THE BULLETIN

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

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

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

The decisions are presented in the following way:

1. *Identification*
    - a) *country or organisation*
    - b) *name of the court*
    - c) *chamber (if appropriate)*
    - d) *date of the decision*
    - e) *number of decision or case*
    - f) *title (if appropriate)*
    - g) *official publication*
    - h) *non-official publications*
2. *Keywords of the Systematic Thesaurus (primary)*
3. *Keywords of the alphabetical index (supplementary)*
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7. *Cross-references*
8. *Languages*

G. Buquicchio
Secretary of the European Commission for Democracy through Law

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

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Strasbourg, March 2005

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There was no relevant constitutional case-law during the reference period 1 January 2004 – 30 April 2004 for the following countries:

Austria, Bulgaria, Ireland, the Netherlands, Sweden (Supreme Court), Sweden (Supreme Administrative Court).

Précis of important decisions of the reference period 1 January 2004 – 30 April 2004 will be published in the next edition, *Bulletin* 2004/2 for the following countries:

Cyprus, Russia.

Albania
Constitutional Court

Important decisions

Identification: ALB-2004-1-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 30.01.2004 / **e)** 1 / **f)** Constitutionality of Electoral Code / **g)** *Fletore Zyrtare* (Official Gazette), 4/04, 119 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.3.1 **General Principles** – Democracy – Representative democracy.
4.5.3.1 **Institutions** – Legislative bodies – Composition – Election of members.
4.9.3 **Institutions** – Elections and instruments of direct democracy – Electoral system.
4.9.4 **Institutions** – Elections and instruments of direct democracy – Constituencies.

Keywords of the alphabetical index:

Parliament, member, mandate, premature termination / Parliament, member, replacement.

Headnotes:

Given the fact that any electoral system in a democratic society aims to guarantee stability and effective governance and is, at the same time, the expression of the people's will to the extent possible, all the rules of a fair and equal competition should be observed.

The people's representation in parliament is realised through the direct election of deputies in each electoral constituency, whereas candidates from the list are elected according to the order decided by political parties. The replacement of a deputy elected in a single-member electoral list for another one from the proportional list infringes the constitutional proportions of representation within the mixed electoral system.

Summary:

The Court was seized by a group of deputies who requested the abrogation of Article 14.3 of the Electoral Code of the Republic of Albania (Law no. 9087, dated 19 June 2003). The appellants claimed that this provision modified the proportion of representation of political forces in parliament. This was due to the fact that the provision in question provided that in cases when the term of office of a deputy elected in a single-member electoral zone terminates prematurely, his/her seat may be occupied by the following candidate from the multi-nominal list of the respective political party.

The Constitution provides for the proportion and the method of election of deputies. 100 deputies are elected directly in single-member electoral constituencies and 40 deputies are elected from the multi-nominal lists. The provision in question modifies the established proportion with 99 deputies elected in single-member electoral constituencies and 41 deputies elected from the multi-nominal lists. This review before the Court was instigated following replacement of a deputy who had resigned.

After having made a short presentation of previous electoral systems, under which the relations between elements of majority and proportional systems were not the same at different times, the Constitutional Court considered that, in spite of some nuances, generally the system which had been applied was a mixed system where the elements of majority system were more pronounced and the elements of proportional system were intended to assuage any disproportions caused by the majority system.

Even the method of replacement of a deputy in cases when his/her term of office terminates prematurely was different at different times (in 1992, his/her replacement was made from the multi-nominal lists; in 2000, the substitution was made according to how he/she had been elected – from the list or through direct elections). According to the electoral law in force, in this case, the replacement was made from the multi-nominal lists. The constitutional question put forward is whether this replacement infringes the constitutional proportions of representation within the mixed electoral system.

Article 2 of the Constitution enshrines the people's sovereignty as a constitutional principle. This principle guarantees the representation of people in the Assembly through the direct election of 100 deputies, whereas, the candidates from the list are elected according to the order decided by the political parties. If a deputy elected in a single-member electoral constituencies were replaced by a candidate from the

multi-nominal list, the constitutional proportion imposed by the legislature for that political forces are represented in parliament would be distorted.

The necessary regulations of each legal provision should take place without infringing the criteria and proportions imposed by the Constitution. Given the fact that the disputed provision of the Electoral Code infringes these proportions (100 to 40), the Court reached the conclusion that it violates the Constitution and decided to abrogate it on these grounds.

Languages:

Albanian.

Argentina
Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-2004-1-001

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 17.02.2004 / **e)** M.528.XXXV / **f)** Mostaccio, Julio Gabriel s/ homicidio culposo / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 327 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

Charge, principle / Conviction, following public prosecutor's request for acquittal.

Headnotes:

The constitutional guarantees regarding the defence and a fair trial are violated if an accused appearing before a criminal court is convicted even though, during the proceedings, the public prosecutor had requested his/her acquittal.

Summary:

In a criminal court oral hearing, the accused had been convicted and sentenced to three years in prison for carrying weapons of war, even though the public prosecutor had called for his acquittal. The convicted person had therefore lodged an extraordinary appeal with the Supreme Court.

The Court declared the appeal admissible and, ruling on the merits, set aside the judgment by a majority decision.

The Court held, in accordance with a long line of previous decisions in criminal matters, that under the guarantee enshrined in Article 18 of the Constitution, essential formal requirements concerning the charge, the defence, the evidence and the judgment delivered by the lawfully established court must be respected during the proceedings.

It further held that, in the case under consideration, these requirements had not been met since the Court had convicted the accused even though no charge had been brought by the public prosecutor who, during the proceedings, had in fact called for the accused's acquittal.

Two judges delivered dissenting opinions on this subject. They held that, although a charge is required in order to guarantee a fair trial, in this case it had in fact been brought during the public prosecutor's address in which he had asked for the accused to be committed for trial. In that connection, they added that the acquittal requested by the public prosecutor in his submissions did not mean the charge had never existed. The oral pleadings do not alter the subject-matter of the action because the parties merely use them to state their conclusions on the evidence presented during the proceedings prior to the delivery of judgment: they are given this right so that they can influence the court's decision. However, the Court retains the right to give a decision on the merits or the inadmissibility of the charge brought by the public prosecutor.

Languages:

Spanish.

Armenia
Constitutional Court

Statistical data

1 January 2004 − 31 April 2004

- 24 referrals made, 24 cases heard and 24 decisions delivered.
  - All 24 decisions concern the conformity of international treaties with the Constitution. All treaties examined were declared compatible with the Constitution.

Important decisions

Identification: ARM-2004-1-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 07.01.2004 / **e)** DCC-466 / **f)** On the conformity with the Constitution of the obligations set out in the International Convention for the Suppression of the Financing of Terrorism / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

4.16 **Institutions** – International relations.

Keywords of the alphabetical index:

Terrorism, financing / Treaty, constitutional requirements.

Headnotes:

The obligations set out in the International Convention for the Suppression of the Financing of Terrorism are in harmony with the principles of sovereignty, the protection of human rights and freedoms, and foreign policy, enshrined in Articles 1, 4 and 9 of the Constitution.

Summary:

On the basis of an appeal lodged by the President of the Republic, the Constitutional Court considered the

conformity with the Constitution of the obligations set out in the International Convention for the Suppression of the Financing of Terrorism.

The Constitutional Court stated that the Republic of Armenia assumed under the Convention the following obligations:

- to establish as criminal offences under its domestic law the offences set out in Article 2 of the Convention and to make those offences punishable by appropriate penalties which take into account the grave nature of the offences;
- to take appropriate measures in accordance with its domestic legislation, *inter alia*, for the forfeiture of the proceeds derived from the offences set out in the Convention; and
- to afford other Contracting Parties legal assistance in connection with criminal investigation or criminal or extradition proceedings in respect of offences set out in the Convention.

The Republic of Armenia also assumes an obligation to cooperate with other Contracting Parties in prevention of financing of terrorism.

The Court found that the obligations set out in the Convention were in conformity with the Constitution.

Languages:

Armenian.

Identification: ARM-2004-1-002

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 07.01.2004 / **e)** DCC-467 / **f)** On the conformity with the Constitution of the obligations set out in the International Convention for the Suppression of Terrorist Bombings / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

4.16 **Institutions** – International relations.

Keywords of the alphabetical index:

Terrorism, bombing / Treaty, constitutional requirements.

Headnotes:

The obligations set out in the International Convention for the Suppression of Terrorist Bombings are in harmony with the principles of sovereignty, the protection of human rights and freedoms, and foreign policy, enshrined in Articles 1, 4 and 9 of the Constitution.

Summary:

On the basis of an appeal lodged by the President of the Republic, the Constitutional Court considered the conformity with the Constitution of the obligations set out in the International Convention for the Suppression of Terrorist Bombings.

The Constitutional Court stated that the Republic of Armenia assumed under the Convention the following obligations:

- to establish as criminal offences under its domestic law the offences set out in Article 2 of the Convention and to make those offences punishable by appropriate penalties which take into account the grave nature of the offences;
- to take appropriate measures in order to establish its jurisdiction over the offences set out in the Convention, when such offences are committed in the territory of the Republic of Armenia or by one of its citizens; and
- to afford other Contracting Parties legal assistance in connection with criminal investigation or criminal or extradition proceedings in respect of the offences set out in the Convention.

The Court found that the obligations set out in the Convention were in conformity with the Constitution.

Languages:

Armenian.

Identification: ARM-2004-1-003

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 30.03.2004 / **e)** DCC-483 / **f)** On the conformity with the Constitution of the obligations set out in the Criminal Law Convention on Corruption (with attached declarations) / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

4.16 **Institutions** – International relations.

Keywords of the alphabetical index:

Corruption, criminal law / Treaty, constitutional requirements.

Headnotes:

The Criminal Law Convention on Corruption will promote the strengthening of democracy and rule of law in the Republic of Armenia, two principles enshrined in Article 1 of the Constitution, as well as the protection of human rights.

Summary:

On the basis of an appeal lodged by the President of the Republic, the Constitutional Court considered the conformity with the Constitution of the obligations set out in the Criminal Law Convention on Corruption (with attached declarations).

The Constitutional Court stated that the Republic of Armenia assumed under the Convention an obligation to take legislative and other measures in order to criminalise:

- the active and passive bribery of domestic public officials and participation in these offences;
- the active and passive bribery, when involving members of domestic and foreign public assemblies, foreign public officials, officials of international organisations, members of international parliamentary assemblies or judges and officials of international courts;
- the active and passive bribery in the private sector; and
- offences connected with money laundering, which are set out by the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

The Republic of Armenia is also obliged to take appropriate measures in order to provide for criminal or other responsibility for account offences, described in Article 14 of the Convention, as well as for legal persons who are responsible for active bribery, trading in influence and money laundering offences.

The Republic of Armenia has to take appropriate measures in order to establish its jurisdiction over the offences set out in the Convention, when such offences are committed in the territory of the Republic of Armenia or by a citizen, domestic official or member of the domestic assembly of the Republic of Armenia.

The Republic of Armenia, in accordance with Article 29 of the Convention, declares that the domestic bodies that are responsible for the cooperation provided for by the Convention are:

- the Office of the Prosecutor General as regards cases that are at the pre-trial stage of proceedings; and
- the Ministry of Justice as regards cases that are at the trial stage of proceedings.

The Court found that the obligations set out in the Convention were in conformity with the Constitution.

Languages:

Armenian.

Azerbaijan
Constitutional Court

Important decisions

Identification: AZE-2004-1-001

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 11.05.2004 / **e)** E-41 / **f)** / **g)** *Azerbaijan*, *Respublika*, *Khalg gazeti*, *Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiya Mehkemesinin Melumati* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.26 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Association, registration, procedure.

Headnotes:

Right to assembly implies the right of every person to establish a public association, the right to join (or not to join) and the right to freely leave an association.

Article 58 of the Constitution provides for the unrestricted activity of public associations. This guarantee also includes the freedom of internal organisation (the right to the free adoption of regulations; the right to the free election of governing bodies; the right to the independent possession of property; the right to set and realise a programme of activity, etc.).

Nevertheless, the right to assembly is not absolute, and certain restrictions on its exercise may be imposed. Restriction of this right is permissible only in cases where it is necessary in a democratic society, fulfils the requirement of being essential to the public interest, and corresponds to the objectives of the law.

The requirement of state registration in itself and the need to meet a number of formal requirements provided for by legislation do not amount to a restriction on the free establishment of public associations. However, lack of state registration may cause the loss of rights particular to legal entities and may accordingly put into question the legal personality of a public association.

Summary:

A complaint was lodged by petitioners seeking verification of the conformity of some judicial acts to laws and the Constitution.

A public association, “Assistance for the protection of the rights of homeless and indigent inhabitants”, was established on 4 April 2001. On 9 April 2001 the founders submitted the relevant documents to the Ministry of Justice and requested the registration of the association. On 18 May 2001 the founders’ documents were returned for failure to indicate the field of activity in the memorandum and articles of association, as required by Article 6 of the Law “on Non-Governmental Organisations (Public Associations and Foundations)”.

Articles 6 and 13 of that Law do not provide that special information as to the field of activity of non-governmental organisations (NGO) must be set out. Nevertheless, complying with the requirements of the Ministry of Justice, the founders submitted the documents again to the Ministry on 4 June 2001. On 10 September 2001, more than 3 months after having received those documents, the Ministry returned them again for failing to comply with Article 25.1 of the Law, that is to say, the memorandum and articles of association failed to indicate the terms of office of the revision commission of the association. Having made the relevant corrections, on 2 October 2001 the founders submitted the documents to the Ministry a third time. On 5 July 2002, i.e. 279 days later, the documents were again returned to the founders, this time, for failure of the memorandum and articles of association to comply with Article 10.3 of the Law. Even though the public association had remedied that failure and had submitted the documents a fourth time to the Ministry of Justice on 29 July 2002, the public association was not registered.

Alleging that the Ministry of Justice had wrongfully refused to register “Assistance for the protection of the rights of homeless and indigent inhabitants” as a public association, the founders challenged the acts of the Ministry of Justice in four separate petitions to the Court of first instance. In those petitions, they asked the Court to enable them to exercise their right to assembly; to eliminate the obstacles set up by officials to state registration of their association; to declare the acts of the Ministry of Justice illegal; and to order the

Ministry to register the public association. Moreover, in one of the petitions, the founders of the public association requested the Court to order the Ministry to pay compensation in the amount of 25 000 000 AZ manats (national currency) for non-pecuniary damage. In another petition, they asked the Court to adopt a special decision with respect to the Chief of the Department for State Registration of Legal Entities at the Ministry of Justice. On 15 July 2002 the Court of first instance ruled that the petitioners' claims were unfounded and rejected the petitioners' request for a declaration that the 5 July 2002 decision on the registration of the public association by the Ministry of Justice was illegal. In an appeal brought by the petitioners, on 19 September 2002 the Judicial Board on Civil Cases (JBCC) of the Court of Appeal upheld the decision of the Court of first instance.

The Court of first instance examined a petition brought under special claim proceedings by the complainants. Relying on Article 259.0 of the Code of Civil Procedure, the first instance court ruled not to consider the petition. That ruling was upheld by a ruling of the JBCC of the Court of Appeal on 1 November 2002, and the latter's ruling, in turn, was upheld by a ruling of the JBCC of the Supreme Court on 10 January 2003.

On 18 December 2002, relying on Article 153.3 of the Code of Civil Procedure, the Court of first instance adopted a ruling rejecting the petition brought by the complainants. That ruling was upheld by a ruling of the JBCC of the Court of Appeal on 5 March 2003 and the latter's ruling was, in turn, upheld without any changes by a ruling of the JBCC of the Supreme Court on 26 September 2003. Relying on Article 153.3 of the Code of Civil Procedure, the Court of first instance examined the petition on 26 February 2003 and rejected the claim.

The complainants brought complaints concerning the four petitions under the additional cassation procedure. They received a reply that there was no ground for their examination by the Plenum of the Supreme Court.

The complainants applied to the Constitutional Court with a request that the Constitutional Court order the restoration of the rights violated by the non-registration of "Assistance for the protection of the rights of homeless and indigent inhabitants" as a public association.

The Constitution and other laws provide for the circumstances under which the right to assembly may be restricted. The exercise of that right may be partially and temporarily restricted upon a declaration of war, martial law or state of emergency, and also mobilisation, taking into consideration international obligations of the state (Article 71.3 of the Constitution. A number of national legislative acts also contain relevant provisions (Martial Law, State Emergency). The right to assembly may be subject to restrictions in the interests of national security, for the protection of health and morals, rights and freedoms of others, for the prevention of crime, disorder and protection of public safety (Constitutional Law "on the Regulation of the Exercise of Human Rights and Freedoms").

Current legislation provides that public associations may be established without the initial permission of state or self-government bodies. Once established, the public associations must be registered. Article 4 of the Law "on State Registration of Legal Persons" in force on 9 April 2001, i.e. at the time the documents of "Assistance for the protection of the rights of homeless and indigent inhabitants" were submitted, provides for the submission of the documents of a public association for registration by its founders and for entrusting the Ministry of Justice with the task of carrying out such registration according to the procedure set out by that law. State registration in itself and the need to meet a number of formal requirements provided for by legislation do not amount to a restriction on the free establishment of public associations. However, lack of state registration may cause the loss of rights particular to legal entities and may accordingly put into question the legal personality of a public association.

The Plenum of the Constitutional Court held that the decisions of the JBCC of the Supreme Court on 20 November 2002 in civil case no. 2-1112/02, on 10 January 2003 in civil case no. 2-1423/02, on 26 September 2003 and 3 September 2003 on matters regarding civil cases DO 4873/02 and DO 247/03 on the petitions by the complainants were to be considered null and void for failure to comply with Articles 60 and 71.1 of the Constitution as well as Articles 416, 417, 418.1 and 418.3 of the Code of Civil Procedure. The judicial acts adopted by the courts of first and appellate instance were, under Articles 60 and 71.1 of the Constitution, in contradiction with Articles 259.0.1, 372.1, 372.7, 384 and 385.1 of the Code of Civil Procedure. The Court ordered a stay of execution of the judicial acts adopted in civil cases nos. 2-1112/02 and 2-1423/02, including DO 4873/02 and DO 247/03, and the re-examination of those cases under the procedure specified in legislation.

Languages:

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

Belgium
Court of Arbitration

Important decisions

Identification: BEL-2004-1-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 14.01.2004 / **e)** 3/2004 / **f)** / **g)** *Moniteur belge* (Official Gazette), 09.03.2004 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.3.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – International treaties.
2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
4.7.16.1 **Institutions** – Judicial bodies – Liability – Liability of the State.
4.16 **Institutions** – International relations.

Keywords of the alphabetical index:

Treaty, assenting act / Treaty, European Union / Responsibility, international relations.

Headnotes:

Since the legislative amendment of 9 March 2003, the Court no longer has jurisdiction to give a preliminary ruling on the constitutionality of the laws, decrees and orders assenting to treaties establishing the European Union, to the European Convention on Human Rights and to the protocols thereto. That unequivocal intention of the special legislature removes from the Court all jurisdiction to answer the preliminary question, even though the question was referred to the Court before the entry into force of the Special Law of 9 March 2003.

Summary:

A customs undertaking requested the Brussels Court of First Instance to order the Belgian State to pay damages in respect of the loss which that undertaking sustained following the disappearance of the activity of customs agent following the creation of the internal market by the Single European Act (Luxembourg, 1 February 1986 and The Hague, 28 February 1986).

In the course of those proceedings, the Court referred to the Court of Arbitration the preliminary question whether the Law of 7 August 1986 approving the Single European Act is contrary to the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) in that that Law makes no provision for compensation for customs agencies and customs agents for the loss of their activities in respect of intra-Community trade.

A few months later, the Special Law of 6 January 1989 on the Court of Arbitration was amended by the Special Law of 9 January 2003, which withdrew from the Court jurisdiction to give preliminary rulings on laws whereby the “Treaties establishing the European Union” are assented.

The Court considered that the new law is of immediate application and it therefore lacked jurisdiction to answer the preliminary question, even though the question was referred to it before the Special Law of 9 March 2003 entered into force.

The special legislature did not confine itself in this instance to reallocating a power or to amending a procedure. Its intention was that “any other competence in the matter [than an action for annulment] before any judicial body whatsoever [be] henceforth excluded”, in order to ensure “the security and stability of international relations”.

Supplementary information:

In Belgium, treaties do not take effect until after the competent parliamentary assembly has expressed its assent by enacting a legislative provision.

The Court of Arbitration reviews the constitutionality of laws either when actions for annulment are brought before it or when preliminary questions are referred to it by the courts. It considered that it had jurisdiction to review assenting laws.

In a leading judgment, Judgment no. 26/91 of 16 October 1991, it established that jurisdiction and stated that its power of review also entailed an examination of the terms of the relevant provisions of international acts. It therefore ascertained whether, in giving its assent to a treaty, the legislature indirectly introduced any unconstitutional provisions into the legal order.

In order to increase legal certainty at international level, the legislature provided that an action for

annulment of an assenting provision must be introduced within sixty days from the publication of that provision, whereas the normal period is one year. In spite of that limit, the Court declared that it had jurisdiction to answer preliminary questions concerning assenting laws. However, it further stated that when exercising its power of review it would take into account that it was dealing not with an act of unilateral sovereignty but with a convention provision which also produced effects outside the domestic legal order (see Judgment no. 26/91, cited above, which is available in Dutch, French and German at www.arbitrage.be – affirmed by, among others, Judgment no. 12/94 (see [BEL-1994-1-004]).

Preliminary questions concerning assent laws could therefore indirectly raise, without limits as to time, problems of the constitutionality of convention provisions, and the confidence of States which conclude treaties with Belgium could therefore have been undermined.

In order to avoid that situation, the legislature amended the Special Law of 6 January 1989 on the Court of Arbitration on 9 March 2003 and expressly precluded the possibility of referring preliminary questions concerning norms having force of law whereby "a Treaty establishing the European Union or the Convention of 4 November 1950 on the Protection of Human Rights and Fundamental Freedoms or a Protocol to that Convention receives assent".

In the present case, the Court was required to consider whether, in the absence of any transitional provision, that legislative amendment was immediately applicable. According to general procedural law (Article 3 of the Judicial Code), laws relating to the judicial organisation, jurisdiction and procedure are applicable to pending proceedings, although the case is not removed from the Court before which, at the appropriate level, it had validly been brought and with the exception of the derogations provided for by law. In the Court's view, the special legislature intended that principles of law which are not compatible with the general rules should prevail.

Languages:

French, Dutch, German.

Identification: BEL-2004-1-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 29.01.2004 / **e)** 17/2004 / **f)** / **g)** *Moniteur belge* (Official Gazette), 29.04.2004 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.4 **General Principles** – Separation of powers.
4.5.8 **Institutions** – Legislative bodies – Relations with judicial bodies.
5.2 **Fundamental Rights** – Equality.
5.3.13.18 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Reasoning.
5.3.24 **Fundamental Rights** – Civil and political rights – Right to administrative transparency.

Keywords of the alphabetical index:

Administrative act, statement of reasons / Parliament, staff.

Headnotes:

The independence of the parliamentary assemblies is not affected by the obligation to state the reasons for a decision which they take in respect of their staff, provided that the decision is not of a political nature and does not in any way involve the exercise of the legislative function.

In order to be consistent with the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), the law on the formal reasons for administrative acts must be interpreted as meaning that even the parliamentary assemblies must state the reasons for decisions concerning their staff (decisions which are subject to judicial review by the Supreme Administrative Court).

Summary:

A staff member of a legislative assembly brought an application before the *Conseil d'État*, the Supreme Administrative Court, for judicial review of the appointment of another candidate for a post of management assistant to the Chamber of Representatives. He claimed, in particular, that the appointment decision did not contain a convincing statement of reasons.

The Law of 29 July 1991 on the formal reasons for administrative acts provides that unilateral legal acts of individual scope issuing from an administrative authority (for example, appointment decisions) must state the reasons on which they are based, in order to make clear what considerations of law and of fact serve as a basis for the decision. For the definition of "administrative authority", reference is made in the 1991 Law to Article 14 of the Consolidated Laws on the *Conseil d'État*.

In its Judgment no. 31/96 (see [BEL-1996-2-003]), the Court had stated that "the absence of any action or application for judicial review of the administrative acts issuing from a legislative assembly or from its organs, when such an action or application may be brought against administrative acts issuing from an administrative authority, infringes the constitutional principle of equality and non-discrimination laid down in Articles 10 and 11 of the Constitution". In order to give effect to that judgment, Article 2 of the Law of 25 May 1999 amended Article 14.1 of the Consolidated Laws on the *Conseil d'État* in such a way as to authorise the administrative section of the *Conseil d'État* also to adjudicate on applications for judicial review of "the administrative acts of the legislative assemblies or their organs […] relating to public contracts and to members of their staff".

Since in 1991 the legislature could not foresee that amendment, and since the Law of 29 July 1991 on the formal reasons for administrative acts had not also been amended, the *Conseil d'État* referred to the Court of Arbitration the question whether that law is contrary to the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), whether it is to be interpreted as not including within its scope the administrative acts of the administrative assemblies or their organs in relation to members of their staff.

In reply, the Court stated that the Law of 1991 infringes Articles 10 and 11 of the Constitution if it is interpreted in that sense. Provided that the legislature has decided to subject the administrative acts of the legislative assemblies or of their organs, in respect of their staff, to the same arrangements for legal protection as that applicable to the acts of the administrative authorities, there are no valid grounds on which the formal obligation to state reasons should not apply to the former. Apart from the fact that members of the staff of the legislative assemblies or their organs would be deprived of a guarantee against possible arbitrariness, the absence of a formal obligation to state reasons would preclude the *Conseil d'État* from exercising effective review.

The Court observed, however, that the Law of 1991 may also be interpreted as bringing within its scope the administrative acts of the legislative assemblies or their organs relating to members of their staff and that, as thus interpreted, it is in fact consistent with Articles 10 and 11 of the Constitution.

Supplementary information:

See [BEL-1996-2-003]. Comparison should also be made with a later Judgment, no. 89/2004 of 19 May 2004, in which a distinction is drawn, as regards recourse to the courts by the staff of the parliamentary assemblies, between the individual decisions of the assemblies and decisions having the status of regulations.

In Judgment no. 93/2004 of 26 May 2004, the Court accepted that Article 14.1 of the Laws on the *Conseil d'État*, interpreted as meaning that the *Conseil d'État* has no jurisdiction to entertain an application for judicial review brought by a member of the Judicial College of the Region of Brussels-Capital against a decision of the Council of the Region of Brussels-Capital dismissing him from office, does not infringe the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), as the appointment of members of the Judicial College is connected to the political activities of that parliamentary assembly.

Languages:

French, Dutch, German.

Identification: BEL-2004-1-003

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 10.03.2004 / **e)** 38/2004 / **f)** / **g)** *Moniteur belge* (Official Gazette), 21.05.2004 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

2.3.6 **Sources of Constitutional Law** − Techniques of review − Historical interpretation.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.
5.3.43 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Child, placement, measure of assistance / Child, grandparents, right to personal relationships / Child, best interest.

Headnotes:

The aim of preventing congestion in the courts does not justify certain categories of subjects being deprived of judicial protection of the statutory rights conferred on them.

Where a measure has the effect that grandparents are prevented from exercising their right to have personal relationships with their grandchild, they must be able to challenge that decision before the Youth Court, which will decide, on the basis of the situation of the child and of the measures that must be taken in regard to him or her, whether, taking the child's interests into account, there are grounds for limiting or suspending the grandparents' right to personal relationships with the child.

Summary:

Before the Liège Court of Appeal, a grandfather was disputing the refusal of the Director of Child Assistance to allow him to be involved in the application of measures taken in respect of his infant granddaughter. The child had been removed from her family pursuant to a judgment. Article 37 of the Decree of the French Community of 4 March 1991 on child assistance specifies the persons who may challenge measures of individual assistance before the Youth Court. These are, for example, the persons with parental authority or those with *de jure* or *de facto* custody of the child. The grandparents are not included among those persons. The Liège Court of Appeal had referred a preliminary question to the Court of Arbitration in order to ascertain whether that difference in treatment is contrary to the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution).

The Court observed, first of all, that under other provisions of the Decree, where the Youth Court decides to remove a child from his or her family, the grandparents may request the Director of Child Assistance to allow them to be involved in the application of that measure. However, they have no right of appeal where their request is refused.

In accordance with its customary practice, the Court of Arbitration sought in the "*travaux préparatoires*" the aim of the legislature which adopted the decree. When the decree was adopted in 1991, the legislature wished to grant the right to bring an action only to persons "having a right over the child", "in order to avoid congestion in the Court, which would be harmful to everyone". The Court observed, however, that subsequently the legislature (this time the Federal legislature) inserted Article 375*bis* into the Civil Code, which grants grandparents the right to maintain personal relationships with the child. The "*travaux préparatoires*" of that Law of 13 April 1995 show that the legislature intended to create a right to personal relationships in the interest of the grandparents and of the child.

The impugned provision therefore infringed Articles 10 and 11 of the Constitution, since by not allowing the grandparents to bring the matter before the Youth Court, it constituted an unjustified breach of their right to maintain personal relationships with the child.

Languages:

French, Dutch, German.

Identification: BEL-2004-1-004

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 24.03.2004 / **e)** 54/2004 / **f)** / **g)** to be published in *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** − Types of claim − Referral by a court.
2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
5.2 **Fundamental Rights** – Equality.
5.2.2.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Building, right to occupy / Couple, unmarried.

Headnotes:

The civil-law right of habitation is enjoyed by the holder of the right and his or her family; there can be no distinction according to whether the family already existed before or has only come into existence since the right was established. The holder of the right may therefore, according to his or her needs, establish his or her family life in the property to which the right relates. There are no valid grounds for allowing the spouse of the holder of the right to live in the property and to deny that possibility to the unmarried partner with whom the holder cohabits.

