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*
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2. *Keywords of the Systematic Thesaurus (primary)*
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G. Buquicchio
Secretary of the European Commission for Democracy through Law

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Strasbourg, June 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:

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Précis of important decisions of the reference period 1 May 2003 – 31 August 2003 will be published in the next edition, *Bulletin* 2003/3 for the following countries:

Denmark, Italy, Russia.

Albania
Constitutional Court

Important decisions

Identification: ALB-2003-2-003

a) Albania / **b)** Constitutional Court / **c)** / **d)** 14.05.2003 / **e)** 18 / **f)** Interpretation of the Constitution / **g)** *Fletore Zyrtare* (Official Gazette), 36/03, 1253 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.9 **General Principles** – Rule of law.
3.18 **General Principles** – General interest.
4.5.2.2 **Institutions** – Legislative bodies – Powers – Powers of enquiry.
4.5.7.1 **Institutions** – Legislative bodies – Relations with the executive bodies – Questions to the government.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Independence.

Keywords of the alphabetical index:

Inquiry, commission, setting up, powers / Minority, parliamentary, right to request an inquiry / Specific issues, definition.

Headnotes:

Commissions of inquiry are effective instruments of parliamentary control that operate within the limits of the Assembly's powers and that are set up with respect to specific issues related to the legislative power. At the request of one-quarter of the deputies, the setting up of parliamentary commissions of inquiry is obligatory. The object and scope of the commissions should respect the constitutional principles and generally accepted rules of international law and not infringe on the independence and activity of State bodies. Commissions of inquiry should function in accordance with constitutional principles. Specific issues are defined as those issues to be investigated as to the verification of the implementation of laws; identification and examination of a specific occurrence, event or activity giving rise to proposals, amendments or adoption of laws aiming at preventing occurrences that are undesirable for the State and society; and the examination and making public of institutional responsibility.

Summary:

A group of deputies applied to the Constitutional Court seeking an interpretation of Article 77.2 of the Constitution regarding the right or the obligation to set up parliamentary commissions of inquiry and the object of their activity. The applicant stated that there were two different approaches taken by the Assembly of Albania as to the interpretation of the constitutional provision on two issues. Those two issues were:

a. Is the Assembly under an obligation to set up a commission of inquiry whenever a minority requests it to do so?
b. Which issues should be defined as specific issues?

The Constitutional Court found that parliamentary activity requires the creation of conditions conducive to the respect of the law. The important legislative function in democracies is realised by its representatives, who on the one hand adopt the laws, and on the other, exercise parliamentary control over the other branches of power. Parliamentary control aims at the gathering of information about administrative questions and implementation of laws within the framework of the Constitution. In that context, the Assembly has the right to investigate issues of public interest by means of commissions of inquiry, which are instruments for realising parliamentary control. Parliamentary control examines and makes public the responsibility of how the country is being governed and results in recommendations for preventing undesirable occurrences and improving future work.

The Constitutional Court held that the Constitution provides for not only the right of the Assembly to set up commissions of inquiry, but also its obligation to do so when requested by the parliamentary minority, thereby strengthening the role of the commission of inquiry as an effective instrument of control. In the literature on constitutional law, the right of parliamentary inquiry has even been recognised as a right of the parliamentary minority to exercise its parliamentary control vis-à-vis the executive. The Constitution lays down an obligation to set up parliamentary commissions for the purpose of establishing a balance between the majority and minority in the Assembly. According to the Constitutional Court, that minority right is not unlimited. It should always follow and respect constitutional

principles. An inquiry that is not related to legislative purposes and does not fall within the legislative activity should not be considered as being in accordance with constitutional principles. Parliamentary commissions of inquiry should always respect the principles of the separation of powers, independence of courts, presumption of innocence, impartiality and the due process of law. The Constitutional Court held that the respect of those principles does not infringe on the minority right to exercise that constitutional power. However, during the process of deciding on and approving the object of the investigation, the Assembly should not reduce that right to such an extent that the accomplishment of the function of a commission of inquiry is impossible.

As to the interpretation of the term "specific issues", the Constitutional Court held that it should be seen within the framework of parliamentary control and the minority right to use that important instrument in accordance with the constitutional principles. The constitutional concept of "specific issue" includes questions to be investigated regarding the verification of the implementation of legislation as well as the preparation of proposals or legal initiatives aimed at the restriction and prevention of occurrences that are undesirable for the State and society.

Languages:

Albanian.

Andorra
Constitutional Court

Important decisions

Identification: AND-2003-2-001

a) Andorra / **b)** Constitutional Court / **c)** / **d)** 09.05.2003 / **e)** 2003-1-CC / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 14.05.2003 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between State authorities.
4.6.3 **Institutions** – Executive bodies – Application of laws.
4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.
4.8.8.4 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Co-operation.

Keywords of the alphabetical index:

Environment, protection / Public health, powers / Building permit, issue, conditions.

Headnotes:

An act of the *Comú* which seeks to protect environmental health conditions does not interfere with the powers of the Government. On the contrary, that allows a greater and improved guarantee of the coordination of the public powers in the interest of constitutional values.

Summary:

The government requested the Constitutional Court to settle a conflict of powers between it and the *Comú* of Andorra-la-Vella. The Government maintained that the *Comú* had encroached upon its powers in relation to public health.

The government ordered the closure of a waste disposal incinerator and declared the area in which it was situated more or less dangerous to human and

animal health according to the level of pollution found. Thus, before granting a building permit for the neighbouring areas, the *Comú* of Andorra-la-Vella requires that the applicant submit a certificate issued by the Government stating that the land to be built upon does not show a degree of pollution representing a danger to health and to human life.

The government maintains that in demanding this certificate the *Comú* is exceeding the powers conferred on it in town and country planning matters and is interfering in the area of health protection, thus encroaching on the powers which, under the Constitution and the law, belong to the government.

In this judgment, the Court considers that an act of the *Comú* which merely requires, for the exercise of its power to grant a building permit, that the applicant present a certificate issued by the state relating to the conditions of environmental health, on matters where the Government has intervened pursuant to the provisions of Article 59 of the Health Act, does not impinge upon the powers of the State; quite to the contrary, it allows a greater and improved guarantee of the coordination of the public powers in the interest of the constitutional values. In the dispute before the Court, therefore, the *Comú* of Andorra-la-Vella did not interfere in the area of powers of the Government, it did not create a State rule relating to the grant of building permits and it did not impose a burden on the Government. It merely adopted a guarantee permitting compliance with the planning rule, following the general principle of town and country planning.

Supplementary information:

1. The Constitutional Court adjudicates in disputes as to powers between the constitutional organs. The following are considered constitutional organs: the Co-Princes (joint and indivisible Heads of State), the General Council (parliament), the government, the Judicial Service Commission and the "*Comuns"*.

2. The *Comú* is the representative and administrative organ of the "*Parroquies"*, roughly equivalent to the district council; Andorra is composed of 7 "Parroquies" (Canillo, Encamp, Ordino, La Massana, Andorra-la-Vella, Sant Julià de Lòria and Escaldes-Engordany).

Languages:

Catalan.

Argentina
Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-2003-2-001

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 01.09.2003 / **e)** A.215.XXXVII / **f)** Asociación Mutual Carlos Mujica c/ Estado Nacional (Poder Ejecutivo Nacional – COMFER) / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 325 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
3.19 **General Principles** – Margin of appreciation.
3.22 **General Principles** – Prohibition of arbitrariness.
5.1.1.5.1 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Private law.
5.2 **Fundamental Rights** – Equality.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
5.3.26 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Association, broadcasting, licence, prohibition / Media, broadcasting, licence, award.

Headnotes:

The prohibition on the participation of associations governed by civil law, cooperatives and non-profit-making mutual associations in public procedures for the award of licences to operate radio stations violates the rights to equality and freedom of expression and also the right to associate for proper purposes laid down in the national Constitution.

Summary:

A non-profit-making mutual association had challenged the validity of the law which authorised only natural persons or commercial companies to participate in public procedures with a view to obtaining licences to operate radio stations. The decisions delivered at first instance and on appeal had allowed the application. The State therefore brought an extraordinary appeal before the Supreme Court.

The Supreme Court upheld the contested judgment. It accepted that, unlike the written press, radio broadcasting by its nature allows greater regulation. However, the criterion to be followed in establishing that regulation cannot be arbitrary or exclude certain persons unless it is based on objective and reasonable grounds.

In that regard, the Court considered that the State had not demonstrated the existence of reasons justifying the contested exclusion, particularly because according to the regulation mutual associations have a structure which allows them to operate a collective undertaking successfully: they must have assets appropriate to their object; they are authorised, in order to attain their objectives, to conclude any contracts in cooperation with persons of a different legal nature; and they are subject to penalties in the event of contractual or non-contractual liability. The Court therefore did not find that these associations, by comparison with commercial companies, present unequal conditions which justify the difference in treatment.

The Court also took into account the fact that the participation of a mutual association in a public contract must facilitate the pluralism of opinions that characterises democratic societies and that it constituted a genuine counterbalance to economic groups. The prohibition therefore infringed the right to associate for proper purposes.

Nor, last, did the Court find that any superior interest justified the prohibition on participating in public contracts imposed on the applicant, which deprived the applicant, in the event of being selected, of the exercise of its right to freedom of expression as protected by Article 14 of the Constitution and by Article 13 of the American Convention on Human Rights.

Languages:

Spanish.

Armenia
Constitutional Court

Statistical data

1 May 2003 − 31 August 2003

- 33 referrals made, 28 cases heard and 28 decisions delivered, including:
  - 12 decisions concerning the conformity of international treaties with the Constitution. All international treaties were declared compatible with the Constitution.
- 21 cases concerning the disputes on the outcome of elections of the National Assembly of the Republic of Armenia:
  - 3 applications were withdrawn by the applicants, 2 cases were not admitted for consideration.
- 16 decisions delivered concerning the disputes on the outcome of elections of the National Assembly of the Republic of Armenia:
  - 15 decisions concerning the dispute on the outcome of elections by the majority system and 1 decision concerning the dispute on the outcome of elections by the proportional representation system.

Important decisions

Identification: ARM-2003-2-002

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 16.06.2003 / **e)** DCC-425 / **f)** On the dispute on the outcome of the elections of the National Assembly by the majority system in Constituency no. 50 held on 25 May 2003 / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

4.9.1 **Institutions** – Elections and instruments of direct democracy – Electoral Commission.
4.9.7.1 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Electoral rolls.
4.9.9.8 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Counting of votes.
5.3.40 **Fundamental Rights** – Civil and political rights – Right to self fulfilment.

Keywords of the alphabetical index:

Election, vote count, court judgment, influence on results / Election, invalidity.

Headnotes:

Where a court of general jurisdiction delivers a judgment in which it makes a finding of fact that the process of the summarisation of the voting results in a precinct was flawed, and it is impossible to determine who the elected candidate in the constituency is, the elections in the constituency must be declared invalid.

Summary:

Two candidates, who participated in the National Assembly elections in Constituency no. 50 held on 25 May 2003, appealed to the Constitutional Court for a declaration that the elections in that constituency were invalid. The candidates argued that violations of the Electoral Code had taken place during the organisation and conduct of the elections, and that those violations had influenced the results of the elections.

The appellants argued, *inter alia*, that the precinct electoral commissions had violated the prescribed manner of filling in summarisation protocols, that other persons had voted in the place of those who should have voted, that the constituency electoral commission did not properly process the applications addressed to it by the competent persons, and that the constituency electoral commission did not take into account the judgment of Shirak Marz delivered by the first instance court on 30 May 2003 concerning voting results in three precincts (Precinct no. 1545, no. 1551 and no. 1564). The first instance court had initiated the verification of voting results in the above-mentioned precincts and had discovered 504 ballot papers without signatures of the electoral commission members (Precinct no. 1545) and 151 uncancelled ballot papers that should have been cancelled. The appellants alleged in particular that those discoveries and other flaws in electoral documents had a substantive influence on the number of inaccuracies, which excluded the possibility of determining who was the elected candidate.

As to the appellants' allegation that the constituency electoral commission did not take into account the above-mentioned judgment of the first instance court, the respondent argued that the constituency electoral commission had neither discussed nor based the summarisation of voting results on the judgment because that judgment had been adopted on 30 May and the commission had received it at the end of that day, that is to say, at the end of the period provided by the Electoral Code for the summarisation of voting results.

In order to support the allegation that other persons had voted in the place of those who should have voted, the appellants placed before the Court a list of 97 voters who, according to them, had not voted in the elections and instead of their true passport data, false data had been entered into the voters' lists. At the request of the Constitutional Court, the Police carried out a check of the passport data, and in 36 cases the identity of passport was confirmed.

According to the Shirak Marz judgment of 30 May 2003 of the first instance court concerning the voting results in three precincts (Precinct no. 1545, no. 1551 and no. 1564), 504 unsigned ballot papers had been discovered in Precinct no. 1545; and 151 ballot papers that should have been cancelled but had not been cancelled had been discovered in Precinct no. 1551.

While examining the register of Precinct no. 1551, the Constitutional Court found that the precinct electoral commission, in violation of Article 60 of the Electoral Code and relevant decision of the Central Electoral Commission, had not properly prepared the protocol of summarisation of voting results. That being so, the Constitutional Court found that it created a suspicion concerning the legality of the summarisation of the voting results in that precinct and amounted to a basis for declaring the official number of cancelled ballot papers in the precinct and in the whole constituency unreliable.

Bearing in mind that in Precinct no. 1551 the difference in the votes cast for the first two candidates was 94, the Constitutional Court held, that had the 151 uncancelled ballot papers been actually cancelled and entered into that precinct's summarisation protocol as cancelled ballot papers, it would have led to a situation, where it would have been impossible to determine the elected candidate.

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

Languages:

Armenian.

Identification: ARM-2003-2-003

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 01.07.2003 / **e)** DCC-434 / **f)** On the dispute on the outcome of the elections of the National Assembly by the majority system in constituency no. 16 held on 25 May 2003 / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

1.3.4.5.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Parliamentary elections.
1.4.8.7 **Constitutional Justice** – Procedure – Preparation of the case for trial – Evidence.
4.9.1 **Institutions** – Elections and instruments of direct democracy – Electoral Commission.
4.9.7.1 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Electoral rolls.
4.9.9.3 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Voting.
5.3.40 **Fundamental Rights** – Civil and political rights – Right to self fulfilment.

Keywords of the alphabetical index:

Electoral Commission, members / Election, invalidity.

Headnotes:

Where, in violation of the Electoral Code, a person who has no right to be a member of a precinct electoral commission is appointed as such, thereby making the electoral commission not legitimate, the voting results of that precinct must be declared unreliable.

According to the Constitution, the Constitutional Court must consider a case and deliver a decision within 30 days after the receipt of an application. Consequently, where a competent state body fails within that period to conduct and present the results to the Constitutional Court of a proper investigation concerning an allegation by an applicant of certain falsifications at some precincts during the electoral process, the Constitutional Court must declare the voting results in those electoral precincts unreliable.

Summary:

A candidate, who participated in the National Assembly elections held on 25 May 2003 in Constituency no. 16, applied to the Constitutional Court for a declaration that the elections in that constituency were invalid. The candidate argued that the violations of the Electoral Code that had taken place during the organisation and conduct of the elections had influenced the results of the elections.

The appellant argued, *inter alia*, that a person who had no right to be a member of a precinct electoral commission had been included in a precinct electoral commission; other persons had voted in the place of those who should have voted; the voters' lists that had been posted at some precinct centers differed from those that had been used by the precinct electoral commissions; the constituency electoral commission had not properly conducted the verification of the conformity of the protocols of the precinct electoral commissions with the actual results of voting; in two precincts, the ballot papers had been altered during the summarisation of the voting results and the signatures of the commission members on the ballot papers had been falsified; and the constituency electoral commission had ordered and circulated more ballot papers than was provided for by law.

During the hearings, the Constitutional Court found that the electoral commission of Constituency no. 16 had in fact ordered more ballot papers than was provided for by the Electoral Code. The Constitutional Court also found that, in violation of the Electoral Code, a person who did not have the right to be a member of an electoral commission had been appointed member of a precinct electoral commission (Precinct no. 0365). The Constitutional Court held that that fact made the voting results for that precinct unreliable.

As to the applicant's allegation concerning the falsification of the signatures of electoral commission's members on ballot papers at two precincts (no. 0347 and no. 0351), the Prosecutor's Office, to which the applicant had referred the matter for investigation, had

failed to conduct the necessary investigation within the period provided by law and to present the results of the investigation to the Constitutional Court. Not having received from the Prosecutor's Office any sufficient information that could disprove or prove the allegations of the applicant, the Constitutional Court, which had to rule on the electoral dispute within 30 days, declared the voting results in these two electoral precincts unreliable.

The Court, in determining the difference between the votes cast for the applicant and the elected candidate (1118), the number (90) of inaccurate and unreliable voting results of the three precincts (no. 0347, no. 0351 and no. 0365), found it impossible to determine the elected candidate.

The Constitutional Court declared the elections in Constituency no. 16 invalid.

Languages:

Armenian.

Identification: ARM-2003-2-004

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 15.07.2003 / **e)** DCC-437 / **f)** On conformity with the Constitution of obligations provided by Protocol no. 6 to the European Convention on Human Rights concerning the abolition of the death penalty / **g)** *Tegekagir* (Official Gazette) / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.
4.5.2.1 **Institutions** – Legislative bodies – Powers – Competences with respect to international agreements.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Death penalty, abolition, by ratification of an international treaty / European Convention on Human Rights, Protocol no. 6.

Headnotes:

The Constitution of the Republic of Armenia permits the death penalty as a “temporary” and “exclusive” punishment while at the same time leaving the issue of the determination or non-determination of the death penalty for certain serious offenses to the discretion of the National Assembly. The National Assembly has the power to abolish the death penalty not only by adopting the appropriate amendments to national legislation, but also by ratification of an international legal instrument, in the this case, Protocol no. 6 to the European Convention on Human Rights concerning the abolition of the death penalty.

Summary:

The President of the Republic of Armenia applied to the Constitutional Court seeking a determination of the compatibility of the obligations under the above-mentioned Protocol with the Constitution.

The Constitutional Court stated that the Republic of Armenia, upon becoming a party to the European Convention on Human Rights and Protocols nos. 1, 4 and 7, had assumed an obligation to establish the rule of law in the country, reform some state institutions and continue the democratisation of social and political life in order to make them compatible with the standards existing in European countries.

After declaring its independence and becoming a party to most of the important universal and regional international treaties on the protection of human rights and fundamental freedoms, Armenia recognised a human being, his/her life and health, honor and dignity, personal integrity as a supreme social value.

The highest legal guarantee of the protection of human rights is the Constitution of the Republic. The right to life is one of the rights guaranteed by the Constitution. The Constitution, recognising that right as an absolute and unalienable right, sets out in Article 45 of the Constitution that that right cannot be restricted under any circumstances. The right to life is enshrined in Article 17 of the Constitution, which allows for only one derogation from that right: that of the death penalty. According to that provision, “death penalty, until its abolition, may be prescribed by law for particular serious crimes, as an exceptional punishment”.

The Constitutional Court held that a systematic consideration of the Constitution, as well as the content of international treaties concluded by the Republic of Armenia, indicated that the Republic

rejected the death penalty as a kind of punishment and provided for the abolition of the use of a penalty as a rule.

Article 17 of the Constitution permits the death penalty as a "temporary" and "exclusive" punishment, and it provides that this punishment may be prescribed only "for serious offenses" by law as an exclusive punishment.

According to Article 62 of the Constitution, the National Assembly exercises the legislative power. The Constitution leaves the issue of the determination or non-determination of the death penalty for certain serious crimes to the discretion of the National Assembly. The latter may abolish the death penalty not only by adopting the appropriate amendments to national legislation, but also by ratification of an international legal instrument, including the international treaties that provide for punishments other than those provided for by the national legislation.

The Constitutional Court held that the discussion and resolution of the issue of the ratification of an international treaty abolishing the death penalty is fully within the powers of the National Assembly, as Article 17 of the Constitution made the temporary existence of the death penalty conditional on the will of the National Assembly, which has a power to abolish the death penalty not only by amending the national legislation, but also by ratifying an international treaty.

The Constitutional Court declared the obligations under Protocol no. 6 to the European Convention on Human Rights concerning the abolition of the death penalty compatible with the Constitution of the Republic of Armenia.

Languages:

Armenian, French (translation by the Court).

Austria
Constitutional Court

Important decisions

Identification: AUT-2003-2-002

a) Austria / **b)** Constitutional Court / **c)** / **d)** 28.06.2003 / **e)** G 78/00 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
3.19 **General Principles** – Margin of appreciation.
5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to family life – Descent.

Keywords of the alphabetical index:

Child, born in wedlock, presumption / Presumption, legal, rebuttable / Paternity, right to determine, child / Family, life, definition / Parentage, interests of the child.

Headnotes:

A child born during a marriage or before 302 days following the dissolution or annulment of a marriage is presumed to be a child born in wedlock. This presumption can only be rebutted by a court's decision declaring that a child does not descend from its mother's husband (§ 138.1 Austrian Civil Code; *Allgemeines Bürgerliches Gesetzbuch*).

Statutory provisions that entitle only the mother's husband to deny his paternity (by contesting the legal presumption of a child's legitimacy) or the public prosecutor where the mother's husband has died or his whereabouts are unknown contradict Article 8 ECHR.

Article 8 ECHR requires that at least the child concerned should be able to challenge this legal presumption and institute legal proceedings to have the parentage of its natural father determined.

Summary:

The mother of two children brought an action in a district court, challenging the legal presumption of her children's legitimacy. She had − while keeping her Austrian nationality − married a national of the Dominican Republic in 1994, given birth to her first child in November 1995 and to her second one in May 1999 (both born in Austria), and she had started divorce proceedings (which were not yet terminated). In her action, she maintained that it was not her husband − with whom she had had no contact since the beginning of 1995 and of whose whereabouts she had no knowledge − who was the father of her children, but another man whom she named.

The district court rejected the action for the formal reason that the plaintiff was not entitled to deny her husband's paternity or challenge the legitimacy of her children. On the basis of the mother's appeal, the Innsbruck Regional Court *(Landesgericht Innsbruck)* asked the Court to review the statutory provisions of the Austrian Civil Code that grant the right to bring an action *(locus standi)* challenging the legal presumption of a child's legitimacy exclusively to the (legal) father and the public prosecutor.

The Innsbruck Regional Court argued that such statutory provisions were not in conformity with Article 8 ECHR since they obstructed the legal recognition of an effective family life. In that respect, Austrian law would contradict Article 8 ECHR in a way similar to the way Dutch law did in the judgment of the European Court of Human Rights in the Case of *Kroon and others v. the Netherlands* of 27 October 1994.

The Court first referred to the relevant case-law of the European Court of Human Rights, according to which the notion of "family life" in Article 8 ECHR is not restricted to relationships based on marriage but comprises also other *de facto* family ties (*Keegan v. Ireland*, Judgment of 26 May 1994 and the above-mentioned *Kroon* Judgment).

Due to the fundamental message of that case-law, a family unit exists between a child and its biological father from the moment of the child's birth. Thus, the State is obliged to act in a manner that this family tie can be developed and legal safeguards must be established which enable a child's integration into its family from the moment of its birth or as soon as possible thereafter. "Respect for family life" additionally requires that biological and social reality take priority over a legal presumption.

The Court noted that on the other hand the legal opinion of the European Court of Human Rights does not mean that *de facto* family ties between a child, its mother and her husband (the man legally presumed to be the father) enjoy a minor protection under Article 8 ECHR insofar as the State would have to allow a legal action (recognition of paternity) for a man regarding himself as the child's natural father, and thus enable him to enter existing family ties against the wish and to the disadvantage of everyone concerned (*Nylund v. Finland*, Judgment of 29 June 1999). Legal certainty, security of family and especially the interests of the child can justify interference within the meaning of Article 8.2 ECHR and even require under certain circumstances that such legal proceedings are not open to everyone.

Finally, the Court concluded that the priority of the legal presumption − in the case of non-existing family ties between the legal father, the child and the mother − over proven facts of existing ties between the child, the mother and the (alleged) natural father would fly in the face of the wishes of those concerned without actually benefiting anyone.

Where a protected family life under Article 8 ECHR cannot be disturbed, the respect for the existing family life under Article 8 ECHR requires that at least the child should be able to initiate legal proceedings by which the paternity of its biological (as opposed to the legal) father is determined in a legally binding way. The possibility of paternity proceedings being instituted by the public prosecutor cannot act as a substitute for this requirement. The fact itself that the child, who is the one who is most affected by this status-relationship, cannot deny the paternity of its mother's husband contradicts Article 8 ECHR. The Court therefore annulled all relevant provisions (§§ 156 to 158; parts of § 159) of the Austrian Civil Code and set a time-limit for their amendment.

Cross-references:

European Court of Human Rights:

- Judgment of 26.05.1994, *Keegan v. Ireland*, Series A, no. 290; *Bulletin* 1994/2 [ECH-1994-2-008];
- Judgment of 27.10.1994, *Kroon and others v. the Netherlands*, Series A, no. 297-C; *Bulletin* 1994/3 [ECH-1994-3-016];
- Judgment of 29.06.1999, *Nylund v. Finland*, *Reports of Judgments and Decisions* 1999-VI.

Languages:

German.

Azerbaijan
Constitutional Court

Important decisions

Identification: AZE-2003-2-004

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 01.08.2003 / **e)** 07/15-7 / **f)** / **g)** *Azerbaycan* (Official Gazette), *Azerbaycan Respublikasi Konstitusiya Mehkemesinin Melumati* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.3.1 **General Principles** – Democracy – Representative democracy.
4.4.2.1 **Institutions** – Head of State – Appointment – Necessary qualifications.
4.9.5 **Institutions** – Elections and instruments of direct democracy – Eligibility.

Keywords of the alphabetical index:

Election, presidential, candidate, requirements / International obligations / Tax, duty to pay.

Headnotes:

The right of a citizen to vote and be elected to state bodies and municipalities as well as his/her participation in referendums is one of the main elements of his/her constitutional status. Along with an active electoral right (to elect), the realisation of a passive electoral right (to be elected) is restricted by certain conditions.

The requirement that candidates for the office of Head of State not have obligations vis-à-vis other States is to be understood as relating to obligations arising from registration, taxation, not leaving the territory of a state for a certain period of time etc. and other obligations, including politico-legal ones, which are related to the existence of continuous, safe and stable relationships connected with long-term residence in a foreign country.

Summary:

In connection with the petition submitted by the Prosecutor's Office, the Constitutional Court noted that the constitutional electoral right is one of the main characteristics of a democratic state. A main factor in formation of state bodies is the realisation of the electoral right that has been adopted as the main institution of democracy. The right of citizens to participate in the governing of the State and the electoral right are reflected in the Constitution (Articles 55 and 56).

Along with an active electoral right (to elect), the realisation of a passive electoral right (to be elected) is restricted by certain conditions. Along with the fact that the electoral right is recognised by a number of international legal acts (Article 21 of the Universal Declaration on Human Rights, Article 25 of the International Covenant on Civil and Political Rights, Protocol I of the European Convention for the Protection of Human Rights and Fundamental Freedoms, etc.), the institutions on international human rights protection do not exclude the possibility of restricting that right by way of a procedure laid down by law.

Article 100 of the Constitution lays down the requirements to be fulfilled by candidates for the office of President. According to that Article, any citizen of Azerbaijan Republic not younger than 35 years of age, permanently living on the territory of the Azerbaijan Republic for more than 10 years, enjoying the right to vote, without any previous convictions, having no obligations to other states, having a university degree and not having dual citizenship may be elected as President.

Legal analysis of some issues was necessary in order for the Court to clarify the legal meaning of one of the above-mentioned requirements: “having no obligations before other states”.

Obligation means the necessity to carry out something, and from the point of view of the particularity of the created legal relationships, it is the binding of one party and his or her dependency on another.

An individual’s obligations to another state may arise from various reasons, including refugee status, asylum, residence permits, etc. However, the relationships between the individual and that state, the status of the individual and the obligations arising from that status depend on the domestic legislation of that state.

The creation of obligations of a citizen to another state is closely connected with existence of legal factors based on the legislation of that state. Legal provisions, first of all, are aimed at the regulation of the relationships of the state with its citizens. The rights and duties of foreigners are connected with their domestic legal status and the regime granting permission to stay in that state (temporary stay regime, temporary residence regime or permanent residence regime) and are proportionate to the relevant regime.

Depending on the regime granting permission to stay in a country, a foreigner may have different obligations to the state where he/she lives. The foreigner who resides temporarily or permanently in a country has various kinds of obligations such as: registration, prohibition on leaving the place of residence or the territory of the state for a period exceeding the specified terms, payment of taxes in certain cases, registration for military service upon reaching a certain age, or other obligations in accordance with the legislation of that state.

In connection with that issue, in its decision *(Ferrazzini v. Italy)* of 12 July 2001, the European Court of Human Rights noted that “Pecuniary interests are clearly at stake in tax proceedings ... In particular … according to the traditional case-law of the Convention institutions, there may exist 'pecuniary' obligations vis-à-vis the State ... [which] are to be considered as belonging exclusively to the realm of” state authorities. It further stated: “Bearing in mind that the Convention and its Protocols must be interpreted as a whole, the Court also observes that Article 1, Protocol no. 1, which concerns the protection of property, reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes ...”. Finally, the Court stated: “It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer.” Thus, the European Court accepted that on the basis of its contents the obligation to pay taxes proceeds from civil-law relationships.

The Constitutional Court considered that the legal meaning of Article 100 of the Constitution “having no obligations before other state” implied the existence of obligations based on relationships causing a citizen to be bound to and dependent on foreign states.

Languages:

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

Identification: AZE-2003-2-005

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 15.08.2003 / **e)** 06/15-8 / **f)** / **g)** *Azerbaycan* (Official Gazette), *Azerbaycan Respublikasi Konstitusiya Mehkemesinin Melumati* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.5.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Presidential elections.
3.10 **General Principles** – Certainty of the law.
4.4.3.3 **Institutions** – Head of State – Term of office – Incapacity.
4.4.3.4 **Institutions** – Head of State – Term of office – End of office.
4.9 **Institutions** – Elections and instruments of direct democracy.

Keywords of the alphabetical index:

Election, presidential, extraordinary, term / Election, electoral code.

Headnotes:

The people are the sole source of state power (Article 1.1 of the Constitution). No part of the people of Azerbaijan, no social group or organisation as well as no individual may usurp the competences of President granted to him/her by the people as a result of free elections (Article 6.1 of the Constitution).

The provision 175.1 of the Electoral Code, which provides that where the President resigns from his/her office before the expiry of the term of office, extraordinary elections for the President are to be held within three months, is to be applied only where there are more than 3 (three) months between the day of the resignation and the regular presidential elections.

Summary:

With the view to eliminating the uncertainty concerning the implementation of the provision of Article 179.1 of the Electoral Code providing “if this takes place after fixing the date of regular presidential elections, then they shall be suspended and extraordinary presidential elections shall be held”, the Prosecutor's Office petitioned for an interpretation of that provision.

The meaning of that provision of Article 179.1 of the Electoral Code is to be determined by considering the position and role of the President within the system of state power and his/her constitutional status.

The President is to be elected for a 5-year term by way of general, direct and equal elections with a free, personal and secret ballot (Article 101.1 of the Constitution).

The people of Azerbaijan are the sole source of state power (Article 1.1 of the Constitution). No part of the people of Azerbaijan, no social group or organisation, no individual may usurp the competences of the President granted to him/her by the people as a result of free elections (Article 6.1 of the Constitution).

It is for that reason that the resignation of the President from his/her office before the expiry of the term of office is possible only in cases and by way of the procedure provided for by the Constitution.

The President is considered as having left his/her office before the expiry of the term of office upon resignation, complete inability to fulfill his/her powers due to illness, dismissal from the office in the cases and in an order envisaged in the Constitution (Article 104.1 of the Constitution).

Where the President resigns from his/her office before the expiry of the term of office, extraordinary elections for President are to be held within three months (Article 105.1 of the Constitution).

According to the requirements of the constitutional provisions in Article 179.1 of the Electoral Code, extraordinary presidential elections are to be held where the term of office of the President ends before the period provided for in Constitution under the circumstances specified in Article 104.1 of the Constitution.

At the same time, that provision provides: “... if this takes place after fixing the date of regular presidential elections, then they shall be suspended and extraordinary presidential elections shall be held”. When considering the last provision, some aspects of Article 105.1 of the Constitution need to be clarified.

Implementation of Article 105.1 of the Constitution is implicit. Therefore, even during regular elections, where the President resigns from his office before the expiry of the term of office, extraordinary presidential elections are to be held.

Elections (referendum) must be announced no later than 120 days before the day of voting (Article 8.1 of the Electoral Code).

In light of the above-mentioned requirements of the provisions of the Constitution and the Electoral Code, the provision of Article 179.1 that reads “if this takes place after fixing the date of regular presidential elections, then they shall be suspended and extraordinary presidential elections shall be held” may be implemented only in the event that there are more than 3 months between the day of resignation and the day of regular elections. In such a case, where the day of elections has been fixed beforehand, it should be changed and the requirement of Article 105.1 of the Constitution on the holding of elections within three months must be observed.

Where there are less than 3 months between the day of resignation and the day of regular elections and where the President resigns from his/her office before the expiry of the term of office, there is no need to suspend the presidential elections for the reason that the fixed regular presidential elections coincide with purposes of the extraordinary presidential elections. Moreover, in such a case, the suspension of regular elections may cause the waste of additional time, means and effort and the appearance of other obstacles.

Therefore, where less than 3 months are left before the day of regular elections and the President resigns from his/her office before the expiry of the term of office, in order to respect the requirements of Article 105, the status of the elections must be changed: the elections should be considered extraordinary elections and the period of the three (3) months before the day of elections should be considered as pertaining to the extraordinary elections. In such a case, all decisions adopted by the Central Election Commission in connection with the realisation of the elections before the resignation must keep their legal force.

The Court decided that the provision reading “if this takes place after fixing the date of regular presidential elections then they shall be suspended and extra-ordinary presidential elections shall be held” must be applied only in cases, when less than 3 (three) months are left until the day of the presidential elections.

Languages:

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

Belgium
Court of Arbitration

Important decisions

Identification: BEL-2003-2-005

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 14.05.2003 / **e)** 66/2003 / **f)** / **g)** *Moniteur belge* (Official Gazette), 20.10.2003 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
4.7.2 **Institutions** – Judicial bodies – Procedure.
5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.
5.2.2.7 **Fundamental Rights** – Equality – Criteria of distinction – Age.
5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.
5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to family life – Descent.
5.3.41 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Paternity, recognition, child's interest / Equality, age, omission in the law / Paternity, establishing child's consent.

Headnotes:

Ratification of the Convention on the Rights of the Child under a law of 25 November 1991 and passing of a law providing that children capable of discernment should be entitled to be heard in proceedings show parliament's desire to make it compulsory that a child's interests be taken into account in judicial proceedings affecting him or her, if appropriate by seeking the child's own opinion, where he or she is capable of expressing it with discernment, and, at all events, by requiring the judge to pay special heed to them.

There may be instances where establishing a child's paternity under a judicial procedure harms the child's interests. Although, as a general rule, it can be deemed to be in the child's interest to have his or her descent from both parents established, there can be no indisputable presumption that this is always the case.

Lack of a procedure enabling the courts to take into consideration the consent of a minor under the age of fifteen, given either in person if he or she is capable of discernment or through the child's representation by the persons responsible for him or her, breaches the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

Summary:

A biological father wished to acknowledge paternity of his two children, aged 11 and 9, but the children's mother opposed such recognition, pleading the children's interests in accordance with Article 319.3 of the Civil Code. The Liège Court of First Instance, before which the case had been brought, asked the Court of Arbitration to determine whether Article 319.3 of the Civil Code was consistent with the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), since it authorised a court to take a child's interests into consideration where the child was over fifteen, but refused the court that possibility where the child was under fifteen.

The Court of Arbitration had already delivered a number of judgments in respect of Article 319.3 of the Civil Code, which provided that recognition of paternity of an unemancipated minor was admissible only with the consent of the mother and of the child, if over the age of fifteen. It also provided that any dispute would be decided by the courts, taking account of the child's interests.

In its Judgments nos. 39/90 of 21 December 1990 and 63/92 of 8 October 1992 the Court had held that this article breached the rules of equality and non-discrimination because it engendered a difference in treatment between fathers and mothers, since recognition of maternity, although rare by reason of application of the *mater semper certa est* rule, was not subject to the father's consent. In its Judgment no. 36/96 of 6 December 1996 the Court had held that, in so far as it required the consent of a child over the age of fifteen, this provision did not violate Articles 10 and 11 of the Constitution, although the fact that such consent was not required for recognition of maternity constituted a breach of those articles (omission in the law). The way in which those judgments had been applied had resulted in a difference in treatment according to the age of the child concerned: only those over fifteen benefited from judicial consideration of their interest in having their descent from their father proved by recognition of paternity.

In its Judgment no. 66/2003 the Court considered whether this difference in treatment was justifiable. It referred to Articles 3.1 and 12 of the Convention on the Rights of the Child and to the amendment made to the Judicial Code on 30 June 1994, in order to translate Article 12 of the Convention into national law, and held that this showed parliament's concern that a child's interests should be taken into account in judicial proceedings affecting him or her, if appropriate by seeking the child's own opinion, where he or she was capable of expressing it with discernment, and, at all events, by requiring the judge to pay special heed to them.

Although, as a general rule, it could be deemed to be in the child's interest to have his or her descent from both parents established, there could be no indisputable presumption that this was always the case.

Since its outcome was that the interests of a child under fifteen were never taken into account in establishing paternity by recognition, the provision under consideration constituted a disproportionate interference with the rights of the children concerned.

The Court held that it was not for it to decide what form the possibility of judicial consideration of the interests of a child under fifteen or a child incapable of discernment should take, but that it was competent to find that the lack of any means for a court to consider the child's interests breached Articles 10 and 11 of the Constitution.

Languages:

French, Dutch, German.

Identification: BEL-2003-2-006

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 14.05.2003 / **e)** 69/2003 / **f)** / **g)** *Moniteur belge* (Official Gazette), 30.05.2003 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
3.10 **General Principles** – Certainty of the law.
3.12 **General Principles** – Clarity and precision of legal provisions.
3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
3.21 **General Principles** – Equality.
5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Liability, criminal / Offence, criminal, precise definition / Communications, offences.

Headnotes:

By empowering the legislature, firstly, to determine in which circumstances and in what form criminal proceedings are possible and, secondly, to pass a law pursuant to which a penalty can be laid down and applied, Articles 12.2 and 14 of the Constitution guarantee all citizens that no conduct shall constitute an offence and no penalty shall be imposed except under rules adopted by a democratically elected deliberative assembly.

Parliament may regard use of telecommunications infrastructure as a specific means of communication making it possible to enter into contact rapidly with a large number of people, who may be very far distant from the author of the communication, and establish a specific offence. However, it cannot punish the perpetrator of an offence that is defined in vague terms, is devoid of specific legal content or lends itself to extensive definitions without violating the principle that criminal offences and the corresponding punishments must be strictly defined by law, taken together with Articles 10 and 11 of the Constitution (equality and non-discrimination).

Summary:

The *Ligue des droits de l'homme*, a non-profit organisation, appealed to the Court of Arbitration seeking the striking down of provisions contained in a programme-law of 30 December 2001, which established penalties of fines and prison sentences for persons who used the telecommunications infrastructure to transmit or attempt to transmit communications prejudicial to compliance with the law, state security, public order or morality, or constituting an insult to a foreign state.

The Court of Arbitration first acknowledged that the appellant had an interest in bringing legal proceedings since there was a sufficient link with its registered purpose of combating injustice and all arbitrary infringements of the rights of individuals and defending the principles of equality, liberty and humanitarianism, on which democratic societies were based.

On the merits, the Court recognised that the challenged difference in treatment was based on an objective criterion. It also considered that the measure taken was appropriate in the light of the objective pursued, which was to take action against misconduct noted in a sector which had recently undergone considerable expansion.

It nonetheless held that the law breached Articles 10 and 11 of the Constitution taken together with the principle that offences and the corresponding punishments must be strictly defined by law. It deduced this principle from Articles 12.2 and 14 of the Constitution and from Article 7 of the European Convention on Human Rights. By empowering the legislature, firstly, to determine in which circumstances and in what form criminal proceedings were possible and, secondly, to pass a law pursuant to which a penalty could be laid down and applied, Articles 12.2 and 14 of the Constitution guaranteed all citizens that no conduct would constitute an offence and no penalty would be imposed except under rules adopted by a democratically elected deliberative assembly.

The principle that offences and punishments must be defined by law (Articles 12 and 14 of the Constitution and Article 7 ECHR) was derived, *inter alia*, from the idea that criminal law must be worded so as to enable everyone to know, on taking a line of conduct, whether or not it constituted an offence. The Court held that parliament disregarded this principle where it made it possible to punish the perpetrator of an offence defined in terms as vague as “communications prejudicial to compliance with the law”, where it employed the expression “prejudicial to state security”, which was devoid of sufficiently precise legal content, where it relied on the concepts of public order and morality, which were no more able than the concept of misconduct to serve as sole definition of a criminal offence without generating an unacceptable degree of

uncertainty, or where it punished the act of insulting a foreign state, which, unless further clarified, could not be made an offence without interfering with freedom of expression of opinions. The Court accordingly struck down the challenged provisions.

Languages:

French, Dutch, German.

Identification: BEL-2003-2-007

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 24.06.2003 / **e)** 88/2003 / **f)** / **g)** *Moniteur belge* (Official Gazette), 11.08.2003 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.21 **General Principles** – Equality.
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.
4.8.7.1 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Finance.
5.1.1.5.2 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Public law.
5.2.2.10 **Fundamental Rights** – Equality – Criteria of distinction – Language.
5.4.20 **Fundamental Rights** – Economic, social and cultural rights – Right to culture.

Keywords of the alphabetical index:

Subsidy, local public library, conditions / Equality, different circumstances.

Headnotes:

The fact that the commune of Rhode-Saint-Genèse is located in the Dutch-speaking region may justify the decision by the authority responsible for issuing decrees that the commune's public library should, as in the other communes in the Dutch-speaking region, devote a specific percentage of its budget to the purchase of Dutch-language publications if it wishes to qualify for a subsidy from the Flemish Community. From this point of view, a percentage of 75% cannot be considered disproportionate to the aim pursued.

Summary:

The Flemish Community, which, together with the French- and German-speaking Communities, has autonomous power in Belgium over cultural matters, including libraries, grants subsidies to those communes which open public libraries and meet certain requirements. One of these is that they spend at least 75% of their budget on Dutch-language publications (Article 10.1.10 of the Flemish Community decree of 13 July 2001 “on encouraging a high-quality, comprehensive cultural policy at local level”).

This regulation applies uniformly to all the communes within the geographical area of the Flemish Community, including some communes where French speakers enjoy certain linguistic facilities in administrative matters (known as “communes with facilities”).

One such commune applied to the Court of Arbitration to have the aforementioned decree declared void (in the commune concerned, a majority of the council members are French speakers). The Court accepted the applicant's interest in the matter, as it had either to meet the requirement or to forfeit the right to subsidies from the Flemish Community, with the attendant budgetary consequences.

The applicant alleged violation of Articles 10, 11 and 23 of the Constitution, Article 14 ECHR and Articles 26 and 27 of the International Covenant on Civil and Political Rights. The applicant considered itself discriminated against because the impugned measure treats communes with facilities in the same way as other communes.

The Court noted that Article 14 ECHR and Article 26 of the International Covenant on Civil and Political Rights add nothing to the principle of equality and non-discrimination contained in Articles 10 and 11 of the Constitution and that there was therefore no need to include them in its deliberations. Article 23 of the Constitution (right to cultural fulfilment) and Article 27 of the aforementioned International Covenant (right to enjoy one's own culture), which concern the right to culture, were, however, examined in conjunction with Articles 10 and 11 of the Constitution (see additional information). The Court had thus to consider whether the impugned provision set discriminatory conditions for enjoyment of the right to cultural and social fulfilment or whether it infringed in a discriminatory manner the right of French-speaking residents of the commune of Rhode-Saint-Genèse to enjoy their own culture in the same way as other members of their group.

The applicant was therefore complaining not of unequal treatment but of identical treatment of communes with facilities and other communes (in the Dutch-speaking region).

The Court first made the general observation that a uniform regulation is in contradiction with the principle of equality and non-discrimination only when categories of people who find themselves in essentially different circumstances are treated in an identical manner without reasonable justification (established case-law).

In communes with facilities, notices, communications and forms for public use must be drafted in French and, as a public service, the public library must reply in French to people who use that language. The Court considered, however, that this regulation did not place this commune in a situation so different from the other communes in the same single-language region as to make it necessary for the authority responsible for issuing decrees to treat it differently in the rules governing the subsidisation of libraries.

The fact that the Flemish Community makes the subsidisation of a local public library, both in a commune located in the Dutch-language region that grants certain language facilities to French speakers and in communes with no language facilities, conditional on it spending at least 75% of its budget on Dutch-language publications does not discriminate against the right to cultural and social fulfilment of the French-speaking residents of the commune.

The Court concluded that there was no discriminatory infringement of the rights embodied in Article 23 of the Constitution and Article 27 of the International Covenant on Civil and Political Rights. It added that, if necessary, the commune could run, open or subsidise a library with its own funds.

Supplementary information:

Prior to the special law of 9 March 2003, the Court of Arbitration had the power to review laws and decrees only in respect of Articles 10, 11 and 24 of the Constitution (with the exception of the provisions regulating the distribution of powers among the federal state entities) and, in respect of other provisions, only indirectly (through the equality principle). The Court now has a direct power of review in respect of all the provisions under Title II of the Constitution (Articles 8-32) which guarantee fundamental rights and freedoms.

Languages:

French, Dutch, German.

Identification: BEL-2003-2-008

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 02.07.2003 / **e)** 94/2003 / **f)** / **g)** *Moniteur belge* (Official Gazette), 11.08.2003 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
3.21 **General Principles** – Equality.
4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
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.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to family life.
5.3.32 **Fundamental Rights** – Civil and political rights – Inviolability of the home.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.
5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.
5.5.1 **Fundamental Rights** – Collective rights – Right to the environment.

Keywords of the alphabetical index:

Decree, regional, derogation / Building permit, procedure for granting.

Headnotes:

The decree of the Flemish Region (a federated entity of federal Belgium with its own legislative powers) by virtue of which, under parliamentary supervision and 'for compelling reasons of public interest', derogations

may be made from the normal rules for granting building permits (one effect of which has been that a number of cases pending before the court have been left unresolved) does not violate the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken alone or in conjunction with the right of access to a judge, the right to own property and the right to protection of the environment, protection of private life and the free choice of a profession and an activity.

In the view of the Court, the fact that the decree-issuing authority provided for an exception to the ordinary regional planning rules was not discriminatory in this specific case, bearing in mind all the objectives set out in the preparatory documents and the economic and budgetary consequences that would jeopardise the urgent continuation of this project of great and compelling general and strategic interest. It is not unreasonable to introduce a special procedure under the supervision of the Flemish Parliament and confirmed by the requisite decree, which can in turn be challenged by way of an application to the Court.

Summary:

To understand this case fully, one must place it in its context:

In Belgium a permit is required for construction work. It is granted only if the project is in conformity with the applicable regional planning rules and environmental legislation (including the relevant European legislation). Regional planning is based on area plans that determine the uses to which different parts of the territory can be put (farmland, industrial areas, residential zones, etc). When major construction work started on a new dock (the *Deurganckdok*) in the port of Antwerp, several local residents initiated legal proceedings against the project. The *Conseil d'État* (Belgium's highest administrative court) handed down a judgment ordering the temporary suspension of the impugned decisions granting building permits, pending closer examination of the grounds of complaint. The work in progress came to a standstill pending the decision of the *Conseil d'État* on the merits, which could be a lengthy process and might lead to a final decision to withdraw the building permits.

On 14 December 2001 the Flemish Region (the federated entity of federal Belgium responsible for regional planning and the environment along with the Walloon Region and the Brussels-Capital Region) adopted a decree "in respect of building permits for which there are compelling reasons of public interest". In this decree, the legislature of the Flemish Region authorised the Flemish Government, in respect of a certain number of specified construction projects (all linked to the work on the new dock), to derogate partially from the ordinary provisions of the area plans and from the ordinary procedure for obtaining building permits. The decree also provided for the confirmation of these permits by the legislature.

Numerous local residents (many of whom were also parties to the proceedings before the *Conseil d'État*) applied to the Court of Arbitration to have this decree declared void. In their opinion the decree-issuing authority had acted in contradiction *(inter alia)* with the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken alone or in conjunction with the right of access to a judge, the right to own property and the right to protection of the environment, protection of private life and the free choice of a profession and an activity. In the view of the applicants, EC law was also violated, in particular the aforementioned directives. The Flemish Government and the "*Gemeentelijk Havenbedrijf Antwerpen"* as intervening party (in its capacity as holder of the building permits) defended the decree-issuing authority's action before the Court.

In its judgment, the Court referred to the preparatory documents for the decree, where detailed reasons were given for the action taken by the decree-issuing authority. According to these preparatory documents, the project was a very important one, not only from the social, community and economic points of view but also from the environmental and regional planning standpoints, and should be implemented and made operational without delay.

The applicants argued that the decree-issuing authority had sought to intervene in pending judicial proceedings (following the suspension of the building permits, the *Conseil d'État* had still to rule on the merits of the decisions to grant them), and there had been discriminatory infringement of their right of access to a judge (the *Conseil d'État* is empowered to hear applications to set aside or suspend acts of the executive, but not those having force of law, which can only be reviewed as to their constitutionality by the Court of Arbitration). The Court found that the decree-issuing authority had not intervened in pending judicial proceedings, as the decree did not confirm any administrative act that had been challenged in court. The decree merely gave authorisation to take administrative measures that had to be confirmed by decree. Third parties were not deprived of the right to challenge those administrative measures before the *Conseil d'État* prior to their confirmation and, subsequently, before the Court. The Court further observed that the existence of a suspension order of the *Conseil d'État* could not prevent the competent legislature from intervening with a view to the future.

As regards violation of property rights, the Court noted that regional planning may legitimately require restrictions on property rights. Referring to the case-law of the European Court of Human Rights, the Court held that restrictions placed by the authorities on property rights were permitted provided that they observed a fair balance between the general interest of society and the protection of the fundamental rights of the individual.

In the view of the Court, none of the impugned measures could be considered as direct or unjustified interference in the applicants' personal fulfilment or that of their families.

Bearing in mind the purpose of the decree and its actual terms, the Court further considered that the impugned provisions could not be regarded as placing unjustified restrictions on the right to the free choice of a professional activity (certain applicants contended that the compensation for environmental damage contained in the decree infringed their rights as farmers).

The applicants also alleged violation of the constitutional principle of equality, taken in conjunction with Article 10 EC and Article 6 of Council Directive 92/43/EEC of 21 May 1992 “on the conservation of natural habitats and of wild fauna and flora” (Habitats directive). They considered that there were grounds for asking the Court of Justice for a preliminary ruling as to whether the regulation introduced by the decree did not infringe the effective and equivalent legal protection requirement deriving from Article 10 EC. The Court replied that the preliminary question raised by the applicants did not fall within the scope of Article 234 EC, which stipulates the conditions under which preliminary questions may or must be raised. As regards the Habitats Directive, the Court of Arbitration considered that the provisions of Article 6 of this directive (environmental impact report and compensatory measures) had been complied with and that there had been no discriminatory infringement of this article, taken in conjunction with Article 10 EC, subject to a further decision of the European Commission or Council, possibly subject to review by the Court of Justice.

An allegation of discrimination in relation to Article 33 EC was also dismissed in so far as, according to the Court, it had not been demonstrated that the impugned decree *per se* would effectively jeopardise the right of the farming community to a reasonable income.

All the other objections having been considered unfounded, the Court dismissed the application.

Supplementary information:

In its Judgment no. 116/2002 of 3 October 2002, the Court had already rejected the application for suspension of the impugned decree.

The impugned decree of 14 December 2001 stipulates that the building permits granted by the Flemish Government were to be confirmed by the Flemish Parliament within a short time, which they were, by decree, on 29 March 2002. Application was made to the Court of Arbitration to have this decree set aside. This case was still under consideration at the time of writing.

Languages:

French, Dutch, German.

Identification: BEL-2003-2-009

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 22.07.2003 / **e)** 106/2003 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.
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.
5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.
5.3.41 **Fundamental Rights** – Civil and political rights – Rights of the child.
5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Foreigner, illegal / Foreigner, difference of treatment / Child, foreigner, right to social assistance.

Headnotes:

Under Article 191 of the Constitution, differences of treatment that place aliens at a disadvantage may only be introduced by law. This provision does not dispense the legislature, when introducing such differences, from observing the fundamental principles enshrined in the Constitution. Article 191 can therefore on no account be considered to dispense the legislature, when introducing a difference of treatment to the detriment of aliens, from ensuring that the difference is not discriminatory, whatever the nature of the principles at issue.

A law is in breach of Articles 10 and 11 of the Constitution, taken in conjunction with Articles 2, 3, 24, 26 and 27 of the Convention on the Rights of the Child, when it fails to grant social assistance even where the competent authorities have found that the parents are not fulfilling, or are unable to fulfil, their duty of support, where it has been established that the application concerns expenses essential to the development of the child on whose behalf the application was made, and where the public welfare centre makes sure that the assistance will be used solely to cover those expenses.

Summary:

A request for preliminary rulings was made to the Court of Arbitration by the labour court in Brussels, in connection with an application by aliens who were parents of young children and were awaiting a decision authorising them to stay in Belgium. Having no income, they applied to the public welfare centres for social assistance, but their applications were rejected. The court before which these decisions were appealed questioned the Court regarding the conformity of the law with the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) taken in conjunction with several constitutional and international provisions, including provisions contained in the Convention on the Rights of the Child. The questions only concerned the right of minors to social assistance; the judge did not envisage granting assistance to the whole family, but only to the children.

Concerning the Convention on the Rights of the Child, the Court dismissed two objections raised by the Council of Ministers. The first was that the convention had no direct effect in domestic law. The Court replied that, being empowered to determine whether a law was in breach of Articles 10 and 11 of the Constitution, it was required, when asked to rule on a violation of these provisions taken in conjunction with an international convention, not to consider whether the convention had a direct effect in domestic law, but to assess whether the legislature had violated Belgium's international commitments in a discriminatory manner.

The second objection was inferred from an interpretative declaration by the Belgian state to the effect that Article 2.1 of the Convention did not oblige it to guarantee automatically the same rights to aliens as to its nationals. The Court considered that this interpretative declaration should be read in the light of Article 191 of the Constitution, which did not dispense the legislature, when introducing a difference between Belgians and aliens, from having regard to the fundamental principles enshrined in the Constitution. Article 191 could therefore on no account be considered to dispense the legislature, when introducing a difference of treatment to the detriment of aliens, from ensuring that the difference was not discriminatory, whatever the nature of the principles at issue.

On the merits, the Court found that it would not be reasonable to treat illegal aliens differently depending on whether or not they were accompanied by their children, and that granting assistance to illegal aliens because they had young children with them would run counter to the aim of the law, which is to encourage aliens residing illegally in the country to comply with the order to leave.

Taking into account the Convention on the Rights of the Child, however, the Court considered that concern to ensure that social assistance was not used for purposes other than that for which it was intended was no justification for totally refusing to grant it to children in all cases, when that refusal was likely to oblige the children to live in conditions detrimental to their health and their development and there was no risk of the assistance benefiting the parents, who had no right to it. The Court therefore answered the preliminary question in the affirmative (finding of a violation), in so far as social assistance would be withheld even where the competent authorities had found that the parents were not fulfilling, or were unable to fulfil, their duty of support, where it had been established that the application concerned expenses essential to the development of the child, and where the public welfare centre made sure that the assistance would be used solely to cover those expenses.

Languages:

French, Dutch, German.

Canada
Supreme Court

Important decisions

Identification: CAN-2003-2-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 06.06.2003 / **e)** 28726 / **f)** Trociuk v. British Columbia / **g)** *Canada Supreme Court Reports* (Official Digest), [2003] x S.C.R. xx, 2003 SCC 34 / **h)** Internet: http://www.lexum.umontreal.ca/csc-scc/en/index.html; 14 *British Columbia Law Reports* (4th) 12; 226 *Dominion Law Reports* (4th) 1; 36 *Reports of Family Law* (5th) 429; 7 *Western Weekly Reports* 391; [2003] S.C.J. no. 32 (Quicklaw), CODICES (English, French).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to family life.
5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to family life – Descent.

Keywords of the alphabetical index:

Child, name / Birth, registration / Name, father, inclusion in the birth registration, mother's discretion.

Headnotes:

The statutory discretion granted to mothers not to include particulars of biological father on birth registration forms and not to include surname of father in child's surname is unconstitutional.

Summary:

Under the British Columbia Vital Statistics Act, mothers were provided with sole discretion whether to acknowledge a father's identity by including his particulars on their child's birth registration forms, and to choose and register the child's surname. Once the registration was completed by the mother, the father was precluded from having the registration altered without the mother's consent. A father, whose particulars had not been included by the mother on the birth registration documents of their three children, and whose name had not been included in the children's surnames, challenged the constitutionality of the legislative provisions. He contended that the provisions violated his equality rights under Section 15.1 of the Canadian Charter of Rights and Freedoms, and were not justified under Section 1 of the Canadian Charter of Rights and Freedoms. In particular, he alleged that the provisions constituted discrimination on the basis of sex, an enumerated ground found in Section 15.1. Both the trial court and the British Columbia Court of Appeal held that the legislative provisions were constitutional. The Supreme Court of Canada struck down the legislation as unconstitutional. The Court decided that the claimant's Charter right to equality had been infringed by the legislation and that the infringement was not justified.

Under Canadian constitutional law, the inquiry to establish whether a legislative provision is unconstitutional because it infringes an equality right guaranteed by the Charter is twofold. The Court first establishes whether the distinction is based on an enumerated or analogous ground. Second, in order to invoke the protection of Section 1, the government, in an effort to uphold the legislation, must demonstrate that an infringement of the Charter is "reasonable" and "demonstrably justified in a free and democratic society".

In a unanimous decision, the nine-member panel held that the legislation constituted discrimination on the basis of sex. The impugned provisions were found to expose fathers to the possible arbitrary exclusion of their particulars from their children's birth registration and, consequently, of their participation in choosing their children's surnames. Moreover, having been so exposed, fathers were provided no recourse. A birth registration is not only an instrument of prompt recording; it also evidences the biological ties between parent and child, and the inclusion of one's particulars on the registration is a means of affirming these ties. A parent's contribution to the process of determining a child's surname is another significant mode of participation in the life of a child. Arbitrary exclusion from these means of participation negatively affects an interest that is significant to a father, and the possibility of his arbitrary and absolute exclusion from the birth registration and the process of naming gives rise to the reasonable father's perception that his dignity has been infringed. The fact that the impugned provisions permitted a mother

to “unacknowledge” a father for good reasons, for example where pregnancy results from rape or incest, was not found to justify arbitrarily exposing a father, without recourse, to the possible disadvantages that flow from an unacknowledgment that protects neither a mother's legitimate interests nor the best interests of the child.

The Court held that the impugned provisions were also not saved under Section 1 of the Canadian Charter of Rights and Freedoms. While the legislation's objective – namely, the accurate and prompt recording of births – was determined to be sufficiently important to warrant overriding Charter rights, and the legislation was rationally connected to that legislative objective, the impugned provisions were not found to impair the rights of fathers as little as reasonably possible. In the Court's view, the risks of mothers falsifying records from fear of the potential negative effects consequent on applications by fathers who have been justifiably “unacknowledged” could be essentially eliminated through means that do not negatively affect unjustifiably “unacknowledged” fathers' interests. Moreover, the provincial legislature itself had, in the interim, chosen means that are less impairing of a father's rights by enacting amendments to the impugned provisions, which provide that a father's particulars must be included on his child's registration of birth, if the application is accompanied by a paternity order. These amendments demonstrated that the legislature could have chosen less drastic means than it did in the original legislation.

In the result, the Court issued a declaration that the legislation was of no force and effect; however the Court suspended that declaration of invalidity for a period of 12 months, so as to allow the provincial legislature an opportunity to remedy the constitutional defect.

Languages:

English, French (translation by the Court).

Croatia
Constitutional Court

Important decisions

Identification: CRO-2003-2-006

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 16.05.2003 / **e)** U-III-2631/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 113/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

Sentence, criminal, penalty, mitigation / Compensation, for non-pecuniary damage / Constitutional complaint, admissibility.

Headnotes:

When considering a constitutional complaint against a decision on a request for extraordinary mitigation of sentence, pursuant to the provision of Article 62.1 of the Constitutional Act the Constitutional Court is not competent to decide on an applicant's rights and obligations, the suspicion and accusation of the applicant with respect to a criminal act, or the human rights and fundamental freedoms guaranteed by the Constitution that may have been violated in the rendering of that decision.

Where a constitutional complaint is considered and determined immediately, an applicant's proposal for a stay on the execution of a final verdict is not considered.

The Constitutional Court neither considers nor determines a claim for damages, because it is a civil claim for which the Constitutional Court is not competent.

Summary:

The Constitutional Court rejected a constitutional complaint against the decision of the Supreme Court of Croatia no. Kr-242/01-4 of 11 June 2002, in which the Supreme Court had accepted an applicant's request for extraordinary mitigation of sentence and altered the decision on punishment in the verdict that the Municipal Court of Beli Manastir had delivered on 2 March 2001. The applicant's initial sentence of eight months' imprisonment for grand larceny, imposed in accordance with Article 217.1.3 of the Penal Act (*Narodne novine* nos. 110/97, 50/00, 129/00 and 51/01), had been extraordinarily reduced to five months' imprisonment.

The applicant claimed in his constitutional complaint that the impugned ruling and the earlier verdicts violated the rights guaranteed in Articles 14.1, 15.1, 18.1, 25.1 and 29.1 of the Constitution, and also the provisions of Articles 5, 6, 7 and 13 of the Convention on the Protection of Human Rights and Fundamental Freedoms (*Narodne novine* – International Treaties, no. 6/99 revised text and no. 8/99-correction).

The applicant requested that the Court allow the constitutional complaint and quash the impugned ruling and the earlier verdicts, and he also requested that the execution of the final verdict be stayed until the Court decided on the constitutional complaint. He also claimed non-pecuniary damages in the amount of 60,000 kunas for mental anguish and in the amount of 160,000 kunas for the denial of the right of equal participation in the proceedings. He was willing to enter into a court or out-of-court settlement for both amounts.

In its interpretation of the provision of Article 62.1 of the Constitutional Act on the Constitutional Court of Croatia (*Narodne novine* no. 49/02 revised text; hereinafter: the Constitutional Act) that reads:

> "Everyone may lodge a constitutional complaint with the Constitutional Court if he deems that the individual act of a state body … which decided about his/her rights and obligations or about suspicion or accusation for a criminal act, has violated his/her human rights and fundamental freedom guaranteed by the Constitution",

the Constitutional Court determined that only a decision in which the competent court decides on the merits of the case, i.e. one deciding the suspicion or accusation of the applicant for a crime, amounted to an individual act in accordance with Article 62.1 of the Constitutional Act. Such an act is one over which the Constitutional Court of Croatia has the jurisdiction to protect an applicant's human rights and fundamental freedoms guaranteed by the Constitution in the course of the proceedings in a constitutional complaint. In the particular case, it was established that the impugned ruling of the Supreme Court of Croatia of 11 July 2002 did not amount to an individual act pursuant to Article 62.1 of the Constitutional Act, against which the Constitutional Court is competent to provide the applicant with the protection of the Constitutional Court.

