are intended to produce legal effects vis-à-vis third parties, is designed to subject to review by the Community judicature measures adopted by the Parliament in the context of the EC Treaty which might encroach on the powers of the Member States or of the other institutions, or exceed the limits which have been set to the Parliament's powers. On the other hand, measures which relate only to the internal organisation of the work of the Parliament cannot be challenged in an action for annulment. This category also includes acts of the European Parliament which either do not have legal effects or have legal effects only within the Parliament as regards the organisation of its work and are subject to review procedures laid down in its Rules of Procedure (see para 61).

3. The purpose of proceedings for interim relief is to ensure that the judgment on the substance has full effect. In order to attain that objective the measures sought must be urgent in the sense that it is necessary, in order to avoid serious and irreparable damage to the interests of the applicant, that the measures should be ordered and should take effect before the judgment in the main proceedings.

Serious damage is liable to be caused to Members of the European Parliament by the failure to suspend operation of a measure adopted by the Parliament concerning the interpretation of one of its rules of Procedure, where this prevents those Members from belonging to a political group, thus making it impossible for them to enjoy the rights and advantages conferred on political groups and thus unable to speak as representatives of the citizens of the Member States of the Community under the same conditions as Members who belong to a political group. The damage is all the more serious because the time taken to investigate and dispose of the case in the main proceedings, time during which it cannot be ruled out that the applicants might suffer discrimination, may represent a not insignificant portion of their limited term of office. Such damage is also irreparable in that even if the measure in question is annulled at the end of the main proceedings this will not remedy the situation.

Moreover, suspension of the operation of that measure – in so far as it would have the effect of enabling the group in question to receive the same treatment as other mixed groups – could not adversely affect the organisation of the work of the European Parliament (see paras 79-81).

Summary:

An application was lodged before the Court of First Instance of the European Communities requesting the suspension of the implementation of the decision of the European Parliament of 14 September 1999 concerning the interpretation of Rule 29.1 of the Rules of Procedure of the European Parliament.

Rule 29 of the Rules of Procedure of the European Parliament concerns the formation of political groups. It provides that members may form themselves into groups according to their political affinities. Following the June 1999 European elections, the “Technical group of independent members (TDI), mixed group” was set up founded on the principle of the total political independence of each of its members. The presidents of the other groups represented in the parliament took the view that the necessary conditions for forming a political group had not been fulfilled and asked the Commission on Constitutional Affairs to give an interpretation of Rule 29.1 of the

Rules of Procedure. The Commission interpreted the provision in question as not permitting the formation of a group which openly rejected any political character and all political affiliation between its members. On 14 September 1999, the Parliament adopted the interpretation advanced by the Committee on Constitutional Affairs. Two members of the TDI Group, Mr Martínez and Mr de Gaulle, lodged an application to have this decision overturned. Separately, they also initiated the current application for interim measures.

The European Parliament maintained that the main application was not admissible and therefore, the application for suspension of operation should also be dismissed as inadmissible. The impugned decision, in its view, came under Parliament's internal affairs and could not, therefore, be challenged in an action for annulment. It was, moreover, merely an interpretation of a general measure which could not, as such, affect the appellants directly and individually. The appellants maintained that the decision in question had legal effects on third parties by restricting the prerogatives of certain parliamentarians and considerably reducing democracy in the European Union. The Court of First Instance referred to the circumstances in which it may prove necessary to examine, as part of an application for interim measures, the question of the admissibility of the main application, and concluded that the decision at issue produced legal effects going beyond the internal organisation of the work of the Parliament. It deprived certain of its members from exercising their parliamentary mandate in the same way as members belonging to a political group and therefore prevented them from playing as full a part as their colleagues in the process culminating in the adoption of Community acts. The Court of First Instance added that under such conditions, it was undeniable that the decision in question was of direct and individual concern to the appellants. In view of all this, the Court held that the main application could indeed be admissible and, consequently, it declared the application for interim measures admissible. Accordingly, it then examined the circumstances establishing the urgency, and the *de facto* and *de jure* arguments justifying prima facie *(fumus boni juris)* suspension of operation.

With regard, first of all to the *fumus boni juris*, the Court of First Instance noted that the plea that there had been an infringement of the principle of equal treatment could not, on the face of it, be deemed to be without foundation. The European Parliament would not have opposed the formation of the “Group for a Europe of Democracies and Diversities”, without however establishing any real political affinities between the members of this group. With regard, subsequently, to the urgency of the measure requested, the Court noted that in the absence of a suspension of operation, the appellants would suffer serious and irreparable damage, in that they would be prevented from exercising their prerogatives under the same conditions as members belonging to a political group; the possible setting aside of the decision of 14 September 1999 at the outcome of the main application did not constitute a remedy for this situation. Lastly, the Court noted that the suspension of the decision at issue pending a ruling on the main application by the Court would enable the TDI Group to be treated the same as the “Group for a Europe of Democracies and Diversities”, without any prejudice to the organisation of the services provided by the parliament. In the light of these considerations, the Court ordered the suspension of the operation of the decision of 14 September 1999.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2003-1-007

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 26.11.1999 / **e)** C-192/98 / **f)** Azienda nazionale autonoma delle strade (ANAS) / **g)** *European Court Reports*, I-8583 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
4.10.6 **Institutions** – Public finances – Auditing bodies.

Keywords of the alphabetical index:

Court of Auditors, procedure, judicial character / Budget, management, control.

Headnotes:

The question whether a body may refer a question to the Court falls to be determined on the basis of criteria relating both to the constitution of that body

and to its function. Thus, a national body may be classified as `a court or tribunal' within the meaning of Article 177 of the EC Treaty (now Article 234 EC) when it is performing judicial functions, but when exercising other functions – of an administrative nature, for example – it cannot be recognised as such.

It follows that in order to establish whether a national body, entrusted by law with different categories of function, is to be regarded as a court or tribunal within the meaning of Article 177 of the EC Treaty, it is necessary to determine in what specific capacity it is acting within the particular legal context in which it seeks a ruling from the Court. For the purposes of that analysis, no relevance is to be attributed to the fact that, when otherwise configured, the body concerned falls to be classified as a court or tribunal (even the same entity whose status is in issue, when it is exercising powers other than those in the context of which the reference was made).

The *Corte dei Conti* (Court of Auditors) is not performing a judicial function – and cannot therefore make a reference to the Court of Justice – when, in the context in which reference is made, it is exercising its powers of *ex post facto* review which is an administrative role consisting in the evaluation and verification of the results of administrative action (see paras 22-25).

Summary:

The *Corte dei Conti* (Italian Court of Auditors) referred to the Court of Justice for preliminary rulings under Article 177 of the EC Treaty [now Article 234 EC] three questions on the interpretation of Directive 92/50 relating to the co-ordination of procedures for the award of public service contracts. These questions were raised in the context of a review procedure as to the legality, propriety and cost-effectiveness of the management of the *Azienda nazionale autonoma delle strade* (independent national roads authority).

Before considering the questions put to it, the Court of Justice verified the capacity of the *Corte dei Conti* to refer matters for a preliminary ruling. According to the latter, when it was sitting as a bench to conduct either a prior review of the lawfulness of a decision or an *ex post facto* review of the budgetary and asset management of government departments, it fulfilled all the criteria laid down by the Court in order to be described as a “court of one of the Member States” within the meaning of Article 177 of the EC Treaty. The Court disagreed. While noting that the concept of “national court or tribunal” was defined according to both structural and functional criteria, it found that the ex post facto review function performed by the *Corte dei Conti* in the main action consisted essentially in the evaluation and verification of the results of administrative action, and was not a judicial function. It therefore declined to exercise jurisdiction in respect of the questions raised.

Languages:

French.

Identification: ECJ-2003-1-008

a) European Union / **b)** Court of First Instance / **c)** Second Chamber / **d)** 01.12.1999 / **e)** T-125/96, T-152/96 / **f)** Boehringer Ingelheim Vetmedica GmbH and C.H. Boehringer Sohn v. Council of the European Union and Commission of the European Communities / **g)** *European Court Reports*, II-3427 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
1.4.10.1 **Constitutional Justice** – Procedure – Interlocutory proceedings – Intervention.
3.10 **General Principles** – Certainty of the law.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.