Summary:

A company granted an individual a civil-law right of habitation. Some years later, that individual entered into a stable relationship with another person and lived with this second person in the building covered by the right of occupation. The owner considered that this cohabitation was in breach of the civil-law right of habitation and initiated proceedings. The Courtrai Court of First Instance was uncertain as to the correct interpretation of Article 632 of the Civil Code, which states: “Anyone who has the right to occupy a dwelling may remain there with his or her family, even where he or she was not married at the time when the right was conferred on him or her.” It considered that the concept of “family” “refers expressly to the traditional family, in which a man and woman are married and possibly have children”.

The Court of First Instance therefore asked the Court of Arbitration whether that provision infringes the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) because it follows *a contrario* that an unmarried partner with whom the holder of the civil-law right of habitation lives permanently does not have the right to cohabit.

In accordance with its customary practice, the Court reviewed in principle the constitutionality of the provision as interpreted by the Court making the reference. However, should it transpire that, as interpreted by that Court, the provision infringed Articles 10 and 11 of the Constitution, the Court must consider whether, if given a different interpretation, it would be compatible with Articles 10 and 11 of the Constitution.

The Court then defined the civil-law right of habitation: it is the right to use a dwelling house; it takes the form of a restricted usufruct. In accordance with Article 628 of the Civil Code, the right is regulated by the document which established it, so that the parties are free to confer on the right whatever scope they wish. If the document does not make clear the scope of that right, Articles 632 to 634 of the Civil Code provide that the person with the right of occupation may remain in the house with his family, even though he was not married at the time when the right was conferred on him; that the right is limited to what is necessary for the occupation by the person on whom the right is conferred and his family; and that the right of occupation cannot be transferred or let.

The Court then stated that spouses and unmarried couples are comparable categories in the light of the aim pursued – to grant the use of a dwelling to a person and his or her family – and for the determination of the scope of the right. It therefore rejected the objection raised by the Council of Ministers and one of the parties that the categories of persons are not comparable.

The Court then considered that the difference in treatment was based on an objective criterion, the legal situation of married couples and unmarried couples, which differs as regards both their reciprocal obligations and their economic situation.

The Court considered, however, that the different treatment is irrelevant by reference to the objective of the legislature. As the civil-law right of habitation is to the advantage not only of the holder of the right but also of his or her family, without distinction according to whether or not the family already existed before or has only come into existence since that right was established, so that the holder of the right, depending on his or her needs, may establish his or her family life in the property to which the right relates, there are no valid grounds for allowing the spouse of the holder of the right to live in the property and for denying that possibility to the unmarried partner with whom the holder cohabits. Such a distinction has the consequence that the civil-law right of habitation no longer corresponds with the holder’s right to live in the property with his or her family, so that his or her right of occupation would be deprived of all its substance.

It followed that, as interpreted by the Court making the reference, Article 632 of the Civil Code infringed Articles 10 and 11 of the Constitution.

The Court then observed that a different, wider, interpretation, suggested, moreover, by the Council of Ministers, of the concept of “family” is possible. This interpretation makes it possible to include persons who are not married but who cohabit. The Court observed that that interpretation finds a basis, in

particular, in Article 22 of the Constitution (which enshrines the right to private and family life), which the framers of the Constitution declared must be understood by reference to the case-law of the European Court of Human Rights on Article 8 ECHR. On that interpretation, there was no longer any difference in treatment and the question must be answered in the negative.

Languages:

French, Dutch, German.

Bosnia and Herzegovina
Constitutional Court

Important decisions

Identification: BIH-2004-1-001

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 30.01.2004 / **e)** U 41/01 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina), 22/04 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
3.4 **General Principles** – Separation of powers.
4.7.1.1 **Institutions** – Judicial bodies – Jurisdiction – Exclusive jurisdiction.
4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.
4.7.14 **Institutions** – Judicial bodies – Arbitration.
4.16.1 **Institutions** – International relations – Transfer of powers to international institutions.

Keywords of the alphabetical index:

Constitutional complaint, admissibility / High Representative, competence / Arbitration, award, judicial control.

Headnotes:

The Constitutional Court lacks the competence to consider and determine any issues arising under the Annexes of the General Framework Agreement for Peace in Bosnia and Herzegovina on the ground that those issues are not constitutional issues.

The Constitutional Court is not competent to review the constitutionality of the acts of the High Representative for Bosnia and Herzegovina where he does not act as a substitute for the legislative authority of Bosnia and Herzegovina.

Summary:

A member of the Presidency of Bosnia and Herzegovina submitted a request to the Constitutional Court

for the review of the constitutionality of the decision by the High Representative binding both the Republika Srpska and the Federation of Bosnia and Herzegovina to final and binding arbitration on the Inter-Entity Boundary Line in the Sarajevo suburbs of Dobrinja I and IV and to the Arbitration Award rendered by an independent international arbitrator for Dobrinja I and IV. The applicant pointed out that the Republic of Bosnia and Herzegovina, the Republika Srpska and the Federation of Bosnia and Herzegovina had reached an agreement in the Agreed Basic Principles for the Achievement of the Final Peace Agreement for Bosnia and Herzegovina in Geneva on 8 September 1995 and in New York on 26 September 1995. Among other things, it was agreed therein that the territories of the Federation of Bosnia and Herzegovina and the Republika Srpska would be divided in such a way that the Federation of Bosnia and Herzegovina would encompass 51% of the territory of Bosnia and Herzegovina, while the Republika Srpska would encompass 49% of the territory. As the applicant stated, that principle of territorial delineation and marking acquired the force of a constitutional norm, since the Agreed Basic Principles were incorporated in the Preamble of the Constitution, which under the case-law of the Constitutional Court has normative effect.

While the representatives of the Entities and IFOR were taking part in drawing up an expert document with a precise delineation of the Inter-Entity Boundary Line, a dispute arose between the Federation of Bosnia and Herzegovina and the Republika Srpska concerning settlements (Dobrinja I and Dobrinja IV) at certain locations on the Inter-Entity Boundary Line. Since the parties could not resolve the dispute in an amicable way, on 5 February 2001 the High Representative issued a decision on Arbitration. On 17 April 2001, the High Representative appointed an international arbitrator who rendered the Arbitration Award, which fixed the new location of the Inter-Entity Boundary Line.

The applicant argued that the Constitution gave the Constitutional Court the exclusive right to decide any dispute arising under the Constitution between the Entities and that those provisions excluded the possibility of having the dispute decided by some other body, including the Office of the High Representative. He requested that the Constitutional Court adopt a decision declaring that the decision of the High Representative was null and void due to a violation of the constitutional norms on the exclusive jurisdiction of the Constitutional Court; that the Arbitration Award was null and void as it considered and determined a dispute that fell within the exclusive jurisdiction of the Constitutional Court; and that both settlements, Dobrinja I and Dobrinja IV, belonged to the territory of the Republika Srpska for the reason that the parties to the dispute had agreed in Dayton that the agreed line of ceasefire and the Inter-Entity Boundary Line overlapped.

The Constitutional Court found that the preliminary issues to be answered in the case were as follows: whether the dispute in question arose under the Constitution, and whether the Constitutional Court was competent to review the constitutionality of the decision of the High Representative and the Arbitration Award.

In relation to the issue of whether the dispute in question arose under the Constitution, the Constitutional Court found it necessary to refer to the relevant provisions of three Annexes to the General Framework Agreement for Peace in Bosnia and Herzegovina: Annex 2 (Agreement on the Inter-Entity Boundary Line and Related Issues − with Appendix), Annex 5 (Agreement on Arbitration) and Annex 10 (Agreement on Civilian Implementation of the Peace Settlement).

The Constitutional Court noted that according to the relevant provisions of Annex 2, it had been agreed that the internal borders between the Federation of Bosnia and Herzegovina and the Republika Srpska were to be delineated as on the map in the Appendix to Annex 2 and that adjustment by the Parties and a manner of delineation and marking had been agreed. In Annex 5, the involvement of both Entities in binding arbitration to settle mutual disputes had also been agreed. Annex 10 granted the High Representative the general competence for implementation of the civilian aspects of the Peace Agreement; authorised him to oversee its implementation and to facilitate the resolution of any difficulties arising in connection with the civilian implementation of the Peace Agreement; and made him the final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement.

As to the character of the above-mentioned Annexes with respect to the Constitution (Annex 4), the Constitutional Court noted that Annex 4 forms an integral part of the Peace Agreement and reiterated that it followed from the structure of the Peace Agreement that the Annexes have the same character, that they supplement each other, and should co-exist side by side. The intention of the authors of the Annexes was not to create conflict or incompatibility between the Annexes or the institutions established in accordance with the Annexes. Relying on its case-law with respect to the review of the constitutionality of the Peace Agreement and its Annexes, the Constitutional Court found that it lacked the competence to consider and determine any

issues arising under the other Annexes (i.e. those other than Annex 4) of the Peace Agreement.

As to whether the Constitutional Court has competence to review the constitutionality of the decision of the High Representative and of the Arbitration Award, the Constitutional Court has already concluded that if the High Representative, by adopting a law or laws, were to intervene in the domain falling within the legislative competence of the Parliamentary Assembly of Bosnia and Herzegovina under Article IV-4.a of the Constitution, the Constitutional Court would have the jurisdiction to review the substance of the adopted legal provisions and their conformity with the Constitution.

In the particular case, the decision of the High Representative and the Arbitration Award did not interfere with the legislative prerogatives assigned to the domestic legislation of Bosnia and Herzegovina by the Constitution. As the dispute arose under the framework of Annex 2 of the Peace Agreement, the impugned decisions had been adopted according to the specific powers of the High Representative regarding the interpretation of the Agreement on the Civilian Implementation of the Peace Agreement.

The Constitutional Court held that the High Representative had not acted as a substitute for the legislative authority of Bosnia and Herzegovina in the exercise of his powers regarding the civilian implementation of the Peace Agreement in the particular case. Considering that the impugned decisions did not have the characteristics of a law, the Constitutional Court found that it was not competent to review their constitutionality.

The Arbitration Award was based on a decision by the High Representative, in which he laid down the arbitration terms. According to international law, a review of an Arbitration Award by another court or a judicial authority is not foreseen in cases in which the resolution of disputes is submitted to international arbitration. The decision of the High Representative provided no possibility for the Arbitration Award to be reviewed by any other authority in Bosnia and Herzegovina. Consequently, the Arbitration Award decided on the dispute and excluded the possibility of review by any court in Bosnia and Herzegovina, including the Constitutional Court.

Under the given circumstances, the examination of the impugned decisions and the review of their conformity with the Constitution were beyond the competence of the Constitutional Court. Therefore, the request was ruled inadmissible.

Languages:

Bosnian, Serbian, Croatian, English (translation by the Court).

Identification: BIH-2004-1-002

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 30.01.2004 / **e)** U 14/02 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina), 18/04 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.9.5 **Institutions** – Elections and instruments of direct democracy – Eligibility.
4.9.9 **Institutions** – Elections and instruments of direct democracy – Voting procedures.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
5.3.40.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.
5.3.40.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Election, disqualification / Vote, right, municipality of last domicile / Property, illegally occupied.

Headnotes:

A provisional restriction on certain human rights may be imposed if it is in accordance with the law and if necessary in a democratic society for the protection of the rights and freedoms of others.

An act or a regulation is discriminatory if it makes a distinction between persons or groups that are in a similar situation and if there is no objective and reasonable justification for that distinction or if there is

no reasonable proportion between the means employed and the aims sought to be achieved.

Summary:

Thirty-three representatives of the People's Assembly of the Republika Srpska submitted a request to the Constitutional Court for a review of the constitutionality of Article 19.8.3 of the Election Law of Bosnia and Herzegovina, which reads as follows:

> "Where a citizen of Bosnia and Herzegovina occupies a house or an apartment for which he/she does not have an ownership or occupancy right, and where an enforceable order for the restitution of that house or apartment has been issued by a competent court, by administrative authority or by the CRPC, that citizen has no right to vote in the place of current residence, until he/she abandons the other person's property, after which he/she may register for election only in the municipality where he/she had his/her last domicile, as determined on the basis of the last Census in Bosnia and Herzegovina."

The applicants considered that the impugned provision of the Law was in contravention of the Constitution, which provides that Bosnia and Herzegovina and its Entities shall secure the highest level of internationally recognised human rights and fundamental freedoms (Article II-1 of the Constitution). The applicants claimed that the impugned article of the Election Law violated the constitutional right to liberty of movement and residence (Article II-3.m of the Constitution), the equal treatment of the citizens of Bosnia and Herzegovina in relation to the right of liberty of movement within the state borders, as well as the right of a citizen of Bosnia and Herzegovina not to be subjected to discrimination in the course of enjoyment of the rights and freedoms provided for in the Constitution or in the international agreements listed in Annex I to the Constitution (Article II-4 of the Constitution).

The Constitutional Court pointed out that pursuant to Article I-2 of the Constitution, Bosnia and Herzegovina is a democratic state, which operates under the rule of law and has free and democratic elections. Pursuant to the Constitution, Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognised human rights and fundamental freedoms, and the rights and freedoms set out in the European Convention on Human Rights shall apply directly in Bosnia and Herzegovina with priority over all other law (Article II-2 of the Constitution).

As to the issue of liberty of movement and residence, the Constitutional Court referred to the general rule that does not permit restrictions of that right, except for restrictions that are in accordance with the law and that are, *inter alia*, established for the protection of the rights and freedoms of others.

The Constitutional Court recalled that the purpose of the impugned provision of the Election Law is the protection of the Constitutional right of all refugees and displaced persons to freely return to their homes as well as to have their property restored to them (Article II-5 of the Constitution).

Therefore, the Constitutional Court found that the provision of Article 19.8.3 of the Election Law should be interpreted as a provision fostering a speedier return of refugees and displaced persons to their homes of origin, for two reasons: firstly, that is the main goal of Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina; and secondly, it is also set out in Article II-5 of the Constitution. The legislator's decision to enact that provision, taken together with the decision that that provision was to be temporary in nature, was not in contravention of the Constitution. That provision advanced a legitimate goal: to realise the principle of a democratic state based on the rule of law and protection of the rights and freedoms of others as established in Article 2 Protocol 4 ECHR, which forms an integral part of the Constitution.

A limitation of fundamental rights, although justified, must be done in a non-discriminatory manner.

In the particular case, the issue of equal treatment of persons in relation to the right to liberty of movement within the state borders arose.

In the particular case, all citizens of Bosnia and Herzegovina who occupied a house or an apartment without an ownership title or occupancy right and who had received notice of an enforceable order for the restitution of that property issued by a competent court or an administrative authority were treated equally. The Constitutional Court considered that the citizens of Bosnia and Herzegovina with the status of refugees and displaced persons and who had not received an enforceable order by a competent authority indicating that they were illegally occupying another person's property were in a different situation than persons who illegally occupied another person's property. Those two categories of persons could not be taken to be in an analogous situation; therefore, the impugned provision of Article 19.8.3 of the Election Law could not be held to be discriminatory or to violate the right to liberty of movement and residence.

Languages:

Bosnian, Serbian, Croatian, English (translation by the Court).

Identification: BIH-2004-1-003

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 27.02.2004 / **e)** U 44/01 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina), 18/04 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.
5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.

Keywords of the alphabetical index:

Municipality, name, modification / Constituent peoples, discrimination / Residence, place, return.

Headnotes:

Giving certain cities and municipalities the name of only one constituent people in Bosnia and Herzegovina on the basis of the post-war population structure cannot be consistent with one of the most basic aims of the Constitution, i.e. the elimination of the consequences of the war and creating the political, economic and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group. Such names go against the basic constitutional principle of the equality of the constituent peoples throughout the territory of Bosnia and Herzegovina.

Summary:

The Constitutional Court was called upon to examine, *inter alia,* whether the provisions dealing with the names of some municipalities in Article 11 of the Law on Territorial Organisation and Local Self-Government of Republika Srpska and Articles 1 and 2 of the Law on the City of Srpsko Sarajevo were in conformity with the Constitution and Article 14 ECHR.

The applicant, the Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, drew up a list of 13 former names of cities and municipalities that had been altered by the impugned Laws in the course of or after the war in Bosnia and Herzegovina by the addition of the word *"Srpski"* (Serb) as a prefix to the names of those cities and municipalities.

In the applicant's view, such a prefix meant that those cities would be the cities of only one people. The members of other constituent peoples and other citizens were thus placed in an unequal and discriminatory position. The changes of names, by adding the prefix "Serb", created an atmosphere of fear and mistrust among the refugees who, having been expelled on ethnic grounds, had to leave their homes.

In the applicant`s opinion, the impugned provisions of the Law conflicted with the Constitution, particularly with Article II-2 of the Constitution, which provides that the rights and freedoms set out in the European Convention on Human Rights and its Protocols shall apply directly in Bosnia and Herzegovina and shall have priority over all other law; Article II-4 of the Constitution, which guarantees non-discrimination; and Article II-5 of the Constitution, which guarantees the right of refugees and displaced persons freely to return to their homes of origin.

The applicant argued that whether the constituent peoples were in a majority or minority position in the Entities, the explicit recognition of Bosniacs, Croats and Serbs as constituent peoples in the Constitution could only mean that none of them had been recognised as a majority, i.e. they enjoyed equality as groups. Therefore, it was a constitutional obligation not to discriminate, in particular, against the constituent peoples that were in reality in a minority position in the respective Entity. There was not only a clear constitutional obligation not to violate in a discriminatory manner the individual rights provided for in Article II-3 and II-4 of the Constitution, but there was also a constitutional obligation of non-discrimination in respect of the rights of groups. It would amount to discrimination for one or two constituent peoples to be given privileged treatment by the legal system of the Entity.

The Constitutional Court considered that in the case under consideration, a question of discrimination arose with respect to the right to return, the

prohibition of discrimination based on ethnic origin, and the guarantee of equal treatment with respect to freedom of movement within the State borders, all of which are safeguarded by the Constitution.

The Constitutional Court recalled its case-law, according to which the constitutional principle of the collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits the grant of any special privilege to one or two of those peoples, any domination in governmental structures or any ethnic homogenisation through segregation based on territorial separation.

According to the case-law of the European Court of Human Rights, an act or regulation is discriminatory if it makes a distinction between individuals or groups who are in a similar situation and if this distinction lacks objective and reasonable justification, or if there is no reasonable proportionality between the means used and the aim sought to be realised.

The groups that had to be compared in the particular case were the Bosniac, Croat and Serb citizens of Bosnia and Herzegovina who should, according to a basic constitutional principle, be granted equal treatment throughout the territory of Bosnia and Herzegovina. However, the change of names by adding *"Srpski"* (Serb) before the names of certain towns or municipalities, by replacing a previous name with a new name indicating a Serb affiliation, or by eliminating in some cases the prefix *"Bosanski"* (Bosnian) showed a clear intention and wish to make it clear that the towns and municipalities concerned were to be regarded as exclusively Serb. In that respect, the question arose whether that unequal treatment could be considered to have an objective and reasonable justification within the meaning of Article II-4 of the Constitution.

Consequently, the Constitutional Court found that the reason for the change of names was primarily a wish to emphasise the fact that the towns and municipalities at issue were located within the territory of the Republika Srpska and that they had a majority of inhabitants of Serb ethnicity at the time. Those reasons could not be accepted as being objective and reasonable, since they were contrary to the basic constitutional principle of the equality of the constituent peoples throughout the territory of Bosnia and Herzegovina.

It was also clear that placing emphasis on the *"Serb"* character of certain towns and municipalities would amount to disregard of the fact that in many cases the population structure at the time was the result of discrimination and ethnic cleansing and did not correspond to the pre-war situation. Article II-5 of the Constitution was intended to promote the elimination of the consequences of the war and the creation of the political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group. Furthermore, it was necessary "to provide all possible assistance to refugees and displaced persons and work to facilitate their voluntary return in a peaceful, orderly and phased manner" (Article II of Annex 7 to the Dayton Peace Agreement − Agreement on Refugees and Displaced Persons). Therefore, choosing names on the basis of the population structure at the time could not be consistent with one of the most basic aims of the Constitution, expressed in Article II:5 of the Constitution, which is to facilitate and encourage the return of refugees and displaced persons to their homes of origin.

In some cases, another reason for the renaming of towns and municipalities might be a desire to distinguish their names from similar names of towns or municipalities located within the territory of the Federation of Bosnia and Herzegovina. However, the Constitutional Court noted that that aim could easily be achieved by choosing prefixes or names that were ethnically neutral. In any event, the constitutional arguments against the choice of names indicating a specific Serb affiliation were so strong that no reasonable proportionality existed in the particular case between the means used and the aim sought to be realised.

The Constitutional Court therefore found that the impugned legal provisions were not consistent with the constitutional principle of the equality of the constituent peoples in Bosnia and Herzegovina and that they constituted discrimination contrary to Article II-4 of the Constitution.

Languages:

Bosnian, Serbian, Croatian, English (translation by the Court).

Canada
Supreme Court

Important decisions

Identification: CAN-2004-1-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 30.01.2004 / **e)** 29113 / **f)** Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General) / **g)** *Canada Supreme Court Reports* (Official Report), [2004] 1 S.C.R. 76, 2004 SCC 4 / **h)** Internet: http://www.droit.umontreal.ca/doc/csc-scc/en/index/html; 234 *Dominion Law Reports* (4th) 257; 180 *Canadian Criminal Cases* (3d) 353;16 *Criminal Reports* (6th) 203; 183 *Ontario Appeal Cases* 1; [2004] S.C.J. no. 6 (Quicklaw); CODICES (English, French).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Clarity and precision of legal provisions.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
5.2.2.7 **Fundamental Rights** – Equality – Criteria of distinction – Age.
5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
5.3.12 **Fundamental Rights** – Civil and political rights – Security of the person.
5.3.43 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Criminal law / Child, punishment, corporal / Punishment, corporal, aim / Parent, legal protection / Education, teacher, legal protection.

Headnotes:

While Section 43 of the Criminal Code which justifies the reasonable use of force by way of correction by parents and teachers against children or pupils in their care adversely affects children's security of the person, it does not offend a principle of fundamental justice. First, Section 43 provides adequate procedural safeguards to protect this interest, since the child's interests are represented at trial by the Crown. Second, it is not a principle of fundamental justice that laws affecting children must be in their best interests. Third, Section 43, properly construed, is not unduly vague or overbroad; it sets real boundaries and delineates a risk zone for criminal sanction and avoids discretionary law enforcement and is thus constitutional.

Summary:

Section 43 of the Criminal Code justifies the reasonable use of force by way of correction by parents and teachers against children in their care. The appellant sought a declaration that Section 43 violates Sections 7, 12 and 15.1 of the Canadian Charter of Rights and Freedoms. The trial judge, the Court of Appeal and the Supreme Court of Canada, in a majority decision, all upheld the constitutionality of Section 43.

The majority found that Section 43 of the Criminal Code does not offend Section 7 of the Charter. The force must have been intended to be for educative or corrective purposes, relating to restraining, controlling or expressing disapproval of the actual behaviour of a child capable of benefiting from the correction. While the words "reasonable under the circumstances" on their face are broad, implicit limitations add precision. Section 43 does not extend to an application of force that results in harm or the prospect of harm. Determining what is "reasonable under the circumstances" in the case of child discipline is assisted by Canada's international treaty obligations, the circumstances in which the discipline occurs, social consensus, expert evidence and judicial interpretation. When these considerations are taken together, a solid core of meaning emerges for "reasonable under the circumstances", sufficient to establish a zone in which discipline risks criminal sanction.

The conduct permitted by Section 43 does not involve "cruel and unusual" treatment or punishment by the state and therefore does not offend Section 12 of the Charter. Section 43 permits only corrective force that is reasonable. Conduct cannot be at once both reasonable and an outrage to standards of decency.

Section 43 does not discriminate contrary to Section 15.1 of the Charter. A reasonable person acting on behalf of a child, apprised of the harms of criminalization that Section 43 avoids, the presence of other governmental initiatives to reduce the use of corporal punishment, and the fact that abusive and harmful conduct is still prohibited by the criminal law, would not conclude that the child's dignity has been offended in the manner contemplated by Section 15.1. While children need a safe environment, they also depend on parents and teachers for

guidance and discipline, to protect them from harm and to promote their healthy development within society. Section 43 is parliament's attempt to accommodate both of these needs. It provides parents and teachers with the ability to carry out the reasonable education of the child without the threat of sanction by the criminal law. Without Section 43, Canada's broad assault law would criminalize force falling far short of what we think of as corporal punishment. The decision not to criminalize such conduct is not grounded in devaluation of the child, but in a concern that to do so risks ruining lives and breaking up families − a burden that in large part would be borne by children and outweigh any benefit derived from applying the criminal process.

One judge dissented in part. He indicated that by denying children the protection of the criminal law against the infliction of physical force that would be criminal assault if used against an adult, Section 43 infringes children's equality rights guaranteed by Section 15.1 of the Charter. To deny protection against physical force to children at the hands of their parents and teachers is not only disrespectful of a child's dignity but turns the child, for the purpose of the Criminal Code, into a second class citizen. The infringement of children's equality rights is saved by Section 1 of the Charter in relation to parents and persons standing in the place of parents. The objective of Section 43 of limiting the intrusion of the Criminal Code into family life is pressing and substantial and providing a defence to a criminal prosecution in the circumstances stated in Section 43 is rationally connected to that objective. As to minimal impairment, the wording of Section 43 not only permits calibration of the immunity to different circumstances and children of different ages, but it allows for adjustment over time. The proportionality requirements are met by parliament's limitation of the Section 43 defence to circumstances where:

i. the force is for corrective purposes, and
ii. the measure of force is shown to be reasonable in the circumstances.

Section 43 in relation to parents is thus justified on this basis. The extension of Section 43 protection to teachers, however, has not been justified under Section 1. Parents and teachers play very different roles in a child's life and there is no reason why they should be treated on the same legal plane for the purposes of the Criminal Code.

Two judges dissented. The first one found that Section 43 of the Criminal Code infringes the equality guarantees of children under Section 15.1 of the Charter. On its face, as well as in its result, Section 43 creates a distinction between children and others which is based on the enumerated ground of age. Moreover, the distinction under Section 43 constitutes discrimination. The government's explicit choice not to criminalize some assaults against children violates their dignity. The infringement of Section 15.1 is not justified as a reasonable limit under Section 1 of the Charter.

The second one found that Section 43 infringes the rights of children under Section 7 of the Charter. The phrase "reasonable under the circumstances" in Section 43 violates children's security of the person and the deprivation is not in accordance with the relevant principle of fundamental justice, in that it is unconstitutionally vague. Since Section 43 is unconstitutionally vague, it cannot pass the "prescribed by law" requirement or the minimal impairment stage of Section 1 of the Charter. Accordingly the infringement of the children's rights under Section 43 is not justified under Section 1.

Languages:

English, French (translation by the Court).

Croatia
Constitutional Court

Languages:

Croatian, English.

Important decisions

Identification: CRO-2004-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 14.01.2004 / **e)** U-I-825/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 16/04 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Treaty, international, validity.

Headnotes:

Pursuant to the provision of Article 128 of the Constitution, the direct review of the constitutionality of an international treaty does not fall within the jurisdiction of the Constitutional Court.

Summary:

The applicant submitted a proposal to institute proceedings to review the constitutionality of four international treaties concluded between the Republic of Croatia and the Holy See. The applicant argued that those treaties were not in conformity with Article 41.1 of the Constitution, according to which all religious communities are equal before the law and separate from the state. Moreover, the applicant pointed out that by accepting the impugned treaties, the Republic of Croatia undertook material obligations that were inappropriate to its economic development and economic potential.

Finding that the proposal sought the institution of proceedings by the Constitutional Court to review the direct constitutionality of an international treaty, a matter which does not fall within the jurisdiction of the Constitutional Court under Article 128 of the Constitution, the Constitutional Court rejected the proposal on the ground of lack of jurisdiction.

Identification: CRO-2004-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 28.01.2004 / **e)** U-I-2694/2003 / **f)** / **g)** *Narodne novine* (Official Gazette), 20/04 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.3.4.9 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of the formal validity of enactments.
2.2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – Hierarchy attributed to rights and freedoms.
3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.

Keywords of the alphabetical index:

Organic law, definition / Law making, constitutional rules / Family law.

Headnotes:

An organic law, which elaborates constitutionally-guaranteed human rights and fundamental freedoms in the sense of the first part of the sentence of Article 82.2 of the Constitution, is exclusively a law whose main object of regulation is one or more particular constitutionally-regulated personal or political rights and human freedoms. Whether the preconditions for designating a certain law as an organic one have been fulfilled within the meaning of the above-mentioned constitutional provision is to be examined, in case of doubt, separately in each individual case, but it is necessary that the law in question be limited to the area of freedom, equality and respect for human rights, as the fundamental constitutional values prescribed in Article 3 of the Constitution. The content of that area, unlike that of economic, social and cultural rights, is determined by the Constitution itself and is individualised by

guaranteed legal protection at the national and international level.

Summary:

The Constitutional Court rejected a proposal to initiate proceedings to review the constitutionality of the Family Act (*Narodne novine*, no. 116/03) as a whole. In examining the grounds of the proposal as to formal constitutionality, the Court recalled the view it expressed in Decision nos. U-I-2566/2003 and U-I-2892/2003 of 27 November 2003 published in *Narodne novine*, no. 190/03. Following that view, the Court found the Family Act not to be an organic law and to have been adopted in a procedure that complied with the Constitution.

Regarding the other claims made by the proponent, the Constitutional Court deemed it necessary for identical legal institutes to be designated by the same legal terms in all laws in which they appear for the purpose of ensuring the principle of the rule of law, in particular, the principle of legal security and certainty. However, the harmonisation of legal terms does not fall within the competence of the Constitutional Court, but rather that of the legislator.

Supplementary information:

In a separate opinion, Judge Milan Vuković disagreed with the view that the Constitutional Court's decision of whether a law was an organic one could be shaped by the Court's interpretation of the order of constitutional provisions within the same terms of Heading III of the Constitution. That viewpoint contravened the principles and the assertion that the provisions in certain chapters were a part of the whole of the constitutional text and were equal in legal value to all the other constitutional provisions.