Article 414 of the Penal Procedure Act (*Narodne novine* nos. 110/97, 27/98, 58/99 and 112/99) provides that where a penalty has become final, it may only be mitigated where circumstances appear that did not exist at the time the verdict entered into force and those circumstances must be such that they would obviously have led to a less severe penalty. The rest of the final verdict is not examined in the course of the application of the extraordinary legal remedy.

The Court did not discuss the applicant's request for a stay of execution of the final verdict, as the constitutional complaint was decided immediately. The Court neither considered nor determined the claim for damages, because it is a civil claim for which the Constitutional Court is not competent.

Languages:

Croatian, English.

Identification: CRO-2003-2-007

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 21.05.2003 / **e)** U-II-2334/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 92/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
3.21 **General Principles** – Equality.

4.8.7 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.

Keywords of the alphabetical index:

Public utility, financing / Gas, supply, access / Municipality, public utility, fee, collection.

Headnotes:

Citizens are entitled to be in an equal position as to the financing of public needs. The equality of citizens is ensured only where all legal and natural persons pay all contributions that they are obliged to pay by law or by a decision of a local self-government unit made on the basis of the Constitution, that is to say, a law adopted in accordance with the provisions of Article 5 of the Constitution. Municipalities, towns and counties are limited in the collection of revenue by law.

Summary:

The Government of Croatia filed a request with the Court asking it to initiate proceedings to review the constitutionality and legality of the Decision on the Requirements for Connection to the Gas Network, issued by the Municipal Council of the Municipality of Brdovec. The Constitutional Court initiated the proceedings and quashed the said Decision.

In that Decision, the citizens of Brdovec Municipality wishing to be connected to the gas network were required to co-finance its construction. That Decision also laid down the conditions for and manner in which citizens were to make payments for that purpose.

Based on the provisions of Articles 18.1, 18.3, 22.1, and 26a.3 of the Utilities Act (*Narodne novine* nos. 36/95, 109/95, 70/97, 128/99, 57/00, 129/00 and 59/01; hereinafter: UA) as well as Article 68.3 of the Law on Local and Regional Self-Government (*Narodne novine* no. 33/01; hereinafter: the LLRSG), the Constitutional Court found that the impugned Decision was not in conformity with Articles 5 and 14 of the Constitution.

Article 5 of the Constitution sets out that the laws in Croatia shall conform with the Constitution; other regulations shall conform with the Constitution and law; and that everyone shall abide by the Constitution and law and respect the legal order of Croatia. Article 14 of the Constitution sets out that all shall be equal before the law.

According to the above-mentioned constitutional provisions, citizens have a right to be in an equal position as to the financing of public needs, including the costs of supplying gas. However, the equality of citizens is ensured only where all legal and natural persons pay the contributions that they are obliged to pay by law or by a decision of local self-government units made on the basis of the Constitution, that is to say a law adopted in accordance with the provisions of Article 5 of the Constitution.

Articles 3 and 5 of the UA regulate the supplying of gas as a utility service. According to the explicit provision of Article 18.1 of the UA, funds for providing gas shall be covered by the price for that utility service. The provision of paragraph 3 of the same article sets out that the price of a utility service for the utility supplied shall be paid to the supplier of the service.

Article 22.1 of the UA prescribes that the funds for financing the construction of the facilities and infrastructure for the supplying of gas shall be provided by utility contributions, the budgets of units of local self-government, donations and other sources regulated by special regulations. Also, according to the provision of Article 26a.3 of the UA, upon being billed, an owner of a built-up plot of land, i.e. of a building, must pay the actual cost of labour and material directly to the contractor who has connected that property to the utility network on the basis of a written contract.

Article 68.3 of the LLRSG regulates the types of revenue that may be raised by local self-government units, i.e. of regional self-government. Point 8 of the said statutory provision stipulates that besides explicitly listed sources of revenue, these units may also generate other types of revenue stipulated by law.

Languages:

Croatian, English.

Identification: CRO-2003-2-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 08.07.2003 / **e)** U-III-706/2003 / **f)** / **g)** *Narodne novine* (Official Gazette), 120/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.
4.7.15.1.2 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Powers of ruling bodies.
5.2.1.2 **Fundamental Rights** – Equality – Scope of application – Employment.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.
5.4.9 **Fundamental Rights** – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Bar, admission / Bar Association, proceedings, determination of facts.

Headnotes:

Where in proceedings for the assessment of an applicant's fitness to practise law the competent bodies do not acknowledge the mandatory legal standards for application of Article 49.2 of the Law on the Legal Profession laid down by the practice of the Constitutional Court, such conduct violates the principle of material truth prescribed by the provision of Article 7 of the Law on General Administrative Procedure (*Narodne novine* nos. 53/91 and 103/96). The reason for this is that all the facts relevant for rendering a legally well-founded and correct decision are not established, i.e. the proper state of affairs cannot be determined in the above-mentioned administrative matter. Where an applicant applies again for the entry of his/her name in the Register of Attorneys, the factual state, which is in this case as the only legally relevant fact for rejecting his/her application, will still exist. Consequently, in order to enable the applicant to acquire the right to have his/her name entered in the Register of Attorneys based on a subsequent application, the Supreme Court of Croatia should radically and completely change its legal standpoint.

Summary:

The applicant lodged a constitutional complaint against a decision of the Supreme Court of Croatia rejecting the applicant's objection against a decision of the Management Board of the Croatian Bar Association (hereinafter: the CBA) on an application to have his name entered in the Register of Attorneys-at-Law and Law Trainees of the Croatian Bar Association (hereinafter: the Register of Attorneys) in Osijek.

The Executive Board of the Croatian Bar Association refused the applicant's application on the basis of the provision of Article 49.2 of the Law on the Legal Profession (*Narodne novine* no. 9/94, hereinafter: the LLP) on the ground that the applicant's past conduct (i.e. he had not practised as attorney-at-law during 1991 for a period longer than six months without valid reasons, as a result of which his name was struck off the Register of Attorneys in a final decision on 28 April 1992) did not ensure that he would conscientiously practise the profession of attorney.

The Constitutional Court took into account the facts established by the Croatian Bar Association and by the Supreme Court of Croatia, as well as the provision of Article 49 of the LLP, which reads:

"1. A person is not fit to practise law if he/she has been sentenced for a criminal act against Croatia, for a criminal act in violation of his/her official office, for a criminal act committed for personal gain or any other criminal act committed out of a dishonest motive or one that makes the person morally unfit to practise law. Such a person shall not have the right to have his/her name entered into the list of attorneys for ten years after being pardoned, or serving a sentence or expiry of the punishment, and where the person has been fined, five years after the finality of the sentence. A person on probation shall not have the right to have his/her name entered into the list of attorneys during the period of probation, once that decision becomes final.

2. A person, whose past conduct or activity does not ensure that he/she will conscientiously practise the legal profession is also unfit for the practise of law.

3. Where an application to have a name entered into the list of attorneys is rejected because an applicant is unfit to practise law for the reasons referred to in Section 2 of this article, a new application may not be submitted before the expiry of a period of two years from the day on which the decision rejecting the application becomes final."

The Constitutional Court found that the provision of Article 49.2 contains terms that are not completely legally defined. Legal provisions that contain legally vague terms are subject to interpretation, and the person applying them is bound by the legal standards established through interpretation.

That being so, the main question of the case before the Constitutional Court from the aspect of the protection of applicant's constitutional rights was:

- may a person's (an attorney's) behaviour during the Homeland War (departure with a family, including a newborn child, from a bombarded city and not practising law for longer than six months, for which the competent bodies of the Croatian Bar Association found no valid reasons, and which resulted in the person's name being struck off the Register of Attorneys) be qualified as a legally relevant fact that is sufficient for reaching the threshold for the application of Article 49.2 of the Law on the Legal Profession to that person for a period longer than a decade and sufficient for determining that he/she is not fit to practise law?

Aside from the applicant's behaviour mentioned above that took place eleven years ago, the impugned acts did not contain any other reason for which the applicant could be found unfit to practise law under the provision of Article 49.2 of the Law on the Legal Profession.

The Constitutional Court found that because the impugned acts of the Croatian Bar Association failed to acknowledge the mandatory legal standards laid down by the practice of the Constitutional Court for the application of Article 49.2, the Bar Association violated the applicant's constitutional rights guaranteed in Article 14.2 (equality before law); Article 26 (all citizens of Croatia and aliens shall be equal before the courts, government bodies and other bodies vested with public authority); Article 44 (every citizen of Croatia shall have the right, under equal conditions, to participate in the conduct of public affairs, and to have access to public services) and Article 54 (everyone shall have the right to work and enjoy the freedom of work; everyone shall be free to choose his vocation and occupation and all jobs and duties shall be accessible to everyone under same conditions) of the Constitution.

The omissions in the case in question included those of the competent bodies in the proceedings arising from the applicant's request to have his name entered into the Register of Attorneys and those of the Supreme Court of Croatia in delivering the impugned judgment affirming the legality of the rulings of the bodies of the Croatian Bar Association.

The Constitutional Court also found that, from the aspect of the protection of the constitutional rights guaranteed in Articles 44 and 54 of the Constitution, it was necessary to consider the impugned judgement of the Supreme Court of Croatia in relation to the purpose of the Law on the Legal Profession. In a case where an applicant applies again for the entry of his/her name in the Register of Attorneys pursuant to Article 49.3 of the Law on the Legal Profession, the factual state, which is in the case the only legally relevant fact for rejecting his/her application for the entry of his/her name in the Register of Attorneys, will still exist, since it cannot be changed because it is something that the applicant has done in the past. Consequently, in order to enable the applicant to acquire the right to have his/her name entered in the Register of Attorneys based on a subsequent application, the Supreme Court of Croatia should radically and completely change its legal standpoint, i.e. it should adopt the opposite legal standpoint to the one it had adopted in the final judgment in the legal matter concerning that party.

Languages:

Croatian, English.

Identification: CRO-2003-2-009

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 09.07.2003 / **e)** U-II-1315/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 122/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
3.12 **General Principles** – Clarity and precision of legal provisions.
3.13 **General Principles** – Legality.
4.6.3 **Institutions** – Executive bodies – Application of laws.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Law, omission / Public road, excessive use, compensation determination.

Headnotes:

The Constitutional Court of Croatia is not competent to review the constitutionality of laws or the constitutionality and legality of other regulations in a case where a proposal challenges a law or another regulation because the person or body issuing it has omitted to regulate a matter in that law or regulation.

Summary:

In response to a proposal brought by several proponents (applicants) seeking a review of the constitutionality and legality of the provisions of Articles 2 and 3 of the Ordinance on Excessive Use of Public Roads (*Narodne novine* no. 40/00; hereinafter: the Ordinance), the Constitutional Court declared the proposal inadmissible.

The impugned provisions of the Ordinance read as follows:

Article 2

"1. Excessive use of a public road entails its use above the traffic load value for which it was planned, i.e. built, during the course of activities carried out by natural or legal persons on the public road.

2. Increased traffic load in relation to paragraph 1 of this article is an average annual daily increase of medium-weight and heavy lorries of more than 10% in relation to the existing traffic load."

Article 3

"The activities in Article 2.1 of this Ordinance are:

- production and/or exploitation of energy raw materials, mineral raw materials for the production of metals and their compounds, non-metallic minerals, construction stone, all kinds of salts and salted waters, mineral and geo-thermal waters for obtaining mineral raw materials, technical construction stone, construction sand and gravel, and brick clay;
- exploitation of renewable deposits of construction sand and gravel from the beds and banks of watercourses, lakes, man-made water reservoirs, regulated and non-regulated inundation areas, the mouths of rivers that flow into the sea, and canals connected to the sea;
- construction of transport, communication, energy, water, industrial, waste disposal and special-use facilities; and
- diverting traffic to other public roads because of closure of a public road for longer than 10 days."

The applicants argued that the above-mentioned provisions of the Ordinance were not in accordance with the provisions of Article 25.1 and 25.3 of the Law on Public Roads (*Narodne novine* nos. 100/96, 76/98, 27/01, 114/01, 117/01 and 65/02; hereinafter: LPR) or with the provisions of Article 3 (the highest constitutional values); Article 5.1 (principle of legality); and Article 49.2 (entrepreneurial freedoms and market freedom) of the Constitution. The applicants elaborated on the violation by claiming that the only activity that led to the excessive use of a public road was transportation, and that activity was not included in Article 3 of the impugned Ordinance, that is to say, that the Minister of Maritime Affairs, Transport and Communications, who issued impugned Ordinance, had omitted to do so.

As to Article 2 of the Ordinance, the applicants claimed that that article did not set standards for determining compensation for excessive use of public roads, as required by the provision of Article 25.2 of the LPR.

Therefore, the applicants concluded that the impugned Ordinance did not, in practice, come into effect, and that the only existing administrative act regulating the amount of as well as the method of calculation and payment of compensation was the one by the County Authority for Roads in Karlovac.

Relying on the provision of Article 45 of the Constitutional Act on the Constitutional Court of Croatia, (*Narodne novine* no. 49/02 – revised text; hereinafter: the Constitutional Act), the applicants requested that the execution of the above decision be temporarily stayed, arguing that its application would lead to irreparable consequences for the company.

After reviewing the reasons stated by the applicants in their proposal and the contents of the impugned provisions of Article 25.2 and 25.3 of the LPR, the Constitutional Court held that the proposal was inadmissible insofar as it challenged the constitutionality and legality of the provisions of Articles 2 and 3 of the Ordinance.

The Constitutional Court found that the impugned provisions of Articles 2 and 3 as well as other provisions of the Ordinance did not set the standards for excessive use of a public road, but only stipulated excessive use of a public road and increased traffic load (Article 2.1 and 2.2) and activities (Article 3). The impugned provisions of the Ordinance and its other provisions did not set out the criteria.

The Court stated that the provisions of Articles 2 and 3 of the Ordinance did not regulate questions that should have been regulated in accordance with the parent act. In order for Article 25.1 to have legal effect, there must be standards set on the basis of the three cumulative legal requirements representing an indivisible set of legally relevant facts and that can only jointly lead to a finding of excessive road use, and accordingly to the obligation to pay compensation.

Therefore, the Court held that there was an omission in that part of the impugned Ordinance.

In accordance with the provision of Article 128.1.2 of the Constitution, the Constitutional Court decides on the conformity of other regulations with the Constitution and law. In accordance with the provision of Article 55.1 of the Constitutional Act, the Constitutional Court must strike down a law or some of its provisions, where the Court finds the law or provisions not to be in accordance with the Constitution; or the Court must strike down a regulation or some of its provisions, where the Court finds the regulation or provisions not to be in accordance with the Constitution and the law.

It follows from the above that the Constitutional Court is not competent to review the constitutionality of a law or the constitutionality and legality of a regulation in response to a proposal challenging a law or a regulation because the person or body issuing it has omitted to regulate a matter in that law or regulation.

The Court had expressed its opinion on an omission in the law in its ruling no. U-I-709/1995 of 1 March 2000.

The Court found that there was an omission, which came about because the person issuing the impugned regulation (the Minister of Maritime Affairs, Transport and Communications) had not completely exhausted the authority set out in Article 25.2 of the LPR. The Court informed the Government of Croatia of its ruling.

The Constitutional Court found the part of the proposal that challenged the constitutionality and legality of the Ordinance in its entirety to be unfounded for the reason that the competent person had issued the Ordinance, on the basis of the legal authority under Articles 25.2 and 61.3 of the LPR, as an implementing instrument and its provisions regulated other issues that were also important for the excessive use of public roads found in Article 1 of the impugned Ordinance.

Therefore, the Court refused to grant the applicants' request for a temporary stay of the execution of the decision of the County Authority for Roads in Karlovac until the delivery of the decision on the proposal.

Languages:

Croatian, English.

Identification: CRO-2003-2-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 09.07.2003 / **e)** U-II-2188/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 120/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
3.16 **General Principles** – Proportionality.
3.21 **General Principles** – Equality.
5.4.7 **Fundamental Rights** – Economic, social and cultural rights – Consumer protection.
5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Telecommunications, tariff, determination / Minister, powers.

Headnotes:

The actions that a provider must undertake in order to provide voice services should be deemed to be a constituent part of providing voice services and part of the provider's obligation to provide services in accordance with the contract.

The current legal framework for a subscription fee, which is a fixed fee for the readiness of a service provider to provide a service, whose amount cannot be determined or measured in relation to the services provided and one that the service user cannot influence by negotiation, results in an unequal position in contractual relationships, where the nature of the contractual obligations is so disproportionate that the user pays the highest subscription fee when he or she does not use the voice services. That clearly infringes the principle of equal value of contractual obligations. That principle would be upheld if the voice service

user paid a fee corresponding to the value of services used. That value may be given in a price list but it must be proportionate to the services provided and used. Adherence to that principle would also make it possible for the service user to exercise his/her right to plan and organise his/her expenditures.

Summary:

The Constitutional Court accepted a proposal by the Consumer Protection Association to initiate proceedings to review the constitutionality and legality of the provision of Article 50.1 of the Ordinance on General Conditions for Providing Telecommunications Services (*Narodne novine* nos. 84/95, 101/96, 105/96 and 2/97; hereinafter: the Ordinance). The Court struck down the above-mentioned provision and ordered that it would be null and void as of 31 October 2003.

The proponent (applicant) claimed that the impugned provision was not in conformity with the provision of Article 15 of the Law on Obligations (*Narodne novine* nos. 53/91, 73/91, 3/94, 7/96, 91/96 and 112/99; hereinafter: the LO).

The impugned provision of the Ordinance provides as follows: "Telephone subscription is a fee for readiness of the telecommunications system".

The provision of Article 15 of the Law on Obligations states: "The starting point for parties entering into bilateral contracts shall be the principle of equal value of mutual contractual obligations. The law shall determine in which cases the infringement of this principle leads to legal consequences".

In the reasons for its proposal, the proponent stated that the impugned provision of the Ordinance, which set out that consumers were to pay a subscription fee that did not include payment for the actual service provided but only for the service provider's readiness to provide the contracted service, was not in conformity with the above-mentioned provision of the Law on Obligations, because the impugned provision amounted to an infringement of the principle of equal value of mutual contractual obligations.

In addition to the statements by the proponent and the answers transmitted by the competent person, the Constitutional Court took into account the provisions of the Ordinance. The Minister of Maritime Affairs, Transportation and Communication had issued that Ordinance on the basis of the authority set out in Article 16.3 of the Law on Telecommunications in force at the relevant time (*Narodne novine* no. 53/94).

The provision of Article 100 of the new Law on Telecommunications reads:

"1. The Minister shall issue the regulations that he or she is authorised to issue in accordance with this Law no later than one year after its entry into force.

2. The Director of the Institute shall issue regulations that he or she is authorised to issue in accordance with this Law no later than one year after its entry into force.

3. Until the regulations mentioned in paragraphs 1 and 2 of this article are issued, the provisions of the regulations issued in accordance with the Law on Telecommunications (*Narodne novine* no. 53/94) shall be applied, where they are not contrary to this Law."

It was found that the impugned Ordinance (*Narodne novine* no. 84/95) continued to be applied even after the expiry of the one-year term in which the regulations should have been issued in accordance with Article 100 of the new Law on Telecommunications from 1999.

The Constitutional Court instituted proceedings to review the constitutionality and legality of the impugned provision of the Ordinance on the basis of Article 128.1.2 of the Constitution of Croatia, the impugned Ordinance being included in the term "other regulations" within the meaning of that article.

The provision of Article 14.1 of the Law on Telecommunications puts a voice services provider under the obligation to provide those services in accordance with the Ordinance, thereby limiting the contracting parties' freedom to act in relation to the contents of the contract. As to the performance of services, the parties cannot negotiate conditions different from those prescribed by the Ordinance, because the relevant provision of the Law is *ius cogens*. Should the parties act contrary to the Ordinance, any contractual provision contrary to the Ordinance would be null and void (Articles 10 and 103.1 of the Law on Obligations). In relation to the principle of free contractual negotiations, which is one of the fundamental principles of contractual law, the provisions in the Ordinance prescribing general conditions for providing telecommunications services should also be considered a regulation.

In the constitutional court proceedings, the Court considered the relevant provisions of the following:

- The Law on Telecommunications (*Narodne novine* nos. 76/99, 128/99, 68/01, 109/01);
- The Law on Obligations (*Narodne novine* nos. 53/91, 73791, 3/94, 7/96, 91/96, 112/99); and
- The Ordinance on the General Conditions for Providing Telecommunications Services (*Narodne novine* no. 84/95).

The Court found that the impugned provision of Article 50.1 of the Ordinance was not in conformity with the provisions of Articles 14, 15 and 28 of the Law on Telecommunications.

The provision of Article 14.1 of the Law on Telecommunications sets out the obligation of public voice services providers to provide services in a manner, within the deadlines and in compliance with the procedure laid down by that Law and the Ordinance on the General Conditions for Providing Public Voice Services, as well as in compliance with laws and other regulations. The Ordinance does not deal with setting the price for the services. The provisions of Articles 15 and 28 of the Law on Telecommunications lay down the principles for the pricing system used to determine the prices of public voice services. With the exception of the provisions allowing the negotiation of prices lower than those approved, the Law does not provide for a special fee for the readiness of the telecommunications system in the form of a telephone subscription. The Court found that to define a subscription fee as one for the readiness of the telecommunications system, as did Article 50.1 of the impugned Ordinance, did not comply with the manner of setting prices for services laid down in the Law on Telecommunications. Consequently, the impugned provision did not comply with the Law.

Furthermore, the Constitutional Court found that the impugned provision of the Ordinance was not in accordance with the provision of Article 15 of the Law on Obligations that, as one of fundamental principles of contract law, sets out that the starting point for participants entering into a bilateral contract is the principle of equal value of mutual contractual obligations. By laying down that each contracting party must give the other the same value it receives, that Law sets out the starting point ensuring the equal position of contracting parties (principle in Article 11 of the Law on Obligations).

The Law also provides for legal consequences in the event of a violation of the principle of equal value of contractual obligations.

A contract may stipulate otherwise, but only on the basis of an express agreement between the contracting parties at the time they enter into the contract or at the time they subsequently modify it, since the autonomy and equal position of the parties in the contractual relationship are the fundamental principles in legal relations of a private nature.

The autonomy allows the parties to agree freely on an arrangement of the value of the mutual contractual obligations that is different to the one prescribed by the Law; however, that may not happen without the intention of the contracting parties.

The actions that a provider must undertake in order to provide voice services should be deemed to be a constituent part of providing voice services and part of the provider's obligation to provide services in accordance with the contract.

The integral part of the obligation in Article 18.1 of the Law on Obligations, which is one of the fundamental principles of that Law, prescribes that a debtor “is obliged to act, in performing his contractual obligations, with the care required by legal transactions involving contractual obligations of a similar nature”. The integral part of the obligation in paragraph 2 of that article, which is also one of the fundamental principles of that Law, prescribes that the debtor “when performing an obligation relating to his professional domain, is obliged to act with greater care, according to professional standards and practice” (care taken by a good expert). These rules are built into the provisions of the Law on Telecommunications, which prescribe the obligations of the voice services provider.

The Constitutional Court found that the impugned provision of the Ordinance was not in accordance with the provision of Article 5.1 of the Constitution, which prescribes as follows: “In the Republic of Croatia all laws shall be in conformity with the Constitution, and other regulations shall be in conformity with the Constitution and the law”. The Ordinance was a by-law, which had to be in accordance with the Law on Telecommunications as well as with principles of the Law on Obligations.

Languages:

Croatian, English.

Identification: CRO-2003-2-011

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 09.07.2003 / **e)** U-I-534/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 120/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Diploma, recognition, procedure / Independence, state, date.

Headnotes:

For the recognition of diplomas or other documents awarded by military or religious institutions of higher education on the territory of the former Yugoslavia, Article 13.5 of the Law on Professional Titles and Academic Degrees establishes 25 July 1991 as the deadline for the acquisition of such diplomas or documents. The Constitutional Court considered that deadline inapplicable because the entry into effect of the Constitutional Decision on Sovereignty and Independence of the Republic of Croatia as well as the Declaration on Proclaiming the Sovereign and Independent Republic of Croatia of 25 June 1991 had been postponed for a period of three months. It is therefore the date of 8 October 1991 that is applicable as a deadline in the recognition of diplomas as well as certain rights guaranteed in a number of other regulations.

The application of the impugned provision has resulted in a situation where persons who received diplomas and other documents from military or religious educational institutions on the territory of the former Yugoslavia after 25 June 1991 and before 8 October 1991 are in an unequal position before the law in relation to persons who received identical documents from the same institutions before 25 June 1991, thereby violating Article 14.2 of the Constitution guaranteeing the equality of all before the law.

Summary:

On the basis of a proposal to initiate proceedings for the review of conformity with the Constitution of the provision of Article 13.5 of the Law on Professional Titles and Academic Degrees (*Narodne novine* no. 128/99; hereinafter: the Law), the Constitutional Court of the Republic of Croatia initiated proceedings and struck out part of the impugned provision of the Law, and declared that provision invalid as from 31 October 2003.

The impugned provision reads:

> "In the case of persons who before 25 July 1991 acquired diplomas or other documents from military or religious institutions of higher education on the territory of the former Yugoslavia, for which the corresponding professional title or academic degree cannot be determined, the minister shall decide on the professional title or academic degree on the basis of an opinion by the Ministry of Defence or the Commission for Relations with Religious Communities".

The impugned decision is based on Article 173.2 of the Law on Institutions of Higher Learning (*Narodne novine* no. 59/96 revised text), which reads:

1. Persons who received diplomas or other documents of higher education from institutions of higher education on the territory of the republics of the former Yugoslavia before 8 October 1991 shall have their professional title or academic degree recognised.

2. In the case of persons who received before that deadline diplomas or other documents from military or religious institutions of higher education on the territory of the former Yugoslavia, for which no corresponding professional title or academic degree can be established, a procedure of validation or recognition of equivalent qualifications shall be carried out in accordance with a special regulation.

The Constitutional Court considered it particularly appropriate to review the conformity of the impugned provision of Article 13.5 of the Law with the provision of Article 14.2 of the Constitution, which sets out that all are equal before the law. The Court found that the concept of "diplomas and other documents received from military or religious institutions of higher education on the territory of the former Yugoslavia" could only be introduced in the Croatian legal order on the day on which the Republic of Croatia became independent. Since it was on 8 October 1991 that the Republic of Croatia adopted the Decision dissolving all State relations on the basis of which it together with the other republics and provinces formed the former Yugoslavia, the legal situation concerning any such diplomas and other documents of education received before that day, i.e. before 8 October 1991, must be regulated by law in a manner equal for all.

The above was not respected by the impugned part of Article 13.5 of the Law, which set a different deadline: 25 June 1991. The Constitutional Court found that that deadline could not be applicable because the entry into effect of the Constitutional Decision on Sovereignty and Independence of the Republic of Croatia and of the Declaration Proclaiming the Sovereign and Independent Republic of Croatia of 25 June 1991 (*Narodne novine* no. 31/91) had been postponed for a period of three months.

The Constitutional Court pointed out that the date of 8 October 1991 is applicable for recognising certain rights in some other regulations as well. In addition to the aforementioned provision of Article 173 of the Law on Institutions of Higher Learning, the provision of Article 174 of the Law on Notary Publics (*Narodne novine* no. 78/93) states that a diploma from the Faculty of Law and a Bar Examination passed before 8 October 1991 on the territory of any other republic of the former Yugoslavia are recognised as if they were acquired in the Republic of Croatia.

The legal relevance of the date of 8 October 1991 is also found in several decisions of the Constitutional Court (for example, in a ruling on instituting proceedings for the review of constitutionality of Article 26.3 of the Law on Croatian Citizenship, no. U-I-147/1992 of 24 May 1993, published in *Narodne novine* no. 49/93, and also in a decision on striking down Article 17.1 of the Law on Recognising the Equal Value of Foreign School Certificates and Diplomas, no. U-I-860/1998 of 9 February 2000, published in *Narodne novine* no. 21/00).

The Constitutional Court did not, however, deny the legislator the right to prescribe the implementation of a special procedure for cases where it is not possible on the basis of such a diploma or document to establish a corresponding professional title or academic degree.

In setting the date on which the unconstitutional part of the provision of Article 13.5 of the Law would cease to have legal force, the Constitutional Court took into consideration the time needed for the legislator to bring that part of the legal provision into accordance with its decision.

Languages:

Croatian, English.

Identification: CRO-2003-2-012

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 09.07.2003 / **e)** U-II-1130/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 120/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
3.18 **General Principles** – General interest.
3.25 **General Principles** – Market economy.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
4.15 **Institutions** – Exercise of public functions by private bodies.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Minister, powers / Animal, protection / Public health, protection / Entrepreneur, market, equal position / Monopoly, created through ministerial decree.

Headnotes:

The provision of Article 50.2 of the Constitution sets out that the exercise of entrepreneurial freedoms may exceptionally be restricted by law for the purposes of protecting interests and security of the Republic of Croatia, nature, environment and public health. The protection of common values, such as public health, lends legitimacy to the possible restriction of entrepreneurial freedoms, which are guaranteed by the Constitution.

Bearing in mind the provision of Article 1.2 of the Veterinary Medicine Act, according to which the organisation and implementation of animal health protection and the promotion of veterinary public health are of interest to the Republic of Croatia, the Constitutional Court held that designating a legal person for the purpose of issuing and distributing ear tags for the mandatory marking of animals with the aim of protecting animal health against contagious diseases could not be considered a restriction of entrepreneurial freedoms in breach of the Constitution.

Summary:

The Constitutional Court rejected a request made by a profit-making organisation seeking the initiation of proceedings for a review of the constitutionality of the provision of Article 5.1 of the Ordinance on the Mandatory Marking of Animals (*Narodne novine* nos. 139/97 and 164/98; hereinafter: the Ordinance).

In the proposal, the applicant argued that the impugned provision of the Ordinance was in breach of Article 49.1, 49.2 and 49.3 of the Constitution because that provision designates the Centre for Reproduction in the Cattle Industry of Croatia as sole and exclusive distributor of tags for marking livestock in the Republic of Croatia. Since that legal person is a limited liability company, the applicant argued that the impugned provision allowed only one legal person to sell tags on the market of the Republic of Croatia, thereby granting that person a position of monopoly on the market, and allowing to make extra profits and high earnings, and to abuse its market position by preventing market access to other entrepreneurs. That enabled that person, in breach of the provision of Article 49.2 in conjunction with Article 49.1 and 49.3 of the Constitution, to hinder competition in the market.

In accordance with Article 42 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (*Narodne novine* no. 49/02 – revised text), the proposal was transmitted for response to the Ministry of Agriculture and Forestry, which had issued the disputed regulation. On the basis of Article 25 of the Constitutional Act, the Constitutional Court asked the Agency for the Protection of Market Competition to provide an expert opinion. It did so, and it stated that the impugned provision was not in breach of the Law on the Protection of Market Competition (*Narodne novine* nos. 48/95, 52/97 and 89/98).

Starting from the provisions of Article 5 of the Constitution (Laws shall conform with the Constitution, and other regulations with the Constitution and law; and everyone shall abide by the Constitution and law and respect the legal order of the Republic of Croatia), and the provisions of Article 128.1 and 128.2 of the Constitution (the Constitutional Court decides on the constitutionality of laws, and the constitutionality and legality of other regulations), the Constitutional Court examined the basis on which proceedings could be initiated: whether the impugned regulation had been issued by a person authorised to do so; whether that person had had the legal authority to issue it (legal basis); and whether the contents of the regulation complied with the legal framework established by law.

Article 16 of the Law on the System of State Administration (*Narodne novine* nos. 75/93, 48/99, 15/00 and 59/01, hereinafter: LSSA) provides that that ministers and directors of governmental authorities issue ordinances, orders and instructions for the implementation of laws and other regulations when explicitly authorised to do so, and within the limits of the authorisation they are given. Article 18 of that Law provides that ordinances further elaborate provisions of the parent law for the purpose of implementation. Therefore, an ordinance, as an instrument of implementation, only elaborates statutory provisions and must stay within the limits of the authorisation granted by the parent law. Anything falling outside the statutorily established boundaries would make the legality of such a regulation open to doubt, as well as its constitutionality.

The Minister of Agriculture and Forestry had issued the impugned Ordinance on the basis of Article 16 of the Law on Veterinary Medicine Act (*Narodne novine* nos. 70/97 and 105/01; hereinafter: VMA), which reads:

Article 16

1. The authorised veterinary station and clinics perform mandatory marking of all cattle, sheep, goats, pigs and horses and keep all records on such markings.

2. The owner of the animals mentioned in paragraph 1 of this article bears the costs of marking.

3. The Minister prescribes the form and contents of the obligatory tags for marking animals, and the manner and procedure of marking, as well as the manner of keeping records and the contents of the forms.

4. The Minister designates the legal person for managing data for the whole territory of the Republic of Croatia.

The impugned provision of Article 5.1 of the Ordinance reads:

Article 5

1. The Centre for Reproduction in the Cattle Industry in Croatia, as the legal person authorised by the Ministry of Agriculture and Forestry, is in charge of issuing and distributing ear tags for the mandatory marking of animals, as well as distributing the prescribed forms for keeping records on the marked animals and for data processing.

From the provisions cited above of the Veterinary Medicine Act, it follows that the Minister of Agriculture and Forestry was authorised to issue an Ordinance providing for the form and contents of the obligatory tag for marking animals; the manner and procedure of marking; the manner of keeping records and the contents of forms; and to designate a legal person for managing data for the whole territory of the Republic of Croatia.

After examining the provisions cited above of the VMA and the contents of the impugned Ordinance, in particular the impugned provision of Article 5, the Constitutional Court found that the Minister of Agriculture and Forestry had acted within the framework of the authorisation set out in Article 16 VMA.

The impugned provision gives the tasks of issuing and distributing ear marks for obligatory marking of animals, distributing prescribed forms for keeping records on the marked animals, data processing and management to the Centre for Reproduction in the Cattle Industry of Croatia, which also manages Central Records on Marked Cattle and the Register of Marked Breeding Stock and is obliged to deliver monthly and annual reports on the distribution of tags and the number of marked cattle to the Ministry of Agriculture and Forestry and the Veterinary Authority.

Marking animals for the purpose of identification is of great importance for controlling animal production and trade, and for protecting the health of animals and people. Therefore, the strict implementation of this measure requires an efficient organisation with precisely defined allocation of responsibilities for the purpose of conducting the necessary control.

The Court bore in mind the provisions of Article 49.1, 49.2 and 49.3 of the Constitution, which state:

> "Entrepreneurial and market freedom shall be the basis of the economic system of the Republic of Croatia.
>
> The State shall ensure all entrepreneurs an equal legal status on the market. Abuse of a monopoly position defined by law shall be forbidden.
>
> The State shall stimulate economic progress and social welfare and shall care for the economic development of all its regions."

The Constitutional Court also bore in mind the provision of Article 50.2 of the Constitution, providing that entrepreneurial freedoms may exceptionally be restricted by law for the purposes of protecting the interests and security of the Republic of Croatia, nature, the environment and public health. The protection of common values, such as public health, lends legitimacy to the possible restriction of entrepreneurial freedoms, which are guaranteed by the Constitution.

Therefore, the Constitutional Court found that the provisions of the Constitution, as well as the relevant provisions of the above-mentioned laws, were provisions regulating the organisation and implementation of animal health protection and promotion of the measures of veterinary public health, all in which the Republic of Croatia has an interest. Therefore, designating a legal person to issue and distribute ear tags for the obligatory marking of animals with the aim of protecting the animals from contagious diseases may not be considered a restriction of entrepreneurial freedoms in breach of the Constitution.

Languages:

Croatian, English.

Cyprus
Supreme Court

Important decisions

Identification: CYP-2003-2-001

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 18.07.2003 / **e)** 7355 / **f)** Psyllas v. Republic of Cyprus / **g)** to be published in *Cyprus Law Reports* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.
5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.
5.3.13.23.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – Right not to incriminate oneself.

Keywords of the alphabetical index:

Suspect, rights / Interrogation, evidence, indirect means / DNA, analysis, consent.

Headnotes:

Evidence obtained in violation of the presumption of innocence of the accused, which includes the right against self-incrimination, is not admissible.

Summary:

Article 7.1 of the Constitution safeguards the right to life and corporal integrity; and Article 12.4 safeguards the presumption of innocence of accused persons.

The appellant was convicted by the Assize Court on two counts of the offence of housebreaking and theft. In the two houses concerned, traces of DNA material had been found belonging to an unknown person. Whilst in police custody, the appellant had refused to give a blood sample for the purpose of DNA fingerprinting. On the day of his refusal, he had been taken to the Interrogator's office in order to be brought to court. On that day the Interrogator had offered drinks to celebrate his promotion to those visiting him. He had offered the appellant a drink, which the appellant consumed with a straw. After the appellant had finished his drink, the Interrogator informed him that the straw would be used for the purpose of DNA fingerprinting. The Interrogator then cautioned the appellant.

On the following day, the same Interrogator brought the appellant to the appellant's house for the purpose of carrying out a search. The appellant was asked once again to give a blood sample and he refused. At that time, the appellant offered refreshments to those present and consumed one himself using a straw. The same process followed again: the straw was taken, and the Interrogator cautioned him. The appellant replied: "Do as you wish".

It emerged from the evidence that the sole purpose of the appellant's presence in the Interrogator's office and his being offered a drink with a straw had been to obtain a DNA sample from the appellant by indirect means.

Upon appeal by the appellant, the Supreme Court quashed the conviction. It recalled Article 12.4 of the Constitution, which safeguards the presumption of innocence and includes the right against self-incrimination. Under the Cypriot case-law (see *Merthodja v. Police* (1987) 2 C.L.R. 227 and *Parpas v. Republic* (1988) 2 C.L.R. 5) detention of a suspect for the purpose of interrogation cannot be used for any other purposes. The object of the detention of a suspect is to facilitate the task of interrogation and not to use a suspect in a way so as to secure evidence against him. Lastly, cautioning a suspect aims at safeguarding the right of silence and the right against self-incrimination. The appellant had been tricked by the police into indirectly giving a DNA sample contrary to his expressed will and in violation of his right against self-incrimination. Under the case-law laying down the importance of human rights and the consequences of their violation (see *Police v. Georghiades* (1983) 2 C.L.R. 33), any evidence obtained directly or indirectly, in violation of the fundamental human rights of the subject, is not admissible as evidence (see, also, *Kattis and Others v. Republic, Criminal Appeal* 6918/28.6.2002 *and Teixeira de Castro v. Portugal* (1998) 4 BHRC 533, ECct HR). The evidence concerning the appellant's DNA had been obtained in violation of his fundamental right against self-incrimination. That fact should have led to its exclusion. Since that evidence constituted the fundamental ground for his conviction on the two counts of housebreaking and theft, his discharge and acquittal were the inevitable consequences.

Languages:

Greek.

Czech Republic
Constitutional Court

Statistical data
1 May 2003 – 31 August 2003

- Judgments by the plenary Court: 6
- Judgments by chambers: 54
- Other decisions of the plenary Court: 16
- Other decisions by chambers: 679
- Other procedural decisions: 23
- Total: 778

Important decisions

Identification: CZE-2003-2-006

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 29.05.2003 / **e)** IV. ÚS 285/02 / **f)** Restitution – time-limit for new claimants / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.
5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Property, restitution / Property, possessor / Restitution, claim, time-limit, conditions.

Headnotes:

In the light of the judgment of the Constitutional Court granting the extension of the time-limit for new claimants bringing claims in restitution at a time when the person originally under the obligation to return or transfer the property no longer possesses the property and the fact that the law does not provide for any specific solution to this problem, it appears fair and just to consider that the person currently in possession of the property concerned is the person under the obligation to return that property.

Summary:

The complainants, who are Czech citizens permanently residing outside the territory of the Czech Republic, challenged a Supreme Court decision dismissing and rejecting their extraordinary appeal. The Supreme Court and a third party to the proceedings stated their views on the complaint. Recalling its established case-law, the Supreme Court stated that there was no reason to quash its decisions. The third party agreed with the Supreme Court in that the impugned decisions did not constitute a breach of Article 11 of the Charter because that article protected the title already acquired, rather than a mere entitlement to title.

In the reasons for its decision, the Court of Appeal had recapitulated the proceedings to that date, summarised the contents of the petition for extraordinary appeal and reviewed the issues related to its admissibility.

According to the Supreme Court, the right of a claimant against persons to whom the property had been returned was conditional on a request for the return of the property having been addressed to the legal entity in possession of it on 1 April 1991. That condition also applied to cases in which only some of the claimants, whose time-limit for the assertion of their rights had started running on that date, had duly filed their requests. In the particular case, the complainants became claimants only after the Constitutional Court delivered a decision striking permanent residence in the Czech Republic from the list of conditions for the return of property on the ground that it was unconstitutional. The complainants, acting on the basis of and relying on the law applicable at the time, had not raised their claims earlier because they had known of their failure to fulfil the condition of permanent residence. They had raised their claims only when it had become possible for them to do so. The decision of the Supreme Court of the Czech Republic had not expressed any legal opinion as to such a situation.

The Constitutional Court considered that the Supreme Court of the Czech Republic had avoided resolving the question that had been raised by the appellate court, and had thus failed to do its statutory duty. The Constitutional Court drew on its established case-law (Pl. 8/95 and Pl. 24/96). Where a right is found to be restricted in an unconstitutional manner, the obstacle barring its exercise must be eliminated. The potential conflict between the constitutionally guaranteed right to equality and the fact that the property might have been returned to another claimant had been in the interim addressed by the legislators in such a way that the persons to whom the property in question had been returned or transferred had to be aware of the risk that their claims might be restricted. That regulation was in harmony with the purpose of the act and the tendency to allow room for the constitutional principle of equality. That regulation would enable all claimants to satisfy their claims to the extent established by law. From such a perspective, the fact that the property may have already been returned to some of the claimants is irrelevant.

The Constitutional Court further explained why it found it inappropriate for persons whose claims in restitution had been already satisfied to plead “acquired rights” or retroactive effect. The award took into account that the property in question had been returned in many cases and was no longer held by the persons originally under the obligation to return it. It was only necessary to set a time-limit to make it possible to settle all of the claims in restitution. In that context, the requirement that requests be directed to the persons originally in possession of the property would be absurd. The definition of a person under an obligation clearly showed that that entity had to possess the property in question as of the effective date of the Act. Other time-limits were derived from the effective date of the Act.

The Constitutional Court concluded that the Supreme Court of the Czech Republic had avoided resolving the question that had been raised, and had thus interfered with the complainants' right to judicial protection and fair trial. If that had led to the exclusion of the right to a fair share in the restitution of property, the principle of the equality of rights would have also been violated. Therefore, the Constitutional Court upheld the complaint and quashed the impugned decision.

Supplementary information:

- Pl. ÚS 8/95 in *Collection of Decisions and Judgments of the Constitutional Court* – vol. 4, no. 83; *Bulletin* 1995/3 [CZE-1995-3-013];
- Pl. ÚS 24/96 in *Collection of Decisions and Judgments of the Constitutional Court* – vol. 6, no. 113.

Languages:

Czech.

Identification: CZE-2003-2-007

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 04.06.2003 / **e)** Pl. ÚS 14/02 / **f)** Direct payment in free health care / **g)** *Sbírka zákonů* (Official Gazette), no. 207/03 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
5.2 **Fundamental Rights** – Equality.
5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.
5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Health, care, cost-free / Health, insurance company.

Headnotes:

The prohibition on accepting direct payment applies to free health care itself, as well as its provision. Direct payments for health care may be collected from insured persons only with respect to the health care that goes beyond the scope of free health care. Such a prohibition does not alter the meaning and content of the law but merely enhances the protection of the sphere of free health care against attempts at violating its integrity and restricting its scope. Such an interpretation conforms to the Constitution and is completely appropriate in terms of the meaning of the law.

Summary:

A group of MP's submitted a proposal for the striking down of a provision of the Act on Public Health Insurance. The complainants argued that the impugned provision was contrary to Articles 3, 4, 26 and 31 of the Charter of Fundamental Rights and Freedoms. The Chamber of Deputies, the Senate and the Ministry of Health stated their views on the proposal.

According to the Chamber of Deputies, the purpose of the Act was to prevent situations where the provision of health care depends on the financial means of the insured person.

According to the Senate, the right to engage in business in the area of health care was not restricted.

According to the Ministry of Health, the striking down of the provision might be deemed to mean that physicians could collect payments for health care or related care without any restrictions.

The impugned Act had been duly adopted and enacted within the powers set out by the Constitution and in the manner prescribed by the Constitution.

The deputies' proposal for striking down the impugned provision did not receive the required majority of 9 affirmative votes and was therefore rejected by the Constitutional Court.

The Act on Public Health Care regulates public health insurance as well as the extent and the conditions of the provision of health care. The Act defines health care that is and that is not covered by health insurance. Schedule 1 to the Act lists treatments not covered by health insurance, or covered subject to certain conditions.

The complainants argued that the entire scope of health care, including health care not covered by health insurance, was concerned. That constituted a violation of each citizen's freedom to engage in business and the right to health.

The Constitutional Court considered that such an interpretation was inappropriate as the prohibition on direct payment applied only to free health care itself.

The impugned provision does not rule out the operation of health care facilities without a contractual relationship with a health insurance company. The insured person's rights to free health care, stemming from the Act on General Health Insurance, apply to health care provided in a facility with a contract with a health insurance company.

The impugned provision does not depart from the framework of constitutional authority. The Act on Public Health Care refers to Article 31 of the Charter of Fundamental Rights and Freedoms. The phrase “neither in connection with the provision of such care” sets out the principle of free health care and is in compliance with the Constitution. The Constitutional Court may not alter the state's health care policy: only the Parliament may do so.

In accordance with constitutional principles, the development of the trend in public health care is towards quality, full-scale and effective care on the basis of the equal status of all insured persons. The difference between “standard” and “above-standard” care must not be in the suitability and effectiveness of treatment. The law sets out the kind of health care that must be provided by a physician in the public interest, so as to ensure that all insured persons are equally entitled to treatment corresponding to objectively established needs and requirements of the adequate level and medical ethics.

This approach is in harmony with international conventions (Convention on Human Rights and Biomedicine) and recommendations (Rec. (2001)13 of the Committee of Ministers to Member States of the Council of Europe) providing that entities entering into health care contracts ensure equal access to health care of appropriate quality.

The Czech Act on Public Health Insurance does not exclude the provision of health care services that are not covered by mandatory insurance.

The Court stated that the provision of the law was not sufficiently clear. The insured person might be requested to make a direct payment even in unjustified cases. The law should define private payments to be made by insured persons in a clear and an unequivocal manner, as is the case in Germany and Switzerland.

The impugned provision concerns only one problem in the overall regulation of public health care. It is not the Constitutional Court's task to assess the overall regulation of health care or the amendment to the act as a whole. The purpose of the impugned provision is to combat the unlawful collection of payments for services provided that are covered by mandatory general health insurance.

The dissenting opinion was based on the following arguments.

The purpose of the provision was to rectify the alleged lack of clarity in the interpretation of the provision of the law and to avoid the possibility of duplicate payments for health care. The judges agreed with part of the reasons for the decision, in particular, with the part interpreting the impugned provision in such a way that it did not prevent the collection of direct payments from insured persons for "health care provided that does not meet the conditions for the provision of free health care". The interpretation in the reasons for the decision refuted the complainants' contention in a manner consistent with the Constitution.

According to the established case-law of the Constitutional Court, a court is bound by the remedy sought rather than the legal arguments and grounds of appeal set out in an application. The judges concluded that the impugned provision was in conflict with Article 31 of the Charter of Fundamental Rights and Freedoms, taken in conjunction with Article 2.2 of the Charter of Fundamental Rights and Freedoms and Article 1.1 of the Constitution, for a reason that had not been put forward by the complainants.

According to Article 31 of the Charter of Fundamental Rights and Freedoms, "everyone is entitled to the protection of his/her health. Citizens are entitled to free health care and medical devices under public insurance on conditions stipulated by law". The law concerned is the Act on Public Health Insurance.

According to the law, an insured person submits for the consideration of the health insurance company applications on potential risks that may threaten or impair his or her health. Insurance may not be used to pay for items, procedures, interventions or services that do not serve to protect the health, but rather satisfy other needs, of the insured person.

The judges concluded that the law set out the obligation to provide free of charge even care that did not constitute health care. However, such care must be provided by a health care facility in connection with free health care. Other insurance companies must then contribute to such care. That, however, goes beyond the constitutionally protected right to the protection of health. The law should set out only the conditions for the provision of free health care, rather than care aimed at satisfying a person's needs other than the protection of health. The act in question transcended the boundaries of the constitutional order by preventing the collection of direct payments from insured persons even when the care provided did not constitute health care and did not in itself serve to protect the insured person's health. It thus created non-objective and unreasonable differences between the insured persons. Contractual insurance may provide a solution to that problem.

The lawmakers are obliged to express transparently the ratio between the components of solidarity and equivalence in the social or health care insurance systems. That division must not be arbitrary (Pl. ÚS 12/94). The insured person is entitled to a component of equivalence in the public health care insurance, transparently defined by the lawmakers, whereby health care insurance would retain the character of a legal instrument of insurance and would not become a tax instrument. The impugned provision did not meet that requirement.

The aforesaid part of the impugned provision should be struck down.

Supplementary information:

- Pl. ÚS 12/94 in *Collection of Decisions and Judgments of the Constitutional Court* – vol. 3, no. 20.

Languages:

Czech.

Identification: CZE-2003-2-008

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 11.06.2003 / **e)** Pl. ÚS 11/02 / **f)** Remuneration of judges / **g)** *Sbírka zákonů* (Official Gazette), no. 198/0303 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.6 **Constitutional Justice** – Effects.
3.11 **General Principles** – Vested and/or acquired rights.
4.7.4.1 **Institutions** – Judicial bodies – Organisation – Members.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Judge, independence, remuneration / Judge, remuneration, changes / Constitutional Court, decision, binding effect / Constitutional Court, decision, departure.

Headnotes:

The Constitutional Court is bound by its own decisions; otherwise its actions would be arbitrary. This rule is an intrinsic part of a democratic legal state. The Constitutional Court may depart from its own case-law only in certain situations, such as a change of social and economic conditions in the country, a change of cultural concepts in the society, etc.

Remuneration of judges represents an irreducible constant rather than a variable factor to be used by a government that might consider judges' salaries too high in comparison with those of civil servants or another professional group.

The principle of equality cannot be viewed as ultimate levelling; it should be interpreted as a guarantee of level starting conditions.

Summary:

The chairwoman of a tribunal of the Municipal Court in Brno submitted a proposal for striking the words “to judges” from the Act regarding the withdrawal of an additional salary from representatives of public power and some bodies of state administration.

The Chamber of Deputies and the Senate expressed their views on the proposal. According to the Chamber of Deputies, the non-payment of the additional salary did not constitute an interference with the independence of judges. Payment of the additional salary did not amount to the material maintenance of judges. Moreover, it was contrary to the principle of citizens’ equality.

The Senate stated that according to an assessment report, the material maintenance of judges was ensured by regular monthly salaries that were relatively high.

The Act had been adopted as prescribed.

The Constitutional Court had addressed the matter in the past. In a decision, Pl. ÚS 13/99 of 15 September 1999, the Court had struck the words “to judges” from an Act because they violated the independence of judges. That decision applied to judges of the ordinary courts. Several other proposals (Pl. ÚS 31/200, Pl. ÚS 30/2000) had been dismissed on the ground of being barred by the doctrine of res judicata. Some proposals (Pl. ÚS 13/2000, Pl. ÚS 18/2000) had been rejected as inadmissible on the ground of pending litigation.

The Act does not have a retroactive effect and cannot be considered as interfering with “acquired rights”. The complainants – judges – claimed that the Act deprived them of an awarded entitlement. Withdrawal of such payments does not fall under the protection of acquired rights. Were such rights to enjoy such protection, their scope could never be reduced.

The Constitutional Court is bound by its own decisions and may depart from them only in specific cases.

The Constitutional Court assessed the matter in light of the changes in the legal order that occurred from July 2000 to the date of the decision. The procedure for reviewing standards takes into consideration the facts of a case and the legal status of the legal order on the date of promulgation of the award.

Until 31 December 2002, representatives of public power and some government agencies as well as

judges and public prosecutors were entitled to receive their salaries for up to six months while being temporarily unable to serve in their official capacity. Act no. 420/2002 Coll. reduced that period to a maximum of 20 business days for judges and a maximum of 30 calendar days for other representatives.

Act no. 425/2002 Coll., relating to the regulation of the salaries of and reimbursements for expenses related to the execution of office by representatives of public power and some government agencies as well as judges and public prosecutors, provides for the salary base on 31 December 2002 to be used for 2003; consequently, the salary base of ministerial staff was not increased. The explanatory notes and purpose show that the aim is to "preserve comparable positions of individual groups" of persons, i.e., civil servants, representatives of public power and judges. The applicant felt that the special position enjoyed by judges in terms of remuneration was unfair and disproportionate.

According to the Constitutional Court, the changes to the provision of law regulating remuneration of judges exceeded the limits for acceptance of the "singular nature" of an act.

Under exceptional circumstances, the principle of equality may be applied to restrictions in the remuneration of civil servants, representatives of public power and judges and may prevail over the principle of the independence of judges. That does not apply to and under all circumstances. Generally speaking, judges' salaries should be an irreducible constant. The principle of equality must be interpreted as a guarantee of level starting conditions.

The state must ensure that judges are independent also in terms of their material maintenance, in order to guarantee impartial and just decisions on the rights of persons. The impugned provision of law could constitute a threat to the independence of judges, with all its negative consequences for the protection of the rights of private persons. The impugned part of the law was contrary to the principle of equality of rights.

The legislators had introduced a uniform regulation of the conditions applicable to different professional categories in order to achieve level results. The Constitutional Court found that aim illegitimate.

The dissenting opinions stated that there were no grounds for a change of legal opinion. The special approach to judges amounted to a hardly acceptable more favourable treatment of a particular group. The fact that financial compensation could have an effect on independence might give rise to a justified doubt regarding judges' independence. There were no convincing reasons for abandoning previous case-law. The rationale based on the principle of equality placed judges in a privileged group without any reason for doing so. The Constitutional Court made a decision that ran contrary to its frequently applied rule – a formalistic approach in the application of law. The award did not address the financial consequences of the decision.

The Constitutional Court awards in Pl. ÚS 18/99 and Pl. ÚS 16/2000 had rejected proposals relating to the years 1999 and 2000. The legislator's interference with remuneration of judges had been found justified (because of the economic situation of the state), reasonable and in compliance with the principle of equality. The proposal before the Court did not differ from the previous ones.

For the same reason, i.e. that of the state budget, the Parliament had adopted the Act. It had done so within the scope of the legislative authority entrusted to it by the Constitution. Parliament did not upset the balance between legislative and judicial authority or violate the principle of proportionality between the means employed and the aims pursued. The Act had been adopted on the basis of a reasonable and justified reason.

Comparison and weighing of values as a decision-making criterion, which are known as the "strong weapon" in the hands of the Constitutional Court, failed in the particular case. If the principle of equality is to be observed, judges are under a legal and moral obligation to participate in economic restrictions along with others.

Withdrawal of additional salaries did not threaten the judges' independence in the proper sense of the word; nor did it jeopardise their material independence. The conditions for their impartial and fair decision-making were not impaired.

Adequate material security is one of the guarantees of judges' independence. However, the withdrawal of an "additional" salary does not jeopardise judges' independence. The profession of judge cannot be turned into a privileged category, in particular at a time when the state is compelled to adopt many economic restrictions because of the economic situation. If the principle of equality is to be respected, judges are legally and morally required to participate in economic restrictions together with others. Judges should demonstrate their solidarity with other groups of workers. However, the current approach merits criticism. The withdrawal of additional salaries is executed every year by way of an individual Act.

Supplementary information:

- Pl. ÚS 13/99 in *Collection of Decisions and Judgments of the Constitutional Court* – vol. 15, no. 123;
- Pl. ÚS 18/99 in *Collection of Decisions and Judgments of the Constitutional Court* – vol. 19, no. 104;
- Pl. ÚS 16/00 in *Collection of Decisions and Judgments of the Constitutional Court* – vol. 19, no. 105.

Languages:

Czech.

Identification: CZE-2003-2-009

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 11.06.2003 / **e)** Pl. ÚS 40/02 / **f)** collective agreement / **g)** *Sbírka zákonů* (Official Gazette), no. 199/2003 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
5.4 **Fundamental Rights** – Economic, social and cultural rights.
5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Collective agreement, freedom not to join / Collective agreement, application, extension / Collective agreement.

Headnotes:

Protection of the freedom of contract is an intrinsic part of a democratic legal state. It derives from the constitutional protection of property rights pursuant to Article 11.1 of the Charter of Fundamental Rights and Basic Freedoms. The possibility of extending the application of a collective agreement to an ordinary contractual agreement results in a conflict between property rights pursuant to Article 11 of the Charter of Fundamental Rights and Basic Freedoms and the public interest in light of Article 6 of the European Social Charter. The priority of the public interest over property rights must be made conditional to the legitimacy (representative nature) of the collective bargaining system. Such a measure must be an extraordinary one. Individual regulations that do not contain a transparent and acceptable rationale and that deprive the addressees of the option of judicial review are contrary to the principle of the rule of law.

Summary:

A group of MPs brought a proposal for the striking down of a provision governing the extension of the binding effect of collective agreements in the Collective Bargaining Act.

The Chamber of Deputies, the Senate and the Ministry of Labour and Social Affairs expressed their views on the proposal. According to the Chamber of Deputies, the extension of the application of a higher-level collective agreement (that is to say, a collective agreement concluded between sector trade unions and unions of employers) was not contrary to international treaties binding on the Czech Republic. According to the Senate, the impugned provision aimed at creating a comparable competitive environment among employers in similar fields; EU law applied a similar approach.

According to the Ministry, similar provisions of law could be found in many European countries. In the case at hand, the Ministry requested that the employer concerned state a position to be taken into account in the decision-making.

The Act had been adopted prior to the date the Constitution came into effect; therefore, the Constitutional Court examined only its compliance in terms of content with the current constitutional order. Collective agreements are the outcome of collective bargaining of social partners. The purpose of the provision of law in question is to ensure social conciliation, to create a mechanism for on-going social communication and provide a democratic procedure for the resolution of potential conflicts between the employers and employees.

The complainant raised four objections: those objections concerned the restriction by higher-level collective agreements on the contractual freedom of non-participating employers, the lack of judicial protection of such employers, the indefinite nature of the impugned provisions and the restriction on the

freedom of association. The extension of the application of a higher-level collective agreement amounted to price regulation because of its general economic nature, as it regulated wages and work conditions of employees. As to the admissibility of price regulation, the Constitutional Court had laid down a specific constitutional framework in its previous case-law regarding the legislators. In its award, Pl. ÚS 24/99, the Constitutional Court had ruled that state regulation had to take into account the possibility of earning profits when setting prices, otherwise the right to engage in business might be restricted. In its award, Pl. ÚS 3/2000, the Constitutional Court had accepted price regulation of rents on the basis of the proportionality principle. In awards concerning agricultural products, Pl. ÚS 5/01 and Pl. ÚS 39/01, the Constitutional Court had stated that the legislator could restrict contractual freedom on the grounds of public interest, when produce was being launched onto the market. In the case before the Constitutional Court, the Court reviewed the acceptability of the priority of public interest arising from the protection of the values safeguarded by Article 6 of the European Social Charter.

In the assessment of fundamental rights, the criteria of suitability, necessity and significance of the fundamental rights and public interest in conflict are applied. The Constitutional Court applies the principle of the minimisation of interference with fundamental rights. The institute of collective bargaining meets the condition of suitability and necessity. In the assessment of the priority of the public interest over property rights, the share of contracting parties in a given market and the exceptional nature of such a measure are relevant. The impugned provision failed to meet the requirement of defining the boundaries of the representative character of collective bargaining in the assessment of the conflicting fundamental rights and the public interest. As to the minimisation of the restriction of fundamental rights, it failed to meet the requirement of the exceptional nature of such measure.

The Ministry is authorised by decree to extend the binding effect of a higher-level collective agreement to employers who are not party to the relevant employers' associations, provided that they engage in similar activities, operate under economic and social conditions similar to those of the contracting parties and are domiciled in the Czech Republic. The Ministry stated in the decree that where higher-level collective agreements exist, their binding effect is extended to employers listed in the schedule to the decree; i.e., to specifically listed entities. The practice departed from one of the fundamental material features of the law (legal regulation), i.e., generality. Arguments favouring that generality are those of division of power, equality and the right to one's own independent judge. The area of application of law resists the adoption of laws pertaining to individual cases. The right to a legitimate judge and independent legal protection rules out individual decrees by the legislators in areas not protected by the principle of "*nulla poena sine lege*". In that respect, Article I, Section 9 of the US Constitution sets out that "no bill of attainder or ex post facto law shall be passed". Individual regulation is in conflict with the principle of the rule of law. The regulation set out above provides an adequate framework of interpretation to lay down the conditions of extension of the application of a specific higher-level collective agreement, in view of the analogous position of employers who are party to employers' unions, and employers who are not.

The wording of the impugned provision did not satisfy the requirement of completeness, as it lacked the representative character of collective bargaining as well as the particular characteristics of a measure restricting title, stemming from the maxim of guarantee of the fundamental right to judicial protection. From the point of view of proportionality, the provision lacked a definition of the boundaries of the representative character of collective bargaining. By setting such boundaries, the objection regarding the conflict between the institute of extension of the application of the higher-level collective agreement and the right to free association ceases to be relevant. The Constitutional Court struck down the impugned provision, effective as of 31 March 2004.

Supplementary information:

- Pl. ÚS 24/99, *Bulletin* 2000/2, *Collection of Decisions and Judgments of the Constitutional Court* – vol. 18, no. 73;
- Pl. ÚS 5/01, *Collection of Decisions and Judgments of the Constitutional Court* – vol. 24, no. 149;
- Pl. ÚS 39/01, *Collection of Decisions and Judgments of the Constitutional Court* – vol. 28, no. 135;
- Pl. ÚS 3/00, *Collection of Decisions and Judgments of the Constitutional Court* – vol. 18, no. 93.

Languages:

Czech.

Identification: CZE-2003-2-010

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 09.07.2003 / **e)** Pl. ÚS 5/03 / **f)** Transfer of property to municipalities / **g)** *Sbírka zákonů* (Official Gazette), no. 211/03 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.6.2 **General Principles** – Structure of the State – Regional State.
3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
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.
4.8.7.1 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Finance.
4.10.8 **Institutions** – Public finances – State assets.

Keywords of the alphabetical index:

State asset, transfer to regions and municipalities / Local self-government, property, right to freely use and dispose, restriction.

Headnotes:

Autonomous municipalities and autonomous regions are the building blocks of a free state. Local self-government must be able to address issues and questions of local importance at its own discretion. This includes issues transcending the regional dimension, which it resolves in its autonomous province. Self-governing regions representing regional communities of citizens must be able to decide freely on the use of funds at their disposal in order to perform tasks incidental to self-governance. Autonomous management of assets for its own benefit and liability is an attribute of local self-government.

Summary:

A group of MPs submitted a proposal to have some provisions of the Act on the Transfer of Some Property in the Ownership of the Czech Republic to Regions and Municipalities struck down. That group claimed that the impugned provisions were in breach of Articles 8 and 100.1 of the Constitution, as well as Article 11 of the Charter of Fundamental Rights and Basic Freedoms.