Keywords of the alphabetical index:

Common agricultural policy / Commercialisation, authorisation / Drug, veterinary, public health, danger / Drug, having a hormonal or thyrostatic action / Animal, farm, food / European Commission, *ultra vires* / Administration, sound, principle.

Headnotes:

1. Directive 96/22 concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of beta-agonists neither breaches the principles of proportionality, the protection of legitimate expectations or sound

administration nor infringes Article 43 of the EC Treaty (now, after amendment, Article 37 EC) in providing that Member States are to prohibit the placing on the market of beta-agonists for administering to animals the flesh and products of which are intended for human consumption and in drawing no distinction between the use of beta-agonists for unlawful purposes – fattening cattle – and their use for (hitherto) lawful therapeutic purposes.

As regards the principle of proportionality, the Council – in the light of the dual objective pursued, that is to say, the protection of public health and the attainment of the aims of the common agricultural policy – did not make a manifest error of assessment either in holding that the general prohibition constituted the preferable solution from the point of view of protecting public health or in considering that only a general prohibition was capable of restoring consumer confidence. Nor do the restrictions imposed on the economic exploitation of veterinary medicinal products developed by certain pharmaceutical undertakings in the past, and no longer protected by a patent, amount to a disproportionate or intolerable sacrifice in relation to the aforementioned objectives pursued in the public interest.

As regards the principles of protection of legitimate expectations and of sound administration, the Council was entitled, given the absence of specific assurances concerning the criteria for refusing marketing authorisation, to impose a prohibition such as the one at issue for the future and to decide that a ban was the most appropriate means of protecting human health and allaying consumer anxieties.

2. An action brought by a pharmaceutical undertaking which manufactures and markets, under marketing authorisations issued in several Member States, veterinary medicinal products containing clenbuterol for annulment of Regulation no. 1312/96 amending Annex III to Regulation no. 2377/90 and establishing maximum residue limits for clenbuterol, but exclusively for certain, very specific, therapeutic purposes, cannot be held inadmissible on the ground that the applicant lacks a right of action or on the ground that it is neither individually nor directly concerned by that measure.

First, in so far as the amendment restricts the validity of clenbuterol maximum residue limits to certain precise therapeutic indications, it is equivalent to a prohibition on the use of that product for any other therapeutic indication, and thus to a partial withdrawal of the marketing authorisations which that applicant holds in a number of Member States. The Regulation thus produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position.

Secondly, in so far as the Regulation was adopted after a formal request by the applicant that a maximum residue limit be fixed for clenbuterol, and in so far as that measure expressly provides that the applicant – being the undertaking responsible for the marketing of the veterinary medicinal products concerned – should be involved in the procedure for establishing such limits, the applicant is affected by that measure by reason of certain attributes peculiar to it and thus finds itself in factual circumstances which differentiate it, as far as that regulation is concerned, from all other persons. The applicant is therefore individually concerned by the Regulation. Moreover, in so far as the Regulation does not require any measures for its transposition into national law and directly affects all the traders concerned, the applicant is also directly concerned by that measure (see paras 158-159, 164-165, 171).

3. Article 37.3 of the Statute of the Court of Justice (under which submissions made in an application to intervene must be limited to supporting the submissions of one of the parties) and Article 116.3 of the Rules of Procedure of the Court of First Instance (under which the intervener must accept the case as he finds it at the time of his intervention) do not preclude the intervener from advancing arguments which are new or which differ from those of the party he supports, provided that those arguments do not alter the context of the dispute and that the intervention is always intended to support the form of order sought by the latter.

The context of a dispute as delimited in an application for annulment is not altered by a line of argument, introduced for the first time by the intervener, to the effect that the defendant exceeded its powers, where the applicant has maintained that the exercise of its property rights and its freedom to pursue trade and professional activities had been unlawfully interfered with. If the misuse of power alleged is established, it would necessarily follow that there has been unlawful interference in the exercise of those rights (see paras 183-184).

Summary:

An application was lodged with the Court of First Instance of the European Communities seeking partial annulment of Directive 96/22 in that it prohibited the placing on the market of beta-agonists for administration to all species of animals, except where used for well-defined therapeutic purposes in the case of equines, certain categories of bovine animals and pets. An application was also made for partial annulment of Regulation no. 1312/96 in that it

set provisional maximum limits for residues of clenbuterol (chemical compound in the beta-agonist category) tolerated in foodstuffs of animal origin, in cases where the use of a beta-agonist was authorised by Directive 96/22.

Boehringer Ingelheim Vetmedica Gmbh (hereinafter BI Vetmedica), a wholly owned subsidiary of *C. H. Boehringer Sohn* (hereinafter Boehringer), produces and markets veterinary medicinal products containing a beta-agonist, clenbuterol, for the treatment of respiratory disorders. It accounts for virtually all sales of clenbuterol within the European Union. At high doses, this substance has anabolic effects, leading to its use by unscrupulous producers for the sole purpose of artificially fattening animals for slaughter. Beta-agonist residues present in the meat of animals treated with very high, non-therapeutic, doses represent a danger to human health, which is all the more real in that the detection of fraud is rendered difficult by the existence of authorised medicinal products containing such substances. It was for this reason that the Council, on a proposal from the Commission, decided to prohibit, subject to certain exceptions, the marketing of beta-agonists. Regulation no. 2377/90 laying down a Community procedure for the establishment of maximum residue limits of veterinary medicinal products in foodstuffs of animal origin prohibits the administration to food-producing animals of veterinary medicinal products containing pharmacologically active substances which are not mentioned in one of its annexes. The Commission, by its Regulation no. 1312/96 amending Annex III to Regulation no. 2377/90, accordingly laid down maximum residue limits for clenbuterol, but only where used for the therapeutic purposes authorised under Directive 96/22. Challenging the measures adopted by both the Council and the Commission, BI Vetmedica and Boehringer brought two actions before the Court of First Instance, one against Directive 96/22, the other against Regulation no. 1312/96. The two cases were joined for the purposes of the judgment. By order of 13 June 1997, the Court of First Instance granted third parties leave to intervene both in support of the forms of order sought by the applicants and in support of the form of order sought by the defendant.

In support of their applications for annulment, the applicants raised a plea of illegality against Directive 96/22. The application for partial annulment of Regulation no. 1312/96 in case T-152/96 was essentially based on the plea of illegality raised against Directive 96/22, whose partial annulment constituted the subject-matter of the action in case T-125/96. The arguments put forward by BI Vetmedica and Boehringer therefore hinged on the issue of the illegality of Directive 96/22. For the purpose of establishing the illegality of this directive, the applicants raised four pleas in law: breach of the principle of proportionality, breach of the principles of legal certainty and protection of legitimate expectations, breach of the principle of sound administration, and infringement of Article 43 of the EC Treaty [now, after amendment, Article 37 EC]. None of these pleas was allowed by the Court of First Instance. The application for annulment of Directive 96/22 was therefore declared unfounded, as was the plea of illegality raised by the applicants. No infringement of the rules of law relied upon having been established, the claim for compensation based on the alleged infringement of those rules was also dismissed.

As regards due consultation of the European Parliament, required under Article 43 of the EC Treaty, amendments made to the form and substance of a measure after the proposal for it had been submitted to the Parliament – namely, adoption of a directive instead of a regulation and introduction of a minor derogation – did not constitute material amendments requiring fresh consultation (cf. paras. 77, 97, 100, 108, 118, 125, 133 and 137).

With regard to the application for annulment of Regulation no. 1312/96, the Commission raised a plea of inadmissibility. It argued that the applicants had no interest in the action and were neither individually nor directly concerned by Regulation no. 1312/96. The Court dismissed the Commission's arguments. After finding that BI Vetmedica had a distinct interest in the action and verifying that it was, without question, individually and directly concerned by the impugned regulation, the Court of First Instance deemed it unnecessary to examine whether Boehringer had the capacity to bring proceedings since a single action was involved and the action brought by BI Vetmedica was admissible in any event.