Judge Vuković described the practice of the Court in Decision nos. U-I-2566/2003 and U-I-2892/2003 of 27 November 2003 and found that it could not be disputed that Article 82 of the Constitution did not expressly refer to either the Family Act or the Media Act as organic laws and that both laws could obtain that status exclusively under the provision of Article 82.2 of the Constitution defining the concept of an organic law. However, the question arose of the goals and principles that were the basis for interpretation. He deemed that that same body of guarantees of human rights and fundamental freedoms did not permit the Constitutional Court to become one of the framers of the Constitution by its own discretion.

Languages:

Croatian, English.

Identification: CRO-2004-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 28.01.2004 / **e)** U-I-3438/2003 / **f)** / **g)** *Narodne novine* (Official Gazette), 15/04 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.3.4.9 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of the formal validity of enactments.
2.2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – Hierarchy attributed to rights and freedoms.

Keywords of the alphabetical index:

Organic law, definition / Organic law, adoption, vote / Media, media law.

Headnotes:

An organic law, which elaborates constitutionally-guaranteed human rights and fundamental freedoms in the sense of the first part of the sentence of Article 82.2 of the Constitution, is exclusively a law whose main object of regulation is one or more particular constitutionally-regulated personal or political rights and human freedoms. Whether the preconditions for designating a certain law as an organic one have been fulfilled within the meaning of the above-mentioned constitutional provision is to be examined, in case of doubt, separately in each individual case, but it is necessary that the law in question be limited to the area of freedom, equality and respect for human rights, as the fundamental constitutional values prescribed in Article 3 of the Constitution. The content of that area, unlike that of economic, social and cultural rights, is determined by the Constitution itself and is individualised by guaranteed legal protection at the national and international level.

In accordance with Article 82.2 of the Constitution, the Croatian Parliament adopts organic laws that elaborate the constitutionally-determined human rights and fundamental freedoms, the electoral system, the organisation, competence and the manner of work of governmental bodies, as well as the structure and scope of work of the local and regional self-government, by majority vote of all the members.

Summary:

The Constitutional Court started by recalling two of its previous decisions (nos. U-I-2566/2003 and U-I-2892/2003 of 27 November 2003, *Narodne novine*, no. 190/03). In those decisions, the Court had struck down the law revising and amending the Penal Act (*Narodne novine*, no. 111/03), had pointed out the criteria for determining whether a particular law elaborating constitutionally-determined human rights and fundamental freedoms was an organic law and had expressed its views on the legal nature of the law elaborating the freedom of the media – as an organic law, as expressed in the case of the constitutional review of the Public Communications Act in which the Court had ruled to institute proceedings to review the constitutionality of that law (Decision no. U-I-1010/1994 of 15 March 1995, *Narodne novine*, no. 19/95) and the decision to strike it down (Decision no. U-I-1010/1994 of 29 November 1995, *Narodne novine*, no. 97/95).

The Constitutional Court then instituted proceedings to review the constitutionality of the Media Act (*Narodne novine*, no. 163/03) and struck down that Act in its entirety on the ground of its formal unconstitutionality in the form of non-compliance of the enactment procedure of that Act with the provision of Article 82.2 of the Constitution: in order for the Act to have been adopted, a majority of the total number of members of the Croatian Parliament should have voted for the Media Act i.e. at least seventy-six (76) members, which was not the case.

In examining the legal nature of the Media Act, the Constitutional Court took into account the provisions of Article 38 of the Constitution, which in paragraph 1 guarantee the freedom of thought and expression, in paragraph 2 guarantee the freedom of expression (which specifically includes the freedom of press and other media of communication, freedom of speech and public expression and free establishment of institutions of public communication) and in paragraph 3 forbid censorship and grant journalists the right of free reporting and free access to information.

Article 3 of the Media Act, which elaborates the freedom of media as a general principle, guarantees the freedom of expression and the freedom of media. Paragraph 2 of that article stipulates what the freedom of media encompasses in particular.

Pursuant to the above, the Court found that the case before it concerned a law that elaborated constitutionally-guaranteed human rights and fundamental freedoms and whose enactment required a vote of the majority of all members of the Croatian Parliament pursuant to Article 82.2 of the Constitution.

Given that the Media Act elaborates constitutionally-determined human rights and fundamental freedoms, i.e. that it regulates, among other things, the preconditions for exercising the principle of the freedom of the media, rights of journalists and other participants in mass communications to the freedom of reporting and free access to public information, in order to avoid creating the legal void that would occur if the Media Act were no longer to be in force on the day of publication of the Constitutional Court's decision in *Narodne novine*, the Constitutional Court delayed the expiry of the Media Act, pursuant to the authority under Article 55 of the Constitutional Act, so as to give the legislator enough time to adopt the new Media Act in a procedure in compliance with the provisions of the Constitution.

Languages:

Croatian, English.

Identification: CRO-2004-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 28.01.2004 / **e)** U-IV-670/2003 / **f)** / **g)** *Narodne novine* (Official Gazette), 15/04 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Jurisdiction, dispute, Constitutional Court, competence, lack.

Headnotes:

The Constitutional Court is competent to resolve jurisdictional disputes only between the bodies stipulated by Article 128.6 of the Constitution. Therefore, it does not fall within its jurisdiction to resolve a negative jurisdictional dispute between a judicial body and a court of arbitration.

Summary:

A domestic legal person submitted a request to the Constitutional Court to resolve a jurisdictional dispute between an ordinary court and the Permanent Arbitration Court at the Croatian Chamber of Commerce in Zagreb, in a case concerning non-fulfilment of a contract concluded with a foreign legal person.

After both the judicial body and the court of arbitration had rejected the application requesting the initiation of arbitration proceedings, the applicant addressed the Constitutional Court claiming that its right to an independent and fair trial, guaranteed by the provision of Article 29.1 of the Constitution, had been violated.

Pursuant to the provision in Article 128.6 of the Constitution, the Constitutional Court decides jurisdictional disputes between the legislative, executive and judicial branches. Article 82.1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (*Narodne novine*, no. 49/02 – consolidated text, hereinafter: "the Constitutional Act") elaborates the said provision of the Constitution: where there is a jurisdictional dispute between the bodies of the legislative, executive or judicial branches arising from those bodies' declaring themselves to have no competence over the same matter, a request to resolve the jurisdictional dispute may be submitted to the Constitutional Court after the court decision has become legally binding i.e. after the finality of the relevant decision of the executive body or the legislative body, whichever decision has been delivered first.

Pursuant to the provision of Article 4 of the Judicial Act (*Narodne novine*, nos. 3/94, 100/96, 115/97, 131/97, 129/00 and 67/01), everyone has a right to be tried by the competent court in statutorily prescribed proceedings without undue delay. Pursuant to the law, in legal matters falling under the jurisdiction of courts, a contract may confer the jurisdiction over a decision about particular legal issues to courts of arbitration.

The provision of Article 2.1.3 of the Arbitration Law (*Narodne novine*, no. 88/01) stipulates that the Arbitration Court is a non-governmental court, which draws its authority to adjudicate from the agreement of the parties.

The case in question dealt with a negative jurisdictional dispute between judicial bodies, namely, the Commercial Court in Zagreb and the Permanent Arbitration Court at the Croatian Chamber of Commerce in Zagreb. That dispute occurred because of the omission of the parties to name in the contract the body authorised to resolve disputes arising between them. Therefore, the request of the proponents was rejected due to the lack of jurisdiction of the Court.

Languages:

Croatian, English.

Czech Republic
Constitutional Court

Statistical data
1 January 2004 – 30 April 2004

- Judgments by the plenary Court: 7
- Judgments by chambers: 50
- Other decisions of the plenary Court: 5
- Other decisions by chambers: 662
- Other procedural decisions: 79
- Total: 803

Important decisions

Identification: CZE-2004-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 16.12.2003 / **e)** I. US 699/02 / **f)** Equal conditions of competition between political forces / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.3.4.5.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Parliamentary elections.
1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
4.5.10 **Institutions** – Legislative bodies – Political parties.
4.9.5 **Institutions** – Elections and instruments of direct democracy – Eligibility.
4.9.8.2 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material – Campaign expenses.
5.3.40.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Constitutional complaint, admissibility / Election, candidate, registration procedure / Election, candidate, requirements / Election, candidate, status.

Headnotes:

A constitutional complaint may be filed by a natural or legal person alleging that a judicial decision, a measure or other intervention by a body of public power is in violation of one of the person's fundamental rights or freedoms protected by the constitutional order.

According to the Rules of Civil Procedure, an application seeking the annulment of an entity's registration for elections may be filed only by persons listed therein [persons with *locus standi*], i.e., other candidates, political parties, political movements or coalitions that have duly filed applications for registration. That provision undoubtedly intends to cover persons who have filed applications that meet the formal requirements of the Parliamentary Elections Act.

Such a restriction of *locus standi* cannot be deemed to be unconstitutional. Its purposes are to guarantee judicial supervision of compliance with the principle of equal conditions in political competition and to ensure equal access to political functions, both of which are guaranteed by the Constitution, so as to make the frustration of elections impossible, e.g., by challenging registrations in court with the intention of frustrating elections.

Any entity that fails to pay the election deposit pursuant to the Parliamentary Elections Act is deemed to have not filed an application meeting statutory requirements. Only after such a duty is fulfilled, does that party have *locus standi* in the aforesaid proceedings.

Summary:

The complainant, a coalition of political parties, lodged a constitutional complaint seeking to have decisions of the District Office and a general court annulled. The complainant asked the Constitutional Court for a declaration that a decision to register the X. political movement for the Senate elections and a court decision rejecting the complainant's application for the annulment of that registration violated the complainant's right to fair trial, equal access to elected offices, equal election chances, fair elections and free competition between political forces.

The District Office rejected the complainant's application for registration for the Senate elections on grounds of, *inter alia*, failure to submit proof that the election deposit had been paid. The District Office discovered that the election deposit had not been paid.

The complainant then applied to the court, which also rejected its application for registration on the ground of failure to pay the deposit.

The Constitutional Court found that the complainant could not file a constitutional complaint because it lacked *locus standi*.

The complainant had failed to pay the election deposit, and thereby failed to meet the requirements of due registration pursuant to the Parliamentary Elections Act. As to the constitutional complaint seeking the annulment of another entity's registration, the complainant lacked *locus standi* under the Act on the Constitutional Court on the ground that the impugned decisions did not prejudice its rights and freedoms.

In a similar case, Pl. ÚS 3/96, an application for the abolishment of the obligation to pay an election deposit in Senate elections was rejected by the plenum of the Constitutional Court for the reason that "in small, single-mandate districts, it is difficult for individuals and small groups to overcome the temptation to run in the elections for reasons other than political, because costs incurred by them in the election competition are fairly low". The Constitutional Court based its decision on a similar *ratio decidendi* when it examined the provisions of the Parliamentary Elections Act, as amended, and found that "election deposits represent a certain guarantee of earnestness in the intent to exercise fundamental political rights guaranteed by the Constitution. The purpose of the election deposit in small electoral districts in a majority system is to discourage persons that intend to run for reasons other than the serious political one of exercising passive election rights. At the same time, election deposits must not violate the principle of equality and must not be an expression of arbitrariness on the part of the lawmaker."

The Constitutional Court dismissed the constitutional complaint without proceeding to a examination of the merits on the ground that the complainant lacked *locus standi*.

Languages:

Czech.

Identification: CZE-2004-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 28.01.2004 / **e)** Pl. US 41/02 / **f)** Security clearance of counsel / **g)** *Sbírka zákonů* (Official Gazette), no. 98/2004 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.
3.4 **General Principles** – Separation of powers.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.7.15.1.4 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Status of members of the Bar.
5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel.

Keywords of the alphabetical index:

Lawyer, information, access / Information, classified, access / Criminal proceedings / Security, national.

Headnotes:

Subjecting counsel acting in criminal proceedings to security clearance prior to allowing them access to classified information conflicts with the right to free choice of counsel. It is the Criminal Code, and not the Act on the Protection of Classified Information, that regulates counsel's access to classified information. Under the current law, the Czech legal order does not require counsel – members of the bar ("counsel") – to undergo security clearance.

Summary:

The District Court lodged an application with the Constitutional Court seeking to have a provision of the Act on the Protection of Classified Information struck out. The word "counsel" has been left out of the impugned provision, thereby excluding counsel from the list of persons who are not subject to security clearance. However, the Criminal Code, pursuant to which only counsel may act as defence counsel in criminal proceedings, has not been amended. The applicant submitted that that provision conflicted with the provisions of the Charter of Fundamental Rights and Basic Freedoms and the Convention that guarantee the accused's right to free choice of counsel. The District Court stated that in a criminal matter before it, the two accused, X. and Y., availed themselves of their right to choose their

counsel, and that they insisted on their choice. As neither of the counsel chosen had security clearance, they were unable to act as defence counsel in the criminal proceedings in question. The applicant concluded that the Act on the Protection of Classified Information conflicted with the constitutional order, and referred the matter to the Constitutional Court.

The Chamber of Deputies, the Senate, the Czech Bar Association and the National Security Agency expressed their opinions on the issue. The Chamber of Deputies considered that the Act as enacted was in harmony with the Constitution and the legal order. The Senate stated that it had returned the bill to the Chamber of Deputies with proposed amendments, but had been outvoted by the Chamber of Deputies. The Czech Bar Association stated that it stood fully behind the District Court's application. It added that the crucial issue was the denial of the possibility of free choice of counsel. The National Security Agency stated that counsel needed to have security clearance.

The Constitutional Court first examined whether the applicant had *locus standi* to lodge the application for striking out the impugned provision. It further examined whether the impugned provision had been adopted and issued in accordance with the competences and the manner prescribed by the Constitution. The Constitutional Court reached an affirmative decision on both issues.

On the merits, the Constitutional Court noted that two different interpretations were possible. According to the first interpretation, one based on the language of the relevant provision, counsel are not included in the list of persons not subject to security clearance. According to the second interpretation, the protection of classified information in criminal proceedings is a special area, and is, as such, regulated by the Criminal Code. In the case at hand, the Criminal Code serves as *lex specialis*, and has, as such, priority over the Act on the Protection of Classified Information as a general act. The Constitutional Court carried out a teleological analysis and decided in favour of the latter interpretation.

The conflict between the alternative interpretations of the relevant ordinary law from a constitutional-law perspective was assessed and resolved on the basis of the principal of proportionality and the principle that an interpretation that complies with the Constitution takes priority over one that derogates from it.

At a constitutional-law level, the crux of the matter was the conflict of a public value, specifically, the security of the state as an element of its sovereign status, with the basic right of defence vested in the accused.

In cases of conflict between fundamental rights, unlike those of conflict of ordinary laws, the Constitutional Court follows the principle of optimisation, i.e., a postulate of the minimisation of the restriction of the fundamental rights and freedoms in question. In the event that the Court reaches a reasoned conclusion that one particular fundamental right must take priority over another, the Court's decision must avail itself of all options to minimise the interference with the right that does not have priority.

From the point of view of appropriateness, i.e., the relationship between the legal means employed and the lawmaker's objectives, subjecting counsel to security clearance is an effective means to attain the intended objective, which is a public value. From the point of view of security, security clearances are not an appropriate means because the objective may be accomplished through other means in the criminal proceedings (e.g. by the court issuing instructions on duties stemming from the Act on the Protection of Confidential Information, criminal sanctions or the duty of confidentiality under the Act on Counsel, etc.), without restricting the fundamental right to defence, equality of weapons and the right to comment on all evidence.

The foregoing called for the application of the interpretation principle laying down that an interpretation that complies with the Constitution is given priority over one that derogates from it.

The Constitutional Court, therefore, dismissed the District Court's application seeking to have a certain provision of the Act on the Protection of Classified Information struck out.

According to a dissenting opinion, the concept that the protection of classified information in criminal proceedings represented a special area was not acceptable. The Constitutional Court should have allowed the application, struck out the impugned provision and deferred the date of delivering a decision on an award until a new provision of law had been enacted.

Languages:

Czech.

Identification: CZE-2004-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 11.02.2004 / **e)** Pl. US 31/03 / **f)** The obligation to provide information / **g)** *Sbírka zákonů* (Official Gazette), no. 105/2004 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.
3.10 **General Principles** – Certainty of the law.
3.12 **General Principles** – Clarity and precision of legal provisions.
3.13 **General Principles** – Legality.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.22 **General Principles** – Prohibition of arbitrariness.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
5.3.24.1 **Fundamental Rights** – Civil and political rights – Right to administrative transparency – Right of access to administrative documents.

Keywords of the alphabetical index:

Information, classified, protection / Information, obligation to provide / Information, denial.

Headnotes:

Neither legal certainty nor predictability of acts of public power is such that it may be placed above other components of the concept of a "democratic state enjoying the rule of law". The protection of the interests of the Czech Republic as a sovereign state is one of the values protected by the Constitution. In cases of potential conflict, while ensuring the effective protection of the state's interests, the lawmakers, as well as the government, should optimise the functioning of the checks and mechanisms protecting both values, and minimise as much as possible the scope for potential arbitrariness in acts of public power.

Summary:

The applicant, the Ombudsman, asked the Constitutional Court to strike out a particular section in the schedule to the Governmental Decree implementing the Act on the Protection of Classified Information, alleging that that section conflicted with the provisions of the Act, as well as with the Constitution and the Charter of Fundamental Rights and Basic Freedoms. The Ombudsman acted within the framework of the application of X. against the Ministry of Foreign Affairs, which kept its human rights policy secret.

The Act on the Protection of Classified Information generally defines classified information as any fact whose unauthorised use could harm the interests of the Czech Republic, and lists the areas in which such classified information may be found.

The Act expressly presumes that the meaning of the term "classified information" would be specified by means of a governmental decree setting out a detailed list of facts that may be classified. In accordance with Governmental Decree no. 246/1998 Coll., aside from the facts expressly listed therein, "sensitive political, security and economic information in the area of international relations" may also be kept secret. The applicant stated that the wording of that provision duplicated and unnecessarily repeated the statutory provision, was not specific and enabled any information to be kept secret. The applicant submitted that by issuing the said decree, the Government had acted in breach of Article 78 of the Constitution, pursuant to which the Government is authorised to issue decrees for the implementation of an act within the limits set out by the act in question. The applicant was of the opinion that by issuing that decree, the government had overstepped the limits set out by the Act on the Protection of Classified Information, a situation that might amount to an unconstitutional interference with the right to information. According to the applicant, the impugned provision was in conflict with the constitutional principles of legal certainty and predictability of acts of public power.

The Constitutional Court requested the opinions of the Government of the Czech Republic, the Ministry of Foreign Affairs and the National Security Agency. Although the Government admitted that there was duplication, it found no inherent conflict in the impugned provision. The Government stated that the only prerequisite for particular information to become classified was that its disclosure could jeopardise the interests of the Czech Republic. According to the Ministry of Foreign Affairs, the incorporation of a more general provision into the list of classified information was absolutely necessary. The National Security Agency stated that to a certain extent, the list of classified information served for only for the purposes of orientation.

The Constitutional Court found that the impugned government decree had been adopted and issued in the manner prescribed by the Constitution. Consequently, the Court proceeded to an examination of the merits.

The Constitutional Court has previously accepted the principle of a more relaxed relationship between laws and decrees, deeming that priority in terms of constitutional legitimacy is the harmony between the meaning and purpose of the law as a whole. One of the main objectives of the Act on the Protection of Classified Information is the protection of the interests of the Czech Republic. The application of the method of teleological interpretation led to the conclusion that the purpose of that law was to ensure, through legal means, that all facts that may be in conflict with the interests of the Czech Republic be kept secret, i.e., including new facts that had yet to be included in the existing lists.

The Constitutional Court referred to the principle of reasonableness, which is another manner of expressing the concept of optimisation. A reasonable restriction of predictability (legal certainty) is one that can still ensure the effective realisation of the purpose of the Act on the Protection of Classified Information. In drawing up the list of classified information, the Government needed to strike the optimal balance between the conflicting requirements of accuracy and specificity on one hand and making an indicative list on the other. To that end, the Government responded by introducing the provision in question.

The Constitutional Court found that the degree of legal uncertainty and unpredictability resulting from the list of classified information was reasonable.

The applicant further complained that the governmental decree could be used to classify information in such a way that an unconstitutional interference with the right of information might occur. The Constitutional Court noted that the room for administrative discretion given by the law might be abused in specific situations to arbitrarily and wilfully keep certain information secret; however, should such a situation arise, the legal system provides for the right to seek protection of one's right to information through the means provided for in the Act on Free Access to Information. According to that Act, a refusal to grant access to such information may be subject to review by an ordinary court, and subsequently by the Constitutional Court.

In light of the above, the Constitutional Court dismissed the application.

According to a dissenting opinion, the application made by the Ombudsman might be deemed to constitute an application for the introduction of proceedings for a "specific review of legal regulations". From a constitutional-law perspective, the impugned regulation should be examined in light of an interference with the right to seek and disseminate information, the violation of which being the primary reason for initiating of proceedings before the Constitutional Court.

Languages:

Czech.

Identification: CZE-2004-1-004

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 26.02.2004 / **e)** II. US 604/02 / **f)** Effects of decisions of the European Court of Human Rights in national law / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
3.16 **General Principles** – Proportionality.
4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.
4.7.16.1 **Institutions** – Judicial bodies – Liability – Liability of the State.
5.3.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.38 **Fundamental Rights** – Civil and political rights – Right to property.
5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to housing.
5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

European Court of Human Rights, friendly settlement, effects in national law.

Headnotes:

When deciding to proceed to a friendly settlement before the Constitutional Court of the country concerned has decided on a matter, the European Court of Human Rights accepts the fact that a

decision on the constitutional complaint regarding the matter is not required, and that a final and binding decision on the matter may be rendered at this stage. A further continuation of proceedings in the matter before the national Constitutional Court would, therefore, be contrary to the principle of subsidiarity.

Summary:

The applicants filed a constitutional complaint, requesting that the Constitutional Court overturn some decisions delivered by ordinary courts.

The applicants had been ejected from their apartments and had moved, together with their personal effects, to Y. They stated that they had been repeatedly informed that following the dissolution of the Czech and Slovak Federal Republic, they would have to move to Y. where they would be given apartments, jobs and social security benefits. The legal basis for the move was a resolution of City X. that had been adopted pursuant to a decree of City X. and subsequently quashed by a Constitutional Court award. They had arrived in Y only to discover that unless they had permanent residence there, the local authorities would be unable to assist them in any way. Consequently, they returned. They found the apartments that they had originally occupied sealed off and locked. City X. rejected their application requesting permission to occupy those apartments again. They camped in a park and were later allocated apartments whose quality and size were different from those of the original apartments. Leases for the new apartments were concluded for a definite term.

The applicants filed an action against City X. The judgment of the District Court terminated part of the proceedings on the ground of a partial withdrawal of the action, and rejected the balance of the claim. The applicants brought an appeal against the judgment. The judgment rendered by the Regional Court upheld the judgment of the first instance court.

The applicants argued that the proceedings had been unreasonably long and that their right to fair process had been violated. Moreover, the manifestation of their will to leave town had been based on false information; therefore, that manifestation could not be deemed to constitute a real manifestation of will and was, as such, absolutely invalid. They submitted that they had left their apartments on manifestly unfavourable terms because City X. had failed to give the matter fair consideration.

The applicants lodged an application against the Czech Republic with the European Court of Human Rights (the "European Court"). Their application resulted in a friendly settlement, approved in a judgment by the European Court. The applicants subsequently filed with the Constitutional Court "an additional filing and partial withdrawal" concerning their previously lodged constitutional complaint because they had inferred from the settlement that they could no longer apply to the Constitutional Court seeking a remedy for matters occurring prior to the date of their previous constitutional complaint.

The agent of the Czech Government at the European Court ("Government Agent") interpreted the content of the friendly settlement. The Government undertook to pay a certain sum to the applicants under the friendly settlement. The said sum was paid. The applicants waived all further claims against the Czech Republic.

The Constitutional Court examined the effect on constitutional complaint proceedings of a friendly settlement approved in a judgment by the European Court, in particular, whether the content of such a judgment rendered by the European Court barred further continuation of constitutional complaint proceedings.

The parties to the settlement interpreted its temporal and substantive effects differently. The applicants argued that the date of filing of the previous constitutional complaint was the relevant date. The Constitutional Court dismissed the complaint in question as manifestly unfounded. The Government Agent was of the opinion that the relevant date was the one on which the European Court delivered its judgment approving the friendly settlement. The applicants believed that from a substantive point of view, the settlement had no impact on their constitutional complaint, while the Government Agent contended that the settlement covered facts not excluded from a review on merits by the European Court.

The Constitutional Court focused on the interpretation of the phrase "the Applicants waive any further claims against the Czech Republic and regard this friendly settlement as a final settlement of the case". Article 35.1 ECHR stipulates that all national remedies must be exhausted before an application may be made. The case-law of the European Court indicates that a constitutional complaint is one such remedy. In the particular case, the European Court had approved the amicable settlement before the Constitutional Court rendered an award, and had consequently accepted that a decision on the constitutional complaint was no longer necessary.

The Constitutional Court further assessed the effects of the "additional filing and partial withdrawal of the constitutional complaint". By their "partial withdrawal",

the applicants implicitly confirmed the original proposed award as set out in their constitutional complaint. Therefore, their will differed from that manifested in the friendly settlement. The Constitutional Court thus had to comment on the relevance of the applicants' will manifested at a later date. Neither the Convention nor the Act on the Constitutional Court addresses that issue. The Constitutional Court thus had to apply the Rules of Civil Procedure *mutatis mutandis*, which set out that a settlement approved by a court has the effects of a final and effective judgment. That means that the content of the settlement is binding on the parties, as well as all the bodies concerned. Such a settlement, like a final and effective decision, bars proceedings on a matter.

With a view to the circumstances in the particular case, the Constitutional Court concluded that the applicants had validly waived their right to continue their constitutional complaint proceedings. Therefore, the Constitutional Court terminated the proceedings.

Languages:

Czech.

Identification: CZE-2004-1-005

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 04.03.2004 / **e)** III. US 495/02 / **f)** The state as a party in private law / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.22 **General Principles** – Prohibition of arbitrariness.
4.6.10 **Institutions** – Executive bodies – Liability.
4.7.2 **Institutions** – Judicial bodies – Procedure.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.13.1.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Litigious administrative proceedings.
5.3.38 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Land, restitution / Land, Fund, land parcel, duty to transfer / State, party to a private law relationship.

Headnotes:

In cases where the state is a party to a relationship governed by private law, its position cannot be considered identical to that of an individual without considering other factors. Even in such kinds of relationships, the state does not have a truly autonomous will, and its actions must always be governed by law, even though it may be represented by subjects appointed for that purpose.

The general rule is that the activities of a body of public power must be non-discriminatory. If ordinary courts are to fulfil their constitutional duty of protecting interests protected by law, in assessing actions taken by the state or persons authorised by the state, ordinary courts need to examine whether there is any arbitrariness. The courts cannot abandon their duty of review by relying on a general argument that the entity in question proceeded in accordance with internal regulations, and without examining whether in the case in question, the application of any such internal regulation may have de facto resulted in unlawful, or even anti-constitutional, discrimination. The state's actions in the performance of its obligations always need to be examined in light of the principle of equality. Care needs to be taken to ensure that when the state is in the position of debtor, it bears liability for failure to perform its obligation, as would any other debtor.

Summary:

The applicants lodged a constitutional complaint, requesting that the Constitutional Court quash the judgments of ordinary courts rejecting their petition for obliging the Land Fund of the Czech Republic (the "Fund") to transfer to them real estate managed by the Fund instead of compensation pursuant to the Land Act. The applicants contested that by issuing the relevant judgments, the ordinary courts had violated the applicants' right to fair process and the principle of the rule of law consisting of a creditor's ability to obtain a legal remedy against a defaulting debtor.

The applicants' restitution claims had entitled them to the transfer of substitute land in accordance with the Land Act. The land should have been surrendered by

the Fund; however, the Fund had failed to fulfil its statutory duty. The applicants had therefore applied to a court for the surrender of a particular plot of land. The Circuit Court rejected the claim for lack of support in the law. Following an unsuccessful out-of-court procedure, the applicant requested that the Fund surrender the land in question. The Fund argued that it had no statutory duty to transfer a particular plot of land to a particular person. The Circuit Court found that the Czech Republic owned the plot of land in question and that the Fund was the manager. The Circuit Court noted that while the applicants were obligees within the meaning of the Land Act and were entitled to the surrender of substitute land, they were not entitled to choose a particular plot of land. The initiative and the right of choice vested with the Fund. The Municipal Court examined the matter on appeal and rejected the appeal. The Municipal Court ruled that the Fund had complete discretion as to the choice of the plot of land.

The Constitutional Court examined the complaint and decided it was timely and founded. The Municipal Court commented that the complaint showed no interference with the applicants' rights guaranteed by the Constitution. The Circuit Court referred to its decision in its entirety. The Land Fund of the Czech Republic responded that it considered the constitutional complaint unjustified and unfounded.

The file showed that the ordinary courts had completely disregarded the applicants' contention that the Fund had acted arbitrarily. The applicants had proposed to adduce evidence to support that contention. The Constitutional Court examined the evidence and concluded that the constitutional complaint was founded.

In the case in question, the Constitutional Court had been asked to assess whether the decisions of the ordinary courts interfered with fundamental rights or freedoms guaranteed by the Constitution. The rights in question in the particular case were the right to peacefully use one's property and not to be deprived of one's property pursuant to Article 1.1 Protocol 1 ECHR.

It had been unequivocally proven before the ordinary courts that the applicants had a substantive interest in the surrender of a substitute plot of land pursuant to the Land Act. Under the Land Act, where the land cannot be surrendered, the Land Fund gratuitously transfers to the obligee other land owned by the state, provided that the obligee consents.

An interpretation of the Land Act in accordance with the Constitution indicates that the Fund has the statutory duty to transfer substitute land, and its offer must be such in terms of quality and quantity that the substitution may be provided to as many obligees as possible in as short a time as possible. As the will of the Fund is derived from the will of the state whose functions the Fund performs, the Fund is unable to act in a way that is different from the way that the state would act. It must not perform its activities in a discriminatory or arbitrary manner. In the particular situation, the court should have either confirmed or refuted the applicants' contention that the Fund had acted arbitrarily. The court, however, had failed to do so.