The proposal had been tabled in both the Chamber of Deputies and the Senate. According to the Chamber of Deputies, the Act in question served the purpose of public administration reform, and assets had been transferred to the regions and municipalities and placed under their autonomous province pursuant to the said act as of 1 January 2003. According to the Senate, it was an economic issue, rather than a legal one. The state was unable to supply the funds to meet the needs of the autonomous self-governing regions: rather, the spending needed to be in line with the revenues. According to the Ministry of Health, the Act amounted to a culmination of the second phase of the reform of public administration. The Ministry could not be liable for the economic results of individual health-care facilities set up by other entities.

According to the Association of Regions of the Czech Republic, the debts of the health-care facilities could jeopardise the regions' financial stability.

The government commented on the issue of indebtedness of hospitals. There were marked differences between the management and economic results of individual health-care facilities. The impugned act had been duly adopted and enacted within the competences set out by the Constitution and in the manner prescribed by the Constitution.

The act in question has a transformational nature. On 1 January 2003, the regions had acquired title to property that had been managed up until then by bodies of the state through district offices as founders. Liabilities had been transferred to the regions as well. According to the deputies, that constituted an interference with the constitutional right to local self-government.

According to the case-law of the Constitutional Court, local self-government is an expression of the right and ability of the bodies of local self-administration to regulate and govern certain public matters within the bounds established by law, in line with its responsibilities and accountability, and in the interest of the local population (Pl. ÚS 1/96, Pl. ÚS 17/98). When deciding on the aforesaid matter, the Constitutional Court took into account, *inter alia*, some conclusions in its Pl. ÚS 34/02 award (*Bulletin* 2003/1). For a unit of local self-administration to be able to pursue its functions effectively, it needs its own adequate financial means or assets. Health-care facilities have debts that could affect the budgets of autonomous self-governing regions. The asset transfer, however, must not be challenged. The new owners may manage the assets more efficiently. Decentralisation of tasks and the related transfer of assets are not constitutionally unacceptable. However, if such a step goes hand in hand with a subsequent transfer or continued existence

of liabilities incidental to such assets, then another solution is required, with the system of taxes, subsidies and similar payments coming into consideration.

The state should not divest itself of the responsibility for debts incurred at the time when it managed the assets being transferred and incurred from previous loss-making use of title or even a failure to comply with the law. The state should definitely not do so with respect to entities through which the state carries out its task of securing fundamental rights under Article 31 of the Charter, where the state itself guarantees the observance of such fundamental rights. Such actions on the part of the sovereign entity may lead to reflections on the abuse of state power at the expense of the autonomous self-governing regions. The problem of liabilities incurred by previous management requires a comprehensive solution. Striking down the impugned provisions will not resolve that issue. Striking down a legal regulation does not affect the rights and obligations arising from legal relations prior to that striking down. The impugned act is an isolated transformational one. Its legal consequences occurred *ex lege* as early as 1 January 2003. An affirmative award of the Constitutional Court with *ex nunc* effect would not change the status. That part of the proposal was therefore rejected.

The situation is different as to the assessment of a provision that restricts the new owner (municipality, region) in relation to the use of real property for a period of ten years from the date of acquisition, during which the real property may only be used for the purpose for which it was used at the time of transfer. If the municipality (region) does not need that property for the entire period for that purpose in light of the local conditions and practice, then that property must be offered to the state for transfer without consideration. Ownership is binding and must not be abused to the detriment of other parties' rights or against the public interests protected by law. The restriction of title prescribed by law in the case in question, with a specific, precisely described and definite purpose, i.e. the aforesaid public interest, did not, in light of the arguments on which it was based, show any elements of arbitrariness and anti-constitutionality.

In the context of the reform of public administration, the public interest may generally be deemed to constitute an admissible, a reasonable and a justifiable reason for the restriction of the title of the autonomous self-governing regions. Fundamental rights and freedoms may be restricted in cases where they conflict with a constitutionally protected value that does not have the nature of a fundamental right or freedom, even where an imperative public interest is involved. The restriction is assessed by means of the principle of proportionality – (in Pl. ÚS 15/96, the Constitutional Court had addressed the issue of restriction of the title of an autonomous self-governing region, and could follow up on the conclusions in that award in the matter before it). Restriction of title makes it possible to achieve the objective pursued, namely, the pursuit of a legitimate public interest – the existence of social, educational and health-care facilities. The criterion of necessity stems from the very necessity to secure a continuous existence of such facilities, also in light of the fundamental right set out in Article 31 of the Charter. However, the time restriction should be a relatively brief period of time. The period of 10 years is manifestly disproportionate to the intended objective. The negative consequences outweigh the benefits to the public interest.

As regards the constitutional requirement of the examination of the substance and purpose of the title being restricted of the fundamental ownership triad *(ius possidendi, iusutendi et ius fruendi, ius disponendi)*, the rights to use and dispose of assets are affected for a period of ten years. Such restriction is contrary to the principle of proportionality and is, as such, anti-constitutional. A ten-year restriction is not appropriate. A restriction may apply only for the period of time that is absolutely necessary, i.e., a “transitory” period.

Supplementary information:

- Pl. ÚS 34/02, *Bulletin* 2003/1;
- Pl. ÚS 1/96, *Collection of Decisions and Judgments of the Constitutional Court* – vol. 6, no. 120;
- Pl. ÚS 17/98, *Collection of Decisions and Judgments of the Constitutional Court* – vol. 13, no. 16;
- Pl. ÚS 15/96, *Collection of Decisions and Judgments of the Constitutional Court* – vol. 6, no. 99.

Languages:

Czech.

Estonia
Supreme Court

Important decisions

Identification: EST-2003-2-001

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 27.01.2003 / **e)** 3-4-1-3-03 / **f)** Review of Mr Aatso Kooskora's complaint against an act of the National Electoral Committee / **g)** *Riigi Teataja III* (Official Gazette), 2003, 4, Article 37 / **h)** CODICES (Estonian).

Keywords of the systematic thesaurus:

4.9.3 **Institutions** – Elections and instruments of direct democracy – Electoral system.
4.9.7.3 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Registration of parties and candidates.
5.3.38.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Election, candidate, requirements / Election, electoral district / Election, candidate, security deposit, payment.

Headnotes:

The Constitution does not require a single nation-wide electoral district for parliamentary elections.

A candidate deposit for persons wishing to stand for election amounting to less than one average monthly salary is not excessive and thus not unconstitutional.

Summary:

The National Electoral Committee returned Mr Kooskora's candidature documents for the parliamentary elections for failure to provide a copy of a payment order certifying payment of the candidate deposit and the number of the electoral district in which Mr Kooskora wished to be nominated. Mr Kooskora filed a complaint with the Supreme Court against the action taken by the National Electoral Committee. Mr Kooskora argued that the candidate deposit was unconstitutional, since it restricted a person's ability to stand for election on the basis of that person's financial status. Mr Kooskora also claimed that he wished to stand for election in the whole country, and not in a specific electoral district.

The Supreme Court noted that the candidate deposit amounted to 4,320 Estonian kroons. According to the Supreme Court, the obligation to pay the candidate deposit discouraged non-serious candidates and thus reduced the number of votes given to candidates with no realistic hope of being elected. The Court did not find that that sum of money was excessive and hindered persons from standing as candidates. The average gross monthly salary in Estonia was 5,853 kroons in the third quarter of 2002. The Court also noted that a candidate was not required to use only his or her personal means to pay the candidate deposit. In addition, the candidate deposit would be returned to the candidate upon election or receipt of votes of at least one-half of the simple quota in the electoral district.

The Supreme Court found that the provisions in the Riigikogu Election Act establishing twelve multi-mandate electoral districts were not in conflict with the Constitution. The Constitution does not require a single nation-wide electoral district. On the contrary, the Constitution leaves the procedure for the elections to be set out by the Riigikogu Election Act. The Constitution prescribes that the members of the Parliament be elected according to the principle of proportionality. The principle of proportionality may be applied to elections based on lists of candidates. Thus, it proceeds from the Constitution that competition between party lists is of primary importance when designing the electoral system.

The Supreme Court dismissed the complaint.

Languages:

Estonian.

Identification: EST-2003-2-002

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 17.02.2003 / **e)** 3-4-1-1-03 / **f)** Review of constitutionality of Section 47 of "Procedure for privatisation of land by auction", approved by regulation no. 268 of the Government of the Republic of 6 November 1996 / **g)** *Riigi Teataja III* (Official Gazette), 2003, 5, Article 48 / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.16 **General Principles** – Proportionality.
4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.

Keywords of the alphabetical index:

Privatisation, procedure / Auction, annulment of results, procedure / Procedure, administrative, effectiveness / Good administration, principle, fundamental right.

Headnotes:

A person's right to good administration is a fundamental one. Ineffective administrative procedure may violate the right to good administration.

According to the regulation provided for in the third sentence of Section 47 of the Procedure for privatisation of land by auction, where a complaint against an auction is found to be valid, a new auction must be organised irrespective of whether it is necessary, considering the nature of the complaint or the objective of the privatisation procedure. Consequently, the impugned regulation may lead to the complete invalidity of the procedure in which the participants took part.

Summary:

A committee organising a public auction by sealed bid in the rural municipality of Kõrgessaare did not take into account the bids for the plots of land under privatisation submitted by OÜ Palgimets, a public limited company. According to the committee, the documents submitted did not meet the requirements laid down by the Procedure for privatisation of land by auction, approved by Government of the Republic Regulation no. 268 of 6 November 1996 (hereinafter "Procedure").

OÜ Palgimets filed a complaint with the County Governor of Hiiu, seeking the annulment of the resolution of the auction committee and a declaration that OÜ Palgimets, having made the best bid, was the winner of the auction. The Governor accepted the complaint, did not approve the results of the auction and ordered the organisation of a new auction.

OÜ Palgimets filed a complaint against the Governor's order with the Tallinn Administrative Court. It argued that a new auction was not necessary. The bids could be reassessed, and the results could be approved without a new auction. An error of the auction committee should not have resulted in a disadvantage for the party making best bid (OÜ Palgimets).

Tallinn Administrative Court annulled the Governor's order and declared Section 47 of the Procedure unconstitutional. The decision of the administrative court was brought before the Supreme Court for a review of the constitutionality of the relevant provision of the Procedure.

The Supreme Court found that only the third sentence of Section 47 of the Procedure was relevant to the adjudication of the administrative law matter in the administrative court. Therefore, the Supreme Court limited its review of constitutionality to the said sentence, which provided that the organisation of a new auction was the inevitable outcome of a decision not to approve the results of an auction.

The Supreme Court referred to Article 14 of the Constitution and affirmed that that provision also provided for subjective fundamental rights, including a general fundamental right to organisation and procedure. That meant, *inter alia*, that the public power had to lay down the rules of administrative procedure. The Constitution did not set forth the requirements to be met by the rules of administrative procedure. Those requirements were to be set out on the basis of the general principles of law.

The Court stated that the principle of good administration had become increasingly recognised as a constitutional principle. Moreover, the right to good administration had been set out in Article 41 of the European Union Charter of Fundamental Rights. Although the Charter was not legally binding on Estonia, the Charter was based on the constitutional tradition and the principles of democracy and the rule of law, common to the member states of the European Union. Those common European principles and values were also valid in Estonia. The Supreme Court concluded that Article 14 of the Constitution gave rise to a person's right to good administration, a fundamental right.

The Court added that in Estonia the principles of good administration had been recognised in administration, judicial practice and several legal acts. The Administrative Procedure Act provided that administrative procedure had to serve a purpose, be effective, clear and conducted without undue delay. Unnecessary costs and inconveniences to persons were to be avoided, and the principle of proportionality was to be applied.

The Constitutional Review Chamber noted that the effectiveness of privatisation of land as a procedure could be assessed on different bases. For the participants in the specific procedure, the effectiveness of the procedure meant that the plot of land put up for auction would be privatised to the person offering the highest bid.

The Supreme Court held that the third sentence of Section 47 of the Procedure disproportionately restricted the right to good administration. The court declared the impugned provision invalid to the extent that it provided that a new auction was to be organised, without exception, in the event that the results of an auction were not approved.

Cross-references:

Decisions of the Supreme Court:

- III-4/A-5/94 of 30.09.1994, *Bulletin* 1994/3, [EST-1994-3-004];
- 3-4-1-5-02 of 28.10.2002, *Bulletin* 2002/3 [EST-2002-3-007].

Languages:

Estonian, English (translation by the Court).

Identification: EST-2003-2-003

a) Estonia / **b)** Supreme Court / **c)** Supreme Court *en banc* / **d)** 17.03.2003 / **e)** 3-1-3-10-02 / **f)** A charge of Sergei Brusilov under Section 139.3.1 of the Criminal Code / **g)** *Riigi Teataja III* (Official Gazette), 2003, 10, Article 95 / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of Fundamental Rights and freedoms.
1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2 **Fundamental Rights** – Equality.
5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.35.1 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Sentence, criminal, mitigation of criminal law, subsequent / Criminal law, more lenient / Remedy, non-available / Court, remedy, exceptional.

Headnotes:

Where the fundamental rights of a person serving a sentence are violated and no other effective means of judicial protection are available to that person, he or she may petition the Supreme Court.

Article 23.2 of the Constitution (providing that where subsequent to the commission of an offence, the law provides for a less severe punishment, the less severe punishment applies) is applicable not only up to the time that a conviction becomes final, but also during the time that a convicted person is serving a sentence.

The aim pursued of the effective functioning of the court system cannot justify the restriction of fundamental rights.

Summary:

In 1997 Mr Brusilov's conviction for theft became final, and he was punished under Section 139.3.1 of Criminal Code with six years' imprisonment. On 30 September 2002 Mr Brusilov petitioned the Supreme Court. He claimed that according to Section 199.2 of the Penal Code, which replaced the Criminal Code as of 1 September 2002, the maximum punishment for theft was five years' imprisonment. Mr Brusilov had served five years as of 22 September 2002 and argued that he should not have to serve the remaining sentence.

The Criminal Chamber of the Supreme Court referred the case to the Supreme Court *en banc*. The Criminal Chamber found that the question of the constitutionality of Sections 1.1 to 1.3 of the Penal Code Implementation Act had to be resolved in order to adjudicate the case.

The Supreme Court *en banc* first considered the question of whether Mr Brusilov's petition was admissible. The Criminal Chamber of the Supreme Court had treated Mr Brusilov's petition as one seeking the correction of an error made by the court (under Section 777.1 of the Code of Criminal Court Appeal and Cassation Procedure), even though his petition did not include any grounds for the correction of a court error and the time-limit for the correction of court errors had lapsed. The Criminal Chamber found that the fundamental rights set out in Articles 14 and 15 of the Constitution justified hearing the matter. The Supreme Court *en banc* noted that Mr Brusilov did not challenge the correctness of the judgements against him. He sought to be released from serving the remaining sentence, for the reason that he had been imprisoned for a period of time longer than that prescribed by the Penal Code as the maximum sentence for a similar crime. The Supreme Court *en banc* concluded that Mr Brusilov's petition could not be considered a petition for the correction of a court error.

The Supreme Court *en banc*, however, noted that according to Article 15 of the Constitution, anyone whose rights and freedoms had been violated had the right to have recourse to the courts. Mr Brusilov's petition concerned his constitutional rights – he raised an issue as to the scope of application of Article 23.2 of the Constitution, providing that, *inter alia*, where subsequent to the commission of an offence, the law provides for a less severe punishment, the less severe punishment is to apply. The Supreme Court concluded that in the light of Article 15 of the Constitution, the Supreme Court could not reject Mr Brusilov's petition as inadmissible, as no other effective means of judicial protection were at his disposal.

As for the substance, the Supreme Court held that Article 23.2 of the Constitution should be interpreted as applying not just to the period prior to the delivery of the final judgement, but also to the period during which the sentence was served. The Supreme Court held that the broader interpretation of fundamental rights was to be preferred. Section 5.2 of the Penal Code does not limit the retroactive effect of a law relating to the mitigation of sentences. The Penal Code Implementation Act explicitly provides for the release from punishment of some groups of persons: those persons whose acts are no longer punishable, those who at the time they committed a criminal offence were less than 14 years of age, and those having committed a criminal offence whose constituent elements correspond to those of a misdemeanour under the new Act. The legislature thus extended the effect of the less severe punishment to persons who had already been convicted and were already serving their sentences. The Supreme Court also examined other fundamental rights, *inter alia*, the right to liberty. The right to liberty is an important constitutional value for the interpretation of Article 23.2 of the Constitution. The Supreme Court noted that that interpretation was consistent with the criminal law provisions of several European countries.

The Supreme Court found that Mr Brusilov's constitutional right to mitigation of sentence was restricted by the Penal Code Implementation Act, because that Act did not provide for persons serving a sentence to be released if the term of imprisonment imposed under Criminal Code exceeded the term of imprisonment set out in the corresponding section of Penal Code. The Supreme Court noted that under the new Act, the provisions for a less severe punishment applied to some persons serving sentences, but not to other persons (including Mr Brusilov) serving sentences longer than those set out by the Penal Code for the same act. Consequently, the right to equal treatment (Article 12.1 of the Constitution) had also been infringed.

The Supreme Court considered the values that could justify restriction of the fundamental rights at stake. The restriction could not be justified by the aim pursued of the effective functioning of the court system. The number of persons involved was not excessively large. According to current understanding, the aim of Mr Brusilov's punishment had been realised. As the legislature had decreased the minimum and maximum imprisonment for theft, it had to be concluded that imprisonment exceeding five years for theft was no longer fair.

Moreover, the right to equality, taken separately, might have also been violated. The Penal Code Implementation Act might treat differently persons having committed identical offences before enactment of the Penal Code. The case might arise where a person is convicted; the conviction becomes final before enactment of the Penal Code; the result is that that person is punished under the Criminal Code. Whereas another person, committing an identical offence at the same time, absconds; that person thereby avoids criminal proceedings and is convicted only after enactment of the Penal Code; the result is that that person is punished under the Penal Code. The Supreme Court found such a differentiation to amount to a violation of Article 12.1 of the Constitution.

The Supreme Court declared that the Penal Code Implementation Act was in conflict with the second sentence of Article 23.2 of the Constitution in conjunction with the first sentence of Article 12.1 of the Constitution to the extent that the Act did not provide for a possibility for a sentence imposed under the Criminal Code to be mitigated up to the maximum term of imprisonment laid down by a corresponding provision of the Penal Code. The Court also ordered that Mr Brusilov be released from serving the remaining sentence.

Supplementary information:

Seven justices out of seventeen delivered three dissenting opinions. According to the dissenting opinions, the retroactive effect under Article 23.2 of the Constitution of a law relating to the mitigation of sentences applied only until the offender's conviction became final and did not apply during the time that a convicted person was serving a sentence. Three justices were of the opinion that the Supreme Court should have declared Mr Brusilov's petition inadmissible, as the law of criminal procedure did not provide for the kind of petition he had filed.

Cross-references:

Decisions of the Supreme Court:

- 3-4-1-6-98 of 30.09.1998, *Bulletin* 1998/3 [EST-1998-3-006];
- 3-3-1-38-00 of 22.12.2000;
- 3-4-1-1-02 of 06.03.2002, *Bulletin* 2002/1 [EST-2002-1-001];
- 3-4-1-2-02 of 03.04.2002, *Bulletin* 2002/1 [EST-2002-1-002];
- 3-1-1-77-02 of 14.11.2002.

Languages:

Estonian, English (translation by the Court).

Identification: EST-2003-2-004

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 14.04.2003 / **e)** 3-4-1-4-03 / **f)** Review of constitutionality of Section 23.4 of the Code of Debt Enforcement Procedure / **g)** *Riigi Teataja III* (Official Gazette), 2003, 13, Article 125 / **h)** CODICES (Estonian).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
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.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Enforcement, property claim, procedure / Debtor, right to object, term, counting.

Headnotes:

It is unconstitutional for a two-week time-limit for filing objections against a document for the enforcement of a debt to start running from the time a bailiff or competent officer sends out the notice of that document to the debtor, for the reason that where the debtor receives the notice after or shortly before its expiry, he or she may not be able to file objections.

Summary:

The Code of Debt Enforcement Procedure applies, *inter alia*, to proprietary claims arising out of notarised contractual relations. Section 23.4 of the Code provides that upon receipt of a document for the enforcement of a debt, a bailiff or competent officer must send the debtor notice of that document and inform the debtor or his or her right to file objections against the claim and the results of not doing so. Where the debtor does not file objections against the claim within two weeks after the bailiff has sent the debtor notice of that document, the enforcement procedure is to be initiated.

The constitutional review of the case was initiated by the Tallinn City Court. A debtor brought an action against the measure taken by a bailiff, claiming that she had received the bailiff's notice only after the two-week time-limit for filing objections had expired. The Court found that that regulation, under which the debtor had no opportunity to file objections for reasons out of his or her control, was unconstitutional.

The Supreme Court noted that in most cases, the initiation of the enforcement of a debt under the procedure is preceded by court proceedings or other proceedings, during which the parties may file objections. In some cases, however, there are no proceedings of such kind. In those cases, it is important for a debtor to have an opportunity to defend himself or herself against the document upon which compulsory enforcement is to take place.

Article 14 of the Constitution sets out that the State has the duty to guarantee rights and freedoms. That does not mean that the State must merely avoid infringing fundamental rights. The State also has a duty to provide for proper procedures for the protection of fundamental rights. In the procedure governing debt enforcement, the bailiff may restrict the property rights of the debtor, guaranteed by Article 32 of the Constitution. At the same time the measures taken by the bailiff protect the property rights of the creditor. The protection of a fundamental right of one person may cause a restriction to a fundamental right of another person. In such a case, a reasonable balance has to be struck between the fundamental rights at stake.

The Supreme Court found the two-week time-limit for filing objections sufficient. The Court found, however, that the regulation according to which the two-week time-limit started running from the time the bailiff sent the debtor notice of the document for the enforcement of a debt did not guarantee sufficient protection of the property rights of the debtor. Where a debtor receives the notice after the expiry of the two-week time-limit, he or she may have either no time or insufficient time to file objections.

The Supreme Court found that the regulation regarding the calculation of time-limits suitable and necessary for a speedy procedure and effective protection of creditor's rights. The Court found, however, the regulation to be disproportionate in the narrower sense. For the protection of the property rights of a creditor, waiting a few days or weeks before the initiation of the enforcement procedure is usually not of decisive importance. Lack of opportunity to file objections, on the other hand, may place a debtor in an extremely unfavourable position. The Court reiterated that the question was not about the compulsory execution of a court judgment or decision (where the existence of a claim has been established by a court), but about compulsory enforcement of a potentially disputable proprietary claim.

The Supreme Court declared Section 23.4 of the Code of Debt Enforcement Procedure to be in conflict with Article 32 of the Constitution in conjunction with Article 14 of the Constitution.

Cross-references:

Decisions of the Supreme Court:

- 3-2-1-119-02 of 16.10.2002;
- 3-2-1-40-02 of 17.04.2002.

Languages:

Estonian.

Identification: EST-2003-2-005

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 11.08.2003 / **e)** 3-4-1-8-03 / **f)** Complaint of Anatoli Kadatski requesting the annulment of Decision no. 76 of the National Electoral Committee of 4 August 2003 / **g)** *Riigi Teataja III* (Official Gazette), 2003, 26, Article 255 / **h)** CODICES (Estonian).

Keywords of the systematic thesaurus:

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
4.8.6.1 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Deliberative assembly.

Keywords of the alphabetical index:

Local council, membership, suspension.

Headnotes:

A mandate of a member of a local government council may be temporarily suspended for a period specified in an application by the council member. That period of suspension may not be subsequently changed.

Summary:

On 6 April 2003 Mr Anatoli Kadatski requested the Loksa City Electoral Committee to temporarily suspend his mandate as substitute member of the local government council until 31 December 2003. On 18 July 2003 he submitted an application requesting the restoration of his mandate.

The Loksa City Electoral Committee denied Mr Kadatski's request. He appealed to the Harju County Electoral Committee, which declared the resolution of the City Electoral Committee invalid. Ms Külli Veidemann, a member of the city council with an interest in the matter, appealed to the National Electoral Committee. The National Electoral Committee annulled the previous resolution. Mr Kadatski filed a complaint with the Supreme Court. He alleged that as Ms Veidemann did not have a legitimate interest in the matter, her complaint should not have been reviewed on its merits. As for the substance, Mr Kadatski claimed that he had legitimately amended his application concerning the suspension of his mandate.

The Constitutional Review Chamber of the Supreme Court found that Ms Veidemann had a legitimate interest in the matter. Had Mr Kadatski's mandate as local government council member been restored, Ms Veidemann would have lost her mandate.

As for the substance, Section 19.2.3 of the Local Government Organisation Act had to be interpreted. This provision read:

> "The mandate of a council member is suspended on the basis of his or her application for the period indicated in the application, which shall not be less than three months."

According to Mr Kadatski, even though he wished to have his mandate restored as council member prior to the date specified in his application, the period of suspension had been more than three months. Therefore, it was legitimate to amend his initial application and to restore his mandate.

The Constitutional Review Chamber noted that the Local Government Organisation Act did not provide for the possibility for a local government council member to change the period of suspension of his or her mandate. The Chamber cited the minutes of the Parliament in which Members of Parliament had pointed out that the mandate of a member of a local government council might be suspended for a period specified by that member, but not for less than three months. The Court dismissed Mr Kadatski's complaint.

Languages:

Estonian.

France
Supreme Court

Important decisions

Identification: FRA-2003-2-008

a) France / **b)** Constitutional Council / **c)** / **d)** 26.06.2003 / **e)** 2003-473 DC / **f)** Law authorising the Government to simplify the law / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 03.07.2003, 11205 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
3.21 **General Principles** – Equality.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Codification, law / Simplification, law / Ordinance, content / Public contract.

Headnotes:

The provisions of an enabling act cannot have either the effect or the objective of relieving the Government, in the exercise of their powers under Article 38 of the Constitution, of the obligation to observe rules and principles of constitutional value.

As regards the "partnership between the public sector and the private sector", ordinances made on the basis of that act can derogate from the rules that guarantee equality before the public contracts, the protection of public property or the proper use of the public purse only on grounds of public interest such as the urgency which, owing to particular or local circumstances, attaches to preventing harmful delay, or the need to take into account the technical functional or economic characteristics of particular facilities or services.

Summary:

Anxious to combat the oft-criticised complexity of the law, the Government requested Parliament to

authorise them to make, by ordinance (under Article 38 of the Constitution), measures to simplify and codify the law. The bill which became the "Proposed law authorising the Government to simplify the law" confers on the Executive the task of making ordinances designed, for a whole range of legislation, to rewrite, simplify, render less stringent and harmonise the substance of the law.

The debates in Parliament were marked by intense controversy, and the bill was referred to the Constitutional Council by more than sixty Senators who challenged the excessive breadth of power conferred.

The pleas alleging imprecision in the scope of the authorisation were rejected.

However, the Constitutional Council expressed a reservation of interpretation in respect of the relaxation of certain rules relating to public contracts.

Languages:

French.

Identification: FRA-2003-2-009

a) France / **b)** Constitutional Council / **c)** / **d)** 17.07.2003 / **e)** 2003-474 DC / **f)** Programme-law on the overseas territories / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 22.07.2003, 12336 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.21 **General Principles** – Equality.
4.8 **Institutions** – Federalism, regionalism and local self-government.
4.8.7.2 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Arrangements for distributing the financial resources of the State.

Keywords of the alphabetical index:

Territory, overseas / Polygamy, repudiation, abolition / Personal status, alteration / Subsidy, State, use.

Headnotes:

In abolishing polygamy and repudiation for Mahorais governed by local civil law who have reached the age of marriage on 1 January 2005, the legislature did not infringe Article 75 of the Constitution, which provides that "Citizens of the Republic who do not have ordinary civil status ... shall retain their personal status so long as they have not renounced it".

In paying a grant pursuant to Article 60 of the programme-law to all overseas communities in order to assist overseas residents to travel to metropolitan France, the State does not infringe either the principle of equal treatment for territorial communities or the principle of equality between persons having links with the overseas territories or the new provisions relating to decentralisation.

Summary:

The programme-law on the overseas territories was referred to the Constitutional Council by more than sixty Deputies.

They challenged, in particular, Article 68, which provided that "the exercise of the individual and collective rights pertaining to civil status under local law can in no circumstances frustrate or limit the rights and freedoms associated with the capacity of French citizens". The Deputies concerned maintained that that provision was contrary to Article 75 of the Constitution, which provides that citizens of the Republic who do not have ordinary civil status, the only one referred to in Article 34, retain their personal status so long as they have not renounced it.

This raised the question of the principle of compatibility between Article 75 of the Constitution and the restrictions placed by the contested law on Mahorais personal status (abolition of polygamy and repudiation) in order to ensure respect for constitutionally-protected rights.

The Council considered that although the legislature cannot put an end to personal status (recognised by Article 75 of the Constitution), it is not prevented from altering it in order to make it more consistent with constitutional requirements such as equality of rights or the dignity of the human person.

Also challenged was the so-called "territorial continuity" grant, intended to provide "financial assistance for air travel by residents in conditions determined by the collectivity". This principle of territorial continuity (also applied in Corsica as

"mitigation of the constraints of insularity") is not a principle of constitutional value.

"Assistance for air travel" is granted in conditions determined by the territorial collectivities. For them, it constitutes an optional power. In the case of grants not appropriated to a particular object and in the absence of obligations to do so, the legislature was not required to define the provision more precisely.

Languages:

French.

Identification: FRA-2003-2-010

a) France / **b)** Constitutional Council / **c)** / **d)** 24.07.2003 / **e)** 2003-475 DC / **f)** Law reforming the election of Senators / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 31.07.2003, 3038 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.3.1 **General Principles** – Democracy – Representative democracy.
3.12 **General Principles** – Clarity and precision of legal provisions.
4.5.3.1 **Institutions** – Legislative bodies – Composition – Election of members.
4.9.3 **Institutions** – Elections and instruments of direct democracy – Electoral system.
4.9.7.4 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Ballot papers.
5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.

Keywords of the alphabetical index:

Senate, election provisions / Senate, composition, women.

Headnotes:

Although the final paragraph of Article 3 of the Constitution allows the legislature to take measures – whether indicative or binding – to promote equal access by women and men to elective office and positions, it is not intended, and must not have as its effect, to deprive the legislature of its power under Article 34 of the Constitution to determine the election provisions of a parliamentary assembly.

Allowing the name of a person who is not a candidate to appear on ballot slips is susceptible of distorting the sincerity of an election.

Equivocal formulas or ambiguous provisions are contrary to the principle of the clarity of the law and the objectives of constitutional value of the intelligibility and accessibility of the law.

Summary:

The ordinary law passed at the same time as the organic act reforming the appointment of Senators was referred to the Constitutional Council. Among the contested provisions, the division of Senators by sectors of the population, although maintaining demographic disparities, none the less reduced the previous inequalities.

The parties referring the law maintained that the provisions on the implementation of equal access to elective office by women and men (Article 3 of the Constitution) were frustrated by the reintroduction of majority vote in *départements* in which the number of Senators to be elected is three. This objection was not upheld.

Lastly, the provisions on the information which may be included on ballot slips were held to be imprecise and equivocal.

Renvois:

- See Decision no. 2003-476 DC of 24.07.2003, organic law reforming the duration of the term of office and the age of eligibility of Senators and the composition of the Senate [FRA-2003-2-011].

Languages:

French.

Identification: FRA-2003-2-011

a) France / **b)** Constitutional Council / **c)** / **d)** 24.07.2003 / **e)** 2003-476 DC / **f)** Organic law reforming the duration of the term of office and the age of eligibility of Senators and the composition of the Senate / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 31.07.2003, 13038 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Senate, seats, increase / Eligibility, age.

Headnotes:

Although the objective of reducing disparities of representation between *départements* could have been achieved without increasing the number of Senators' seats, such an increase is not in itself contrary to any rule or to any principle of constitutional value.

Summary:

As the Constitution provides, the organic law reforming the duration of the mandate and the age of eligibility of Senators and the composition of the Senate was submitted to the Constitutional Council. It was held to be consistent with the Constitution.

The provisions of that law, which reduce the mandate from 9 years to 6 years, reduce the age of eligibility from 35 years to 30 years and increase the overall number of Senators (from 321 to 346) in order to ensure improved representation of the different territorial collectivities, are not contrary to the Constitution.

Renvois:

- See Decision 2003-475 DC of 24.07.2003, law reforming the election of Senators [FRA-2003-2-010].

Languages:

French.

Identification: FRA-2003-2-012

a) France / **b)** Constitutional Council / **c)** / **d)** 30.07.2003 / **e)** 2003-478 DC / **f)** Organic law on experimentation by the territorial collectivities / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 02.08.2003, 13302 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.8.4 **Institutions** – Federalism, regionalism and local self-government – Basic principles.
4.8.8.2 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation.

Keywords of the alphabetical index:

Decentralisation, administrative / Territorial collectivity, experimentation / Organic law, competence.

Headnotes:

Except where the essential conditions of the exercise of a public freedom or a constitutionally-guaranteed right are at issue, the fourth subparagraph of Article 72.1 of the Constitution allows Parliament to authorise temporarily, for the purposes of experimentation, the territorial collectivities to implement, in the areas within their comptences, measures which derogate from the legislative provisions relating to the exercise of their powers.

Summary:

The constitutional revision of 28 March 2003 provides that the organisation of the Republic is decentralised. Under the new Article 72 of the Constitution, the territorial collectivities or their groups may, if authorised to do so by the legislature, derogate on an experimental basis from the legislative and regulatory provisions which govern them. The procedures relating to such experiments must be determined by an organic law. This law was submitted to the Constitutional Council and declared to be consistent with the Constitution.

Languages:

French.

Identification: FRA-2003-2-013

a) France / **b)** Constitutional Council / **c)** / **d)** 30.07.2003 / **e)** 2003-482 DC / **f)** Organic law on local referenda / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 02.08.2003, 13303 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.
4.9.9.10 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Minimum participation rate required.

Keywords of the alphabetical index:

Decentralisation / Referendum, local, scope / Referendum, local, decision-making nature / Organic law, sphere.

Headnotes:

An organic law enacted in compliance with the rules of procedure laid down by the Constitution for organic laws and not containing any provisions extraneous to the sphere of organic laws is consistent with the Constitution.

The limits of the constitutional authorisation were not ignored as regards either the scope of local referendum, its organisation or the arrangements for remedies, in particular:

- by precluding individual acts from the scope of the local referendum, or
- by making the decision-making nature of the local referendum conditional on the participation therein of at least half of the registered electors.

Summary:

The Constitutional Law of 28 March 2003, whose primary object was to improve decentralisation, must be supplemented by organic laws. The provisions relating to local referenda were incorporated in Article 72.1 (second subparagraph) of the Constitution. According to that subparagraph, the conditions of its application are to be determined by an organic law.

In accordance with Articles 46 and 61 of the Constitution, that law was submitted to the Constitutional Council by the Prime Minister. The Constitutional Council declared it consistent with the Constitution.

Languages:

French.

Identification: FRA-2003-2-014

a) France / **b)** Constitutional Council / **c)** / **d)** 31.07.2003 / **e)** 2003-477 DC / **f)** Law on economic initiative / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 05.08.2003, 13464 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.

Keywords of the alphabetical index:

Economic situation, adjustment / Company, transfer, taxation / Company, continuity / Taxation, exempting measures.

Headnotes:

Tax incentives which pursue an aim in the general interest and are based on criteria which are objective and reasonable in relation to the ends pursued are not contrary to the principle of equality before taxation proclaimed by Article 13 of the Declaration of the Rights of Man and the Citizen of 1789 (which states that the common contribution to the burdens of the State “must be shared among all citizens according to their means”).

Summary:

The law on economic initiative included articles which were very diverse but which had a general object: in a difficult economic context, it was necessary to encourage the establishment and transfer of undertakings, and more generally to protect their continuity.

Thus, measures which gave partial exemption from the transfer duties provided for in matters of succession were extended to the *inter vivos* transfer in full, by gift, of undertakings. Also exempt from the taxable basis of wealth tax, as to part of their value, were shares in companies active in the fields of industry, commerce, small-scale industry, agriculture or professional services, etc.

In declaring those measures compatible with the Constitution, the Constitutional Council referred to its traditional case-law, according to which such measures must be justified on grounds of general interest (the adjustment of the economic situation) and be based on criteria which are objective and reasonable in relation to the objective pursued.

Languages:

French.

Identification: FRA-2003-2-015

a) France / **b)** Constitutional Council / **c)** / **d)** 31.07.2003 / **e)** 2003-480 DC / **f)** Law amending Law no. 2001-44 of 14 January 2001 on preventive archaeology / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 02.08.2003, 13304 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.15 **Institutions** – Exercise of public functions by private bodies.

Keywords of the alphabetical index:

Heritage, archaeology, preservation / Archaeology, excavation, private operator.

Headnotes:

The general-interest objective in the preservation of the archaeological heritage must be reconciled with constitutional rights such as the right to property, the right to work and freedom to engage in trade, and also with other general interests such as town and country planning or economic development.

There is no rule or principle of constitutional value that prohibits the legislature from engaging approved private operators to carry out the excavations ordered by the State.

Summary:

The Law enacted on 22 July 2003 substantially amended the Law of 17 January 2001, which had attracted considerable criticism. Those who referred the matter to the Constitutional Council claimed that the new law was prejudicial to the general interest in protecting the archaeological heritage. The Constitutional Council rejected all those objections, in particularly that relating to violation of the constitutional principles relating to public services.

Languages:

French.

Identification: FRA-2003-2-016

a) France / **b)** Constitutional Council / **c)** / **d)** 14.08.2003 / **e)** 2003-483 DC / **f)** Law reforming retirement / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 22.08.2003, 14343 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
4.5.2 **Institutions** – Legislative bodies – Powers.

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

Keywords of the alphabetical index:

Retirement, sex, positive discrimination / Solidarity, national / Retirement, scheme, pay-as-you-go / Retirement, contribution, duration, extension.

Headnotes:

The implementation of a national solidarity policy in favour of retired workers is in accordance with a constitutional requirement for whose implementation the legislature may choose specific rules without depriving that constitutional requirement of legal guarantees.

The legislature may take into account the de facto inequalities of which women have been the object in the past, in particular by interrupting their occupational activities in order to raise their children.

For reasons in the general interest, the legislature was able to retain, while specifying their scope, provisions intended to compensate for the inequalities that were intended to be removed.

Summary:

The Law reforming retirement, which was imposed by demographic developments, was laid before the Council of Ministers and then before Parliament following negotiation with employers and workers. Reform was necessary in order to protect the continuity of the pay-as-you-go pension schemes. The extension of the contribution period is thus intended to protect the pay-as-you-go pension scheme.

The Constitutional Council confirmed the validity of the law. It further accepted the preservation of differences in treatment between men and women justified by the existence of inequalities inherited from the past which changing mentalities will reduce only gradually in the future. It was thus able to maintain enhanced child entitlement for mothers.

Languages:

French.

Georgia
Constitutional Court

Important decisions

Identification: GEO-2003-2-001

a) Georgia / **b)** Constitutional Court / **c)** Second Board / **d)** 05.05.2003 / **e)** 2/5/172-198 / **f)** "Avtandil Lomtadze and Merab Kheladze v. President of Georgia" / **g)** *Adamiani da Konstitutsia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.
5.3.36.4 **Fundamental Rights** – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Employee, health protection / Successor, legal, liability for damages.

Headnotes:

According to Decree no. 48 of 9 February 1999 issued by the President of Georgia, in the event of liquidation, reorganisation and privatisation of a state enterprise, institution or organisation, the liability for damage to an employee's health falls on its legal successor or an organisation founded on the basis of the property of the said state enterprise.

The legal successor and assignee are terms having the same meaning that imply transfer of both rights and liabilities of a previously existing legal person to a newly created legal person, and it is of no importance whether the legal person acquiring the object acknowledges the liabilities or whether the liabilities were disclosed at the moment of privatisation.

Summary:

A claimant, "*Sakmilsadenmsheni"* Ltd., stated in its constitutional claim that in 1997 the privatisation of state-owned enterprises had taken place, as a result of which the claimant had been created. In that way, "*Sakmilsadenmsheni"* Ltd. had acquired the

ownership rights to a state enterprise and became, in its opinion, the legal successor and not the assignee of the purchased property. The claimant considered that its ownership rights, safeguarded by Article 21 of the Constitution, were directly violated, as it, as the newly created enterprise, had to compensate damage caused to an employee by the previously existing state enterprise.

The respondent, the President of Georgia, refuted the claim through a representative by submitting that the impugned Decree was in full compliance with the legislation of Georgia and did not contradict Article 21 of the Constitution. The claimant's opinion that a legal successor and an assignee were to be interpreted as different notions was not shared by the representative of the respondent, as there could be no right without obligations and no obligation without rights.

The Constitutional Court of Georgia did not allow the claim for the following reasons. It stated that the Law of Georgia "On Privatisation of State Property" provided "[privatisation is] the purchase of the ownership rights to state property by natural and legal persons or their associations, as a result of which the State loses the right to own, use and dispose the privatised property ..."; moreover, Article 10.4 of that Law provided " … [t]he purchaser of the state property becomes the legal successor of the purchased property". Considering the above, the Court could not accept the claimant's assertion that after privatisation of the enterprise, compensation of damage caused to the health of an employee of a state enterprise should be carried out by the State. The Constitutional Court held that privatisation was the acquisition of the rights to state property by natural and legal persons or their associations; that, implied the acquisition of not only property rights (assets) but also obligations (liabilities). The Constitutional Court found that the Claimant failed to explain which way its rights had been violated in relation to Article 21 of the Constitution.

Languages:

Georgian, English (translation by the Court).

Germany
Federal Constitutional Court

Important decisions

Identification: GER-2003-2-006

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 03.03.2003 / **e)** 1 BvR 310/03 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

4.7.2 **Institutions** – Judicial bodies – Procedure.
4.7.9 **Institutions** – Judicial bodies – Administrative courts.
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:

Appeal, procedure / Appeal, competent court.

Headnotes:

§ 124a.4 of the Rules of the Administrative Courts *(Verwaltungsgerichtsordnung)*, pursuant to which the grounds by virtue of which the Higher Administrative Court *(Oberverwaltungsgericht)* has to grant leave to appeal are to be submitted in writing to the Administrative Court *(Verwaltungsgericht)* within two months of the judgment being served, is constitutionally unobjectionable. It is therefore not sufficient to submit the grounds, within the time limit, only to the Higher Administrative Court.

Summary:

I. In a judgment, an Administrative Court *(Verwaltungsgericht)* dismissed an action brought by the complainant. The instructions about time and manner of appealing the decision stated, *inter alia*, that the grounds by virtue of which the Higher Administrative Court *(Oberverwaltungsgericht)* was to grant leave to appeal were to be submitted in writing to the Administrative Court within two months of the judgment being served.

The complainant applied for leave to appeal to the Administrative Court: in the evening of the last day of the time allowed for filing an appeal, he filed the grounds for his application by fax. Contrary to the instructions in the judgment and contrary to § 124a.4.5 of the Rules of the Administrative Courts *(Verwaltungsgerichtsordnung),* the complainant transmitted his appellate brief only to the Higher Administrative Court and not to the Administrative Court. The Higher Administrative Court therefore rejected the application. The complainant then made an application seeking to have the status quo ante restored; that application has not yet been decided.

The complainant later lodged a constitutional complaint in which he alleged a violation of his fundamental rights under Article 3.1 (principle of equality before the law), Article 19.4 (guarantee of the recourse to a court) and Article 103.1 (right to a hearing in court) of the Basic Law. According to the complainant, the provision of § 124a.4 of the Rules of the Administrative Courts was contrary to the legal system and therefore unconstitutional. In the case of a leave to appeal that was to be granted by the Administrative Court, the grounds had to be filed with the Higher Administrative Court (cf. § 124a.3 of the Rules of the Administrative Courts), whereas the legislature had provided, without any factual reasons for doing so, that the grounds of applications for a leave to appeal had to be filed with the Administrative Court.

II. In an order dated 10 January 2003, the Third Chamber of the First Panel did not admit the constitutional complaint for decision, and gave, essentially, the following reasons.

The application and interpretation of § 124a.4 by the Higher Administrative Court were unobjectionable. The legislature has determined unambiguously and unmistakably with which court the grounds of applications for leave to appeal must be filed. The federal government explained the purpose of the regulation in the legislative procedure. The time-limits for filing the grounds for an appeal that has been declared admissible pursuant to § 124a.3 and for the application for leave to appeal under the terms of § 124a.4.5 are different. Where the Administrative Court has already granted leave to appeal, the period for substantiating the appeal may be extended by the Higher Administrative Court. In such a case, the files are sent to the Higher Administrative Court immediately after the appeal has been received so that a decision can be taken. In a case of an application for leave to appeal, however, the period for substantiating the appeal cannot be extended. The purpose of the regulation in § 124a.4.5 is therefore to keep the files available for inspection by the parties to the proceedings at the Administrative Court nearby. If the files remain there until the grounds are filed, it guarantees that they are always available.

Although the application for leave to appeal had been received by the Higher Administrative Court within the time-limit, it was constitutionally unobjectionable to dismiss the application as inadmissible. The Higher Administrative Court was only obliged to forward the complainant's appellate brief in the ordinary course of business. Even so, the brief, which had been received by fax late in the evening of the last day of the period, could not have arrived within the time-limit provided in § 124a.4.4 of the Rules of the Administrative Courts.

Languages:

German.

Identification: GER-2003-2-007

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 19.03.2003 / **e)** 1 BvR 752/02 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.
5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Child support, amount, determination criteria / Secondary gainful activity / Employment, additional / Income, assessment / Act, freedom to.

Headnotes:

The interpretation and application of constitutional statutes that govern support payments may not lead to results that are unconstitutional. Support payments that have been determined by court decisions may not disproportionately burden a person who is obliged

to pay support. If the bounds of what is reasonable with regard to support claims are transgressed, the restriction of the obliged person' freedom of financial disposition is no longer a part of the constitutional order and cannot stand up against the fundamental right guaranteed in Article 2.1 of the Basic Law.

Summary:

I. The complainant has been living apart from his wife and his two children since September 2000. His primary employment is that of electrician in an underground mine. He had an additional job, in which he had average monthly earnings of DM 378.49, that lasted until end of 2000, i.e. for six years. The employment relationship in that additional job was terminated by the complainant's employer with effect from 31 December 2000.

The competent courts ordered the complainant to make from 2001 onwards support payments (maintenance and child support) to his wife during their separation. The potential earnings from his additional employment were taken into account in the courts' calculation of the amount of the payments. The courts held that it could be reasonably expected of the complainant to continue working in an additional job to the same extent as before the termination of his previous one.

The complainant lodged a constitutional complaint alleging a violation of Article 2.1 (general right of personality), Article 3.1 (principle of equality before the law), Article 6 (protection of marriage and the family) and Article 20.3 (Principle of the rule of law) of the Basic Law. The complainant put forward that in view of the change in the circumstances in his life after the separation, of the burdens of his primary employment and of the labour-market situation, he could not be reasonably expected by the courts to take up additional employment.

II. The Third Chamber of the First Panel admitted the constitutional complaint for decision, overturned the decision and referred the matter back to the court that had delivered the final decision.

The Chamber's reasoning was essentially as follows.

The imposition of support payments restricted the complainant's freedom to act, which is protected by Article 2.1 of the Basic Law. The freedom to act, however, is only protected in the framework of the constitutional order. Because the law that governs support payments is a component of the constitutional order, the interpretation and application of the constitutional statutes that govern such payments may not lead to results that are unconstitutional. Support payments that have been determined by court decisions may not disproportionately burden a person who is under the obligation to pay them. Where the bounds of what is reasonable as to support claims are transgressed, the restriction of that person's freedom in his financial arrangements can no longer be said to be a part of the constitutional order and cannot stand up against the fundamental right guaranteed in Article 2.1 of the Basic Law.

The fundamental prerequisite of a support claim is the ability to pay of the person under the obligation to pay. The law that governs support payments enables the courts to take the principle of proportionality into consideration. The courts must review, in each individual case, whether the person who is under an obligation to make such payments is in a position to pay the amount claimed, or whether this would go beyond his or her financial capacity. It can only be assumed that the person under an obligation to pay support has a duty to realise earnings that go beyond his or her actual employment where he or she can reasonably be expected to take up other employment, and where this does not burden him or her in a disproportionate manner. In such a review, the circumstances of the individual case must be taken into account.

Where fictitious additional earnings are to be taken into account, there must be a review based on the standard of the principle of proportionality as to whether the person under an obligation to make support payments can be required to bear the physical strain of his or her actual and additional employment and the demands on time made by the actual and additional employment. In this context, the provisions on the protection of working capacity (as set out, *inter alia*, in §§ 3 and 6 of the Working Hours Act – *Arbeitszeitgesetz*) must be taken into account. In addition to the factors mentioned above, a review should include whether the person affected can reasonably be expected to take up additional employment, taking into account the specific circumstances of his or her life and work, the availability of appropriate additional employment on the labour market, and the existence of any legal obstacles to such employment. In that respect, the person under an obligation to make support payments has the onus of presentation and the burden of proof.

The competent courts have not performed that review to a sufficient extent.

Admittedly, the fact that the complainant had an additional job before the separation from his wife is an indication of the reasonableness of such employment. The fact that the complainant lost that employment should, however, have induced the

Higher Regional Court to take the complainant's specific living and working situation into account when reviewing whether the complainant could have reasonably been expected to take up additional employment in addition to his full-time employment.

Languages:

German.

Identification: GER-2003-2-008

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 19.03.2003 / **e)** 2 BvR 1540/01 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.3.5 **Sources of Constitutional Law** – Techniques of review – Logical interpretation.
2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.
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:

Jury, composition / Criminal proceedings / Judge, lay, suspension.

Headnotes:

The restriction, by way of §§ 338.1 (second part of the sentence) and 222b.1 of the German Code of Criminal Procedure *(Strafprozessordnung)*, of the possibilities of legal remedy or defence sought is compatible with Article 103.1 of the Basic Law if the parties to the proceedings are provided sufficient opportunity to be heard, and if negative legal consequences for the person affected only arise as a consequence of a delay for which the person affected is responsible.

Summary:

I. The complainant was sentenced by a Regional Court *(Landgericht)* to imprisonment for accepting a bribe. On the first day of the oral hearing, the complainant had brought several motions under procedural law; for instance, one successfully challenging one of the lay judges' sitting in the proceedings. The Regional Court had cancelled two dates of the hearing. The presiding judge of the Chamber had ordered that a substitute lay judge be called to participate in the proceedings and had informed the complainant of that fact by fax before the date on which the proceedings were to be continued. On the day of the continuation of the oral hearing, the presiding judge had announced that a substitute lay judge would participate in the proceedings. The lay judge had joined the panel of judges on the third day of the main hearing, after new motions brought by the complainant's defence counsel had been dealt with and the main hearing had been interrupted again. The complainant's defence counsel had brought other motions, and the main hearing had been interrupted once more. On the fourth day of hearing, after several new motions brought by the complainant's defence counsel under procedural law had been dealt with, the bill of indictment was read, and a declaration was made that the main hearing had been opened pursuant to an order of the Chamber. The Regional Court then questioned the complainant about his personal circumstances and on the charges. Subsequently, the finding of facts took place during several days of the hearing, and the sentence was ultimately passed.

After an unsuccessful appeal to the Federal Court of Justice *(Bundesgerichtshof),* the complainant lodged a constitutional complaint. He alleged a violation of his right to a hearing in a court (Article 103.1 of the Basic Law), of his right to a fair trial (Article 2.1 of the Basic Law) taken in conjunction with Article 20.3 of the Basic Law and of his right to effective legal protection (Article 19.4 of the Basic Law). At the same time, he indirectly challenged the statutes that govern the extinction of the exercise of a right in §§ 338.1 (second part of the sentence) and 222b of the German Code of Criminal Procedure, which, in his opinion, violated Article 3.1 (principle of equality before the law), Article 19.4 and Article 101.1.2 (right to one's lawful judge) of the Basic Law.

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

1. The provisions under §§ 338.1 (second part of the sentence) and 222b.1 of the German Code of Criminal Procedure that were challenged by the

constitutional complaint and the interpretation of these statutes were unobjectionable.

The restriction, by way of statutes that govern the extinction of the exercise of a right, on the possibilities of the legal remedy or defence sought is compatible with Article 103.1 of the Basic Law where the statutes provide the parties to the proceedings sufficient opportunity to be heard, and where they provide negative legal consequences for the person affected only in the event of a delay for which that person is responsible. Due to their far-reaching consequences for the dilatory party to the proceedings, statutes that govern the extinction of the exercise of a right are of a strictly exceptional nature that, for reasons of legal clarity, in principle prohibits their application.

2. The Federal Court of Justice's interpretation complied with these requirements. The complainant and his defence counsel had sufficient opportunity to assert, by raising an objection to the composition of the panel under § 222b of the Code of Criminal Procedure, a violation of § 192.2 and 192.3 of the Judicature Act and of § 226 of the Act of Judicial Procedure by the substitute lay judge being called in only on the second day of the main hearing, i.e. belatedly. § 222b.1 of the Code of Criminal Procedure allows for an objection that the composition of the court is contrary to the rules to be raised until the examination of the defendant on the charges, which in the case in question took place on the fourth day of the main hearing. If, even in such a comparatively long period of time, the complainant and the defence counsel did not consider themselves to be in a position to review the question whether a defect in the composition of the court existed, they could have either made a motion for the main hearing to be interrupted (§ 222a.2 of the Code of Criminal Procedure), thereby gaining more time for legal review, or, as a precaution, raised objections to the composition of the panel of judges with reference to the fact that a substitute lay judge evidently had not been uninterruptedly present; the effort required for substantiating that objection would have been small.

3. The application of the provisions governing the extinction of the exercise of a right challenged by the constitutional complaint is also not based on an impermissible analogy but on an interpretation that is compatible with the wording and the purpose of the provisions. The inclusion of defects in the composition of the court, which are based on a violation of the principle of uninterrupted presence under the terms of § 226 of the Code of Criminal Procedure in the scope of application of §§ 338.1.2b and 222b.1 of the Code of Criminal Procedure, corresponds to the purpose of the provisions. The legislature wished to ensure, by way of those provisions, that defects in the composition of a panel are ascertained and remedied at an early stage of the proceedings in order to avoid a situation where a sentence, the passing of which involved great judicial effort, is overturned in appellate proceedings solely on the ground of a defect in the composition of the panel. In such a case, the proceedings would have to be repeated, with a considerable additional burden on the judiciary and on the defendant. The purpose of the regulation covers a composition of a panel that is contrary to the provisions irrespective of whether the defect is due to an infringement of the plan of assignment of cases or to an infringement of the requirement of uninterrupted presence. A defect in the composition of a panel that is due to the belated calling in of a substitute lay judge can be remedied at an early stage in the proceedings by repeating all previous stages, thus avoiding the overturning of a judgment in appellate proceedings.

Languages:

German.

Identification: GER-2003-2-009

a) Germany / **b)** Federal Constitutional Court / **c)** Fourth Chamber of the Second Panel / **d)** 19.08.2002 / **e)** 2 BvR 443/01 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
3.9 **General Principles** – Rule of law.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
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:

Church, self-determination / Tax, religious, rate assessment, criteria.

Headnotes:

When levying church taxes, religious bodies are bound to the order that is established by the Basic Law, in particular as to fundamental rights. Their law-making and their execution of church tax are subject to judicial review by state courts and must comply with the principles of the rule of law. If churches wish to avoid this commitment, they must resort to private membership fees for their funding.

Summary:

I. The plaintiff in the original proceedings, a member of the Lutheran Church of the Northern Elbe Region *(Nordelbische Evangelisch-Lutherische Kirche)* who lives in the Oldenburg church district situated in the *Land* (state) of Schleswig-Holstein, had her church tax assessed in the tax office assessment notice for the year 1994 at 9% of the income (or wage) tax payable. The plaintiff requested a decrease of the church tax on the basis of the lower tax rate of 8% that was valid at that time in Hamburg. Pursuant to the relevant provision of the church law of the Lutheran Church in force in the 1994 fiscal year, the church districts levy the church tax on the basis of a percentage rate of the income tax. In 1994, the church tax was 8% in the Free and Hanseatic City of Hamburg, whereas it was 9% of the income tax in the *Land* of Schleswig-Holstein. Since 1 January 2001, the rate of assessment of 9% has been valid in the entire territory of the Lutheran Church of the Northern Elbe Region. The plaintiff's action in the Administrative Court *(Verwaltungsgericht)* to set aside the church tax assessment notice for 1994 was unsuccessful. The Higher Administrative Court *(Oberverwaltungsgericht)*, however, allowed her action in appeal proceedings. The Federal Administrative Court *(Bundesverwaltungsgericht)* rejected the church's complaint against the denial of leave to appeal on points of law. The complainants challenged that decision by way of a constitutional complaint. They regarded the decision of the rate of assessment of church tax as an intra-church issue, which was not subject to a commitment to fundamental rights. Moreover, they put forward that the Higher Administrative Court should have submitted the church law in question to the Federal Constitutional Court for a review of its constitutionality.

II. The Second Chamber of the Second Panel did not admit the constitutional complaint for decision because it was not of fundamental importance and had no chance of success.

The Chamber's essential reasoning was as follows. The competent courts had not infringed the right to one's lawful judge (Article 100.1 of the Basic Law). The order concerning church tax, which had been issued by the synod, i.e. by the competent intra-church legislative body, fell under the autonomous statutory law of a religious body under public law. It was therefore not subject to the court's obligation to submit laws to the Federal Constitutional Court for a review of their constitutionality.

The impugned decisions did not violate the complainants' right to self-determination, as protected by Article 140 of the Basic Law, in conjunction with Article 137.3 of the Weimar Constitution (see “Supplementary information”).

Pursuant to Article 140 of the Basic Law, in conjunction with Article 137.6 of the Weimar Constitution, religious bodies that are corporate bodies under public law are entitled to levy taxes on their members. The state is obliged to confer on religious bodies that have the status of corporate bodies the right to tax, which is a sovereign power. Pursuant to the Federal Constitutional Court's case-law, religious bodies are therefore bound by the order of the Basic Law, in particular by fundamental rights, if they make use of such sovereign power.

The state complies with its obligation under the Constitution if it establishes the legal prerequisites for the right to tax and, in doing so, provides for the possibility of enforced collection. In Schleswig-Holstein and Hamburg, the legislature has restricted itself to regulating the types of church tax and to establishing the basis for the grant of the authority to enact intra-church tax laws. In doing so, the state has left it to the religious bodies themselves to decide how they act within this framework. With a view to that, it is incumbent on the religious bodies, on the basis of their own responsibility, to enact intra-church tax laws and to issue orders concerning rates of assessment. In doing so, they are bound by the constitutional order. Intra-church tax laws must therefore comply with the minimum standards that apply to the levying of taxes in a state governed by the rule of law. If, at the time of setting out its own regulations for levying church tax a religious body follows the standards that are valid for state income tax, the principle following from Article 3.1 of the Basic Law that taxation must take economic performance into account applies to church tax.

The impugned judgment of the Higher Administrative Court complied with those constitutional requirements. The Federal Administrative Court's decision was also constitutionally unobjectionable.

The Higher Administrative Court had rightly affirmed that church legislature was bound by the principle of equality before the law. The result of the Court's interpretation was constitutionally unobjectionable.

The Higher Administrative Court had not erred in its judgment as to the meaning and scope of Article 140 of the Basic Law in conjunction with Article 137.6 of the Weimar Constitution, nor had it erred as to the churches' right to self-determination. The Court had rightly assumed that the differences in the average incomes of church members in the *Länder* of Hamburg and Schleswig-Holstein could not justify the different rates of assessment. If the average income had indeed been chosen as a reference, then a higher rate of assessment had been established in the assessment area with the lower average income. That infringed Article 3.1 of the Basic Law, which, concerning tax law, provides that taxation be in accordance with the taxpayers' economic performance. That standard, which is compulsory when tax laws are made by the state, also applies to the intra-church tax legislature if, as in this case, church tax is levied in accordance with income tax.

The Chamber further stated that the mere fact that parts of the church territory belonged to different *Länder* was, pursuant to the Constitution, not a sufficient reason for differentiation. Finally, the different rates of assessment could not be justified by putting forward that their harmonisation required a consensus with the Catholic Church. Admittedly, such consensus between the churches was required for the administration of church tax by the state, but not for the abolishment of different rates of assessment within the Lutheran Church of the Northern Elbe region.

Supplementary information:

Article 137 of the Weimar Constitution:

> 137.3: Every religious body regulates and administers its affairs autonomously within the limits of the law valid for all. It confers its offices without the participation of the state or the civil community.
>
> 137.6: Religious bodies that are corporate bodies under public law are entitled to levy taxes in accordance with State law on the basis of the civil taxation lists.

Languages:

German.

Identification: GER-2003-2-010

a) Germany / **b)** Federal Constitutional Court / **c)** Fourth Chamber of the Second Panel / **d)** 18.12.2002 / **e)** 2 BvR 367/02 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.19 **General Principles** – Margin of appreciation.
3.22 **General Principles** – Prohibition of arbitrariness.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.

Keywords of the alphabetical index:

Lawyer, pension, scheme / Pension, insurance scheme / Pension, fund, compulsory / Tax, deduction of pension insurance premiums.

Headnotes:

The fact that self-employed lawyers cannot deduct their pension insurance premiums for private old-age pension schemes (“Riester pensions”) as special expenses in their income tax assessment is not contrary to Article 3.1 of the Basic Law, provided that the principle of equality is respected. Such a principle requires the existence of sound reasons or reasons that are otherwise obvious to justify a different treatment of the favoured group of persons and the non-favoured group.

Summary:

I. Since 1984, all German *Länder* have successively introduced old-age pension schemes for members of the professions. The specific regulations on the establishment of the corresponding pension funds, e.g. for lawyers, valid in the individual *Länder* differ considerably in some aspects. What they all provide, however, is that membership in the pension fund is compulsory for a lawyer as soon as he or she is admitted to practise as a lawyer.

Accordingly, the complainant, a self-employed lawyer, is a compulsory member of the Bavarian Pension Fund for Lawyers and Tax Consultants.

In a constitutional complaint, he directly challenged the regulation governing the deduction of insurance premiums for private old-age pension schemes as special expenses under para. no. 10a.1.1 of the

German Income Tax Act. That particular deduction had been introduced by the Old Age Assets Act *(Altersvermögensgesetz)* of 26 June 2001 and amended by Article 11.1 of the 2001 Pension Amendment Act *(Versorgungsänderungsgesetz)* of 20 December 2001.

The group of persons favoured by the regulation includes compulsory members of the social security pension insurance scheme and persons whose status is equal to that of compulsory members pursuant to para. no. 10a.1.1.2 of the Income Tax Act (*inter alia,* public officials in active service, judges and soldiers). It is not possible for, *inter alia,* self-employed lawyers, who are compulsory members of a professional insurance scheme, to obtain tax concessions for corresponding premiums for old-age pension schemes.

The complainant regarded such unequal treatment as a violation of Article 3.1 of the Basic Law and alleged that it constituted an exclusion from an advantage in a manner that was contrary to the principle of equality before the law.

II. The Third Chamber of the Second Panel did not admit the constitutional complaint for decision for lack of fundamental constitutional significance; the Panel's reasoning was essentially as follows.