As to the substance, the arguments on which the applicants based their application for annulment of Regulation no. 1312/96 were dismissed as unfounded as they relied on the alleged illegality of Directive 96/22. However, Regulation no. 1312/96 was partially annulled on the ground that, by restricting the validity of the maximum residue limits for clenbuterol to certain specific therapeutic indications, the Commission had exceeded the power conferred upon it by Regulation no. 2377/90. This argument, put forward by one of the intervening parties in its statement of intervention and taken up by the applicants in their replies to the Court's written questions, was accepted by the Court, which noted that Article 37.3 of the EC Statute of the Court of Justice and Article 116.3 of the Rules of Procedure of

the Court of First Instance did not preclude the intervener from advancing arguments which were new or which differed from those of the party he supported, provided those arguments did not alter the context of the dispute and the intervention was always intended to support the form of order sought by the latter. The Court of First Instance found that the procedure for establishing maximum residue limits laid down by Regulation no. 2377/90 was strictly limited to the determination of the threshold below which residues of a given product, present in or on foodstuffs, might be regarded as posing no danger to human health. Since there was no provision in this regulation authorising the Commission to limit the maximum residue limits of a veterinary medicinal product permissible in foodstuffs of animal origin to certain therapeutic indications, Regulation no. 1312 could not be validly adopted.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish.

Identification: ECJ-2003-1-009

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 04.02.2000 / **e)** C-17/98 / **f)** Emesa Sugar (Free Zone) NV v. Aruba / **g)** *European Court Reports*, I-0665 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.4.1 **Constitutional Justice** – Procedure – General characteristics.
1.4.9.4 **Constitutional Justice** – Procedure – Parties – Persons or entities authorised to intervene in proceedings.
1.4.13 **Constitutional Justice** – Procedure – Re-opening of hearing.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
4.17.1.4 **Institutions** – European Union – Institutional structure – Court of Justice of the European Communities.
5.3.13.19 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Adversarial principle.

Keywords of the alphabetical index:

Advocate General, conclusions, right to response / Applicant, right to response.

Headnotes:

Fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have cooperated or of which they are signatories. The European Convention on Human Rights – referred to, moreover, in Article 6.2 EU – has special significance in that respect.

Article 6.1 ECHR concerning the right of all persons, in adversarial proceedings, to a fair hearing does not preclude the Court from refusing a request for leave to submit written observations in response to the Opinion of the Advocate General.

First, within the judicial system established by the Treaty and by the Statute of the Court of Justice, as set out in detail in the Court's Rules of Procedure, the Opinion of the Advocate General – by contrast with an opinion addressed to the judges or to the parties which stems from an authority outside the Court or which derives its authority from that of, say, a Procureur General's department [or French *ministère public*] – constitutes the individual reasoned opinion, expressed in open court, of a Member of the Court of Justice itself, who takes part, publicly and individually, in the process by which the Court reaches its judgment, and therefore in carrying out the judicial function entrusted to the Court.

Summary:

In a case referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC), the plaintiff in the dispute to be determined by the national court, *Emesa Sugar (Free Zone) NV*, seeking to explain its position to the Court, sought leave to submit written observations in reply to the submissions of the Advocate General. There was provision for this neither in the Statute of the Court nor in its Rules of Procedure. The applicant maintained that it should be allowed to do so under the case-law of the European Court of Human Rights

(ECHR) regarding the scope of Article 6.1 ECHR, and it referred in particular to the judgment in *Vermeulen v. Belgium* (20 February 1996, *Reports of Judgments and Decisions* 1996 I, p. 224). The applicant argued that not being allowed to reply to the Advocate General's submissions would contravene its fundamental right to adversarial proceedings, as guaranteed by Article 6.1 ECHR. It maintained that European Court of Human Rights case-law in the matter applied to the Advocate General's submissions to the Court of Justice. The Court pointed out that, under its established case-law, fundamental rights were among the general legal principles whose observance it ensured and in that context the European Convention on Human Rights, as referred to in Article 6.2 EU, was of special significance.

The Court nonetheless took the view that Article 6.2 did not prevent its rejecting a request from a party to lodge written observations in reply to the Advocate General's submissions: first, in the judicial system established by the Treaty and by the Statute of the Court of Justice, as set out in detail in the Court's Rules of Procedure, the submissions of the Advocate General, unlike an opinion addressed to the judges or the parties by an authority outside the Court or deriving their authority from that of a prosecutor's department, constituted the individual reasoned opinion, expressed in open court, of a member of the Court of Justice itself, who publicly and individually took part in this way in the process by which the Court reached its decision and therefore in performing the judicial function entrusted to the Court.

Secondly, regard being had to the very purpose of adversarial proceedings, which was to prevent the Court from being influenced by arguments which the parties had been unable to discuss, the Court might of its own motion, or on a proposal from the Advocate General or at the request of the parties, reopen the oral proceedings in accordance with Article 61 of its Rules of Procedure, if it considered that it lacked sufficient information, or that the case must be dealt with on the basis of an argument which had not been debated between the parties (see paras 8-10, 14-15, 18 and 20).

Holding that Emesa's application did not relate to reopening of the proceedings, the Court rejected it.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2003-1-010

a) European Union / **b)** Court of First Instance / **c)** Third Chamber / **d)** 10.02.2000 / **e)** T-32/98, T-41/98 / **f)** Government of the Netherlands Antilles v. Commission of the European Communities / **g)** *European Court Reports*, II-201 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.2.1.6 **Constitutional Justice** – Types of claim – Claim by a public body – Local self-government body.
1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.

Keywords of the alphabetical index:

Proceedings for annulment, admissibility / Territory, overseas / Import.

Headnotes:

1. The fact that the Court of First Instance has, by an earlier order, given leave to a Member State to intervene in support of the forms of order sought by one of the parties does not preclude re-examination of the admissibility of its intervention in the judgment bringing the proceedings to a conclusion. However, the fact that a Member State ratified the Treaty of Accession of another Member State only in respect of its European territory is not capable of affecting the latter's exercise of its entitlement to intervene in any proceedings before the Court of First Instance, which is vested in it by virtue of its status as a Member State (see paras 30-31).

2. An autonomous entity of a Member State endowed with legal personality under national law and forming part of the overseas countries and territories (OCTs) may institute proceedings against Regulations no. 2352/97 introducing specific measures in respect of imports of rice originating in the OCTs and no. 2494/97 adopted in the context of those measures.

Summary:

This decision was a further legal episode in a dispute between the Government of the Netherlands Antilles

and the Council and Commission about imports of rice originating in the overseas countries and territories (OCTs).

Under Article 136 of the EC Treaty (since amendment, Article 187 EC), on 25 July 1991 the Council adopted Decision 91/482 on the association of OCTs with the Community. Until amended in November 1997 the decision provided that products originating in the OCTs could be imported into the Community free of customs duties and charges having equivalent effect. Similarly the Community undertook to apply to such imports neither quantitative restrictions nor measures having equivalent effect. During 1997, however, a series of safeguard measures limiting rice imports from the OCTs was introduced under Article 109.1 of Decision 91/482. The decision itself was eventually revised accordingly. The Government of the Netherlands Antilles challenged each of those measures. In the present case the Court of First Instance dealt with two actions for annulment, one concerning Regulation no. 2352/97 introducing specific measures in respect of imports of rice originating in OCTs (case T-32/98), the other concerning Regulation no. 2494/97 on the issuing of import licences for rice originating in the OCTs in connection with the specific measures introduced by Regulation no. 2352/97 (case T-41/98). The two cases were joined for the purposes of the judgment. In orders of 1 and 10 July 1998 Spain was granted leave to intervene in support of the Commission.