The ordinary courts had relied on an erroneous assessment of the legal status of the Land Fund, and had deemed the Land Fund to be a private-law entity with a fully autonomous will. The Fund, however, is a public institution because it serves a public purpose, is established by law and its activities are supervised by the state.

When examining the position of the state in a private-law relationship, the other dimension of the state, i.e., the one in which it performs its main function, the public power must not be disregarded.

The fact that a court does not accept all of the evidence adduced by an applicant cannot in itself be viewed as a violation of that applicant's constitutional rights. Only a court is authorised to decide which part of the evidence adduced it will actually take into account. However, a court must always determine why it decides not to accept certain evidence.

All of the above led the Constitutional Court to conclude that the ordinary courts had failed to satisfy their duty to protect the legitimate expectations of the applicants, i.e., that a substitute plot of land would be furnished to them. For those reasons, the Constitutional Court allowed the constitutional complaint, and quashed the impugned decisions.

Languages:

Czech.

Identification: CZE-2004-1-006

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 09.03.2004 / **e)** IV. US 590/03 / **f)** Proceedings against a fugitive from justice / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
5.1.1.1.1 **Fundamental Rights** – General questions – Entitlement to rights – Nationals – Nationals living abroad.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
5.3.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.

Keywords of the alphabetical index:

Fugitive, abroad / Prosecution, criminal, avoiding / Prosecution, *in absentia*.

Headnotes:

The grounds for proceedings against a fugitive from justice must always be established, and the court must ascertain throughout the proceedings that those grounds continue to exist.

In this respect, it is not relevant whether the complainant has succeeded in avoiding the service of process in a legal or illegal manner; what matters is that he did so with the intention of avoiding criminal proceedings. The fact that a person stays abroad is not in itself sufficient to lead to the conclusion that that person is avoiding criminal proceedings; the person concerned needs to do so in order to avoid criminal proceedings, a fact that must be established on the basis of specific facts.

The right to defence cannot be interpreted in such a way as to mean that its exercise could result in the state's legitimate effort to see justice done in criminal matters being completely and effectively frustrated at the beginning of the criminal process by an inability to start that process.

Summary:

The complainant applied to the Constitutional Court, seeking to have some court resolutions quashed on the ground that those resolutions had been adopted without authorisation in proceedings against a fugitive from justice. He contended that he had the right to live outside the territory of the Czech Republic, that the place of his stay abroad was a known fact, that he had chosen it long before the resolutions were issued and was willing to cooperate with the Police of the Czech Republic. He believed that his criminal prosecution was political and aimed at criminalising his business activities.

The police counsel of the Police of the Czech Republic, Anti-corruption and Financial Crime Department, submitted that the constitutional complaint was unfounded, that penal bodies had respected the complainant's place of residence and had conformed the process to the same. The Supreme Public Prosecutor argued that the Constitutional Court should reject the constitutional complaint as manifestly unfounded.

The police file showed that the investigator had informed the complainant that there was justified suspicion of fraud, and inquired whether the complainant was willing to accept the statement of charges and cooperate. After the complainant declared that he was willing to cooperate, the police counsel issued two resolutions on the initiation of criminal proceedings. There being no bilateral treaty on legal assistance in criminal matters between the Czech Republic and the complainant's state of residence, the High Public Prosecutor's Office requested legal assistance in the matter of service of process on the basis of the principle of reciprocity. Government agencies of the state of residence issued an order on the service of process, and unsuccessfully attempted to serve the complainant twice. The complainant's legal counsel advised the Ministry of Foreign Affairs of the state of residence and Interpol in writing that the Czech authorities' actions were being allegedly influenced by a political campaign during the election process. The complainant lodged an application with the Supreme Court of the state of residence, seeking a review of the order on service of process from the Czech Republic, and contesting its legality. The complainant contended that his criminal prosecution was of a political nature and that the resolutions had not been issued by a judicial body. The Czech Highest Prosecutor's Office refuted that contention in a letter to the bodies of the state of residence. Despite that, the Supreme Court of the country of residence decided to suspend service of process with respect to

any documents sent by the Czech Republic until the contested proceedings were reviewed.

The police found that the complainant's conduct met the prerequisites for the initiation of proceedings against a fugitive from justice. Defence counsel was appointed, who lodged complaints against both resolutions initiating criminal proceedings. The Supreme Prosecutor's Office rejected the complaints as unfounded.

The constitutional complaint was admissible. The Constitutional Court was aware of the fact that proceedings against a fugitive from justice restricted the principle of fair process.

The Constitutional Court did not accept the complainant's objection that he was neither in hiding nor avoiding the criminal proceedings by staying abroad, and that there were thus no grounds for initiating proceedings against a fugitive from justice. The complainant's contention that he was not in hiding because his foreign place of residence was a known fact was irrelevant to the situation at hand, because that provision is only applicable if a person is in hiding in the territory of the Czech Republic; the penal bodies correctly justified the initiation of proceedings against a fugitive from justice by contending that he was avoiding criminal proceedings by living abroad.

The Constitutional Court found that the complainant's intention to avoid criminal proceedings by living abroad was proven. The fact that the complainant and his legal counsel declared that the complainant was willing to cooperate with the Czech police was irrelevant, as the complainant took prior and subsequent steps to convince the bodies of the state of residence that his criminal prosecution was politically-motivated and was not conducted in accordance with the law. While it was not necessary to hold the complainant responsible for the fact that while exercising his right to defence, he opted for tactics making it impossible to serve the notice of the initiation of criminal proceedings on him, such tactics could not make the bodies of the Czech Republic abandon the criminal proceedings against the complainant.

The right to freely leave the Czech Republic is not an absolute right, and in the case at hand, it conflicted with the right and duty of the state to prosecute criminal activity. The complainant's position was markedly different from the position of other fugitive defendants. While a fugitive from justice usually receives no information on the progress of the criminal proceedings, and all of his or her rights are assumed by defence counsel appointed in the case, in the particular case, the complainant was able to keep himself informed about the progress of the criminal proceedings, and to fully and actively defend himself, though *in absentia*. The complainant was not penalised for having surrendered his right to defend himself in person, and that right was preserved to the extent that his stay abroad made realistically possible.

For the above reasons, the Constitutional Court found no violation of the fundamental rights of the complainant in the proceedings against a fugitive from justice. Therefore, the Constitutional Court rejected the constitutional complaint for being manifestly unfounded.

Languages:

Czech.

Denmark
Supreme Court

Important decisions

Identification: DEN-2004-1-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 03.12.2004 / **e)** 158/2003 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen* 2004.734 H.

Keywords of the systematic thesaurus:

4.5.10 **Institutions** – Legislative bodies – Political parties.
4.9.8 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Racist statement / Internet, racist statements, dissemination.

Headnotes:

Publishing degrading and insulting statements towards Muslims via Internet, with the intent to disseminate them to a broad circle of persons constitutes propaganda and is not covered by the broader freedom of speech enjoyed by politicians. Punishing such behaviour does not violate Articles 10 and 17 ECHR.

Summary:

The defendant was the front-runner for "*Fremskridtspartiet*" (The Progress Party) in the elections for the Copenhagen City Council. As a part of his election campaign, he had established an Internet homepage with the address www.muhamedanerfrit.dk, in which he published an article called "Mohammedan rape on Denmark". In this article, the defendant claimed that the only way to preserve the lives and security of the Danes would be to intern all unwanted aliens in concentration camps. While the aliens were living in such camps, the standard of living would have to be gradually lowered in order to make aliens want to leave Denmark.

In this case the defendant was sentenced to 20 days of imprisonment for making racist statements. Considering that the defendant had no previous convictions, the sentence was suspended subject to his not committing any crime during the course of a two-year probation period.

The District Court found that the defendant publicly and with the intent to disseminate his statements to a broad circle, had initiated degrading comments towards Muslims. Even though such remarks had been made in a political context, they were made on the Internet and not as a part of a political debate. The statements were therefore not covered by the broader freedom of speech enjoyed by politicians. The Court however did not find that comments of this nature amounted to propaganda, which is considered an aggravating circumstance, in the fixing of the sentence. The sentence was fixed at alternatively 6 fines of 500 DKK each or prison for 6 days imprisonment.

On the same grounds as the District Court the High Court, also found the defendant guilty. Unlike the District Court, however, the High Court concluded that the statements constituted propaganda. Indeed, they had been made via an electronic medium where everybody who sought information on the defendant's political views would find them. On account of this aggravating factor, the sentence was fixed at 20 fines of 500 DKK or 20 days imprisonment.

The Supreme Court found the statements insulting and degrading towards the ethnic group in question. The broader freedom of speech that politicians enjoy regarding statements on public matters did not apply under these circumstances, and the Supreme Court therefore concurred in the conviction of the defendant by the High Court and further regarded such conviction to be in accordance with Articles 10 and 17 ECHR.

As the defendant was a candidate for political office and the name of his homepage was designed to attract the public's attention, the Supreme Court furthermore concurred in the High Court's finding that the statements constituted propaganda.

The defendant was sentenced to 20 days of imprisonment, which were suspended on account of the defendant's lack of previous convictions.

Languages:

Danish.

Estonia
Supreme Court

Important decisions

Identification: EST-2004-1-001

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 16.09.2003 / **e)** 3-4-1-6-03 / **f)** Review of constitutionality of Article 9.8 and the second sentence of Article 12.1 of Land Valuation Act and Annex I of regulation no. 276 of the Government of the Republic of 22 August 2001 / **g)** *Riigi Teataja III* (Official Gazette), 2003, 27, 269 / **h)** http://www.nc.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.
5.3.38 **Fundamental Rights** – Civil and political rights – Right to property.
5.3.38.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Property, restitution / Property, compensation, calculation.

Headnotes:

The protection of Article 32 of the Constitution does not extend to unlawfully expropriated property which is returned or compensated for in the course of ownership reform.

Although the protection of Article 32 of the Constitution is not extended to unlawfully expropriated property, the fundamental right to equality, referred to in Article 12 of the Constitution, must be observed upon the return of or compensation for land on the basis of laws on ownership reform and land reform.

All those, in regard to whom a decision to compensate the unlawful expropriation of land has been or will be taken are to be treated equally. The amount of compensation for an unlawful expropriation must be determined on the basis of the value of the land fixed following the assessment carried out in

1993, and must not be influenced by the time of taking the decision to pay compensation. Such a regulation guarantees legal equality of the persons entitled to receive a compensation.

Summary:

Pärnu Administrative Court started the proceedings claiming that in the course of compensating for unlawfully expropriated land, the right to equal treatment, guaranteed by Article 12 the Constitution, had been violated. The assessed values of land, determined as a result of the 2001 assessment, were substantially different from the assessed values of land determined as a result of the 1993 assessment. On the basis of the 1993 assessment the value of a square metre of the plot of land owned by the complainants' mother in Kuressaare city was 16 kroons, whereas on the basis of the 2001 assessment the value was 70 kroons, which is 4.5 times higher. The complainants considered that determining the amount of compensation for the land on the basis of 1993 values violates the principle of equal treatment.

The Court first pointed out that the protection of Article 32 of the Constitution does not extend to unlawfully expropriated property which is returned or compensated for in the course of ownership reform. According to international law, Estonia is not responsible for the unlawful acts committed on its territory, which was not controlled by a legal government. The decision to undo the injustices caused by violations of the right of ownership and to create the preconditions for the transfer to a market economy was based on the principle of a society based on democracy and the rule of law, and was possible because a high proportion of the unlawfully expropriated property was in the possession of the state when Estonia's independence was restored (see judgment of the Supreme Court general assembly of 28 October 2002 in case no. 3-4-1-5-02 − RT III 2002, 28, 308).

The Court continued stating that although the protection of Article 32 of the Constitution does not extend to unlawfully expropriated property, the fundamental right to equality, referred to in Article 12 of the Constitution, must be observed upon the return of or compensation for land on the basis of laws on ownership reform and land reform.

The Chamber was of the opinion that in order to ascertain whether there had been a violation of the fundamental right to equality the administrative court had erroneously compared the entitled subjects of ownership reform to whom the property is returned with those subjects to whom the property is compensated for. It is true that persons to whom land was returned in the course of ownership reform or who received compensation for unlawfully expropriated land were in a similar situation at the initial stage of ownership reform. Both could submit an application for the return of or compensation for land. It is only in the course of proceedings that it became clear that it was possible to return land to some persons who had requested the return, but not to others.

The owners of an unlawfully expropriated property and their legal successors must be treated equally with regard to procedural rights. As a result of the restitution process, some persons will receive restitution in kind while others will receive compensation. When comparing the entitled subjects of the ownership reform, different treatment consists first and foremost in the fact that the state returns property to some persons and compensates others.

The Court found that it was necessary to compare the persons to whom the amount of compensation was calculated on the basis of the results of the land assessment valid at the time of granting the compensation with the persons whose compensation was not based on the results of the last assessment of land. The closest common denominator of those to be compared are persons who receive compensation for the unlawfully expropriated property.

On the basis of the foregoing the Constitutional Review Chamber found that Article 9.8 and the second sentence of Article 12.1 of Land Valuation Act were not in conflict with the principle of equal treatment established in Article 12.1 of the Constitution, and the petition of Pärnu Administrative Court was dismissed.

Cross-references:

- 3-4-1-5-02 of 28.10.2002;
- 3-4-1-10-00 of 22.12.2000, *Bulletin* 2000/3, [EST-2000-3-009].

Languages:

Estonian, English.

Identification: EST-2004-1-002

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 25.11.2003 / **e)** 3-4-1-9-03 / **f)** Review of constitutionality of minimum sanction of Article 215.2 of the Criminal Code / **g)** *Riigi Teataja III* (Official Gazette), 2003, 35, 368 / **h)** http://www.nc.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
3.16 **General Principles** – Proportionality.
3.19 **General Principles** – Margin of appreciation.
4.7.2 **Institutions** – Judicial bodies – Procedure.

Keywords of the alphabetical index:

Punishment, disproportionate / Circumstance, mitigating / Criminal offence, sanction, balance.

Headnotes:

When deciding on the pertinence of a provision it may be necessary to assess whether the court which initiated concrete norm control has correctly interpreted the norm it declared unconstitutional, including the norms determining the conditions and extent of the norm.

If the Court which initiated constitutional review has declared a provision of law unconstitutional and has not applied it on the basis of an incorrect interpretation, it will lead to a situation where the constitutional review court must review the constitutionality of a norm which is not pertinent.

The constitutionality of a punishment provided by a section or subsection of the special part of a legal norm can be reviewed only if it is not possible, in a criminal matter, to apply a mitigating regulation provided by the general part.

Summary:

Jõgeva County Court held that the imposition of at least two years' imprisonment, pursuant to clauses 1 and 3 of Article 215.2 of the Criminal Code (hereinafter "CC"), on A. Tamm for repeated unauthorised use and attempted use of a motor vehicle, and on W. Laaneväli, who had previously been punished pursuant to criminal procedure, for unauthorised use and repeated use of a motor vehicle, would disproportionately infringe these persons' right to liberty. Jõgeva County Court also found that in the given matter Article 61.1 CC, allowing for the imposition of punishments less onerous than the minimum term, is not applicable, because pursuant to the application practice the special circumstances justifying the imposition of a punishment less onerous than the minimum rate must be "related to the commission of a criminal offence, not only to the personality of the offender". The county court declared the minimum sanction of Article 215.2 CC − two years' imprisonment − to be in conflict with Articles 20.1 and 11 of the Constitution and did not apply the minimum sanction.

Pursuant to Article 14.2 of the Constitutional Review Court Procedure Act (CRCPA) the Supreme Court is entitled to declare only pertinent provisions unconstitutional or invalid. The Chamber held that the second sentence of Article 14.2 CRCPA means that the Supreme Court shall not, by way of constitutional review, solve the legal dispute which is the subject of the initial court case and shall not ascertain the facts already ascertained in the course of the proceeding of the initial court case.

When deciding on the pertinence of a norm of penal law it has to be considered that the general and special parts of the Criminal Code form a whole. The general part formulates the principles of penal law, which are essential for the application of all or many norms of the special part. This structure of the Criminal Code enables a judge, taking into consideration the circumstances of a criminal offence or an offence and data characterising the offender to impose a punishment on the offender which is less onerous than prescribed by the section or subsection of the special part of the Criminal Code, pursuant to which the person is found guilty. Also, it is possible to release a person from punishment or substitute a punishment by community service.

The Chamber was convinced that the constitutionality of a punishment provided by a section or subsection of the special part can be reviewed only if it is not possible, in a criminal matter, to apply a mitigating regulation provided by the general part, which provides for a possibility to impose punishment less onerous than that established by the minimum sanction and application of which would result in a punishment which is considered correct by the court. The provisions of the general part extend the scope of discretion of a judge upon punishing the offender.

It is probably because the county court gave a restrictive interpretation to special circumstances established in Article 61.1 CC that the Court failed to analyse in its judgment whether there were special

circumstances in the criminal matter based on the personalities of A. Tamm and W. Laaneväli which could have served as a basis for imposing a punishment less onerous than the term or rate provided by law, for the criminal offence qualified under clauses 1 and 3 of Article 215.2 CC. The existence or non-existence of the special circumstances referred to in Article 61.1 CC is a fact that has to be ascertained in criminal proceedings. Proceeding from the second sentence of Article 14.2 CRCPA the Constitutional Review Chamber of the Supreme Court is not competent to solve the issue itself. That is why the Supreme Court shall not declare the minimum sanction of Article 215.2 CC invalid and shall not satisfy the petition of Jõgeva County Court.

The Constitutional Review Chamber noted that the legislator had wide discretion in determining a punishment corresponding to necessary elements of an offence. Terms and rates of punishments are based on value judgments accepted by society, which the legislator is competent to express. Also, in this way the parliament can form the penal policy of state and influence criminal behaviour.

Cross-references:

- 3-4-1-11-02 of 02.12.2002, *Bulletin* 2002/3 [EST-2002-3-009];
- 3-4-1-5-02 of 28.10.2002, *Bulletin* 2002/3 [EST-2002-3-007].

Languages:

Estonian, English.

Identification: EST-2004-1-003

a) Estonia / **b)** Supreme Court / **c)** *En banc* / **d)** 10.12.2003 / **e)** 3-3-1-47-03 / **f)** Viktor Fedtsenko's action applying for the annulment of Decision no. 382 of the social benefits dispute committee of the Social Insurance Board and for requiring the committee to carry out a medical assessment / **g)** *Riigi Teataja III* (Official Gazette), 2004, 1, 1 / **h)** http://www.nc.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Clarity and precision of legal provisions.
3.22 **General Principles** – Prohibition of arbitrariness.
5.2.2.8 **Fundamental Rights** – Equality – Criteria of distinction – Physical or mental disability.
5.2.2.10 **Fundamental Rights** – Equality – Criteria of distinction – Language.
5.3.8 **Fundamental Rights** – Civil and political rights – Right to citizenship or nationality.

Keywords of the alphabetical index:

Disability, discrimination / Citizenship, acquisition, condition / Language, examination, exemption.

Headnotes:

The right to aquire citizenship by naturalization is not a fundamental right. However, in establishing norms regulating acquisition and loss of citizenship the legislator must take into consideration the fundamental rights and freedoms, in particular the fundamental right to equality and prohibition of discrimination.

Equal treatment requires that equal conditions for the acquisition of citizenship must be created for persons suffering from poor hearing impeding language learning.

If there is no reasonable ground for unequal treatment, it amounts to arbitrary unequal treatment, which is in conflict with the first sentence of Article 12.1 of the Constitution.

From the point of view of language learning ability it is irrelevant whether a person needs personal assistance or guidance in daily life. Making the exemption from language examination dependent on the need for personal assistance does not sufficiently take into consideration the actual language learning ability of persons with poor hearing.

Summary:

The dispute in the administrative matter arose from the fact that V. Fedtšenko, who was suffering from poor hearing, wanted to acquire Estonian citizenship without taking the language examination. The exemption from the language examination in the acquisition of citizenship because of severe, profound or moderate disability is regulated in Article 35.2.2 and Article 35.4 of Citizenship Act (hereinafter "CA").

Pursuant to Article 35.4 CA in force from 10 July 2000 until 9 November 2002 severe, profound or moderate disability, qualifying for exemption from the language examination, had to be ascertained pursuant to the procedure established by the State Pension Insurance Act. Neither the referred Act nor legislation of general application issued on the basis thereof determined how profound, severe or moderate disability should be understood, nor did they determine the procedure for ascertaining such degrees of severity of disabilities. These definitions were provided in the Social Benefits for Disabled Persons Act. That is why the general assembly concluded that despite the erroneous reference to the State Pension Insurance Act, it was the objective of the legislator to determine the degrees of severity of disability established in Article 35.4 CA on the basis of the Social Benefits for Disabled Persons Act. Since 10 November 2002 the reference to the State Pension Insurance Act in Article 35.4 CA was replaced by reference to the Social Benefits for Disabled Persons Act.

According to a definition of severe, profound or moderate disability provided by the Social Benefits for Disabled Persons Act, persons can be exempted from a language examination due to their need for personal assistance or guidance for at least once a month.

The general assembly pointed out that international law leaves precise conditions for acquisition of citizenship to be decided by each state. The most important fundamental rights that the legislator has to consider in regulating citizenship are the fundamental right to equality and prohibition of discrimination (first sentence of Article 12.1 of the Constitution).

The observance of the right to equality requires that persons in an equal situation be treated equally and persons in an unequal situation be treated unequally. The referred provision also means the equality of legislation, which, as a rule, requires that laws, in essence, must treat similarly persons who are in similar situations. (Judgment of Constitutional Review Chamber of Supreme Court no. 3-4-1-2-02 of 3 April 2002 − RT III 2002, 11, 108 [EST-2002-1-002]).

To check whether there has been a violation of the fundamental right to equality it is necessary, first of all, to determine all important elements characterising the compared persons. These are in the current case poor hearing impeding language learning and necessity to learn the Estonian language for the acquisition of citizenship. Persons meeting these characteristics must be treated equally.

Subsections 2.2 and 4 of Article 35 CA, providing for exempting from the language examination, do not proceed only from the fact that persons have poor hearing. The disputed regulation makes the exemption from language examination dependent on whether a person has a moderate disability for the purposes of the Social Benefits for Disabled Persons Act or not. Thus, the persons who are in an equal situation due to poor hearing impeding language learning are treated unequally, because persons with poor hearing and moderate disability have been guaranteed the possibility to acquire Estonian citizenship without passing a language examination, whereas persons without a moderate disability but with poor hearing do not have such a possibility. Thus, Subsections 2.2 and 4 of Article 35 CA infringe the sphere of protection of the fundamental right to equality.

The infringement of the sphere of protection of the fundamental right to equality is further manifested in the fact that as the contested regulation does not allow those persons who do not need personal assistance, that is persons without a moderate disability, to be exempted from language examination, they would be forced, for the acquisition of citizenship, to learn the language on an equal basis with persons with normal hearing. Thus, persons in unequal situations would be treated equally.

Next, the Court examined whether there was a reasonable ground for the unequal treatment. If there was no reasonable ground for unequal treatment, this would amount to arbitrary unequal treatment, which is in conflict with the first sentence of Article 12.1 of the Constitution.

The general assembly of the Supreme Court was of the opinion that the aim of Article 35.2.2 CA was to exempt from language examination those persons who, because of their poor health condition (visual, hearing or speech impairment), were not able to learn the Estonian language.

As referred to above, exemption from the language examination in the acquisition of citizenship depends on whether a person has a disability for the purposes of Social Benefits for Disabled Persons Act. A disability is ascertained on the basis of the need for personal assistance or guidance.

The general assembly of the Supreme Court argued that from the point of view of language learning ability it is irrelevant whether a person needs personal assistance or guidance in daily life. A person with poor hearing can manage in daily life without personal assistance or guidance, yet he is unable to learn the language on an equal footing with a person with normal hearing. In certain cases a person with poor hearing impeding language learning can be

exempted from language examination − that is if he or she needs personal assistance or guidance and his or her disability has been ascertained for the purposes of Social Benefits for Disabled Persons Act. This means that the criterion for exemption from language examination − need for personal assistance or guidance − chosen by the legislator is not reasonable. Making exemption from the language examination dependent on the need for personal assistance does not sufficiently take into consideration the actual language learning ability of persons with poor hearing. That is why the criterion chosen by the legislator cannot fulfill the objective of Article 35.2.2 CA fully.

On the basis of the aforesaid there is no reasonable ground for differentiating persons with poor hearing depending on whether they need personal assistance or not. Thus, the contested regulation of the Citizenship Act violates the fundamental right to equality provided for in the first sentence of Article 12.1 of the Constitution.

Finally, the Court dealt with the question of legal clarity. As referred to above, Article 35.4 CA, in force from 10 July 2000 until 9 November 2002, established that a disability necessary for exemption from language examination shall be ascertained pursuant to procedure established on the basis of the State Pension Insurance Act. Above, the Supreme Court has also concluded that the reference was erroneous, as it was actually not possible to ascertain a profound, severe or moderate disability on the basis of the State Pension Insurance Act or legislation issued on the basis thereof.

It is impossible to directly apply a reference provision containing an erroneous reference, because in order to fully understand the provision mere adherence to the reference is not enough. In order to understand the provision a person, first of all, has to realise that the reference it contains is erroneous. After that the persons should be able to find, from among the valid norms, the necessary legislation of general application which could be applied alongside the reference provision. Thus, it is much more difficult to understand and observe a regulation like this than to observe a reference provision with a correct reference. The general assembly of the Supreme Court found that the reference in and the rest of the wording of Article 35.4, in force from 19 July 2000 until 9 November 2002, were not in conformity with each other and, thus, did not conform to the principle of legal clarity.

By this judgment the general assembly declared Article 35.2.2 CA partly invalid and Article 35.4 CA in the wording in force from 10 July 2000 until 9 November 2002 partly unconstitutional. The procedure of ascertainment of V. Fedtšenko's disability was initiated to solve the issue of whether he could be exempted from the language examination required for the acquisition of citizenship. Thus, Decision no. 382 of the dispute committee of the Social Insurance Board of 11 July 2001, contested by V. Fedtšenko, was also based on the contested regulation of the Citizenship Act. That is why the referred decision was invalidated and V. Fedtšenko's complaint satisfied in this respect.

- 2 dissenting opinions;
- 2 concurring opinions.

Cross-references:

- 3-4-1-8-00 of 05.10.2000;
- 3-4-1-2-02 of 03.04.2002, *Bulletin* 2002/1 [EST-2002-1-002].

Languages:

Estonian, English.

Identification: EST-2004-1-004

a) Estonia / **b)** Supreme Court / **c)** *En banc* / **d)** 06.01.2004 / **e)** 3-1-3-13-03 / **f)** Criminal case on charges brought against Tiit Veeber under Articles 148.1.7, 166.1 and 143.1 of the Criminal Code / **g)** *Riigi Teataja III* (Official Gazette), 2004, 4, 36 / **h)** http://www.nc.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.4.6 **Constitutional Justice** – Procedure – Grounds.
1.4.13 **Constitutional Justice** – Procedure – Re-opening of hearing.
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.

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

Keywords of the alphabetical index:

Proceedings, reopening, condition / European Convention on Human Rights, violation, ground for reopening proceedings.

Headnotes:

It has to be ascertained whether reopening proceedings is a necessary and appropriate remedy for a violation of a Convention right or a violation with a causal link to the former, found by the European Court of Human Rights. The reopening of proceedings would be justified only in a case of a continuing and serious violation and only where it is a remedy affecting the legal status of the person. The need to reopen judicial proceedings must be weighed against legal certainty and the possible infringement of other persons' rights in a new hearing of the matter.

The European Convention on Human Rights constitutes an inseparable part of the Estonian legal order, and under Article 14 of the Constitution, the guarantee of the rights and freedoms of the Convention is also the responsibility of the judicial power.

The Supreme Court may refuse to hear a person's petition only where there are other effective ways available for the person to exercise his or her right to judicial protection, which is guaranteed by Article 15 of the Constitution.

Summary:

In the *Veeber v. Estonia* (no. 2) Judgment of 21 January 2003, the European Court of Human Rights found that the Republic of Estonia had violated Article 7.1 ECHR.

The Court observed that according to the text of Article 148.1 of the Criminal Code (hereinafter: "CC") before its amendment in 1995, a person could be held criminally liable for tax evasion only where he or she had already received an administrative penalty for a similar offence. The Court consequently concluded that that prerequisite was an element of the offence of tax evasion, without which there could be no criminal conviction. The Court further observed that a considerable number of the acts of which the applicant had been convicted took place prior to January 1995. The sentence imposed on the applicant – a suspended term of three years and six months' imprisonment – took into account acts committed both before and after January 1995. The Court pointed out that it could not be stated with any certainty that the domestic courts' approach had no effect on the severity of the punishment or had no tangible negative consequences for the applicant. That being so, the European Court of Human Rights found that the domestic courts had retrospectively applied the 1995 amendment to the law to behaviour which did not previously constitute a criminal offence and, in doing so, had violated Article 7.1 ECHR.

After the European Court of Human Rights had delivered that decision, T. Veeber filed a petition for the correction of court errors with the Supreme Court, requesting that the judgment of the Criminal Chamber of the Supreme Court of 8 April 1998, the judgment of Tartu Circuit Court of 12 January 1998 and the Judgment of Tartu City Court of 13 October 1997 be quashed and that he be acquitted under Articles 143.1, 148.1.7 and 166 CC. Counsel applied for dismissal of the civil actions.

The first question that had to be decided by the general assembly of the Supreme Court was whether and on the basis of which procedure the Supreme Court was competent to hear the petition. The second question was whether it was necessary to reopen criminal proceedings after a finding by the European Court of Human Rights of a violation of a Convention right.