1. The principle of equality before the law under Article 3.1 of the Basic Law obliges the legislature to treat equally what is materially equal and to treat unequally what is materially unequal. An exclusion from an advantage that is contrary to the principle of equality before the law is therefore also prohibited, i.e. one may not grant a particular group of persons an advantage and deny the advantage to another group if no reasons for such statutory differentiation can be found that result from the nature of things or are otherwise obvious.

When reviewing whether in an Act that grants an advantage under tax law, the delimitation of the favoured group of persons from the non-favoured group has been made in accordance with the principle of equality before the law, the Federal Constitutional Court may not examine whether the legislature has found the most expedient or the fairest solution. What is decisive is only whether the legislature has respected the constitutional bounds of its legislative discretion, which, in principle, are broad in this context. The legislature may not differentiate between the favoured group of persons and the non-favoured one according to irrelevant considerations, i.e., may not differentiate in an arbitrary manner.

2. Because there is a sound and an obvious reason to justify the unequal treatment of the self-employed lawyer in comparison to the group of persons favoured by para. no. 10a.1.1 of the Income Tax Act, there is no exclusion from an advantage that would be contrary to Article 3.1 of the Basic Law.

From the materials relating to the laws in question, it is apparent that the relevant regulations of the Old Age Assets Act and the amendments of the Act by the 2001 Pension Amendment Act are based on the appropriate concept that only persons who will be affected by the future decrease of employees' and officials' pension levels that is provided by the above-mentioned Acts will be favoured by the possibility of deducting their pension insurance premiums as special expenses in their income tax assessment. According to the federal government's reasons given in the debates on the Bill of the Old Age Assets Act, the group of taxpayers favoured by para. no. 10a.1.1 of the Income Tax Act are persons:

1. whose pension levels have been decreased in order to stabilise the contributions to the social security pension insurance scheme; and
2. for whom an incentive to join a voluntary, private old-age pension scheme with a capital cover is supposed to be created.

This means that the group of favoured persons does not include, *inter alia*:

1. self-employed persons who have been able to join a private old-age pension scheme; and
2. persons who are compulsory members of a professional insurance scheme, because the Old Age Assets Act does not provide a decrease of the pension level to which this group of persons is entitled.

That appropriate concept was also followed at the time that para. no. 10a of the Income Tax Act was amended by the 2001 Pension Amendment Act. Pursuant to the amendment, only persons who are affected by the decrease of the future pensions by the Pension Amendment Act (e.g. officials in active service) will benefit from tax concessions when joining an old-age pension scheme with a capital cover.

This is, in particular with a view to Article 3.1 of the Basic Law, a sufficiently appropriate reason for not including the complainant in the group of persons who may deduct their pension insurance premiums as special expenses in their income tax assessment pursuant to para. no. 10a.1.1 of the Income Tax Act in order to encourage them to join additional voluntary private old-age pension schemes.

Languages:

German.

Identification: GER-2003-2-011

a) Germany / **b)** Federal Constitutional Court / **c)** Fourth Chamber of the Second Panel / **d)** 25.07.2003 / **e)** 2 BvR 153/03 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
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:

Trial, within reasonable time, remedy / Penalty, criminal, mitigation.

Headnotes:

A considerable delay in the proceedings due to the fault of the prosecuting authorities violates the right of the accused to fair trial and due process, and must be taken into consideration in the enforcement of the state's right to punish. In such cases, the principle of proportionality requires, in view of the additional negative effects and burdens on the accused, a careful examination of with which means, if at all, the state may (still) take criminal action against the person affected. In particularly serious cases where a constitutional bar on the proceedings must be assumed, it is possible to consider the withdrawal of charges.

The existence of a delay that is contrary to the rule of law must be determined by an overall evaluation of the particular circumstances of the individual case.

Summary:

I. In its judgment of 7 June 2002, the competent Regional Court *(Landgericht)* imposed an aggregate fine of 80 daily rates of € 100 each on the complainant. The sentence had been preceded by a lengthy trial. The criminal offences had been committed in 1991 and 1992. In the course of very extensive police investigation proceedings initiated in 1993, the complainant, as a person charged with a criminal offence, was first heard in June 1995. He was served with an indictment in June 1997. In August 2000, the Regional Court opened the main hearing. A fifteen-day trial resulted in the complainant's acquittal of part of the charges and warning on the other part. The warning was issued with a suspended fine of 80 daily rates of € 500 each. On 22 August 2001, the Federal Court of Justice *(Bundesgerichtshof)* overturned the Regional Court's judgment as to the dictum and the acquittal. After a new main hearing in the Regional Court on 6 and 7 June 2002, a fine of 180 daily rates of € 100 each was imposed on the complainant for the same offences. The charges were withdrawn relating to the offences of which he had been acquitted in the first trial because the Regional Court assumed that a two-and-a-half year delay between the service of the indictment and the order opening the trial was unjustified. The Regional Court held that the prerequisites for a warning with a suspended penalty did not exist. The complainant's appeal on points of law was unsuccessful. The complainant brought a constitutional complaint challenging the excessive length of the proceedings.

II. The Third Chamber of the Second Panel granted the constitutional complaint; the essential reasoning was as follows.

The principle of the rule of law requires that criminal proceedings be brought to a close within a reasonable time. A considerable delay in the proceedings due to the fault of the prosecuting authorities violates the right of the accused to fair trial and due process. The existence of a delay that is contrary to the rule of law must be determined by an overall evaluation of the particular circumstances of the individual case. The decisive factors of the overall evaluation are:

1. the length of the delay caused by the judicial authorities;
2. the total length of the proceedings;
3. the seriousness of the offence with which the accused is charged;
4. the scope and the difficulty of the subject-matter of the case; and
5. the extent of the particular burdens that are caused to the accused by the length of the proceedings.

Delays in the proceedings that are caused by the accused are not taken into consideration. A delay that is contrary to the rule of law must be taken into consideration in the enforcement of the state's right to punish. The consequences can be the withdrawal of charges, a prohibition on prosecution, the discontinuance of proceedings, the court's dispensing with punishment, a warning with a suspended penalty and the taking into account of the circumstances in the court's assessment of punishment. In particularly serious cases where a constitutional bar on the proceedings must be assumed, it is possible to consider the withdrawal of charges.

The dictum of the complainant's sentence did not stand up to review under constitutional law. It was not apparent whether the legal consequences of the dictum were still compatible with the principle of proportional punishment in view of the considerable delay in the criminal proceedings due to the fault of the prosecuting authorities. Taken alone, the length of the proceedings, i.e. seven and a half years, was unreasonably long. It could also not be justified by invoking the scope, or the particular difficulties, of the case. In addition, there had been delays in the proceedings that could not be explained and that were solely due to the prosecuting authorities' inaction. Apart from the period between the service of the indictment and the opening of the hearing, the delays included at least one more year in which no measures whatsoever had been taken to expedite the proceedings. That point was noted in the decision.

Admittedly, the time that had elapsed because of the filing of an appeal on points of law did not, in principle, have to be added to the excessive length of proceedings. The time required for appeal proceedings is the result of an organisation of criminal proceedings that is in accordance with the rule of law. However, the longer the length of proceedings due to delays caused by the state, the greater the efforts must be on the part of the prosecuting authorities and the courts to bring the proceedings to a close as soon as possible.

Admittedly, the Regional Court had taken into account the excessive length of the proceedings caused by the fault of the judicial authorities and the particular burdens that that length had placed on the complainant. The court had imposed an aggregate fine of 180 daily rates instead of a prison sentence, which the accused would have normally incurred. That, however, did not reflect the true extent of the infringement of the principles of fair trial and due process caused by the delay in the proceedings. In determining the punishment, the Regional Court had only taken into account the period of delay of two and a half years, for which the criminal jurisdiction had been responsible. It had failed to take into account the other periods of time during which the proceedings had not been not expedited. In spite of such an infringement of the principle of proportionality, no constitutional bar on the proceedings could be assumed. Such a constitutional bar would have required the Federal Constitutional Court to withdraw the charges against the complainant. In view of the damage that had been caused by and the large number of offences that had been committed by the complainant, not all the sanctions under criminal law that could still be imposed were to be regarded as disproportionate from the outset. The Regional Court was to weigh, on the one hand the interest in criminal prosecution that existed at the relevant time against the encroachment on the complainant's rights, on the other hand. In that context, a warning with a suspended fine was not excluded in a case of excessive length of proceedings contrary to the rule of law.

Languages:

German.

Identification: GER-2003-2-012

a) Germany / **b)** Federal Constitutional Court / **c)** Fourth Chamber of the Second Panel / **d)** 06.08.2003 / **e)** 2 BvR 1071/03 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.22 **General Principles** – Prohibition of arbitrariness.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.
5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.

Keywords of the alphabetical index:

Decision, ground, reasoning, obligation / Evidence, evaluation / Expert opinion, requested by the complainant.

Headnotes:

The right to a hearing in court is violated where a court does not sufficiently substantiate in writing a sentence from which no further appeal lies.

This is the case where in the grounds for imposing a sentence, a court merely makes reference to the first-instance court's findings of fact instead of providing its own evaluation of evidence.

Summary:

The complainant was sentenced by a Local Court *(Amtsgericht)* to three years' imprisonment for rape. In the appeal proceedings, the Regional Court *(Landgericht)* imposed a young offender sentence of four years' imprisonment. In its written sentence, the criminal division, referring to para. no. 267.4 of the Code of Criminal Procedure *(Strafprozessordnung)*, did not state the grounds for the decision that were essential for the verdict of guilty and the evaluation of evidence on which the verdict of guilty was based because "as regards the offence with which the accused is charged ... the division ... has made the same findings as the first-instance court." The court held that in order to avoid repetition, reference could be made to the findings of the first instance court.

During the trial, the Regional Court denied a motion to take evidence in which the complainant applied for a psychiatrist's expert opinion to be commissioned on the injured party's credibility in order to prove that the injured party suffered from a mental disorder causing her to feign or produce physical illness in order to obtain medical treatment (factitious disorder). The criminal division held that it had its own specialised knowledge and, furthermore, the opposite of the alleged fact had already been proved.

The complainant brought a constitutional complaint alleging an infringement of the prohibition of arbitrariness pursuant to Article 3.1 of the Basic Law and a violation of the right to a hearing in court (Article 103.1 of the Basic Law). The complainant lastly claimed that the denial of his motion to take evidence amounted to an infringement of the principles of fair trial pursuant to Article 6 ECHR.

The Third Chamber of the Second Panel granted the constitutional complaint; the essential reasoning was as follows.

Where a court judgment errs only in the interpretation of a law, it does not amount to an infringement of the Constitution in view of the prohibition of arbitrariness under Article 3.1 of the Basic Law.

An infringement only exists where:

1. a statute that is obviously relevant has not been taken into account; or

2. the content of a statute is grossly misinterpreted, which leads to the obvious conclusion that the application of the law is based on irrelevant, and therefore arbitrary, considerations.

Where a court convicts an accused, para. no. 267.1 to 267.3 of the Code of Civil Procedure provides that the grounds for the judgment must include a self-contained presentation of the findings on which the court bases its judgment. Nothing different can be inferred from para. no. 267.4 of the Code of Civil Procedure because the regulation, pursuant to its unambiguous wording, is only applied where all parties entitled to file an appeal waive their right to do so or if no appeal is sought within a certain time-limit, but that regulation is not applied where the judgment is *res iudicata* upon its pronouncement because no appeal lies from it.

The Regional Court, with reference to para. no. 267.4 of the Code of Criminal Procedure, did not state its evaluation of the evidence. It thus erred as to the purpose of para. no. 267 of the Code of Criminal Procedure in a constitutionally relevant manner. Para. no. 267 of the Code of Criminal Procedure is a manifestation, in ordinary law, of the right to a hearing in court. Para. no. 267.4 of the Code of Criminal Procedure only permits the grounds for the judgment to be stated in a shorter form where all parties to the proceedings waive their right of appeal. In such cases, the parties to the proceedings may seek a comprehensive statement of reasons from the court by filing an appeal. With their waiver of their right of appeal, they at the same time waive a comprehensive statement of reasons for the decision that incriminates them. Where, however, the judgment is *res iudicata* upon its pronouncement, there is no waiver by the parties. The impugned decision is therefore not only clearly contrary to the wording of the statute, but also does not comply with the purpose of the statute.

The denial of the complainant's motion for an expert opinion did not violate the complainant's right to fair trial in accordance with the rule of law. Pursuant to the Code of Criminal Procedure, criminal proceedings are official proceedings in which the principle of establishing the material truth prevails and in which the court is obliged, *proprio motu*, to establish the truth (para. no. 244.2 of the Code of Criminal Procedure). The safeguarding of justice by way of investigating the true facts of the case is promoted by the right of the accused to participate actively in the

investigation of the facts by motions to take evidence, which can only be denied under narrowly defined preconditions. Para. no. 244.4.2 of the Code of Criminal Procedure takes the obligation to establish the truth in criminal proceedings sufficiently into account. The provision does not encroach on the guaranteed minimum standard of the accused's rights under procedural law to take an active part in the proceedings. Pursuant to para. no. 244.4.2 of the Code of Criminal Procedure, a motion to take evidence by examining an expert may be denied where the court itself possesses the necessary specialised knowledge. Hearing another expert may also be refused where the opposite of the alleged fact has already been proved by the first expert opinion. It is constitutionally acceptable that the accused's influence on the content and scope of the court's inquiry into the facts is restricted. If the court were to grant all motions for further inquiry brought by an accused, the accused would acquire an influence on the length and scope of the proceedings that would exceed what is required for his or her defence, and which could seriously jeopardise compliance with the duty to provide a speedy process. After an “intensive examination” of the witness, the Regional Court, having its own specialised knowledge arising from long-standing professional practice, did not find any indications of a factitious disorder or of any other personality disorder. Its findings were corroborated by the psychological expert's appraisal. On the basis of that assessment, there were no constitutional grounds to challenge the denial of the motion to take evidence. It is not for the Federal Constitutional Court to examine whether the Regional Court's assessment of its own specialised knowledge is correct under ordinary law. Within the bounds of constitutional law, the application of ordinary law is for the ordinary courts alone.

Languages:

German.

Hungary
Constitutional Court

Important decisions

Identification: HUN-2003-2-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 09.04.2003 / **e)** 13/2003 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2003/35 / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
4.8.6.2 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Executive.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.
5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
5.3.12 **Fundamental Rights** – Civil and political rights – Security of the person.

Keywords of the alphabetical index:

Supervisor, public place, powers / Freedom and personal security, limitation, duration.

Headnotes:

In conformity with the Act on the Supervision of Public Lands and Places, a supervisor of public lands and places may justifiably ask anyone for information who may be able to provide essential information for the conduct of proceedings. A lack of co-operation or a refusal to answer may involve a limitation of the right to freedom and personal security for an indefinite duration. Such a degree of restriction is not proportionate with the constitutional aim of ensuring the exercise of the official duty.

Summary:

The petitioners challenged certain provisions of the Act on the Supervision of Public Lands and Places

(henceforth: the Act). They argued that the provision of the Act permitting the supervisors of public lands and places (henceforth: the supervisors) to detain persons for the purpose of questioning for the duration of such questioning (§ 14) and persons for the purpose of ascertaining their identity for a report (§ 15) violated the right to freedom and personal security as well as the right to move freely, secured in the Constitution.

The Constitutional Court found that although the provision in question touched on the right to move freely, the issue to be examined in the case was whether the restriction on the right to freedom and personal security met the constitutional requirements concerning the limitation of fundamental rights.

As regards the legal status of the supervisors, the Constitutional Court found that as part of the local government, they did, in fact, exercise public power; however, they were a local policing body, especially not the police of the local government.

The supervisor may justifiably ask anyone for information who may be able to provide essential information for the conduct of proceedings. The limitation on the right to freedom and personal security essential for the asking and answering of questions is in such a case not disproportionate.

However, the impugned provision, without directly setting out that the answering of questions is compulsory, makes it so in practice, since it sets out that the personal freedom may be limited of persons who are not under suspicion or have committed a misdemeanour, and that their personal freedom may be limited indefinitely. The Constitutional Court held that the provision in question was unconstitutional and struck it down.

However, the legal right granted to supervisors to detain persons whose identity had to be ascertained for the purposes of reports or legal proceedings was not found to be unconstitutional. Firstly, in such cases the limitation of personal freedom had a fixed duration: it could only last until the identity was ascertained. Secondly, the Act adequately regulated any potential cases of illegality.

Supplementary information:

In a concurring opinion, Chief Justice János Németh argued that the unconstitutional provision of the Act not only violated the right to freedom and personal security, but also ran contrary to the provision of the Constitution securing the right to free movement.

Languages:

Hungarian.

Identification: HUN-2003-2-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 18.04.2003 / **e)** 15/2003 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2003/39 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.2.1 **Constitutional Justice** – Jurisdiction – Type of review – Preliminary review.
1.3.4.5.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Referenda and other consultations.
1.3.4.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Admissibility of referenda and other consultations.
4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.

Keywords of the alphabetical index:

Referendum, preliminary review / Referendum, outcome, violation of human rights and freedoms.

Headnotes:

The Constitutional Court has the jurisdiction to examine whether or not the outcome of the referendum conducted on the basis of a decision by the National Election Commission manifestly compels the legislature to adopt an Act violating the essence of fundamental rights.

Summary:

In cases of national referenda, the Constitutional Court is an instance of legal redress. Within its competence, the Constitutional Court may take a final decision as to whether a referendum may be held on

a given issue (the Constitution defines the scope of the subject-matter on which no referenda may be held).

The case concerned a referendum to be organised on the purchase and ownership of arable land. In its decision, the National Election Commission (the first instance) declared that the referendum could be held, since it met the legal regulations and conditions in force. However, objections to the decision of the National Election Commission were filed with the Constitutional Court.

One of the objections was that according to Article 8.2 of the Constitution, not even the Parliament had the competence to limit the essential content of any fundamental right unnecessarily and disproportionately. In spite of that, the proposed referendum concerned such a decision. No referendum was possible on such a question.

The Constitutional Court rejected the petition. It declared that although it could happen (for example, in the case of a national referendum on a petition by at least 200,000 voters) that a question in a referendum could compel the legislature to prepare a legal provision that manifestly and seriously violated certain fundamental rights or caused serious private wrong, in such a case, however, the preliminary constitutional review of the question to be raised in the referendum would provide adequate protection.

The Court recalled that the legal system in Hungary recognised several legal institutions that ensured the proper exercise of the political right to hold a referendum in accordance with the Constitution. In spite of that, the provisions of the Constitution, and especially those concerning fundamental rights, could not be made dependent on whether the authorised institutions (MPs, the Head of State etc.) availed themselves of the opportunities provided in the Constitution and the Act on Constitutional Court in the later phases of the referendum and applied to the Constitutional Court.

In the particular case, however, the Constitutional Court found the contents of the statutory provision to be adopted could not be established on the basis of the question raised in the referendum; the legislature could draft a provision that would not violate the Constitution, even if the positive votes were in the majority.

Languages:

Hungarian.

Identification: HUN-2003-2-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 28.04.2003 / **e)** 22/2003 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2003/43 / **h)**.

Keywords of the systematic thesaurus:

5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.

Keywords of the alphabetical index:

Patient, right to self-determination / State, duty to protect life / Euthanasia, active / Suicide, assisted, prohibition.

Headnotes:

In the case of euthanasia, the right to human dignity does not form an inseparable unity with the right to life, but *vice versa*: the exercise of the one may mean that the other is pushed into the background. Therefore, it may not be claimed, on the basis of the absolute nature of the right to human dignity in unity with the right to life, that an incurable patient's right to self-determination in relation to ending his or her life would be an absolute right. The right to self-determination may be restricted on the bases of the general test of fundamental rights and Article 8.2 of the Constitution.

The Constitutional Court also emphasised that the boundary between the constitutional and unconstitutional regulation of the exercise of a patient's right to self-determination in the field of legal regulation is not laid down forever; the level of knowledge, the state of institutions, their development and several other factors may influence a judgment of the Constitutional Court on the question.

Summary:

According to Article 15 of Health Act, a patient has the right to self-determination. However, Article 20 of that Act restricts the exercise of that right.

A patient with decision-making capacity has the right to refuse medical treatment, except where it endangers the lives or physical integrity of others. Account being taken of the natural course and outcome of an illness, a patient may refuse life-sustaining and life support measures only where he or she suffers from an incurable disease that, according to the current state of medical knowledge and even with appropriate medical treatment, will lead to death within a short period of time. The refusal is valid only where a commission of three physicians examines the patient and states in writing that the request is based on the patient's considered decision. It will become effective only where that patient reconfirms his or her intention to refuse medical treatment before two witnesses on the third day after the preparation of the commission's report. Where the patient does not consent to examination by the commission of physicians, his or her wish to refuse medical treatment cannot be considered. Governmental Decree 117/1998 contains further regulations on the detailed rules on the refusal of some particular kinds of medical treatment.

The petitioners argued that a patient's right to human dignity under Article 54.1 of the Constitution involved the right to self-determination, part of which was the right to euthanasia. They claimed that the restrictions to that right under the Health Act and the Decree were disproportionate, and thus unconstitutional. The petitioners also claimed that the prohibition of active euthanasia was unconstitutional. Moreover, they claimed that the Criminal Code did not deal with, set out an exception or a special section for the particular features of a case involving assisted suicide, and did not distinguish assisted suicide from homicide.

The Constitutional Court rejected the petition as a whole.

In making its decision, the Court took into account the practice of international legal organisations, foreign courts and constitutional courts, as well as the foreign and international legal regulations concerning the questions referred to in the petitions.

The Court stated that as the petitioners relied only on Article 54.1 of the Constitution ("In the Republic of Hungary everyone has the inherent right to life and to human dignity, of which no one can be arbitrarily deprived"), the Court had to examine the petitions exclusively from that aspect. The Court recalled its previous case-law and held that the principles in that case-law formed an appropriate basis for determining the case: the right to life and human dignity is an indivisible and absolute right. However, according to Article 8 of the Constitution, the subsidiary rights deduced from the right to human dignity as a general fundamental right (for example the right to self-determination involved in the case in question) may be restricted on the basis of a necessity or proportionality test and the protection of the essential content, just like any other fundamental right.

The fact that the Act punishes a doctor or another person who ends a patient's life without the patient's wishing to have his or her life ended, even where it is done to save the patient's human dignity, has no direct constitutional relation to an incurable patient's right to self-determination; therefore, an incurable patient's right to self-determination cannot be deduced from that fact.

Where a doctor actively induces a patient's death, it is a restriction of the patient's right to self-determination, according to Article 8.2 of the Constitution. The same restriction holds where the exercise of an incurable patient's right to refuse life-sustaining and life support measures is subject to defined conditions and strict procedural regulations (Article 20 of the Health Act).

As to those regulations, the Constitutional Court stated that the Act makes it possible only in part for incurable patients to exercise their right to self-determination to end their lives in accordance with their right to human dignity, but it also restricts it in part, on the basis of the duty of the State to protect human life under Article 8.1 of the Constitution. The Constitutional Court, however, did not find those restrictions disproportionate with the objective of protecting the right to life.

Finally the Constitutional Court did not accept the arguments against the Criminal Code. It stated that the legislature had no duty according to the Constitution, to set out an exception for or special section dealing with the particular features of the various forms of assisted suicide. The motives of the persons inducing the death of incurable patients may be evaluated by the court when imposing a penalty.

Supplementary information:

Several concurring opinions and dissenting opinions were expressed in relation to the decision.

In her concurring opinion, Justice Éva Tersztyánszky Vasadi stated that in her opinion in the particular case (on the various forms of euthanasia) the decision of the Constitutional Court on the inseparability of life and human dignity had to be held valid. Consequently, raising the question of a conflict and choice between life and human dignity was based on a false interpretation of human dignity. In her opinion, a legal provision allowing life to be ended with medical assistance would be inconsistent with the right to life.

Justice András Holló, in his concurring opinion, emphasised his opinion that the constitutional limitations on the right to self-determination relating to ending life in a dignified way did not exclude and did not make a possible, broader interpretation of the right to self-determination unconstitutional for the future. That decision, however, fell within in the margin of appreciation of the legislative power.

In a dissenting opinion, Justice Holló stated that several paragraphs of Articles 20 and 23 of Health Act as well as the provisions regulating the practice of a patient's right to self-determination, unnecessarily and disproportionately restricted the right to self-determination in relation to ending life with dignity, forming a counterbalance in part because of over-regulation, in part because of unclear legal concepts, which was not justifiable under the Constitution; and they thus deprived that right of its essential meaning. For that reason, those provisions were unconstitutional, and the Constitutional Court should have struck them down.

Justice István Kukorelli joined Justice Holló both in his concurring and his dissenting opinion.

In a dissenting opinion, Justice Mihály Bihari evaluated the relationship of the right to self-determination and euthanasia, and the various forms of euthanasia thoroughly, and stated that the provisions of Article 20 of Health Act, and especially the regulations concerning delaying procedures that made the exercise of the right to self-determination more difficult, unconstitutionally restricted the right to self-determination in relation to the refusal of life-sustaining and life support measures of incurable patients.

In his dissenting opinion, Justice Árpád Erdei stated that Article 18 of Health Act gave an unconstitutional possibility for the extension of the use of invasive measures infringing a patient's right to self-determination.

Languages:

Hungarian.

Identification: HUN-2003-2-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 04.06.2003 / **e)** 32/2003 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2003/62 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Church, member / Church, internal regulation / Church, state law, application.

Headnotes:

In accordance with the Constitution, State courts are competent to deal with legal disputes arising from relations between the Church and persons in a legal relationship with the Church, where that relationship is based on the legal rules of the State. Such competence does not violate the constitutional principle of the separation of Church and State.

Summary:

The case is based on lengthy labour proceedings, during which several courts stated that in a legal dispute concerning the official relations of a qualified clergyman with the Church, the proceedings had to be conducted according to the laws of the Church, and any claims arising from such relations fell exclusively within the competence of the ecclesiastical courts. For that reason, the Supreme Court found it did not have jurisdiction over Application no. 8211. It did not adjudicate on the merits and stayed the proceedings.

The petitioner lodged an appeal with the Constitutional Court against the decision of the Supreme Court. He challenged Article 15.1 and 15.2 of the Act IV of 1990 on the freedoms of conscience and religion, and the Churches (henceforth: the Act). The petitioner considered that the unilateral use of those provisions resulted in a violation of Article 57.1 of the Constitution, guaranteeing the right to turn to the court. Article 15.1 of the Act declares the separation of Church and State in the same words as the Constitution. Article 15.2 states that no State pressure may be used against the internal laws and regulations of the Church.

The Constitutional Court found the petition unfounded as to both impugned provisions. Concerning Article 15.1 of the Act, unconstitutionality was formally out of question, since its wording repeats that of Article 60.3 of the Constitution. In relation to Article 15.2 of the Act (the prohibition of State pressure in the internal legal disputes of the Church), the Constitutional Court considered that it was the logical result of Article 60.3 of the Constitution (and Article 15.1 of the Act). The principle of the separation of Church and State prohibits the State from interfering in religious questions and in the internal affairs of the Church. In that way, the Church or its authorised bodies may ensure that church rules are observed as to the regulation of internal church relations between the Church and its members through proceedings determined by the Church.

It is nevertheless possible for the Church and one of its members, or even a person in the service of the Church, to enter into a legal relationship based on the legal rules of the State.

Languages:

Hungarian.

Identification: HUN-2003-2-005

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 02.07.2003 / **e)** 41/2003 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2003/78 / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.

Keywords of the alphabetical index:

Compensation, detention / Compensation, exclusion, grounds / Legal remedy, right.

Headnotes:

It cannot be considered a violation of the right to defence to exclude persons who have hidden, escaped or attempted escape from receiving compensation for preliminary detention and temporary forced medical treatment. The fulfilment of the duty of co-operation by the accused may be compelled, which is constitutionally necessary and justified from the point of view of the public interest. The right to defence is not extended to include hiding and escape.

The Code on Criminal Procedure, however, unnecessarily restricts the right to defence by not setting out an adequately differentiated regulation for excluding the payment of compensation to persons who have attempted to deceive authorities in order to delay or obstruct an effective investigation and to persons who have not appealed against the judgment of the court that first tried them.

Summary:

The petitioner challenged certain provisions of the Code of Criminal Procedure (henceforth: the Code) concerning compensation. The Code lays down the rules of compensation in cases where there are lawful enforcement actions that involve detention but do not result in charges being laid or conviction. Articles 383.3.a, 383.3.b, 384.3.a and 384.3.b provide for the exclusion of compensation in certain cases. The following persons are excluded from compensation for preliminary detention and temporary forced medication: those persons who have hidden; have escaped or attempted to escape from authorities; have tried to mislead the authorities in order to delay or obstruct an effective investigation; or have acted in such a way as to give reason for suspicion [Article 383.3.a and 383.3.b of the Code]. The following are among the reasons for which a person may be excluded from receiving compensation for detention: in cases where detention on remand or forced medication have taken place on the basis of a final judgment; in cases where in the main case the accused has held back information or evidence upon which the judgment in the new trial is based; and in cases where the accused has not filed an appeal against the judgment of the court that first tried him or her [Article 384.2.a and 384.2.b of the Code].

The Constitutional Court was of the opinion that in accordance with the guaranteed principles of criminal procedure, the accused had the right to remain silent and the right not to tell the truth. The latter right has its limits defined by the Criminal Code itself: there is a prohibition on giving false evidence, misleading the authorities, etc. Those are the external limits of the

right to defence. However, within that sphere, the accused cannot be restricted in employing defence tactics to deceive authorities.

Moreover, the Constitutional Court considered that excluding persons who had acted in such a way as to give reason for suspicion violated the proportionality requirement that is inevitably related to the constitutionality of restricting the right to personal freedom. The reason for this is that in the case of individuals who have not committed any crimes, any reason for excluding them from compensation deprives compensation of all meaning, and the ground that the accused played a part in the development of a well-founded suspicion by deliberate or careless behaviour is a ground for exclusion that may be established in the case of almost all claims for compensation.

One of the necessary elements of the proportionality of detention is that where a court (authority) makes a mistake, the adequate remedy for the injury may be secured within the field of the state's responsibility for damage. For the reasons mentioned above, however, the regulation in question did not meet that requirement, as by defining the grounds for exemption too generally, albeit with the aim of preventing the accused from dishonestly taking advantage of the situation, that regulation unjustly restricted the real possibility of any remedy for a judicial mistake in the event of a well-meant but legally imperfect defence of the accused.

The Constitutional Court did not find it unconstitutional for the legislator to use an adequately differentiated regulation to exclude from compensation for preliminary detention or temporary forced medication individuals whose deliberately dishonest behaviour resulted in the court ordering or extending the forced action. It was on the basis of that consideration that the Constitutional Court did not find it unconstitutional for the Code to include a provision that excludes compensation for the accused upon being acquitted in a new trial, where the accused has held back in the first case information or evidence upon which the judgment in the new trial is based. The reason is that in such a case the statements and concealment by the accused definitely amount to deliberate, conscious behaviour, and one cannot speak of honesty.

Unlike the previous provision, the Court did not find the provision to be constitutional that provides for the accused to be excluded from compensation after acquittal in a new trial, where he or she has not appealed against the judgment of the court that first tried him. That would amount to the subsequent sanctioning of an omission to exercise the constitutional right of legal redress, which would change the exercise of that right into a duty. That, however, is contrary to Article 54.1 of the Constitution, part of which is the right to autonomy and the right of the parties to self-determination, because it belongs to the individual's sphere of autonomy to decide whether to initiate legal proceedings or not.

In its reasoning, the majority of the Constitutional Court examined the provisions in question in light of Article 57.1 of the Constitution that secures the right to defence and Article 55.1 that guarantees the right to personal freedom. In its reasoning, the majority stated that the general duty of compensation of the state under Article 55.3 of the Constitution related to provisions that concerned judicial and official measures resulting in unlawful detention and could not be used with respect to compensation that served to remedy mistakes occurring in the practice of the punitive power of the state.

Supplementary information:

In relation to the latter point, Justice Attila Harmathy wrote a concurring opinion. The essence of it was that, in his opinion, Article 55.3 of the Constitution should have been considered during the constitutional review.

Languages:

Hungarian.

Ireland
Supreme Court

Important decisions

Identification: IRL-2003-2-001

a) Ireland / **b)** Supreme Court / **c)** / **d)** 31.07.2003 / **e)** 215 & 216/03 / **f)** Meenan v. Commission to Inquire into Child Abuse / **g)** Report on three clinical trials involving babies and children in institutional settings 1960/61, 1970 and 1973, Chief Medical Officer of the Department of Health / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.
5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Civil proceedings.

Keywords of the alphabetical index:

Court, direction, powers / Witness, capacity to give evidence / Child, abuse / Expectation, legitimate, requirement to fulfil / Estoppel, promissory.

Headnotes:

Directions issued by statutory tribunals must not be issued for purposes other than those enumerated in the statute pursuant to which they are established. In dealing with prospective witnesses, such Tribunals need not invite submissions from interested parties before issuing directions to attend, but should at all times treat such persons in accordance with the requirements of fair procedures.

Summary:

On 31 March 2003, in the course of correspondence between the parties in which the respondents (The Commission to inquire into Child Abuse) were attempting to procure the testimony of the appellant (Professor Meenan, then aged 86 and infirm) at an inquiry into the trial of a vaccine carried out in five mother and baby homes and one industrial school in 1960/61, the respondents issued the appellant with a direction pursuant to Section 14 of the Commission to inquire into Child Abuse Act 2000 to attend a public hearing of the "vaccine trials division" of the Commission. Professor Meenan was one of six co-authors of the article describing the trial which was published in the British Medical Journal in the following year. Although the letter issuing the direction itself declared that the appellant's attendance was required in order that he be examined under oath on his involvement in the vaccine trials, a letter sent on 2 April 2003 stated that the purpose of issuing the direction was to induce any application that his solicitors might see fit to bring in relation to his ability to give evidence. The prior correspondence between the parties had not indicated that the fitness of the appellant to give testimony would be decided at a public hearing, only that any decision taken in relation to such fitness would be announced publicly. Prior correspondence also stated that if a statement was furnished by the appellant, that it was likely that any public examination might be avoided. This view is also supported by evidence of a private meeting of the Commission at which the appellant's situation was discussed. The High Court dismissed Professor Meenan's claim for an order of certiorari of that direction and acceded to the respondent's application for an order pursuant to Section 14.3 of the Act of 2000 requiring the applicant to comply with the direction. Professor Meenan appealed that decision to the Supreme Court, who allowed the appeal.

Hardiman J, in allowing the appeal, discussed the doctrines of promissory estoppel and legitimate expectations. He endorsed the comments of Fennelly J in *Kavanagh v. The Governor of Mountjoy Prison and The Attorney General* (Supreme Court unreported 1 March 2002) and O'Hanlon J *in Fakih v. Minister for Justice* [1993] 2 IR 406 in relation to legitimate expectations, being a rule applicable to the decision making process, which applies to all makers of decisions on behalf of the State. Such decision makers should not be allowed to disappoint expectations which they themselves have created and are reasonably entertained. However the existence of a legitimate expectation does not compel the decision maker to act in such a way as to fulfil the expectation. It is not a binding rule of law. He considered that the correspondence of the Commission could have grounded an expectation that the appellant would not be required to attend an oral hearing if he produced a written statement, and that the Commission had not treated the appellant fairly with regard to his health and personal situation. As legitimate expectations had not been raised in argument however, Hardiman J preferred to ground his decision on the narrower basis of whether the order was made for a proper purpose. He found that according to the Commission's own explanation of its

decision to issue a direction to attend, it had been done in order to force the appellant to attend a hearing at which his fitness to appear before the Commission would be examined. As Section 14 of the Act of 2000 makes it clear that the power to issue directions is limited to the power to issue directions to attend for the purposes of giving evidence to the Commission, Hardiman J therefore held that the direction was made for an improper purpose capable of leading to the quashing of the direction. Keane CJ, also in allowing the appeal, held that having regard to the nature of the inquiry (established to investigate vaccine trials carried out on children in the early 1960's), which was only tenuously linked to the purposes for which the Commission was established pursuant to the Act of 2000, i.e. to inquire into the physical and sexual abuse of children in residential homes, and which would require the testimony of persons as aged and in as poor health as the appellant, the Commission, in refusing to consider the medical reports submitted to it by the appellant before issuing their direction, had not upheld the requirements of fair procedures.

Languages:

English.

Israel
Supreme Court

Important decisions

Identification: ISR-2003-2-007

a) Israel / **b)** Supreme Court / **c)** Panel / **d)** 22.01.2003 / **e)** CrimA 3852/02 / **f)** John Doe v. District Psychiatric / **g)** [2003] IsCR 57(1) 900 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.2 **Sources of Constitutional Law** – Categories – Written rules – Foreign rules.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
3.20 **General Principles** – Reasonableness.
5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.

Keywords of the alphabetical index:

Psychiatric disturbance, degree / Psychiatric institution, criminal commitment, duration.

Headnotes:

Holding a patient in commitment infringes his or her rights of liberty and dignity, guaranteed under the Israeli Basic Law on 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 others.

The law must strike a reasonable balance between Patient no. 8217's rights and the public interest.

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

Summary:

The petitioner, Patient no. 8127, after being charged with assault, was found unfit to stand trial. He was criminally committed to a psychiatric institution. Under Israeli law, criminal commitment restricts a patient's liberty more than civil commitment, *inter alia*, in 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 a period longer than his sentence would have been had he actually stood trial and been convicted.

The petitioner asserted, *inter alia*, that that 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 that the petitioner remain in commitment indefinitely. The respondent also asserted that the petitioner could not be held in civil commitment, as the civil commitment system did not provide for adequate control and supervision.

The Court held for the petitioner. The Court noted that holding the petitioner in commitment for any length of time infringed his rights of liberty and dignity, guaranteed under the Israeli Basic Law: Human Dignity and Liberty. However, the Court noted that such an infringement might be justified where it is intended for the protection of the accused as well as for the protection of others. However, the Court noted that the law must strike a reasonable balance between Patient no. 8217's rights, on the one hand, and the public interest, on the other. The Court held that forced criminal commitment becomes unreasonable when its duration exceeds the amount of time the patient would have served in prison had he been convicted. In reaching its judgment, the Court relied on comparative law from the United States, Canada and Australia.

The Court stated that the court that issues the original criminal commitment order should, when the duration of criminal commitment becomes unreasonable, transfer a patient to civil commitment. The Court noted that the patient himself might approach the court, assert that the period of criminal commitment has become unreasonable, and ask to be transferred to the civil track. However, the Court added that the Attorney-General might act as proxy for the patient, where the patient does not approach the Court himself.

Languages:

Hebrew, English (translation by the Court).

Identification: ISR-2003-2-008

a) Israel / **b)** Supreme Court / **c)** / **d)** 15.05.2003 / **e)** E.Au. 11280/02; E.Au. 50/03; E.Ap. 55/03; E.Ap. 83/03; E.Ap. 131/03 / **f)** The Central Election Committee v. Parliament Member Tibi / **g)** 57(4) Isr.S.C. 1 (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

3.3.3 **General Principles** – Democracy – Pluralist democracy.
3.17 **General Principles** – Weighing of interests.
3.24 **General Principles** – Loyalty to the State.
4.5.10.4 **Institutions** – Legislative bodies – Political parties – Prohibition.
4.9.5 **Institutions** – Elections and instruments of direct democracy – Eligibility.
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.
5.3.38.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.
5.3.38.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Democracy, defensive / Party, disqualification, burden of proof / State, Jewish / Democratic state, core elements.

Headnotes:

A thriving democracy must not participate in its own destruction. Thus the "democratic paradox" arises from conflicting desires to foster an open marketplace of ideas (in which minority voices are protected against majority political forces), and to enable democracy to protect itself from those who seek to destroy it. In an attempt to resolve this paradox, the State of Israel has enacted numerous laws relating to the registration of political parties, the conduct of general elections, and the criminalisation of certain activities that threaten democracy.

There are many democratic states, but there is only one Jewish State. The Jewish character of Israel is its central feature − it is axiomatic. Israel's Basic Law

therefore bars the participation of a candidate or list of candidates who advocate nullification of the core elements of the State's Jewish character as a central part of their aspirations and actions. The same prohibition applies to those seeking to abolish the basic democratic features of the State. Democracy is based on dialogue, not on force. Those who wish to change the structure of society may participate in the democratic dialogue, as long as they use legal means to achieve their aims, and as long as their activities comply with the core democratic characteristics of the state.

Summary:

Section 7A of the Basic Law on the Knesset empowers the Central Election Committee, ("the Committee") to prohibit a list of candidates or a particular candidate from participating in the elections to the Parliament if they (in their aims or actions, either explicitly or implicitly):

1. deny the existence of the State of Israel as a Jewish and democratic state;
2. incite racism;
3. support the armed struggle, by an enemy state or of a terrorist organisation, against the State of Israel.

The Committee's decision to disqualify a particular candidate must be reviewed by the Supreme Court, and there is a right to appeal a decision disqualifying a list of candidates.

On the basis of Section 7A of the Basic Law on the Knesset, the Committee considered the disqualification of several candidates for the January 2003 general elections. The first candidate, Azmi Bishara, is an Israeli Arab member of Knesset. The Committee cited two reasons for its decision to prevent Bishara from participating in the elections:

1. Bishara denied the Jewish character of the State, through his campaign to transform Israel into a "state of all of its citizens" as opposed to a Jewish state; and
2. Bishara supported the armed struggle of both Palestinian and Lebanese (Hezbollah) terrorist organisations against Israel. In addition, the Committee also decided to disqualify the list of candidates proposed by Bishara's political party, the National Democratic Assembly (N.D.A.: Brit Leumit Democratit (B.L.D. in Hebrew)).

The second candidate, Ahmed Tibi, is also an Israeli Arab Member of Knesset. Tibi was disqualified from participating in the elections due to his support of Palestinian terrorist groups' armed struggle against Israel. The Committee also considered the disqualification of Baruch Merzel, an Israeli Jewish candidate in a far right-wing party, Herut. Merzel is the former leader of the outlawed Kach movement, a racist anti-Palestinian and anti-Arab group. Numerous complaints of incitement to racial hatred were made against Merzel, but Merzel argued that he had changed his views, and the Committee approved his participation. All of those decisions were reviewed by the Supreme Court.

The Supreme Court, sitting as an extended bench of eleven Justices, held that Section 7A of the Basic Law on the Knesset assumes that a democracy can defend itself from undemocratic forces using democratic means to undermine democracy. That dilemma represents a kind of democratic paradox; Israeli constitutional law balances the democratic freedoms of expression and pluralism with the preservation of Israel as a Jewish and democratic state. Thus, that dilemma reflects Israel's character as a defensive democracy.

Disqualifying a candidate or a list of candidates is an extreme measure that infringes upon the electorate's right to vote and the candidates' right to participate in an election. To justify such a disqualification, the Committee must satisfy a heavy evidentiary burden. The candidates' participation in activities prohibited by the Basic Law must be a dominant and central feature of their public lives, and they must undertake measures in order to accomplish the prohibited aims. The Court proceeded to discuss in obiter dicta the possibility of interpreting the Basic Law to require proof of probable success in achieving the prohibited aims (the probability element).

Due to the grave implications of the disqualification procedure, Israel's characteristics as a "Jewish state" and "democratic state" should not be applied too broadly in this context. The core elements of a Jewish state include the right of every Jew to immigrate to Israel, in which there is a Jewish majority; the establishment of Hebrew as the official language; and the centrality of Jewish heritage in Israel's state culture, as reflected in its national holidays and symbols. However, Israel's Jewish character must not contradict the fact that all of its citizens, Jews and non-Jews alike, have a right to equality. The core elements of a democratic state include free and equal elections, basic human rights, separation of powers and the rule of law. Drawing upon these interpretive principles, Israel may prohibit incitement to racial hatred and may prohibit political candidates from supporting an armed struggle against Israel.

A majority of the Supreme Court overturned the Committee's decision to disqualify Bishara and the N.D.A. list of candidates. It held that although the aims of Bishara and the N.D.A. were clearly not Zionist, they did not necessarily contradict the core elements of Israel as a Jewish state. While there was some evidence of support by Bishara and the N.D.A. for the general struggle by Palestinians and Lebanese against Israel, the Court doubted whether that included support for an armed struggle as required by the Basic Law, and found that such doubt should be resolved in favour of the candidates. The minority opinion would have upheld the disqualifications, based on its conclusion that the evidence established Bishara and the N.D.A. aimed to abolish Israel as a Jewish state, had undertaken actual measures to accomplish that aim, and had in fact supported the armed struggle of terrorist groups against Israel.

The Court unanimously overturned Tibi's disqualification, citing the lack of evidence in support of the Committee's decision.

Finally, a majority of the Court ruled that the Committee had acted reasonably in accepting Merzel's assertion that he no longer espoused the racist views of the Kach movement. In contrast, a minority of the Justices found that the Committee had abused its discretion in permitting his candidacy, pointing to evidence suggesting Merzel's recent involvement in racist activities.

The Court decided the case on 9 January 2003. The elections took place on 28 January 2003, with the participation of Bishara, the N.D.A. list of candidates, Tibi, and Merzel. The Court's reasons were published on 15 May 2003.

Cross-references:

- E.Ap. 1/65 *Yardor v. The Chairperson of the Central Election Committee* 19(3) Isr.S.C. 365;
- E.Ap. 2/84 *Neiman v. The Chairperson of the Central Election Committee* 39(2) Isr.S.C. 225 (also available in English at the Court site www.court.gov.il);
- E.Ap. 1/88 *Neiman v. The Chairperson of the Central Election Committee* 42(4) Isr. S.C. 177;
- E.Ap. 2/88 *Ben Shalom v. The Central Election Committee* 43(4) 221 Isr. S.C. 221.

Languages:

Hebrew, English (translation by the Court).

Kazakhstan
Constitutional Council

Important decisions

Identification: KAZ-2003-2-001

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 23.04.2003 / **e)** 4 / **f)** On the Official Interpretation of Articles 2.2 and 6.3 of the Constitution of the Republic of Kazakhstan. Resolution of the Constitutional Council of the Republic of Kazakhstan no. 4 of 12 May 2003 / **g)** *Kazakhstanskaya pravda* (Official Gazette) / **h)** CODICES (English, Russian).

Keywords of the systematic thesaurus:

3.1 **General Principles** – Sovereignty.
3.8.1 **General Principles** – Territorial principles – Indivisibility of the territory.
4.10.8 **Institutions** – Public finances – State assets.
4.16 **Institutions** – International relations.

Keywords of the alphabetical index:

Land, allocation, principles / Diplomatic representation, land use.

Headnotes:

Article 2.2 of the Constitution stating that the state ensures the integrity, inviolability and inalienability of its territory is to be understood as a prohibition of the dismemberment of its territory, of the use of natural resources without the consent of the government, of the arbitrary change of the status of Kazakhstan regions and of territorial concessions to the prejudice of national interests as well as the safeguarding of the inviolability of the frontiers and the sovereignty of the state.

Land shall be made available by way of lease to foreign countries for allocation to their diplomatic representatives accredited in Kazakhstan. The existence of the jurisdiction of foreign countries on the territory allocated to their diplomatic representatives does not violate the principles of sovereignty, integrity, inviolability and inalienability of the territory recognised by international law and set out in Article 2.2 of the Constitution.

Land made available to foreign countries for allocation to their diplomatic representatives shall remain the property of the state.

In conformity with Article 6.2 of the Constitution, the right to regulate real property relations in the country belongs to the state, which establishes the legal regulation of ownership and alienation of land. The legislator shall set out the grounds, conditions and limits of land ownership and the subjects and objects of the legislation.

Making land available to foreign counties for their diplomatic representatives accredited in Kazakhstan shall be carried out according to the international agreements ratified by the state.

Summary:

The Chairman of the Parliament (Mazhilis) of Kazakhstan applied to the Constitutional Council for an interpretation of Articles 2.2 and 6.3 of the Constitution. According to Article 2.2, "the state ensures the integrity, inviolability and inalienability of its territory". Article 6.3 provides: "The land and underground resources, waters, flora and fauna, other natural resources shall be owned by the state. The land may also be privately owned on terms, conditions and within the limits established by legislation".

The application questioned whether the said provisions of the Constitution implied that the assignment of land exceptionally designated for allocation to the diplomatic representatives accredited in Kazakhstan must be provided for by way of legislation.

The Constitutional Council recalled that the notion of the territory of Kazakhstan in the Constitution is closely connected with the notion of its sovereignty. Article 2.2 sets out that "the sovereignty of the Republic extends to its entire territory". The territory of the state is the spatial border within which the state exists and functions as a sovereign organisation of power. It is the supreme power on this territory, indivisible and independent. The land and underground resources, waters, flora and fauna, other natural resources found within the territory of the Republic are the pubic and legal property of Kazakhstan.

Land made available to foreign countries for allocation to their accredited diplomatic representatives may only be made available by way of a legal form that does not result in the land being excluded from the public and legal property of Kazakhstan. That legal form is a lease.

The Republic, when it makes land available to foreign countries for allocation to their accredited diplomatic representatives, must ensure the integrity, inviolability and inalienability of its territory. The conditions under which land is made available are to be laid down on the basis of the nature of the particular relationship of Kazakhstan with a foreign country.

Languages:

English, Russian.

Korea
Constitutional Court

Important decisions

Identification: KOR-2003-2-001

a) Korea / **b)** Constitutional Court / **c)** / **d)** 15.05.2003 / **e)** 2003Hun-Ka9, 2003Hun-Ka10 (consolidated) / **f)** Local Election Political Party Candidate Case / **g)** 81 *Korean Constitutional Court Gazette* (Official Digest), 30 / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
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.
4.9.8 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.2.2.9 **Fundamental Rights** – Equality – Criteria of distinction – Political opinions or affiliation.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
5.3.38.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Local council, autonomy / Political expression / Candidate, political affiliation, expression / Law, purpose, ineffective / Election, political indifference / Political party, affiliation, prohibition to communicate.

Headnotes:

A candidate in a local election has a constitutionally protected right to political expression including the right to declare that he or she has a particular political party's support or recommendation for his or her candidacy during the election campaign. Voters also have a right to know a political party's candidate in

order to properly exercise their voting rights, which are guaranteed by the Constitution.

Summary:

1. The petitioners were candidates for a city council election. They were prosecuted for violating Article 84 of the Act on the Election of Public Officials and the Prevention of Election Abuses (Election Law). It prohibits, *inter alia,* a candidate standing for election to an autonomous city, district or town council (these are also called the elementary-level assemblies; hereinafter called the "elementary local councils") from declaring that he or she is supported or recommended by a particular political party. The petitioners were found guilty of doing so and fined by their respective local courts. They appealed the rulings to the relevant high courts, and challenging the constitutionality of the provision, they requested that the cases be referred to the Constitutional Court. The high courts accepted their requests and referred their cases to the Constitutional Court.

2. The Constitutional Court held by a vote of six to three that the prohibition on declarations by candidates of their being supported or recommended by a political party during elementary local council elections was inconsistent with the Constitution in that it infringed, without legitimate justification, the constitutional rights of individuals to political expression, and it also constituted unfair discrimination in comparison with other local elections where such information could be freely conveyed.

The essential reasoning of the Court was as follows.

The prohibition laid down by Article 84 of the Election Law had a questionable legislative purpose. It is fundamentally in the hands of voters whether to choose a candidate based on the candidate's political party or personal abilities. The proposed governmental purpose to exclude attempts by political parties to influence elementary local elections and induce people to vote a certain way was of questionable legitimacy, since governmental interference in the election process runs contrary to the basic principle of free democratic elections.

Moreover, the legislative purpose of protecting and ensuring the autonomy of local governance from political party pressure was not necessarily achieved by the method used in the statute. The effectiveness of the prohibition for achieving the proposed governmental objective was open to serious doubt. The causal connection between the legislative purpose and the means used was vague and unconvincing.

Firstly, the effectiveness of the impugned statute in achieving the legislative purpose was in practice very uncertain, even insignificant; however, it placed substantial restrictions on the basic rights of individuals. Candidates for elections to elementary local councils were not even allowed to answer enquiries by voters about the specific information prohibited under the provision. Moreover, the law severely restricts persons from entering the arena of local politics at the elementary level by joining a political party and then running for election, which is a basic operating mechanism of a multi-party democratic system. Furthermore, since the period of an election campaign for local council is limited to fourteen days, voters do not have sufficient opportunity to contact local election candidates and acquire information about them. Additionally, the local council election is held together with another three local elections, requiring voters to choose four different candidates simultaneously in each local election. It is in practice very difficult for voters to assess and evaluate every candidate based on his or her personal qualifications and abilities. Thus, the information concerning the political party is imperative to the exercise of a person's voting rights.

Prohibition on such information results in a situation where people vote without knowing the political tendencies of candidates. It may heighten a citizen's political indifference, even to the point of not exercising his or her voting rights. It also infringes, without just cause, an individual's constitutional right to know such information. Because of all these circumstances, a proportional balance is not struck between the public benefits of the prohibition and the restriction of individual rights. The provision excessively infringes a person's constitutional rights to political expression in the pursuit by ineffective means of uncertain legislative purposes.

Secondly, the provision unfairly discriminates against candidates standing for election to elementary local councils as compared to those standing for other local elections, resulting in a breach of the equality principle in the Constitution. If the proposed legislative goal is to ensure the autonomy of local governance from political party pressure by excluding political party influence from a local election, it is equally applicable to other local elections such as regional local council elections, regional local government head elections and elementary local government head elections. It has not been established that elementary local council elections are essentially different from other local elections and should be treated in a different way. The Court held that the prohibition in the statute targeting only

candidates standing for election to elementary local councils unfairly discriminated against them without a reasonable basis and was inconsistent with the equality principle of the Constitution.

Cross-references:

- Decision of 30.01.2003 (2001Hun-Ka4).

Languages:

Korean.

Latvia
Constitutional Court

Important decisions

Identification: LAT-2003-2-006

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 20.05.2003 / **e)** 2002-21-01 / **f)** On the Compliance of Article 27.4 and the Text of Article 28.2 "... until that person reaches the age of 65" of the Law on Higher Education and Article 29.5 of the Law on Scientific Activity with Articles 91 and 106 of the Constitution *(Satversme)* / **g)** *Latvijas Vestnesis* (Official Gazette), 75, 21.05.2003 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.
5.2.2.7 **Fundamental Rights** – Equality – Criteria of distinction – Age.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Age, limit / University, administrative position / University, professor, age, limit.

Headnotes:

The main criteria set out in the impugned legislative provisions for qualifying for academic and administrative positions shall be ability and qualifications but not age. Consequently, the prohibition in the impugned legislative provisions providing for an age limit in relation to the fundamental right enshrined in Article 106 of the Constitution *(Satversme)* is incompatible with the principle of proportionality.

Summary:

The impugned legislative provision of the Law on Scientific Activity provides that administrative positions (director, deputy director and manager of a scientific structural unit) in State scientific institutions and positions in elected collegiate scientific

institutions may be held by persons only until the age of 65. The impugned provisions of the Law on Higher Education lay down that "the elected positions of professor, associated professor, assistant professor and administrative positions (rector, proctor and dean) in institutions of higher education may be held by a person only until that person reaches the age of 65" and "professors shall be elected for six years according to the provisions of Article 33 of this Law in an open competition, and the rector shall conclude with the person elected either an employment contract for the whole six-year term, or where that person reaches the age of 65 during that six-year term, an employment contract until that person reaches the age of 65".

All claimants have reached the age of 65. They argued that the impugned provisions violated the guarantees set out in Article 106 of the Constitution *(Satversme)* and enacted discriminatory restrictions relating to their right to choose freely their employment and workplace. Their rights had been restricted not because of their ability or qualifications (as permitted under Article 106) but because of their age. They had lost neither their ability nor their qualifications.

The Court pointed out that in Article 106 of the Constitution, the right to freely choose one's employment and workplace means firstly, equal access to the labour market for every person, and secondly, a prohibition on the State to lay down restrictive criteria: it may only lay down requirements relating to the ability and qualifications that are necessary for carrying out the duties of the position.

The Court found that the impugned provisions of the Law on Higher Education and the Law on Scientific Activity denied persons who had reached 65 years of age the possibility of running for the above-mentioned positions on an equal footing with others. Consequently, those persons did not enjoy equal access to the labour market, which is guaranteed by Article 106 of the Constitution.

Restrictions to the rights guaranteed by Article 106 of the Constitution must:

a. be set out in the law;
b. be in compliance with the legitimate aim the State wishes to attain when laying down the restriction; and
c. comply with the principle of proportionality.

As the impugned provisions had been set out in laws adopted by the parliament *(Saeima)*, had been proclaimed under the procedure provided for by law and were valid, the Court held that there was no doubt the restrictions had been determined by law.

The Court did not accept the argument that the legitimate aim of the restrictions was to ensure the advancement of science and modernisation in order to protect democratic State structure. However, because an appropriate level of education and science is an inalienable precondition of successful State development, the Court held that the aim of the restrictions in the impugned provisions was to ensure public welfare.

In order to examine the proportionality of the restrictions in the impugned provisions in relation to the defined legitimate aim, those restrictions had to be assessed on the basis of their necessity in a democratic society. In the case in question, it had to be considered whether the legitimate aim could be attained by the means used by the legislator; whether the aim might be attained by other means that would restrict the rights and legal interests of an individual to a lesser degree; and whether the benefit to society would be greater than the loss of the rights and harm to the lawful interests of an individual.

The Court pointed out that it was not possible to achieve the qualitative advancement of higher education and science where the decisive criterion for holding a certain academic or scientific position is age and not professional ability. Restrictions based on the assumption that mental abilities automatically decreased with age should be eliminated. The age limit alone, set out in the impugned provisions, was insufficient as a general criterion for the prohibition of employment in specific professions, positions and activities.

The Court found that it was impossible to further the process of attaining the aim of the State – advancement of higher education and science – by merely limiting the range of persons who might qualify for the positions on the grounds of age, as was done in the impugned provisions. The legislator, in order to ensure the recruitment of young specialists, could use other less offending means that would not restrict the fundamental rights of persons, such as electing persons who have reached the above-mentioned age for a shorter period of time.

The Court held that legislative acts had to incorporate more precise qualification criteria for administration positions of the State scientific institutions, as well for posts of professors and associated professors, as it would ensure transparency and promote harmonised requirements. Article 106 of the Constitution provides that the main criteria for qualifying for the academic and administrative positions listed in the impugned provisions are ability and qualifications, but not age. Consequently, the prohibition in the impugned

provisions providing for an age limit in relation to the fundamental right enshrined in Article 106 of the Constitution was incompatible with the principle of proportionality.

The Court declared that the first sentence of Article 27 of the Law on Higher Education and the text of Article 28.2) "or for the time until that person reaches the age of 65 " and the first sentence of Article 29.5 of the Law on Scientific Activity were incompatible with Article 106 of the Constitution and null and void as of the date of the announcement of the judgment.

Cross-references:

Former decisions of the Court:

- no. 2001-12-01, *Bulletin* 2002/1 [LAT-2002-1-004];
- no. 2001-16-01, *Bulletin* 2002/1 [LAT-2002-2-005];
- no. 2002-20-0103.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2003-2-007

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 05.06.2003 / **e)** 2003-02-0106 / **f)** On the Compliance of Article 19.5 of the Radio and Television Law with Articles 89, 91, 100 and 114 of the Constitution *(Satversme)* as well as with Articles 10 and 14 ECHR (read together with Article 10 ECHR) and Articles 19 and 27 of the International Covenant on Civil and Political Rights / **g)** *Latvijas Vestnesis* (Official Gazette), 84, 05.06.2003 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.2.10 **Fundamental Rights** – Equality – Criteria of distinction – Language.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Media, radio and television, broadcasting instructions / Language, use, restrictions.

Headnotes:

The impugned provision of the Radio and Television Law provides that the proportion of foreign language programs aired by a broadcasting organisation must not exceed 25 per cent of the total airtime per day. Those language use restrictions cannot be regarded as necessary and proportionate in a democratic society, because it is possible to attain the aim pursued by other means that would limit the right in question to a lesser degree.

Summary:

The claimants − twenty-four deputies of the parliament *(Saeima)* − sought a review of the conformity of the impugned legislative provision with Articles 89, 91, 100 and 114 of the Constitution; Articles 10 and 14 ECHR (read together with Article 10 ECHR); and Articles 19 and 27 of the International Covenant on Civil and Political Rights.

The Court pointed out that freedom of expression is considered one of the most essential fundamental human rights. It embraces a wide sector and includes two aspects: private and public. The public aspect of freedom of expression refers to the right of every person to freely receive information and voice his/her views in any way: orally, in a written form, visually, with the help of artistic means etc. Mass media – radio and television – are also means of receiving and imparting information. The term "freedom of expression", which is incorporated into Article 100 of the Constitution *(Satversme)*, also includes the notion "freedom of the press".

Fundamental rights may be restricted in circumstances provided for by the Constitution in order to protect vital public interests and where the principle of proportionality is observed. The restriction of the right to freedom of expression must comply with the following requirements: it shall be determined by law; it shall be justified by a legitimate aim that the State

wishes to attain when laying down the restriction; and it shall be proportionate to that aim.

The Court found that the impugned legislative provision had been laid down by a law adopted by the parliament; had been published in accordance with the procedure determined by law; and was valid. Therefore, there could be no doubt that the restrictions had been determined by law.

The Court held that under Article 116 of the Constitution, public welfare is one of the legitimate aims for which the right to freedom of expression may be restricted. Along with the material welfare aspects, the notion "public welfare" includes the non-material welfare aspects that are necessary for the functioning of a harmonious society. The actions of the State to secure public dominance of the Latvian language may be considered a non-material aspect.

The Court pointed out that in order to evaluate whether the limitations on freedom of press in the impugned provision were necessary in a democratic society and might be used as the means for attaining a legitimate aim, it had to be determined whether the bounds of the essence of human rights had been violated. It meant that it had to be considered whether the limitations were socially needed and proportionate.

The Court found that the implementation of the impugned provision neither promoted the more extensive use of the State language nor advanced the process of integration. The results of the research, attached to the materials of the case, show that where − because of language restrictions − residents cannot use the services of the local broadcasting organisations, they choose the services of broadcasting organisations of other States, in the particular case, the Russian television channels. Consequently, the limitation on the use of language in the impugned provision could not be regarded as socially required in a democratic society.

Article 10.1 ECHR does not prevent the State from requiring the licensing of radio and television broadcasting. Granting radio and television broadcasting licenses must not create disproportionate restrictions to fundamental human rights, including freedom of expression. To secure the enlargement of the sphere of the Latvian language in the electronic mass media, only the means that comply with that requirement are to be used. For example, one of the criteria for granting broadcasting licenses to private broadcasting organisations might be the number of companies broadcasting in foreign languages offering to broadcast programs promoting public integration as well as other criteria. The former Estonian Minister of National Affairs has pointed out that the companies broadcasting programs in foreign languages have stimulated the process of integration in Estonia. That indicates that it is possible to attain the aim pursued by other means that would limit the right in question to a lesser degree.

The Court concluded that the language use restrictions in the impugned provision could not be regarded as necessary and proportionate in a democratic society.

The Court declared that Article 19.5 of the Radio and Television Law was incompatible with Article 100 of the Constitution, and null and void as of the day of the publication of the Judgment.

Cross-references:

Earlier decisions of the Court:

- no. 2000-03-01, *Bulletin* 2000/3 [LAT-2000-3-004];
- no. 2002-04-03;
- no. 2002-08-01;
- no. 2002-20-0103.