The Court of First Instance firstly considered the admissibility of Spain's intervention. The applicant argued that it was not permissible for the court to take into account the observations in Spain's intervention statements because there was no link in Community law between the Netherlands Antilles and Spain, the Netherlands having ratified the Treaty of Spanish accession in respect only of their European territory. Despite its order giving Spain leave to intervene in support of the Commission's case, the court agreed to re-examine the admissibility of the intervention. It pointed out, in that connection, that member states were by definition entitled to intervene without restriction in any proceedings before the Court of First Instance.

Secondly the court considered the admissibility of the applications submitted by the Government of the Netherlands Antilles. The Commission argued that because it was not a state, the applicant could not bring an action under Article 173.2 of the EC Treaty [since amendment, Article 230.2 EC]. Nor, having neither a direct nor an individual interest in the regulations challenged, could it apply under Article 173.4 of the EC Treaty. Lastly, the applicant had no interest in bringing the actions independently of the Netherlands, and consequently it was for the Netherlands to defend the Netherlands Antilles' interests. The Government of the Netherlands Antilles submitted that its applications were admissible under Article 173.2 and 173.4 of the EC Treaty. Pointing out that the Court of Justice had sole jurisdiction to hear applications under Article 173.2 of the EC Treaty, the Court of First Instance observed that the applicant, in its own capacity, did not have any *locus standi* under that provision. It did however have *locus standi* under Article 173.4 of the EC Treaty.

Although it was not a member state within the meaning of Article 173.2 of the EC Treaty (since amendment, Article 230.2 EC), autonomous entities of member states which were endowed with legal personality in national law and were overseas countries or territories could, in principle, bring actions for annulment under Article 173.4 of the EC Treaty.

In addition, although the contested regulations were, by their nature, of general application and did not constitute decisions within the meaning of Article 189 of the EC Treaty (now Article 249 EC), they were of individual concern to the applicant in so far as the Commission, when envisaging their adoption, had been under a duty specifically to take account of the applicant's situation by virtue of Article 109.2 of Decision 91/482 on the association of the OCT. Moreover, the interest of the applicant in bringing proceedings for the annulment of the contested regulations cannot be excluded solely because the Member State has an autonomous right of action pursuant to Article 173.2 of the EC Treaty.

Lastly the applicant was directly concerned by Regulation no. 2352/97, which contained comprehensive rules leaving no latitude to the authorities of member states in that it regulated in a binding manner the machinery on applying for and issuing import licences for rice originating in the OCTs and authorised the Commission to suspend issue if a quota which it had set was exceeded or in the event of serious disturbances to the market. It was also directly concerned by Regulation no. 2494/97 in that that regulation excluded issue of import licences for rice coming under CN code 1006 and originating in the OCTs for applications made from 3 December 1997 onwards and suspended until 31 December 1997 the submission of further applications for import licences for rice of that origin (see paragraphs 43, 45, 48, 57-58 and 60-61).

On the substance of the case the Court found that, contrary to Article 109.1 of the OCT Decision, the Commission had not established any causal link between application of the decision and occurrence of the disturbances to the Community market which the adoption of Regulation no. 2352/97 had been

supposed to prevent. It therefore annulled Regulation no. 2352/97 and consequently Regulation no. 2494/97 in that it was based on Regulation no. 2352/97.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2003-1-011

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 14.03.2000 / **e)** C-54/99 / **f)** Association Église de scientologie de Paris and Scientology International Reserves Trust v. Prime Minister / **g)** *European Court Reports*, I-1335 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
3.18 **General Principles** – General interest.
3.26.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.

Keywords of the alphabetical index:

Free movement, capital / Investment, foreign, prior authorisation.

Headnotes:

Article 73d.1.b of the EC Treaty (now Article 58.1.b EC), which provides that Article 73b of the EC Treaty (now Article 56 EC), prohibiting restrictions on the movement of capital between Member States and between Member States and non-member countries, is without prejudice to the right of Member States to take any measures which are justified on grounds of public policy or public security, must be interpreted as precluding a system of prior authorisation for direct foreign investments which confines itself to defining in general terms the affected investments as being investments that are such as to represent a threat to public policy and public security, with the result that the persons concerned are unable to ascertain the specific circumstances in which prior authorisation is required. Since such a lack of precision does not enable individuals to be apprised of the extent of their rights and obligations deriving from Article 73b of the EC Treaty, the system in question is contrary to the principle of legal certainty (see paras 21-23 and operative part).

Summary:

Under Article 177 of the EC Treaty (now Article 234 EC), France's *Conseil d'État* had referred to the Court of Justice for a preliminary ruling a question concerning the interpretation of Article 73d.1.b of the EC Treaty [now Article 58.1.b EC].

The question was in connection with the dispute between the *Église de Scientologie de Paris*, an association constituted under French law, and the Scientology International Reserves Trust, a trust established in the United Kingdom, on the one hand, and the Prime Minister of France on the other concerning the latter's implied decision rejecting the applicants' request for repeal of the provisions governing the system of prior authorisation laid down by French law for certain categories of direct foreign investments.

The applicants had contested that decision before the *Conseil d'État* as being *ultra vires*, alleging a failure to comply with Community rules on free movement of capital. Taking the view that it was unclear how Article 73d of the EC Treaty was to be construed, the *Conseil d'État* had asked the court whether Article 73d.1.b of the EC Treaty, under which Article 73b of the Treaty was without prejudice to the right of Member States to take measures which were justified on grounds of public policy or public security, permitted national regulations such as those at issue in the main proceedings which required prior authorisation for direct foreign investments that were such as to represent a threat to public policy or public security. After finding that the prior-authorisation rules for direct investments were characterised by a lack of precision as to the investments concerned and that the result of the imprecision was that, contrary to the principle of legal certainty, persons concerned were unable to ascertain the specific circumstances in which prior authorisation was required, the court held that such a system was contrary to Community law.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

European Court of Human Rights

Important decisions

Identification: ECH-2003-1-001

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 30.01.2003 / **e)** 40877/98 / **f)** Cordova v. Italy (no. 1) / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.20 **General Principles** – Reasonableness.
4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.29 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Immunity, parliamentary, limits / Parliament, member, immunity, limits.

Headnotes:

Parliamentary immunity attaching to statements made by Members of Parliament pursues the legitimate aims of protecting free parliamentary debate and maintaining the separation of powers between the legislative and the judiciary and does not in itself constitute a disproportionate restriction on the right of access to a court. However, where there is no clear link between the statements and the exercise of parliamentary functions the application of parliamentary immunity may constitute a disproportionate restriction on the right of access to court, in particular if the individual has no other reasonable way of protecting his rights.

Summary:

At the time of the events in question, the applicant was a public prosecutor. As such, he was required to investigate a person who had had dealings with a former President of Italy, now a life member of the Senate. The latter sent the applicant a number of sarcastic letters, followed by a gift of children's toys. The applicant considered that his honour and reputation had been injured, and lodged a criminal complaint against the senator, who was prosecuted for insulting a public official, with the applicant appearing as a civil party in the proceedings. The Senate decided, however, that the senator's constitutional immunity covered the acts of which he had been accused, and its President so informed the district court judge hearing the case, who accordingly terminated the proceedings. The applicant then asked the public prosecutor to appeal against the order terminating the proceedings – which would have allowed him to raise a question of conflict of powers before the Constitutional Court at a later stage. The public prosecutor refused, on the grounds that the Senate had not used its power arbitrarily.

In the application lodged with the Court, the applicant complained that the application of the principle of parliamentary immunity had deprived him of his right of access to a court. He relied on Article 6.1 ECHR.

The Court recalled that, in order to have an effective right to a court, an individual must have a clear and practical possibility of contesting any act which affects his rights. The Senate's decision to extend the parliamentary immunity guaranteed by the Constitution to the acts complained of, and the district court judge's refusal to seek a ruling on a conflict of state powers from the Constitutional Court, led to termination of the proceedings brought by the applicant, who was thus deprived of any possibility of obtaining compensation for the alleged injury. In other words, his right of access to a court was violated.