As regards the first question, the general assembly found that even a broad interpretation of the grounds for review and correction of court errors set out in the Code of Criminal Court Appeal and Cassation Procedure (hereinafter "CCCACP") did not allow a new hearing of a criminal matter after the delivery of a judgment by the European Court of Human Rights. Examining whether the court was competent to hear the petition even though the CCCACP did not provide grounds for it to do so, the Court pointed out that according to Article 123.2 of the Constitution, the European Convention on Human Rights constitutes an inseparable part of the Estonian legal order, and that the guarantee of the rights and freedoms of the Convention is, under Article 14 of the Constitution, also the responsibility of the judicial power. The general assembly found that in order for the judicial power to best fulfil that duty, an amendment to the procedural laws was required with a view to eliminating any ambiguity as to whether, in which cases and in which manner a new hearing of a criminal matter was to take place after the delivery of a judgment by the European Court of Human Rights.

That, however, did not mean that the Supreme Court had no jurisdiction to consider and determine T. Veeber's petition. In its Judgment of 17 March 2003 in case no. 3-1-3-10-02 (RT III 2003, 10, 95), the general assembly of the Supreme Court held that criminal proceedings might be considered in the Supreme Court even if the code of procedure did not provide for a direct ground to do so. The Supreme Court may refuse to hear a person's petition only where there are other effective ways available to the person for exercising his or her right to judicial protection, guaranteed by Article 15 of the Constitution.

The general assembly stated that in deciding whether to reopen proceedings, it had to be ascertained whether the reopening of proceedings would be a necessary and appropriate remedy of a violation of a Convention right or of a violation with a causal link to the former found by the European Court of Human Rights. In doing so, it was necessary to consider whether the finding of a violation or an award of just satisfaction by the Human Rights Court was sufficient for the person. The general assembly was of the opinion that reopening of proceedings would be justified only in cases of continuing and serious violation and only where it is a remedy affecting the legal status of the person. The need to reopen judicial proceedings must be weighed against legal certainty and the possible infringement of other persons' rights in a new hearing of the matter. Moreover, a prerequisite for the revision of a judgment that has entered into force is that there are no other effective means to remedy the violation.

Next, the general assembly assessed whether the reopening of criminal proceedings against T. Veeber concerning his conviction under Article 148.1.7 CC for acts committed before 1995 was justified on the basis of the *Veeber v. Estonia* (no. 2) Judgment of the European Court of Human Rights.

The general assembly was of the opinion that the fact that T. Veeber had been convicted for acts that were not punishable at the time they had been committed did not in itself constitute a ground to argue that that his rights were still being seriously violated. Furthermore, the general assembly pointed out that the European Court of Human Rights had ordered the Estonian Republic to pay T. Veeber 2,000 euros compensation for non-pecuniary damage.

The European Court of Human Rights held that it followed from Article 7.1 of the Convention that T. Veeber should not have been convicted under Article 148.1.7 CC for the acts committed before 1995. Thus, if the criminal proceedings were to be reopened, T. Veeber would be acquitted under Article 148.1.7 CC for the acts committed before 1995 on the ground of the absence of the necessary elements of the criminal offence. Pursuant to Article 269.3 CCP, such an acquittal would be accompanied by a partial refusal to hear the civil action. As the amount of the civil action would decrease considerably, the Court found it necessary to reopen proceedings under Article 148.1.7 CC for the acts committed before 1995. The judgments of conviction of the Criminal Chamber of the Supreme Court of 8 April 1998, of Tartu Circuit Court of 12 January 1998 and of Tartu City Court of 13 October 1997 were quashed.

- 1 dissenting opinion.

Cross-references:

Supreme Court of Estonia:
- 3-1-3-10-02 of 17.03.2003, *Bulletin* 2003/2 [EST-2003-2-003].

European Court of Human Rights:
- *Veeber v. Estonia* (no. 2) Judgment of 21.01.2003, which entered into force on 21.04.2003, *Reports of Judgments and Decisions* 2003-I.

Languages:

Estonian, English.

Identification: EST-2004-1-005

a) Estonia / **b)** Supreme Court / **c)** *En banc* / **d)** 10.01.2004 / **e)** 3-3-2-1-04 / **f)** An action brought by AS Giga applying for a declaration of illegality of a measure taken by the Tartu City Government and a measure taken by the Tartu Police Prefecture. / **g)** *Riigi Teataja III* (Official Gazette), 2004, 4, 37 / **h)** http://www.nc.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

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

5.3.13.1.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Non-litigious administrative proceedings.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Proceedings, reopening / European Court of Human Rights, decision, effect in national law / Human right, violation, continued.

Headnotes:

The Supreme Court may refuse to hear a person's petition only where another effective way is available for the person to exercise the right to judicial protection that is laid down by Article 15 of the Constitution.

A violation of Article 6.1 ECHR, found by the European Court of Human Rights, constitutes a violation of Article 15 of the Constitution.

Where the legislator does not provide for an effective and gap-free mechanism for the protection of fundamental rights, the judicial power must, according to Article 15 of the Constitution, guarantee the protection of fundamental rights.

A continuing and serious violation of a basic right may be sufficient to reopen the proceedings after the delivery of a decision by the European Court of Human Rights finding a violation of a Convention right.

Summary:

A petition filed in 1996 by AS Giga was not heard by the Estonian administrative courts to the extent that it related to the legality of the activities of the Tartu Police Prefecture, that is to say, the allegations that the police prefecture had violated Article 33 of the Constitution and Article 8 ECHR, as well as some provisions of the Code of Criminal Procedure. The circuit court dismissed the proceedings on the administrative matter on the ground that the hearing of the action did not fall within the competence of the administrative courts. On 15 January 1997 the Appeals Selection Committee of the Supreme Court did not grant AS Giga leave to lodge an appeal in cassation.

On 4 July 1997 T. Veeber filed an application (no. 37571/97) against the Republic of Estonia with the European Commission of Human Rights under former Article 25 of the Convention. In the *Veeber v. Estonia* (no. 1) Judgment of 7 November 2002, the European Court of Human Rights held that the Republic of Estonia had violated Article 6.1 ECHR on the ground that contrary to the requirements of the provision, the hearing of the matter by a tribunal had not been available to the applicant in an effective manner. The judgment of the European Court of Human Rights referred to the applicant's attempts to challenge the measures taken by the Tartu Police Prefecture in Estonian administrative courts.

The appeal by AS Giga against the acts of the police prefecture had not been reviewed by an administrative court, and with respect to contesting the activities of the police prefecture, AS Giga had not actually been able to exercise the right of appeal, which is guaranteed by Article 6.1 ECHR as well as Article 15 of the Constitution, in Estonian administrative courts. AS Giga argued before the Supreme Court in a petition for review that the above-mentioned judgment of the European Court of Human Rights constituted a new fact for the purposes of Article 75.2.1 of Code of Administrative Court Procedure (hereinafter "CACP").

Firstly, the general assembly of the Supreme Court examined whether the application by AS Giga was admissible in light of the fact that it was T. Veeber who had applied to the European Court of Human Rights and AS Giga that submitted the petition for review to the Supreme Court after the delivery of the *Veeber v. Estonia* (no. 1) Judgment by the European Court of Human Rights.

The general assembly was of the opinion that the petition by AS Giga was admissible. The European Court of Human Rights proceeded from the fact that all shares of AS Giga belonged to T. Veeber (clause 9 of *Veeber versus Estonia* (no. 1) Judgment). For that reason, the European Court of Human Rights did not differentiate between the rights of T. Veeber and those of AS Giga.

Secondly, the Court considered and determined whether the Supreme Court was competent to hear the case and whether administrative court proceedings should be initiated.

The general assembly found that Administrative Court procedural law did not support AS Giga's position. AS Giga had exhausted the possibilities of appeal in cassation, as on 15 January 1997 the Appeals Selection Committee of the Supreme Court did not grant AS Giga leave to appeal in cassation. The

grounds for review in administrative court procedure are set out in Article 75 CACP. The general assembly was of the opinion that the ground for review (Article 75.2.1 CACP) put forward in AS Giga's petition for review did not exist. Nor did any grounds exist under Article 81 CACP to support a petition for the correction of court errors.

However, the Court found that under Article 15 of the Constitution, the Supreme Court could refuse to hear a person's petition only where another effective way is available to the person for exercising the right to judicial protection provided for in that article.

The violation of Article 6.1 ECHR found by the European Court of Human Rights constitutes a violation of Article 15 of the Constitution. The general assembly was of the opinion that where an action alleging a violation of fundamental rights is filed with an administrative court and the action is not heard on the merits, the situation constitutes a continued and serious violation in itself. Pursuant to Article 14 of the Constitution, the guarantee of rights and freedoms is also the responsibility of the judicial power. The general assembly considered that where the legislator does not provide for an effective and gap-free mechanism for the protection of fundamental rights, the judicial power must, relying on Article 15 of the Constitution, guarantee the protection of fundamental rights.

Consequently, the situation was such that contrary to Article 15 of the Constitution, the action by AS Giga challenging the legality of acts carried out by the police prefecture had not been heard by Estonian courts, and AS Giga had not been able to exercise its right of appeal against the alleged violation of its rights. Thus, the administrative court proceedings of AS Giga's action had to be reopened to the extent that the circuit court had dismissed the proceedings in relation to the administrative matters, that is to say, as to the complaint against the acts of the Tartu Police Prefecture.

- 1 dissenting opinion.

Cross-references:

Supreme Court of Estonia:
- 3-3-1-38-00 of 22.12.2000;
- 3-1-1-50-98 of 08.04.1998;
- 3-1-3-10-02 of 17.03.2003, *Bulletin* 2003/2 [EST-2003-2-003].

European Court of Human Rights:
- *Veeber v. Estonia* (no. 1) Judgment of 07.11.2002.

Languages:

Estonian, English.

Identification: EST-2004-1-006

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 21.01.2004 / **e)** 3-4-1-7-03 / **f)** Review of constitutionality of Article 22.1.4 of Social Welfare Act / **g)** *Riigi Teataja III* (Official Gazette), 2004, 5, 45 / **h)** http://www.nc.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
3.19 **General Principles** – Margin of appreciation.
4.5.2 **Institutions** – Legislative bodies – Powers.
5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.
5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Social assistance, individual character / Housing, benefit.

Headnotes:

The right to social assistance in case of need as provided for in Article 28.2 of the Constitution is a social fundamental right, arising from the principles of a state based on social justice and human dignity referred to in Article 10 of the Constitution.

It is up to the legislator to decide to what extent the state shall grant assistance to needy persons. Nevertheless, the Court has a duty to intervene where assistance falls below the minimum level.

A state, having created social security systems and provided for social assistance, must also ensure the observance of the fundamental right to equality, expressed in Article 12.1 of the Constitution.

Unequal treatment cannot be justified by difficulties of a mere administrative and technical nature.

Summary:

A. Maisurjan, a student of Faculty of Medicine of Tartu University, made an application to the Social Welfare Department of Tartu City Government for subsistence benefit. To the application, he annexed a lease for a room in a hostel as a document proving the right to use the dwelling and a document from the Faculty of Medicine certifying that he did not get a scholarship and that he was not on academic leave. In resolutions passed on 17 April and 16 May of 2003, the Social Welfare Department of Tartu City Government refused his application for subsistence benefit. According to the resolutions, the document submitted by A. Maisurjan to prove the legal basis for the permanent use of the dwelling did not comply with the legal bases referred to in Article 22.1.4 of Social Welfare Act (hereinafter "SWA").

A. Maisurjan challenged the resolutions of the Social Welfare Department in the Tartu Administrative Court. He requested that the resolutions be annulled and subsistence benefit for April and May be paid to him. On 27 June 2003, Tartu Administrative Court allowed his action and declared Article 22.1.4 SWA unconstitutional and did not apply it. Before the proceedings in A. Maisurjan's case commenced, the Legal Chancellor invited the Riigikogu to bring Article 22.1.4 SWA into conformity with the Constitution. As the proceedings exceeded all the time-limits, the Legal Chancellor brought the case before the Constitutional Review Chamber of the Supreme Court.

The petitions of the Legal Chancellor and Tartu Administrative Court pertain to the right to state assistance in case of need, provided for in Article 28.2 of the Constitution. That right is a social fundamental right, arising from the principles of a state based on social justice and human dignity, referred to in Article 10 of the Constitution.

The Constitution determines neither the amount nor the conditions for the receipt of social assistance. The second sentence of the second subsection of Article 28 of the Constitution leaves it up to the legislator to decide to what extent the state shall grant assistance to needy persons. Nevertheless, the legislator may not freely decide to what extent and to whom the social rights established by Article 28 of the Constitution shall be guaranteed. Courts have a duty to intervene where the assistance falls below the minimum level.

A state, having created social security systems and having provided for social assistance, must also ensure the observance of the fundamental right to equality, expressed in Article 12.1 of the Constitution. When deciding on state social assistance and the extent thereof, the provisions of Article 27 of the Constitution must also be taken into account.

Article 28.2 of the Constitution refers to need as one of the grounds entitling a person to state assistance and requiring the state to provide assistance. The Constitution does not specify the circle of persons who may be considered needy. For that reason, in the interpretation of the Constitution, it is necessary to examine international agreements to which the Republic of Estonia has acceded.

The Constitutional Review Chamber referred to Article 11 of the Covenant on Economic, Social and Cultural Rights, Articles 13.1 and 12.1 of the European Social Charter (revised) and the Charter of Fundamental Rights of the European Union.

The Social Welfare Act regulates the conditions and procedure for the receipt of assistance in case of need. The Act is based on the principle that the state has an obligation to provide assistance where the potential for a person or family to cope is insufficient (Article 3.1.3). A needy person is entitled to subsistence benefit.

The judgment of the administrative court and the petition of the Legal Chancellor pertained to the wording of Article 22.1.4 SWA that was in force from 1 January 2002 to 5 September 2003. The judgment of the court and the petition of the Legal Chancellor both agreed that the Act excluded persons whose dwellings did not fulfil the requirements of Article 22.1.4 SWA from receiving subsistence benefits. The complainants were of the opinion that the exclusion of those persons from the group of persons entitled to social benefits was not in conformity with the right to state assistance in case of need established in Article 28.2 of the Constitution, in conjunction with the principle of equal treatment established in Article 12.1 of the Constitution.

The Supreme Court was of the opinion that Article 22.1.4 SWA meant that in granting subsistence benefits to needy persons and families whose dwellings did not fulfil the requirements of Article 29 of the Dwelling Act, the expenses connected with those dwellings could not be taken into account and housing benefits could not be paid to them. When granting subsistence benefits in the broader sense to needy persons whose dwellings fulfilled the requirements of Article 29 of the Dwelling Act, the expenses connected with the dwellings within

the limits established by local government had to be taken into account and housing benefits had to be paid to them. Thus, the Act treated needy persons and families differently, depending on where they lived.

Although not discussed by the legislator, the possible justifications for the unequal treatment might be the elimination of unjustified applications for subsistence benefits (e.g. applications to compensate for the expenses connected with a hotel room), avoidance of technical problems in administrating subsistence benefit applications, and maintenance of the budgetary balance of the state.

The Chamber pointed out that it would be possible to avoid unjustified applications for subsistence benefits by the legislator's empowering local government councils to establish the limits of expenses connected with dwellings. Unequal treatment could not be justified by difficulties of a mere administrative and technical nature. An excessive burden on the state budget is an argument that could be considered when deciding on the scope of social assistance, but the argument could not be used to justify unequal treatment of needy persons and families.

On the basis of the foregoing, the Chamber concluded that there was no reasonable ground for unequal treatment of needy persons and families. The violation of the right to equality and the disregard of the right to state assistance in case of need were manifestly inappropriate. Article 22.1.4 of the Social Welfare Act in the wording in force from 1 January 2002 to 5 September 2003 was in conflict with the right of every person to state assistance in case of need, established in Article 28.2 of the Constitution, in conjunction with the general right to equality, established in Article 12.1 of the Constitution, to the extent that in the granting of subsistence benefits to some persons and families, it did not permit the taking into account of the expenses connected with dwellings, and some persons and families had not been paid housing benefits.

Cross-references:

- 3-3-1-65-03 of 10.11.2003;
- 3-1-3-10-02 of 17.03.2003, *Bulletin* 2003/2 [EST-2003-2-003].

Languages:

Estonian, English.

Identification: EST-2004-1-007

a) Estonia / **b)** Supreme Court / **c)** *En banc* / **d)** 25.02.2004 / **e)** 3-3-1-60-03 / **f)** Action of Nikolai Irhin applying for declaration of unlawfulness of the acts of Tallinn Police Prefecture and for requiring the issue of a weapons permit / **g)** *Riigi Teataja III* (Official Gazette), 2004, 7, 70 / **h)** http://www.nc.ee; CODICES (Estonian, 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.
5.3.42 **Fundamental Rights** – Civil and political rights – Right to self fulfilment.

Keywords of the alphabetical index:

Hunting, self-fulfilment / Weapon, acquisition, permit, condition / Employment, work permit, requirement for permit to possess weapons / Residence, permit, requirement for permit to possess weapons.

Headnotes:

The need to guarantee national security and public order may serve as a legitimate and justified aim for restricting a person's right to possess weapons.

Making the grant of a permit to possess weapons in Estonia conditional on the holding of a permit to possess weapons granted by the state of permanent residence is a disproportionate restriction on the right to possess weapons of a person without permanent residence in a foreign state. It also violates a person's fundamental right to free self-realisation.

Summary:

N. Irhin has been living in Estonia since 1968 and held a permit to possess weapons for hunting until 1998. The amendments to the Weapons Act (hereinafter "WA"), which entered into force on 31 March 2002, entitled a person staying in Estonia on the basis of a temporary residence permit to apply for a permit to possess weapons. The Tallinn Police Prefecture refused to hear an application because the applicant had failed to submit the documents referred

to in Article 35.2 WA, that is to say, a work permit and a permit to possess weapons granted to him by the state of his permanent residence (the Russian Federation) for the type of weapon in question.

Article 30.2 WA regulates the acquisition and possession of weapons or ammunition by all foreigners with a legal basis for staying in Estonia. On the basis of Article 35.2 WA, a prerequisite for obtaining a permit to possess weapons is that the person submits documents showing that he meets the requirements established in Article 29 or Article 30 WA. As N. Irhin did not meet all the requirements established in Article 30.2, it was not possible to take a decision on granting him a permit to possess weapons.

Article 30.2 WA establishes the following restrictions on the acquisition and possession of a weapon by a foreigner who is staying in Estonia on the basis of a temporary residence permit:

1. requirement of holding a work permit; and
2. requirement of holding a permit to possess the type of weapon in question granted by a competent authority of the state of his permanent residence.

A person's right to acquire or possess a weapon may fall under the right to free self-realisation, established in Article 19.1 of the Constitution. Although the right to free self-realisation may be restricted by law, it should be noted that the restriction must be necessary in a democratic society and the means used must be proportionate to the desired aim. Restrictions must not prejudice the interests or rights protected by law to a greater extent than justifiable by the legitimate objective of the norm (see the judgment of the Constitutional Review Chamber of 17 March 1999, paragraph 13, in case no. 3-4-1-1-99 − RT III 1999, 9, 89; and the judgment of 28 April 2000, paragraph 13, in case no. 3-4-1-6-2000 − RT III 2000, 12, 125).

The Constitutional Review Chamber and the general assembly of the Supreme Court have held in previous cases that the need to prevent danger to life and health of persons is a legitimate aim of restrictions on the possession of weapons. The general assembly has also stated that in addition to the above-mentioned aim, the need to guarantee national security and public order may also amount to a legitimate and justified aim for restricting the possession of weapons. The general assembly has pointed out that in addition to the above-mentioned aim there may be other significant circumstances justifying the restrictions on the possession of weapons.

In the case under review, the general assembly assessed first the proportionality of the requirement of a work permit, and second, the proportionality of the requirement of a permit to possess weapons granted by the state of permanent residence.

As regards the first element, the general assembly had no ground to believe that upon issuing a work permit a check was made, *inter alia*, as to whether a person was responsible enough to possess a weapon, that is to say, whether the person would constitute a danger to the life and health of others, to the national security or public order, if he or she were to possess a weapon. Nor did the existence of a work permit show whether a person's thoughts, knowledge, skills and social maturity were such as to make him capable of handling a weapon in such a way that it would not constitute a danger to public order and security.

That being so, the requirement of a work permit laid down by Article 30.2 WA was a disproportionate restriction with respect to foreigners staying in Estonia on temporary residence permits and who did not hold a work permit for some reason or another.

Analysing the proportionality of the requirement of a permit to possess weapons issued by the state of permanent residence, the meaning of "state of permanent residence" for the purposes of Article 30.2 WA had to be ascertained first. The general assembly argued that the term "state of permanent residence" in Article 30.2 WA meant a foreign state and not Estonia.

The materials of the case showed that N. Irhin was born in 1924, had permanently resided in Estonia since 1968 and had no permanent residence in a foreign state. For that reason, N. Irhin had to be treated as a person without permanent residence in a foreign country. Therefore, the general assembly had to form an opinion on the proportionality of the requirement of a permit to possess weapons granted by the state of permanent residence to the extent that it affected persons permanently residing in Estonia without permanent residence in a foreign state.

As for the purposes of Article 30.2 WA "the state of permanent residence" meant a foreign state, it was impossible for persons who did not have permanent residence in a foreign state to fulfil the requirement to submit a permit to possess weapons granted by the state of permanent residence. For that reason, the general assembly was of the opinion that such a restriction on the possession of weapons was disproportionate in regard to persons without permanent residence in a foreign state, and

consequently also violated the fundamental right to free self-realisation.

The general assembly declared Article 30.2 WA invalid and postponed the entering into force of that declaration for four months.

Cross-references:

- 3-4-1-9-2000 of 06.10.2000, *Bulletin* 2000/3 [EST-2000-3-008];
- 3-4-1-1-99 of 17.03.1999, *Bulletin* 1999/1 [EST-1999-1-001];
- 3-4-1-6-2000 of 28.04.2000, *Bulletin* 2000/1 [EST-2000-1-004];
- 3-4-1-7-01 of 11.10.2001, *Bulletin* 2001/3 [EST-2001-3-005].

Languages:

Estonian, English.

France
Constitutional Council

Important decisions

Identification: FRA-2004-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 12.02.2004 / **e)** 2004-490 DC et 2004-491 DC / **f)** Institutional Act granting autonomy status to French Polynesia and supplementary Act on the autonomy status of French Polynesia / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 02.03.2004, 4220 et 4227 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.3.5.4 **Constitutional Justice** – Jurisdiction – The subject of review – Quasi-constitutional legislation.
4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.

Keywords of the alphabetical index:

Autonomous territorial authority, overseas, status / Autonomous territorial authority, status , powers / Law, of the country.

Headnotes:

Subject to the requirements of Articles 7, 16 and 89 of the Constitution, there is nothing to prevent the constituent power from introducing into the Constitution new provisions that create exceptions to the rules or principles with constitutional status applicable to the situation in question (the autonomy status of an overseas territorial authority). However, the implementation of the exceptions is limited to the extent that is absolutely necessary for the implementation of the autonomy status. This applies to the provisions concerning the local population in Article 74.10 of the Constitution.

Under the constitutional provisions on overseas autonomous authorities, embodied in the constitutional revision of 28 March 2003, the following have a

quasi-constitutional status: the conditions under which laws and regulations are applicable in French Polynesia, the authority's powers, the jurisdiction of and rules governing the organisation and functioning of its own institutions, the electoral system of its deliberative assembly, the arrangements for consulting its institutions on draft legislation, orders and decrees with provisions exclusively concerning the authority, and on ratification or approval of international undertakings on matters within its jurisdiction, the special judicial supervision exercised by the *Conseil d'État* over certain measures of the deliberative assembly, the circumstances under which that assembly may amend legislation enacted after the entry into force of the French Polynesia statute of autonomy on matters within the authority's jurisdiction, measures regarding employment, the exercise of certain occupations and the protection of land that are justified by local circumstances and designed to assist the local population and, finally, the conditions under which the authority may be involved, under state supervision, in the exercise of the latter's reserved powers.

Matters inextricably linked with those referred to above, particularly concerning the functioning of the institutions of French Polynesia, the rules governing the status of its measures and decisions and the arrangements by which the state supervises these institutions also have a quasi-constitutional status.

In accordance with Article 74.12 of the Constitution, the other special arrangements governing the organisation of French Polynesia are outside the scope of the Organic law.

Article15 of the Organic law authorises French Polynesia to establish representations in any state, or one of its regions, or territory recognised by France or any international bodies in the Pacific region. However, this power, which has not hitherto been enjoyed by French Polynesia, cannot extend to granting these representations diplomatic status without encroaching on one of the state's exclusive powers.

Autonomous overseas authorities may only be granted rule or law making powers in areas that remain, under the Constitution or the autonomy statute, within the state's jurisdiction with the prior agreement of the state authority lawfully exercising these powers. In the absence of such prior agreement, the relevant state authority might prevent the application of rules or laws issued by the autonomous authority in areas where it exercises authority. Such a situation would be incompatible with the guarantee of rights enshrined in Article 16 of the Declaration of Human Rights of 1789.

Summary:

The Organic law granting autonomy status to French Polynesia and the supplementary act on the autonomy status of French Polynesia were enacted on 29 January 2004. This was the third time in twenty years that the French parliament had legislated on the status of this overseas authority.

The Organic law was referred to the Constitutional Council by the Prime Minister under Articles 46 and 61.1 of the Constitution. The other, ordinary, act was referred to it by more than 60 members of parliament under Article 61.2.

The Constitutional Council ruled that certain provisions were unconstitutional:

- Article 32, which empowered the French Polynesia assembly to enact “laws of the country” without the prior approval of the French parliament on matters that remained within the legislative prerogative of the state under the Constitution or the statute; and

- the transfer to French Polynesia of responsibility for the police and security of territorial waters (paragraph 11 of Article 90), whereas public security had to remain a state responsibility under the combined effects of Articles 73.4 and 74.4 of the Constitution.

The Constitutional Council rejected the objections of the members of parliament to the ordinary supplementary legislation on autonomy status and did not consider it necessary to question any aspect of the constitutionality of this act of its own motion.

Languages:

French.

Identification: FRA-2004-1-002

a) France / **b)** Constitutional Council / **c)** / **d)** 02.03.2004 / **e)** 2004-492 DC / **f)** Act to adapt the criminal justice system to changing patterns of crime / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 10.03.2004, 4637 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Clarity and precision of legal provisions.
3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
3.22 **General Principles** – Prohibition of arbitrariness.
4.7.8.2 **Institutions** – Judicial bodies – Ordinary courts – Criminal courts.
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.
5.3.5.1.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Arrest.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.9 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Public hearings.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.
5.3.34 **Fundamental Rights** – Civil and political rights – Inviolability of the home.
5.3.35.1 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Correspondence.

Keywords of the alphabetical index:

Offence, criminal exceptional complexity and gravity / Offence, organised gangs / Guilt, prior acknowledgement / Criminal record, sexual offence / Prosecution, criminal / Search, night-time / Foreigner, humanitarian organisation, activity.

Headnotes:

Legislation must strike a balance between, on the one hand, preventing threats to public order and apprehending offenders, both necessary to defend constitutional rights and principles, and on the other hand, the exercise of constitutionally protected freedoms. The latter include freedom of movement, inviolability of the home, confidentiality of correspondence and respect for privacy, which are protected by Articles 2 and 4 of the Declaration of Human Rights of 1789, and individual freedom, which Article 66 of the Constitution places under the supervision of the courts.

Article 34 of the Constitution and the principle that offences and penalties must be established in law require parliament to define such offences and penalties in sufficiently clear and precise terms. This means not only removing any arbitrary element from sentencing but also avoiding unnecessary rigour in apprehending offenders.

The effect of these provisions is that parliament may authorise special investigative measures for the purposes of detecting particularly serious and complex offences, assembling evidence and apprehending those responsible, on condition that their application is not incompatible with the prerogatives of the judicial authorities, as guardians of individual liberties, and that the restrictions they impose on constitutional rights are necessary for establishing the truth, are proportionate to the complexity and gravity of the offences and do not entail any unjustified discrimination. The courts are responsible for ensuring that when the special rules of criminal procedure instituted by the legislation are applied, these principles, as set down in the preliminary article of the Code of Criminal Procedure, are respected.

A consequence of Articles 6, 8, 9 and 16 of the Declaration of Human Rights of 1789, taken together, is that other than in exceptional circumstances that might justify a hearing in camera, criminal cases that could result in a custodial sentence should be tried in public.

Summary:

The Act to adapt the criminal justice system to changing patterns of crime, which contained more than 220 articles that made major changes to criminal procedure and had been sharply criticised, was referred to the Constitutional Council, which ruled it unconstitutional on two counts and specified how the provision should be interpreted in order to be constitutional.

a. The new procedures for dealing with offences committed by organised gangs

The Council found that the offences connected with organised crime listed in the new Article 706-73 of the Code of Criminal Procedure were sufficiently clearly defined and were serious and complex enough to justify, in principle, special criminal and judicial investigation and prosecution procedures.

It established that the impugned procedures (extension of police custody to forty-eight hours, night-time searches, interception of telecommunications correspondence, photographing and sound recording in private places and so on) would require a decision of the judge responsible for ordering detentions on remand or release from such detention or the investigating judge, would have to be justified by the needs of the criminal or judicial investigation and would have to offer appropriate safeguards for constitutional rights and freedoms.

The courts would have to exercise their powers to the full.

In this context, the Constitutional Council specified how the application of Article 1 of the Act should be interpreted in order to be constitutional.

In that respect, the Constitutional Council stated that judges applying the procedures provided for in this article would be required to ensure for each individual case:

- that there were plausible grounds for believing that one of the serious offences listed in Article 706-73 of the Code of Criminal Procedure had been committed by an organised gang; and

- that the needs of the criminal or judicial investigation justified the restrictions that those measures could impose on individual freedom, the inviolability of the home or the right to privacy.

The new Article 706-104 of the Code of Criminal Procedure was declared unconstitutional because it exempted certain procedural measures that did not meet the above requirements from being declared null and void. The article read “if at the end of a criminal or judicial investigation or before the trial court the existence of an organised gang is no longer accepted as an aggravating circumstance this shall not constitute grounds for setting aside decisions or actions lawfully taken in accordance with this provision”.