The European Court of Human Rights Judgments:

- *Sunday Times v. the United Kingdom*, *Special Bulletin ECHR* [ECH-1979-S-001]; Vol. 30, Series A of the Publications of the Court;
- *Groppera Radio AG and Others v. Switzerland*, Vol. 173, Series A of the Publications of the Court;
- *Markt Intern Verlag GmbH and Claus Berman v. the Federal Republic of Germany*, Vol. 165, Series A of the Publications of the Court;
- *Autronic AG v. Switzerland*, *Special Bulletin ECHR* [ECH-1990-S-003]; Vol. 178, Series A of the Publications of the Court;
- *Radio ABC v. Austria*, *Reports* 1997-VI.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2003-2-008

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 27.06.2003 / **e)** 2003-04-01 / **f)** On the Compliance of Articles 82.5 and 453.2 of the Code of Civil Procedure with Articles 91 and 92 of the Constitution *(Satversme)* / **g)** *Latvijas Vestnesis* (Official Gazette), 97, 01.07.2003 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

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.
5.3.13.26 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel.

Keywords of the alphabetical index:

Court of Cassation, lawyer, representation, mandatory / Legal aid, absence / Lawyer, representation, mandatory / Fundamental right, implementation.

Headnotes:

The legislator, when laying down the principle of mandatory representation, had the possibility of using less restrictive means for reaching the legitimate aims. The restrictions laid down by the legislator are not proportionate, as state-financed legal aid is not ensured and the impugned statutory provisions deny persons the right of access to a court. The impugned provisions of the Code of Civil Procedure (CCP) providing that natural and legal persons must have the help of an advocate in order to conduct court proceedings in the Court of Cassation do not comply with the principle of proportionality and are incompatible with Article 92 of the Constitution *(Satversme)*.

Summary:

The applicant brought a constitutional claim in which she submitted that the impugned statutory provisions violated her rights, as she − like most people − could not afford to pay for the services of an advocate. In 2000, the applicant had made a request to the Council of Advocates for the appointment of an advocate to act in the proceedings free of charge. Her request had been refused, because advocates could not be appointed to represent an applicant in the review of a civil matter.

The Court held that when interpreting Article 92 of the Constitution *(Satversme)* in conjunction with Article 86 of the Constitution, one could conclude that the right to defend one's rights in a fair court might be restricted by law where the restriction (as the European Court of Human Rights has resolved with regard to the rights set out in Article 6.1 ECHR) has been established by law, has a legitimate aim and is proportionate to that aim.

The Court noted that the special function of the cassation instance was the reason for the specific nature of the proceedings in the Court of Cassation. Unlike the "Soviet" cassation model, the essential feature of the Latvian cassation institute is that the final determination is not important for the pursuit of the parties' interests, which are sufficiently protected by the first two instances of the Court, but of legal public interests. Only *quaestiones iuris* − i.e. issues on the application of substantive and procedural rules − are reviewed by the cassation instance. The restrictions incorporated into the impugned provisions envisage the protection of the rights of persons, as Article 477 CCP lays down that no appeal lies from the decision of the cassation instance. Therefore, the proper preparation of a claim and qualified representation at the cassation instance, which can be achieved only if there is a capable, skilled and experienced representative, is in the interests of natural and legal persons. In the past, every person had the right to prepare an appeal for the Court of Cassation; consequently, that court was flooded with claims devoid of any legal grounds of appeal. Moreover, the legislator, in requiring a qualified person, wanted to limit the right of every person to speak during the court proceedings. Where a qualified lawyer represents a person, the bench can review the legal issues without hearing arguments that are unrelated to the legal issues. Therefore, the restrictions have two legitimate aims: the first is to ensure qualified legal representation in the Court of Cassation for the parties; the second is to ensure the efficient performance of the Court of Cassation.

The Court stressed that the principle of proportionality sets out that in cases where the public authority restricts the rights and legitimate interests of a person, a reasonable balance between the public and individual interests must be struck. In order to evaluate whether the statutory provision complies with the proportionality principle, one has to ascertain whether the means used by the legislator are suitable for achieving the legitimate objective; whether it is possible to attain the objective by other means that would limit the rights of an individual to a lesser degree; and to show whether the action of the legislator is proportionate.

The Court held that such means for reaching the legitimate aims existed, especially for ensuring

qualified legal representation in the Court of Cassation; consequently, it was possible to use less restrictive means for securing qualified legal representation in the Court of Cassation.

The Constitutional Court held that the right of all persons to the assistance of an advocate should be understood as a subjective right to qualified legal aid. The right to an advocate within the meaning of Article 92 of the Constitution includes firstly the right to qualified legal aid, and secondly the obligation of the State to render such aid to persons who cannot afford it themselves. Every indigent person has the right to such aid in all cases where mandatory representation is required or the interests of the proceedings require it (the potential grievous effects of the case and complicated proceedings).

The Court concluded that the restrictions set out in the impugned statutory provisions had been determined by law and had legitimate aims. The means used by the legislator were appropriate for reaching the legitimate aims, namely − requiring mandatory representation by an advocate at the cassation instance did ensure qualified legal representation and the efficient performance of the cassation instance. However, the legislator, when determining the principle of mandatory representation, had the possibility of employing less restrictive means for reaching the legitimate aims. Moreover, the restrictions laid down by the legislator were not proportionate, as state-financed legal aid was not ensured and the impugned statutory provisions denied persons the right of access to the Court. Thus, the public benefit was not greater than the loss of the rights and damage to the legitimate interests of an individual. In a state governed by the rule of law, the protection of the rights and interests must be secured, not only declared. However, the valid statutory regulation was evidently insufficient and did not ensure the implementation of the rights guaranteed in Article 92 of the Constitution. Thus, the impugned statutory provisions do not comply with the principle of proportionality and were unlawful.

The Court declared that Articles 82.5 and 453.2 of the Civil Procedure Law were incompatible with Article 92 of the Constitution and null and void as from 1 January 2003.

Cross-references:

Earlier decisions of the Court:

- no. 2001-12-01, *Bulletin* 2002/1 [LAT-2002-1-004];
- no. 2002-03-01;
- no. 2002-04-03, *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2002-09-01, *Bulletin* 2002/3 [LAT-2002-3-009].

The European Court of Human Rights Judgment in Cases:

- *Golder v. the United Kingdom*, *Special Bulletin ECHR* [ECH-1975-S-001]; Vol. 18, Series A of the Publications of the Court;
- *Fayed v. the United Kingdom*, Vol. 294-B, Series A of the Publications of the Court;
- *Delcourt v. Belgium*, *Special Bulletin ECHR* [ECH-1970-S-001]; Vol. 11, Series A of the Publications of the Court;
- *Airey v. Ireland*, *Special Bulletin ECHR* [ECH-1979-S-003]; Vol. 32, Series A of the Publications of the Court.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2003-2-009

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 27.06.2003 / **e)** 2003-03-01 / **f)** On the Compliance of Article 77.7 (sentence three) of the Code of Criminal Procedure of Latvia with Article 92 of the Constitution *(Satversme)* / **g)** *Latvijas Vestnesis* (Official Gazette), 97, 01.07.2003 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.
3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
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.

Keywords of the alphabetical index:

Arrest, safeguards / Detention, provisional, right to take part in proceedings / Security, measure, arrest, extension of the term.

Headnotes:

The provision of the Code of Criminal Procedure that provides that the term of preventive detention of one year and six months may be extended by the Supreme Court Senate in exceptional cases does not run contrary to the observation of the presumption of innocence by the Court and does not deny the right of the defendant to have the matter reviewed within a reasonable time; however, it is incompatible with Article 92 of the Constitution *(Satversme)* on the ground that a procedure for ensuring the realisation of the right of the accused to be heard is not laid down by the law.

Summary:

Article 77.7 of the Code of Criminal Procedure provides that the term of preventive detention, from the day the Court receives the case until the completion of its review by the first instance court, shall not exceed one year and six months. At the end of that term, the order of preventive detention shall be revoked, and the accused shall be immediately released. The Supreme Court Senate (henceforth − Senate) may prolong the term of preventive detention in exceptional cases, i.e. − criminal matters involving especially serious crimes connected with violence or threat of violence.

The applicants brought a constitutional claim challenging the compatibility of Article 77.7, sentence 3 of the Code of Criminal Procedure (henceforth − the impugned provision) with the first and second sentences of Article 92 of the Constitution *(Satversme).*

The Court noted that Article 92 of the Constitution requires the State to set up a system under which the Court may review criminal matters in proceedings ensuring fair and impartial adjudication of the matters. Article 92 of the Constitution guarantees the minimum rights enshrined in Articles 5.4 ECHR, 6.1 ECHR and 6.2 ECHR.

The Court stated that the presumption of innocence meant that in carrying out their duties, the Court and its officials are not permitted to voice the assumption that the defendant is guilty of the crime until the announcement of the judgment. Proof and determination of guilt takes place only in court when the case is reviewed on its merits. The justification of the decision to detain a person for a long period of time is to be assessed in every individual case by taking into consideration the particular circumstances of the case. Detaining a person for a long period of time may be justified only in cases where there are specific indications of a true public interest, which − bearing in mind the presumption of innocence − is more important than the right of a person to liberty, guaranteed by Article 5 ECHR. As the impugned provision does not require assessment of the guilt of the accused, a court does not violate the presumption of innocence by asking the Senate to extend preventive detention in a case where there are well-founded suspicions that the person committed the crime and where the Court does not mention the guilt of the accused in its request. Consequently, the impugned provision does not run contrary to the observation of the presumption of innocence by the Court.

The Court held that even though the impugned provision did not determine the maximum term of preventive detention, it did not prevent a court from adjudicating the case within a reasonable time because neither the Court requesting extension of detention nor the Senate may apply the provision without grounds. When evaluating the amount of time needed for the adjudication of the case, the Court must consider all factors, *inter alia*, the complexity of the case, behaviour of the accused and the activity of the competent institution (the Court). Because of objective reasons, a court is not always able to adjudicate the matter in a year and a half (for example, in especially serious crimes connected with violence or threat of violence). Had the impugned provision not been adopted, an accused would be able to deliberately delay the legal process in such a way as to be released from prison. Moreover, if the accused were released from prison without an assessment of his or her personality, the security of both the witnesses and the public might be endangered. Therefore, the impugned provision does not deny the right of the accused to a review of the matter within reasonable time.

The Court pointed out that the right to be heard follows from the principle of justice, which includes all the guarantees of due process. It is one of the most important procedural guarantees of an accused. This right is realised in several ways. It includes also the right of the person to express his/her viewpoint on facts and legal issues. Implementation of that right, at least in the written form, must be ensured.

The Court held that the impugned provision, when providing that the Senate could extend detention after a year and six months, did not provide for the right of the accused to participate in the court hearing or to express his/her viewpoint in another way. The accused must be given the opportunity of becoming acquainted with the conclusions of the Court on the

extension of his/her detention and be given an opportunity to defend himself/herself. However, neither the provisions of the Code nor the case-law of the Senate on the extension of preventive detention safeguard the above-mentioned right. Consequently, the impugned provision did not guarantee the right to a fair court, laid down by Article 92 of the Constitution.

The Court declared that Article 77.7 (third sentence) of the Code of Criminal Procedure was incompatible with Article 92 of the Constitution, and null and void as of 1 October 2003, if by that date the law did not set out a procedure for ensuring the realisation of the right of the accused to be heard.

Cross-references:

Earlier decisions of the Court:

- no. 2001-08-01, *Bulletin* 2002/1 [LAT-2002-1-001];
- no. 2001-10-01;
- no. 2001-17-0106, *Bulletin* 2002/2 [LAT-2002-2-006];
- no. 2002-04-03, *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2002-06-01.

The European Court of Human Rights Judgments in Cases:

- *Sanchez-Reisse v. Switzerland*, Vol. 107, Series A of the Publications of the Court;
- *Niedbala v. Poland*;
- *Bezicheri v. Italy*, Vol. 164, Series A of the Publications of the Court;
- *Süßmann v. Germany*, *Bulletin* 1996/3 [ECH-1996-3-013]; *Reports* 1996-IV;
- *Assenov v. Bulgaria*, *Reports* 1998-VIII;
- *Lavents v. Latvia.*

The Czech Constitutional Court, 10.11.1998, Judgment in Case no. IV.US 358/98, *Bulletin* 1998/3 [CZE-1998-3-014].

Languages:

Latvian, English (translation by the Court).

Liechtenstein
State Council

Important decisions

Identification: LIE-2003-2-003

a) Liechtenstein / **b)** State Council / **c)** / **d)** 30.06.2003 / **e)** StGH 2002/72 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.22 **General Principles** – Prohibition of arbitrariness.
5.2.1.2 **Fundamental Rights** – Equality – Scope of application – Employment.

Keywords of the alphabetical index:

Employment, dismissal / Education, teacher, employment, system / Kindergarten, teacher, employment, contract.

Headnotes:

In principle, the legislator may make state school teachers subject not only to public law but also to private law. However, a legislative decision to make a given category of teachers holding full-time permanent posts subject to one system and all other full-time teachers subject to the other system, may be regarded as arbitrary. There is no objective justification, where legal relations arising out of employment contracts are concerned, for applying public law to teachers holding full-time permanent posts (e.g. primary school teachers) while applying private law to kindergarten teachers.

Summary:

As a result of a judicial appeal against the dismissal of a female kindergarten teacher, an application was lodged under the procedure for supervising legal rules laid down in Article 28.2 of the Law on the State Council *(StGHG)* with a view to securing a review of the constitutionality of Article 33.3 of the Law on the teaching service *(Lehrerdienstgesetz – LdG)*, which

lays down that the municipality must conclude private-law contracts with kindergarten teachers.

The State Council struck down this provision on grounds of unconstitutionality because it violated the principle of prohibition of abuses of rights.

The argument that kindergarten staff had shorter total working hours was rejected as a justification for such differentiation in terms of contracts of employment, since the shorter working time was justified on organisational grounds.

Languages:

German.

Lithuania
Constitutional Court

Statistical data
1 May 2003 – 31 August 2003

Number of decisions: 3

- 3 final decisions (2 of which are important).

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-2003-2-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 04.03.2003 / **e)** 27/01-5/02-01/03 / **f)** On the restoration of property rights / **g)** *Valstybės Žinios* (Official Gazette), 24-1004, 07.03.2003 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
3.19 **General Principles** – Margin of appreciation.
5.3.36.2 **Fundamental Rights** – Civil and political rights – Right to property – Nationalisation.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Restitution, criteria / Compensation, conditions.

Headnotes:

When regulating the restoration of real property rights, the legislature has the discretion to lay down the conditions and procedure for the restoration of those rights. This discretion is objectively defined by

the essential changes in the system of property since the unlawful expropriation of the property. When laying down such conditions and procedure with respect to existing real property, the legislature is bound by the Constitution and must therefore take into consideration the constitutional principle of the protection of the rights of ownership; the constitutional endeavour to achieve an open, the principle of a just and harmonious civil society and other constitutional values.

There is no conflict between the State's duty to the owners and its duty to the tenants of the houses, parts thereof or flats subject to being returned (or already returned) to the owners. The State's guarantees to the tenants are, at the same time, its guarantees to the owners, since only upon the fulfilment of the guarantees to the tenants, may the owners fully implement their rights of ownership, i.e. to possess, use and dispose of the houses, parts thereof and flats returned to them in kind. Thus, from a legal point of view, there is no conflict between the legal expectations of the owners and the tenants.

The seizure of property (with adequate compensation) is permitted only for public needs that cannot be objectively met if that particular property were not seized. A person whose property is seized for the needs of society has a right to demand compensation equivalent to the value of the property seized.

The question of whether property is seized for the needs of society is not determined by the person or entity (the State, municipality, legal or natural person) owning that property after the seizure but by whether the seizure of that property was in fact necessary to satisfy the needs of society, i.e. socially important objectives, which can only be achieved with the use of the particular property seized.

When considering the socially important objectives sought at the time a particular property was seized, the Court must rule on a case by case basis whether the needs for which property was seized were, in fact, those of society.

Summary:

The petitioners – the Kaunas Regional Court and a group of members of Parliament *(Seimas)* – applied to the Constitutional Court requesting it to determine whether some provisions of the Law "On the Procedure and Conditions for Restoration of Rights of Ownership of Citizens to Existing Real Property" (the Law) were in conflict with the Constitution of the Republic of Lithuania. The Kaunas Regional Court, one of the petitioners, also requested that the Court determine whether some provisions of the Governmental Resolution no. 27 "On the Compulsory Purchase of Residential Property Necessary for State Needs" of 17 January 1994 were in conflict with the Constitution and the Law.

The Constitutional Court recalled that after the 1940 nationalisation of private property by the occupying power and the subsequent expropriation of private property by other unlawful means, the inherent human right to possess private property had been denied. Residential property had also been nationalised and otherwise unlawfully expropriated, and attributed to the State public housing stock. Lawful State or public property could not and did not exist on the basis of such arbitrary acts by the occupying power, since no right may be founded on unlawfulness. According to the Constitutional Court, any property seized that way was to be considered as being only under *de facto* management by the State.

The nature of the relations between the State and the owners of the houses, parts thereof and flats subject to being returned was such that the owners had acquired the right to have restored, under the conditions and procedure established by law, their rights to the existing real property mentioned above by having it returned in kind, and where such return was not possible, to be compensated. The State had a duty to further regulate the restoration of the rights of ownership by law so that the rights of ownership to the existing real property would be restored to the owners. The owners had a legitimate expectation that their rights of ownership of the real property would be restored; their legitimate expectation was protected and safeguarded by the Constitution. The nature of the relations between the State and the tenants residing in the houses, parts thereof and flats subject to being returned (or already returned) was such that after the State had laid down the guarantees for the tenants, the tenants acquired a legitimate expectation that the State guarantees laid down and repeatedly reiterated by laws would be fulfilled. The State had a duty to establish a legal regulation and act in such a way so that its guarantees to the tenants would be fulfilled. The tenants' expectation was also protected and safeguarded by the Constitution.

The State had chosen limited restitution and not *restitutio in integrum*. Under that system, the citizens' rights of ownership are not restored as to the entire property that was unlawfully nationalised and expropriated, but as to the existing real property.

Under Article 23 of the Constitution, property may be seized from the owner only where it is necessary for the needs of society, justly compensated and where such seizure and compensation is in accordance with the procedure established by law. According to the

Constitutional Court, the needs of society under Article 23.3 of the Constitution are the interests of either the whole or part of society, which the State, while implementing its functions, is under a constitutional obligation to secure and serve. Where property is seized for the needs of society, one must strive for a balance between various legitimate interests of society and its members. The needs of society for which property is seized must always be particular and clearly expressed as to that particular property.

Seizure of property for the needs of society is linked in the Constitution not to the recipient of that property but to the objectives of its seizure: to use the item in the interests of society, for socially important objectives that may only be achieved with the use of the individual features of a particular item seized. It is therefore impossible to construe the term "needs of society" of Article 23.3 of the Constitution as prohibiting in all cases the seizure of property and its transfer into private ownership.

The needs of society are not static. Things that at a certain stage of development of a society and a State are regarded as the needs of society may be considered not in line with the constitutional concept of the needs of a society at a different stage of development of the society and the State, and vice versa.

The Constitutional Court ruled that while the impugned provisions of the Law were in conflict with the Constitution, those of Government of the Republic of Lithuania Resolution no. 27 "On the Compulsory Purchase of Residential Property for State Needs" of 17 January 1994 were not in conflict with the Constitution and the Law.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2003-2-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 17.03.2003 / **e)** 39/01-21/02 / **f)** On the Law on the Reorganisation of Joint-stock Companies "Būtingės nafta", "Mažeikių nafta" and "Naftotiekis" / **g)** *Valstybės Žinios* (Official Gazette), 27-1098, 19.03.2003 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.9 **General Principles** – Rule of law.
3.17 **General Principles** – Weighing of interests.
3.25 **General Principles** – Market economy.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.
5.4.7 **Fundamental Rights** – Economic, social and cultural rights – Consumer protection.

Keywords of the alphabetical index:

Economy, state regulation / Competition, protection.

Headnotes:

Article 46.3 of the Constitution provides that the State shall regulate economic activity so that it serves the general welfare of the Nation. This provision of the Constitution consolidates a principle that establishes the directions, ways of and limits of the regulation of economic activity. When regulating economic activity in this way, the State must strike a balance between the interests of the person and of society, and not deny the principle of fair competition and other principles of the Lithuanian economy that are entrenched in the Constitution.

The provision of Article 46.4 of the Constitution providing that the law shall protect freedom of fair competition also encompasses the obligation for the legislature to establish by law a regulation of the sphere so that the market and production will not be monopolised, that freedom of fair competition will be ensured and measures will be provided for its protection.

Article 46.5 of the Constitution consolidates the State's right to protect consumers' interests. Implicit in that provision is that the laws and other legal acts set out various measures of protection to secure consumers' interests and that State institutions check whether commercial entities are fulfilling the requirements established by laws and other legal acts.

Summary:

The petitioners – the Vilnius Regional Administrative Court and a group of members of the Parliament *(Seimas)* – applied to the Constitutional Court requesting it to determine whether the provision "after the strategic investor acquires the shares under Item 1 of Paragraph 1 of this Article, neither State nor municipal institutions will be permitted to raise additional claims against the joint-stock

company 'Mažeikių nafta' or its subsidiaries concerning the activity or failure to act of the joint-stock company 'Mažeikių nafta' or its subsidiaries or as regards other events that took place prior to the acquisition of the shares by the strategic investor" of Article 3.4 of the Republic of Lithuania Law on the Reorganisation of Joint-stock Companies "Būtingės nafta", "Mažeikių nafta" and "Naftotiekis" (wording of 5 October 1999) was in conflict with the principles of a just society and of a State governed by the rule of law that are entrenched in the Preamble to the Constitution of the Republic of Lithuania as well as with the provisions of Articles 5.1, 5.2, 46.3, 46.4 and 46.5 of the Constitution.

The petitioners argued that the legislature had deprived state and municipal institutions of the opportunity to raise additional claims against a commercial entity by the provision cited above of Article 3.4 of the Law. Due to that provision, the said institutions lost the ability to raise additional claims founded on the activities or failure to act of the aforementioned companies or events taking place prior to a certain date, i.e. the liability of the aforementioned companies vis-à-vis State and municipal institutions covering a very long period of time, save in cases where the claims advanced by those institutions were not additional ones. Moreover, the petitioners argued that with that provision of the Law, Parliament had restricted the powers of the Competition Board and violated the principle of the separation of State powers.

The petitioners also argued that the impugned provision of the Law deprived a State institution of the ability to regulate the activities of certain commercial entities by way of enforcing liability.

The Constitutional Court emphasised that the implementation of the rights and legitimate interests of various commercial entities, including that of the rights and interests relating to fair competition, might be linked to decisions of State and municipal institutions and claims arising from those decisions. If State and municipal institutions were prohibited from raising claims concerning activity or failure to act of the joint-stock company "Mažeikių nafta" or its subsidiaries or as regards other events prior to the acquisition of the shares by the strategic investor under Article 3.1.1 of the Law, the rights and legitimate interests of the said commercial entities, the implementation of which might be linked to the claims raised by State and municipal institutions, would be violated.

The Court stressed that the legislature, in seeking to restructure a certain sector of the country's economy, might choose various ways of doing so (also for the purpose of attracting a strategic investor). Where the legislature regulates a sector of the economy in a way which is different from other sectors, and where it establishes a special situation for individual commercial entities, it must also include in the law measures for compensating damage or making amends to other entities in order to cover the damage or loss for which the commercial entities that are in a special legal situation are no longer liable.

The Constitutional Court also noted that where the legislature regulates the relations in a sector of the economy in which a special legal situation of certain commercial entities is established, and where it provides in other laws the exceptions to that regulation, it must also lay down additional legislative measures to ensure the protection of the rights and legitimate interests of consumers.

The Constitutional Court ruled that impugned provision was in conflict with Article 46.3, 46.4 and 46.5 of the Constitution as well as the constitutional principle of a State governed by the rule of law; to the extent that the impugned provision set out that municipal institutions were not permitted to raise the additional claims indicated in that provision, it was in conflict with Articles 20.2 and 122 of the Constitution.

Supplementary information:

A strategic investor is an investor who takes a majority stake in a privatised company and undertakes to fulfil a number of conditions set by the Government (such as maintaining a certain level of employment or certain production lines, minimum investment, etc.).

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2003-2-005

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 24.03.2003 / **e)** 3/01 / **f)** On the censorship of the correspondence of convicts / **g)** *Valstybės Žinios* (Official Gazette), 29-1196, 26.03.2003 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.16 **General Principles** – Proportionality.
5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.
5.3.33.1 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Correspondence.

Keywords of the alphabetical index:

Prisoner, correspondence, censorship.

Headnotes:

When regulating the restriction of the human rights and freedoms of persons serving prison sentences, including their right to the inviolability of correspondence, the legislature is bound by the Constitution. Under the Constitution, only a law setting out the grounds and procedure of a restriction may restrict the right of convicts to the inviolability of correspondence. The restriction should not violate the reasonable relation between the adopted means and the legitimate and common important objective sought. To attain this objective, measures may be established which would be sufficient and which would restrict the rights of the person no more than necessary.

Summary:

The petitioner – the Vilnius Regional Administrative Court – made a reference to the Constitutional Court as to whether Article 41.2 of the Code of Correctional Labour (the CCL) of Lithuania (wording of 2 July 1997) stating that the correspondence of convicts must be censored was in conflict with Article 22 of the Constitution.

The petitioner stated that Article 41.2 CCL provided for the right of some persons to the inviolability of private life to be restricted. The petitioner questioned whether the provision of Article 41.2 CCL stating "the correspondence of convicts must be censored", in the absence of a procedure established by law and sub-statutory acts, infringed the right of convicts to the inviolability of private life.

The Constitutional Court emphasised that under Article 41.2 CCL, all correspondence of persons serving prison sentences, except for cases specified in Article 50.2 CCL, had to be censored irrespective of whether such restriction of the inviolability of correspondence was necessary in a democratic society and without consideration of the objective sought and whether such restriction was proportionate to the objective sought.

The Court ruled that the provision "the correspondence of convicts must be censored" of Article 41.2 of the Code of Correctional Labour to the extent that it established obligatory censorship of the correspondence of persons serving a prison sentence without establishing by law the grounds for such censorship was in conflict with Article 2 of the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2003-2-006

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 09.04.2003 / **e)** 17/01 / **f)** On the institution *actio Pauliana* / **g)** *Valstybės Žinios* (Official Gazette), 36-1594, 16.04.2003 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
5.2 **Fundamental Rights** – Equality.
5.3.36 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Actio Pauliana / Debt, settlement / Debtor, insolvent, assets, transfer to third party / Creditor, rights.

Headnotes:

The Constitution of Lithuania does not prohibit the institution of *actio Pauliana*. The institution *actio*

Pauliana aims at protecting the rights of a creditor from a dishonest debtor who, having transferred his property to a third party, becomes insolvent, and is therefore unable to pay the debts he owes to the creditor and thereby violates the rights of the creditor. *Actio Pauliana* is a request by the creditor that a transaction made by the debtor transferring his property to a third party be declared null and void. The effect of *actio Pauliana* is *restitutio in integrum*. The *actio Pauliana* amounts to an attempt to ensure that, once the restitution is carried out, the debtor can pay the debts owed to the creditor.

Summary:

The petitioner – the Mažeikiai Local District Court – made a reference to the Constitutional Court as to whether Article 571.3 and 571.4 of the Civil Code (the CC) of Lithuania (wording of 11 June 1998) conflicted with Articles 23 and 29 of the Constitution.

The petitioner stated that Article 571 CC granted the creditor a right to challenge a transaction concluded by the debtor that was prohibited if it violated the creditor's rights and the debtor knew or should have known of that violation. The petitioner questioned whether paragraph 3 providing "the relief on the basis of the creditor's claim against the debtor shall aim at the restitution of the property transferred under the transaction or, in the event of impossibility, at the fair market value of the property insofar as it is necessary to satisfy the creditor's claim" and paragraph 4 providing "a person, who has concluded a transaction with a debtor, in the event that the transaction is declared null and void, must return not only what he obtained under such a transaction, but also any earnings gained before the transaction was declared null and void insofar as they exceed the expenses for the maintenance of the property" of Article 571 CC (wording of 11 June 1998) were in conflict with Article 29 of the Constitution, setting out the principle of equality of persons before the law, the court, and other State institutions and their officials.

The petitioner submitted that the impugned provisions granted advantages to the creditor. On the basis of that regulation of the matter, a third party concluding a transaction with a debtor might suffer negative legal consequences, regardless of his good or bad faith, i.e. regardless of whether he knew or should have known that a transaction violated the creditor's rights, he must return not only what he obtained under the transaction, but also any profits he made before the transaction was declared null and void. The petitioner submitted that the provisions of Article 571.3 and 571.4 CC were also in conflict with Article 23 of the Constitution (the protection of the rights of ownership) for the reason that the impugned provisions of Article 571 CC did not sufficiently protect the rights of ownership of a third party acting in good faith.

The Constitutional Court emphasised that the courts may declare a transaction concerning a purchase for value null and void subsequent to an application by a creditor. The Constitutional Court also noted that where, upon application by the creditor, the courts declare null and void a transaction concerning a purchase for value, then the purchaser who concluded the transaction in good faith with the debtor may demand that the debtor return what he paid or gave him.

The Court ruled that the following were not in conflict with the Constitution:

- Article 571.3 of the Civil Code of Lithuania to the extent that it provides that a transaction concerning a purchase for value concluded by a debtor and a third party is declared null and void upon a request by the creditor, the relief as to the creditor's claim against the debtor shall be aimed at the restitution of the property transferred under the transaction concerning a purchase for value or, in the event of impossibility, at the fair market value of the property insofar as it is necessary to satisfy the creditor's claim; and

- Article 571.4 to the extent that it provides that a person, who has concluded a transaction concerning a purchase for value with the debtor, in the event that the transaction is declared null and void, must return not only what he obtained under that transaction, but also the earnings he made before that transaction was declared null and void insofar that they exceed the expenses for the maintenance of the property.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2003-2-007

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 30.05.2003 / **e)** 21/2003 / **f)** On the Elections to Municipal Councils / **g)** *Valstybės Žinios* (Official

Gazette), 53-2361, 31.05.2003 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.8.4 **Institutions** – Federalism, regionalism and local self-government – Basic principles.
5.3.37 **Fundamental Rights** – Civil and political rights – Linguistic freedom.

Keywords of the alphabetical index:

Municipal council, member, incompatibility / Municipal council, member, resignation, date of effect.

Headnotes:

According to the Constitution, state administration and local self-government are two systems of public authority. The same persons may not discharge the executive functions 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 the prohibition of a double mandate: state officials who, according to the Constitution and laws, enjoy the powers to review or supervise the activities of municipal councils may not be members of municipal councils. In cases where a legal situation occurs that a person discharging the executive functions of state power or a state official who, under the Constitution and laws, enjoys the powers to review or supervise activities of municipalities is elected member of a municipal council, that person must decide, before the newly elected municipal council holds its first sitting, whether to remain in his or her current office or be a member of the municipal council.

Summary:

The petitioner, the Vilnius Regional Administrative Court, applied to the Constitutional Court requesting it to examine:

1. whether or not Article 4.2 of the Republic of Lithuania Law (hereinafter − the Law) supplementing and amending Articles 86 and 87 of the Law on the Elections to Municipal Councils and its supplementary Article 881 was in conflict with Articles 5.1, 5.2, 59.4, 60.1 and 60.2 of the Constitution;
2. whether or not the Government Resolution no. 457 "On the Dismissal of the Chief of the Vilnius County" of 11 April 2003 was in conflict with the principle of a State governed by the rule of law entrenched in the Preamble to the Constitution and Article 9.1 of the Law "On the Procedure of Publication and Coming Into Force of the Laws and Other Legal Acts of the Republic of Lithuania".

1. The Law was adopted as a reaction to a 24 December 2002 Constitutional Court Ruling. The Constitutional Court noted that the wording "that person must decide, before the newly elected municipal council holds its first sitting, whether to remain in his or her current office or be a member of the municipal council", employed in the Constitutional Court ruling of 24 December 2002, meant that before the first sitting of the newly elected municipal council, that person had to, according to the procedure established by law, declare his or her decision either to remain in the office he or she held or be a member of the municipal council. Where that person decides to be a member of the municipal council, then before the first sitting of the newly elected municipal council, a declaration must be made, according to the procedure established by laws, that that person has resigned from the office that is incompatible with that of member of the municipal council. Where that person has decided to remain in office and not be a member of the municipal council, then before the first sitting of the newly elected municipal council, a declaration must be made, according to the procedure established by law, that that person has forfeited the mandate of member of the municipal council. The law must establish a legal regulation that resolves the issue of the legal status of such a person before the first sitting of the newly elected municipal council.

However, according to Article 4.2 of the Law, the provisions of Article 881.2 of the Law on Elections to Municipal Councils concerning the timing of a refusal of a mandate of council member are to be applied from the next municipal council elections onwards.

While interpreting the legal regulation established by Article 4.2 of the Law, the Constitutional Court noted the fact that the Law had come into force on 25 February 2003. The elections to the municipal councils for the 2003-2007 term of office had been held on 22 December 2002. Upon the entry into effect of the Law, the first sittings of the newly elected municipal councils for the 2003-2007 term of office had not yet been held.

The Constitutional Court emphasised that the legal regulation established by Article 4.2 of the Law meant that a person elected to the municipal council during

the elections for the 2003-2007 term of office, whose office was incompatible with that of member of the municipal council and who had "decided to refuse the mandate of member of the municipal council" under Article 3 of the Law, was not required to declare his or her decision to refuse that mandate before the first sitting of the newly elected municipal council, and that a declaration of that person's loss of mandate was not required to be made before the first sitting of the newly elected municipal council. The Constitutional Court ruled that Article 4.2 of the Law supplementing and amending Articles 86 and 87 of the Law on the Elections to Municipal Councils and its supplementary Article 881 was in conflict with some provisions of the Constitution.

2. The Constitutional Court noted that Government Resolution no. 457 "On the Dismissal of the Chief of the Vilnius County" of 11 April 2003 dismissed G. Paviržis from the office of Chief of the Vilnius County as from the date indicated in his application. It was clear from the case material that in his application, G. Paviržis had requested to be dismissed from the office of Chief of the Vilnius County as from 8 April 2003. The impugned Government resolution was adopted on 11 April 2003 and published in the Official Gazette *Valstybės Žinios* on 16 April 2003. Consequently, G. Paviržis had been dismissed from the office of Chief of the Vilnius County by the impugned Government resolution before that resolution was adopted, published and came into force. The impugned Government resolution itself came into force on 17 April 2003, i.e. on the day after its publication in the Official Gazette *Valstybės Žinios;* the effect of the resolution's content was retroactive.

The Constitutional Court emphasised that one of the requirements of the constitutional principle of a State governed by the rule of law in the field of state administration is that the power of legal acts that decide the issues of state administration should be prospective.

The Constitutional Court ruled that the impugned Government resolution was in conflict with the constitutional principle of a State governed by the rule of law and Article 9.1 of the Law "On the Procedure of Publication and Coming Into Force of the Laws and Other Legal Acts of the Republic of Lithuania".

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2003-2-008

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 10.06.2003 / **e)** 13/02-22/02 / **f)** On the regulation concerning the imposition of the criminal penalty / **g)** *Valstybės Žinios* (Official Gazette), 57-2552, 13.06.2003 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.2.3 **Sources of Constitutional Law** – Categories – Unwritten rules – Natural law.
3.9 **General Principles** – Rule of law.
3.16 **General Principles** – Proportionality.
4.5.2 **Institutions** – Legislative bodies – Powers.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.

Keywords of the alphabetical index:

Punishment, penal, just / Punishment, individualised / Count, power of appraisal, restriction.

Headnotes:

The principle of natural justice consolidated in the Constitution presupposes that punishments established by penal laws must be just. The constitutional principles of justice and a state governed by the rule of law imply, *inter alia,* that the means used by the state must be proportionate to the objective sought. The establishment is not permitted of punishments or the severity of punishments for criminal offences that are obviously inappropriate for those criminal offences and the purpose of the punishment.

The legislator, having constitutional powers to set out punishments and the severity of those punishments for criminal offences, has a duty to set the maximum limits on the punishments for particular criminal offences. Failure to do so would create a situation embodying the pre-requisites for the imposition of unreasonably severe punishments and the violation of human rights and freedoms. According to the Constitution, the legislator may also establish minimum punishments for certain criminal offences.

When the legislator, in an article laying down the constitutive elements of a particular criminal offence,

provides for a punishment that is severe due to the length of the minimum term of imprisonment for that criminal offence, the legislator must also ensure that a legal provision exists giving the Court that imposes punishment a discretion to take into account all circumstances of the case relevant to mitigation of sentence, including those which have not been *expressis verbis* established by the law, and to impose a less severe punishment than that provided for by the law.

Under the Constitution, it is impossible to have a legal regulation of the matter (punishments or their severity) in the penal laws establishing that a court, when taking into account all circumstances of a case and applying the penal laws, would not be able to individualise the punishment imposed on a particular person for the commission of a particular criminal offence.

Summary:

The petitioner, the Court of Appeal of Lithuania, applied to the Constitutional Court requesting it to examine whether or not Article 45.4 (wording of 2 July 1998) and the minimum punishment of five years' imprisonment laid down by Article 312.3 of the Criminal Code (hereinafter − CC) (wording of 3 February 1998) were in conflict with Article 31.2 of the Constitution and the constitutional principle of a state governed by the rule of law. A second petitioner, the Panevežys Regional Court, applied to the Constitutional Court requesting it to examine whether or not Article 45.4 CC (wording of 2 July 1998) was in conflict with Article 29.1 and Article 31.2 of the Constitution.

The Court of Appeal of Lithuania stressed that in the application of Article 312.3 CC (wording of 3 February 1998), the Court was obliged to impose a punishment of not less than five years' imprisonment and a fine on a person who had committed a particular criminal offence, even though the imposition of such a severe punishment was not always in line with the principle of justice. Article 45 CC, under certain conditions and in certain situations enables the Court to avoid imposing a clearly unjust punishment and enables it to impose a less severe punishment than the one provided for by the law, where a particular sanction does not allow it to take into account the nature of the crime and the person who committed it. However, Article 45.4 CC (wording of 2 July 1998) provided that the criminal offences in question did not fall under Article 45.2 CC, which would have permitted the imposition of less severe punishment than that provided for in the law. The petitioner was of the opinion that singling out certain crimes so as to prohibit the imposition of a less severe punishment than the one provided for in the particular sanction (i.e. application of Article 45 CC) fettered the court's discretion to examine the case justly and to individualise the punishment.

The Constitutional Court considered that under the Constitution, it would be impossible to have a legal regulation of the matter (punishments or their severity) in the penal laws establishing that a court, when taking into account all circumstances of a case and applying the penal laws, would not be able to individualise the punishment imposed on a particular person for the commission of a particular criminal offence.

The Court ruled that Article 45 CC (wording of 2 July 1998) to the extent that it restricted the right of the Court, when taking into account all circumstances relevant to mitigation of sentence, including those not specified by the law, to impose a less severe punishment than the one provided for by Article 312.3 CC (wording of 3 February 1998) was in conflict with Article 31.2 of the Constitution as well as the constitutional principle of a state governed by the rule of law. The Court also ruled that the provision of Article 312.3 CC (wording of 3 February 1998) "shall be punished by imprisonment from five years (…)" was not in conflict with Article 31.2 of the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Moldova
Constitutional Court

Important decisions

Identification: MDA-2003-2-003

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 27.05.2003 / **e)** 34 / **f)** Review of constitutionality of certain provisions of Article 11 of Law no. 544-XIII of 20 July 1995 on the statute of judges and of Article 19 of Law no. 947-XIII of 19 July 1996 on the Judicial Service Commission, as amended by Law no. 373-XV of 19 July 2001 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.21 **General Principles** – Equality.
4.4.1 **Institutions** – Head of State – Powers.
4.7.4.1.2 **Institutions** – Judicial bodies – Organisation – Members – Appointment.
4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.

Keywords of the alphabetical index:

European Charter on the Statute of Judges / Judge, appointment, power of proposal / Judge, new appointment / Judge, refusal of candidature.

Headnotes:

The exercise of the power of the President of the Republic to appoint judges laid down in Article 116.2 of the Constitution is not subject to any conditions and, accordingly, the President has the discretion to take an optional decision in regard to the candidature proposed by the Judicial Service Commission. The President may appoint a new candidate or remove a judge from office only on presentation of the proposal concerned by the Judicial Service Commission and is therefore required to state the grounds on which the candidature proposed is refused.

Summary:

Parliament adopted Law no. 373-XV of 19 July 2001 in order to amend and supplement certain legislative acts whereby it amended and supplemented Law no. 544-XIII of 20 July 1995 on the statute of judges and Law no. 947-XIII of 19 July 1996 on the Judicial Service Commission.

A group of Members of Parliament submitted an application to the Constitutional Court. The application asserts that, on 19 July 2001, Parliament adopted Law no. 373-XV in order to amend and supplement certain legislative acts. That law amended and supplemented a number of laws on the judicial organisation, including Law no. 544-XIII of 20 July 1995 on the statute of judges and Law no. 947-XIII of 19 July 1996 on the Judicial Service Commission.

The Members of Parliament maintained that the application of Article 11.3 and 11.4 of the Law on the statute of judges and of Article 19.4 of the Law on the Judicial Service Commission led to a flagrant breach of Article 26.1 of the Constitution, which guarantees that every person, including judges, is to have the right of defence, and also of Articles 116.2, 116.4 and 123.1 of the Constitution.

In support of the application, the applicants also rely on Recommendation no. R(94)12 on the independence, efficiency and role of judges, adopted by the Committee of Ministers of the Council of Europe on 13 October 1994 and containing a provision similar to the constitutional provision in Article 116 of the Constitution.

On 21 March 2003, the Parliament adopted Law no. 140-XV amending Article 11 of Law no. 544-XIII of 20 July 1995 on the statute of judges.

Following those amendments, on 22 March 2003, the applicants supplemented the application of 22 January 2003, relying on the arguments previously raised.

The Constitutional Court compared the contested statutory provisions with the provisions of the Constitution, the international acts and the applicable domestic legislation, and held as follows.

The Constitution provides expressly that all citizens are equal before the law and the authorities, without distinction based on race, nationality, ethnic origin, language, religion, sex, opinion, political allegiance, assets or social origin.

According to Articles 116 and 123 of the Constitution, the judges and the judicial organs are independent, impartial and irremovable, in accordance with the law. The Judicial Service Commission is responsible for appointments, transfers and promotions to duties and applies disciplinary measures to judges.

Under the provisions of the Constitution, the following take part in the appointment of judges: the Judicial Service Commission, which ensures (prepares in a certain, lasting and guaranteed manner) the appointment of judges, validates by voting the proposals for the appointment of judges and submits proposals to the President of the Republic and the Parliament concerning the appointment of judges. The President of the Republic and the Parliament, in the exercise of their powers, appoint the judges proposed by the Judicial Service Commission.

Having regard to the fact that, according to the European Charter on the Statute for Judges (point 3.3), a decision refusing to renew an appointment must be based on the proposal, the recommendation, the opinion or the agreement of an independent body, the legislature provided in Article 11.4 of the Law that the definitive decision concerning the refusal of the candidature proposed for the appointment of a judge aged below the maximum permitted age, and also the decision to remove a judge from his post because his powers have lapsed, is to be adopted solely on a proposal from the Judicial Service Commission pursuant to Articles 25.1.j and 25.2 of Law no. 544-XIII.

Exercising its power of constitutional review, the Court declared constitutional the provisions of Article 11.3 and 11.4 of Law no. 544-XIII of 20 July 1995 on the statute of judges, as amended by Law no. 373-XV of 19 July 2001 amending and supplementing certain legislative acts and by Law no. 140-XV of 21 March 2003 amending Article 11 of Law no. 544-XIII of 20 July 1995 on the statute of judges, and also the provisions of Article 19.4 of Law no. 947-XIII of 19 July 1996 on the Judicial Service Commission, as amended by Law no. 373-XV of 19 July 2001.

Dissenting opinion

One judge delivered a dissenting opinion. In his view, the contested provisions entail a violation of Articles 26.1, 26.2, 116.2, 116.4 and 123.1 of the Constitution and also of Recommendation no. R(94)12 of the Committee of Ministers of the Council of Europe, of the European Charter on the Statute for Judges and of the Fundamental Principles on the Independence of Judges adopted by the UNO.

The judge considered that the decision of the Court was unfounded and that the contested provisions were unconstitutional.

Languages:

Romanian, Russian.

Identification: MDA-2003-2-004

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 29.05.2003 / **e)** 10 / **f)** Review of constitutionality of certain provisions of Law no. 588-XIII of 22 September 1995 on trade marks and denominations of origin of products, as supplemented by Law no. 65-XV of 12 April 2001, and of Government Decrees no. 852 of 16 August 2001 on the detailed rules on the use of trade marks constituting State property and no. 1080 of 8 October 2001 on the approval of the List of trade marks constituting State property / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
3.25 **General Principles** – Market economy.
4.10.8 **Institutions** – Public finances – State assets.
5.3.37 **Fundamental Rights** – Civil and political rights – Linguistic freedom.

Keywords of the alphabetical index:

Trade mark, transfer of rights / Trade mark, filed, by two or more persons.

Headnotes:

In presenting in Article 2.6 of Law no. 588-XIII the concept of well-known mark, the legislature is stipulating, consistently with the international measures, the conditions on which a well-known mark may be recognised as the exclusive property of the State, making clear that this exclusive right does not refer to trade marks lawfully held and used before 1 January 1992 by two or more legal persons. They may use such marks, in the same way as the State, during the action seeking registration of the trade mark or of the denomination of origin of the goods. Consequently, there can be no question of a restriction of the constitutional right to property and of other associated rights.

Summary:

An application was brought seeking the consideration of this case by the Supreme Court of Justice, which

involved reviewing the constitutionality of certain provisions of Law no. 588-XIII of 22 September 1995, as amended by Law no. 65-XV of 12 April 2001, and of Government Decrees no. 852 of 16 August 2001 on the detailed rules on the use of trade marks – property of the State, and no. 1080 of 8 October 2001 on the approval of the List of trade marks – property of the State.

The application states that the amendments introduced in that Law and those Decrees constituted infringements of Articles 1, 46, 102, 126 and 127 of the Constitution, in breach of the right of property and of other associated rights.

The Constitution of the Republic lays down the principles of the market economy, based on public and private property. Property thus becomes an essential element of society and of the State.

However, Article 46 of the Constitution states that the right to private property, and also debts incurred by the State, are guaranteed and that no one may by deprived of his property except for a reason of public interest, determined in accordance with the law, in return for fair compensation paid in advance.

Law no. 588-XIII of 22 September 1995 on trade marks and denominations of origin of goods governs the registration, legal protection and use of trade marks and of denominations of origin of goods.

Article 1 of the First Protocol to the Convention on the Protection of Human Rights and Fundamental Freedoms of 4 November 1050 states that every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

Article 6 bis of the Paris Convention of 20 March 1883 on the protection of industrial property provides that the contracting countries undertake to refuse or to cancel the registration of a trade mark which constitutes a reproduction, an imitation, or a translation liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a national of another contracting country and used for identical or similar goods.

In its Judgment of 21 February 1986 (Series A, no. 98), the European Court of Human Rights stated that the deprivation of property might, in certain circumstances, be in the “public interest”. However, such a measure depriving a person of his property must preserve a just balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

According to Law no. 488-XIV of 8 July 1999 on expropriation in the public interest, a public interest declaration is made in respect of works of national interest or of local interest. Works of national public interest are those which meet the objectives and interests of the whole or the majority of society.

For the purpose of implementing those provisions, Law no. 65-XV amended and supplemented Law no. 588-XIII and the Government adopted the measures forming the subject-matter of the case.

In the Court's opinion, in supplementing Article 6 of Law no. 588-XIII, the legislature implemented both the provisions of the international treaties cited and the constitutional provisions in Article 72.3.i on the regulation of the general legal regime of property and Article 126.2.c, which provides that the State must ensure the protection of the national interests in the economical and financial activities and in activities relating to foreign currencies.

In this way, by the provisions of Article 6.4 of Law no. 588-XIII, the State did not limit the general law on trade marks, but limited the exclusive right on trade marks lawfully held or used before 1 January 1992 by two or more legal persons. The use of those marks by those legal persons or by their successors in title does not constitute a breach of the right of the owner of the registered trade mark.

By Article 6.5 of Law no. 588-XIII, trade marks lawfully used before 1 January 1992 by two or more legal persons were declared the property of the State and the Government was required to establish the detailed rules for their use.

Decrees no. 852 and no. 1080, which contain the list of trade marks belonging to the State and the regulation on the detailed rules for the use of those trade marks, were adopted by the Government for the purpose of implementing the provisions in question.

Having regard to the arguments submitted to it, the Constitutional Court held that Article 6.4 and 6.5 of Law no. 588-XIII of 22 September 1995, as amended by Law no. 65-XV of 12 April 2001, and Government Decrees no. 852 and no. 1080 were consistent with the Constitutional provisions, with the Universal Declaration of Human Rights and with the other covenants and treaties to which the Republic of Moldova is a party.

Languages:

Romanian, Russian.

Identification: MDA-2003-2-005

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 03.06.2003 / **e)** 11 / **f)** Constitutional review of Law no. 718-XII of 17 September 1991 on parties and other social and political organisations, as amended by Laws no. 146-XIV of 30 September 1998, no. 367-XIV of 29 April 1999, no. 795-XIV of 10 February 2000 and no. 1534-XV of 13 December 2002 amending and supplementing Law no. 718-XII of 17 September 1991 on parties and other social and political organisations / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.3.1 **General Principles** – Democracy – Representative democracy.
4.9.7.3 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Registration of parties and candidates.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Political party, member, list, renewal / Party, persons responsible, obligation to report / Political party, definition.

Headnotes:

A political party is an association which has the aim of applying an ideology relating to the government of society. The political party has a managing body, composed of responsible persons, with responsibility to the members of the party and to society for the activities for the managing organs of the party, for discipline and for providing evidence both within the framework of the party and in relation to the other institutions of society.

The measures concerning evidence and the responsibility placed on the leaders in the context of the parties, the submission of reports to the public institutions and the collection of signatures of their members do not restrict the right of free association in parties, as guaranteed by Article 41.1 of the Constitution.

Article 41.4 of the Constitution provides that parties and other social or political organisations may be dissolved if they are declared unconstitutional where, by their activities, they are engaged in fighting against political pluralism, the principles of a State governed by the rule of law, the sovereignty and independence, and also the territorial integrity, of the Republic.

Summary:

A Member of Parliament brought an application to the Constitutional Court for consideration of this case, which involved reviewing the constitutionality of Law no. 718-XII of 17 September 1991 on parties and other social and political organisations, as amended by Law no. 146-XIV of 30 September 1998 amending Article 5.3.a, by Law no. 367-XIV of 29 April 1999 replacing the word “150” in that article by the word “600”, by Law no. 1534-XV of 13 December 2002 amending and supplementing Articles 15.2, 18.3, 20.1, 21.1 and 32.1 of that law.

The amendments to the Law on political parties and other social and political organisations introduced by those laws establish the number of members necessary to register the articles of association of a party and the conditions on which a party ceases its activities. According to the new provisions, the Supreme Court of Justice declares that a party has ceased its activities and may dissolve it where the party has not convened a congress for four years, or has not, within the period prescribed by law, submitted the lists of its members, renewed annually. On the date on which the lists of the members of the party are checked, it may be declared that the number of members has fallen below the limit fixed for registration of the articles of association.

The applicant challenged the rules according to which parties must submit annually to the Ministry of Justice, between 1 January and 1 March, the lists of their members in order to confirm that they have the minimum number of members, and the capacity of member must be recorded annually in the lists of members of the party or of other social and political organisations.

The applicant maintained that the abovementioned provisions limited the citizen's right of free association and limited the practical application of political pluralism as a constitutional principle. Those provisions required the completion of certain

organisational and evidential acts which, in his view, amounted to a new annual registration of political parties and diverted their attention from the implementation of their action programmes and required the questioning of members of the party and annual confirmation of their political choice at the initiative of the organ of the party of which they were members, thus failing to have regard for the constitutional provision on the individual's right of free association.

The Court considered that the proceedings concerning the constitutional review of Article 5.3.a of Law no. 718-XII, as amended by Law no. 146-XIV determining the number of members necessary for registration of the status of the party, had to be stayed, as it had previously ruled on the constitutionality of that article, by Judgment no. 3 of 29 January 1999.

The Court held that the measures concerning evidence and the responsibilities placed on the management organ of the party, the submission of reports to the public institutions, and also the collection of members' signatures, did not restrict the right to associate freely in parties, as guaranteed by Article 41.1 of the Constitution.

The Court stated that, according to their legal nature, the provisions on the cessation of the activities of the party were in the nature of a sanction as they specify the conditions on which the party or other social and political organisations may be dissolved.

Under Article 41.4 of the Constitution, parties and other social and political organisations may be dissolved only if they are declared unconstitutional and if, by their aims or activities, they are engaged in fighting against political pluralism, the principles of a State governed by the rule of law, the sovereignty and independence or the territorial integrity of the Republic.

The European Court of Human Rights has held in its judgments, emphasising the importance of democracy in the system of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that political parties are covered by Article 11 and that, accordingly, their dissolution by the authorities of the State must satisfy the requirements of Article 11.2 of the Convention.

At its 41st session (10-11 December 1999), the Venice Commission adopted seven guidelines on the prohibition and dissolution of political parties and similar measures. In those principles, the Venice Commission reiterated the findings of the European Court establishing that the prohibition or dissolution of a political party had to be decided by the Constitutional Court or other appropriate judicial body in a procedure offering all guarantees of due process, openness and a fair trial.

In exercising its power to apply its constitutional jurisdiction, the Court held that the following provisions were constitutional: the word “600” in Article 5.3.a of Law no. 718-XII of 17 September 1991 on parties and other social and political organisations, as amended by Law no. 367-XIV, the provisions of Articles 15.2.e, 18.3.4 and 20.1 of Law no. 718-XII of 17 September 1991, as amended by Law no. 1534-XV, the words “The capacity of member shall be recorded in the lists of members of the party or of another social and political organisation according to the rules laid down in the regulation on the registration of parties and other social and political organisations” in Article 21.1 of Law no. 718-XII, as amended by Law no. 1534-XV.

The Court declared the provisions of Article 32.1 of Law no. 718-XII, as amended by Law no. 1534-XV, unconstitutional.

Dissenting opinion

Two judges delivered a dissenting opinion. By Judgment no. 11 of 3 June 2003, the Court held that the words “The capacity of member shall be recorded in the lists of members of the party or of another social and political organisation according to the rules laid down in the regulation on the registration of parties and other social and political organisations” were constitutional.

In the view of the dissenting judges, the periodical reconfirmation by signature of adherence to the party restricted the individual's right of free association in the form of a party, the right to political identity and, indirectly, the right to freedom of movement, since the person concerned was required to remain in the administrative and territorial unit during the period in which signatures were collected. The judges considered that the Court's decision was unfounded and that the contested provisions were unconstitutional.

Languages:

Romanian, Russian.

Identification: MDA-2003-2-006

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 19.07.2003 / **e)** 12 / **f)** Constitutional review of Law no. 1260-XV of 19 July 2002 on the profession of lawyer / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

4.7.15.1.1 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Organisation.
5.3.26 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Bar, obligation to join / Bar, Council, members, conditions of eligibility / Lawyer, bar, membership, obligation.

Headnotes:

The general principles of the profession of lawyer require the establishment by law of certain guarantees for the purpose of exercising that activity in the Republic in accordance with the principles and norms generally recognised by international law and the Constitution of the country. The provisions on the autonomous administration of lawyers by the Bar, adopted by the majority of lawyers, are recognised as guarantees of the activity of providing legal assistance and are consistent with the provisions of the Constitution (Articles 1, 4-8, 15, 16, 20 and 26).

The introduction of a minimum seniority in the profession of lawyer in order to be eligible for the Bar Council or the Ethical and Disciplinary Committee is within the competence of legislation and has as its purpose the selection of candidates with professional experience and a high level of qualifications.

Summary:

Certain Members of Parliament brought an application for consideration of this case, which involved a review of the constitutionality of Law no. 1260-XV of 19 July 2002 on the profession of lawyer.

The applicants asserted that the provisions of Article 31 of Law no. 1260-XV established a monopoly by members of the Bar over the activities of lawyers. Taking the view that all lawyers in the Republic came within the jurisdiction of the lawyers' autonomous administrative bodies and relying on the grounds of Judgment no. 8 of the Constitutional Court of 15 February 2000 on the constitutional review of certain provisions of Law no. 395-XIV of 13 May 1999 on the profession of lawyer, the applicants maintained that the provisions of Articles 31-42 of the law were contrary to Article 42 of the Constitution, which guarantees the right to establish and join trade unions, and to Article 43 of the Constitution, which guarantees the right to work and protection against unemployment.

They also maintained in the application for review that a person who had obtained a licence to practise as a lawyer and who was a member of the Bar should be entitled to be elected to the Bar Council or to the Bar's Ethical and Disciplinary Committee without being required to have a minimum level of seniority as a lawyer, since the sole condition for access to the Bar was that the person concerned obtain the requisite number of votes.

On 18 April 2003, the applicants supplemented their initial application by a request for constitutional review of Law no. 1260-XV in its entirety, since, in their view, that law had been adopted in breach of the provisions of Articles 2, 64.1 and 72-76 of the Constitution. They maintained that, following the adoption of the law after a second reading, certain provisions which had not been voted on had been introduced, certain provisions had been omitted and certain titles had been amended.

The fundamental human right of freedom of association, which is protected by numerous international instruments to which the Republic of Moldova is a party, presumes that everyone is free to form or join associations without being authorised to do so by the State.

According to its statutes and to the legal rules governing it set out in Law no. 1260-XV, the Bar exercises powers in the public interest in order to ensure justice, the independence of lawyers and compliance with the professional ethical rules.

The Bar is established by the intention of lawyers expressed in Congress, which is regarded as lawfully assembled if the majority of lawyers in the Republic participate in its work (Article 32.3 of Law no. 1260-XV).

The professional association of lawyers (Bar), which is known in European practice, has public-law status and is established by the legislature in order to ensure public control of the exercise of the profession.

For lawyers in the Republic, this control entails the need to join an independent administrative organ of lawyers; that, according to the law, is the case of the Bar ; lawyers must submit to the authority of the Bar. The Bar exercises a public function, which none the less preserves the autonomy of its members.

Membership, even compulsory membership, of a professional association (Bar) is not characterised by the European Court of Human Rights as an interference with freedom of association and is not regarded as a restriction of the rights guaranteed by Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms. On the contrary, it represents an advantage in the protection of professional rights.

By its decision of 2 July 1990 in the case of *Association of Spanish Lawyers v. Spain*, the European Commission of Human Rights considered that professional organs are essentially public-law organs, having missions of general interest, and are not institutions within the meaning of the law governing associations. Accordingly, the Bar cannot be regarded as an association within the meaning of Article 11 of the Convention; the legislature has conferred on it the status of professional organisation of lawyers by attributing to it powers governed by the ordinary law and of public interest. According to the case-law of the European Court on professional associations, an institution of a public-law nature, like the Bar established on the conditions laid down by Law no. 1260-XV, is regarded as acceptable and as consistent with the requirements of the Convention.

Freedom of association, within the meaning of Article 11 of the Convention, is the purpose of Article 30 of Law no. 1260-XV, which provides that, in order to protect their rights and interests, lawyers are entitled to associate voluntarily, in accordance with the legislation on non-commercial organisations, in local, central and international professional associations, acquiring the capacity of member, individually or collectively, and to join such associations according to the relevant procedures.

Consequently, the provisions of Law no. 1260-XV, examined from the aspect of the right of lawyers to associate freely, including by forming a Bar, do not infringe the constitutional provisions on the right to form and joint trade unions (Article 42).

The Constitutional Court considered that the claims of the applicants for constitutional review that there had been a violation by Law no. 1260-XV of the lawyers' right to work and to be protected against unemployment were unfounded.

The activity of lawyer is remunerated by the fees received from natural and legal persons, and the amount of the fees is determined by agreement between the parties and cannot be altered by the public authorities or by the court.

The State guarantees that lawyers will be paid in full for legal aid granted *ex officio* at the request of the prosecution authorities and the courts (Article 54.1-54.3).

As regards the amendments to Law no. 1260-XV following its adoption, the Court stated that the Constitutional Court had addressed the problems relating to the legislative procedure on a number of occasions.

In examining the text of the Bill and the amendments to the text of Law no. 1260-XV, published in *Monitorul Oficial* no. 126-127 of 12 September 2002, the Court held that the amendments to the text of Law no. 1260-XV following its adoption did not distort the concept of the law and did not alter the meaning of its provisions. Being purely of a drafting nature, they do not infringe the rights and freedoms enshrined in the Constitution and in other laws.

Consequently, the arguments of the applicants for review that Law no. 1260-XV had been adopted in breach of Articles 2, 64.1 and 72-76 of the Constitution could not be upheld.

For the reasons stated and in the light of the considerations set out, the Court considered that Law no. 126-XV of 19 July 2002 on the profession of lawyer was compatible with the Constitution.

Languages:

Romanian, Russian.

Identification: MDA-2003-2-007

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 05.08.2003 / **e)** 17 / **f)** Constitutional review of certain provisions of Government Decree no. 1202 of 8 November 2001 concerning certain measures to regulate the use of aquatic basins / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

4.6.2 **Institutions** – Executive bodies – Powers.
4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
4.8.6.2 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Executive.
4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.
4.15 **Institutions** – Exercise of public functions by private bodies.
5.3.37 **Fundamental Rights** – Civil and political rights – Linguistic freedom.

Keywords of the alphabetical index:

Property, municipal, management, restriction / Public property, right of use, transfer to a private body.

Headnotes:

In approving the lists of fish-breeding aquatic basins which constitute the public property of the State, and in obliging the local public administrative authorities to cancel decisions relating to leases on such aquatic basins, the Government disregarded both the principles of the organisation and functioning of local autonomy and the management by the local public administration of the property subject to such management.

Furthermore, by transferring to a private undertaking the right to participate in various ways in the management of the aquatic basins constituting the public property of the administrative and territorial units, the Government exceeded its legal powers.

Summary:

Certain Members of Parliament brought an application for the consideration of this case, which involved reviewing the constitutionality of Articles 4, 6 and 10 of Government Decree no. 1202 of 8 November 2001 on certain measures to regulate the use of aquatic basins.

The applicants claimed that the provisions of those articles of the decree infringed the provisions of Articles 4, 8, 109, 112, 126 and 127 of the Constitution, the legislation in force and the provisions set out in Article 4 of the European Charter of Local Self-Government of 15 October 1985, to which the Republic of Moldova is a party, infringing the right of administrative and territorial units to possess, use and dispose of public property.

The Constitution lays down the fundamental principles of the local public administration (Chapter VIII). The public administration in the administrative and territorial units is based on the principles of local autonomy, the decentralisation of public services, the eligibility of the local public administrative authorities and consultation of citizens on local problems of special interest.

The Constitution regards the local public administration as an integral part of the public authorities of the State and requires that the State contribute to the development and protection of local public administration, which, within the limits of its powers, is autonomous. The rules on the right of local autonomy and the decentralisation of public services are set out in Articles 112 and 113 of the Constitution.

By Articles 4 and 6 of Decree no. 1202 on certain measures to regulate the use of aquatic basins, the Government approved the lists of fish-breeding aquatic basins which constitute the public property of the State, obliging the local public administrative authorities to annul decisions concerning leases on those aquatic basins. Article 10 of the Decree provides that the use of aquatic basins for fish-breeding is to be authorised by the fish-breeding service and subject to the opinion of the association *"Piscicola"*, which, together with the local public authorities, are to establish the artificial aquatic basins owned by local authorities and other beneficiaries.