The aims pursued by this interference were legitimate, since they were connected with protecting free parliamentary debate and maintaining the separation of powers between legislature and judiciary. As for the proportionality of the interference, it would be contrary to the aim and purpose of the Convention if adoption of one of the systems normally used to give members of parliament immunity automatically absolved Contracting States of all liability under the Convention in this area. A state cannot, unreservedly and without supervision by the Convention bodies, withdraw a whole series of civil actions from the courts' jurisdiction or exempt certain categories of person from all liability, without disregarding the pre-eminence of law in a democratic

society and Article 6.1 ECHR. In a democracy, parliament or other comparable bodies provide vital tribunes for political debate. Pressing reasons are thus needed to justify any interference with freedom of expression, as practised in these bodies. Parliamentary immunity cannot therefore be regarded, in general, as a disproportionate restriction on the right of access to a court guaranteed by Article 6.1 ECHR. In this connection, immunity covering statements made in parliamentary debates, and designed to protect the interests of parliament as a whole, rather than those of individual members, has been judged compatible with the Convention.

In this case, however, the conduct complained of had nothing to do with the exercise of parliamentary functions in the strict sense, but seemed more the product of a private quarrel. In such cases, access to the courts cannot be refused simply because the quarrel might be political, or connected with a political activity. Because there is no obvious link with a parliamentary activity, the concept of proportionality between the aims pursued and the means employed must be interpreted narrowly. This applies particularly when restrictions on the right to access result from a decision taken by a political body. To conclude differently would be to restrict the individual's right of access to a court, in a manner incompatible with Article 6.1 ECHR, whenever the statements at issue in proceedings had been made by a Member of Parliament.

Thus the termination of the proceedings to the senator's advantage, and the decision to block any other legal action aimed at protecting the applicant's reputation, failed to respect the fair balance which must exist in this area between the need to protect the general interests of the community and the need to protect the fundamental rights of individuals. Moreover, the applicant had no other reasonable ways of effectively protecting the rights guaranteed him by the Convention, and the Italian Constitutional Court now considers it unlawful that immunity should extend to remarks having no substantial connection with previous parliamentary acts which the representative in question could be taken as reflecting.

Consequently, there had been a breach of Article 6.1 ECHR.

Cross-references:

- *Golder v. the United Kingdom*, Judgment of 21.02.1975, Series A, no. 18; *Special Bulletin ECHR* [ECH-1975-S-001];
- *James and Others v. the United Kingdom*, Judgment of 21.02.1986, Series A, no. 98;
- *Powell and Rayner v. the United Kingdom*, Judgment of 21.02.1990, Series A, no. 172;
- *Tomasi v. France*, Judgment of 27.08.1992, Series A, no. 241-A; *Special Bulletin ECHR* [ECH-1992-S-005];
- *Padovani v. Italy*, Judgment of 26.02.1993, Series A, no. 257-B;
- *Fayed v. the United Kingdom*, Judgment of 21.09.1994, Series A, no. 294-B;
- *Bellet v. France*, Judgment of 04.12.1995, Series A, no. 333-B;
- *Brualla Gómez de la Torre v. Spain*, Judgment of 19.12.1997, *Reports of Judgments and Decisions* 1997-VIII;
- *Aït-Mouhoub v. France*, Judgment of 28.10.1998, *Reports* 1998-VIII;
- *Osman v. the United Kingdom*, Judgment of 28.10.1998, *Reports* 1998-VIII;
- *Pérez de Rada Cavanilles v. Spain*, Judgment of 28.10.1998, *Reports* 1998-VIII;
- *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I; *Bulletin* 1999/1 [ECH-1999-1-005];
- *Khalfaoui v. France*, no. 34791/97, ECHR 1999-IX; *Bulletin* 1999/3 [ECH-1999-3-010];
- *Jerusalem v. Austria*, no. 26958/95, ECHR 2001-II;
- *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI; *Bulletin* 2002/1 [ECH-2002-1-002];
- *Cisse v. France,* no. 51346/99, ECHR 2002-III;
- *Papon v. France*, no. 54210/00, ECHR 2002-VII;
- *Posti and Rahko v. Finland*, no. 27824/95, Judgment of 24.09.2002, unreported;
- *A. v. the United Kingdom*, no. 35373/97, ECHR 2002.

Languages:

French.

Identification: ECH-2003-1-002

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 11.02.2003 / **e)** 56568/00 / **f)** Y. v. Norway / **g)** *Reports of Judgments and Decisions of the Court* / **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.
5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Civil proceedings.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Presumption of innocence, meaning / Acquittal, effect / Liability, civil / Liability, criminal / Proof, standard.

Headnotes:

An acquittal in criminal proceedings does not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict standard of proof. However, the presumption of innocence may be violated if the language used in the decision on compensation casts doubt on the correctness of the acquittal.

Summary:

The applicant was convicted of violent assault, sexual assault and homicide. He was also ordered to pay compensation of 100,000 kroner to the victim's parents. The applicant appealed to the High Court which, after taking evidence, acquitted him, accepting the jury's verdict. The following day, after hearing legal argument on behalf of both the applicant and the victim's parents, the court upheld the award of compensation. It observed that it had to be clear "on the balance of probabilities that the accused has committed the offences" and found it "clearly probable" that the applicant had "committed the offences". The Appeals Selection Committee of the Supreme Court refused leave to appeal in so far as the appeal concerned the assessment of evidence but granted leave in so far as the applicant challenged the High Court's procedure and interpretation of the law. However, the Supreme Court rejected the appeal.

In the application lodged with the Court, the applicant complained that the presumption of innocence had been violated on account of the High Court's finding that it was probable that he had committed the offences, notwithstanding his acquittal. He relied on Article 6.2 ECHR.

The European Court of Human Rights considered that the fact that the applicant remained "charged" until the acquittal gained legal force was of no relevance to the compensation proceedings, which had their basis in the Damage Compensation Act 1969. Criminal liability was not a prerequisite for liability to pay compensation and even where the victim opted to join the compensation claim to the criminal proceedings it would still be considered as "civil". Indeed, the Supreme Court described it as such. Thus, the compensation claim was not viewed as a "criminal charge" under domestic law.

As to the nature of the proceedings, the claim was to be determined on the basis of principles proper to the civil law of tort. The outcome of the criminal proceedings was not decisive for the civil claim ; the compensation issue was to be the object of a separate legal assessment based on criteria and evidentiary standards which in several important respects differed from those that applied to criminal liability. The fact that an act that might give rise to a civil claim was also covered by the objective constituent elements of a criminal offence could not provide a sufficient ground for regarding the defendant as being "charged with a criminal offence", nor could the fact that evidence from the trial was used to determine the civil law consequences. Otherwise, Article 6.2 ECHR would have the undesirable effect of pre-empting the victim's possibilities of claiming compensation, entailing an arbitrary and disproportionate limitation on the right of access to court. Such an extensive interpretation was not supported by either the wording of Article 6.2 ECHR or any common approach in Contracting States. Consequently, an acquittal should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict standard of proof.

However, if the decision on compensation contained a statement imputing criminal liability to the defendant, this could raise an issue falling within the ambit of Article 6.2 ECHR. It was therefore necessary in the present case to examine whether the domestic courts had acted in such a way or used such language as to create a clear link between the criminal case and the ensuing compensation proceedings, so as to justify extending the scope of the application of Article 6.2 ECHR. The High Court had found it "clearly probable that [the applicant had] committed the offences" and the Supreme Court, by upholding that judgment, albeit using more careful language, had not rectified the matter. The language employed overstepped the bounds of the civil forum, thereby casting doubt on the

correctness of the acquittal and there was accordingly a sufficient link to the earlier criminal proceedings. Article 6.2 ECHR was therefore applicable to the compensation proceedings and had been violated.