The following specifications as to the constitutional interpretation or clarifications were also made:

- the special procedures in Article 1 of the impugned legislation should only apply to robbery by an organised gang if there were other sufficiently serious circumstances, such as violence, damage to social interests or the cultural heritage, repeat offences and so on;

- the offence (referred to in paragraph 13 of the new Article 706-73 of the Code of Criminal Procedure) of aiding the unlawful entry, circulation and residence of foreign nationals should not include the activities of humanitarian organisations assisting foreign nationals;

- the principle that there was no offence if there was no intent to commit one also applied this offence;

- when it required the state prosecutor to be advised that the classification of an offence justified deferral of the first visit to a person in police custody the legislation clearly intended that this classification should also be immediately scrutinised by the prosecutor;

- the initial assessment by a police officer that a lawyer's visit to a person in police custody should be deferred could not bind the judicial authorities or determine the subsequent course of the proceedings;

- the “immediate risk of the disappearance of material or other evidence”, on the basis of which an investigating judge might order a night-time search, must be understood as only justifying such a search if it could not be carried out at another time; and

- the new Article 706-101 of the Code of Criminal Procedure on photographing and sound recording for investigation purposes restricted recordings for the purpose of discovering the truth to what appeared in official records drawn up by investigating judges or by the police on their instructions, where the recorded images and sounds were recorded or transcribed. Parliament had therefore clearly intended that recordings relating to private life that were unrelated to offences under investigation could not under any circumstances be retained in case files.

b. Appearance with prior acknowledgement of guilt

This new procedure, based on *composition pénale*, an alternative to trial procedure introduced in 1999, was considered compatible with the separation of prosecution and judicial functions since presidents of regional courts, or judges nominated by them, had full discretion to give or withhold approval for sentences proposed by prosecutors and accepted by accused persons.

However, the Constitutional Council considered that where the procedure could result in a custodial sentence the judicial approval hearing had to be in public. It therefore declared the provision for such hearings to be held in private to be unconstitutional.

It also issued a reservation inviting presidents of regional courts to make full use of their trial court power to assess the facts when sitting in such approval proceedings.

c. The establishment of a sexual offenders register with the addresses of those concerned

The Council found that Article 48 of the Act was constitutional, in view of:

- the need for the judicial authorities to have means of preventing repeated sexual offences, particularly on children or young persons; and

- the safeguards available to persons registered, particularly in terms of data confidentiality and the possibility of removing them.

Languages:

French.

Identification: FRA-2004-1-003

a) France / **b)** Constitutional Council / **c)** / **d)** 29.04.2004 / **e)** 2004-494 DC / **f)** Lifelong Vocational Training and Social Dialogue Act / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 05.05.2004, 7998 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
4.5.2 **Institutions** – Legislative bodies – Powers.
5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.
5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.
5.4.17 **Fundamental Rights** – Economic, social and cultural rights – Right to just and decent working conditions.

Keywords of the alphabetical index:

Worker, participation, principle / Work, conditions, determination / Collective agreement, negotiation / Company agreement, branch agreement / Employment, Labour Code, derogation, conditions.

Headnotes:

The eighth paragraph of the Preamble to the Constitution of 27 October 1946 grants all workers the right to participate, via their representatives, in the collective determination of their working conditions and the management of their undertakings while Article 34 of the Constitution makes parliament responsible for determining the fundamental principles of labour law. Parliament must therefore decide how this law should be applied, and with what safeguards, bearing in mind the participation principle embodied in the paragraph 8 of the Preamble.

In accordance with these provisions, having defined the rights and obligations relating to employment conditions and relations, parliament should leave it to employers and employees, or their representative organisations, to work out the practical details of how the rules it lays down should be applied, particularly through collective bargaining. In particular, within the statutory framework, the social partners can decide on the relationship between the different collective agreements reached at national, branch and company levels. However, when legislation authorises the exemption of a collective agreement from a rule already laid down in other legislation that was intended to be mandatory, the purpose of and conditions governing this exemption must be clearly specified.

Summary:

The Lifelong Vocational Training and Social Dialogue Act was referred to the Constitutional Council by more than sixty members of parliament.

In its Decision no. 2004-494 DC of 29 April 2004, it rejected the application.

The applicants challenged Articles 41 and 42 of the act, on the ground that they authorised agreements that were less advantageous than the higher level agreements covering a wider geographical area or occupational group, unless the latter specified otherwise, thus infringing the principle that lower level collective agreements must represent an improvement in employees' conditions.

They also challenged Article 43, which extended the right to derogate from certain provisions of the Labour Code from branch to company agreements.

They argued that all those provisions were in breach of Article 34 of the Constitution, under which legislation must determine the fundamental principles of labour law, and the eleventh paragraph of the 1946 Preamble, under which the nation must ensure universal entitlement to health protection, material security, rest and leisure.

Regarding Articles 41 and 42, the Constitutional Council noted that having defined the rights and obligations relating to employment conditions and relations, parliament should leave it to employers and employees, or their representative organisations, to work out the practical details of how the rules it laid down should be applied, particularly through collective bargaining. In particular, within the statutory framework, the social partners could decide on the relationship between the different collective agreements reached at national, branch and company levels.

In this case, the statutory framework included a number of safeguards. There was no right of derogation if the signatories to the higher level agreement had excluded this option; the conclusion of such exceptional agreements had to comply with the majority principle as provided for in law; and company agreements could not derogate from branch ones in certain areas, notably minimum wages and job classifications. Finally, the new provisions did not apply retroactively.

Turning to Article 43, the Constitutional Council ruled that when legislation authorised the exemption of a collective agreement from a rule already laid down in other legislation that was intended to be mandatory, the purpose of and conditions governing this exemption had to be clearly specified. This was the case with these particular exemptions.

Languages:

French.

Georgia
Constitutional Court

Important decisions

Identification: GEO-2004-1-001

a) Georgia / **b)** Constitutional Court / **c)** Second Chamber / **d)** 11.03.2004 / **e)** N2/1/241 / **f)** Akaki Gogichaishvili v. the Parliament of Georgia / **g)** *Adamiani da Konstitutsia* (Official Gazette) / **h)**.

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.
3.17 **General Principles** – Weighing of interests.
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.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Media, television / Defamation, facts, allegation, proof.

Headnotes:

Limitations on freedom of speech are permissible where its exercise infringes upon the rights of others. The right of each person ends where the rights of others begin. The requirement to protect the “rights of others” carries more weight than disseminating information, since the right of honour and dignity of an individual is an absolute right.

Summary:

The subject of the dispute was the constitutionality of Article 18.2 of the Civil Code of Georgia and Article 20.1 of the Law of Georgia relating to Other

Means of Mass Communication and Dissemination of Information, which states:

> "A person is entitled to demand in court the retraction of information that defames his/her honour, dignity, privacy, personal inviolability or business reputation unless the person who has disseminated such information can prove that it corresponds to the true state of affairs. The same rule applies to the incomplete dissemination of facts, where such dissemination defames the honour, dignity or business reputation of a person".

The claimant, Akaki Gogichaishvili, is a journalist who was ordered by a judgment of the Supreme Court of Georgia to retract the information broadcast by the television company "Rustavi 2" on 1 April 2001. The Court based its judgment on the above-mentioned article of the Civil Code.

The claimant argued that the impugned articles violated Article 19.2 of the Constitution, which states: "the persecution of a person on account of his/her speech, thought, religion or belief as well as the compulsion to express his/her opinion about them is prohibited". He pointed out that the right of a person not to be compelled to express his/her opinion was an explicitly protected right.

The respondent, the representative of the parliament, expressed her opinion that the legislation of Georgia regulated the issue in accordance with international instruments. She pointed out that Article 9 ECHR primarily protected the religious beliefs of a person, and moreover, that article did not deal with absolute rights, which were not to be restricted. Limitations must, however, be prescribed by law and be proportionate to the legitimate aim. The respondent considered that although freedom of thought was a fundamental right, it might be restricted, in particular, where it infringes upon the rights of others, or where restriction is permitted within the framework of law. The law in the particular case was Article 19 of the Constitution, setting out: "The restriction of the freedoms enumerated in the present Article shall be impermissible unless their manifestation infringes upon the rights of others." She, therefore, considered that Article 18 of the Civil Code of Georgia did not contradict Article 19 of the Constitution.

The Second Chamber of the Constitutional Court noted that Article 10 ECHR provides for duties and responsibilities. Responsibilities may lead to restrictions where the statements (facts) are false and the protection of morals can be relied on to justify a restriction of the freedom of expression. Furthermore, facts and value judgments are differentiated by the case-law of the European Court. The existence of facts may be susceptible to proof, whereas the truth of value judgments is not.

Article 18.2 of the Civil Code of Georgia obliges a person to retract information where the three following conditions exist:

1. where a person has disseminated statements (facts);
2. those statements are false; and
3. the person who has disseminated such statements cannot prove the truth of those statements before the court, and those statements defame the honour and dignity of others.

In light of the above, the Constitutional Court considered that the obligation to retract the disseminated statements met the legitimate aim of the restriction of freedom of speech.

Consequently, the Chamber did not allow the constitutional claim.

Supplementary information:

Upon request by the Constitutional Court of Georgia, the Venice Commission provided an *amicus curiae* opinion on the relationship between the Freedom of Expression and Defamation with respect to unproven defamatory allegations of fact (CDL-AD(2004)011), which was taken into consideration by the Court in its deliberations relating to the present decisions.

Languages:

English.

Germany
Federal Constitutional Court

Important decisions

Identification: GER-2004-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 05.02.2004 / **e)** 2 BvR 2029/01 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift*, 2004, 739-750; *Europäische Grundrechte Zeitschrift*, 2004, 73-89; CODICES (German).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.
5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.
5.3.37.1 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Detention, preventive / Criminal, dangerous / Dangerousness, prognosis / Resocialisation, principle / Imprisonment, conditions / Detention, enforcement / Criminal, violent / Guilt, principle.

Headnotes:

1.a. A person's human dignity will not be violated even by long lasting placement in preventive detention if this is necessary because of his or her continued dangerousness. However, it is also necessary in these cases to respect the autonomy of the detainee and honour and protect his or her dignity. Therefore, the aim of preventive detention like the aim of penal detention must be to lay the foundations for a responsible life in freedom.

b. Article 1.1 of the Basic Law does not impose on the institution of preventive detention a constitutional requirement that there be a fixed maximum period for the detention at the time it is imposed or at a later time when it is re-examined. It is not objectionable for the legislature to provide that it is not necessary at the commencement of preventive detention for a binding decision to be made on the expected time of the detainee's release.

2.a. The longer the placement in preventive detention lasts, the stricter the conditions governing its continuation.

b. The provision in § 67.d.3 of the Criminal Code takes into account the increased importance of the right to freedom after ten years in custody by allowing higher demands to be placed on the threatened legal interest and the proof of the detainee's dangerousness and by only allowing the continuation of detention in exceptional cases.

c. Due to the special significance that the relaxation of detention conditions has for the prognosis of future dangerousness, the court responsible for enforcing the sentence is not permitted to accept without sufficient reason a refusal by prison authorities to relax detention conditions which could prepare the way for the end of the preventive detention measure.

d. The judicial administrations in the *Länder* (states) have to ensure that a detainee is able to have his or her preventive detention conditions improved to the full extent that is compatible with prison requirements.

3. The area of application of Article 103.2 of the Basic Law is restricted to state measures which express sovereign disapproval of illegal and culpable conduct and thus impose suitable and appropriate punishment on it.

4. The abolition of the maximum period of detention where preventive detention is ordered for the first time and the application of the same to criminals who had been placed in preventive detention prior to the pronouncement and coming into force of the new provision and who had not yet finished their sentences is in conformity with the protection of public confidence guaranteed in a state governed by the rule of law (Article 2.2 of the Basic Law in conjunction with Article 20.3 of the Basic Law).

Summary:

I. The complainant had numerous previous convictions for serious criminal offences and had only been free for a few months since the age of 15. Most recently he had been sentenced in 1986 to a prison sentence of five years for attempted murder in connection with robbery. At the same time his (subsequent) placement in preventive detention was ordered. According to the provision in force at this time, a person's first placement in preventive detention could not exceed ten years (§ 67.d.1 of the Criminal Code). This provision was amended in 1998 to the effect that a term of preventive detention would only be considered to have expired within this period of time if there was no danger that the offender would commit other serious crimes (§ 67.d.3 of the Criminal Code). At the time the new provision came into force, the complainant was being held in preventive detention and if it had not been for the new provision he would have had to have been released at the expiration of the ten years. The Penal Execution Division of the responsible court (*Strafvollstreckungskammer*) refused to declare that the complainant had completed his term in preventive detention in 2001.

His appeals were unsuccessful. Therefore, the complainant lodged this constitutional complaint. The complainant alleges, in particular, that the new provision violates the prohibition of retroactivity in Article 103.2 of the Basic Law. According to that article, an act can only be punished where it constituted a criminal offence under the law before the act was committed.

II. The Second Panel rejected the constitutional complaint as unfounded. The Court's reasoning was as follows:

The placement of a person in preventive detention without there being a statutory maximum time limit for detention does not violate the guarantee of human dignity. A person's human dignity will also not be violated by long lasting placement in preventive detention if this is necessary because of his or her continued dangerousness. An individual's connection and involvement with the community which is provided for in the Basic Law justify the adoption of indispensable measures to protect essential public interests against damage. Nothing prevents a polity from safeguarding itself against dangerous criminals by placing them in detention. However, it is also necessary in these cases to respect the autonomy of the detainee and honour and protect his or her dignity. Therefore, the aim of preventive detention like the aim of penal detention must be to lay the foundations for a responsible life in freedom.

The current form of preventive detention satisfies this standard. The constitutional protection of human dignity does not require that a binding decision be made on the expected time of release at the time when preventive detention is ordered due to a person's continued dangerousness or at a later time when the detention is re-examined. This is because a future danger can only be estimated in the present. How long a danger will continue to exist will depend on future developments which cannot be predicted with certainty. At every stage of preventive detention, the question of whether the person concerned can be freed is considered. The fact that the authorities repeatedly examine whether preventive detention should be suspended or terminated also guarantees the person concerned adequate legal certainty under the law of procedure.

The legal and practical purpose of preventive detention is reintegration into society. This imprisonment goal and the obligation to counteract potential damage caused by detention also apply to detainees in preventive detention. Thus, according to the Prison Act in addition to the general privileges available during preventive detention special privileges should contribute to the detainee's leading a purposeful life. According to information from the governments of the *Länder*, preventive detention is not in practice purely a matter of holding dangerous criminals in custody.

There is also no violation of the fundamental right of freedom of the person under sentence 2 of Article 2.2 of the Basic Law. If one takes into account the following considerations preventive detention is a restriction of fundamental rights in conformity with the Basic Law. It is true that the possibility of lifelong preventive detention constitutes a serious encroachment upon fundamental rights. However, such possibility does not violate the guarantee of the essence of fundamental rights because the new provision only allows the continued preventive detention at the expiration of ten years, if it serves to prevent serious damage to the mental or physical integrity of potential victims.

The new provision satisfies the requirements of the principle of proportionality. The Federal Constitutional Court is only to a limited extent able to examine the exercise of the legislature's discretion in deciding whether detention is necessary and choosing suitable means for it. The same applies to the legislature's assessment and prognosis regarding a detainee's dangerousness that is necessary in this context. The uncertainties associated with placement in preventive detention affect the minimum requirements imposed on the prognosis and its evaluation in connection with the prohibition of excessiveness. However, such uncertainties do not eliminate the requirement for

encroachments on freedom to be suitable and necessary. The detention must remain reasonable in order to avoid an excessive burden. The fundamental right to freedom of the person concerned must be safeguarded at the procedural and substantive levels. The legislature satisfies these substantive requirements of the prohibition of excessiveness by making the requirements which have to be satisfied for preventive detention to be continued at the expiration of ten years far more stringent than the original requirements. As a result, a continuation is limited to serious sexual offenders and violent criminals. In addition, there is a statutory presumption that dangerousness will generally no longer exist at the expiration of ten years. Continuation of the preventive detention beyond this time limit can only be considered the *ultima ratio* in the case of those persons whose assumed safeness has been clearly rebutted. From the point of view of the law of procedure, the requirements of the prohibition of excessiveness are also satisfied. The legislature has created a system for regularly examining whether a detainee's sentence should be suspended or terminated and the requirements for carefully defining the foundations of the prognosis. In applying these provisions, judges must, however, satisfy certain standards of diligence in order to conform to the prohibition of excessiveness. In particular, the decision to continue preventive detention must be based on an expert opinion which justifies the decision's exceptionalness. Repeated, routine evaluations must be avoided. Therefore, judges must carefully choose and check experts. These checks must cover the prognosis results and the quality of the entire prognosis procedure. In addition to being transparent the psychiatric prognosis must have a sufficiently wide prognosis basis. The relaxation of detention conditions has special significance for the basis of the prognosis. Therefore, the court responsible for enforcing the sentence is not permitted to accept without sufficient reason a refusal by prison authorities to relax detention conditions which could prepare the way for the end of the preventive detention. Ultimately, the special character of preventive detention must also be taken into account within the framework of measures of correction and prevention (other than punishment). Solid reasons do justify a partial concordance between preventive detention and the punishment. Nevertheless, the state's justice administrations must make use of their statutory possibilities for allowing a detainee improvements in his or her detention conditions to the extent that such improvements are compatible with prison needs.

The total prohibition of retroactivity in Article 103.2 of the Basic Law is not violated. The prohibition does not extend to the measures of correction and prevention in the Criminal Code. The area of application of the total prohibition of retroactivity is limited to state measures which express sovereign disapproval of illegal and culpable conduct and thus impose suitable and appropriate punishment on it. The total prohibition of retroactivity in Article 103.2 of the Basic Law is anchored in the guarantee of human dignity and the principle of guilt. An accusation of criminal guilt presupposes that the standard for deciding whether or not such guilt exists has already been determined by statute. Only persons who are aware of such standard and can adapt their conduct to its legal consequences can act responsibly. Citizens should clearly recognise the spectrum of human behaviour outside the realm covered by criminal law in order to be able to behave accordingly. Preventive detention does not serve this legislative goal. In contrast to imprisonment, it is not associated with either disapproval of reprehensible conduct nor does it aim to punish criminal guilt. Instead it is aimed exclusively at the prevention of future criminal offences.

The new provision is also compatible with the protection of public confidence in a state governed by the rule of law pursuant to Article 2.2 of the Basic Law in conjunction with Article 20.3 of the Basic Law. It has a permissible retroactive connection to the offence. The reliability of the legal system is a fundamental prerequisite of a free constitution. Therefore, special justification is needed if the legislature wishes to subsequently amend to the detriment of the persons concerned the legal consequences of conduct which occurred in the past.

The new provision's connection with the past is evident from the fact that it also applies to cases where preventive detention was ordered for the first time prior to its pronouncement. The abolition of the maximum period of detention does not, however, extend back to a point in time prior to the coming into force of the new provision and does not modify any past events. This is because a preventive detention order did not depend even under old law on the circumstances existing at the time of the original offence, but rather on the circumstances prevailing at the time of sentencing. Similarly, the new provision does not change the legal consequences of a final criminal sentence to the person concerned's detriment. The ten-year time limit was not an integral part of the criminal sentence passed under the old law i.e. it was not final and absolute. The new provision only covers persons who were still in preventive detention at the time it came into force. In the case of these persons, the coming into effect of the newly regulated legal consequences also depends on circumstances which only occurred later and, in particular, the person's conduct during

imprisonment. A decision on the end of preventive detention thus depends on events which had not occurred at either the time the offence was committed or the sentence was passed or the entry into force of the new provision.

Languages:

German.

Identification: GER-2004-1-002

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 03.03.2004 / **e)** 1 BvR 2378/98, 1 BvR 1084/99 / **f)** / **g)** *Bundesgesetzblatt* I 2004, 470 / **h)** *Neue Juristische Wochenschrift*, 2004, 999-1022; CODICES (German).

Keywords of the systematic thesaurus:

1.3.5.3 **Constitutional Justice** – Jurisdiction – The subject of review – Constitution.
3.16 **General Principles** – Proportionality.
5.1 **Fundamental Rights** – General questions.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.
5.3.34 **Fundamental Rights** – Civil and political rights – Inviolability of the home.

Keywords of the alphabetical index:

Residence, acoustic monitoring / Evidence, exclusion / Communication, eavesdropping, electronic / Data, destruction / Data, collection.

Headnotes:

1. Article 13.3 of the Basic Law in the version of the Act to Amend the Basic Law (Article 13) of 26 March 1998 is in conformity with Article 79.3 of the Basic Law.

2. The inviolability of human dignity pursuant to Article 1.1 of the Basic Law includes the recognition of absolute protection of an individual's inner private sphere. The acoustic monitoring of residential premises for the purpose of criminal prosecution (Article 13.3 of the Basic Law) is not permitted to intrude in this area. To this extent, there is no need to weigh the inviolability of the home (Article 13.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law) and the interest in the prosecution of crime in accordance with the proportionality principle.

3. Not every acoustic monitoring of residential premises violates the human dignity aspect of Article 13.1 of the Basic Law.

4. Statutory authority to monitor residential premises must guarantee the inviolability of human dignity and satisfy the constituent elements of Article 13.3 of the Basic Law as well as other constitutional requirements.

5. If the acoustic monitoring of residential premises based on such authority nevertheless leads to the collection of information derived from the individual's inner private sphere which enjoys absolute protection, the monitoring must cease immediately and recordings must be deleted; no exploitation of such information is permitted.

6. The provisions in the Code of Criminal Procedure for the implementation of acoustic monitoring of residential premises for the purpose of criminal prosecution do not entirely satisfy the constitutional requirements regarding the protection of human dignity (Article 1.1 of the Basic Law), the proportionality principle incorporated in the principle of a state governed by the rule of law, the guarantee of effective legal protection (Article 19.4 of the Basic Law) and the right to a hearing in court (Article 103.1 of the Basic Law).

Summary:

I. As the result of an amendment to the Basic Law in 1998, Article 13 of the Basic Law – the fundamental right to the inviolability of the home – was amended by the addition of paragraphs 3 to 6. The previous paragraph 3 became paragraph 7 of Article 13 of the Basic Law. In passing the amendment, the legislature was primarily seeking a way to combat organised crime. Pursuant to Article 13.3 of the Basic Law acoustic monitoring of residential premises for the purposes of criminal prosecution is now permitted. For the operation of Article 13 it is necessary that specific facts lead to the assumption that someone has committed one of a number of explicitly listed grave crimes, that that person is probably at the private premises and investigation of the facts by

other means would be unproportionally obstructed or without chance of success. Article 13.3 of the Basic Law was implemented in an ordinary law, namely the Act to Improve the Suppression of Organised Crime. The main provision is § 100.c.1.3 of the Code of Criminal Procedure. According to that provision, it is permissible to eavesdrop on and record the words of an accused spoken in private if certain facts justify the suspicion that he or she has committed one of a number of listed offences ("catalogue offences").

The power to order eavesdropping measures lies with the State Protection Division of the Regional Court and in cases of imminent danger, with the Division's president. Other provisions regulate, *inter alia*, bans on the taking of evidence, the exclusion of evidence improperly obtained and duties to inform the person concerned. The use of the collected data is also now permitted in other contexts. In particular, the complainants argue that their fundamental rights under Article 1.1 of the Basic Law (inviolability of human dignity), Article 1.3 of the Basic Law (binding effect of the fundamental rights on state authorities) and Article 13.1 of the Basic Law in conjunction with Article 19.2 of the Basic Law (ban on the violation of the essence of a fundamental right), Article 79.3 of the Basic Law (impermissibility of amendments of the fundamental rights), Article 19.4 (effective legal protection) and Article 103.1 of the Basic Law (right to a hearing in court) have been violated.

II. The First Panel allowed the constitutional complaints in part to the extent that they were admissible.

The Court's reasoning was essentially as follows. Article 13.3 of the Basic Law, which allows the legislature to authorise the monitoring of residential premises for the purposes of criminal prosecution, is in conformity with Article 79.3 of the Basic Law. Article 79.3 of the Basic Law only forbids constitutional amendments which affect the principles laid down in Articles 1 and 20 of the Basic Law. These include the requirement that human dignity be respected and protected (Article 1.1 of the Basic Law).

However, the statutory authorisation to carry out the acoustic monitoring of residential premises based on Article 13.3 of the Basic Law (§ 100.c.1.3, § 100.2 and 100.3 of the Code of Criminal Procedure) and other related provisions are unconstitutional in significant respects. The legislature, for instance, did not sufficiently define the constitutionally necessary bans on monitoring and the collection of evidence in § 100.d.3 of the Code of Criminal Procedure by taking into account the inner private sphere of the individual. Monitoring must be impermissible if the accused is at home alone with very close family members or other persons very close to him or her and if there are no reasons to suspect that they were involved in the accused's offence. There are also insufficient statutory precautions to ensure that monitoring is ceased if the situation suddenly changes so that the inviolable private sphere is affected. In addition, a prohibition on the use of information improperly obtained and a requirement that information improperly obtained be immediately destroyed are missing. Moreover, there needs to be a guarantee that information from the inviolable private sphere is not used in main proceedings or used as a basis for further investigations. Pursuant to Article 13.3 of the Basic Law, monitoring may only be considered during the investigation of grave offences individually listed in the statute. Some of the so-called catalogue crimes to which reference is made in § 100.c.1.3 of the Code of Criminal Procedure do not fulfil these requirements. Thus, they do not qualify as grounds for monitoring residential premises.

The fundamental right to the inviolability of the home must also be protected under procedural law, in particular through the involvement of a judge (§ 100.d.2, 100.d.4.1 and 100.d.4.2 of the Code of Criminal Procedure). The Panel defined more closely the prerequisites for a court order's content and written substantiation. Thus, the order must specify the type of measure as well as its scope and duration. The public prosecutor's office and the responsible court must examine a case carefully and give detailed reasons if they wish to have the duration of the monitoring period originally fixed extended; such extension is in principle possible. Court involvement is also necessary in order to ensure that the prohibition on using evidence improperly obtained is respected.

The provisions on the duty to notify the persons affected (§ 101 of the Code of Criminal Procedure) are only in part compatible with the Basic Law. The subjects of fundamental rights have in principle a right to be informed about measures for monitoring residential premises. In addition to the accused, the owner and occupants of a home in which monitoring measures have been taken are to be informed. This also applies to third parties who are affected, unless enquiries into their names and addresses would further intervene in their right to privacy. The reasons listed in § 101.1.1 of the Code of Criminal Procedure for allowing the notification of the parties to be deferred in exceptional circumstances are only partly in conformity with the Basic Law. The threat posed to public security, which is only referred to in a general manner, or to the possibility of later operations by an undercover officer are not sufficient. The right to a hearing in court (Article 103.1 of the Basic Law) will

also be violated if after the commencement of public proceedings a court defers notification with the result that it becomes aware of facts to which the accused is not privy.

The provisions regarding the use of personal information in other proceedings (§ 100.d.5.2 and § 100.f.1 of the Code of Criminal Procedure) are largely in conformity with the Basic Law. However, it is only permissible to use information to solve other similarly important "catalogue crimes" and to eliminate threats, in individual cases, to highly important legal interests. The purpose of use must be compatible with the original purpose of the monitoring. The non-existence of a duty to state how the information was obtained is a violation of the constitution.

The provisions concerning the destruction of data (§ 100.d.4.3, § 100.b.6 of the Code of Criminal Procedure) are not in conformity with Article 19.4 of the Basic Law. The legislature failed to balance the interests in the destruction of data and the guarantee of effective legal protection with the monitoring of residential premises. To the extent that data must still be available for examination by the court, it may not be destroyed. However, access to it must be blocked. The information may also not be used for any other purpose than the information of the person concerned and for judicial review.

III. Two members of the Panel have attached a dissenting opinion to the decision. In their opinion Article 13.3 of the Basic Law is not in conformity with the Basic Law and therefore void. They advocate a strict and narrow interpretation of Article 79.3 of the Basic Law. The issue in an age in which people seem to have become accustomed to unlimited technical possibilities and in which even a person's privacy within his or her own four walls is no longer a taboo that can deter the [state's] security needs is not simply to stop the beginning of a dismantling of fundamental rights positions guaranteed by the constitution. Instead, the issue is to prevent such development from reaching a bitter end, i.e. a situation in which the concept of the individual that has been generated by such development is no longer reconcilable with the values in a free democratic state governed by the rule of law.

Languages:

German.

Identification: GER-2004-1-003

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 09.03.2004 / **e)** 2 BvL 17/02 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift*, 2004, 73-89; 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.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.3.41 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, speculative transactions / Tax, securities, transactions / Tax, duty to pay, income / Tax, declaration / Tax, burden, equality / Law, enforcement, equality / Law, enforcement, deficit, unconstitutionality.

Headnotes:

1. The principle of equality before the law in Article 3.1 of the Basic Law requires that tax legislation subject taxpayers to the same tax burden in law and in actual fact. If the legal form of the collection procedure does not in principle achieve the goal of evenly spreading the tax burden, this can result in the statutory tax base being considered unconstitutional (following Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 84, 239).

2. A contradiction between a normative command in a substantive tax provision which provides for obligations on the part of the taxpayer and a collection rule which is not designed to be enforceable will be in violation of the constitution. The inefficiency in practice of legal norms will not be automatically in breach of the principle of equality before the law. However, the normative deficit of law that through its inherent contradictions is designed to be ineffective will be.