The Court compared the provisions of Articles 4, 6 and 10 of Decree no. 1202 with the provisions of the Constitution, the applicable legislation and international treaties and declared them unconstitutional.

The Court also observed that the Government did not consult the local public administration on that problem when it obliged it to cancel leases on the aquatic basins. However, by transferring to a private undertaking the right to participate by various means in the management of the aquatic basins constituting the public property of the administrative and territorial units, the Government exceeded its legal powers and infringed the constitutional provisions referred to, and also the provisions of the European Charter of Local

Self-Government, which, under Articles 4 and 8 of the Constitution, are to prevail over any national laws which are contrary to the international acts to which the Republic of Moldova is a party.

Languages:

Romanian, Russian.

Norway
Supreme Court

Important decisions

Identification: NOR-2003-2-004

a) Norway / **b)** Supreme Court / **c)** / **d)** 13.05.2003 / **e)** 2003/37 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
3.20 **General Principles** – Reasonableness.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Photo, in the courtroom, reportage.

Headnotes:

The general rule is that photography in the courtroom after the court is adjourned and publication of any such photographs are forbidden; however, the ban does not apply under exceptional circumstances.

Summary:

In May 2002, A. was fined for violation of the provisions of the Court of Justice Act relating to the publication of photographs taken of B. while in the building where a hearing was held. The Court of Appeal found B. guilty of the rape and murder of two

8- and 10-year old girls. In imposing the sentence, the Court of Appeal acted on the basis that the murders were premeditated; committed in order to conceal the rapes and evade punishment for sexual abuse; and committed under particularly aggravating circumstances. The Court of Appeal sentenced B. to 21 years' preventive detention with a minimum term of 10 years, and the accomplice to 19 years' imprisonment. The film footage taken of B. as he was leaving the courtroom after sentencing lasted only a few seconds. The footage was part of that evening's television channel TV 2's news broadcasts at 6.30 p.m. and 9.00 p.m. The actual footage showed a person leaving the courtroom half grinning and chewing gum. The news broadcasts also contained an interview with his defence counsel who stated that B. "was disappointed; this was reasonably clear from his body language". The punishment for A. for showing the footage was a fine of NOK 25,000 or 25 days' imprisonment. A. did not pay the fine. The case was referred to the District Court, which in a judgment of 5 December 2002 acquitted him. The prosecuting authority appealed directly to the Supreme Court against the application of the law as to the question of guilt.

In the Supreme Court, a majority of three justices dismissed the appeal. The majority found that the general prohibition against photography in Section 131.a of the Court of Justice Act was, in the case of photography in the courtroom, basically valid in relation to the requirements of Article 10 ECHR on freedom of speech. However, the ban was to be applied subject to the reservation arising from the evaluation of necessity under Article 10.2 ECHR.

The majority found that there were exceptional circumstances. B. had been convicted of crimes of such a shocking nature that the news media, including TV 2, had found it right to refrain from referring to details. The criminal case had generated extreme public interest. The public had long known his identity and seen his photograph. B's personal qualities and anomalies had been central in the case and mentioned in the news media. Even if his conduct immediately after sentencing was very unusual, it could be doubtful whether that alone would be sufficient for limiting the application of the prohibition under Article 10 ECHR. But when those circumstances were seen in conjunction with the defence counsel's comments to TV 2 about B's conduct, it put the case in an entirely different position. The defence counsel used vis-à-vis the public B's body language as an argument that B. was disappointed, in other words that he reacted "normally" to the sentence. Given that TV 2 had footage that very strongly indicated that the body language expressed something entirely different from what the defence counsel expressed, showing the footage as a correction to the defence counsel's statement was justified. The majority reached the conclusion that the encroachment on A's rights entailed a violation of Article 10 ECHR and that the District Court's acquittal was based on the correct application of the law.

Two justices agreed with the majority's interpretation of the Court of Justice Act and Article 10 ECHR; however, in the concrete weighing of the interests involved, the minority found that the publication of the footage was also unlawful in relation to Article 10 ECHR. The defence counsel merely expressed his own opinion of the defendant's body language. His statement could not deprive B. of the protection to which, in the minority's opinion, he would have otherwise been entitled. TV 2 should have been able to describe B's conduct without showing footage of him in the courtroom. The encroachment on the freedom of speech was not disproportionate in relation to the general public's right to receive information or the media's interest in communicating it.

Languages:

Norwegian.

Identification: NOR-2003-2-005

a) Norway / **b)** Supreme Court / **c)** / **d)** 23.06.2003 / **e)** 2002/1285 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Contempt of court, fine, without prior notice / Witness, contempt of court.

Headnotes:

A system where the courts may, without specific prior notice, impose a fine for contempt of court on witnesses who either fail to appear without a lawful excuse or fail to give notice of a lawful excuse in due time is compatible with the right to a fair trial under Article 6 ECHR.

Summary:

The Court of Appeal fined A. NOK 3,000 or four days' imprisonment for contempt of court for failure to appear as a witness in a criminal case in spite of having been lawfully summoned.

A. appealed against the ruling to the Appeals Selection Committee of the Supreme Court. A decision was made that the appeal in full was to be tried by the Supreme Court. The Chief Justice decided that the rules applicable to appeal cases were to apply to the oral proceedings between the parties.

The appeal concerned two questions: the first was whether the substantive conditions under Section 205.1 of the Court of Justice Act were satisfied; and the second was whether the fact that A. had not been given specific notice and the opportunity to express his opinion before the imposition of the fine for contempt of court constituted a procedural error. Concerning procedure, A. submitted that it was contrary to Article 6.1 and 6.3 ECHR to impose a fine for contempt of court without prior notice.

The defence counsel relied on, among other things, the Supreme Court's decision in *Rt*. 1997, page 1019 [NOR-1997-2-002] in support of the submission of an unconditional right to express one's opinion before a fine is imposed.

The Supreme Court found that the system where Norwegian trial and appellate courts may, without giving specific prior notice, impose fines for contempt of court on witnesses who either fail to appear without a lawful excuse, or who fail to give notice of a lawful excuse in time, was compatible with the right to a "fair trial" under Article 6 ECHR. According to the national classification, a fine for contempt of court is a "criminal charge", but the Convention was not infringed. Decisive is a full assessment of the system: an overall evaluation showed that sufficient guarantees of due process of law were incorporated into the system, and as a result Article 6 ECHR was not violated. It should also be taken into account that the printed text in the witness summons contains a notice that a fine may be imposed for failure to appear without a lawful excuse, that the court imposing the fine has the authority to reverse the ruling, cf. Section 215.2 of the Court of Justice Act, that it is assumed that the witness will be advised thereof on notification of the ruling, and that the decision may be appealed to the Court of Appeal, which has full competence with regard to facts and application of the law. It is clear that the nature of the cases must also carry weight, including the issue to be assessed under Section 205.1.

As regards the decision in *Rt*. 1997, page 1019, the Supreme Court stated that that case concerned an entirely different situation: that case did not concern a question of sanctions against witnesses who failed to appear, but concerned a fine for contempt of court imposed on a party and his lawyer for having filed an obviously unfounded lawsuit, cf. Section 202 of the Court of Justice Act. It was, in other words, a case concerning parties who had appeared and been present at the court hearing, but who were without notice fined for contempt of court in the judgment that decided the dispute between the parties.

The ruling contains a general description of the rules relating to fines for contempt of court pursuant to the provisions of the Court of Justice Act and in particular Section 215.

In the concrete evaluation, the Supreme Court left the question open whether an appointment for an x-ray examination on the same day as a court hearing amounts to a lawful excuse. In any event, A. had not given notice of his lawful excuse in time. It was not a violation of Section 38 of the Criminal Procedure Act for the Supreme Court to rely on that alternative.

The conditions for imposing a fine for contempt of court were accordingly satisfied, and the appeal was dismissed.

Cross-references:

- *Bulletin* 1997/2 [NOR-1997-2-002].

Languages:

Norwegian.

Identification: NOR-2003-2-006

a) Norway / **b)** Supreme Court / **c)** / **d)** 01.07.2003 / **e)** 2002/922 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
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.
5.3.30.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Defamation, through press / Information, false, nullification.

Headnotes:

It is the European Convention on Human Rights and the practice of the European Court of Human Rights that are the primary sources of law when Norwegian courts must draw the line for defamatory statements that can be made the object of punishment or a declaration that the defamatory statements are null and void. When weighing the relevant interests under Article 10 ECHR, an assessment must be made on the basis of several criteria.

Summary:

B. is A.'s spouse and owns a property in the municipality of X. On 8 June, *"Tønsbergs Blad"* published a report about non-compliance with the obligation to reside on that property. Front-page headlines read: "Can be forced to sell" with the subheading, "C. and A. must explain themselves regarding the obligation to reside on their property". The text contained the following statement:

> "Obligation to reside on a property: C. may, at worst, be forced to sell his property at ... The same applies to A. According to Tønsbergs Blad's information, their properties are on a list that the municipal authorities of X. will in the near future send to the County Governor. The list contains properties where it is believed that the obligation to reside on the property is not complied with."

The item on the front page was followed up with an article on page 3. It was illustrated with photographs of the properties and bore the heading: "The municipal authorities of X. are flushing out offenders of the residence obligation". The preamble read:

> "Both singer C. and director A. may be forced to sell their properties at X. The reason is that, according to the municipal authorities of X., they have not complied with their obligation to reside on their properties."

A. later received from the Chief Municipal Officer written confirmation that the property was not subject to the residence obligation for the reason that the property had been acquired as an open (unbuilt) plot of land, and that it was not until later that a house was built on it. On 30 June, "*Tønsbergs Blad"* featured a major article where that was made clear, and elaborated on it in another article on 8 August 2000. In the article of 30 June, it was stated that also C's property was not subject to the residence obligation.

A. initiated private prosecution proceedings against "*Tønsbergs Blad"* and the editor in charge seeking punishment, a declaration that the defamatory statements were null and void, and damages for non-economic loss. The City Court found that the article of 8 June contained a defamatory accusation against A. but that accusation was not unlawful and, therefore, acquitted the newspaper. The Court of Appeal, with dissenting opinions, handed down a judgment declaring the defamatory statements null and void, and awarded damages for non-economic loss. A unanimous Court of Appeal agreed with the City Court that the statements contained a defamatory accusation under Section 247 of the Penal Code, and that no clear and convincing proof of the allegation had been presented. The majority of the Court − two professional judges and two lay judges − found that the statements were also unlawful and could therefore be the object of an declaration of being null and void, and amounted to grounds for damages for non-economic loss. The minority − a professional judge and two lay judges − agreed with the City Court that the newspaper had to be acquitted on the grounds of the absence of unlawfulness. The newspaper was acquitted as to punishment, as there was no qualified majority in favour of punishment.

The appeal to the Supreme Court concerned the application of the law. The appeal was dismissed with one dissenting opinion.

A unanimous Supreme Court found that the newspaper had made a defamatory accusation about facts. The core of the accusation was that A. was on a list that was drawn up by the municipal authorities and contained the names of individuals that the local authorities believed had breached their duty to reside on their properties. The Supreme Court stated that the decision in *Rt.* 2002, page 764 (not summarised in the *Bulletin*) underlined the fact that it is the Convention and the practice of the European Court of Human Rights as to that Convention that are the primary source of law when Norwegian courts are to define the defamatory statements that may be the object of punishment or a declaration of being null and void. When weighing the relevant interests involved under Article 10 ECHR, an assessment must be made on the basis of several criteria.

That the statement containing the accusation was of interest to the general public was − in the majority's opinion − a fundamental condition for the media's own presentation of false defamatory allegations about actual facts aimed at private individuals to be regarded as protected by the freedom of speech. The majority found that the question of enforcement of the obligation to reside on a property in a coastal municipality was clearly of public interest, but whether properties/owners were on a list to be forwarded by the municipal authorities to the County Governor was of limited public interest. A. could not automatically be regarded as a public person in relation to the issue of the obligation to reside on the property. It could not be assumed that the newspaper had passed on a defamatory accusation made by others. No source of the accusation had been stated, and the Supreme Court could not depart from the Court of Appeal's assessment of evidence as regards the fact that the newspaper relied on an anonymous source for the information that A. was on the list that was to be forwarded to the County Governor and that his property “had thus been considered more carefully in respect of a breach of the obligation to reside on the property”. That was the basis of the accusation that the local authorities believed that A. had breached the said obligation. In the case of the use of anonymous sources, the requirement of due care is made more stringent, and it must, to a considerable extent, be at the risk of the newspaper whether or not the information presented as fact is actually true. There were no written documents from any municipal examination of the case, and at the time the accusation was published, the reporter had no other factual indications that the allegation was true.

The minority agreed that the newspaper had made a false defamatory accusation and that as a general rule, such an accusation, according to the European Court of Humans Rights' interpretation of Article 10 ECHR, is not protected by the freedom of speech. However, the conditions for an exemption were satisfied in the case in question. The publication of a possible breach of the obligation to reside on the property on the part of A. was of general public interest, and the newspaper could not be reproached to any great extent for confusing the tip-off list with the list that the municipal authorities were to forward to the County Governor for a decision on compliance with the obligation to reside on the property.

Languages:

Norwegian.

Poland
Constitutional Court

Statistical data
1 May 2003 − 31 August 2003

I. Constitutional review

Decisions:
- Cases decided on their merits: 25
- Cases discontinued: 0

Types of review:
- *Ex post facto* review: 25
- Preliminary review: 0
- Abstract review (Article 22 of the Constitutional Tribunal Act): 20
- Courts referrals ("points of law"), Article 25 of the Constitutional Tribunal Act: 5

Challenged normative acts:
- Cases concerning the constitutionality of statutes: 21
- Cases on the legality of other normative acts under the Constitution and statutes: 4

Holdings:
- The statutes in question to be wholly or partly unconstitutional (or subordinate legislation violating the provisions of superior laws and the Constitution): 12
- Upholding the constitutionality of the provision in question: 13

Precedent decisions: 6

II. Universally binding interpretation of laws

- Resolutions issued under Article 13 of the Constitutional Tribunal Act: 25
- Motions requesting such interpretation rejected: 0

Important decisions

Identification: POL-2003-2-013

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 28.01.2003 / **e)** K 2/02 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
5.2 **Fundamental Rights** – Equality.
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, ban / Alcoholism, prevention.

Headnotes:

Some provisions of the Act on the Prevention of Alcoholism impose a ban on the advertising and promotion of products and services that use the likeness or the identity of distinctive marks or symbols objectively related to alcohol. Other provisions impose a ban on the advertising and promotion of alcohol that use other distinctive features related to beverages containing alcohol, their producers or distributors. As far as the above-mentioned provisions are understood as not banning advertising and promotion that use features coincidently similar to the distinctive features of products containing alcohol or producers of alcohol, they are compatible with commercial and industrial freedom, the right to property and the right to equal treatment.

Summary:

The Tribunal examined a case brought before it in a motion filed by the Polish Confederation of Private Employers.

The Tribunal stressed that although Poland was not directly obliged to apply the *acquis communautaire* in the pre-accession period, the Tribunal shared the opinion that priority should be given to the interpretation of law that complies with the concepts accepted by the Community law and case-law. The Tribunal noted that the case should be reviewed in the context of the *acquis communautaire*.

The Tribunal emphasised that the restrictions on the advertising of alcohol were justified by the protection of public health and that the ban on advertising was construed in a neutral way without distinguishing national from foreign producers and distributors. Moreover, pursuant to the Community case-law (e.g. the *Gourment* case), an assessment of the proportionality of the measures is to be done on the basis of the local situation.

In that respect, the Tribunal took into account the extent of the social problem of alcoholism in Poland on the one hand, and the conscious economic decision to promote non-alcoholic drinks by using distinctive marks already used for products containing alcohol, on the other hand. Therefore, the Tribunal held that the restrictions on commercial freedom were proportionate and justified in the light of the aim of the restrictions, i.e. the protection of public health. The restrictions amounted to an appropriate measure for achieving that aim.

Cross-references:

- Decision of 21.11.2000 (K 4/00);
- Decision of 08.10.2001 (K 11/01);
- Decision of 27.09.1997 (K 15/97);
- Decision of 28.03.2000 (K 27/99), *Bulletin* 2000/2 [POL-2000-2-010];
- Decision of 24.10.2000 (K 12/00);
- Decision of 08.04.1998 (K 10/97);
- Decision of 15.07.1996 (K 5/96);
- Decision of 08.05.2000 (SK 22/99);
- Decision of 24.01.2001 (SK 30/99), *Bulletin* 2001/1 [POL-2001-1-004].

Languages:

Polish. Substantial parts of the judgment are also available in English.

Identification: POL-2003-2-014

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 19.02.2003 / **e)** P 11/02 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
3.12 **General Principles** – Clarity and precision of legal provisions.
4.12.3 **Institutions** – Ombudsman – Powers.
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:

Civil proceedings, judgment, final / Appeal, extraordinary, time-limit.

Headnotes:

The provisions of the Code of Civil Procedure providing that the Ombudsman has a right to file an appeal in cassation within 6 months after a judgment is delivered to the party is incompatible with the constitutional rule of access to courts insofar as those provisions do not precisely state when a judgement of the court of appeal becomes final.

Summary:

The Tribunal examined a case referred to it by the Supreme Court.

An appeal in cassation, which is considered and determined by the Supreme Court, is an extraordinary remedy at law for parties taking part in proceedings. An appeal in cassation is filed with the court that issued the judgment or decision under appeal within one month after the delivery that judgment or decision to a party. The legal provisions in question give the Ombudsman the power to file an appeal in cassation within 6 months after the delivery of a judgment or decision to the party.

The Tribunal found that the Act failed to state when precisely a judgment of the Court of appeal became final. That failure might diminish the efficiency of civil proceedings and have a negative impact on the exercise of the right of access to the courts.

In a democratic state governed by the rule of law, the legal provisions concerning an individual's rights and obligations must meet some minimal standards of clarity and preciseness. That enables an individual to foresee decisions taken by the state institutions and the consequences thereof. The moment a court judgment becomes final is important for safeguarding the individual's interests. Therefore, it must be regulated in an unambiguous manner that leaves no doubts as to interpretation. Failure to do

so would infringe on the constitutional right of access to the courts.

One judge dissented.

Cross-references:

- Decision of 10.05.2000 (K 21/99), *Bulletin* 2000/2 [POL-2000-2-013];
- Decision of 09.06.1998 (K 28/97), *Bulletin* 1998/2 [POL-1998-2-013];
- Decision of 11.06.2002 (SK 5/02), *Bulletin* 2002/2 [POL-2002-2-018];
- Decision of 13.05.2002 (SK 32/01).

Languages:

Polish. Substantial parts of the judgment are also available in English.

Identification: POL-2003-2-015
(A revised version of this précis will be published in the next issue)

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 26.02.2003 / **e)** K 1/01 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
3.21 **General Principles** – Equality.
4.5.2 **Institutions** – Legislative bodies – Powers.
5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.
5.3.41 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Foster family, social aid / Child, disabled, care, costs.

Headnotes:

The provision of the Act on Social Assistance that differentiates between the situation of children in foster families and dependants under other kinds of social welfare is incompatible with the rule of equal treatment.

Summary:

The Tribunal examined a case referred to it by a court.

The Tribunal reiterated its opinion according to which social assistance had to be granted to children in foster families, even though those children were not considered dependants.

The Convention on the Rights of the Child sets out that all actions carried out by public or private social assistance institutions concerning children must take into account the protection of the children's interests.

It does not fall within the jurisdiction of the Tribunal to determine the scope and method of differentiating the situation of disabled children. That issue falls within the discretion of the legislative body, whose members are politically responsible to their voters for the use of and the results of the use of their legislative powers. The Tribunal examined whether the mechanism of granting social assistance adopted by the legislator resulted in the breach of any constitutional values e.g. equality.

When a foster child no longer lives with a foster family, it means that pursuant to the above-mentioned provision, social assistance for the costs of living of a child in a foster family is taken back. The Court concluded that the existing regulation breached the constitutional principle of equality. It deprived foster families of financial support for the costs of living of children who had reached the age of majority and were pursuing their studies.

Cross-references:

- Decision of 26.04.1995 (K 11/94);
- Decision of 20.11.1995 (K 23/95);
- Decision of 17.06.1996 (K 8/96);
- Decision of 19.12.1999 (K 4/99).

Languages:

Polish. Substantial parts of the judgment are also available in English.

Identification: POL-2003-2-016

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 29.04.2003 / **e)** SK 24/02 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.3.1 **General Principles** – Democracy – Representative democracy.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.

Keywords of the alphabetical index:

Local self-government, European Charter / Referendum, local, subject.

Headnotes:

The provision of the Act on Local Referendums providing that the citizens of a local community express their will directly by referendum in relation to issues that concern the community and fall within the scope of the competences of local authorities or in relation to issues that concern the revocation of the powers of local authorities is not incompatible with the rule of a democratic state governed by the rule of law, the principle of organising local referendums or Article 5 of the European Charter of Local Self-Government.

Summary:

The Tribunal examined a case brought before it in a motion filed by the Ombudsman.

The Tribunal recalled that two principles coexist in relation to democracy at a local level: the principle of the execution of local self-government tasks by local authorities, and the principle of the direct expression of the will of the local community in all matters that are of vital importance to that community.

The Constitution provides that citizens of a local community have the right to express their will by means of two kinds of referendums: the first is fully binding and decisive; and the second reflects the community's opinion or amounts to a consultation, unless the second kind of referendum influences or constructively influences a final decision concerning that local community.

Where an issue is subject to a referendum, the local authority is obliged to take prompt action to implement results of the referendum. That may also mean that the local authority is obliged to express a relevant opinion or to take a stand that complies with the results of the referendum.

The provisions of the European Charter of Local Self-Government complete the constitutional principles on local referendum.

In connection to the above, the provision of the Act on Local Referendums shall be interpreted as not excluding the rights of citizens of the local community to participate in referendums in order to express their opinions on crucial issues relating to social, economical and cultural factors that are common to that community.

Cross-references:

- Decision of 13.02.1996 (W 1/96), *Bulletin* 1996/1 [POL-1996-1-004].

Languages:

Polish. Substantial parts of the judgment are also available in English.

Identification: POL-2003-2-017

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 05.03.2003 / **e)** K 7/01 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.
5.3.29 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

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:

Secret service, past co-operation, publishing.

Headnotes:

It is an infringement of the principle of equality for a state journal publishing information to apply a uniform definition to different legal and factual situations of work, service or cooperation with the secret service authorities without distinguishing the relevant time and kind of secret service activity. The legislator treats equally situations that are not identical. As to public opinion regarding an individual under investigation, both the kind of function he or she performed and the character of the activity in the secret services are important.

A duty to publish information on the cooperation of individuals with the secret services in the same manner in all cases and to treat all cases the same infringes the right of the persons under investigation to the equal protection of private and family life, the right to respect for one's honour and reputation, and the right to decide on one's personal life.

Summary:

The Tribunal examined a case brought before it in a motion filed by the Ombudsman.

The impugned provisions regarding the disclosure and publication of employment or cooperation with the secret service authorities require the publication in a state journal of the contents of Part A of the Statement, that is to say, only the part that discloses the mere fact that one has worked (employment/cooperation) for the secret service authorities, but contains no details of the kind of work or kinds of tasks performed, or the post held. That information is normally contained in Part B of the Supplement, which is not published in a state journal.

The provisions of the Act on the Disclosure of Work or Service of Public Officers in the State Secret Service or Cooperation with the State Secret Service Authorities between 1944 and 1990 that set out the confidentiality and non-publication of the data disclosed in Part B of the Supplement and data relating to the tasks performed in the secret services and the relevant time are incompatible with the right to equality, the right to respect for one's reputation and with the guarantees of private life and family life. However, they are not incompatible with the right to respect for one's dignity.

Cross-references:

- Decision of 27.02.2002 (K 47/01);
- Decision of 21.10.1998 (K 24/98).

Languages:

Polish. Substantial parts of the judgment are also available in English.

Identification: POL-2003-2-018

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 18.03.2003 / **e)** K 50/01 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Clarity and precision of legal provisions.
3.18 **General Principles** – General interest.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Veterinary surgeon, right to practice, professional qualifications.

Headnotes:

The profession of veterinary surgeon is one involving the trust of the public and is organised in such a way that bodies of self-regulation supervise the prudent and diligent practice of the profession. An important issue such as permitting some activities performed by veterinary surgeons to be performed by unqualified persons needs to be regulated in the form of a statute. A provision of the Act amending the Act on Veterinary Surgeons and the Veterinary-Medical Society that amended the nature of the rule-making powers delegated to the minister without stating the precise limits on the exercise of the delegated powers

or directions as to the content of the regulations is incompatible with the rule of precision in the delegation of powers to issue regulations.

Summary:

The Tribunal examined an application filed by the National Veterinary and Medical Council.

The provision in question amended the rule-making powers delegated to the minister to determine the scope and manner by which permission could be given to persons who are not qualified as veterinary surgeons to perform some activities that are usually performed by veterinary surgeons.

That delegation of powers to issue such regulations was found to have no precise limits and directions as to the content of such regulations. That provision allows for regulations to be issued that do not implement the statute. The legislator infringed the constitutional nature of a regulation, that is to say, an act that implements a statute but does not replace the statute itself.

A regulation based on an unconstitutional provision must also be considered unconstitutional.

In order to enable the legislator to adjust the content of the provision to the situation created by the judgment, the Tribunal determined that the provision would cease to be binding as of 18 March 2004.

Cross-references:

- Decision of 22.11.1993 (U 7/92), *Bulletin* 1999/3 [POL-1999-3-017];
- Decision of 25.04.1995 (U 9/94);
- Decision of 19.12.1999 (K 10/99);
- Decision of 29.05.2002 (P 1/01), *Bulletin* 2002/2 [POL-2002-2-017];
- Decision of 17.10.2000 (K 16/99);
- Decision of 26.10.1999 (K 12/99), *Bulletin* 1999/3 [POL-1999-3-027];
- Decision of 22.05.2001 (K 37/00).

Languages:

Polish. Substantial parts of the judgment are also available in English.

Identification: POL-2003-2-019

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 01.04.2003 / **e)** K 46/01 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
4.8.7.1 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Finance.
4.8.7.2 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Arrangements for distributing the financial resources of the State.

Keywords of the alphabetical index:

Local self-government, taxation.

Headnotes:

The provision of the Act on the Goods and Services Tax and Excise Duty providing that local self-government authorities must, without charging stamp duty, issue certificates affirming payment of the agriculture tax so that a taxpayer may obtain fuel coupons and that those authorities must prepare reports as to the fulfilment of this task without receiving any additional financial means is compatible with the constitutional guarantees of the financial independence of local self-government bodies.

Summary:

The Tribunal examined an application filed by Municipality in the City of *Przemysl*.

The Tribunal drew attention to the limited financial means available to public bodies. Therefore, in the determination of the participation of local self-government bodies in public revenue, the financial standing of the whole state must be taken into account. When distributing financial means among local self-government and local state bodies, the legislator must consider not only the scope of the duties assigned to local self-government bodies but also those assigned to local state bodies.

Two things should be noted: the first, the solutions implemented by the provisions did not cause a decrease in the revenue of the self-government bodies; and the second, the newly assigned tasks

were not a serious burden on the local self-government bodies. At the same time, the presumed revenue from the stamp duty that might have been collected by local self-government bodies would have been negligible.

Consequently, the provisions in question did not infringe the substance of the financial independence of local self-government bodies or their participation in public revenues.

There was also a dissenting opinion.

Cross-references:

- Decision of 16.03.1999 (K 35/98), *Bulletin* 1999/1 [POL-1999-1-006].

Languages:

Polish. Substantial parts of the judgment are also available in English.

Identification: POL-2003-2-020

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 28.04.2003 / **e)** K 18/02 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) / **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.
5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to family life – Descent.
5.3.41 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Child, born out of wedlock / Child, recognition by one of the parents / Father, biological / Child, best interests.

Headnotes:

A provision of the Family Code that makes the validity of the recognition of a child by a man conditional on the mother’s consent is compatible with the constitutional guarantees of the child's interests.

Where a man is not granted an independent right to initiate court proceedings for determining a child's origins, it may result in a complete deprivation of the opportunity to recognise paternity. That would be contrary to the constitutional guarantees of the child's rights and would infringe the principle of access to the court.

Summary:

The Tribunal examined an application filed by the Ombudsman.

The Tribunal noted that the principle of the protection of a child's interests gives priority to a method of determining a child's origins that recognises family relations on the basis of natural relationships. In the Tribunal's opinion, the statutory mechanisms for identifying the father, e.g. the recognition by a father (out of court with the mother's consent) and the determination by a court of paternity, needed to be examined separately.

The recognition of a child by a man that is its biological father constitutes an alternative to court proceedings. Therefore, the determination of family relations by means of the former mechanism requires particular consideration of the interests involved. The validity of the father's statement recognising a child is conditional on the mother’s consent. The mother’s consent constitutes an additional safeguard and prevents abuse of the mechanism in a way that may be contrary to the child's best interests.

The Tribunal emphasised that the proper recognition of a child's civil status is of great importance for the protection of both its non-proprietary interests (such as right to its own biological identity, the relations with its natural parent and its family) and proprietary interests (such as the right to child support and the right to inherit).

The failure of the Family Code to provide a man with an independent right to initiate proceedings seeking the judicial determination of a child's origins is incompatible with the constitutional guarantee of the child's rights and infringes the principle of access to the court.

Cross-references:

- Decision of 12.11.2002 (SK 40/01), *Bulletin* 2003/1 [POL-2003-1-005].

Languages:

Polish. Substantial parts of the judgment are also available in English.

Identification: POL-2003-2-021

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 29.04.2003 / **e)** SK 24/02 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Contract, leasing, termination grounds.

Headnotes:

The provision of the Civil Code providing that the parties to a lease for a fixed term must specify the grounds for termination in the lease is not incompatible with the constitutional provision providing that the introduction of limitations on the freedom of economic activity is only admissible in the form of a statute and only on the ground of great public interest. The provision concerns all leases and contracts of tenancy concluded for a fixed term, whether or not a party is an entrepreneur. Therefore, the provision does not impose direct limitations on the commercial market but relates to the market as a whole.

Summary:

The Tribunal examined a constitutional claim.

The provision in question governs the unilateral termination of a lease (and respectively, a contract of tenancy) concluded for a fixed term. Unilateral termination is permitted only if the events specified in the lease (or the contract of tenancy) occur. The provision limits the parties' freedom to determine their legal relations.

However, the provision in question is not a special statutory instrument directly relating to economic freedom. The provision defines a scope of freedom of contract and interferes with freedom of economic activity in a factual way.

In the case in question, it was not possible to determine whether the provision was in breach of the provision of the Constitution providing for the possibility of limiting the freedom of economic activity. The provision of the Constitution on which the applicant relied does not set out any directives that may be used to assess the provision in question.

Cross-references:

- Decision of 24.10.2001 (SK 10/01).

Languages:

Polish. Substantial parts of the judgment are also available in English.

Identification: POL-2003-2-022

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 19.05.2003 / **e)** K 39/01 / **f)** / **g)** *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest) / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
3.10 **General Principles** – Certainty of the law.
4.5.2 **Institutions** – Legislative bodies – Powers.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.
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:

Foreigner, residence permit, requirements / Family reunification / Family, protection.

Headnotes:

A provision of the Act on Foreigners creating more favourable conditions for the settlement of foreigners coming to Poland in order to join a family, *inter alia*, providing for a shorter period of continuous stay in the territory of Poland before being able to file an application for a residence permit with the right to settle in Poland, is not incompatible with the constitutional principle of equality or the principle of social justice.

A provision that allows only a foreigner to file an application for family reunification and deprives a Polish citizen of this right grants a legal status to a Polish-foreign family that is less favourable than the one granted to foreign families. Therefore, the provision is incompatible with the constitutional principle of the protection of a family.

The legislator is free to adjust and amend law to the changing circumstances of border traffic and, consequently, to limit or amend the provisions regulating an issue concerning the residence permit in Poland.

Summary:

The Tribunal examined an application filed by the Ombudsman.

Taking into account both the constitutional protection of the family and state policy, the legislator is entitled to grant more favourable rights to a category of foreigners who come to Poland in the framework of family reunification. In the case in question, a criterion of differentiation laid down by the legislator, i.e. family reunification, complies with the standard of differentiation and is constitutionally justified.

The idea of family reunification is to promote conditions that safeguard the existence of a united family in the territory of Poland. A right to file an application should be granted both to foreigners and to Polish citizens that comply with statutory requirements.

A provision of the Act on Foreigners depriving Polish citizens of the right to file an application for a foreigner for a residence permit with the right to settle in Poland in the framework of family reunification is incompatible with the constitutional principle of equal treatment.

A provision of the Act on Foreigners providing less favourable conditions in comparison to those in the Act before amendment of the requirements for obtaining a residence permit is not incompatible with the principle of a citizen's trust in the state and the law enacted by the state.

The principle of a democratic state governed by the rule of law imposes on the legislator an obligation to determine an appropriate *vacatio legis,* in particular when introducing more stringent requirements for obtaining a residence permit in Poland. In the case in question, the adjustment of the seven-week period, together with the transitional provisions, enabled the interested parties to protect interests and rights that had been acquired on the basis of previous provisions.

Cross-references:

- Decision of 23.09.1996 (K 10/96).

Languages:

Polish. Substantial parts of the judgment are also available in English.

Portugal
Constitutional Court

Statistical data
1 May 2003 − 31 August 2003

Total: 174 judgments, of which:

- Preventive review: 3 judgments
- Abstract *ex post facto* review: 1 judgment
- Appeals: 89 judgments
- Complaints: 74 judgments
- Electoral matters: 1 judgment
- Political parties and coalitions: 2 judgments
- Political parties' accounts: 4 judgments

Important decisions

Identification: POR-2003-2-005

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 18.06.2003 / **e)** 304/03 / **f)** / **g)** *Diário da República* (Official Gazette), 165 (Serie I-A), 19.07.2003, 4208-4216 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.3.1 **General Principles** – Democracy – Representative democracy.
3.10 **General Principles** – Certainty of the law.
3.16 **General Principles** – Proportionality.
4.9.9 **Institutions** – Elections and instruments of direct democracy – Voting procedures.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.

Keywords of the alphabetical index:

Election, code general principles / Political party, dissolution / Political party, member, compulsory dismissal / Political rights, loss / Political party, democratic procedures / Voting, secrecy, individual.

Headnotes:

The rule requiring dissolution of a political party that fails to put up candidates at two successive general parliamentary elections is an excessive and therefore unacceptable restriction on parties' freedom of activity. The rule is thus unconstitutional, being contrary to the principle of proportionality and parties' freedom as guaranteed by Articles 2, 46.2 and 51.1 of the Constitution.

Rules requiring that party office bearers be dismissed if found guilty of a criminal offence, or convicted of involvement in a constitutionally prohibited organisation, may be considered as amounting to loss of rights "as an automatic consequence" of conviction of certain types of crime. The Constitution, however, presupposes a general rule that conviction and punishment must not give rise to automatic additional penalties based on the nature of either the sentence or the crime. Even if it is thought that a person's conviction for certain crimes may reasonably call into question his or her integrity and suitability for political activity, inasmuch as it suggests he or she cannot perform important duties within the party apparatus, he or she may be dismissed only after disciplinary proceedings in which an independent body makes a detailed assessment of the offence to see if dismissal is justified.

The requirement that voting be conducted on an individual basis is justified under the same principles, part of the purpose of direct voting being – without unacceptably encroaching on the rights of persons concerned – to foster the honesty, freedom and reliability that should characterise electoral choices. The rule that party voting must be by individual secret ballot is not therefore in breach of the Constitution and is not disproportionate from the standpoint of freedom of association.

Summary:

The President of the Republic sought a prior review of the constitutionality of three provisions of a parliamentary decree submitted to him for promulgation as an organic law on the organisation of political parties and completely replacing the first (1974) law on the organisation of political parties.

The Court noted that, with the role of the state shifting from a liberal to a social one, the subject of political parties had assumed a legal and constitutional dignity that it had lacked in the second half of the 19th century and the early decades of the 20th century. In Portugal this change had become particularly obvious with the fourth revision of the Constitution (in 1997), the aim of which had been to transpose explicitly into parties' internal workings a number of constitutional principles, including constantly improved internal pluralism, a multi-centred approach, transparency and strictly democratic procedures. At the same time

it had been recognised that parties had very important rights of their own and that the state had certain duties in respect of parties, notably with regard to funding, assets and accounts. For that reason the principles of democratic party-organisation were binding on all political parties, parties must be governed by rules on transparency and on democracy of internal proceedings and management systems, and all party members must have the right to participate.

The nature of mass political parties, which had started out as purely private bodies, had thus come to assume considerable constitutional significance, with the result that political parties today could be regarded as a separate species from other types of organisations generally provided for in current legislation. In other words, parties were groupings that were both private in character and constitutionally important and they were fundamental components of the political system inasmuch as they were entrusted – in some cases exclusively – with helping to organise and express the will of the people.

A further and no less important dimension had been the embodiment of certain other principles – alongside freedom of association and the freedom to establish political parties – concerning parties' internal organisation. These included the principle of democracy and acceptance of restrictions as to parties' programmes, ideology, names, emblems, origins and supervision by the courts.

The democratic principle had two kinds of practical implications within parties: one substantive and concerned with members' basic rights, the other structural, organisational and procedural.

With regard to the provisions on dismissal of party office bearers, the President of the Republic was unsure about compatibility with the guarantee in Article 30.4 of the Constitution that a criminal conviction must not result, in law, in automatic loss of rights. It would be a restriction on the exercise of a political right if dismissal was the automatic consequence of conviction, without any procedure for examining the circumstances of the case. A considerable body of Constitutional Court case-law on Article 30.4 established that ordinary legislation could not institute any system of double punishment under which persons convicted of specific crimes automatically, and as a consequence of the conviction, lost certain rights. In other words, the effect of the Constitutional provision was to prevent loss of rights – following criminal conviction – by direct application of the law. The rules at issue were therefore unconstitutional, being contrary to Article 30.4 of the Constitution.

Lastly, with regard to the rule that party elections should be conducted on the basis of individual secret ballot, the President of the Republic had asked whether such provision breached the constitutional guarantee afforded by Article 46.2. That article was not concerned specifically with political parties but with associations in general. It provided that associations could pursue their objectives freely and without interference from any public authority, and that they could not be dissolved by the state or their activities be suspended, unless by judicial decision in circumstances prescribed by law. It was generally recognised that, under the Constitution, *the* rule governing democratic expression of the national will and exercise of the political vote – namely direct secret suffrage – went hand in hand with that democratic principle. It was a necessary feature of all elections provided for (notably in Articles 10.1 and 113.1 of the Constitution). The Court found this procedural requirement to be justified on the one hand by a concern to safeguard voters' basic rights, in that the secret ballot undoubtedly reinforced the authenticity and integrity of a vote, and on the other hand because it lent democratic credibility to parties' political activities.

Languages:

Portuguese.

Identification: POR-2003-2-006

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 25.06.2003 / **e)** 306/03 / **f)** / **g)** *Diário da República* (Official Gazette), 164 (Serie I-A), 18.07.2003, 4142-4165 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.20 **General Principles** – Reasonableness.
3.22 **General Principles** – Prohibition of arbitrariness.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.30.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.
5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

5.4.10 **Fundamental Rights** – Economic, social and cultural rights – Right to strike.
5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Collective labour agreement / Examination, occupational, compulsory / Dismissal, unfair / Dismissal, declaring void / Employment, reinstatement / Procedure, disciplinary, respect for defence rights / Trade union, strike, organisation / Trade union, joining.

Headnotes:

The right to privacy (as laid down in Article 26 of the Constitution) consists principally of two subsidiary rights: the right to prevent strangers from gaining access to information about one's private and family life and the right to a guarantee that no one may divulge information about another person's private and family life, including, of course, health-related information. The right is not an absolute one, and even requiring a person to undergo medical examinations or tests may, in certain cases, be considered permissible, given the need to balance the right to privacy with other legitimate and constitutionally recognised rights or interests (such as protection of public health or administration of justice) and provided that the principle of proportionality is respected.

In the field of labour relations the right to health protection and the duty to protect and promote health (enshrined in Article 64.1 of the Constitution) justify requiring workers to undergo appropriate and necessary medical examinations in order to ensure – given the nature and type of work they do and subject to reasonable criteria – that they do not represent a risk to third parties and that, for example, the risk of accidents in the workplace is kept to a minimum and other workers or third parties are not exposed to infection. Equally the nature and purpose of a health examination must not be such that the requirement is being abused or is discriminatory or arbitrary.

However the possibility of re-opening disciplinary proceedings is not in itself contrary to the substantive aim of prohibiting unfair dismissal. Nor does it interfere with the procedural dimension of the constitutional guarantee in that the very purpose of re-opening disciplinary proceedings is to ensure observance of the formal requirements intended to safeguard the accused's defence rights.

If a court declares a dismissal unlawful, the declaration entails the restoration of the legal position that existed before the contract of employment was interrupted, and reinstatement is the natural consequence of that. Nonetheless, under current legislation the worker – and only the worker – may refuse reinstatement and opt for compensation based on length of service. The fact of having been unlawfully dismissed thus constitutes a valid reason for terminating the contract of employment at the worker's initiative. Reinstatement and compensation are not equal-ranking alternatives: compensation is a substitute for reinstatement.

Although the right to strike is by nature a collectively exercised right, it is enjoyed both by the workforce generally and by each member of the workforce. The fact that it is "normally" exercised by trade-union decision – which is not constitutionally required but is simply provided for in ordinary law – does not alter the fact that that right belongs to the workers. As a trade union declaration of strike action presupposes workers' right to strike, any renunciation or restriction of trade unions' right to make such a declaration, even on a temporary, partial or conditional basis, deprives workers of their constitutional right to strike in just the same way as a total renunciation.

Summary:

The President of the Republic sought prior review of the constitutionality of a set of Labour Code provisions approved by Parliament and submitted to him for promulgation.

The first question of constitutionality concerned the provision that job applicants or workers could be required to supply information about health or pregnancy if the particular demands of the type of work justified it. The Court held the following points to be indisputable:

i. information about a job applicant's or worker's health or state of pregnancy fell within the sphere of private life;
ii. interference in that sphere resulted not only from the obligation to undergo medical tests and examinations but also the requirement to supply information;
iii. a requirement that the job applicant or worker supply such information constituted respectively an obstacle to obtaining employment and a real legal duty on which continuation of the employment contract might depend;
iv. restricting the basic right to privacy in such a manner was constitutionally permissible only if the requirements of proportionality were observed.

Nonetheless the provision in question ought not to be found unconstitutional because, in addition to protection of the worker's or third parties' safety and health, there might be other requirements deriving from special features of the work that justified asking workers or job applicants to supply information about health or pregnancy. Another aspect of the provision was, however, contrary to the principle of proportionality. To achieve the desired outcome it would suffice to involve a doctor, who would be required to notify the employer only as to whether or not the worker was fit for the work. Employers did not themselves need to have private details about an applicant or worker. They merely needed to be informed about possible problems of entering into a contract with someone or allocating them certain tasks. A doctor's duty of professional confidentiality minimised the risk of private information being divulged inappropriately or unnecessarily. Moreover, deciding whether state of health or pregnancy rendered someone unfit for work of a particular kind would in some cases require professional expertise that, in principle, only a doctor possessed.

The second question concerned the possible unconstitutionality of the provision that disciplinary proceedings could be re-opened where the courts had declared a dismissal void. There were divergences of legal opinion and of case-law as to whether an employer who dismissed an employee and then became aware that disciplinary proceedings were void (or indeed had not taken place) should be able to withdraw the dismissal decision, re-open disciplinary proceedings, correcting defects in the initial proceedings, and possibly redismiss the employee. The President of the Republic took the view that allowing the employer to re-open proceedings could weaken workers' defence rights and significantly affected legal certainty. However, the provision in question – interpreted as non-applicable in cases where no disciplinary proceedings had taken place, and as ruling out any addition to the allegations of fault against the worker – was not unconstitutional. Firstly the longer limitation period or periods did not unacceptably affect either workers' defence rights or legal certainty, and secondly the provision did not breach the *non bis in idem* principle because the principle did not prevent a rehearing, or retrial in a criminal case, if a decision or judgment had been set aside for formal reasons and the grounds for setting it aside concerned the defendant.

The third question concerned the provision that an employee in an extremely small company, or in an administrative or managerial position, and whose dismissal was found by the courts to be unlawful need not be reinstated if his or her return would have an extremely adverse or disruptive effect on the company's activity. The important question was whether the constitutional prohibition of unlawful dismissal necessarily and in all cases rendered such dismissal void and consequently entitled the employee to be reinstated, or whether there were situations in which it was constitutionally permissible to depart from the reinstatement rule. Inasmuch as the provision at issue allowed employers to oppose reinstatement in certain circumstances because the employee's return to an extremely small company or to an administrative or managerial position would have “an extremely adverse or disruptive effect on the company's activity”, it was not unconstitutional in a system that recognised objective reasonable grounds of dismissal. Such a mechanism did not pose a disproportionate threat to stability of employment given that it could operate only where there had been a prior decision by a court.

The fourth question concerned the constitutionality of the provision allowing the terms of collective agreements to replace the rules laid down in the Labour Code. The provision was unconstitutional to the extent that the argument for permitting the extension of the application of the terms of a collective agreement could not be used to allow those terms to replace regulations on minimum conditions (i.e. labour regulations approved by the Minister of Labour and the minister with responsibility for the relevant sector), which had an innovative standard-setting function.

The fifth question concerned the constitutionality of the provision that collective labour agreements could include no-strike clauses. The President of the Republic took the view that restriction by collective agreement of trade unions' right to call strikes raised the controversial question of whether it should be possible to renounce the right to strike, or – more precisely – the right to have strikes declared by unions that had signed such an agreement, since the right to strike was an entitlement, a freedom and a safeguard for workers under Article 57 of the Constitution. It was debatable whether workers were sufficiently well represented by their trade unions in the context of collective agreements for the unions to be considered lawfully empowered to renounce the right to strike, even temporarily (for the duration of the collective agreement) or to a relative extent (in the sense of recourse to strike action being forbidden only in matters covered by the agreement).

According to the Court, the provision at issue took in strikes called with a view to amending clauses in an agreement where circumstances had not changed; strikes called on the ground that circumstances had changed abnormally so as to render all or part of agreed clauses unfair or unduly burdensome; and strikes called in protest at a company's alleged

breach of an agreement. With regard to the impact on workers, on the one hand a union, by entering into an agreement, bound its members in such a way that they could be held liable for losses caused by non-compliance with any obligation laid down in the agreement, and on the other hand if a strike was called unlawfully the striking workers could be deemed to have absented themselves without good reason, thus incurring loss of pay or seniority. The provision in question, given its scope and implications, had to be regarded as incompatible with the constitutional right to strike, which was an inalienable right of workers. The provision was therefore contrary to Article 57.1 of the Constitution.

The sixth question concerned the constitutionality of the provision on cessation of the effects of a collective labour agreement after the expiry of the term of the agreement (i.e. the validity of such effects after the expiry of the agreement). Under the provision, if a collective agreement had expired and no fresh agreement had been concluded, or process of arbitration begun, the existing agreement ceased to have effect. That appeared to contravene the provisions and principles of Article 56.3 and 56.4 of the Constitution, for while the legislature had wide discretion in this field, the scope of the provision was such that, in practice, it risked calling in question the essence of the constitutional safeguard that labour relations were traditionally regulated by collective agreement. However, the Court considered that the legal solution concerned was reasonable and balanced inasmuch as the period of time after expiry of the agreement was kept within reasonable limits. It was merely a subsidiary solution (that is to say, one that applied when no other provision applied) allowing a period of up to two and a half years between denunciation of an agreement and the beginning of arbitration. Thereafter, for one party unilaterally to require that the other continue a relationship against its will would be incompatible with the principle of the parties' independence, which was fundamental to collective agreements.

The seventh question concerned the constitutionality of provisions on transitional arrangements for standardising collective labour agreements, there being possible infringement of the principle of trade unions' independence and their representative role under Article 56.1 and of the right under Article 56.3 of the Constitution to conclude collective agreements. The Court held that allowing an agreement to be terminated against the will of its signatories simply because a majority of workers in the company or sector had chosen to apply a different agreement concluded by another trade union was an unacceptable infringement of the constitutionally recognised right to collective bargaining. The provisions were therefore unconstitutional, being contrary to Article 56.1 and 56.3 of the Constitution.

Supplementary information:

The judgment was the subject of much debate among the 13 Constitutional Court judges and all the decisions were taken on a majority vote. The Court having found four of the impugned provisions of the Labour Code to be unconstitutional, the President of the Republic exercised his veto and sent it back to Parliament.

Languages:

Portuguese.

Identification: POR-2003-2-007

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 08.07.2003 / **e)** 360/03 / **f)** / **g)** *Diário da República* (Official Gazette), 232 (Serie I-A), 07.10.2003, 6624-6630 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.15 **General Principles** – Publication of laws.
4.5.6 **Institutions** – Legislative bodies – Law-making procedure.
5.3.26 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Civil and public services, labour legislation / Trade union, right to participate in the preparation of labour legislation / Right to organise.

Headnotes:

In relation to the civil and public services, labour legislation comprises all measures concerning general and particular aspects of the employer-employee relationship, working conditions, pay and other forms of remuneration, retirement pension, social benefits and additional entitlements.

The Constitution guarantees trade unions the right to participate in the preparation of legislation so that holders of rights are able to influence the legislature. This arrangement is the only way to safeguard a right designed to ensure that the legislature's decisions take workers' interests into account, even though participation as such does not mean that the legislature is bound by trade unions' proposals.

Official publication of a bill, provided it is properly done (i.e. has the desired outcome), should be sufficient to reach all the bodies that have a guaranteed right to participate. The bill on the national budget was published in the parliamentary gazette – that is, before parliament had given it general approval. This form of publication, in the absence of an invitation to trade unions to comment on provisions amending pension rules – those provisions being included in the bill in the form of budget items – cannot be regarded as sufficient to achieve the constitutional aim of genuinely enabling trade unions to influence the legislation that parliament will pass.

Trade unions are freely set up. They are also free to form trade-union federations and some may choose not to participate either directly or indirectly in such federations. It is therefore unnecessary for the constitutional right to be consulted to be exercised by each and every workers' organisation.

Summary:

The President of the Republic asked the Constitutional Court to assess those provisions in the national budget for 2003 which amended either the method of calculating retirement pensions (thus also altering their value) or the early-retirement scheme for public servants, and to issue a general and binding ruling that the disputed provisions were unconstitutional and unlawful. To summarise, he argued that they should have been the subject of prior collective negotiation between the Government and the trade unions representing public servants. As no such collective negotiation had taken place, the provisions were unconstitutional because they interfered with trade unions' right to bargain collectively (under Article 56.3 of the Constitution). Further, under Article 56.2.a of the Constitution, trade unions had the right to participate in the preparation of labour legislation, and the pension scheme for public servants had to be regarded as falling under that heading. In any event – if trade unions' constitutional right to take part in the preparation of labour legislation were not to be rendered meaningless – consultation should not have taken place after parliament had given general approval to the bill, at a stage when, objectively, there could no longer be any effective public participation.

The provisions fixing or substantially amending the method of calculating – and consequently the value of – retirement pensions were possibly unconstitutional because of non-observance of trade unions' right to bargain collectively. Deciding the matter would entail determining whether the subject of the provisions in question fell within the constitutional right to bargain collectively. The Court had already delivered many rulings on the extent of that right, notably in relation to social security measures. However, it would not be necessary to determine the matter unless the second ground of unconstitutionality which the President had raised – namely that the trade unions had not participated in the legislative process – was rejected.

The provisions which the Court had been asked to assess had to be regarded as core aspects of the pension scheme and therefore as falling under the heading of labour legislation.

The right was one that workers could exercise only through trade unions. It was also a right subject to the law: the Constitution guaranteed it “in accordance with the law”. Legislation – with a limiting or restrictive effect – could be enacted in respect of the right to bargain collectively but there always had to be a basic set of matters that was left open to bargaining. In other words the law had to ensure that certain matters were reserved for settlement by collective agreement.

Each and every trade union was entitled (under Article 56.2.a of the Constitution) to participate in the preparation of labour legislation. The procedure followed therefore had to be capable of guaranteeing all of them the possibility of participation. Under the Constitution, therefore, workers' committees and trade unions were entitled to participate in the preparation of labour legislation.

In the light of this finding of unconstitutionality it was unnecessary to rule on whether the right to bargain collectively had been infringed. Likewise it was unnecessary to pursue either the question of possible unconstitutionality resulting from indirect infringement of Articles 2 and 112.3 of the Constitution, or the application for a general and binding declaration that the disputed provisions were unlawful.

Languages:

Portuguese.

Romania
Constitutional Court

Important decisions

Identification: ROM-2003-2-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 15.05.2003 / **e)** 216/2003 / **f)** Decision on the objection of unconstitutionality of the provisions of Article 78.3 of the Code of Civil Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 16.06.2003, 422 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.21 **General Principles** – Equality.
5.2.1.2.1 **Fundamental Rights** – Equality – Scope of application – Employment – In private law.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.26 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel.
5.3.13.26.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel – Right to paid legal assistance.

Keywords of the alphabetical index:

Legal aid, approval, calling in question of approval.

Headnotes:

The constitutional principle that citizens have equal rights before the law and public authorities does not imply uniformity. Only where situations are the same is the same legal treatment required, while different situations require different legal treatment.

The constitutional principle that free access to justice cannot be limited by the law means that no category or social group may be excluded from the exercise of procedural rights.

The absence of any remedy against the interlocutory decision whereby the trial court approves an application for legal aid or calls in question legal aid which has been approved does not impair free access to justice, provided that, in accordance with Article 75.2 of the Code of Civil Procedure, the possibility of submitting a further application for legal aid before the same court is guaranteed where fresh matters have come to light of such a kind as to require and justify the grant of such an application to the parties concerned.

The right to put forward a case includes the right to legal aid, or the appointment of a lawyer *ex officio* for a person who is manifestly unable to meet the costs of proceedings.

Summary:

The Constitutional Court was seised of an objection of unconstitutionality in respect of the provisions of Article 78 of the Code of Civil Procedure, which provide: “The interlocutory decision concerning the application for legal aid, or whereby legal aid which has been granted is called in question, shall not be subject to appeal”. The person who put forward the objection is of the opinion that that provision does not comply with Articles 1.3, 15.1, 16.1, 20, 21, 24 and 51 of the Constitution and Article 26 of International Covenant on Civil and Political Rights.

In examining those allegations, the Court finds that the text of the law being reviewed does not infringe the constitutional principle that citizens are equal before the law and the public authorities, as it does not distinguish between the parties to the proceedings. The derogation from the general law, in the sense that interlocutory decisions rejecting an application for legal aid or calling in question legal aid which has been approved are not subject to appeal, is justified by the different legal arrangement in the area concerned. The Constitutional Court has held in its case-law, in accordance with the practice followed by the European Court of Human Rights in adopting its decisions, that the principle of equality does not imply uniformity, since it is only where situations are the same that similar legal treatment is required, while different situations require different legal treatment.

As regards the violation of Article 21 of the Constitution, the Court refers to Decision no. 1 of 8 February 1994, where it was held that the significance of the guarantee of access to justice that cannot be restricted by the law is that it is not possible to exclude any category or social group from the exercise of procedural rights. In examining certain particular situations, however, the legislature may introduce special procedural rules and also particular procedures for the exercise of procedural rights. Free access to justice does not mean access in every case to all the judicial structures and to all remedies.

The Court finds that Article 24 of the Constitution has not been infringed. The right to legal aid gives expression to the right to put forward a case, but the two rights do not wholly coincide, since in accordance with Article 24.2 of the Constitution, during the proceedings the parties are entitled to be assisted by a lawyer of their choice or appointed *ex officio*.

The right to put forward a case has a complex content, which includes the possibility recognised to a person who is party to proceedings to put forward and prove his arguments, in compliance with the procedural rules applicable, and also the possibility, when doing so, to use qualified legal assistance, by employing a lawyer for whose fees he is responsible.

A person who finds it manifestly impossible to assume responsibility for legal fees without jeopardising his own maintenance or that of his family is entitled to seek legal aid or to have a lawyer appointed *ex officio*.

The decision of the court to approve or to continue approval of such an application relates to the lack of material evidence, which may only be temporary or attributable to present circumstances or which may be determined by the insufficiency of the evidence adduced in the application. The legislature did not confer the status and effect of a final judgment on the interim decision, thus enabling the applicant to repeat his application and to prove that a state of necessity has come about, that it exists or that it persists. Thus, the impugned legislative provision precludes situations in which refusal of the application for legal aid or calling in question its approval would entail a breach of the constitutional right to put forward a case, even though there is no remedy against the interim judgment imposing such a measure.

To recognise that the applicant was entitled to challenge such judgments before a higher court would open the way to procedural abuse, with the consequence that proceedings involving the role of the courts would be prolonged indefinitely.

Cross-references:

Decision no. 1 of the Plenary Assembly of 08.02.1994 was published in the Official Gazette of Romania *(Monitorul Oficial)*, Part I, no. 69 of 16.03.1994.

Languages:

French.

Identification: ROM-2003-2-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 05.06.2003 / **e)** 233/2003 / **f)** Decision on the objection of unconstitutionality of the provisions of Article 18.2 of Law no. 146/97 regulating stamp duties in judicial proceedings, as subsequently amended and supplemented / **g)** *Monitorul Oficial al României* (Official Gazette), 25.07.2003, 537 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.9 **General Principles** – Rule of law.
4.6.2 **Institutions** – Executive bodies – Powers.
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:

Stamp duty, judicial proceedings, determination / Government, emergency order, censure of the method of determination by the judicial authorities.

Headnotes:

Administrative censure of the method of determination by the judicial authorities of stamp duties in judicial proceedings by interlocutory decisions given in the context of the proceedings disregards the constitutional principles of the exercise of justice in the name of the law and the independence of the judges and also the principle of the separation of powers in the State.

Summary:

The Constitutional Court was seised of an objection of unconstitutionality of the provisions of Article 128 of the Constitution.

In allowing the objection, the Court referred to the requirements of the constitutional principles of Article 1.3 – Romania is a state governed by the rule of law, Article 125.1 and 125.3 on the courts and Article 128 on appeals, and also the fact that stamp duties in judicial proceedings are determined by the judicial authorities in interlocutory decisions delivered

in the context of the proceedings, subject to the remedies provided for by law.

The principles referred to are infringed when the method of determining stamp duties in judicial proceedings is censured by the administrative procedure provided for in Article 18.2 of Law no. 146/1997, with reference to Government emergency Order no. 13/2001 on the resolution of disputes against the measures imposed by review by or taxation decisions drawn up by the organs of the Ministry of Public Finance.

In light of those principles, the argument that Article 12 of the Government emergency order provides that the decisions of the administrative courts provided for in that normative act "may be challenged, in accordance with the law, before the trial court" is of no relevance.

The exercise of that remedy may have the effect of cancelling an error made by the administrative court in the resolution of the dispute against the method whereby the trial court determined the judicial stamp duties but it is not capable of making good the very interference of the administrative authority in the jurisdiction of the courts.

The Constitutional Court made a similar adjudication in Decision no. 127 of 27 March 2003, when it declared unconstitutional Article 1.2 of Government emergency Order no. 13/2001, under which "disputes against the method of determining stamp duties in judicial proceedings" were also resolved.

Languages:

French.

Slovakia
Constitutional Court

Statistical data
1 May 2003 − 31 August 2003

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 7
- Decisions on the merits by the panels of the Court: 85
- Number of other decisions by the plenum: 6
- Number of other decisions by the panels: 209

Important decisions

Identification: SVK-2003-2-001

a) Slovakia / **b)** Constitutional Court / **c)** First Panel / **d)** 15.07.2003 / **e)** I. ÚS 23/01 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (slovaque).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
3.22 **General Principles** – Prohibition of arbitrariness.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to participate in the administration of justice.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Decision, administrative, judicial review / Stay, decision, administrative, enforceable / Property, right to enjoyment.

Headnotes:

The basic aim of a stay of execution of an administrative decision is to protect persons who require the granting of that stay; however, the fundamental rights of the persons against whom that stay is granted should be respected as well. A stay of execution of a lawful administrative decision has an extraordinary character because the court in such cases overrules, before a decision on the merits of the case is taken, the legal effects of the lawful administrative decision in question. A stay is available only in extraordinary and just cases, as expressly defined by the legislator as being those where there is a threat of considerable damage.

The granting of a stay of execution of an administrative decision is done on the basis of the requirements emerging from the right to judicial protection i.e. such a decision must have a legal basis and cannot be arbitrary.

Summary:

The applicants challenged the violation of their fundamental rights to judicial protection and the right to own property, use it and dispose of it. They considered those fundamental rights to have been violated by the fact that the Regional Court had stayed the execution of a decision (grant of a building permit) by an administrative authority on the basis of a complaint by the participants seeking a review of the lawfulness of that decision. The applicants could not continue the reconstruction of their house, and due to other circumstances, they could not use their property. The execution of the decision (grant of a building permit) had been stayed without the court having considered the issue of whether the immediate execution of the impugned decision would have resulted in a threat of serious damage, as provided for by the Code of Civil Procedure.

After considering the complaint, the Constitutional Court found a violation of the following fundamental rights: the right to judicial protection; the right to own property, use it and dispose of it; and the right to the peaceful enjoyment of property. At the same time, the Court awarded the applicants adequate financial satisfaction in the amount of 50,000 Slovak crowns.

In court decisions granting stays of execution of administrative decisions, the fundamental requirements must be fulfilled (the decision should have a legal basis and cannot be arbitrary) that emerge from the right to judicial protection.

The Constitutional Court stated that the right to judicial protection included not only a person's right to claim his/her right in proceedings before a court or another authority of the Slovak Republic, but also the right to be a party to proceedings such as those in which the applicant's rights and duties had been decided.

The applicants, according to the law, had not been parties to the proceedings; however, the relevant provision of the Code of Civil Procedure did not prohibit the Regional Court, in special circumstances such as those in the above-mentioned case, from proceeding with persons who were not parties to the proceedings and whose rights guaranteed under the Constitution might be infringed. The Regional Court should have interpreted the provision of the Code of Civil Procedure in such a way so as not to exclude the applicants from the proceedings and, in a way appropriate to the aim pursued and all circumstances of the case, so as not to interfere with the substance of the applicants' right to judicial protection. The fact that the Code of Civil Procedure does not expressly define someone as being a party to proceedings does not mean that the court dealing with the case cannot call that person, if needed, to take part in the proceedings, where the effects of the proceedings or the decision concern that person's fundamental rights which are guaranteed under the Constitution or an international treaty.

The applicants were not allowed to enjoy their property peacefully, not even the part of the house that was not affected by the impugned ruling of the Regional Court: such a situation resulted in the interference with their right of property and its limitation by the court. Concerning the duration of that restriction and as regards the circumstances of the case, the Constitutional Court found that such a restriction was not appropriate; therefore, it found an infringement of the right to own property, use it and dispose of it.

In the circumstances of the above-mentioned case, the substance of the infringement of that right was the fact that during a year and a half, the claimants did not have at their disposal any remedy for the protection of their ownership right in relation to the part of the real property which had been *de facto* affected, even though it was not subject to the building permit.

Languages:

Slovak.