Cross-references:

- *Minelli v. Switzerland*, Judgment of 25.03.1983, Series A, no. 62; *Special Bulletin ECHR* [ECH-1983-S-003];
- *Lutz, Englert and Nölkenbockhoff v. Germany*, Judgments of 25.08.1987, Series A, no. 123;
- *M.C. v. the United Kingdom*, no. 11882/85, decision of 07.10.1987, *Decisions and Reports* 54, p. 162;
- *X. v. Austria*, no. 9295/81, Commission decision of 06.10.1992, *Decisions and Reports* 30, p. 227;
- *Sekanina v. Austria*, Judgment of 25.08.1993, Series A, no. 266-A;
- *Allenet de Ribemont v. France*, Judgment of 10.02.1995, Series A, no. 308; *Bulletin* 1995/1 [ECH-1995-1-003];
- *A.P., M.P. and T.P. v. Switzerland,* Judgment of 29.08.1997, *Reports of Judgments and Decisions* 1997-V;
- *Rushiti v. Austria*, no. 28389/95, Judgment of 21.03.2000, unreported;
- *Lamanna v. Austria*, no. 28923/95, Judgment of 10.07.2001, unreported;
- *Phillips v. the United Kingdom*, no. 41087/98, ECHR 2001-VII.

Languages:

English.

Identification: ECH-2003-1-003

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 13.02.2003 / **e)** 41340/98, 41342/98, 41343/98, 41344/98 / **f)** Refah Partisi [The Welfare Party] and others v. Turkey / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.3.3 **General Principles** – Democracy – Pluralist democracy.
3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
3.18 **General Principles** – General interest.
3.19 **General Principles** – Margin of appreciation.
3.20 **General Principles** – Reasonableness.
5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.
5.3.26 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Political party, dissolution / Political party, programme / Fundamentalism / Secularity, principle / *Sharia*, democracy, incompatibility / Public freedoms, constant evolution.

Headnotes:

The dissolution of a political party constitutes an interference with the right to freedom of association. However, it may be justified where the party advocates a model of society which is incompatible with democracy principles and there is a real and immediate risk of it being in a position to implement its policies.

Summary:

The first applicant is a political party and the others were, at the material time, its chairman and two vice-chairmen, all of whom were also Members of Parliament. The party obtained 16.88% of the vote in the 1991 general elections and 22% of the vote in the 1995 general elections, when it became the largest party in Parliament. It subsequently formed a coalition government with the True Path Party.

In May 1997, Principal State Counsel at the Court of Cassation applied to the Constitutional Court for the dissolution of the party on the ground that it was a centre of activities contrary to the principles of secularism (Article 69.6 of the Constitution). He referred to acts and statements of certain leaders and members of the party. The party's representatives submitted that the statements had been distorted and

taken out of context, that no criminal offence had been committed and that the party had been given no warning permitting it to expel any member acting contrary to the law. State Counsel maintained that the party had described itself as engaged in a holy war *(jihad)* and had expressed the intention of introducing a theocracy and Islamic law *(sharia)*.

In January 1998 the Constitutional Court ordered the dissolution of the party. It referred to statements made by the second applicant with regard to the introduction of separate legal systems and the institution of a theocracy, if necessary by force, which the court found to be contrary to the constitutional principle of secularism. The Court also referred to statements made by other members of the party, including Members of Parliament, advocating the introduction of *sharia* and, in some instances, the use of violence. As an automatic consequence of the dissolution, the party's assets were transferred to the Treasury. Moreover, the Constitutional Court decided to terminate the applicants' mandates as Members of Parliament and to ban them from founding or joining any other political party for five years.

In the application lodged with the European Court of Human Rights, the applicants complained that the dissolution of the Welfare Party violated their right to freedom of association. They relied on Article 11 ECHR.

The Court considered that the dissolution constituted an interference with freedom of association. As to whether it was prescribed by law, it was not disputed that activities contrary to the principles of equality and respect for the democratic, secular republic were undoubtedly unconstitutional or that the Constitutional Court had sole jurisdiction to dissolve a party which was a centre of such activities. Although a divergence had arisen between the Law on the regulation of political parties and the Constitution, the Constitution took precedence over statute law and the Constitutional Court was clearly required to give precedence to the provisions of the Constitution. Moreover, *Refah* was a large political party which had legal advisers conversant with constitutional law and the rules governing political parties, while the other applicants were experienced politicians and two of them were also lawyers. In these circumstances, the applicants were reasonably able to foresee the dissolution of the party if its leaders engaged in anti-secular activities. Furthermore, taking into account the importance of the principle of secularism for the democratic system in Turkey, *Refah's* dissolution pursued the legitimate aims of protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others.

As to the necessity of the interference, the Court had to concentrate on:

i. whether there was plausible evidence that any risk to democracy was sufficiently imminent;

ii. whether the acts and statements of the party's leaders and members were imputable to the party as a whole, and

iii. whether acts and statements imputable to the party formed a whole which gave a clear picture of a model of society advocated by the party which was incompatible with a “democratic society”.

a. As to the existence of a pressing social need, the Court considered that in view of its election results, the party had at the time of its dissolution the real potential to seize political power without being restricted by the compromises inherent in a coalition. Moreover, although the statements had been made several years earlier, the courts could legitimately take into consideration the progression over time of the real risk that the party's activities represented. The programme and policies of a party may become clear through the accumulation of acts and speeches over a relatively long period and the party may over the years increase its chances of gaining political power and implementing its policies. While *Refah's* policies were dangerous for Convention rights and freedoms, the real chances of it implementing those policies made that danger more tangible and more immediate, so that the courts could not be criticised for not acting earlier or for not waiting and they had not, therefore, exceeded the margin of appreciation in electing to intervene when they did.

As to the imputability to *Refah* of the acts and speeches of its members, the party had not proposed altering Turkey's constitutional arrangements in a manner contrary to democracy in either its constitution or its coalition programme. The dissolution referred rather to statements made by certain leading figures. The statements made by the three applicants could incontestably be attributed to *Refah*, since remarks by office-bearers on political questions are imputable to the party they represent unless otherwise indicated. Moreover, in as much as the acts and remarks of other members in elected posts formed a whole which disclosed the party's aims and intentions and projected an image of the society it wished to set up, these could also be imputed to *Refah*. Finally, *Refah* had presented those who had made such statements as candidates for important posts and had taken no disciplinary action against them before dissolution proceedings were instituted.

With regard to the main grounds for dissolution, these could be classified into three main groups:

i. a plurality of legal systems cannot be considered compatible with the Convention system, as it would introduce a distinction between individuals based on religion and thus, firstly, do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of different religions and beliefs and, secondly, create an unacceptable discrimination;

ii. as to the application of *sharia* within the context of such a plurality of systems, explicitly proposed in certain of the statements referred to, the Court accepted the Constitutional Court's conclusion that these statements formed a whole and gave a clear picture of a model proposed by *Refah* of a state and society organised according to religious rules; however, *sharia* is incompatible with the fundamental principles of democracy, since principles such as pluralism in the political sphere and the constant evolution of public freedoms have no place in it and a regime based on *sharia* clearly diverges from Convention values; Contracting States may oppose political movements based on religious fundamentalism in the light of their historical experience, and taking into account the importance of the principle of secularism in Turkey the Constitutional Court was justified in holding that *Refah's* policy of establishing *sharia* was incompatible with democracy;

iii. as to the relationship between *sharia* and the plurality of legal systems, Refah's policy was to apply some of *sharia*'s private law rules to the Muslim population in the framework of a plurality of legal systems; however, such a policy goes beyond the freedom of individuals to observe the precepts of their religion and falls outside the private sphere to which Turkey confines religion, thus suffering from the same contradictions with the Convention system as the introduction of *sharia*; freedom of religion, including freedom to manifest religion, is primarily a matter of individual conscience and the sphere of individual conscience is quite different from the field of private law, which concerns the organisation and functioning of society – it had not been disputed that in Turkey everyone can observe in his private life the requirements of his religion but on the other hand any State may legitimately prevent the application within its jurisdiction of private law rules of religious inspiration prejudicial to public order and the values of democracy;

iv. as to the possibility of recourse to force, whatever meaning is given to *jihad* there was ambiguity in the terminology used to refer to the method to be employed to gain political power and in all the speeches referred to by the Constitutional Court the possibility was mentioned of resorting “legitimately” to force; moreover, the leaders had not taken prompt steps to distance themselves from members who had publicly approved the use of force.