Summary:

I. The plaintiff in the original proceedings declared other income from speculative transactions pursuant to § 22.2 in conjunction with § 23.1.1.1.b of the Income Tax Act in the total amount of DM 1,752 in his income tax declaration for the 1997 assessment period. The competent tax office accepted this in its 1997 income tax assessment notice. The plaintiff considers the taxation of speculative profits unconstitutional. However, the statement of claim lodged by him was unsuccessful at first instance. He appealed to the Federal Finance Court which stayed the proceedings so that it could refer a question to the Federal Constitutional Court. The question was whether § 23.1.1.1.b of the Income Tax Act was incompatible with the Basic Law to the extent that the enforcement of the taxation claim was largely prevented by structural obstacles to enforcement. The Federal Finance Court is convinced of the unconstitutionality of the substantive tax provision. It stated: Tax collection arrangements are insufficient since the instruments for review available to the fiscal authorities are either not appropriate or insufficient to meet constitutional requirements. Due to the way taxes are collected, the goal of evenly spreading the taxation burden in the case of income from speculative transactions is in principle not effectively achieved. The legislature must accept the blame for placing a burden on honest taxpayers in violation of the principle of equality. The substantive tax provision at issue here is not in actual fact enforced. This illustrates the inequality of the tax burden.

II. The Second Panel decided that § 23.1.1.1.b of the Income Tax Act in the version applicable in the assessment periods 1997 and 1998 was incompatible with the general principle of equality before the law (Article 3.1 of the Basic Law) and null and void to the extent that it concerned sales transactions in relation to securities. The Panel's reasoning was essentially as follows. The substantive tax duty established by the tax provision submitted for review is not constitutionally objectionable. However, the inadequate enforcement of the substantive duty violates the constitutional requirement that taxpayers be subject in actual fact to the same tax burden through the same enforcement of a statutory provision. This leads to the unconstitutionality of the substantive tax provision. According to the principle of equality before the law, the burden for taxpayers under a tax act must be the same legally and in actual fact. In order to prevent the statutory tax base from being unconstitutional, the substantive tax act must be accompanied by legislative provisions which ensure that taxpayers really are subject to the same tax burden. Instruments which come into question are the collection of taxes at source or the supplementation of the declaration principle through the verification principle in the assessment procedure. In order to determine if there is a structural impediment to enforcement, it is necessary to consider the usual tax procedure. If certain income can only be recorded accurately under substantive law where there is a particular willingness on the part of the taxpayer to declare it and if there is in reality little risk of discovery if he or she fails to declare it, then these factors will already be sufficient reason for finding that an act is inherently unequal in its application of the law. The income tax assessment procedure being a procedure applied to a substantial part of the population has to use administrative investigative measures in an appropriately selective manner in order to remain viable. It should be possible to enforce the law equally without the necessity for disproportionate amounts of cooperation from the taxpayer or excessive investigative effort on the part of the fiscal authorities. According to these standards, the taxation of speculative profits from private securities transactions during the assessment periods 1997 and 1998 did not meet the equality principle in tax law. The enforcement of tax claims failed to satisfy equality principles because of the deficiencies in the tax collection structure. The recording of speculative profits from private securities transactions depended primarily on the willingness of the taxpayer to declare such profits.

A taxpayer who submitted his or her tax declaration for the years 1997 and 1998 in the prescribed form and who did not make any obviously contradictory or improbable statements regarding his or her speculative transactions with securities had as a rule little chance of being caught if the statements concerning profits gained were incomplete or incorrect. To this extent, the way the tax forms were drafted promotes inequality in the enforcement of the law. This is because the general procedural principles that limit investigations were not sufficiently supplemented for the assessment periods 1997 and 1998 by practicable and efficient collection rules which were adequately suited to review in normal assessment proceedings.

The fiscal authorities investigate the facts *ex officio*. According to the relevant ordinances, the fiscal authorities should accept the statements of taxpayers in their tax declarations to the extent that they are conclusive and there are no specific indications suggesting that they contain errors.

Taxpayers are not obliged to provide information about speculative profits realised by them other than in their tax return nor must they substantiate such profits by submitting records. Similarly, they are not obliged to keep records or to preserve old records. At the time the assessment for the assessment periods

1997 and 1998 was conducted, the tax offices concerned had hardly any other opportunities for otherwise examining the taxpayers' statements. The likelihood that the tax office carrying out the assessment would receive tax-audit tracer notes from external audits of banks was very slight. In any case, an external tax audit does not have access to a considerable number of the accounts suitable for directly discovering speculative profits from private securities transactions. There is normally no provision for a subsequent examination as part of an external audit in the case of private persons. The ascertainment of the existence of structural deficits in the collection system does not depend on the individual measures used by authorities investigating suspected tax evasion. The risk of being caught would still be slight in normal assessment proceedings even if one were to extend the scope of the information which can be requested by the fiscal authorities. To this extent too there are practical and legal obstacles to investigation. The manner of collecting income tax on speculative profits in the case of securities almost invites illegal behaviour if compared with tax collection for other income in the assessment periods 1997 and 1998. Notaries are obliged by statute to notify the fiscal authorities in relation to speculative real estate transactions. Taxpayers who run an industrial, agricultural or forestry enterprise or who are self-employed professionals can be subjected to an external audit without the satisfaction of preliminary conditions. Where the taxpayer receives income from renting or leasing, he or she will not be able to conceal the income generating object because generally, it is held over the long term. Often losses will be claimed as tax exemptions. There is withholding tax for income from capital assets as well as control through notices from banks to the Federal Finance Office. In the case of income from employment, the collection of income tax is organised in the form of a highly efficient withholding tax (salary tax) system.

The improvements to enforcement undertaken by the federal fiscal authorities and those of the *Länder* are more a confirmation than not of the structural deficits in the assessment periods 1997 and 1998. To this extent there are no indications that the actual collection deficit ascertained was the result of temporary deficits in the fiscal administration.

The finding of structural enforcement deficits can also not be transferred automatically from one assessment period to the years thereafter. The statutory position clearly changed from the assessment period 1999 onwards. Thus it is possible as a result of the 1999/2000/2002 Tax Relief Act of 24 March 1999 to balance speculative losses against speculative profits. In any case, since spring 2000 there has been a downward trend in the capital markets. In view of such trend, it is possible that existing normative deficits will no longer have an effect which is constitutionally relevant.

Languages:

German.

Hungary
Constitutional Court

Statistical data
1 January 2004 − 30 April 2004

Number of decisions:

- Decisions by the plenary Court published in the Official Gazette: 10
- Decisions by chambers published in the Official Gazette: 3
- Number of other decisions by the plenary Court: 41
- Number of other decisions by chambers: 9
- Number of other (procedural) orders: 42

Total number of decisions: 105

Important decisions

Identification: HUN-2004-1-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 02.03.2004 / **e)** 5/2004 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2004/23 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Admissibility of referenda and other consultations.
5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.
5.3.8 **Fundamental Rights** – Civil and political rights – Right to citizenship or nationality.

Keywords of the alphabetical index:

Referendum, initiative / Nationality, definition / Naturalisation, preferential / Citizenship, acquisition, conditions.

Headnotes:

The question to be put to a referendum does not refer to any obligations arising from international agreements or to the content of an Act on such obligations and does not create a situation where an international agreement should be terminated or its content changed; therefore, that question is not contrary to Article 28/C.5 of the Constitution.

The ground for the proposed preferential naturalisation is the existence of a strong bond to Hungary, to be examined on an individual basis. This reasonable ground for granting advantages when regulating questions of citizenship conforms to Article 6.3 of the Constitution and, therefore, does not constitute unlawful discrimination.

Summary:

The National Election Commission (NEC) took a decision to certify a document for the collection of signatures, a document submitted as part of an initiative of the Hungarian World Federation. According to the initiative, a referendum was to be organised relating to the acquisition of citizenship by Hungarians living abroad with the following question:

“Do you want the Hungarian Parliament to pass an Act enabling any non-Hungarian citizen not living in Hungary, who claims to be of Hungarian nationality, and whose Hungarian identity can be certified by a “Hungarian certificate” (Article 19 of the Act LXII of 2001) or by any other method defined in the proposed Act, to acquire Hungarian citizenship with preferential naturalisation, if the person so requests?” (In this case nationality and citizenship are not synonyms; nationality indicates the person’s ethnic origin).

An objection was filed with the Constitutional Court against the decision of the NEC, alleging that no national referendum could be held on that question, since it (or as a result of it, the Act) would on one side be against international treaties, on another side violate Article 70/A.1 of the Constitution (on non-discrimination), and finally, that the wording of the question was difficult and ambiguous.

According to the petitioner, preferential treatment concerning naturalisation was against Article 5 (non-discrimination clause) of the European Convention on Nationality (henceforth, “the Convention”). (For the purpose of that Convention, “nationality” means the legal bond between a person and a State and does not indicate the person’s ethnic origin: Article 2 of the Convention). The Constitutional Court first referred to the Nottebohm Case of the International Court of Justice and to the European Convention on Human Rights. According to the case-law of the European Court of Human Rights, the non-discrimination clause in Article 14 ECHR is not violated where a difference in treatment is based on the inequality of the cases,

where it has objective justification, and where the aim sought by the treatment is proportionate with the means employed. Granting citizenship by naturalisation is not connected with the any of the rights enumerated in the European Convention on Human Rights. Consequently, in the event of a successful referendum, the resulting Act would not be against Article 14 ECHR.

The Constitutional Court then referred to the Explanatory Report of the Convention on Nationality, according to which not all cases in which states grant certain advantages in relation to the acquisition of citizenship amount to a violation of the non-discrimination rule. The Court held that the advantage was substantiated when granted on the basis of knowledge of the national language, descent or place of birth. The Explanatory Report referred to the fact that the Convention itself laid down preferential treatment in Article 6.4 (under this article, a state party shall facilitate in its internal law the acquisition of its nationality for − among others − spouses of its nationals, persons who were born on its territory and reside there lawfully and habitually or for stateless persons). In that respect, the Constitutional Court surveyed the preferential rules of some European states. As a result, the Constitutional Court considered that in the event of a successful referendum, the question on the document for collecting signatures would add a new kind of preferential naturalisation to the already existing ones, or it would regulate preferential naturalisation and it would incorporate the case in the document into the list of new resolutions. Consequently, the question was not against Article 28/C.5 of the Constitution.

The Constitutional Court did not accept the petitioner's argument that a referendum would lead to the creation of an Act that would be against the constitutional provision of non-discrimination.

Finally, the Constitutional Court was of the opinion that the wording of the question in the given case met the grammatical requirements of unambiguity; consequently, the legislative duty of the Hungarian Parliament would be easy to understand. For that reason, the Court rejected the petitioner's objection with respect to that issue and affirmed the decision of the NEC.

Justice Mihály Bihari delivered a concurring opinion, in which he stated some ideas of fundamental importance as to the decision's reasoning in relation to non-discrimination and granting advantages.

Justice István Kukorelli delivered a dissenting opinion, in which he stated that the reasoning in the explanation for the Constitutional Court's majority decision was unjustifiably based on the advantages with respect to naturalisation already existing in the Act on Citizenship. That did not follow from the question to be put to referendum. The legislative power has the possibility to further facilitate the preconditions of acquiring citizenship in certain cases, and to make it easier in comparison with the existing rules by securing exemptions from some of the objective conditions of the Act on Citizenship. That, however, could not violate the Constitution or any international legal obligations. Nor could it result in an exemption secured by legislation from all objective conditions for acquiring citizenship in favour of a certain group of individuals. On the basis of the question to be put to referendum, people granted preferential naturalisation would be entitled to preferential naturalisation simply because they claimed to be ethnic Hungarians, irrespective of their place of residence, place of birth, mother-tongue or descent. Referring to nationality (ethnicity) as the sole condition for acquiring citizenship did not amount to justified grounds for preferential treatment on the basis of the Convention. Being ethnic Hungarian in itself was not sufficient for the verification of a close, real (effective) relationship between the citizen and the state, as required in the *Nottebohm* Case.

Languages:

Hungarian.

Identification: HUN-2004-1-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 30.03.2004 / **e)** 9/2004 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2004/38 / **h)**.

Keywords of the systematic thesaurus:

5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.5.1.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Arrest.

Keywords of the alphabetical index:

Police, firearm, use.

Headnotes:

The right to use firearms is justified and constitutional where supported by the fact that the person to be captured has previously violated the right to life by taking the life of another person.

The provision providing for the right of a police officer to use firearms against a person whose behaviour points to a direct use of firearms or other dangerous instruments against others is unconstitutional insofar as the expression "other dangerous instruments" can be interpreted too broadly and make the use of firearms possible even in cases where it would otherwise be unnecessary. The use of firearms by the police can be constitutional only against weapons and other instruments that may lead to taking the life of another.

Summary:

Several petitions have been filed with the Court concerning the Police Act of 1994.

Article 54.h of the Police Act permits the use of firearms for capturing a person who has committed a crime against humanity or the state, and preventing that person's escape. According to the Court, the constitutionality of the use of firearms was substantiated by the fact that the person involved had previously violated the right to life by taking another person's life. However, since exterminating persons did not appear in the statutory provision of a crime against the state, the Court stated that in dealing with such cases the use of firearms was not justifiable, and that the provision violated the right to life. Among crimes against humanity, some include the extermination of persons as a fact of the case. Here, Article 54.g, which concerns such cases, can be applied. Consequently, the Court found the police's use of firearms unjustifiable in cases of crimes against humanity.

Article 54.g of the Police Act permits the use of firearms against a person whose behaviour points to a direct use of firearms or other dangerous instruments against others. In the Court's view, that provision would make it possible to use firearms even if the behaviour of the person involved hinted at the direct use of an instrument in his/her possession that is incapable of causing death, but is nevertheless considered a dangerous instrument against others by the police officer concerned.

Article 54.j of the Police Act states that it is legal to use firearms to prevent the escape, the forcible rescue of a person captured, arrested or detained on the basis of a judicial decision for committing crime, with the exception of cases where the person is under-age, independent of the seriousness or nature of the crime committed by the person. This provision applies to detainees and persons who take part in the rescue. The Court held that the police had to provide for the secure custody of the detainee, so as to avoid his/her escaping. Where negligence during custody leads to the escape of a person who has not been called to legal account, the rectification of that negligence may not involve the use of any instrument (firearm) that is capable of causing death. However, the Court did not find unconstitutionality in cases of a person taking part in a forcible rescue, since such a person would necessarily participate in an offensive initiative, and during a forcible rescue, the lives or health of others would be endangered.

According to Article 54.g of the Police Act, a police officer may use firearms for the prevention of the escape of or for the capture of a person who has deliberately taken the life of another. In that respect, the Court stated that a person who had violated the right to life by taking another's life was not and could not be put outside the sphere of law, and that that person took the risk that his/her own life would be endangered by a justifiable use of firearms against him/her. The justification for using firearms does not arise from the effectiveness of law enforcement or criminal procedure, but from the requirement of the right to life: a person who has taken the life of another has to face criminal proceedings.

According to the petitioner, under Article 11.1 of the Police Act a police officer's duty to protect "public security and internal order, even by risking his/her own life" meant the complete and irrevocable denial of a police officer's right to life. The Court stated that the impugned provision used the term "risking… life" in connection with the practice of a voluntarily chosen profession. One of the requirements of that profession is that police officers must protect public security and public order, even at the risk of their own lives.

Article 17.2 of the Police Act sets out that when using coercive instruments, death and injury must be avoided, if possible. In the petitioner's opinion, that provision potentially allowed manslaughter, which violated Article 54.1 of the Constitution. According to the Court, the expression "if possible" did not amount to a prohibition. Aside from the negative content, that restraint also had some permitting content. The provision in question was a recommendation concerning the method of the dispensation of justice, a provision which at the same time had to be

interpreted in association with other provisions of the Police Act relating to the proportionality of coercive actions and actions to be taken preceding the use of firearms. Focusing on the words "if possible" in that context had no constitutional relevance.

The petitioner argued that Article 19.1 of the Police Act violated Article 54.1 of the Constitution because the legal protection it granted set out that the justification of measures carried out by the police could not be questioned at the time those measures were being carried out. In the Court's view, in order for the state's public order and public security to be protected, the body guarding public order and public security had to be granted the effective means to do so. That requirement, which served public interests, justified Article 19.1 of the Police Act, which requires everyone to submit to police measures aiming at the enforcement of legal rules and to obey a police officer's orders. Assuming the legitimacy of police measures is in fact a kind of legal protection that can, however, subsequently be refuted by crosschecking; consequently, there is a legal remedy.

In the case of rules concerning the use of firearms against a person in a crowd, Article 57.2 excludes unlawfulness in a situation where the person hit has not left the spot upon receiving a police warning. Ignoring a police warning is an individual's personal choice, which results in a person's consciously taking the risk of losing his/her life, and as a result, any possible consequences must be borne by the individual.

Chief Justice Holló delivered a dissenting opinion, in which he disagreed with the majority decision rejecting the unconstitutionality of Articles 17.2 and 54.g. In his opinion, those provisions were unconstitutional. Justice Kukorelli joined the dissenting opinion.

Justice Vasadi also delivered a dissenting opinion, stating in all questions in which the Court made a declaration of unconstitutionality, the Court should have rejected the proposals. At the same time, she believed that Article 57.2 of the Police Act violated the right to life.

Languages:

Hungarian.

Identification: HUN-2004-1-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 07.04.2004 / **e)** 12/2004 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2003/43 / **h)**.

Keywords of the systematic thesaurus:

1.2.4 **Constitutional Justice** – Types of claim – Initiation *ex officio* by the body of constitutional jurisdiction.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
5.3.24.1 **Fundamental Rights** – Civil and political rights – Right to administrative transparency – Right of access to administrative documents.

Keywords of the alphabetical index:

Data, public, access / Transparency, decision-making process.

Headnotes:

The restriction on the availability of public data (information) concerning the preparation of decisions is not justifiable after a decision has been taken on the majority of the documents associated with the cases. From this, it follows the publication of data associated with the preparation of decisions is not an obstacle to the "quality", "effectiveness" or independent nature of public servants' work. Here, the emphasis is put on creating a transparent administration that is responsible to society and devoid of corruption, as well as on the further use of information.

Summary:

The petitioners challenged Article 19.5 of the Act on the Protection of Personal Data and the Freedom of Information (Act on Data Protection), according to which any data created for internal use or associated with the preparation of decisions is not to be made public within twenty years of its being handled unless the law requires otherwise or the leader of the body permits it to be made public earlier. The petitioners also challenged Article 4.1 of the Act on State and Official Secrets (Act on State Secrets), which contains the definition of official secrets.

According to the petitioners, the provisions in question were "elastic clauses", and their wording, which was too general, violated Article 61.1 of the Constitution (on the right to know information of public interest) and Article 8.2 of the Constitution (on the limits of the limitation of fundamental rights).

After reiterating its previous decisions concerning restrictions on the publication of public data and the test to be applied in the limitation of fundamental rights, the Constitutional Court stated that neither the automatic restriction on the publication of data handled in association with the preparation of decisions, nor the definition of official secrets violated the fundamental right to know public data. As regards the first, the Court referred to the contents of the Constitutional Court's Decision no. 34/1994 [HUN-1994-2-010], and stated that the automatic restriction on publication was to guarantee the quality and effectiveness of public servants' work by permitting public servants to operate informally and independent of the pressure of publication. That, in fact, meant a sort of facilitation of the work of persons handling data of public interest, since decisions on the secrecy of information in the preparation of decisions needed not to be made on a case-by-case basis at the time the information was being created. In relation to official secrets, the Constitutional Court held that that kind of restriction on publication served the purpose of promoting the undisturbed nature of the work of the state body and protecting that body against undue influence. Moreover, there were adequate guarantees ensuring that the legal limitation was not arbitrary: the list of the kind of information classified as secret was public; the restriction could only be made for as long as necessary; and it had to be reviewed regularly. The real guarantee was the possibility of judicial review of the justification of the classification of the information as secret. On that basis, the Constitutional Court rejected the request of the petitioner to annul the impugned provisions.

At the same time, the Constitutional Court initiated *ex officio* proceedings concerning Article 19.5 of the Act on Data Protection to examine whether it contained the requisite legal guarantees for the exercise of the fundamental right. The Court found that the restriction on the availability of public data concerning the preparation of decisions was not justifiable after a decision had been taken on the majority of the documents associated with the cases. From that, it followed that making the data associated with the preparation of decisions public was not an obstacle to the "quality", "effectiveness" or independent nature of the work of public servants. The emphasis was put on creating a transparent administration that was responsible to society and devoid of corruption, and as well as on the further use of information. The impugned part of the Act on Data Protection, however, did not differentiate between restrictions before and after decision-making. Consequently, the restriction was based only on formal considerations. The system of guarantees was rather imperfect (the classification of the documents as secret could stand for an indefinite period, since storing itself could also be considered handling). The expressions "preparation of decisions" and "for internal use" lacked the requisite precision, and judicial review did not amount to an examination of the substance. Thus, the Constitutional Court stated that by neglecting the regulation of the system of guarantees, the legislature created an unconstitutional situation. The Court gave the legislature until 31 December to remedy that neglect.

Cross-references:

- Decision no. 34/1994, *Bulletin* 1994/2 [HUN-1994-2-010].

Languages:

Hungarian.

Identification: HUN-2004-1-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 25.04.2004 / **e)** 18/2004 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2004/70 / **h)**.

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Hatred, incitement / Freedom of expression, regulation / Public order, threat.

Headnotes:

When regulating hate speech, the legislator should take into account that the freedom of speech may be limited by criminal sanctions only in cases of what is known as the most dangerous conduct, that is to say, behaviour capable of stirring up such intense emotions in the majority of the people and, which

upon giving rise to hatred, might result in the endangering of fundamental rights, which, in turn, could lead to the disturbance of the social order and public peace (this danger must be clear and present).

Summary:

The subject of the case was the amendment of the Act on the Criminal Code, which was accepted on 8 December 2003 by the parliament and referred to the Constitutional Court by the President of Hungary. The amendment changed several elements of Article 269 of the Criminal Code on incitement to racial hatred, and completed it with the new paragraph 2.

Article 269 of the Criminal Code in force provides that anyone who, before a large public audience, incites hatred against the Hungarian nation, any other nationality, people, religion or race, or certain groups among the population commits an offence punishable by up to three years' imprisonment.

Article 269.1, as amended, would provide that anyone who, before a large public audience, inflames to hatred or calls for violent action against any nation, any other nationality, people, religion or race, or certain groups among the population commits an offence punishable by up to three years' imprisonment. Under the new paragraph 2, someone who publicly insults the dignity of a person because of his or her national, racial, ethnic or religious affiliation could be found guilty of a misdemeanour and be sentenced to up to two years' imprisonment.

Before the promulgation of the law in question, the President of Hungary challenged the above-mentioned provisions. According to the President, Article 269.1 violated Article 61.1 of the Constitution on the freedom of speech for the reason that the expression "inflame to racial hatred" risked lowering the threshold of punishability by the interpreting courts. As to the behaviour referred to in the term "calls for violent action", that term was unconstitutional, as it did not require the violation of individual rights. In the President's opinion, Article 269.2 also violated freedom of speech as it protected the public peace only in a way that was abstract and too general.

The Constitutional Court first had to resolve the issue whether changing the wording of the provision from "incite racial hatred" into "inflame to racial hatred" in Article 269.1 lowered the threshold of punishability. The Court emphasised that on the basis of its Decisions nos. 30/1992 and 12/1999 [HUN-1999-3-003], the legislator could limit freedom of speech by criminal sanctions only in the case of what was known as the most dangerous conduct. The Court also stressed that freedom of speech could not be restricted in a way as to lower the legal regulation's threshold of punishability under the limit of what was still considered constitutional.

The Court considered that in the case under review, the purpose of the legislator was to include in the term "inflame to hatred" not only the most dangerous conduct. The insertion of the term "inflame to hatred", the further emphasis on the call for violent action, and the joint treatment of those two new kinds of conduct of perpetration clearly indicated the legislator's intention to make punishable conduct that fell outside the concept of incitement to hatred, as defined in Decision no. 30/1992 of the Constitutional Court. By doing so, the legislator also made punishable behaviour that fell within the scope of freedom of expression and thus unnecessarily limited Article 61.1 of the Constitution.

When examining the term "calls for violent action", the Constitutional Court emphasised that the conduct of perpetration did not reach the level of punishability, and that the threat of violating a particular individual right was not a condition for committing the crime. The legislator wanted to make punishable the attempt to persuade others to take violent action. Apart from that, the disturbance of the public peace was not required for the commission of the crime, nor did the call for violent action have to be one that was fit for the purpose of disturbing the public peace. Endangering the public peace in such an abstract way did not justify the use of criminal sanctions.

Finally, the Court also examined the constitutionality of Article 269.2, under which a person who publicly insults the dignity of another because of the latter's national, racial, ethnic or religious affiliation could be found guilty of a misdemeanour and be sentenced to up to two years' imprisonment. It stated that according to its established practice, the expression of an opinion in the form of disparagement that did not reach the level of incitement to hatred was not punishable, since it fell within the scope of the freedom of expression (Article 61.1 of the Constitution). The Court also considered that when choosing the criminal sanctions to protect the right to human dignity and public peace against hate speech, the legislator did not choose the least restrictive means to limit the freedom of speech, but instead restricted the freedom of speech disproportionately. The Court reiterated its reasoning in Decision no. 30/1992 that abusive language needed to be answered by sanctions for which the payment of a large sum of damages would be considered as adequate. Criminal sanctions could be used for the defence of other rights and only when unavoidably necessary;

however, they were not to be used as a means of shaping public opinion as to the manner of political debate.

Furthermore, the Court stressed that not all disparagements or humiliations violating human dignity on the basis of ethnical, racial or religious grounds amounted to a direct and obvious danger of disturbance of the public peace. In the absence of an actual breach of the public peace, the violation of the public peace remains an assumption, which was not enough for the limitation of the fundamental right to free speech. Consequently, both Article 269.1 and Article 2 were declared unconstitutional.

Cross-references:

- Decisions nos. 30/1992 (to be published in the *Special Bulletin*) and 12/1999, *Bulletin* 1999/3 [HUN-1999-3-003].

Languages:

Hungarian.

Italy
Constitutional Court

Important decisions

Identification: ITA-2004-1-001

a) Italy / **b)** Constitutional Court / **c)** / **d)** 13.01.2004 / **e)** 24/2004 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette) / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

1.1.3 **Constitutional Justice** – Constitutional jurisdiction – Status of the members of the court.
3.9 **General Principles** – Rule of law.
3.18 **General Principles** – General interest.
4.4.4.1.1.3 **Institutions** – Head of State – Status – Liability – Legal liability – Criminal liability.
4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.
4.6.10.1.3 **Institutions** – Executive bodies – Liability – Legal liability – Criminal liability.
5.2 **Fundamental Rights** – Equality.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.

Keywords of the alphabetical index:

Council of Ministers, President, criminal proceedings, suspension, duration / Senate, Speaker, criminal proceedings, suspension, duration / Constitutional Court, President, criminal proceedings, suspension, duration.

Headnotes:

The principle of equality admits of different rules governing different situations. However, where appropriate, it must be verified that a difference in treatment provided for by law in different situations does not undermine fundamental values of the legal system. In the case under consideration the legislature sacrificed equal treatment before the courts, a fundamental principle under the rule of law, for the sake of the need to protect the highest state officials from the consequences of being accused in

criminal proceedings. The fact that suspension of proceedings was automatic prevented state officials from continuing to hold office (as was their right under Article 51 of the Constitution) if they wished to be able to prove their innocence through the courts. The rights of civil parties to proceedings, who had to endure the trial's suspension, were also sacrificed.

Justice must be administered within a reasonable time, as expressly required by Article 111 of the Constitution since the constitutional reform of 1999. Otherwise, the right of action and the right to a fair trial were jeopardised, as the Court had not failed to point out in Judgment no. 354 of 1996 concerning suspension of a trial for an indefinite period.

By treating the Speakers of the two Chambers of Parliament, the President of the Council of Ministers and the President of the Constitutional Court differently from other members of the organs over which they presided, the provision referred to the Court drew a distinction which was not provided for by the Constitution and which breached the principle of equality of members of the same constitutional body.

Summary:

The Milan Court, before which criminal proceedings were pending against the President of the Council of Ministers, Mr Silvio Berlusconi, in respect of events dating back to before he took office, raised the question of the constitutionality of the second paragraph of Article 1 of Law no. 140 of 20 June 2003, in the light of the first paragraph of the same section, since, without amending by way of a constitutional law. Articles 90 and 96 of the Constitution (respectively concerned with the President of the Republic's liability for high treason or breaches of the Constitution and with offences committed by the President of the Council of Ministers or by ministers in the performance of their duties), it provided for the suspension, as from its entry into force, of criminal proceedings pending against the President of the Republic, the Speaker of the Senate or the Chamber of Deputies, the President of the Council of Ministers or the President of the Constitutional Court, no matter what stage those proceedings had reached and regardless of the nature of the offence (except where linked to the performance of their duties), which could concern events dating back to before they took office. The suspension was to last for the entire duration of their term of office.

The Court found that, by providing for an automatic, general suspension of proceedings pending without fixing any time-limit, the legislation in question violated:

1. Article 3 of the Constitution with reference to Article 112 of the Constitution, whereby initiating criminal proceedings was mandatory;
2. Articles 68, 90 and 96 of the Constitution, since, without having had recourse to a constitutional law, it conferred on those concerned by those articles prerogatives not provided for in the Constitution;
3. Articles 24, 111 and 117 of the Constitution, since it deprived the accused and the civil parties of the right to a fair hearing, in breach of the European Convention on Human Rights.

The Court considered the various circumstances in which suspension of criminal proceedings was already provided for under Italian law with the aim of guaranteeing the conditions necessary to fair conduct of the trial, even if that entailed a temporary suspension of the rights at stake (as with suspension of proceedings in cases where the accused was incapacitated and accordingly unable to take a conscious role in the trial). Parliament could naturally introduce other cases of suspension, but not without verifying beforehand the conditions to be fulfilled by such suspensions and the purposes served.

The aim of the legislation referred to the Court was to ensure that the state's highest officials could perform their duties with the necessary peace of mind by sparing them the obligation to appear in court. It accordingly served a significant interest, worthy of being pursued in accordance with the fundamental principles of the rule of law.