Slovenia
Constitutional Court

Statistical data
1 May 2003 − 31 August 2003

The Constitutional Court held 15 sessions (8 plenary and 7 in chambers) during this period. There were 447 unresolved cases in the field of the protection of constitutionality and legality (denoted "U" in the Constitutional Court Register) and 836 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 May 2003). The Constitutional Court accepted 76 new U and 276 Up new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 66 cases U in the field of the protection of constitutionality and legality, in which the Plenary Court made:
  - 19 decisions and
  - 47 rulings;
- 26 cases U cases joined to the above-mentioned cases for common treatment and adjudication.

Accordingly the total number of U cases resolved was 92.

In the same period, the Constitutional Court resolved 127 Up cases in the field of the protection of human rights and fundamental freedoms (8 decisions issued by the Plenary Court, 119 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 (full text versions in Slovenian, 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 full text versions in Slovenian from 1990 onwards, combined with appropriate links to the text of the Slovenian Constitution, Slovenian Constitutional Court Act, Rules of Procedure of the Constitutional Court and the European Convention for the Protection of Human Rights and Fundamental Freedoms translated into Slovenian);
- since September 1998 in the database and/or Bulletin of the Association of Constitutional Courts using the French language (A.C.C.P.U.F.);
- since August 1995 on the Internet (full text in Slovenian as well as in English at http://www.us-rs.si; http://www.us-rs.com (mirror));
- since 2000 in the JUS-INFO legal information system on the Internet (full text in Slovenian, available at http://www.ius-software.si) and;
- in the CODICES database of the Venice Commission (important decisions).

Important decisions

Identification: SLO-2003-2-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 15.05.2003 / **e)** U-II-2/03 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), 52/03 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (Slovenian).

Keywords of the systematic thesaurus:

1.3.4.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Admissibility of referenda and other consultations.
1.3.5 **Constitutional Justice** – Jurisdiction – The subject of review.
1.4.8.3 **Constitutional Justice** – Procedure – Preparation of the case for trial – Time-limits.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.5.2 **Institutions** – Legislative bodies – Powers.

4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.38.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Commerce, opening hours, Sunday / Referendum, for repeal of amendment to legislation.

Headnotes:

Although a referendum question is connected to a Bill that is still subject to parliamentary debate, when reviewing the referendum question the Constitutional Court may not consider the issue of the constitutionality of the entire proposed statute, but must limit itself to the content of the referendum question and to the reasons stated in the National Assembly's reference. When deciding on the conformity of a referendum question with the Constitution, it (indirectly) also decides on the admissibility of its being carried out. A Constitutional Court decision that a referendum question is contrary to the Constitution means that the referendum cannot be carried out; it limits the right of voters to participate in the management of public affairs through a referendum (Article 90 in conjunction with Article 44 of the Constitution). Therefore, the jurisdiction of the Constitutional Court under Article 16 of the Referendum and People's Initiative Act must be understood in such a way that the Court may deliver a negative opinion only if the referendum question is clearly contrary to the Constitution. If the referendum question is not in itself contrary to the Constitution, the issue of the conformity of the envisaged statutory solution with the Constitution may arise with respect to the proportional weight of several constitutionally protected rights or values (in conflict with each other), and the Constitutional Court decides which is to be given greater weight. Here, priority must be given to the right of voters to decide directly by a referendum.

The public interest as a basis for limiting entrepreneurial freedom is not a uniform concept: its definition depends on the nature and purpose of an individual economic activity. The purpose of commercial activity is to supply consumers with goods. Thus, when regulating the opening hours of stores, the legislature must, *inter alia,* also consider consumers' interests. In a referendum, the voters (being also consumers) may express their interests. Accordingly, the Constitutional Court held that the content of the referendum question on determining opening hours was not contrary to Article 74 of the Constitution.

Summary:

On 9 April 2003 the National Assembly referred a matter to the Constitutional Court for a decision on the constitutionality of a referendum question. More than 40,000 citizens (the number required under Article 13 of the Referendum and People's Initiative Act (ZRLI) to file such request) requested that the National Assembly call a preliminary statutory referendum on the Bill amending the Trade Act. They opposed the general opening of stores on Sundays. The question in their request read as follows:

> "Are you in favour of the Bill amending the Trade Act requiring stores that sell the necessities of life to open at least 10 Sundays a year, and allowing gas stations, stores in hospitals, hotels, airports, railway or bus stations and at border crossings to open without restriction?"

According to Article 16 of ZRLI, where the National Assembly believes that, *inter alia,* the content of a request for a referendum is inconsistent with the Constitution, it must refer the matter to the Constitutional Court.

Unlike the petitioners, the deputies thought that there was no public interest in determining opening hours and that the proposed solutions could result in the inequality of the operating conditions of stores. Furthermore, they believed that restricting Sunday opening hours could interfere with the freedom of enterprise, as protected by Article 74 of the Constitution. They questioned the need, in pursuit of the aim of protecting workers' rights, to interfere with opening hours to the point of encroaching on the constitutional guarantee of free enterprise, and asked whether such an aim could be realised by less severe measures that would not interfere with that constitutional right. They stated that although the State had to use all means to ensure the conditions for the exercise of the rights of workers (respecting the principles of a social State), it also had to consider profitable capital investments. For that reason and for that of the cost of the referendum, they found it appropriate to seek an opinion from the Constitutional Court.

The Court emphasised that as a rule it carries out subsequent constitutional review, which means that it reviews existing regulations. It is, however, empowered to deliver preliminary opinions in two instances:

1. according to Article 160.2 of the Constitution, it may deliver a preliminary opinion on the conformity of a treaty with the Constitution, and

2. pursuant to the last subparagraph of Article 160.1 of the Constitution empowering the Court to decide issues determined by statute, the Court may decide on the conformity of a referendum question with the Constitution.

The jurisdiction to review the constitutionality of the content of a request for a referendum (referendum question) is laid down by Article 16 of ZRLI, which regulates the manner and procedure of resolving a dispute between the National Assembly and persons requesting a referendum. As the Assembly is bound by the result of a preliminary statutory referendum, the purpose of preliminary constitutional review is to avoid a situation where the Assembly is forced to adopt an unconstitutional statute.

When reviewing existing regulations, the Court carries out a thorough analysis of the issues by studying examples from comparable legal systems and the legal literature. It may use various techniques of decision-making − from annulment to declaratory and interpretative decisions. By linking issues, it may extend its review to other statutory provisions and order the legislature to fill a constitutional gap in the law within a certain period of time. When delivering a preliminary opinion, the Court is in a completely different position. Although a referendum question refers to a Bill that is still subject to parliamentary debate, when reviewing that question the Court may not consider the issue of the constitutionality of a proposed statute. This also follows from the fact that the Court must deliver an opinion in such a short period of time that any thoroughly prepared opinion on that issue is impossible.

The referendum question referred to the regulation of opening hours. In an earlier decision, the Court had held that regulating opening hours was not in itself inconsistent with the Constitution (more precisely, with Article 74 − Decision U-I-16/98) and that opening hours was an objective operating condition of commerce that could be laid down by the legislature on the basis of the public interest. From that decision, it follows that an extremely liberalist notion of entrepreneurship would not be consistent with the Constitution. In paragraph 15 of that decision, the Court had explained:

> "If the public interest is shown, the legislature may lay down special subjective and/or objective conditions for entrepreneurial activities. This is based on Article 74.2 of the Constitution, according to which the conditions for founding businesses are established by law and that commercial activities may not be pursued in a manner contrary to the public interest. The legislature's interference with free enterprise is based on a constitutional provision permitting more than the mere possibility of statutory regulation. If required by the public interest, the legislature is obliged to regulate the conditions and manner of the operation of a commercial activity. Failure to do so would amount to an unconstitutional gap in the law. However, the legislature's freedom in laying down the conditions for performing an activity is not absolute and unrestricted … [it] is bound by the general constitutional principle of proportionality, which allows it to limit a constitutional right only to the extent that is necessary to protect the public interest and for a reason for which it is constitutionally admissible to interfere with a constitutional right. Therefore, when enacting a limitation, the legislature must select a measure that ensures the effective protection of the public interest and with the least possible interference with a constitutional right."

In its reference asking the Court to review the referendum question, the Assembly argued that the question was unconstitutional as it allegedly amounted to an interference that was not proportionate. As the case concerned the restriction of entrepreneurial freedom in the public interest, the Court found it first necessary to determine the nature of the public interest. The public interest as the basis for restricting entrepreneurial freedom is not a uniform concept: its definition depends on the nature and purpose of an individual commercial activity. The purpose of trade activity is to supply consumers with goods, thus when regulating opening hours, the legislature must also consider consumers' interests. In a referendum, the voters (being also consumers) may express their interests. Accordingly, the Court held that the content of the referendum question was not in itself contrary to the Constitution.

Supplementary information:

Legal norms referred to:

- Articles 44, 74, 90 and 160 of the Constitution;
- Article 16 of the of the Referendum and People's Initiative Act;
- Article 21 of the Constitutional Court Act.

Languages:

Slovenian, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-2003-2-005

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 13.05.2003 / **e)** CCT 6/2002 / **f)** Norman Murray Ingledew v. The Financial Services Board / **g)** / **h)** 2003 (8) *Butterworths Constitutional Law Reports* 825 (CC); 2003 (4) *South African Law Reports* 584 (CC); CODICES (English).

Keywords of the systematic thesaurus:

1.4.1 **Constitutional Justice** – Procedure – General characteristics.
1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Investigation, preliminary / Document, access / Appeal, interlocutory, procedure / Rules of procedure.

Headnotes:

Leave to appeal may be refused if it is not in the interests of justice to hear a case therefore a finding that an application raises a constitutional issue is not decisive.

Summary:

The Financial Services Board (the Board) instituted action against Mr Ingledew (the applicant) in terms of the Insider Trading Act 135 of 1998 for alleged insider trading. In the High Court, prior to pleading, the applicant sought discovery of the full record of a prior investigation by the Board into the alleged insider trading. This application was refused.

He appealed to the Constitutional Court against the order of the High Court. In the Constitutional Court, he contended that he was entitled to the information sought under rule 35.14 of the Uniform Rules of Court (these rules govern superior court practice). He submitted that in view of the penal nature of the proceedings instituted by the Board, the subrule should be construed purposively and in a manner that is consistent with the right of access to information in the Constitution (Section 32.1.a). In the alternative, he contended that he was entitled to the information directly under Section 32.1.a.

The Constitution requires that legislation be enacted to give effect to the right of access to information, until this is done, access to information will be governed by the Constitution. When the applicant launched his application in the High Court, the Promotion of Access to Information Act 2 of 2000 had been passed but had not come into force. Therefore the right of access to information was governed by the Constitution and not the legislation. As a result this case arose in a hiatus period as future cases will be governed by the Promotion of Access to Information Act.

The Court found that the central constitutional question raised by the applicant was whether he could, during the course of litigation, obtain information directly under Section 32.1.a without challenging the constitutionality of rule 35.14. However the Court found it unnecessary to decide the constitutional question and dismissed the application for leave to appeal as it was not in the interests of justice to grant the application. The finding was based on the fact that the applicant would not be prejudiced if he did not get the information required at this stage of the proceedings. On the facts, the Court found that the applicant would be able to plead even if he did not get the information required and that he could utilise the pre-trial discovery procedures to obtain the information later. This application only served to delay the proceedings. Additionally, the ruling in this matter is unlikely to affect other applications for discovery made in the hiatus period, as a substantial amount of time has passed and it is likely that they have been disposed of.

Languages:

English.

Identification: RSA-2003-2-006

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 27.06.2003 / **e)** CCT 15/2003 / **f)** Minister of Home Affairs v. Eisenberg & Associates / **g)** / **h)** 2003 (8) *Butterworths Constitutional Law Reports* 838 (CC); CODICES (English).

Keywords of the systematic thesaurus:

1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
3.13 **General Principles** – Legality.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Regulation, interim, minister, procedural rules / Regulation, implementing statute / Immigration, law.

Headnotes:

The Immigration Act 13 of 2002 distinguishes between two regulation-making mechanisms: one before a Board constituted in terms of the Act has been established and one after that Board has been established. The procedural requirements of notice and comment that apply to regulations made after the Board is established need not be complied with before the Board is established.

The circumstances in which interim regulations were promulgated by the Minister of Home Affairs under the Immigration Act fall within the exception to the usual procedural requirements of notice and comment under the Promotion of Administrative Justice Act 3 of 2000.

A member of the public who would have had a right to comment on draft regulations has standing in his or her own interest to challenge the legality of regulations that did not call for comment.

Summary:

This judgment relates to the powers of the Minister of Home Affairs ("the Minister") to make Immigration Regulations under the Immigration Act 13 of 2002 ("the Act").

In the Cape High Court, Eisenberg & Associates (a firm of attorneys specialising in issues connected with immigration law) challenged the legality of regulations made by the Minister on the grounds that he had made these regulations without complying with the public notice and comment procedures prescribed by the Act. This contention was upheld by the High Court, and the regulations were declared to be invalid. The Minister appealed to the Constitutional Court against this decision. The Court upheld the appeal and set aside the declaration of invalidity.

The Minister conceded that Eisenberg & Associates (the respondent) had standing to challenge the constitutionality of the regulations. The Court agreed. It held that the constitutional issue was whether the notice and comment procedures were applicable to the regulations made by the Minister. The respondent would have had a right to comment on the draft regulations if those procedures were applicable and thus it had standing to raise the issue in its own interests.

The Act distinguishes between two regulation-making mechanisms: one to be used before the Immigration Advisory Board (the Board) has been established and the other to be used after the Board has been established. The Board plays an important role in the public notice and comment procedures prescribed by the Act. The central issue in the appeal was whether these procedures also had to be followed in the case of regulations made prior to the Board being established.

The respondents contended that even before the Board was set up, the Minister could not make regulations without going through the notice and comment procedures in so far as these could be followed without involving the Board. It was also argued that the Minister's interpretation of the Immigration Act was in conflict with the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") which requires special procedures to be followed where administrative action materially and adversely affects the rights of the public.

The Minister contended that the notice and comment procedures prescribed by the Act were not applicable to regulations made prior to the constitution of the Board. It was essential to make regulations necessary for the implementation of the Act and he was entitled to do so before the Board was constituted. He saw the regulations as providing a temporary mechanism necessary to bring the Act into operation. He intended to replace these regulations with more detailed regulations after the Board was in a position to discharge its duties under the Act, and would follow the notice and comment procedures before making those regulations. By the time the appeal was heard this process was already underway.

The Court held that it was competent in the circumstances for the Minister to use the power he

had to make regulations prior to the Board being constituted. The public notice and comment procedure was a time-consuming process which could not possibly have been complied with prior to the operative provisions of the Act coming into force. The Act distinguished between regulations made prior to the Board being constituted and regulations made after the Board was in place. The public notice and comment procedures were applicable to the latter but not to the former. It was not possible to read the Act in any other way − to do so would be contrary to the clear language of the Act and would render certain sections unnecessary.

In dealing with the argument relating to PAJA, the Court expressed doubt as to whether PAJA was applicable to the promulgation of regulations but found it unnecessary to decide this question. PAJA provides that the special procedures prescribed for administrative action need not be followed if it is reasonable and justifiable in the circumstances to depart from these procedures. In the present case, there was insufficient time to follow the procedures prescribed by PAJA. As the Act would be unworkable without regulations it was reasonable and justifiable for the Minister to adopt the procedure that he did. Thus even if PAJA was applicable, the Minister was not bound to follow the procedures on which the respondent had relied.

Cross-references:

- *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2002 (2) *South African Law Reports* 674 (CC); 2000 (3) *Butterworths Constitutional Law Reports* 241 (CC), *Bulletin* 2000/1 [RSA-2000-1-003].

Languages:

English.

Identification: RSA-2003-2-007

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 28.08.2003 / **e)** CCT 36/2002 / **f)** Abduraghman Thebus and Another v. The State / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.
5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent.

Keywords of the alphabetical index:

Silence, pre-trial, right / Common purpose, doctrine / Inference, adverse / Common law, principle, constitutionality / Alibi, defence.

Headnotes:

The doctrine of common purpose is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons to commit a crime.

The pre-constitutional requirements of the doctrine of common purpose justifiably limit the appellants' rights to human dignity, freedom and security of the person and a fair trial, including the right to be presumed innocent.

The doctrine of common purpose does not require development because it is not inconsistent with the Constitution.

The right to silence is violated when an adverse inference is drawn from the accused's failure to disclose an alibi defence after being informed of his right to remain silent.

Summary:

Mr Thebus (first appellant) and Mr Adams (second appellant) were convicted and sentenced by the Cape High Court on a count of murder and two counts of attempted murder. They had been part of a protesting group involved in a shoot-out with a reputed drug dealer. As a result of the cross-fire, a young girl was killed and two others wounded. The shots, which killed the girl and wounded the other persons, came from the group of which the first and second

appellants were part. However, there was no direct evidence that any of the appellants fired the shots. The appellants were convicted on the basis of the common law doctrine of common purpose and each was sentenced to a period of eight years' imprisonment suspended for five years on certain conditions.

The first appellant only raised an alibi defence at trial some two years after his arrest. The first appellant testified in support of his defence and called two witnesses. The trial court rejected the alibi evidence as untrustworthy and in doing so took into account the late disclosure of the alibi. On appeal, the Supreme Court of Appeal (SCA) confirmed these findings, upheld the state appeal against the sentence, and sentenced each appellant to fifteen years imprisonment.

The appellants approached the Constitutional Court on two issues: first, whether the SCA acted unconstitutionally in failing to develop the doctrine of common purpose, thereby violating their rights to human dignity, freedom and security of the person, and a fair trial, which includes the right to be presumed innocent; secondly, whether the first appellant's right to silence contained in section 35.1.a of the Constitution had been infringed by the negative inference drawn by reason of the late disclosure of his alibi defence.

The appellants' principal challenge to the constitutionality of the common purpose doctrine was based on the fact that the doctrine does not require a causal connection between their actions and the resultant crimes for which they are convicted. A unanimous Court held that the common law doctrine of common purpose is not inconsistent with the Constitution and thus does not require development. This finding was based on the following reasoning:

a. conviction on the basis of the common purpose doctrine does not amount to an arbitrary deprivation of freedom because the doctrine is rationally related to the legitimate object of limiting and controlling joint criminal enterprise;
b. a person who knowingly, and bearing the requisite intention, participates in the achievement of a criminal outcome cannot, upon conviction in a fair trial, validly claim that his or her rights to human dignity have been violated;
c. the doctrine of common purpose does not place a reverse onus on the accused, nor does it relieve the prosecution of any part of its burden to prove criminal liability beyond a reasonable doubt and therefore the presumption of innocence is not infringed.

On the question of the constitutionality of drawing an adverse inference from the first appellant's pre-trial silence, the Court was divided. The majority of the Court (Justices Ackermann, Goldstone, Mokgoro and O'Regan) held that the appellant's right to silent was breached in the case because an adverse inference was drawn from his failure to disclose an alibi after being informed of his right to remain silence. Despite this finding, the majority dismissed the appeal on the ground that the record established the guilt of the accused beyond a reasonable doubt without reliance on any adverse inference from his silence.

Three members of the Court (Chief Justice Chaskalson, Justices Madala and Moseneke) held that it was impermissible for a court to draw an inference of guilt from the pre-trial silence of the accused. However, where appropriate, looking at the evidence as a whole, a court may draw a negative inference as to credibility from the late disclosure of an alibi defence as this is a justifiable limitation to the right to silence.

Two members of the Court (Deputy Chief Justice Langa and Justice Ngcobo) found that the first appellant's right to silence was not implicated in the matter because he had been warned of his right to remain silent but instead chose to make an exculpatory statement which was inconsistent with his alibi.

Justice Yacoob emphasised that an accused's right to remain silent and any inferences drawn there from must be evaluated in light of the requirements for a fair trial. He concluded that drawing an inference as to the guilt or credibility of an accused solely from his silence would render a trial unfair.

Cross-references:

- *S v. Mgedezi and Others* 1989 (1) *South African Law Reports* 687 (A);
- *R v. Director of Serious Fraud Office*, *Ex Parte Smith* [1993] Appeal Cases 1 (House of Lords);
- *Petty and Maiden v. The Queen* (1991) 173 *Commonwealth Law Reports* 95 (High Court of Australia).

Languages:

English.

Switzerland
Federal Court

Important decisions

*Identification:*SUI-2003-2-005

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 15.11.2002 / **e)** 2P.70/2002 / **f)** Fédération syndicale SUD and others v. Vaud Cantonal Government / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 129 I 113 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
4.6.9 **Institutions** – Executive bodies – The civil service.
5.1.1.5.1 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Private law.
5.2.2.9 **Fundamental Rights** – Equality – Criteria of distinction – Political opinions or affiliation.
5.2.3 **Fundamental Rights** – Equality – Affirmative action.
5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Trade union, consultation / Trade union, equal treatment / Civil service, staff, regulations, working conditions.

Headnotes:

Articles 8 and 28 of the Federal Constitution; Article 11 ECHR; trade union freedom within the civil service; participation in the legislative process concerning staff regulations; equality between trade unions.

Locus standi of a trade union not allowed to participate in the drafting of regulations governing application of a law on staff; judicially protected interest under Article 88 of the Law on Organisation of the Courts on grounds of trade union freedom and equality (point 1).

Trade union freedom does not entail a right for civil service unions to participate in the legislative process concerning staff regulations, but only the right to be consulted in an appropriate manner where amendments to legislation or regulations significantly affect their members' working conditions (point 3).

As employer, the state must refrain from taking any unjustified discriminatory measure in respect of trade unions if it is not to impair their freedom and that of their members. Excluding one trade union, on account of the opinions it advanced during the initial stage of the legislative process, from the next stage of that process while allowing another to participate, amounts to discrimination (point 5).

Summary:

In September 1999 the Vaud cantonal government published a document defining its human resources policy with a view to preparing new legislation on the canton's staff. It initiated negotiations with the three umbrella associations representing state employees, the *Fédération des sociétés de fonctionnaires* (FSF), the *Fédération syndicale* SUD (SUD) and the *Syndicat des services publics* (SSP). These led to an agreement entitled “The main options for preparing the preliminary draft law on staff of the Canton of Vaud”, concluded on 28 January 2000. The FSF signed the agreement, the SUD refused to sign, and the SSP failed to attend the final session of negotiations.

On 6 August 2001 the head of the canton's Finance Department determined the procedure for drawing up the regulations governing application of the draft law. A Steering Committee, comprising representatives of the cantonal authorities and of the FSF, was to draft the regulations. The SUD and the SSP were, however, excluded from the committee and were asked to submit written or oral comments to it.

The SUD objected to this procedure, which, it maintained, favoured the FSF over the SUD and the SSP. In an official decision the cantonal government dismissed the SUD's objection on the ground that the situation of the FSF differed from that of the SUD and the SSP, which had refused to sign the agreement of 28 January 2000.

The SUD and other appellants lodged a public-law appeal with the Federal Court seeking to have the cantonal government's decision set aside, mainly on the ground that the fact that they had been unable to participate as fully as the FSF in the committee's work on the rules governing application of the law on staff violated trade union freedom and the principle of equal treatment. The Federal Court allowed the appeal in so far as it was admissible.

The appellant had standing to lodge a public-law appeal on its own behalf and on behalf of its members and to complain of a violation of the principle of equality in connection with trade union freedom. Trade union freedom, which was expressly guaranteed by Article 28 of the Constitution, included, firstly, collective trade union freedom – the right for trade unions to exist and to act as such, i.e. to defend their members' interests and participate in collective bargaining – and, secondly, individual trade union freedom, whereby individuals are entitled to take part in forming a union, to join an existing union or to participate in a trade union's activity and also not to join or to resign from a union.

The right of trade unions to participate in collective negotiations and in the definition of labour regulations could not be applied as its stood to the civil service, where working conditions were determined not by negotiations and agreements, but by legal texts resulting from a legislative process. Power to legislate was an essential characteristic of state sovereignty. A preliminary agreement negotiated with a view to drawing up a draft law or regulation was accordingly not binding on the legislative authorities. That did not mean, however, that the civil service unions had no say concerning their members' status and working conditions. At the same time, the case-law of the European Court of Human Rights on Article 11 ECHR required that national law permit trade unions to take appropriate measures for the defence of civil servants' interests. The trade unions accordingly had the right to be consulted about significant amendments affecting their members' status.

In the case under consideration, the SUD was allowed to comment, in writing or orally, on the draft regulations governing application of the law on staff. This manner of expressing the trade union's views could not be deemed inappropriate. The SUD was accordingly wrong to complain of a violation of trade union freedom from that standpoint.

With regard to equal treatment, according to the established precedents a decision breaches this principle where it introduces legal distinctions that cannot be justified on any reasonable ground, in the light of the prevailing circumstances, or where it fails to draw distinctions that are necessary in view of the circumstances. In the case under consideration the question was whether the fact that the FSF had signed the agreement of 28 January 2000, whereas the SUD had refused to do so, constituted a ground which justified involving the FSF to a particularly close extent, through the inclusion of some of its representatives on the Steering Committee drawing up the rules on the law's application, and confining the SUD to making written and oral comments.

The reason advanced by the cantonal government for this difference in treatment was based on the degree of cooperation with the state as employer and, in particular, on the level of support for the staff policy options proposed by the latter. This ground did not constitute an objective, reasonable criterion that might warrant such a difference in treatment. The disapproval voiced by the SUD was no reason to reproach it for having adopted a line of conduct inconsistent with the rules of fair play or having systematically sought to impede progress on the issue. Trade union freedom entailed the right for unions to express or support ideas and opinions without restriction in the defence of their members' interests. In its capacity as employer the state must afford trade unions guarantees regarding their existence, their independence and a given sphere of action. The decision complained of was accordingly tantamount to an unacceptable means of pressure. The difference in treatment between the SUD and the FSF might also jeopardise the appellant's very existence, since there was a risk of disaffection on the part of some of its members, who might feel that they were no longer represented in negotiations with the state. It indirectly impaired individual trade union freedom since it had the effect of introducing a de facto restriction on the freedom of choice of individuals wishing to join a union. The complaint of a violation of the principle of equality in connection with trade union freedom was consequently well-founded.

Languages:

French.

Identification: SUI-2003-2-006

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 17.01.2003 / **e)** 2A.246/2002 / **f)** A.X. v. Zurich Cantonal Government and Zurich Cantonal Administrative Court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 129 II 249 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
2.2.1.6.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Primary Community legislation and constitutions.
5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.2.3 **Fundamental Rights** – Equality – Affirmative action.
5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Foreigner, child, residence / Family reunification, right / Free movement, persons.

Headnotes:

Article 13.1 (respect for family life), Article 8.1 and 8.2 (equal treatment), Article 191 (obligation of the Federal Court to apply federal laws and international law) of the Federal Constitution; Article 8 ECHR; Article 3 Appendix I to the agreement between the Swiss Confederation and the European Union and its member states on free movement of persons; Federal Law on Residence and Settlement of Foreigners (LRSF); Order Limiting the Number of Foreigners (OLF); family reunification of foreign members of a Swiss national's family following the entry into force of the agreement with the European Union on free movement of persons.

Right of a Swiss national's foreign child who is still a minor to family reunification on the basis of Article 17.2 LRSF and Article 8 ECHR; admissibility of the administrative-law appeal (point 1.2). Refusal of a subsequent request for family reunification where the parents are separated and there is no fundamental change in child custody arrangements (point 2).

The rules on family reunification under the agreement on free movement of persons apply solely in the case of a cross-border situation concerning a member state of the European Union (point 3); foreign nationals who do not originate from a European Union member state cannot in principle claim any entitlement there under, even where they have Swiss relatives living in Switzerland (point 4).

Adaptation of Swiss nationals' right to family reunification, in line with the less restrictive rules of the agreement on free movement of persons, to comply with the principle of equal treatment and the ban on discrimination? Under Article 191 of the Federal Constitution, the Federal Court remains bound by the legal provisions in force (Articles 7 and 17.2 LRSF), despite any unequal treatment of foreign members of a Swiss national's family not originating from a European Union member state (point 5).

Summary:

B.X., a Turkish national, arrived in Switzerland in 1989. He applied for and was refused asylum. In 1992 he married a Swiss national and in 1997 he obtained Swiss nationality.

B.X. had left a daughter A.X., born out of wedlock in 1987, with her mother in Turkey. In 1999 the daughter came to Switzerland under a tourist visa. The father subsequently asked the authorities to grant his daughter a residence permit under the rules on family reunification.

The authority competent in immigration matters refused this request on the ground that the conditions for family reunification were not fulfilled. That decision was upheld by both the Zurich Cantonal Government and the Zurich Cantonal Administrative Court.

A.X., represented by her father, lodged an administrative-law appeal with the Federal Court, asking that the Administrative Court's decision be set aside and that she be given leave to stay under the rules on family reunification. The Federal Court dismissed the administrative-law appeal.

Article 17 of the Federal Law on Residence and Settlement of Foreigners (LRSF) provides that unmarried children under the age of 18 shall be entitled to be included on their parents' residence permit. This provision also applies to foreign children of Swiss nationals. The father, B.X., had been naturalised and the daughter, A.X., was not yet 18. The appellant could also rely on Article 8 ECHR and Article 13.1 of the Federal Constitution, which guaranteed respect for family life. A.X. was accordingly entitled to lodge an administrative-law appeal.

The purpose of family reunification was to enable members of a family to live together. Where the parents were separated or where one parent lived abroad, there was no unconditional right to family reunification. On the contrary, the child must have a predominant family relationship with the parent living in Switzerland. That was not the case here. The father had abandoned his daughter when she was

two years old and had left her in the care of her mother and her grandparents for a long time. As a result, the daughter had grown up in a stable social and cultural environment. There were no recent changes or imperative reasons to justify removing the daughter from her current situation. The fact that B.X. had been appointed as his daughter's guardian under a very recent decision by a Turkish Justice of the Peace in no way changed the situation. Nor was it a decisive criterion that the father had sustained good relations with his daughter over the many years of separation and had supported her financially as far as possible. In short, in refusing family reunification, the Administrative Court had committed no breach of federal, constitutional or treaty law.

The appellant also referred to the agreement between the Swiss Confederation and the European Union and its member states on free movement of persons (the Agreement on Free Movement), arguing that, with the entry into force of this agreement, Swiss nationals enjoyed the same right to family reunification as had been granted to nationals of a European Union member state living in Switzerland.

The status of European Union nationals and their families was governed by the Agreement on Free Movement and the appendix thereto. Those rules were directly applicable, took precedence over Swiss national law and conferred a real right to family reunification. However, the agreement solely concerned cross-border relations between Switzerland and European Union member states. Under EU law and the case-law of the Court of Justice, the principles of free movement of persons applied only where the person concerned pursued, or had pursued, his or her occupation in another member state; conversely, a person who had never left his or her home country could not ask that country to guarantee the free movement of members of his or her family living in another country. Those principles were valid in the case under consideration. No entitlement under the agreement could accordingly be claimed vis-à-vis Switzerland.

This state of affairs was not contrary to the law of the agreement. Its consequence could be to place a Swiss national at a disadvantage in comparison with a national of a European Union member state living in Switzerland (reverse discrimination). The question was accordingly whether Swiss nationals' right to family reunification could or must be brought into line with the less restrictive rules of the agreement, in accordance with the constitutional principles of equality and non-discrimination.

A violation of constitutional rights could be complained of in an administrative-law appeal. Under Article 191 of the Federal Constitution, the Federal Court was obliged to apply federal law. Since the agreement was not applicable in the case under consideration, the only decisive law was the Federal Law on Residence and Settlement of Foreigners. That law did not provide for adaptation of Swiss nationals' legal situation in line with the rules of the Agreement on Free Movement. The issue of discrimination against Swiss nationals had been raised and debated in connection with the agreement's ratification. Although it was aware of the problem, parliament had decided against such new rules, while envisaging a subsequent revision of the federal law in the context of a more wide-ranging reform of immigration law. In the circumstances, the Federal Court was bound by the legislature's clear, unambiguous intent. It was hence not possible to extend the right to family reunification for Swiss nationals in line with the situation provided for in the Agreement on Free Movement. The administrative-law appeal was accordingly unfounded.

Languages:

German.

Identification: SUI-2003-2-007

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 28.03.2003 / **e)** 1A.205/2002 / **f)** B. v. Department of Planning, Infrastructure and Housing and Administrative Court of the Republic and Canton of Geneva / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 129 II 321 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.3.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.
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.
5.3.42 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Building permit, missing / Building, demolition / Traveller, camp site / Development plan / Land, use plan.

Headnotes:

Article 13.1 of the Federal Constitution (respect for private and family life), Article 8 ECHR, Articles 2, 3 and 24 *et seq.* of the Federal Law on Spatial Development (LSD); camp sites for Travellers.

Spatial development plans must allocate suitable areas and sites as places where Swiss Travellers may live in accordance with their traditional way of life, which is protected under constitutional law (points 3.1 and 3.2).

Outside a building zone, a relatively large camp site for Travellers cannot benefit from an exemption in accordance with Articles 24 *et seq.* LSD (points 3.3 - 3.5).

Summary:

Michael B. is a member of the Swiss Traveller community. In April 1999 he purchased approximately 6,800 square metres of land in a Genevan municipality; the plot was situated in an agricultural area and was bordered by a stream and a forest. From September 1999 the Department of Planning, Infrastructure and Housing of the Canton of Geneva (a department of the cantonal administration) noted several instances of work done by Michael B. on his land without permission. He had in particular laid paths and a parking area for caravans, converted an old barn and built the “new Gypsy church” and a wood chalet. Michael B. now lives on the site with his family.

On several occasions the department ordered administrative measures with a view to restoring the land to its former state. Michael B. challenged all of these measures in the cantonal Administrative Court. In February 2000 Michael B. applied for planning permission for a project entitled “running of a nursery garden and permission to live on the site”. His application was refused, and he again appealed to the cantonal Administrative Court, which found against him. He then lodged an administrative-law appeal with the Federal Court, asking that his planning permission application be granted and the administrative measures repealed. He contended that there was a discrepancy in the law, in that it did not provide for an exemption in the case of Travellers. He based his arguments, *inter alia*, on freedom of settlement, the right to private and family life and the guarantees afforded to ethnic minorities. The Federal Court dismissed the administrative-law appeal.

According to the Federal Court's case-law in spatial development matters, projects which are large in size or have significant local planning or environmental implications must figure in development plans, since in such cases there can be no question of granting an exemption under the rules concerning the exceptions provided for outside building zones. This means that the authorities are obliged, when pursuing their spatial development activities, to give binding effect in land use plans to the aims and principles of federal spatial development law. The question was therefore firstly whether a land use plan must be adopted if no existing zone was appropriate for implementation of the project at issue.

The appellant stated that he wished to use the land concerned in order to assert his specific cultural right to live with his family in caravans or small chalets. He referred to the case-law of the European Court of Human Rights, which recognised living in a caravan as an integral part of the Gypsy identity, a way of life consistent with that minority's longstanding tradition of travel. Measures relating to the parking of caravans could accordingly affect the ability to preserve one's Gypsy identity and to lead a private and family life consistent with tradition. The interests of Travellers must be taken into account in spatial development decisions, which must in general respect the needs of the population. Development plans must accordingly make provision for appropriate areas and sites.

The appellant's camp site was relatively large and had a planning and environmental impact. This led to the conclusion that a planning procedure was necessary before such a camp site could be installed. It was for the authorities responsible in spatial development matters to seek an appropriate site and initiate a procedure complying with democratic requirements and procedural safeguards, which could result in the adoption of a special land use plan, while taking account of the Traveller community's interests and the rights deriving from Article 8 ECHR and Article 13.1 of the Federal Constitution.

It was clear that the land chosen by the appellant, most of which was designated as non-building land under the special legislation for the protection of forests and waterways, was unsuitable as a future camp site for Travellers. In view of the extent of the building work done without permission, there could be no question of an exemption from the rules applicable to the land at issue. The Genevan authorities had accordingly not violated federal law by refusing the permission requested and by ordering administrative measures with a view to restoring the site to its former state.

Languages:

French.

Identification: SUI-2003-2-008

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 23.04.2003 / **e)** 1A.49/2002 / **f)** Abacha and others v. Federal Office of Justice / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 129 II 268 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
3.9 **General Principles** – Rule of law.
5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.

Keywords of the alphabetical index:

Judicial assistance, international, conditions.

Headnotes:

Article 2, paragraphs a, b and d of the Federal Law on International Assistance in Criminal Matters (IACM).

In view of the human rights situation in Nigeria, assistance must be made subject to specific conditions.

Summary:

The Federal Republic of Nigeria requested Switzerland's assistance with an investigation opened in Nigeria into the alleged misappropriation of funds by the late Sani Abacha, the country's Head of State from November 1993 to June 1998, and his relatives (including his spouse Maryam Abacha and his sons Mohammed and Abba). Pursuant to that request, the Federal Office of Justice ordered the communication to the requesting state of documents relating to thirty-four bank accounts subject to attachment in Switzerland.

Maryam, Mohamed and Abba Abacha lodged administrative-law appeals with the Federal Court, requesting that the Federal Office of Justice's decision be set aside. They relied *inter alia* on Article 2 of the Federal Law on International Assistance in Criminal Matters (IACM), maintaining that they would be in danger of being ill treated if they were imprisoned in Nigeria and risked having their procedural rights violated and being tried for their political opinions. The Federal Court partly allowed the appeals on grounds set out in the points.

The aim of Article 2 IACM was to ensure that Switzerland did not aid, through judicial assistance or extradition, proceedings which failed to guarantee the defendant a minimum standard of protection, consistent with that afforded by the law of democratic states, as defined in particular by the European Convention on Human Rights or the UN Covenant II on Civil and Political Rights, or which breached recognised standards of international public order. Switzerland itself would be in breach of its international obligations if it extradited a person to a state where there were serious reasons to believe that the person concerned was threatened with treatment contrary to the European Convention on Human Rights or the UN Covenant II.

The appellants adduced no concrete evidence suggesting that they would be brought to trial for hidden reasons, linked to their political opinions, their membership of a given social group, their race, their religion or their nationality.

They also denounced the human rights situation in Nigeria and, in that connection, referred to Articles 7, 9, 10 and 14 of the UN Covenant II. In 2002 the US State Department had published a report on the human rights situation in Nigeria. Despite the government's efforts serious problems subsisted in that field. This had been confirmed by reports issued in 2002 by Amnesty International and Human Rights Watch.

The requesting state's authorities had appended to the request for assistance a diplomatic note whereby the government guaranteed that human rights, especially those relating to a fair trial, would be respected, in particular in accordance with the UN

Covenant II. In view of the very precarious prison conditions in the requesting state and of the context of the case, it was justifiable to apply Article 80p IACM and make the granting of assistance subject to specific conditions. The requesting state would be asked to provide the following guarantees should the appellants be arrested and brought to trial for the offences set out in the assistance request:

a. while in custody they would not be subjected to any treatment causing them physical or mental harm;
b. no special court could be set up to try them for the offences they had allegedly committed;
c. they would be allowed the necessary time and facilities to prepare their defence and be entitled to assistance and to communicate with counsel of their choosing;
d. they would have the right to be tried in public, within a reasonable time, by an independent, impartial court;
e. the presumption of innocence would apply;
f. Switzerland's diplomatic representatives could at any time request information on the progress of the criminal proceedings, attend hearings on the merits and obtain a copy of the decision concluding the trial; they would be allowed to visit the accused at any time, without supervision; the latter would be able to communicate with them at all times, whether during the judicial investigation or while serving any prison sentence handed down.

After the Federal Court had delivered judgment, the Federal Office of Justice would transmit these conditions to the requesting state, allowing it an appropriate time-limit within which to accept or refuse them. The Federal Office would then decide whether the requesting state's reply constituted a sufficient undertaking in the light of these conditions. That decision could be challenged in separate proceedings.

Languages:

French.

“The Former Yugoslav Republic of Macedonia”
Constitutional Court

Important decisions

Identification: MKD-2003-2-001

a) “The Former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 07.05.2003 / **e)** U.br. 173/2002 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 34/2003 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.9 **General Principles** – Rule of law.
3.12 **General Principles** – Clarity and precision of legal provisions.
4.7.15.1.2 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Powers of ruling bodies.
4.7.15.1.4 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Status of members of the Bar.

Keywords of the alphabetical index:

Lawyer, foreign, admission to practice, conditions / Lawyer, loss of working capacity / Bar, member, immunity.

Headnotes:

The Constitution provides for the independence and impartiality of the Bar and attorneys. A law may not provide for the immunity of attorneys from liability and inspection of their premises and business books. The checking of reciprocity, as a pre-requisite for foreign attorneys performing legal services in the country, may not be delegated to the Bar. Government bodies are the only ones authorised to carry out that kind of function, provided that it is regulated by bilateral agreements between states. The Bar has no authorisation to determine whether an attorney lost his/her capacity to practise law as a ground for the

revocation of his/her status. It falls within the jurisdiction of the ordinary court, by way of non-contentious proceedings, to deprive a person of his or her capacity to work or to practise law.

Summary:

Bearing in mind the arguments presented in the petition, as well as its own findings, the Court held that some provisions of the Law on the Bar were unconstitutional. According to the impugned provisions, foreign attorneys may provide legal services in the country subject to the condition of reciprocity, provided that the Bar checks such reciprocity under the provisions and manner set out in its by-laws. That provision was interpreted in such a way that two conditions must be met in order for foreign attorneys to be allowed to provide legal services in the territory of the country.

Firstly, there had to be reciprocity with the foreign country; and secondly, that reciprocity was to be determined by the Bar in accordance with its internal rules set out in its by-laws. The Court found that the principle of reciprocity was indisputable. However, the Court found it doubtful that the Bar could be authorised to check the existence of reciprocity pursuant to its internal rules. Since the Court affirmed that the checking of reciprocity fell within the powers of government bodies (Ministry of Justice and the Ministry of Foreign Affairs) and could not be delegated to the Bar, the Court found that provision unconstitutional. The Bar could not play the role of state bodies entrusted with the right to regulate the question of international legal co-operation.

The second provision that the Court found unconstitutional provided for the immunity of attorneys. Article 21 of the Law on the Bar states:

1. an attorney may not be held liable for an opinion he/she gave during the trial;

2. he/she may not be arrested or detained without prior consent of the Bar for a criminal offence committed while performing legal services;

3. an inspection of an attorney's office may be carried out only in his/her presence and that of an authorised representative of the Bar;

4. an inspection may be carried out only in relation to the documents listed in a court decision. Any other written materials, files or documents are excluded from the inspection.

The Court found that all those provisions were aimed at securing and safeguarding the freedom, independence and impartiality of an attorney in performing his/her job. However, Article 53 of the Constitution states that the Bar is an independent and autonomous public service, which provides legal assistance and carries out public mandates in accordance with law. Therefore, the Court held that the statutory provision providing for immunity was not only superfluous, but it was also questionable from a constitutional law point of view. That holding emerged from the fact that immunity is reserved only for certain holders of public mandates specified by the Constitution itself. The Constitution does not speak of attorneys, either as persons or a profession, enjoying immunity in the exercise of duties.

The Law also sets out conditions under which an attorney loses the right to practise law. An attorney loses that right if he/she is deprived of his/her capacity to work or if he/she loses the capacity to practise law. Another method of revoking his/her status of attorney is by a formal determination by the Bar stating that the disqualification criteria have been fulfilled. That provision was found unconstitutional on the ground that it was inaccurate and ambiguous, for the reason that it is the ordinary court, by way of non-contentious proceedings, that revokes a person's capacity to practise a profession. The Constitutional Court found the term "determination" by the Bar in the context mentioned above to be incomplete and imprecise; such inaccuracy could create uncertainty and be subject to different interpretations by legal entities, and was, as such, in contradiction with the principle of the rule of law and division of state powers.

These were the grounds upon which the Court founded its decision.

Languages:

Macedonian.

Identification: MKD-2003-2-002

a) "The Former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 22.05.2003 / **e)** U.br. 51/2003 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 37/2003 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.13 **General Principles** – Legality.
4.7.15.1.2 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Powers of ruling bodies.
5.2 **Fundamental Rights** – Equality.
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:

Bar, admission, subscription fee / Lawyer, admission to practice, conditions / Licence, granting.

Headnotes:

The payment of a registration fee for having one's name entered in the Bar's directory may not be treated as an additional requirement for becoming an attorney and entering the legal profession. A person who meets all the requirements set out by the Law on the Bar should be registered in the directory and granted permission to practise law. The Bar may not lay down the payment of a registration fee as an additional requirement for obtaining permission to practise law. The payment of the registration fee is lawful and the Bar has a right to demand it, but it may not be taken as a condition for granting permission to practise law.

Summary:

Taking into account all considerations raised by the petitioner, the Court intervened in some provisions of the Bar's by-laws on the ground that the Bar had gone beyond the powers given to it by law. The exercise of excessive power by the Bar was reflected by those provisions of its by-laws defining the payment of a registration fee as additional requirement that had to be fulfilled before the attorneys were granted permission to practice law. The Law itself provides for the requirements and criteria that must be fulfilled by a candidate in order to be admitted to the practise of law as an attorney. These requirements are, *inter alia*: that the person should have Macedonian citizenship; fulfilled the general requirements to be employed in public administration; graduated from the study of law and successfully completed the bar exam; and should enjoy reasonable respect. The law speaks also of a registration fee charged by the Bar when a person fulfilling all those requirements asks to be registered in its directory. However, the Law does not mention that fee in relation to being granted permission to practise law. That means that a graduate lawyer may become an attorney and may be granted permission to practise law after being registered in the Bar's directory, irrespective of the duty to pay the registration fee. Consequently, the Court found that payment of a registration fee could not be treated as an additional requirement for becoming an attorney arising out of the conditions set out in the Law. The Bar defined it in a way that went beyond its powers and restricted a person's right to work. Article 32 of the Constitution provides that everyone has the right to work, free choice of employment, protection at work and material assistance during temporary unemployment. Moreover, every job is open to everyone under equal terms. The law and collective agreements regulate the exercise of labour rights and the position of employees. With that provision in mind, the Court found that raising the level of importance of the registration fee and the treatment of its payment as a necessary requirement for obtaining permission to practise law restricted the right to work. Linking permission to practise law with the payment of a registration fee puts financially weak persons in a disadvantageous position as to access to the profession of attorney. The Court found that treating the registration fee that way fell outside the intention the Law.

In its judgment, the Court annulled a decision by the Bar fixing the registration fee at the amount equivalent to 1 000 €, payable in denars by new attorneys after being registered in the Bar's Directory, but before being granted permission to practise law.

Languages:

Macedonian.

Ukraine
Constitutional Court

Important decisions

Identification: UKR-2003-2-010

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 28.05.2003 / **e)** 10-rp/2003 / **f)** Official interpretation of the term "organisation of the distribution of postage stamps, stamped envelopes and cards" used in the second paragraph of the third part of Article 15 of the Law on the Post Office (case on the organisation of the distribution of postage stamps, stamped envelopes and cards) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 23/2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.25 **General Principles** – Market economy.
5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Post, service public / Post, distribution, cards, stamps / Post, organisation, distribution, right, private persons, legal entities.

Headnotes:

The term "organisation of the distribution of postage stamps, stamped envelopes and cards" used in Article 15.3.2 of the Law on the Post Office shall be understood as covering a body of activities pursued by the public postal services in respect of supplying the users of postal services and other customers with postage stamps, stamped envelopes and cards, and as including the activity of determining the procedure for the distribution of those items and making them available through the public postal services directly and/or through other legal entities and individuals on a contractual basis according to the laws of Ukraine.

Summary:

The Constitutional Court of Ukraine found that when the legislator had granted the public postal services the exclusive rights as to the printing, introduction into distribution and withdrawal from distribution of postage stamps, stamped envelopes and cards, it had laid down the public postal services' exclusive rights to organise the distribution rather than to the distribution itself of the above-mentioned items because such an exclusive distribution by the public postal services would have restricted the opportunities for the purchase of those items by essentially reducing the number of the sellers. That would have complicated access to postal services.

The organisation of the distribution of those items, in the opinion of the Constitutional Court of Ukraine, included the activities of the public postal services related to setting out the conditions under which those items would be distributed and made available to customers. Having the exclusive rights under the Law to organise the distribution of postage stamps, stamped envelopes and cards, the public postal services may, *inter alia*, distribute them within the framework of the proper execution of their own postal services.

At the same time, the distribution itself of postage stamps, stamped envelopes and cards does not amount to an activity that must be carried out exclusively by the public postal services. In conformity with Article 13.1 of the Law on the Post Office, the distribution of those items may be carried out by suppliers, that is to say, by other legal entities that and individuals who meet certain conditions and enter into an agreement with the Post Office.

After a thorough analysis of the Law on the Post Office, the Constitutional Court of Ukraine held that the organisation of the distribution of envelopes, with or without artwork (without postage stamps), was not an exclusive right of the public postal services.

Languages:

Ukrainian.

Identification: UKR-2003-2-011

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 10.06.2003 / **e)** 11-rp/2003 / **f)** Constitutionality of the Law introducing a Moratorium on the Compulsory Disposal of Property (case on a moratorium on the compulsory disposal of property) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 25/2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
3.25 **General Principles** – Market economy.
4.7.3 **Institutions** – Judicial bodies – Decisions.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Property, disposal, moratorium, temporary / Decision, execution, stay.

Headnotes:

The provisions of the Law introducing a Moratorium on the Compulsory Disposal of Property concerning the introduction of a temporary moratorium on the compulsory disposal of property owned by state-owned enterprises and corporations do not contradict the Constitution of Ukraine.

Summary:

The Law introducing a Moratorium on the Compulsory Disposal of Property ("the Law") provides for a temporary moratorium on the application of the compulsory disposal of property owned by state-owned enterprises and corporations, that is to say, enterprises and corporations in which the State owns at least 25% of the authorised capital.

The objectives of the Law are to secure the economic security of the state, to avoid the destruction of the integral parts of the property of state-owned enterprises and to protect the interests of the state at the time of a disposal of the corporations' property. Under the Constitution of Ukraine, protecting the sovereignty and territorial indivisibility of Ukraine and ensuring its economic and informational security are the most important functions of the State and a matter of concern for all the Ukrainian people (Article 17), as is the social orientation of the economy (Article 13).

In conformity with Article 92.1.7 of the Constitution of Ukraine, the legal regime of property is established exclusively by the laws of Ukraine, which lay down its specific features. The state provides equal protection to all forms of property, which may have their own specific features related to the terms of and the reasons for the creation or termination of the property rights that have been laid down by the legislator. The legal status of persons as to their rights arising from different forms of property is based on the universal constitutional principles, and each form has its own specific features. The state provides for the protection of the rights of all persons as to their property on the basis of the universal and specific features of their property rights under the law.

The moratorium does not cover an alienation of the property of an enterprise, where that alienation is a sale of real property by an enterprise that does not carry on production activities, or where a debtor enterprise enters into an agreement to ensure production in the process of a reorganisation. The Law does not allow an unlawful restriction of competition, unfair competition in business, the abuse of an exclusive market position or the deprivation of the protection of the property rights of one party in the disposition of property.

The Law does not release the enterprises from liability for damage caused by them to citizens. In the event that the right to a safe environment for life and health is infringed, the damage shall be reimbursed for any property that is not covered by the moratorium to the ecological insurance fund or to the funds of the State Budget of Ukraine.

The Law does not violate the constitutional requirement that a judicial decision be binding. The Law does not invalidate court decisions on the compulsory disposal of the property of enterprises made before and after enactment of the Law. Those decisions remain in force, but their execution is stayed until the mechanism for the compulsory disposal of property has been improved. The Law provides for the time-limit for their execution to be extended by the length of the duration of the stay.

Languages:

Ukrainian.

Identification: UKR-2003-2-012

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 26.06.2003 / **e)** 12-rp/2003 / **f)** Official interpretation of the provisions contained in the first part and the third part of Article 80 of the Constitution of Ukraine; the first part of Article 26 and the first part, the second part, and the third part of Article 27 of the Law of Ukraine on the Status of a National Deputy of Ukraine (case on the guarantee of parliamentary immunity) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 28/2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.5.9 **Institutions** – Legislative bodies – Liability.
4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.

Keywords of the alphabetical index:

Immunity, parliamentary / Parliament, member, detention, arrest, conditions / Parliament, member, powers, restriction.

Headnotes:

Parliamentary immunity is an element of the status of a national deputy of Ukraine and a constitutional guarantee aimed at the establishment of the proper conditions for the unobstructed and effective pursuit of deputy activities (exercise of deputy powers). It is not a personal privilege; it entails a public and legal character. Its purpose is not only to protect the national deputies of Ukraine from unlawful intervention into their deputy activities, but also to facilitate the proper functioning of the Parliament.

In Article 80.3 of the Constitution of Ukraine, the provisions refer to detention and arrest not only as preventive measures under criminal procedure, but also to detention as an administrative procedural measure and to arrest as an administrative punishment. As both restrict the right to freedom and the personal immunity of a national deputy, they may not be taken without the consent of the Parliament *(Verkhovna Rada)* of Ukraine.

Summary:

The Constitutional Court considered that the provisions of Article 80.1 of the Constitution of Ukraine, in which the national deputies of Ukraine are guaranteed parliamentary immunity, and the relevant provisions contained in Article 27.1 of the Law on the Status of a National Deputy of Ukraine ("the Law") were be understood as follows. Parliamentary immunity, as an element of the status of national deputies, serves as a constitutional guarantee of the unobstructed and effective exercise by the national deputies of their powers. It also provides for their exemption from legal liability under the circumstances set out in the Constitution of Ukraine and for a special procedure governing the establishment of the national deputies' criminal liability, their detention, their arrest and other acts related to the restriction of their personal rights and freedoms.

The provisions contained in Article 80.3 of the Constitution of Ukraine and Article 27.1 of the Law on the Status of a National Deputy of Ukraine concerning the detention of a national deputy shall be understood in such a way that detention as a temporary precautionary measure of criminal procedure or a measure of administrative procedure may be taken against a national deputy only with the consent of the Parliament *(Verkhovna Rada)* of Ukraine, for the reasons in and according to the procedure laid down by the Constitution and the laws of Ukraine.

The provisions contained in Article 80.3 of the Constitution of Ukraine and Article 27.1 of the Law on the Status of a National Deputy of Ukraine concerning the arrest of a national deputy shall be understood in such a way that arrest (taking into custody) as a precautionary measure of criminal procedure and detention as an administrative punishment for an offence committed may be taken against or imposed on a national deputy only with the consent of the Parliament of Ukraine, for the reasons in and according to the procedure laid down by the Constitution and the laws of Ukraine.

The provisions contained in Article 27.2 of the Law on the Status of a National Deputy of Ukraine concerning the detention of a national deputy in the context of the provisions in Article 80.3 of the Constitution of Ukraine shall be understood in such a way that the detention or arrest of a national deputy is possible only with the consent of the Parliament of Ukraine, irrespective of the availability of the consent as to the criminal liability of a national deputy.

The provisions contained in Article 26.1 of the Law on the Status of a National Deputy of Ukraine that no one shall have the right to restrict the powers of the national deputies except under the circumstances set out in the Constitution of Ukraine, in the Law and in other laws of Ukraine shall be understood in such a way that the powers of the national deputies that are laid down by the Constitution and the laws of Ukraine may not be limited by the acts or omissions of the state bodies, bodies of local self-government, their officials and servants, managers of companies, establishments

and organisations irrespective of their form and subordination, citizens and their associations.

The national deputies' exercise of their powers is, first and foremost, aimed at the exercise of the competence of the parliament by way of their joint activities at the plenary meetings of the Parliament of Ukraine. Any restriction on the powers of a national deputy shall be established exclusively by the Constitution and the laws of Ukraine.

Languages:

Ukrainian.

Identification: UKR-2003-2-013

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 03.07.2003 / **e)** 13-rp/2003 / **f)** Official interpretation of the provisions contained in Article 29.6 of the Law on the Election of the National Deputies of Ukraine (case on the time-limit for appeals and applications for review concerning an infringement at the time of counting votes and establishing the results of voting) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 29/2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.9.1 **Institutions** – Elections and instruments of direct democracy – Electoral Commission.
4.9.9.8 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Counting of votes.
4.9.9.11 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Announcement of results.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.38 **Fundamental Rights** – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Electoral Commission, work, irregularity / Appeal, time-limit.

Headnotes:

In practice, the Electoral Committee proceedings often result in voting and election results being established in constituencies by the relevant constituency Electoral Committees after the expiry of the time-limit for appealing against the decisions, acts or omissions of the constituency Electoral Committees. By limiting the time-limit for appeal to two to five days after the day of the elections, the provisions of Article 29.6 of the Law on Elections deprive the subjects of the electoral process of the right to appeal to a court and the relevant Electoral Committee of the right to apply for review of any infringements by local or constituency Electoral Committees during the process of counting the votes and establishing the voting results in cases where that process lasts more than two or five days after the elections.

Summary:

Persons having the right to bring a constitutional appeal petitioned for an official interpretation of the provisions contained in Article 29.6 of the Law on the Election of the National Deputies of Ukraine ("the Law on Elections") that set out a time-limit of five days after the day of the elections for bringing an appeal to the Central Electoral Committee or to a court against the decisions, acts or omissions of the Electoral Committees and their members in the course of their work for the constituency Electoral Committees at the time of counting the votes and establishing the voting results.

The Law on Elections sets out the procedure for appeal and examination of complaints relating to infringements concerning elections, including, *inter alia*, the time-limit for filing an appeal. That is intended to ensure, on the one hand, the exercise of the electoral rights of the citizens of Ukraine, and on the other hand, the formation of the legitimate composition of the Parliament and an opportunity for the newly elected Parliament *(Verkhovna Rada)* of Ukraine to start exercising their powers within the time-limit stipulated in the Constitution of Ukraine. Therefore, the strict time-limit on appeal complies with the nature of the electoral process. However, the setting out and application of time-limits should not restrain the rights and freedoms of voters, political parties (electoral blocs of parties), candidates or national deputies of Ukraine.

When setting out the requirements of continuity and urgency of the process of establishing the voting results in single mandate constituencies, the Law on Elections does not set out a time-limit in which the Constituency Electoral Committee must establish the election results. Therefore, Article 29.6 of the Law on

the Elections of the National Deputies of Ukraine relating to appeals and applications for review concerning infringements by local or constituency Electoral Committees during the counting of votes and the establishing of voting results fails to comply with the Constitution of Ukraine to the extent it sets out that the time-limit for filing an appeal or application against such infringements is two or five days after the elections. Those provisions violated constitutional rights such as the right to judicial protection and the right of everyone to lodge an individual or collective written appeal with state bodies, bodies of local self-government, their officials and servants.

Languages:

Ukrainian.

Identification: UKR-2003-2-014

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 08.07.2003 / **e)** 14-rp/2003 / **f)** Constitutionality of the provisions contained in Article 150 of Code of Criminal Procedure of Ukraine in respect of gravity of the crime (case on taking to consideration the gravity of the crime at the time of taking the preventive measures) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 29/2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.19 **General Principles** – Margin of appreciation.
5.3.5.1.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Arrest.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.

Keywords of the alphabetical index:

Preventive measure, conditions / Crime, gravity.

Headnotes:

The list of circumstances in Article 150 of the Code of Criminal Procedure to be taken into consideration in a decision on preventive measures is not an exhaustive one. When considering preventive measures, the gravity of a crime of which a person is suspected or accused may be taken into consideration along with other circumstances.

Summary:

The Constitution of Ukraine provides that the arrest and the holding in custody of a person may take place pursuant to a court decision stating the reasons for such a measure and only for the grounds and in accordance with the procedure established by law (Article 29.2). According to Article 29.3 of the Constitution, in the event of urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure.

In accordance with those provisions of the Constitution, the Code of Criminal Procedure sets out that preventive measures − for example, custody − are possible pursuant to a court decision stating reasons and only for the grounds and in accordance with the procedure established by Articles 148, 149, 150 and 155; and the detention of individuals as a temporary preventive measure (Article 149.2) shall be taken by way of extrajudicial procedure by a body of inquiry for the grounds and in accordance with the procedure set out in Articles 106, 106.1, 115 and 165.2 of the Code.

An analysis of Articles 148, 149, 150 and 155 of the Code of Criminal Procedure reveals that Article 150 does not exhaustively set out the grounds for preventive measures or the circumstances to be taken into consideration at the time of taking preventive measures for every specific event for and every kind of preventive measure (written undertaking not to leave a place, custody etc.). Article 150 of the Code of Criminal Procedure, which provides that when deciding on preventive measures the gravity of the crime of which a person is accused or suspected shall also be taken into consideration together with other circumstances, complies with the Constitution.

Languages:

Ukrainian.

Identification: UKR-2003-2-015

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 08.07.2003 / **e)** 15-rp/2003 / **f)** Constitutionality of the Government Resolution approving the Civil Servant Assessment Regulations (case on civil servant attestation) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 29/2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.
4.6.9.2 **Institutions** – Executive bodies – The civil service – Reasons for exclusion.

Keywords of the alphabetical index:

Civil servant, assessment / Civil servant, dismissal.

Headnotes:

The Government Resolution approving the Civil Servant Assessment Regulations implementing the provisions set out in the Labour Code, other laws of Ukraine and the Decree of the President of Ukraine regarding the assessment of civil servants does not lay down any additional grounds for termination of employment, does not violate any guarantees protecting citizens from illegal dismissal and, therefore, does not contradict Article 43.6 of the Constitution of Ukraine.

Summary:

In conformity with the Constitution of Ukraine, the Cabinet of Ministers of Ukraine ("the Government") is the highest body of the executive power and, in addition to the functions laid down by the Constitution of Ukraine, carries out other functions set out in the laws of Ukraine and the acts of the President of Ukraine.

The Law on the Civil Service ("the Law") authorises the Government to implement regulations governing issues concerning the civil service including, *inter alia*, the setting up of procedures established by the laws, the setting up of additional procedures for the selection of civil servants, promotion, terms of remuneration, and the approval of the procedure for competitions for recruitment of civil servants and reserve lists. According to the Law, the Central Department of the Civil Service, which operates as an agency of the Government, was organised with the aim of pursuing established state policies in the sphere of the civil service and managing the civil service.

Article 96.6 of the Labour Code ("the Code") provides for the assessment of civil servants as a method for checking and evaluating the qualifications of civil servants, their knowledge and skills. Having approved the Civil Servant Assessment Regulations, the Government has not established assessment as a requirement, but has only regulated the procedure of civil servant assessment. That power of the Government follows from the responsibility vested in it by the Constitution and the law to pursue state policies in the field of the civil service. The Government Resolution approving the Civil Servant Assessment Regulations ("the Resolution") was enacted according to the Decree of the President of Ukraine.

The results of the assessment do not amount to grounds for dismissal of civil servants. With respect to civil servants, the Regulations allow the Assessment Committee to take only decisions that are recommendations by nature. It is the manager of the state body who takes the final decision.

According to Section 20 of the Regulations, a civil servant may be dismissed on the basis of the results of the assessment for the grounds laid down by Article 40.1.2 of the Code. That section also allows a civil servant's employment contract to be terminated without using the results of an assessment, where it is confirmed a civil servant cannot properly carry out his or her duties because of a lack of qualifications.

Languages:

Ukrainian.

United States of America
Supreme Court

Important decisions

Identification: USA-2003-2-002

a) United States of America / **b)** Supreme Court / **c)** / **d)** 23.06.2003 / **e)** 02-241 / **f)** Grutter v. Bollinger / **g)** 123 *Supreme Court Reporter* 2325 (2003) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
4.6.8.1 **Institutions** – Executive bodies – Sectoral decentralisation – Universities.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.2.2 **Fundamental Rights** – Equality – Criteria of distinction – Race.
5.2.3 **Fundamental Rights** – Equality – Affirmative action.