In conclusion, in view of the fact that *Refah's* plans were incompatible with the concept of a “democratic society” and the real opportunities it had of putting them into practice, the penalty imposed by the Constitutional Court could reasonably be considered to have met a “pressing social need”.

b. As to the proportionality of the interference, *Refah's* other Members of Parliament remained in office and in view of the low value of its assets the transfer to the Treasury had no bearing on proportionality. Moreover, the prohibition imposed on the individual applicants was temporary. The interference was not, therefore, disproportionate. There had consequently been no violation of Article 11 ECHR.

Cross-references:

- *Communist Party (KPD) v. the Federal Republic of Germany*, no. 250/57, Commission decision of 20.07.1957, Yearbook 1, p. 222;
- *Handyside v. the United Kingdom*, Judgment of 07.12.1976, Series A, no. 24; *Special Bulletin* [ECH-1976-S-003];
- *X. v. the United Kingdom*, no. 7992/77, Commission decision of 12.07.1978, *Decisions and Reports* 14, p. 234;
- *Müller and Others v. Switzerland,* Judgment of 24.05.1988, Series A, no. 133; *Special Bulletin ECHR* [ECH-1988-S-003];
- *X. v. the United Kingdom*, no. 8160/78, Commission decision of 12.03.1981, *Decisions and Reports* 22, p. 27;
- *Ezelin v. France,* Judgment of 26.04.1991, Series A, no. 202;
- *Margareta and Roger Andersson v. Sweden*, Judgment of 25.02.1992, Series A, no. 226-A;
- *Yanasik v. Turkey*, no. 14524/89, Commission decision of 06.01.1993, *Decisions and Reports* 74, p. 14;
- *Karaduman v. Turkey*, no. 16278/90, Commission decision of 03.05.1993, *Decisions and Reports* 74, p. 93;
- *Kokkinakis v. Greece*, Judgment of 25.05.1993, Series A, no. 260-A; *Special Bulletin ECHR* [ECH-1993-S-002];
- *Jersild v. Denmark*, Judgment of 23.09.1994, Series A, no. 298; *Bulletin* 1994/3 [ECH-1994-3-014];

- *Vogt v. Germany,* Judgment of 26.09.1995, Series A, no. 323; *Bulletin* 1995/3 [ECH-1995-3-014];
- *Kalaç v. Turkey*, *Reports of Judgments and Decisions* 1997-IV; *Special Bulletin Freedom of Religion and Beliefs* [ECH-1997-R-001];
- *United Communist Party of Turkey and Others v. Turkey*, Judgment of 30.01.1998, *Reports* 1998-I; *Bulletin* 1998/1 [ECH-1998-1-001];
- *Socialist Party and Others v. Turkey*, Judgment of 25.05.1998, *Reports* 1998-III;
- *Buscarini v. San Marino* [GC], no. 24645/94, ECHR 1999-I;
- *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, ECHR 1999-VIII;
- *Serif v. Greece*, no. 38178/97, ECHR 1999-IX; *Bulletin* 1999/3 [ECH-1999-3-011];
- *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, ECHR 2000-VII; *Bulletin* 2000/2 [ECH-2000-2-006];
- *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V;
- *K. and T. v. Finland* [GC], no. 25702/94, ECHR 2001-VII; *Bulletin* 2001/2 [ECH-2001-2-005];
- *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29225/95 and 29221/95, ECHR 2001-IX; *Bulletin* 2002/1 [ECH-2002-1-001];
- *Metropolitan Church of Bessarabia and Others v. Moldova,* no. 45701/99, ECHR 2001-XII; *Bulletin* 2002/1 [ECH-2002-1-003];
- *Petersen v. Germany* (dec.), no. 39793/98, ECHR 2001-XII;
- *Calvelli and Ciglio* [GC], no. 32967/96, ECHR 2002-I;
- *Kingsley v. the United Kingdom* [GC], no. 35605/97, ECHR 2002-IV;
- *Göç v. Turkey*, [GC], no. 36590/97, ECHR 2002-V;
- *Yazar and Others v. Turkey,* nos. 22723/93, 22724/93 and 22725/93, ECHR 2002-II.

Languages:

English, French.

Identification: ECH-2003-1-004

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 25.02.2003 / **e)** 51772/99 / **f)** Roemen and Schmit v. Luxembourg / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.
5.3.32 **Fundamental Rights** – Civil and political rights – Inviolability of the home.
5.3.33 **Fundamental Rights** – Civil and political rights – Inviolability of communications.

Keywords of the alphabetical index:

Journalist, sources, disclosure / Search, lawyer's office / Search, seizure, document / Search, proportionality.

Headnotes:

Searches of a journalist's home and business premises with the aim of identifying the perpetrator of an offence and consequently identifying the journalist's source constitute an interference with his freedom of expression more serious than an order to disclose the identity of the source. Where it has not been shown that other measures to identify the source were not available, the interference will be disproportionate to the aims pursued.

The search of a lawyer's office and the seizure of a document relating to a journalist client, with a view to identifying the source of information obtained by the latter, constitutes a disproportionate interference with the lawyer's right to respect for his private life, home and correspondence.

Summary:

In July 1998 the applicant, a journalist, published an article in a daily newspaper alleging that a Luxembourg minister had committed VAT frauds and had had a fiscal fine imposed on him as a result. The applicant produced documentary evidence in support of those

allegations, in particular a decision antedating the publication of the article of the director of the Revenue Department ordering the minister to pay the fine in question.

Following a criminal complaint by the minister, an inquiry was initiated for concealment of a breach of professional secrecy against the journalist and for violation of professional secrecy against a person or persons unknown. The Public Prosecutor's application to commence proceedings stated that the inquiry aimed to determine which officials of the Revenue Department had access to the relevant file and documents.

The first two searches ordered by the investigating judge, one at the journalist's home and the other at his workplace, proved fruitless and actions for annulment brought by the applicant against the orders of the investigating judge were unsuccessful. During the search of the chambers of the second applicant, who was the first applicant's lawyer in the proceedings brought against him, the officers seized an internal, confidential letter from the director of the Revenue Department dating from after the publication of the article. The applicants explained that that letter had been forwarded anonymously to the editors of the applicant's newspaper and that the applicant had forwarded it immediately to his lawyer. Since that search was null and void, the document seized was returned. But on the same day, a new order of the investigating judge, the validity of which was confirmed, enabled it to be seized once again.

In the application lodged with the European Court of Human Rights, the applicants complained, firstly, that the searches carried out at the journalist's home and business premises with a view to disclosing his sources violated the right to freedom of expression and, secondly, that the search carried out at the lawyer's chambers violated his right to respect for private life, home and correspondence. The applicants relied on Article 10 ECHR and Article 8 ECHR respectively.

With regard to freedom of expression, the Court considered that the searches conducted at the journalist's home and business premises with the aim of identifying the perpetrator of a breach of professional secrecy and hence the journalist's source constituted an interference with his rights guaranteed by Article 10 ECHR. That interference, which was prescribed by law, had legitimate aims relating to the prevention of disorder or crime. The question was essentially whether that interference was necessary in a democratic society.

The searches were intended to identify the potential perpetrators of a breach of professional secrecy and the possible unlawful act committed subsequently by the applicant in the performance of his duties; they therefore fell within the sphere of the protection of journalistic sources. The applicant's press article discussed a subject of general interest. The searches had been carried out first at the applicant's premises, whereas the investigation had been initiated concurrently against him and the officials. Measures other than searches of the applicant's premises might have enabled the investigating judge to identify the possible perpetrators of the offences and the Government had failed to show that, in the absence of searches of the applicant's premises, the national authorities would not have been able to identify in the first place whether any breach of professional secrecy had been committed.

Searches with the purpose of identifying the journalist's source – albeit fruitless – constituted an act more serious than an order to disclose the identity of the source. This was because investigators who, armed with a search warrant, surprise a journalist at his work place have very extensive powers of investigation owing to the fact that they have, *ipso facto*, access to all the documentation held by the journalist. However, the restrictions imposed on the confidentiality of journalistic sources required the Court to carry out the most careful examination. Whereas the reasons invoked by the national courts might be regarded as “relevant”, they were not “sufficient” to justify the searches carried out at the applicant's premises. Those searches were therefore disproportionate to the aims pursued and Article 10 ECHR had been violated.

With regard to Article 8 ECHR, the search conducted at the lawyer's chambers and the seizure of a document relating to her client's case-file constituted an interference which was prescribed by law and had a legitimate aim, namely that of preventing disorder and crime.

As regards the necessity for the interference, whereas the search carried out in this case was accompanied by special procedural guarantees, the search warrant gave relatively wide powers to the investigators. Secondly and above all, the aim of the search ultimately came down to identifying the journalist's source through the intermediary of his lawyer, with the result that the search of the lawyer's chambers affected the rights guaranteed to the applicant by Article 10 ECHR. Furthermore, the search conducted at the lawyer's chambers was disproportionate to its aim, having regard in particular to the rapidity with which it was carried out. There had therefore been a violation of Article 8 ECHR.

Cross-references:

- *Lingens v. Austria,* Judgment of 08.07.1986, Series A, no. 103; *Special Bulletin ECHR* [ECH-1986-S-003];
- *Niemietz v. Germany,* Judgment of 16.12.1992, Series A, no. 251-B; *Special Bulletin ECHR* [ECH-1992-S-007];
- *Crémieux v. France*, Judgment of 25.02.1993, Series A, no. 256-B;
- *Goodwin v. the United Kingdom*, Judgment of 27.03.1996, *Reports of Judgments and Decision* 1996-II; *Bulletin* 1996/1 [ECH-1996-1-006];
- *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I; *Bulletin* 1999/1 [ECH-1999-1-001];
- *Bottazzi v. Italy* [GC], no. 34884/97, ECHR 1999-V;
- *Christine Goodwin v. United Kingdom* [GC], no. 28957/95, ECHR 2002-VI; *Bulletin* 2002/3 [ECH-2002-3-008].

Languages:

English, French.

Systematic thesaurus (V14) *

* 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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8 E.g. assessors, office members.
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13 Review *ultra petita*.
14 Horizontal distribution of powers.
15 Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.
16 Decentralised authorities (municipalities, provinces, etc.).
17 This keyword concerns decisions on the procedure and results of referenda and other consultations.
18 This keyword concerns decisions preceding the referendum including its admissibility.
19 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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21 Including constitutional laws.
22 For example organic laws.
23 Local authorities, municipalities, provinces, departments, etc.
24 Or: functional decentralisation (public bodies exercising delegated powers).
25 Political questions.
26 Unconstitutionality by omission.
27 For the withdrawal of proceedings, see also 1.4.10.4.
28 Pleadings, final submissions, notes, etc.

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[29] May be used in combination with Chapter 1.2 Types of claim.
[30] For the withdrawal of the originating document, see also 1.4.5.
[31] Comprises court fees, postage costs, advance of expenses and lawyers' fees.

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[32] For questions of constitutionality dependent on a specified interpretation, use 2.3.2.
[33] This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).
[34] Including its Protocols.

2.1.1.4.7 International Covenant on Economic, Social and Cultural Rights of 1966
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3.20 **Reasonableness**....................................**18, 40, 56, 64, 69, 105, 106, 143, 161, 164**

3.21 **Equality[44]**....................................**8, 40, 133**

3.22 **Prohibition of arbitrariness**....................................**6, 35, 39, 40, 52, 55, 81, 98, 143**

3.23 **Equity**

36 Including the principle of a multi-party system.
37 Includes the principle of social justice.
38 See also 4.8.
39 Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.
40 Including maintaining confidence and legitimate expectations.
41 Principle according to which sub-statutory acts must be based on and in conformity with the law.
42 Prohibition of punishment without proper legal base.
43 Including compelling public interest.
44 Only where not applied as a fundamental right. Also refers to the principle of non-discrimination on the basis of nationality as it is applied in Community law.

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4.4.4 Status
4.4.4.1 Liability
4.4.4.1.1 Legal liability
4.4.4.1.1.1 Immunity

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[45] Including questions of treason/high crimes.
[46] Including prohibition on monopolies.
[47] For the principle of primacy of Community law, see 2.2.1.6.
[48] Including the body responsible for revising or amending the Constitution.
[49] For example presidential messages, requests for further debating of a law, right of legislative veto, dissolution.
[50] For example nomination of members of the government, chairing of Cabinet sessions, countersigning of laws.
[51] For example the granting of pardons.

4.4.4.1.1.2 Civil liability
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4.5.2 Powers[53] **87**, **99**, **101**, **111**, **125**
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52 Bicameral, monocameral, special competence of each assembly, etc.
53 Including specialised powers of each legislative body and reserved powers of the legislature.
54 In particular commissions of enquiry.
55 For delegation of powers to an executive body, see keyword 4.6.3.2.
56 Obligation on the legislative body to use the full scope of its powers.
57 Representative/imperative mandates.
58 Presidency, bureau, sections, committees, etc.
59 Including the convening, duration, publicity and agenda of sessions.
60 Including their creation, composition and terms of reference.
61 State budgetary contribution, other sources, etc.
62 For the publication of laws, see 3.15.
63 For example incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.
64 For local authorities, see 4.8.

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[65] Derived directly from the Constitution.
[66] See also 4.8.
[67] The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.
[68] Civil servants, administrators, etc.
[69] Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.
[70] Other than the body delivering the decision summarised here.
[71] Positive and negative conflicts.

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4.8.8.5.1 Conclusion of treaties

[72] For example, Judicial Service Commission, *Conseil supérieur de la magistrature*.
[73] Comprises the Court of Auditors in so far as it exercises judicial power.
[74] See also 3.6.
[75] And other units of local self-government.

4.8.8.5.2 Participation in international organisations or their organs

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76 See also keywords 5.3.38 and 5.2.1.4.
77 Proportional, majority, preferential, single-member constituencies, etc.
78 For aspects related to fundamental rights, see 5.3.38.2.
79 For the creation of political parties, see 4.5.10.1.
80 E.g. Names of parties, order of presentation, logo, emblem or question in a referendum.
81 Tracts, letters, press, radio and television, posters, nominations, etc.
82 Impartiality of electoral authorities, incidents, disturbances.
83 E.g. signatures on electoral rolls, stamps, crossing out of names on list.
84 E.g. in person, proxy vote, postal vote, electronic vote.
85 E.g. Panachage, voting for whole list or part of list, blank votes.
86 E.g. Auditor-General.
87 Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

4.12.2 Guarantees of independence
4.12.2.1 Term of office
4.12.2.2 Incompatibilities
4.12.2.3 Immunities
4.12.2.4 Financial independence
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88 E.g. Court of Auditors.
89 The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.
90 Institutional aspects only: questions of procedure, jurisdiction, composition etc are dealt with under the keywords of Chapter 1.
91 Including state of war, martial law, declared natural disasters etc; for human rights aspects, see also keyword 5.1.4.
92 Positive and negative aspects.
93 For rights of the child, see 5.3.41.

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5.3.13.1.1 Constitutional proceedings

94 The question of *"Drittwirkung"*.
95 See also 4.18.
96 Taxes and other duties towards the state.
97 Here, the term "national" is used to designate ethnic origin.
98 For example, discrimination between married and single persons.
99 This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.
100 Detention by police.
101 Including questions related to the granting of passports or other travel documents.
102 May include questions of expulsion and extradition.

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[103] 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.
[104] This keyword covers the right of appeal to a court.
[105] Including the right to be present at hearing.
[106] Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.
[107] This keyword also includes the right to freely communicate information.
[108] Militia, conscientious objection, etc.

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[109] Aspects of the use of names are included either here or under "Right to private life".
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[111] For institutional aspects, see 4.9.5.
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* The précis presented in this Bulletin are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

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