Keywords of the alphabetical index:

University, admission / Race, diversity, student body / Racial classification, narrowly tailored.

Headnotes:

Courts reviewing racial classifications imposed by government must subject them to strict scrutiny analysis, under which a classification based on race will be valid only if it is narrowly tailored to further a compelling state interest.

The constitutional equal protection requirement does not prohibit an educational institution's narrowly tailored use of race as a factor in admissions decisions in order to advance a compelling state interest.

The attainment of student body diversity is a compelling state interest for purposes of equal protection analysis.

To be narrowly tailored under equal protection analysis, an educational admissions program cannot employ a race-based quota system.

To be narrowly tailored under equal protection analysis, a race-conscious admissions program must not unduly burden individuals who are not members of favoured racial or ethnic groups.

When race is used as a positive factor in educational admissions programs, equal protection analysis requires that all applicants must be evaluated as individuals and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.

To be narrowly tailored under equal protection analysis, race-conscious educational admissions programs must be limited in time.

Summary:

Barbara Grutter, an unsuccessful applicant for admission to the University of Michigan Law School (a public law school in the State of Michigan), brought suit against the Law School and a number of officials, alleging that they had discriminated against her on the basis of race in violation of civil rights legislation and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. That clause prohibits the States from denying any person the equal protection of the laws. Ms. Grutter is white (Caucasian), and she alleged that her application for admission was rejected because the Law School adhered to an affirmative action policy that she claimed used race as a predominant criterion, giving non-white applicants a greater chance of admission than applicants with similar credentials who are members of disfavoured racial groups.

The U.S. District Court concluded that the Law School's use of race as a factor in admissions was unconstitutional and issued an injunction prohibiting the Law School from using race as a criterion. The U.S. Court of Appeals for the Sixth Circuit reversed the District Court's judgment and vacated the injunction. The U.S. Supreme Court decided to accept the case, in order to resolve disagreement among the federal Courts of Appeals on what the Supreme Court termed “a question of national importance”: whether student body diversity is a compelling interest that can justify the limited use of race in selecting applicants for admission to public universities.

The Supreme Court affirmed the judgment of the Court of Appeals, thereby upholding the constitutionality of the Law School's admissions policy because it satisfied the requirements of Equal Protection analysis. In so doing, the Court took into account its 1978 judgment in the case of *Regents of University of California v. Bakke*, which also addressed the

question of the constitutionality of a university's race-conscious admissions policy.

Courts reviewing racial classifications imposed by government, the Court stated, must subject them to strict scrutiny analysis. Under this approach, a classification based on race will be valid only if it is narrowly tailored to further a compelling governmental interest. The attainment of student body diversity, the Court determined, is a compelling interest that yields essential educational benefits for all students. Among those benefits, the Court found, are the promotion of cross-racial understanding, the breaking down of racial stereotypes, and the preparation of students as legal professionals and participants in an increasingly diverse work force and society. In this regard, the Court's conclusions endorsed what the Court termed the “touchstone for constitutional analysis” of race-conscious admissions policies articulated in the Bakke decision: that attainment of a diverse student body is the only permissible use of race as an admissions factor.

The Court closely analysed the Law School's admissions policy to determine whether it exceeded the permissible contours of narrow tailoring. Under the Equal Protection Clause, the Court stated, the use of a numerical quota system in a race-conscious admissions program is impermissible. In addition, such a program must not unduly burden individuals who are not members of the favoured racial or ethnic groups, and it must be limited in time, since a core purpose of the Fourteenth Amendment is to eliminate all governmentally-imposed discrimination based on race. After detailed analysis of the Law School's program, the Court found that it satisfies these requirements because, while it uses race as a positive factor in admissions decisions, it also entails highly individualized review of all aspects of an applicant's file, does not make an applicant's race or ethnicity the defining feature of his or her application, and takes into account various race-neutral alternatives. In addition, the Court, noting the beneficial results of efforts nationwide to enhance student body diversity in the 25 years since the *Bakke* decision, voiced the expectation that within the next 25 years the use of racial preferences will no longer be necessary to further the state interest.

Supplementary information:

Five of the nine Justices voted in favour of the Court's judgment. On the same day that it decided *Grutter v. Bollinger*, the Court in the case of *Gratz v. Bollinger* [USA-2003-2-004] upheld an equal protection challenge to the University of Michigan's use of race in admissions to its undergraduate programs.

Cross-references:

- *Regents of University of California v. Bakke*, 438 *United States Reports* 265, 98 *Supreme Court Reporter* 2733, 57 *Lawyer's Edition Second* 750 (1978);
- *Gratz v. Bollinger*, 123 *Supreme Court Reporter* 2411, 156 *Lawyer's Edition Second* 257 (2003), [USA-2003-2-004].

Languages:

English.

Identification: USA-2003-2-003

a) United States of America / **b)** Supreme Court / **c)** / **d)** 23.06.2003 / **e)** 02-361 / **f)** United States v. American Library Association, Inc. / **g)** 123 *Supreme Court Reporter* 2297(2003) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
4.5.2 **Institutions** – Legislative bodies – Powers.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Internet, access, public library / Internet, obscenity, filtering / Pornography, Internet, filtering / Software, filtering, obligatory / Internet, service, public funds, conditions.

Headnotes:

Internet access in a public library is not a public forum, thereby necessitating a strict scrutiny standard of judicial review of governmental decisions imposing restrictions in that setting based on content.

When the government appropriates public funds to establish a program, the broad definition of the program's limits is constitutionally valid.

Summary:

The U.S. Congress, in an effort to address problems associated with the availability of Internet pornography on computer terminals in public libraries, enacted the Children's Internet Protection Act (CIPA). The CIPA includes a provision that prohibits public libraries from receiving federal funding for Internet services unless the libraries install filtering software to block obscene or pornographic images. The federal funds affected by the CIPA allow libraries to acquire computer technologies for provision of Internet information services to their patrons and also entitle libraries to purchase Internet access at discounted prices. The CIPA also permits librarians, upon request by patrons, to disable the filters to enable Internet access for "*bona fide* research or other lawful purposes".

A group of libraries, library associations, library patrons, and website publishers challenged the constitutionality of the CIPA in U.S. District Court. The District Court ruled that the filtering provisions were unconstitutional because the Congress had violated its spending power under the Constitution by forcing public libraries to violate the First Amendment to the U.S. Constitution if they complied with the CIPA. The First Amendment provides that the U.S. Congress "shall make no law ... abridging the freedom of speech." In making this conclusion, the District Court reasoned that a library providing Internet access is for First Amendment purposes a "public forum" in which governmental decisions to impose content-based access restrictions are subject to strict judicial scrutiny. Applying this standard, the District Court determined that, although the government has a compelling interest in preventing the dissemination of obscene material and child pornography, the use of software filters was not narrowly tailored to attain this objective.

On direct appeal, the U.S. Supreme Court reversed the District Court decision and upheld the validity of the filtering provisions. The Court ruled that Internet access in a public library is not a public forum, due to the fact that public forum principles are not compatible with the broad discretion that libraries must exercise in making content decisions concerning the maintenance of their collections. Therefore, the Court concluded, the CIPA provisions need not be subject to strict judicial scrutiny. As to the petitioners' "unconstitutional conditions" claim, the Court cited its case law that has held that when the government appropriates public funds to establish a program, it is entitled to define broadly that program's limits. Also, in separate opinions, two Justices concurring in the judgment emphasized the statutory exception that limits the speech-related harm: the discretion given to librarians to disable the filtering software, upon patrons' request, for the purposes enumerated in the legislation.

Supplementary information:

Four of the nine Justices joined the plurality opinion in favour of the Court's judgment. The judgment was joined by the two concurring Justices, and the remaining three Justices dissented.

Languages:

English.

Identification: USA-2003-2-004

a) United States of America / **b)** Supreme Court / **c)** / **d)** 23.06.2003 / **e)** 02-516 / **f)** Gratz v. Bollinger / **g)** 123 *Supreme Court Reporter* 2411 (2003) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
4.6.8.1 **Institutions** – Executive bodies – Sectoral decentralisation – Universities.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.2.2 **Fundamental Rights** – Equality – Criteria of distinction – Race.
5.2.3 **Fundamental Rights** – Equality – Affirmative action.

Keywords of the alphabetical index:

University, admission / Race, diversity, student body / Racial classification, narrowly tailored.

Headnotes:

Courts reviewing racial classifications imposed by government must subject them to strict scrutiny analysis, under which a classification based on race will be valid only if it is narrowly tailored to further a compelling governmental interest.

The use of the strict scrutiny standard of review of racial classifications under equal protection analysis is not dependent on the race of the persons burdened or benefited by a particular classification.

The constitutional equal protection requirement does not prohibit an educational institution's narrowly tailored use of race as a factor in admissions decisions in order to advance a compelling state interest.

The attainment of student body diversity is a compelling state interest for purposes of equal protection analysis.

To be narrowly tailored under equal protection analysis, an educational admissions program cannot employ a race-based quota system that does not provide for individualized consideration of all applications.

Summary:

Two unsuccessful applicants for admission to the Bachelor's degree program at the University of Michigan, a public institution in the State of Michigan, brought suit against the University and certain of its officials, alleging that they had been denied equal protection of the laws as guaranteed under the Fourteenth Amendment to the U.S. Constitution. Both applicants claimed that, as Caucasians, they were invalidly discriminated against on the basis of race because the University adhered to an affirmative action policy that gave non-Caucasian applicants a greater chance of admission than applicants with similar credentials who are members of disfavoured racial groups. In particular, the applicants pointed to the University's policy of automatically granting 20 points, or one-fifth of those needed for admission, to all applicants from non-Caucasian "underrepresented minority" racial groups.

The U.S. District Court ruled that the University's current admissions policy was constitutional, but not the policy in force at the time that the applicants were denied admission. While appeals were pending in the U.S. Court of Appeals for the Sixth Circuit, that Court of Appeals issued an opinion in the case of *Grutter v. Bollinger*, upholding the admissions policy of the University of Michigan Law School. The U.S. Supreme Court decided to review both cases, even though the Court of Appeals had not rendered judgment in *Gratz v. Bollinger*.

Employing the same strict scrutiny equal protection analysis that it used in *Grutter v. Bollinger*, decided the same day, and noting that this standard of review is not dependent on the race of the persons burdened or benefited by a particular classification, the Supreme Court ruled that the University's policy for Bachelor's degree program admissions was unconstitutional because it failed to satisfy the requirement that a racial classification must be narrowly tailored. The Court found that the policy of automatically granting 20 points in the admissions process to all members of non-Caucasian "underrepresented minority" racial groups was not narrowly tailored to achieve the state interest in educational diversity. This policy, the Court concluded, amounted to application of a numerical quota that did not provide for sufficient individualized consideration of each application.

Supplementary information:

Six of the nine Justices voted in favour of the Court's judgment. The opinion of the Court in *Grutter v. Bollinger*, decided the same day, contains a detailed discussion of the equal protection analysis employed in both cases, including discussion of the Court's 1978 Judgment in the case of *Regents of University of California v. Bakke*. In *Grutter v. Bollinger* [USA-2003-2-002], the Court ruled that the University of Michigan Law School's use of race in its admissions policy was constitutionally valid.

Cross-references:

- *Regents of University of California v. Bakke*, 438 *United States Reports* 265, 98 *Supreme Court Reporter* 2733, 57 *Lawyer's Edition Second* 750 (1978);
- *Grutter v. Bollinger*, 123 *Supreme Court Reporter* 2325, 156 *Lawyer's Edition Second* 304 (2003), [USA-2003-2-002].

Languages:

English.

Identification: USA-2003-2-005

a) United States of America / **b)** Supreme Court / **c)** / **d)** 26.06.2003 / **e)** 02-102 / **f)** Lawrence v. Texas / **g)** 123 *Supreme Court Reporter* 2472 (2003) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.6.3.1 **Constitutional Justice** – Effects – Effect *erga omnes* – *Stare decisis*.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
3.17 **General Principles** – Weighing of interests.
5.2.2.11 **Fundamental Rights** – Equality – Criteria of distinction – Sexual orientation.
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 **Fundamental Rights** – Civil and political rights – Right to private life.
5.3.32 **Fundamental Rights** – Civil and political rights – Inviolability of the home.

Keywords of the alphabetical index:

Homosexuality / Sodomy, crime.

Headnotes:

Legislation that makes certain forms of sexual conduct a crime implicates constitutional liberty interests by intruding upon individual privacy.

To be constitutionally valid, legislation making certain forms of sexual conduct a crime must advance a legitimate state interest sufficient to justify the intrusion on individual privacy.

The doctrine of binding precedent, or *stare decisis*, while advancing respect for court judgments and the stability of the law, is not an inexorable command that precludes the court from overriding its own earlier decisions when compelling reasons exist to do so.

Summary:

Police officers, responding to a reported weapons disturbance in a private residence, entered an apartment and found two adult men engaged in a private, consensual act of sodomy. The men were arrested and found guilty of violating a criminal statute of the State of Texas that prohibits a person from engaging in “deviate sexual intercourse with another individual of the same sex.” Both men were fined 200 U.S. dollars and required to pay court costs of 141 U.S. dollars. The Texas Court of Appeals affirmed the convictions.

The United States Supreme Court reversed the judgment of the Texas Court of Appeals. The Court ruled that the Texas statute invalidly infringed upon the petitioners' exercise of liberty interests protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Section One of the Fourteenth Amendment, in relevant part, prohibits the States from depriving any person of liberty “without due process of law.”

In making this determination, the Court declared that it was overruling its 1986 decision in the case of *Bowers v. Hardwick*, in which the Court upheld the constitutional validity of a State of Georgia statute that made it a criminal offence to engage in sodomy, whether or not the participants were of the same sex. The Court concluded that, in *Bowers v. Hardwick*, it failed to appreciate the extent of the liberty in question because it framed the question simply in terms of deciding whether the U.S. Constitution confers a fundamental right upon homosexuals to engage in sodomy. Instead, the Court stated, the laws at issue in both *Bowers v. Hardwick* and the instant case did more than prohibit a particular sexual act: they implicated sensitive privacy concerns by affecting the most private human conduct, sexual behaviour, in the most private of places, the home. Finding that the Texas statute did not advance any legitimate state interest that could justify the intrusion into individuals' private lives, the Court concluded that the right to liberty gave the petitioners the full right to engage in their conduct without government interference.

In stating that it was overruling *Bowers v. Hardwick*, the Court addressed the doctrine of *stare decisis*, stating that while the doctrine of binding precedent advances respect for the Court's judgments and the stability of the law, it is not an inexorable command. In this regard, the Court concluded that its holding in *Bowers v. Hardwick* had not induced any individual or societal reliance that would suggest caution in overruling the decision, once compelling reasons exist to do so. Because *Bowers v. Hardwick* was incorrectly decided, the Court concluded, it should not remain binding precedent.

Supplementary information:

Six of the nine Justices voted in favour of the Court's judgment. One of the six, Justice O'Connor, concurred in the judgment but did not join the Court in overruling *Bowers v. Hardwick*. Instead of relying on the Due Process Clause, Justice O'Connor based her decision on the Equal Protection Clause of the Fourteenth Amendment (which prohibits the States from denying any person the equal protection of the laws), focusing on the fact that the Texas Statute made sodomy a crime if engaged in by members of the same sex, but not opposite-sex partners. In a

dissenting opinion, Justice Scalia criticized the Court for overlooking the will of the majority of Texas citizens, expressed via the legislature, when the Court concluded that the legislation did not further any legitimate state interest. Such an approach, Justice Scalia stated, effectively means the end of all legislation based upon views of public morality.

Of note also in *Lawrence v. Texas* is the dialogue among the Justices as to the value of taking into account foreign judicial decisions. The Court's opinion, in discussing the question of views on homosexuality in Western civilization, made reference to judgments of the European Court of Human Rights in *Dudgeon v. United Kingdom* (1981) and subsequent cases. This reportedly is the first time that a majority opinion of the Supreme Court has invoked decisions of the European Court of Human Rights. Justice Scalia's dissenting opinion criticized such discussion and consideration of foreign views.

Cross-references:

- *Bowers v. Hardwick*, 478 *United States Reports* 186, 106 *Supreme Court Reporter* 2841, 92 *Lawyer's Edition Second* 140 (1986).

European Court of Human Rights:

- *Dudgeon v. United Kingdom*, 22.10.1981, *Special Bulletin – ECHR* [ECH-1981-S-003]; *Publications of the Court*, Series A, vol. 45.

Languages:

English.

Court of Justice of the European Communities and Court of First Instance

Important decisions

Identification: ECJ-2003-2-012

a) European Union / **b)** Court of Justice of the European Communities / **c)** Fifth Chamber / **d)** 06.04.2000 / **e)** C-286/95 P / **f)** Commission of the European Communities v. Imperial Chemical Industries plc (ICI) / **g)** *European Court Reports*, I-2341 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
1.4.6.3 **Constitutional Justice** – Procedure – Grounds – *Ex-officio* grounds.
3.10 **General Principles** – Certainty of the law.
3.15 **General Principles** – Publication of laws.

Keywords of the alphabetical index:

Authentication, decision, European Commission / Notification, Commission act.

Headnotes:

1. The authentication of acts provided for in Article 12.1 of the Commission's Rules of Procedure is intended to guarantee legal certainty by ensuring that the text adopted by the college of Commissioners becomes definitive in the languages which are binding. The principle of legal certainty requires that any act of the administration that has legal effects must be definitive, in particular as regards its author and content.

It follows that authentication constitutes an essential procedural requirement within the meaning of Article 173 of the Treaty (now, after amendment, Article 230 EC), breach of which gives rise to an action for annulment. It is the mere failure to authenticate an act which constitutes the infringement of an essential procedural requirement and it is not

necessary also to establish that the act is vitiated by some other defect or that the lack of authentication resulted in harm to the person relying on it.

If the Community court finds, on examining the act produced to it, that the act has not been properly authenticated, it must of its own motion raise the issue of infringement of an essential procedural requirement through failure to carry out proper authentication and, in consequence, annul the act vitiated by that defect (see paras 40-45, 51).

2. It is for the Community court to decide in accordance with the provisions of the Rules of Procedure in regard to measures of inquiry whether it is necessary for an authenticated act to be produced, in the light of the circumstances of the case. It is not necessary to establish by reference to other factors that there is prima facie defect in the act other than the lack of proper authentication (see paras 48-49).

3. It follows from a literal and schematic interpretation of Article 12 of the Commission's Rules of Procedure that authentication of an act adopted by the Commission must necessarily precede its notification, as is confirmed by the purpose of that rule on authentication.

There is an infringement of an essential procedural requirement within the meaning of Article 173 of the Treaty (now, after amendment, Article 230 EC) where authentication of a decision occurs on a date after the notification of the act (see paras 60, 63).

Summary:

The Commission of the European Communities brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of 29 June 1995, *ICI v. Commission* [T-37/91, *European Court Reports* II-1901] by which the Court of First Instance had annulled the Commission decision imposing a fine on Imperial Chemical Industries plc for abuse of a dominant position within the meaning of Article 86 of the EC Treaty [now Article 82 EC]. After pointing out that the text of the notified decision had not been previously authenticated by the signatures of the President and Executive Secretary of the Commission in accordance with Article 12.1 of the Commission's Rules of Procedure, the Court of First Instance had held this defect to be sufficiently serious to justify annulling the decision.

In support of its application, the Commission alleged errors of law and lack of reasoning. According to the Commission, the contested judgment was vitiated first of all by an error of law in that the Court of First Instance had taken the view that there was an infringement of an essential procedural requirement as soon as there was a failure to observe the procedural requirement in question, whether or not there were other defects affecting the notified texts or the interests of the party seeking annulment of the decision were affected. The Court dismissed these arguments. It noted that since the intellectual component and the formal component formed an inseparable whole, reducing the act to writing was the necessary expression of the intention of the adopting authority. Lack of proper authentification of an act adopted by the Commission therefore constituted an infringement of an essential procedural requirement within the meaning of Article 173 of the EC Treaty [now, after amendment, Article 230 EC]. In annulling the contested decision on this sole ground, the Court of First Instance had, therefore, not committed any error of law. Neither could it be criticised for having ordered the Commission to produce the authenticated decision without its having been challenged on any other ground.

The Commission also argued that the impugned judgment was vitiated by an error of law in that the Court of First Instance had held that authentification must take place before the act was notified to the addressee, failing which it was void. According to the Commission, however, the adoption of a decision was wholly complete when the draft decision was adopted by the college of Commissioners. The Court dismissed this argument. It was, it stressed, essential that authentification should precede notification, failing which there would always be a risk of the notified text not being identical to the text adopted by the Commission.

All of the arguments put forward by the Commission having proved unfounded, the Court dismissed the application.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2003-2-013

a) European Union / **b)** Court of First Instance / **c)** / **d)** 02.05.2000 / **e)** T-17/00 R / **f)** Willi Rothley e.a. v. European Parliament / **g)** *European Court Reports*, II-2085 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.4.2 **Constitutional Justice** – Procedure – Summary procedure.
3.17 **General Principles** – Weighing of interests.
4.5.4.1 **Institutions** – Legislative bodies – Organisation – Rules of procedure.
4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.

Keywords of the alphabetical index:

Appeal, admissibility / Fraud, fight, investigation / European Parliament, member, immunity.

Headnotes:

1. In principle the issue of the admissibility of the main action should not be examined in proceedings for interim relief so as not to prejudge the substance of that case. It may, however, prove necessary, where it is contended that the main application from which the application for interim relief is derived is manifestly inadmissible, to establish the existence of certain factors which would justify the prima facie conclusion that such an action is admissible (see para. 45).

2. The purpose of Article 230.1 EC, which provides that the Court of Justice is to review, *inter alia*, the legality of acts of the Parliament intended to produce legal effects vis-à-vis third parties, is to make it possible to submit to review by the Community judicature measures adopted by the Parliament within the sphere 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 that institution's powers. On the other hand, measures affecting only the internal organisation of the work of the Parliament cannot be the subject of an action for annulment. That class of measures includes measures adopted by the 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 established by its Rules of Procedure (see para. 46).

3. The urgency of an application for interim measures must be assessed in relation to the necessity for an interim order to prevent serious and irreparable harm to the party applying for those measures. It is for that party to prove that it cannot wait for the outcome of the main action without suffering harm of that nature.

If the agents of the European Anti-Fraud Office were to initiate an internal investigation concerning a member of the European Parliament and assume custody of documents or information in his office, in accordance with Article 4.2 of Regulation no. 1073/99, in his absence or without having previously obtained his consent, as Article 5 of the Parliament decision concerning the conditions and procedure for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the interests of the Community apparently permits in certain circumstances, the risk that his immunity as a member of the Parliament would be infringed would seem to be foreseeable with a sufficient degree of probability.

Since the Parliament has not interpreted the decision amending its Rules of Procedure pursuant to the inter-institutional agreement concerning internal investigations carried out by the Office as requiring the Parliament, where the Office intends to take action against members, immediately to inform the members concerned, to refuse the Office access to members' offices in the members' absence and to ensure that the Office cannot gain access to the members' offices without their consent, the exercise of the powers conferred on the Office entails the risk that the immunity enjoyed by every member of the Parliament will be infringed. The materialisation of that risk cannot subsequently be repaired by annulment of the decision amending its rules of procedure.

Furthermore, the duties to cooperate and to supply information imposed on the members of the European Parliament, as provided for by the decision of the Parliament concerning the conditions and procedure for internal investigations, risk infringing their parliamentary immunity. In the absence of any contrary provision in that decision amending its Rules of Procedure, the duty to cooperate fully with the Office must be complied with by members when agents of the Office carry out internal investigations within the Parliament. Compliance with the duty to cooperate fully with the Office might therefore mean that the member must authorise access to his office and permit the Office to assume custody of documents and information in order to ensure that there is no danger of their disappearing, as it is permitted to do by Article 4.2. As regards the duty to inform the President of the Parliament or, if members consider it useful, the Office direct, compliance by members of

the Parliament is liable to constitute a preliminary to an internal investigation conducted by the Office concerning one of them. The exercise of the powers conferred on the Office therefore entails the risk of infringing parliamentary immunity (see paras 103, 107-110).

Summary:

Following the interinstitutional agreement of 25 May 1999 [OJ L 136, p. 15] on the internal investigations conducted by the European Anti-Fraud Office (OLAF), the European Parliament adopted the decision of 18 November 1999 amending its Rules of Procedure [OJ L 202, p. 1] and allowing the OLAF to conduct internal investigations.

71 MEPs lodged an application with the Court of First Instance for annulment of this decision of the Parliament. At the same time they brought an application for suspension of the operation of the decision or, alternatively, for interim measures to protect their immunity (Article 8 to 10 of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965; OJ 1967, 152, p. 13).

The Parliament considered that the application for interim relief should be dismissed, the application for annulment on which it was based being manifestly inadmissible. Although it was settled case-law that the issue of the admissibility of the main action should not be examined in proceedings for interim relief, the President of the Court of First Instance held that it was necessary in a case such as this, where the issue of the manifest inadmissibility of the main action had been raised, to establish the existence of certain factors which would justify the *prima facie* conclusion that the main action was admissible. He found that, contrary to the Parliament's contention, the decision in question could have legal effects going beyond the internal organisation of the institution's work, in that the information obtained by the OLAF in its investigations was, in the event of any criminal implications, passed on to the judicial authorities in the member state of origin, which could then request that the MEP's immunity be lifted. He also found that the applicants formed part of a closed circle of persons on whom the contested decision individually imposed the duties to co-operate with the OLAF and supply information. Consequently, since there was a strong case for holding that the admissibility of the main action was not precluded, the application for interim relief was admissible.

The President of the Court of First Instance considered that the applicants enjoyed immunity, during the sessions of the Parliament, against certain actions of the OLAF, since those actions might be a preliminary to legal proceedings before a national court and might hinder the internal working of the Parliament. The contested decision did not provide for any specific guarantee regarding respect for the rights of MEPs. OLAF officers were permitted to have access to MEPs' offices in their absence or without their consent, MEPs were not informed of any possible personal implication if that was likely to harm the investigation, and the obligation to invite MEPs to give their views could be deferred in agreement with the President of the Parliament. Consequently, it was possible that internal investigations conducted by the OLAF against MEPs within the Parliament might infringe their immunity. The plea alleging infringement of immunity was therefore sufficiently well founded for an application for interim measures to be accepted *(fumus boni juris)*.

The second requirement for acceptance of an application for interim relief, namely the urgency of the application owing to a risk of serious and irreparable damage, was also satisfied. Since the Parliament had not undertaken to immediately inform the MEPs concerned by an investigation or to refuse the OLAF access to those members' offices in their absence or without their consent, the risk of infringement of an MEPs' immunity seemed foreseeable with a sufficient degree of probability. Furthermore, in the absence of any provision to the contrary in the contested decision, MEPs were required to comply with the duties of co-operating with the OLAF and supplying information. This was likely to infringe their immunity in that MEPs were required to allow access to their offices and the provision of information might constitute a preliminary to an investigation by the OLAF in respect of an MEP.

Weighing the interests of the applicants and those of the Community, which had a duty to prevent and combat fraud and any illegal activity damaging its financial interests, but also to ensure the independence of MEPs in carrying out their duties, the President of the Court of First Instance decided to suspend the operation of the parts of the decision requiring MEPs to co-operate with the OLAF and supply information, to order the Parliament to inform the applicants without delay of any imminent action by the OLAF against them, and to prohibit the Parliament from granting the OLAF access to MEPs' offices without their consent.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2003-2-014

a) European Union / **b)** Court of Justice of the European Communities / **c)** Fifth Chamber / **d)** 15.06.2000 / **e)** C-237/98 P / **f)** Dorsch Consult Ingenieurgesellschaft mbH v. Council of the European Union and Commission of the European Communities / **g)** *European Court Reports*, I-4549 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
3.26 **General Principles** – Principles of Community law.
4.6.10 **Institutions** – Executive bodies – Liability.

Keywords of the alphabetical index:

Liability, in respect of a lawful act / Liability, non-contractual / Compensation, right / Burden of proof.

Headnotes:

1. If the Community is to incur non-contractual liability as a result of a lawful or unlawful act, it is necessary in any event to prove that the alleged damage is real and that a causal link exists between that act and the alleged damage. In the event of the principle of Community liability for a lawful act being recognised in Community law, a precondition for such liability would in any event be the existence of unusual and special damage. It follows that the Community cannot incur non-contractual liability in respect of a lawful act unless the three conditions referred to, namely the reality of the damage allegedly suffered, the causal link between it and the act on the part of the Community institutions, and the unusual and special nature of that damage, are all fulfilled (see paras 17-19).

2. In an action to establish the non-contractual liability of the Community it is incumbent upon the applicant to produce to the Community judicature the evidence to establish the fact of the damage which it claims to have suffered. Moreover, the existence of actual and certain damage cannot be considered in the abstract by the Community judicature but must be assessed in relation to the specific facts characterising each particular case in point.

Where an applicant alleges that he has suffered actual and certain damage because his claims have become temporarily irrecoverable following the adoption of a Community measure, the fact that those claims have not yet been paid at the date of the application for compensation cannot suffice to prove that those claims have become irrecoverable and that there is therefore actual and certain damage within the meaning of the relevant case-law. An applicant must at least produce evidence to show that he has exhausted all avenues and legal remedies open to him in order to recover his claims (see paras 23, 25-27).

3. The Court of First Instance has exclusive jurisdiction to find the facts, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts. That appraisal thus does not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice in the context of an appeal. Consequently, it is only where the appellant contends that the Court of First Instance has made findings which the documents in the file show to be substantially incorrect or that it has distorted the clear sense of the evidence before it, that objections based on findings of fact and their assessment in the contested judgment will be admissible (see paras 35-36).

4. It is for the Court of First Instance alone to assess the value to be attached to the items of evidence adduced before it. The Court of First Instance cannot, subject to its obligation to observe general principles and the Rules of Procedure relating to the burden of proof and the adducing of evidence and not to distort the true sense of the evidence, be required to give express reasons for its assessment of the value of each piece of evidence presented to it, in particular where it considers that that evidence is unimportant or irrelevant to the outcome of the dispute (see paras 50-51).

Summary:

Under Article 49 of the EC Statute of the Court of Justice, the company *Dorsch Consult Ingenieurgesellschaft mbH* appealed against the judgment of the Court of First Instance of 28 April 1998, *Dorsch Consult Ingenieurgesellschaft mbH,* [T-184/95, *European Court Reports* II-667] dismissing its claim for compensation for the damage it alleged it had suffered as a result of the adoption of Regulation no. 2340/90 banning trade with Iraq and Kuwait.

Because of a contract for services relating to the organisation and supervision of work on Iraqi Expressway no. 1, the Iraqi authorities had several debts towards the applicant early in 1990. After the

invasion of Kuwait by Iraq and the resulting international and Community trade embargo, the Iraqi government decided to freeze all the property and assets located in Iraq of governments, companies, banks and other undertakings in the countries that had taken measures against it. As the applicant had not received payment of the sums owed to it by the Iraqi authorities, it applied to the Council and the Commission for compensation for the damage suffered as a result of the adoption by the Community of Regulation no. 2340/90. In a letter dated 20 September 1995, the Council refused to grant that request for compensation. The case was brought before the Court of First Instance, which dismissed it in its entirety on the grounds that the applicant had not proved that it had suffered actual and certain damage, as required by the case-law concerning the Community's non-contractual liability. Nor had it proved the existence of a direct causal link between the loss claimed and the adoption of Regulation no. 2340/90. Lastly, it had not indicated why the damage suffered could be described as special and unusual, whereas the existence of damage of this nature was necessary if the Community was to be held liable for a lawful act.

In its appeal, the applicant contested this analysis on the grounds that the existence of actual and certain damage and a direct and foreseeable causal link had been established to the requisite legal standard. It claimed that, given the special and unusual nature of the damage, it was entitled to compensation by virtue of the case-law on compensation by the Community for damage caused by a lawful act.

The Court did not accept any of the applicant's arguments. It began by pointing out that it was necessary to meet all the relevant conditions if the Community was to be held non-contractually liable for damage caused by a lawful act. It went on to say that it was up to the applicant to prove the existence of the damage it claimed to have suffered and noted in this connection that the evidence produced was not such as to show, to the requisite legal standard, that it had been confronted with a definitive refusal by the Iraqi authorities to settle their debts. The Court added, in passing, that the appraisal of the facts, except in cases where it was distorted, did not constitute a point of law which was subject, as such, to review by the Court of Justice, and that the Court of First Instance could not be reproached for findings based on inaccuracies in the file submitted; nor could it be considered to have distorted the evidence submitted to it. Similarly, the Court of First Instance could not be required to give express reasons for its assessment of the value of each piece of evidence presented to it. In the light of all these considerations, the Court of Justice dismissed the applicant's appeal.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2003-2-015

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 04.07.2000 / **e)** C-387/97 / **f)** Commission of the European Communities v. Hellenic Republic / **g)** *European Court Reports*, I-5047 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.6.6.2 **Constitutional Justice** – Effects – Execution – Penalty payment.
3.16 **General Principles** – Proportionality.

Keywords of the alphabetical index:

Decision, execution, deadline / Penalty payment, determination.

Headnotes:

1. Infringement proceedings brought by the Commission under Article 171.2 of the Treaty (now Article 228.2 EC) for a declaration that a Member State has failed to fulfil its obligations by not taking the necessary measures to comply with a judgment of the Court establishing a breach of obligations on its part and for an order requiring it to pay a periodic penalty payment are admissible where all the stages of the pre-litigation procedure, including the letter of formal notice, have occurred after the Treaty on European Union entered into force (see para. 42).

2. While Article 171 of the Treaty (now Article 228 EC) does not specify the period within which a judgment establishing that a Member State has failed to fulfil its obligations must be complied with, the importance of immediate and uniform application of Community law means that the process of compliance must be initiated at once and completed as soon as possible (see para. 82).

3. Article 171.1 of the Treaty (now Article 228.1 EC) provides that, if the Court finds that a Member State has failed to fulfil an obligation under the Treaty, that State is required to take the necessary measures to comply with the Court's judgment. If the Member State concerned does not take those measures within the time-limit laid down by the Commission in the reasoned opinion adopted pursuant to Article 171.2.1 of the Treaty, the Commission may bring the case before the Court. As provided of Article 171.2.2 of the Treaty, the Commission is to specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. In the absence of provisions in the Treaty, the Commission may adopt guidelines for determining how the lump sums or penalty payments which it intends to propose to the Court are calculated, so as, in particular, to ensure equal treatment between the Member States. While these suggestions of the Commission cannot bind the Court, they are however a useful point of reference (see paras 81, 83-84, 89).

4. It is stated of Article 171.2.3 of the Treaty (now Article 228.2.3 EC) that the Court, if it finds that the Member State concerned has not complied with its judgment, may impose a lump sum or a penalty payment on it. First, since the principal aim of penalty payments is that the Member State should remedy the breach of obligations as soon as possible, a penalty payment must be set that will be appropriate to the circumstances and proportionate both to the breach which has been found and to the ability to pay of the Member State concerned. Second, the degree of urgency that the Member State concerned should fulfil its obligations may vary in accordance with the breach. To that end, the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations (see paras 89-92).

Summary:

Under Article 171 of the EC Treaty [now Article 228 EC], the Commission of European Communities applied for a declaration to the effect that, by failing to take the necessary measures to comply with Court's judgment of 7 April 1992 in the *Commission v. Greece* case [C-45/91, *European Court Reports* I-2509], the Hellenic Republic had failed to fulfil its obligations under the above-mentioned article. The Commission also asked the Court to order Greece to pay a daily penalty as a means of ensuring compliance with the above-mentioned judgment.

Directive 75/442 on waste and Directive 78/319 on toxic and dangerous waste are both designed to protect human health and safeguard the environment against the harmful effects of the collection, carriage, treatment, storage and tipping of such waste. In order to ensure the achievement of this objective, the directives impose certain obligations on member states. In its judgment of 7 April 1992, the Court found that Greece had failed to fulfil several of its obligations. As it continued to fail to do so, the Commission decided to bring the proceedings in question.

In its defence, Greece first argued that the proceedings brought on the grounds of its failure to comply with the *Commission v. Greece* judgment were inadmissible since they were brought before the entry into force of the Treaty on European Union and hence before Article 171, in its new wording, came into force. Application of this provision would, in the case in question, therefore be tantamount to applying, retrospectively, a stricter and more onerous rule, in violation of the principle *"nulla poena sine lege"*. The Court did not accept the argument. It held that, contrary to the submissions of the Greek government, all the stages of the pre-litigation procedure, including the letter of formal notice, had taken place after the Maastricht Treaty had come into force. Accordingly, it rejected the plea of inadmissibility.

On the merits, Greece argued that the volume of improperly treated waste in the region which the proceedings concerned had decreased significantly since the judgment of 7 April 1992. The Court observed, however, that no means had been found of permanently solving the waste disposal problem in accordance with Article 1 of Directive 75/442. Similarly, Greece had still not drawn up the waste disposal plans provided for in Article 6 of Directive 75/442, or the plans for the disposal of toxic and dangerous waste provided for in Article 12 of Directive 78/319. Admittedly, the Commission had not proved that Greece had not fully complied with the obligations laid down in Directive 78/319 as far as toxic and dangerous waste was concerned, but the fact remained that Greece had not taken all the steps needed to comply with the *Commission v. Greece* judgment. It was therefore sentenced under Article 171 of the EC Treaty.

After pointing out that the process of compliance with a judgment finding that a member state had failed to fulfil an obligation must be initiated at once and completed as soon as possible, the Court set

about establishing the means of calculating the daily penalty that the member state concerned could be ordered to pay. It accepted the fact that the Commission could adopt guidelines for determining how the penalty payments it intended to propose should be calculated. Those guidelines, setting out the approach which the Commission proposed to follow, helped to ensure that it acted in a manner that was transparent, foreseeable and consistent with legal certainty. As for the criteria to be taken into consideration when calculating the amount of the penalty payment, the Court endorsed those set by the Commission in its guidelines, namely the duration of the offence, its seriousness and the ability to pay of the member state concerned. The Court added that, in applying these criteria, it was necessary to take account in particular of the effects of failure to comply on private and public interests and of the urgency of getting the member state concerned to fulfil its obligations. In the case in question, these criteria prompted the Court to order the Hellenic Republic to pay the Commission a penalty of 20,000 EUR per day's delay in taking steps to comply with the *Commission v. Greece* judgment, as from delivery of the judgment.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2003-2-016

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 04.07.2000 / **e)** C-424/97 / **f)** Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein / **g)** *European Court Reports*, I-5123 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
3.19 **General Principles** – Margin of appreciation.
4.6.10 **Institutions** – Executive bodies – Liability.
5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Damage, reparation / Community law, sufficiently serious breach, determination / Appointment scheme, dentist, social security, conditions.

Headnotes:

1. It is for each Member State to ensure that individuals obtain reparation for loss and damage caused to them by non-compliance with Community law, whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation.

However, reparation for loss and damage caused to individuals by national measures taken in breach of Community law does not necessarily have to be provided by the Member State itself in order for its obligations under Community law to be fulfilled. Thus, in the Member States in which certain legislative or administrative tasks are devolved to territorial bodies with a certain degree of autonomy or to any other public-law body legally distinct from the State, reparation for that loss and damage caused by measures taken by a public-law body may be made by that body.

Nor does Community law preclude a public-law body, in addition to the Member State itself, from being liable to make reparation for loss and damage caused to individuals as a result of measures which it took in breach of Community law (see paras 27, 29, 31-32, 34, and operative part 1).

2. In order to determine whether there is a serious breach of Community law, qua one of the conditions to be satisfied for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible, account must be taken of the extent of the discretion enjoyed by the Member State concerned. The existence and the scope of that discretion must be determined by reference to Community law and not by reference to national law. The discretion which may be conferred by national law on the official or the institution responsible for the breach of Community law is therefore irrelevant in this respect.

In order to determine whether a mere infringement of Community law by a Member State constitutes a sufficiently serious breach, a national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it. Those factors include, in particular, the clarity and

precision of the rule infringed, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law (see paras 36, 40, 41-43, 49, and operative part 2).

Summary:

The judgment, following a reference for a preliminary ruling by the *Landgericht* Düsseldorf, originated with proceedings lasting more than ten years between *Salomone Haim* and the *Kassenzahnärztliche Vereinigung Nordrhein* (KVN – association of dental practitioners of social security schemes in the North Rhine region). It was the second *Haim* judgment, as the Court had already ruled on a reference for a preliminary ruling in this case (Judgment of 9 February 1994, *Haim I*, C-319/92, *European Court Reports* I-425).

Mr Haim, an Italian national, held a diploma in dentistry awarded in 1946 by the University of Istanbul, Turkey, the town in which he had practised as a dentist until 1980. In 1981, he obtained permission to practise as a self-employed dentist in the Federal Republic of Germany. However he decided to practise in Belgium, where in 1982 his Turkish diploma was recognised as equivalent to the relevant Belgian qualification. In 1988 he applied to the KVN to be enrolled on the register of dental practitioners so that he could then be eligible for appointment as a dental practitioner under a social security scheme. In a decision of 10 August 1988, the KVN refused to enrol Mr Haim on the register of dental practitioners on the ground that he had not completed the two-year preparatory training period required by the national regulations and did not hold a qualification awarded by another member state. Mr Haim challenged that decision on the grounds that it infringed Community law and in the course of those proceedings the *Bundessozialgericht* referred a number of questions to the Court of Justice for preliminary ruling. In a decision of 9 February 1994, the Court adopted a cautious approach. Although Article 20 of Directive 78/686 did not prohibit a member state from requiring a national of another member state in a similar situation to Mr Haim to complete a preparatory training period in order to be eligible for appointment as a dental practitioner under a social security scheme, under Article 52 of the EC Treaty [now, after modification, Article 43 EC] it was not permissible for the competent authorities of that member state to refuse such an appointment without examining whether, and, if so, to what extent, the experience already established by the person concerned corresponded to what was required by that country's legislation. Following this decision, Mr Haim was enrolled on the register of dental practitioners by decision of 4 January 1995. On account of his age, he did not take the steps necessary to obtain his appointment as a dental practitioner under a social security scheme, but nevertheless brought a further action against the KVN to obtain compensation for the loss of earnings. Before reaching a decision on this claim, the *Landgericht* Düsseldorf submitted certain questions to the Court of Justice that were answered in this judgment.

Firstly the national court asked whether a public-law body could be held liable for damages to an individual as a result of violations of Community law as well as the member state itself. The Court's reply was very clear: where the conditions for member state liability for breach of Community law are met, it is on the basis of rules of national law on liability that the state must make reparation for the consequences of the loss and damage caused. Nothing therefore prevents a member state from making a decentralised authority or any other public-law body distinct from itself liable to make any reparation under Community law. Nor is it precluded from making itself and the public law body jointly liable.

In the second question, the national court asked the Court of Justice to clarify the notion of a “sufficiently serious” beach of Community law, which is one of the three conditions of entitlement to reparation. Could the fact that an official did not have any discretion in taking his decision give rise to a serious breach of Community law? After reviewing its case-law on the subject, the Court ruled that the discretion which may be conferred by national law on the official or the institution responsible for the breach of Community law is irrelevant in assessing that breach. In order to determine whether such an infringement of Community law constitutes a sufficiently serious breach, a national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it. Whether or not the Court has already ruled in a similar case is one of the factors national courts must take into account in reaching a decision.

In the third question, the national court asked the Court of Justice whether the competent authorities of a member state could make the appointment to a social security scheme of a dental practitioner in Mr Haim's situation conditional upon his having the linguistic knowledge necessary for the exercise of his profession in the member state of establishment. After noting that such a situation did not fall within the scope of Directive 78/686 the Court stated that national measures which restrict the exercise of

fundamental freedoms guaranteed by the EC Treaty can be justified only if they are applied in a non-discriminatory manner, are justified by overriding reasons based on the general interest, are suitable for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain that objective. In this context the Court considered that the reliability of a dental practitioner's communication with his patient and with administrative authorities and professional bodies constitutes an overriding reason of general interest such as to justify making his appointment under a social security scheme subject to language requirements. However it is also in the interest of patients whose mother tongue is not the national language that there exist a certain number of dental practitioners capable of communicating with them in their own language. The national courts must therefore strike a balance between these linguistic requirements.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2003-2-017

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 04.07.2000 / **e)** C-62/98 / **f)** European Commission v. Portugal / **g)** *European Court Reports*, I-5171 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Community law, failure / Treaty, pre-Community / Third country, compatibility / Service, freedom to provide services, maritime transport.

Headnotes:

1. Where a Member State has not succeeded in adjusting, by recourse to diplomatic means, within the time-limit laid down by Regulation no. 4055/86 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, a bilateral agreement concluded with a third State before the accession of the Member State to the Communities and containing cargo-sharing arrangements incompatible with that regulation, and in so far as denunciation of such an agreement is possible under international law, it is incumbent on the Member State concerned to denounce it.

In that regard, the existence of a difficult political situation in the third State which is a contracting party cannot justify a continuing failure on the part of a Member State to fulfil its obligations under the Treaty (see paras 34, 39).

2. The purpose of Article 234.1 of the Treaty (now, after amendment, Article 307.1 EC) is to make it clear, in accordance with the principles of international law that application of the Treaty does not affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations thereunder. Although, in the context of Article 234.2, the Member States have a choice as to the appropriate steps to be taken, they are nevertheless under an obligation to eliminate any incompatibilities existing between a pre-Community convention and the Treaty. If a Member State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce that agreement cannot therefore be excluded.

In that connection, the argument that such denunciation would involve a disproportionate disregard of foreign-policy interests of the Member State concerned as compared with the Community interest cannot be accepted. The balance between the foreign-policy interests of a Member State and the Community interest is incorporated in Article 234 of the Treaty, in that it allows a Member State not to apply a Community provision in order to respect the rights of third countries deriving from a prior agreement and to perform its obligations thereunder. That article also allows them to choose the appropriate means of rendering the agreement concerned compatible with Community law (see paras 44, 49-50).

Summary:

The case, which was brought by the Commission of the European Communities against Portugal on 27 February 1998 for failure to fulfil its obligations and which culminates with this judgement, concerns Council Regulation (EEC) no. 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between

Member States and between Member States and third countries.

Several years before its accession to the Communities, Portugal had concluded an agreement with, in particular, Angola, reserving the carriage of maritimecargo between Portuguese and Angolan ports to vessels flying the flag of either of the parties or to vessels operated by persons or undertakings having the nationality of either of the parties. Vessels operated by nationals of other member states were therefore excluded from the trade concerned. The Commission took the view that these cargo-sharing clauses were in breach of Regulation no. 4055/86 and brought an action under Article 169 of the EC Treaty (now Article 226 EC) to secure compliance of the contested agreement with Community law or, failing that, its denunciation. In the absence of any specific adjustments it brought a case before the Court of Justice.

Portugal did not challenge the incompatibility of the disputed clauses with Community law but argued its case on three main grounds.

Firstly, the Commission's actions were premature in view of the advanced stage of negotiations with the Republic of Angola. This argument was immediately dismissed by the Court which noted that as guardian of the EC Treaty, it is for the Commission alone to decide whether it is appropriate to bring proceedings against a member state for failure to fulfil its obligations.

The second justification concerned the state of war and constant tension prevailing in Angola. Here the Court simply referred to its case-law in its judgment of 14 September 1999, *Commission v. Belgium* [C-170/98, *European Court Reports* I-5493], according to which a difficult political situation in a third state which is a contracting party cannot justify a member state's failure to fulfil its obligations.

Finally the Portuguese Government maintained that it could not be held to have failed to fulfil its obligations under Article 234 of the EC Treaty [now, after modification, Article 307 EC]. In the case of agreements concluded before the entry into force of the EC Treaty, Article 234.2 requires member states to take all appropriate steps to eliminate any incompatibilities between such an agreement and the EC Treaty, but without an obligation to achieve a specified result. Cases where a convention must be denounced under Article 234 of the EC Treaty arise only exceptionally and in extreme circumstances. In this case, such denunciation would involve a disproportionate disregard of the interests linked to Portugal's foreign policy as compared with the Community interest. The Court rejected these arguments for a very simple reason, which was that the obligation incumbent on the Portuguese Republic was based not on Article 234 of the Treaty but on the provisions of Regulation no. 4055/86. Nevertheless in order to dispel any doubts that might remain concerning the interpretation of Article 234 it replied to Portugal's arguments. Firstly it noted that while Portugal must in all cases respect the rights which Angola derived from the contested agreement, the agreement contained a clause expressly enabling the contracting parties to denounce it, which implied that denunciation by Portugal would not encroach upon Angola's rights. It added that although member states have a choice as to the appropriate steps to eliminate incompatibilities between Community law and pre-Community conventions with third states, an obligation to denounce such agreements may be the only way for member states to satisfy their Community obligations. Finally, it noted that in this case denunciation of the agreement would not involve a disproportionate disregard of Portugal's foreign-policy interests as compared with the Community interest because the balance between the foreign-policy interests of a member state and the Community interest is already incorporated in Article 234 of the Treaty. It therefore concluded that by failing either to denounce or to adjust the contested agreement within the time limit laid down, the Portuguese Republic had failed to fulfil its obligations under Articles 3 and 4.1 of Regulation no. 4055/86.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

European Court of Human Rights

Important decisions

Identification: ECH-2003-2-005

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 06.05.2003 / **e)** 39343/98, 39651/98, 43147/98, 46664/99 / **f)** Kleyn and Others v. the Netherlands / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.7.2 **Institutions** – Judicial bodies – Procedure.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Independence.
5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Impartiality.

Keywords of the alphabetical index:

Judge, impartiality, objective / Opinion, advisory / Judge, consecutive exercise of advisory and judicial functions.

Headnotes:

The consecutive exercise of advisory and judicial functions within one body, such as a Council of State, does not raise an issue under Article 6 ECHR as regards objective impartiality where the advisory opinion cannot reasonably be interpreted as expressing views on, or amounting to a preliminary determination of, any issues decided in the subsequent judicial proceedings.

Summary:

In 1991 the Council of State gave an advisory opinion on the Transport Infrastructure Planning Bill, which was intended to provide a legislative framework for the supra-regional planning of a major new transport infrastructure. A number of changes were made to the bill on the basis of the Council of State's opinion and it eventually came into force as the Transport Infrastructure Planning Act in 1994. In the meantime, the Government had presented a draft Outline Planning Decision concerning a new railway, the Betuweroute railway, which would join up with the German rail network. Following a public consultation process, a revised document was put before both Houses of Parliament. It became valid on its publication in May 1994. A large number of appeals against the revised document had been lodged with the Administrative Jurisdiction Division of the Council of State, which in January 1997 rejected most of the appeals, including those lodged by the applicants.

In June 1994, a preliminary draft of the Routing Decision, setting out the exact route of the railway, had been opened to public inspection. Following public consultation, the route was finalised in November 1996. A large number of appeals were lodged with the Administrative Jurisdiction Division, including those of the applicants, two of whom challenged the judges on the ground that the plenary Council of State had been involved in the drafting of the legislation at issue. A special chamber declared the complaint inadmissible in so far as it concerned the Council of State as a whole and rejected the complaint in so far as it was directed against the three judges who were to hear the appeals, on the ground that they had not in any way expressed themselves in a manner contrary to the position of the appellants. The Administrative Jurisdiction Division subsequently dismissed most of the appeals, although it allowed certain specific complaints. The Government considered that the decision left the project 95% intact and that no radical review was needed. New partial decisions were taken in respect of the parts which had been annulled and the applicants' further appeals in that respect were unsuccessful.

In the application lodged with the Court, the applicants complained that the Administrative Jurisdiction Division of the Council of State was not an independent and impartial tribunal, because the Council of State combined both advisory and judicial functions. They relied on Article 6.1 ECHR.

The Court considered that the case did not require the application of any particular doctrine of constitutional law; it was faced solely with the question whether, in the circumstances, the Administrative Judicial Division had the requisite appearance of independence or the requisite “objective” impartiality. There was nothing to substantiate the applicants' concerns as to the independence of the Council of State and its members, nor was there any indication of subjective prejudice or bias on the part of any member hearing the applicants' appeals. Nevertheless, as shown in the case *Procola v. Luxembourg*, the consecutive exercise of advisory and judicial functions within one

body may raise an issue under Article 6 ECHR as regards objective impartiality.

The Court was not as confident as the Government that the arrangements made to give effect to the *Procola v. Luxembourg* Judgment (exclusion of judges who had participated in an advisory opinion if the appeal went to a matter explicitly addressed in the opinion) ensured that in all appeals coming before the Administrative Jurisdiction Division it constituted an impartial tribunal. However, the Court's task was not to rule in the abstract on the compatibility of the system with the Convention. The issue before it was whether, with regard to the appeals brought by the applicants, it was compatible with the requirement of objective impartiality that the Council of State's institutional structure allowed certain of its members to exercise both advisory and judicial functions. In that respect, the plenary Council of State had advised on the Transport Infrastructure Planning Bill, whereas the applicants' appeals were directed against the Routing Decision. Thus, unlike the situation in the *Procola* Judgment, the advisory opinion and the subsequent proceedings on the appeals could not be regarded as involving the “same case” or the “same decision”. The references in the advisory opinion to the proposed railway could not reasonably be interpreted as expressing views on, or amounting to a preliminary determination of, any issues subsequently decided in the Routing Decision. In the circumstances, therefore, the applicants' fears as to a lack of independence and impartiality could not be regarded as being objectively justified.

Consequently, there had been no breach of Article 6.1 ECHR.

Cross-references:

- *Benthem v. the Netherlands*, 23.10.1985, Series A, no. 97; *Special Bulletin ECHR* [ECH-1985-S-003];
- *Hauschildt v. Denmark*, 24.051989, Series A, no. 154; *Special Bulletin ECHR* [ECH-1989-S-001];
- *Oerlemans v. the Netherlands*, 27.11.1991, Series A, no. 219;
- *Procola v. Luxembourg*, 28.09.1995, Series A, no. 326;
- *Findlay v. the United Kingdom*, 25.02.1997, *Reports of Judgments and Decisions* 1997-I;
- *Selmouni v. France* [GC], no. 25803/94, *Reports of Judgments and Decisions* 1999-V; *Bulletin* 1999/2 [ECH-1999-2-008];
- *McGonnell v. the United Kingdom*, no. 28488/95, *Reports of Judgments and Decisions* 2000-II;
- *Morris v. the United Kingdom*, no. 38784/97, *Reports of Judgments and Decisions* 2002-I;
- *Stafford v. the United Kingdom* [GC], no. 46295/99, *Reports of Judgments and Decisions* 2002-IV.

Languages:

English, French.

Identification: ECH-2003-2-006

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 06.05.2003 / **e)** 44306/98 / **f)** Appleby and Others v. the United Kingdom / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
5.1.2 **Fundamental Rights** – General questions – Effects.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of assembly.
5.3.38 **Fundamental Rights** – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Property, use / Freedom of expression, state, positive obligation.

Headnotes:

Article 10 ECHR does not bestow any freedom of forum. However, a positive obligation to regulate property rights may arise where a bar on access to property has the effect of preventing any effective exercise of freedom of expression.

Summary:

The applicants are three individuals and an environmental group which they set up to campaign

against a proposed development on a playing field in the vicinity of their town centre. The first applicant set up stands at the entrance to "The Galleries" shopping mall, built by a public development corporation as the new town centre and subsequently sold to a private company. The applicant was obliged to remove the stands after security guards prohibited her from continuing to collect signatures for a petition. She was given permission by the manager of one of the hypermarkets in the mall to set up stands and collect signatures in the store. However, the manager of the mall itself refused permission to set up a stall in the mall or in adjacent car parks, referring to the owner's policy of strict neutrality on political and religious issues. The applicants continued to seek access to the public by setting up stalls on public footpaths and in the old town centre.

In the application lodged with the Court, the applicants complained that they had been prevented from meeting in the town centre to impart information and ideas. They relied on Articles 10 and 11 ECHR.

The Court noted that the Government did not bear any direct responsibility for the restrictions on the applicants' freedom of expression and the Court was not persuaded that any element of State responsibility could be derived from the fact that a public development corporation had transferred property to the owner or that this had been done with ministerial permission. The issue to be determined was therefore whether the Government had failed in any positive obligation to protect the applicants' rights from interference by the private owner.

The matter to which the applicants wished to draw attention was one of public interest. However, freedom of expression is not unlimited and it was necessary to have regard also to another Convention right, namely the owner's right of property. In so far as the applicants referred to case-law from the United States and Canada, it could not be said that there was as yet any emerging consensus that could assist the Court in its examination under Article 10 ECHR, which did not bestow any freedom of forum. The Court was not convinced that changes in the ways in which people move around and come into contact with each other required the automatic creation of rights of entry to private property, although it did not exclude that a positive obligation to regulate property rights could arise where a bar on access to property had the effect of preventing any effective exercise of freedom of expression or destroying the essence of the right.

In the present case, however, the restriction on the applicants' ability to communicate their views was limited to the entrance areas and passageways of the mall; it did not prevent them from obtaining permission from individual businesses within the mall, from distributing their leaflets on the public access paths, from campaigning in the old town centre or from employing alternative means such as calling door-to-door or seeking exposure through the media. Consequently, the applicants could not claim that they were effectively prevented from communicating their views to their fellow citizens. Balancing the rights at issue, the Court did not find that the Government had failed in any positive obligation to protect the applicants' freedom of expression. Moreover, largely identical issues arose under Article 11 ECHR. Consequently, there had been no breach of Articles 10 and 11 ECHR.

Cross-references:

- *James and Others v. the United Kingdom*, 21.02.1986, Series A, no. 98;
- *Rees v. the United Kingdom*, 17.10.1986, Series A, no. 106;
- *Osman v. the United Kingdom*, 28.10.1998, *Reports of Judgments and Decisions* 1998-VIII;
- *Özgür Gündem v. Turkey*, no. 23144/93, *Reports of Judgments and Decisions* 2000-III;
- *Fuentes Bobo v. Spain*, no. 39293/98, 29.02.2000, unreported.

Languages:

English.

Identification: ECH-2003-2-007

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 24.07.2003 / **e)** 52854/99 / **f)** Ryabykh v. Russia / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

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

Keywords of the alphabetical index:

Res iudicata / Decision, final and binding, setting aside / Investment, value, inflation.

Headnotes:

The quashing of a final and binding judicial decision as a result of a supervisory review procedure which can be instituted, without any time-limit, by a state official who was not a party to the proceedings, infringes the principle of legal certainty and the right to a court.

Article 1 Protocol 1 ECHR does not require States to maintain the purchasing power of investments.

Summary:

In 1997 a District Court made an award to the applicant in respect of the State's failure to revalue her savings in order to offset the effects of inflation, as she claimed it was required to do by 1995 legislation. After the judgment had been set aside on appeal, the District Court delivered a similar judgment, awarding the applicant almost 134,000 roubles. This judgment became final in June 1998. However, in 1999 the Regional Court, on an application for supervisory review lodged by its President, set aside the judgment and dismissed the applicant's claims.

In 2001 the Supreme Court granted an application for supervisory review of the Regional Court's judgment and remitted the case to the District Court, which again found in the applicant's favour. The Regional Court having set that judgment aside, the District Court gave a further judgment in the applicant's favour. The Regional Court also set that judgment aside and remitted the case to the District Court which, in a different composition, dismissed the applicant's claims. The Regional Court upheld this judgment. However, the Regional Court's judgment was quashed following an application for supervisory review by its President. The District Court then granted the applicant's claim in part and the Regional Court upheld this judgment. The applicant subsequently reached a settlement with the authorities and the Government purchased a flat for her at a price of 330,000 roubles.

In the application lodged with the Court, the applicant complained that the setting aside of the judgment in her favour had violated her right of access to court and her right of property. She relied on Article 6.1 ECHR and Article 1 Protocol 1 ECHR.

With regard to the right of access to court, the Court found that although it appeared that the State had made efforts to remedy the applicant's situation (the judgment granting her claim and the purchase of a flat), it was not the failure to revalue her savings which was at the heart of her complaint under Article 6 ECHR, which concerned rather the effect of the supervisory review procedure. The fact that the applicant's claims were ultimately granted did not by itself remove the effects of the legal uncertainty which she had had to endure for three years after the original judgment in her favour had been quashed. She could therefore continue to claim to be a victim in that respect.

The supervisory review procedure resulted in the entire judicial process which had culminated in a legal binding decision being set at naught. The procedure was set in motion by the President of the Regional Court, who was not a party to the proceedings, and there was no time-limit on the exercise of his power. The right to a court was illusory if a final and binding judicial decision could be quashed on an application by a State official and in the present case the Regional Court, by using the supervisory review procedure, had infringed the principle of legal certainty and the applicant's right to a court. There had therefore been a violation of Article 6.1 ECHR.

With regard to the right of property, the Court noted that under the settlement which was reached, the State had provided the applicant with a flat which was worth significantly more than the amount which she had initially been granted. Moreover, Article 1 Protocol 1 ECHR does not require the State to maintain the purchasing power of investments and the 1995 legislation, as interpreted by the domestic courts, did not establish an enforceable obligation for the State to compensate for losses caused by inflation. Consequently, there had been no breach of Article 1 Protocol 1 ECHR.

Cross-references:

- *X. v. Germany*, no. 8724/79, Commission decision of 06.03.1980, *Decisions and Reports* 20, p. 226;
- *Amuur v. France*, 25.06.1995, *Reports* 1996-III; *Bulletin* 1996/2 [ECH-1996-2-011];
- *Hornsby v. Greece*, 19.03.1997, *Reports* 1997-II; *Bulletin* 1997/1 [ECH-1997-1-008];

- *Dalban v. Romania* [GC], no. 28114/95, *Reports of Judgments and Decisions* 1999-VI; *Bulletin* 1997/1 [ECH-1997-1-008];
- *Brumarescu v. Romania* [GC], no. 28342/95, *Reports of Judgments and Decisions* 1999-VII;
- *Rudzinska v. Poland* (dec.), no. 45223/99, *Reports of Judgments and Decisions* 1999-VI;
- *Burdov v. Russia*, no. 59498/00, *Reports of Judgments and Decisions* 2001-IV;
- *Gayduk and Others v. Ukraine* (dec.), no. 45526/99, *Reports of Judgments and Decisions* 2002-VI;
- *Appolonov v. Russia* (dec.), no. 67578/01, 29.08.2002, unreported.

Languages:

English.

Systematic thesaurus (V14) *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

1 Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).
2 E.g. Rules of procedure.
3 Including the conditions and manner of such appointment (election, nomination, etc.).
4 Including the conditions and manner of such appointment (election, nomination, etc.).
5 Vice-presidents, presidents of chambers or of sections, etc.
6 E.g. State Counsel, prosecutors, etc.
7 Registrars, assistants, auditors, general secretaries, researchers, etc.
8 E.g. assessors, office members.
9 Registrars, assistants, auditors, general secretaries, researchers, etc.
10 Including questions on the interim exercise of the functions of the Head of State.

11 Referrals of preliminary questions in particular.
12 Enactment required by law to be reviewed by the Court.
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).

20 As understood in private international law.
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.

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.

[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.

[35] Presumption of constitutionality, double construction rule.

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.
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.

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.
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.

[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.

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.
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.
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.
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.
109 Aspects of the use of names are included either here or under "Right to private life".
110 Including compensation issues.
111 For institutional aspects, see 4.9.5.
112 This keyword also covers "Freedom of work".

[113] Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

Keywords of the alphabetical index *

* The précis presented in this Bulletin are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

Page numbers of the alphabetical index refer to the page showing the identification of the decision rather than the keyword itself.

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