The Court examined the characteristics of a suspension, as governed by the legislation before it. Such a suspension was general in nature, since it concerned all offences perpetrated before the official took office or during his or her term of office (in the latter case, the offences must not have been committed by the President of the Republic or the President of the Council of Ministers in the performance of their duties, since Articles 90 and 96 would then apply); it was also automatic, since it was applicable whenever the holders of any of the above offices were accused, irrespective of the specific circumstances of the case; lastly, its duration was not foreseeable in that the same person could enjoy immunity from proceedings while turn by turn holding all of the offices to which the measure applied.

Article 1, paragraph 2, of Law no. 140 of 20 June 2003, which provided for the suspension of criminal proceedings pending against the Speakers of the two Chambers of Parliament, the President of the Council of Ministers and the President of the Constitutional Court, was accordingly ruled unconstitutional, with reference to Articles 3 and 24 of the Constitution.

Pursuant to Article 27 of Law no. 87 of 1953, the Court also declared unconstitutional paragraph 1 of the same section, establishing the principle of the above officials' immunity from criminal proceedings, and paragraph 3, which became totally inapplicable if the two above-mentioned paragraphs no longer existed.

Supplementary information:

A request for an abrogative referendum was lodged concerning Article 1 of Law no. 140 of 20 June 2003 and was found admissible by the Court, pursuant to Article 75 of the Constitution, in Judgment no. 25 of 2004, [ITA-2004-1-002].

Languages:

Italian.

Identification: ITA-2004-1-002

a) Italy / **b)** Constitutional Court / **c)** / **d)** 13.01.2004 / **e)** 25/2004 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette) / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

1.3.4.6.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Admissibility of referenda and other consultations – Referenda on the repeal of legislation.
4.6.10.1.3 **Institutions** – Executive bodies – Liability – Legal liability – Criminal liability.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Council of Ministers, President, criminal proceedings, suspension / Parliament, Speaker, criminal proceedings, suspension / Constitutional Court, President, criminal proceedings, suspension / Referendum, abrogative, admissibility.

Headnotes:

The request for a referendum – held to satisfy the requirements of the law on referendums by the Central Office for Referendums of the Court of Cassation – was found admissible. In the light of its provisions, the legislation concerned by the request for a referendum did not fall within the scope of the laws for which Article 75 of the Constitution rules out abrogative referendums (tax or budget laws, amnesties, pardons or ratification of international treaties) or those for which referendums were also precluded under the Court's case-law, on account of their close links with the above-mentioned laws. Furthermore, the request satisfied the conditions laid down by the Constitutional Court: it did not concern a constitutional law or law amending the constitution, or a “constitutionally necessary” law or one with “constitutionally mandatory” substance; it possessed the characteristics of homogeneity (voters had to choose for or against repealing a measure in favour of the highest state officials), clarity and unambiguity (the provisions to which the proponents of the referendum objected were contained in a single section, the very section which was the subject of the referendum).

Summary:

The Constitutional Court was asked to rule on the admissibility of a request for an abrogative referendum concerning Article 1 of Law no. 140 of 20 June 2003, entitled “Provisions implementing Article 68 of the Constitution and regarding criminal proceedings against the highest state officials”.

Without amending Articles 90 and 96 of the Constitution (respectively concerned with the President of the Republic's liability for high treason or breaches of the Constitution and with offences committed by the President of the Council of Ministers or by ministers in the performance of their duties), the first paragraph of the above-mentioned section provided that the President of the Republic, the Speaker of the Senate, the Speaker of the Chamber of Deputies, the President of the Council of Ministers and the President of the Constitutional Court would be immune from criminal proceedings in respect of any offence (except where linked to the performance of their duties), even concerning events dating back to before they took office.

Subject to Articles 90 and 96 of the Constitution, the second paragraph provided for the suspension, from its entry into force, of criminal proceedings pending against the President of the Republic, the Speaker of the Senate or the Chamber of Deputies, the President of the Council of Ministers or the President of the Constitutional Court, no matter what stage they had reached and regardless of the nature of the offence (except where linked to the performance of their duties), which could concern events dating back to

before they took office. The suspension was to last for the entire duration of their term of office.

The third paragraph, which was purely accessory in nature, provided for suspension of the limitation period in the above cases.

The Court recalled that, in its Judgment no. 24 of 2004, [ITA-2004-1-001], it had held that the legislation concerned by the referendum request was unconstitutional. In that connection, it pointed out that it was not for it to assess how its decision would affect the Central Office for Referendums' order recognising the lawfulness of the request for a referendum: such an assessment lay outside the limits of its jurisdiction to determine the admissibility of the request for a referendum, pursuant to Article 75 of the Constitution.

Languages:

Italian.

Japan
Supreme Court

Important decisions

Identification: JPN-2004-1-001

a) Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 10.11.1999 / **e)** (o) (Gyo-Tsu), 35/1999 / **f)** Judgment on a case concerning: 1. The constitutionality of the small constituency system for the election of the House of Representatives; 2. The constitutionality of provisions of the Law on Public Elections that allow election campaigns by political parties that have presented candidates for the election of members of the House of Representatives in small constituencies / **g)** *Minshu* (Official Collection of the decisions of the Supreme Court of Japan on civil cases), 53-8, 1704 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.3.1 **General Principles** – Democracy – Representative democracy.
3.19 **General Principles** – Margin of appreciation.
3.20 **General Principles** – Reasonableness.
4.9.3 **Institutions** – Elections and instruments of direct democracy – Electoral system.
4.9.4 **Institutions** – Elections and instruments of direct democracy – Constituencies.
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.
5.3.40.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Election, constituency, boundary, demarcation.

Headnotes:

1. The small constituency system adopted by the Law on Public Elections for the election of the House of Representatives is not against the principle of the people's representation as provided by the Constitution.

2. Provisions of the law allowing election campaigns that include the broadcasting of political views by political parties that have presented candidates for the election of members of the House of Representatives in small constituencies result in a difference concerning the election campaign between candidates who belong to a political party and those who do not, but it cannot be determined that this difference is of such a degree that it is not generally reasonable; therefore, that difference is not against Article 14.1 of the Constitution providing for the principle of equality.

Summary:

In 1994 the Law on Public Elections was amended, and the system of election for members of the House of Representatives underwent a change from a medium-size constituency system with one vote for each voter to a parallel system of a small single constituency and the proportional representation system. Under this system, each voter was given one vote for the members of the House of Representatives from the single constituency and another vote for the proportional representation system respectively, and the elections for both systems were to be held simultaneously. Accordingly, amendments were made in relation to the requirements concerning the methods used in the election campaign, etc.

The validity of the election was challenged in a case brought by electors alleging that the provisions of the amended law were against the Constitution and null and void, and consequently, the 1996 small constituency election in the electors' constituency, which was based on that system, was null and void.

The Supreme Court ruled as follows and dismissed the appeal. (On the issue of item 2 of the Headnotes, there are dissenting opinions.)

The Constitution provides that matters related to the election of the Diet must be determined by law, and leaves the actual decision on the scheme of the election system of the members of both houses to the broad discretion of the Diet. Where the Diet adopts a new system of election, the system is unconstitutional only where the choice of the actual system goes beyond the discretion of the Diet – even when its broad discretionary power is taken into consideration.

1. The small constituency system can be regarded as one of the rational methods of reflecting the will of the people on the allocation of seats of the Diet by election. The adoption of such a system does not exceed the scope of the discretion of the Diet and cannot be regarded as unconstitutional.

2. The Constitution requires equality of the value of the vote. However, it is not the sole and absolute criterion for designing the system of election.

When demarcating the boundaries of constituencies, the most important and fundamental criterion is to keep the number of voters or the population per member as equal as possible, but the Diet is empowered to consider other elements. Prefectures are unavoidable and fundamental elements, as are density of population, geographical elements, etc. Therefore, the fact that the Diet has taken all these elements into account and determined the criteria for the demarcation of constituency boundaries as provided by the law cannot be regarded as the Diet's having exceeded its scope of discretion. Where the value of the vote of each voter is unequal under the system, and where the system is such that it cannot be regarded as generally reasonable, even when taking into account various elements which the Diet is empowered to consider, such inequality is presumed to be beyond the reasonable discretion of the Diet, and unless special grounds which justify such inequality are presented, it has to be regarded as unconstitutional.

The demarcation of constituencies by the amended law was prepared in accordance with two criteria. The first criterion requires that the ratio of the population numbers between constituencies should be less than 1:2, although administrative division, geography, transportation, etc., are to be taken into account. The second criterion allocates one seat to each prefecture prior to the demarcation of the boundary, and then allocates the remaining seats to prefectures in proportion to the population. Consequently, the said provision has given adequate consideration to the equality of the value of the vote.

The difference in population between constituencies was at the maximum 1:2.137 and the survey most recent to the election in question in this case showed 1:2.309. The fact that at the time close to the amendment, the difference already exceeded 1:2 leaves room for argument. However, that difference in the value of the vote cannot be said to have reached a level of unreasonableness in general, and therefore, the provision cannot be found to be against the Constitution.

3. Political parties are the indispensable element of the basis of democracy in the Diet and are the most influential medium for formulating the political will of the people. Therefore, in determining the design of the electoral system, making the electoral system primarily based upon policies and political parties falls within the scope of discretion granted to the Diet. Furthermore, the issues of who may conduct an

election campaign and the manner in which it may be conducted fall within the discretion of the Diet.

The Constitution requires that each candidate be treated in an equal manner in relation to election campaigns, but it does not prohibit the creation of differences based upon reasonable grounds.

According to the amended law, in small constituency elections, candidate-presenting parties as well as candidates are allowed to conduct election campaigns. It is inevitable that there are differences in the election campaigns between candidates who belong to candidate-presenting parties and those who do not. Only where such differences reach a level that can never be regarded as reasonable in general, should the creation of such differences be regarded as exceeding the scope of Diet's discretion.

Differences which can be seen in the election campaign such as campaigning by using cars, loud speakers, documents, prints, etc. constitute a level of differences that inevitably emerge as a result of allowing election campaigns to be conducted by candidate-presenting political parties. Considering the fact that a political broadcast is merely a part of the election campaign, and candidates who do not belong to candidate-presenting parties can also conduct the remaining election campaign adequately and in a manner that is not inadequate for conveying political views to the voters, it is not possible to find that the differences between the candidates in the provisions concerning election campaigns have reached a level that they cannot be regarded as reasonable, and it cannot be said that these provisions have exceeded the limits of the reasonable discretion of the Diet. Therefore, provisions of the amended law cannot be regarded as unconstitutional.

Languages:

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

Identification: JPN-2004-1-002

a) Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 06.09.2000 / **e)** (o) (Gyo-Tsu), 1189/1993 / **f)** Judgment on a case concerning the constitutionality of the provision on apportionment of seats of the Upper House / **g)** *Minshu* (Official Collection of the decisions of the Supreme Court of Japan on civil cases), 54-7, 1997 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.19 **General Principles** – Margin of appreciation.
3.20 **General Principles** – Reasonableness.
4.5.1 **Institutions** – Legislative bodies – Structure.
4.5.3.1 **Institutions** – Legislative bodies – Composition – Election of members.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.3.4.1 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity – Scientific and medical treatment and experiments.

Keywords of the alphabetical index:

Election, constituency, size, unequal.

Headnotes:

Even if the revision of the provision on apportionment of the Upper House seats in accordance with the 1994 Law resulted in the largest gap between constituencies being 1:4.81 and 1:4.99 in terms of population size per member based on the results of the 1990 national census and the number of eligible voters per member at the time of the revision respectively, the revision cannot be judged to go beyond the bounds of the Diet's legislative discretion. Moreover, in view of the findings that the largest gap measured by population size based on the results of the 1995 national census was reduced to 1:4.79 and the largest gap measured by the number of eligible voters per member was 1:4.98 etc., the provision was not regarded as unconstitutional at the time of the election.

Summary:

1. The Upper House Election Law divided the 252 Upper House seats into 100 seats to be decided by national constituency voting and 152 seats to be decided by local constituency voting, and required the former to be elected on the basis of a nation-wide constituency and the latter to be elected on the basis of prefectural constituencies. The number of seats apportioned to each perfectural constituency should be an even number of at least two per constituency;

this is in line with the provisions of the Constitution that half the members of the Upper House are to be elected every three years and that an even number of seats are to be apportioned in proportion to the population of each constituency.

In reference to the largest gap of 1:6.59 of the number of voters per member between constituencies at the time of the 26 July 1992 election, a Grand Bench Judgment in 1996 pointed out that such a significant inequality had arisen that a question of unconstitutionality was raised. Consequently, using the results of the most recent national census, the law was revised to redress that disparity by limiting the number of constituencies subject to an increase/decrease in seats to the minimum possible and redefining the number of members to be re-elected so that the gap in terms of population size per member among constituencies based on population was reduced from a maximum of 1:6.48 to a maximum of 1:4.81.

The case at instance dealt with the validity of the election of the Upper House on 12 July 1998. At the time of the election, the largest gap of the number of voters per member was 1:4.98. The appellants were electors who complained that the equality of their right to vote, which is set out in Article 14.1 of the Constitution, was violated by the revised provision and alleged that the election that had been held on the basis of that provision was null and void.

2. The Supreme Court ruled as follows and dismissed the appeal. (There is a dissenting opinion.)

The Constitution calls for equality of the value of votes. However, it is not the sole and absolute criterion for designing the election system. Therefore, it should be construed that as far as what is specifically stipulated by the Diet is recognised as the rational exercise of its discretion, it is an unavoidable consequence that equality of the value of votes is undermined.

In line with the Constitution’s adoption of the bicameral system with a view to vesting the Upper House with unique elements in substance and function of its representation by way of differentiating its system of seat distribution from that of the Lower House, the system divides the Upper House seats into nationally-elected members (or members elected under the proportional representation system) and locally-elected members (or members elected by way of constituency voting). The system provides the former with the significance or function of intensively reflecting the will of the people comprising the unit. A prefecture can be defined as a unit with historical, economic, social integrity and substance and with political entity. Consequently, the Upper House election system set out in the Law cannot be said to lack rationality but can be affirmed as the rational exercise of the legislative discretion left to the Diet.

Consequently, even if the impugned provision caused disparities in the ratio of seats apportioned to each constituency and the number of voters or population size of the constituencies, which in turn undermined equality of the value of votes among constituencies to that extent, it is not possible to conclude that for that reason the impugned provision violates the provisions of the Constitution. Under the election system, one cannot avoid compromising the requirement of equality of the value of votes to a certain extent, in comparison to an election system that is based on the principle of apportionment in proportion to population size as the most important and essential criterion. Moreover, with the dynamic mobility of people at times undergoing dramatic social, economic changes, the issue how to reflect such demographic change in the election system, etc. requires complex and highly political deliberation and judgment, and the decision on such issues is left to the discretion of the Diet.

Therefore, it is appropriate to construe that the provision on apportionment of seats does not amount to a violation of the Constitution unless it is found to go beyond the legislative discretion that may be exercised – even when one takes into consideration that the situation concerns the Diet's discretionary power that is to be exercised on the basis of complex and highly political deliberation and judgment.

Under the Upper House election system, the requirement of equality of the value of votes is inevitably subject to compromise to certain extent, and there are a variety of factors to be taken into account for political or technical consideration of how to redress such disparity. Moreover, as to Upper House members (seats decided by constituency voting), it is deemed rational as legislative policy to fix the apportionment of seats for a longer period of time and bestow on the Upper House the function of steadily reflecting the people's interests and opinions in the Diet.

Even if that disparity remains unresolved after the revision, the inequality of the value of votes among constituencies as shown by the disparity is not deemed to have reached such a level that it should not be overlooked in the light of the importance of equality of the value of votes, and the revision is not deemed to be beyond the bounds of legislative discretion.

Furthermore, in the light of the aforementioned changing gaps measured by population size and number of voters per member under the provision since the enactment of the revision, there is no

reason to conclude that the provision on apportionment of Upper House seats reached such a level as to violate the Constitution at the time of the election.

Languages:

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

Kazakhstan
Constitutional Council

Important decisions

Identification: KAZ-2004-1-001

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 21.04.2004 / **e)** 4 / **f)** Concerning the Conformity of the mass media law of the Republic Kazakhstan with the Constitution of the Republic Kazakhstan. Resolution of the Constitutional Council of the Republic of Kazakhstan no. 4 of 21 April 2004 / **g)** *Kazakhstanskaya pravda* (Official Gazette) / **h)** CODICES (Kazakh, Russian).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Media, access / Media, media law.

Headnotes:

The restriction of the right to demand that a newspaper publish a correction or retraction to Kazak citizens only is unconstitutional.

Freedom of expression may be limited only by law and not by sub-statutory acts.

The revocation of mass media registration certificates without the possibility of appealing to a court is unconstitutional.

Summary:

1. Article 20.2 of the Constitution of the Republic of Kazakhstan states: “everyone shall have the right to freely receive and disseminate information by any means not prohibited by law”. The decision of the Constitutional Council of the Republic no. 12 of 1 December 2003 states: “the Constitution of the Republic of Kazakhstan differentiates the legal status of a person by using the terms “a citizen of the Republic of Kazakhstan”, “everyone”, “all”, “foreigners” and “persons without citizenship”. At the same time it is necessary to understand that where the text of the Constitution speaks of “everyone” and “all”, it means both citizens and non-citizens of Kazakhstan.

The Preamble of the law sets out: “the law... aims at the realisation of the right on the freedom of speech and the right to freely receive and disseminate information, which are established and guaranteed by Constitution of the Republic Kazakhstan”. The Constitutional Council considers that “citizen”, the term used in the law, narrows the application of the law and leads to a discrepancy between the contents of its preamble and Article 20.2 of the Constitution.

The provisions of Article 29.1, 29.4 and 29.5 of the law giving the right on demanding the publication of a correction or retraction only to citizens of the Republic do not correspond to the above-mentioned provisions and requirements of Article 18.1 of the Constitution (“everyone shall have the right to inviolability of private life, personal and family secrets, protection of honour and dignity”).

2. Article 5.1 of the law sets out that the freedom of speech and the right to freely receive and disseminate information by any means not prohibited by law amount to two of the main principles of mass media activity. The above-mentioned provisions of the law assume that freedom of speech and the right to freely receive and disseminate information may be restricted not only by law, but also by normative legal acts. That conflicts with Article 20.2 (“everyone shall have the right to freely receive and disseminate information by any means not prohibited by law”) and Article 39.1 of the Constitution (“rights and freedoms of an individual and citizen may be limited only by laws”), which provide guarantees from unlawful rule-making.

3. The restrictions of the freedom of speech laid down by the law, together with Article 8.4 of the law, enable the authorised body in the field of mass media to take a decision to revoke a television radio broadcasting licence and to revoke or annul a mass media registration certificate issued in proper legal form (Articles 24.4 and 12.11). The restrictive nature of those measures is such that they should only be imposed by the courts. That follows from Article 76.2 of the Constitution: “judicial power shall be extended to all cases and disputes arising on the basis of the Constitution, laws...”. That statement also reflects the legal positions in the normative decision of the Constitutional Council no. 7/2 of 29 March 1999: “the right is given to the court on the basis of the law to pronounce judgment ... allowing restrictions of some constitutional rights of individual and citizen”.

Consequently, Article 8.4 of the law allowing the authorised body to revoke mass media registration certificates conflicts with the general provisions, principles and rules of the Constitution safeguarding the constitutional rights on the freedom of speech (Articles 1.1, 12.1, 13.2, 20.1, 75.1 and 76.2 of the Constitution).

Accordingly, the Constitutional Council of the Republic held that the mass media law of the Republic of Kazakhstan adopted by the Parliament of the Republic on 18 March 2004 and submitted for signature to the President of the Republic of Kazakhstan on 25 March 2004 was not in accordance with the Constitution.

The Constitutional Council also noted that there were some difficulties with the law in relation to questions of legal techniques.

Languages:

Kazakh, Russian.

Latvia
Constitutional Court

Important decisions

Identification: LAT-2004-1-001

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 30.01.2004 / **e)** 2003-20-01 / **f)** On the Compliance of Articles 10, 11.3 and 11.4, 14 and Items 6 and 8 of the Transitional Provisions of the Law on the Preservation and Protection of the Historic Centre of Riga with Articles 1 and 58 of the Constitution *(Satversme)* / **g)** *Latvijas Vestnesis* (Official Gazette), 17 (2965), 03.02.2004 / **h)** CODICES (English, Latvian).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
4.6.5 **Institutions** – Executive bodies – Organisation.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
4.8.8 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers.

Keywords of the alphabetical index:

Heritage, cultural, preservation, protection and development / UNESCO, World Heritage List / State administration, structure / Institution, consultative / Town, centre, planning.

Headnotes:

The need for the preservation, protection and development of the Historic Centre of Riga, which the UNESCO Committee of the World Heritage included in the World Heritage List, has priority over other interests of city development. Specific regulation of the above-mentioned area is therefore necessary and justified.

Consultative institutions are subordinate to the Cabinet of Ministers and are set up for the purpose of carrying out particular duties that are not connected with the use of the public power. Such consultative institutions, which involve both specialists and public representatives in their activities, deliver conclusions and opinions on particularly complicated cases before decisions on these cases are taken by State administrative institutions.

Summary:

The Law on the Preservation and Protection of the Historic Centre of Riga provides for the setting up of the Council for the Preservation and Development of the Historic Centre of Riga (henceforth − the Council) in order to promote the co-operation of institutions and adoption of decisions on issues concerning the preservation, protection and development of the Historic Centre of Riga and the surrounding area. The composition of the Council (on the proposal of the Minister of Culture) and its Statutes are approved by the Cabinet of Ministers. The Council is a public consultative institution with ten members. Decisions on projects involving any new construction, demolition of historical buildings, and reconstruction of buildings and structures as well as the erection and reconstruction of monuments in the Historic Centre of Riga are to be taken by the Council, until the development planning of the area of the Historic Centre of Riga comes into effect.

The submitter of the claim, the Riga Dome, pointed out that the parliament *(Saeima)* had adopted the impugned Law contrary to the State Administration Structure Law, the Law "On Local Authorities" and the European Charter of Local Self-Government, as well as against the objection of the ministries and the State President. The Dome argued that setting up of the Council ran counter to Article 58 of the Constitution, namely − it did not fit into the organised hierarchical system.

The Court held that in order to assess the compliance of the impugned norms with Article 58 of the Constitution, the following issues had to be clarified:

1. whether there was a need for specific legal regulation of the preservation and protection of the Historic Centre of Riga; and
2. should the Council, which had been set up in accordance with the Law on the Historic Centre of Riga, be included in the State Administrative Structure.

The Court pointed out that in order to take the decision whether specific legal regulation of the Historic Centre of Riga was needed, it had to examine not only the status of the Historic Centre of Riga but also the duties of the Republic of Latvia stemming from the national legal norms and the norms incorporated into the Convention [UNESCO 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (hereinafter referred to as "the Convention")], as well as the implementation of those legal norms.

On 4 December 1997 the UNESCO Committee of the World Heritage adopted a decision to include the Historic Centre of Riga in the World Heritage List. Incorporation of the Historic Centre of Riga into the UNESCO World Heritage List confirms the special and universal value of that cultural object and stresses the fact that its preservation is in the interests of the whole of humanity. Therefore, the Court found that the Historic Centre of Riga merited a specific approach.

Since the incorporation of the Historic Centre of Riga into the UNESCO World Heritage List, Latvia has undertaken all the duties under the Convention. In accordance with Article 5 of the Convention, Latvia has undertaken the duty of implementing a policy with the aim of giving the cultural heritage certain functions in the life of the community, of enshrining issues on the protection of that heritage into programmes, of setting up services for the protection of that heritage and other services to perform legal, scientific, technical, administrative and financial activities to protect that heritage. One of the most significant preconditions for reaching the above aims is the planning of the development of the particular area.

The Court considered that in order to secure the preservation and protection of the Historic Centre of Riga as world cultural heritage, independent and objective control over the construction was a must. As the Historic Centre of Riga lies within the administrative territory of the Riga local authority, the Dome must also take care of the implementation of the normative acts regulating preservation, protection and development of the cultural heritage of the territory. However, an analysis of the structure of the Dome revealed that the institutional structure of the Dome did not secure independent and objective control over construction in the Historic Centre of Riga.

The materials in the case showed that the Dome had not taken into account the requirements set out in normative acts in connection with the construction of new buildings or reconstruction of the existing ones (e.g. they had been built or rebuilt without any coordination with the Inspection, which is a requirement established by law) in the Historic Centre of Riga, and had failed to execute the duties undertaken by it in classification of the cultural heritage.

The Court held that the Law on the Historic Centre of Riga limited the “free hand” of the Dome in the sector of construction in the area of the Historic Centre of Riga. However, as the Dome had not been able to execute the duties envisaged in the normative acts, the limitation of the permanent function of the Dome in the sector of construction was justifiable and even necessary.

The Court pointed out that the structure of the state administration had to be set up in such a way as to function efficiently, democratically and in conformity with the law. Therefore, neither the State Administration Structure Law nor other normative acts prohibited the setting up of consultative institutions subordinate to the Cabinet of Ministers. When carrying out the functions envisaged in the impugned law, the Council, in fact, realises the role of a consultative institution.

The Court examined the status and the functions of the Council and held that Council both institutionally and functionally fit into the state administrative structure.

The Court declared the impugned law in conformity with Article 58 of the Constitution *(Satversme)*.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2004-1-002

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 09.02.2004 / **e)** 2003-21-0306 / **f)** On the Compliance of Items 2 and 6 of the Cabinet of Ministers 5 August 2003 Regulation no. 438 Amendments to the Cabinet of Ministers 13 May 1997 Regulation no. 180 By-law of the Guarantee (Reserve) Fund of Mandatory Civil Liability Insurance for Owners of Road Transport with Article 91 of the Constitution *(Satversme)* and Article 14 ECHR / **g)** *Latvijas Vestnesis* (Official Gazette), 21 (2969), 10.02.2004 / **h)** CODICES (English, Latvian).

Keywords of the systematic thesaurus:

3.25 **General Principles** – Market economy.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Entrepreneur, equal status / Insurance, fund, contribution.

Headnotes:

When regulating the performance of insurance companies in mandatory civil liability insurance for owners of road transport, the State must protect the interests of all companies in that market, regardless of the length of time the companies have been providing those services. Maintenance of an environment of free enterprise demands a comparison of the insurance companies in a market and not the consideration of the length of time a particular company has been active in the market.

Summary:

The Law On Mandatory Civil Liability Insurance for Owners of Road Transport (hereinafter − LIOR Law) envisages the setting up of the Guarantee (Reserve) Fund of Mandatory Civil Liability Insurance for Owners of Road Transport (hereinafter − the Guarantee Fund) and sets out that the Cabinet of Ministers shall approve the Statutes of the Guarantee Fund.

A previous version of the Cabinet of Ministers Regulation no. 180 "By-law of the Guarantee (Reserve) Fund of Mandatory Civil Liability Insurance for Owners of Road Transport" laid down that "the amount of a single contribution is 5 000 lati". The impugned act − the Cabinet of Ministers 5 August 2003 Regulation no. 438 Amendments to the Cabinet of Ministers 13 May 1997 Regulation no. 180 "By-law of the Guarantee (Reserve) Fund of Mandatory Civil Liability Insurance for Owners of Road Transport" substituted the figure "400 000" for the previous figure of "5 000". Consequently, under the impugned act the amount of a single contribution is 400 000 lati. The impugned norm provides: "By 1 September 2003 the calculation shall be based on the aggregate amount of deductions paid into the fund of each insurance company from the premiums of mandatory civil liability insurance for owners of road transport. If the aggregate amount is less than the amount of the contribution referred to in paragraph 14 of these Regulations, the insurance company shall pay within one year the balance into the Fund, making the relevant payments by the 15th of the last month of each quarter".

The submitter of the constitutional claim, the insurance stock company "If Latvia", challenged the conformity of that norm with Article 91 of the Constitution (henceforth − the Constitution) and Article 14 ECHR.

The submitter argued that the impugned norm created an unequal approach towards the insurance companies that had provided LIOR services for several years and those companies that had recently started to provide those services.

The Cabinet of Ministers pointed out that the increase in the single contribution was necessary to ensure the stability of the LIOR service market and to protect the interests of the insurance holders, as well as to implement the Directives of the European Union envisaging a higher limit on compensation to be paid out by insurance companies.

The Cabinet of Ministers submitted that not the activity in the LIOR service market but the length of time an insurance company had been active in it should be regarded as the decisive element in the situation. Insurance companies that had been active in the market for a longer period of time had made greater payments into the Guarantee Fund and − unlike the submitter or any other new company − had proved their stability.

With the reference to its 3 April 2001 judgment, the Court reiterated that the principle of equality did not allow the State institutions to adopt norms that permitted differentiated treatment of persons in equal and comparable circumstances without a reasonable ground. The principle of equality allows and even demands a differentiated approach towards persons in equal circumstances where an objective and reasonable ground exists for doing so. To assess whether the impugned norm complied with Article 91 of the Constitution, it had to be determined:

1. whether the impugned norm had a legitimate aim;
2. whether the insurance companies providing LIOR services were in equal and comparable circumstances; and
3. whether the impugned norm envisaged a differentiated approach and whether it had an objective and reasonable ground.

The Court did not agree with the view that the legitimate aim of the impugned norm was the protection of the interests of companies that had been active in the LIOR service market for a long time and had proved their stability. The Court considered that securing the stability of LIOR market was the legitimate aim of the impugned norm.

The Court stressed that insurance companies providing LIOR services carry out their activities in compliance with the LIOR Law. The objective of the LIOR Law is to regulate the legal relations between the owners of road transport and the insurers with the aim of protecting the property interests of the victims of road accidents. Maintenance of an environment of free enterprise demanded the comparison of

insurance companies as participants in the market and not the consideration of the length of time a particular company had been active in the LIOR market. Consequently, all the insurance companies providing LIOR services were in equal and comparable circumstances.

The Court found that the contributions to be made by the submitter were not equal to those made by the other members of the LIOR market; therefore, a differentiated attitude towards one of the participants of the market was unfounded and the principle of legal equality had been violated. The principle of legal equality would be observed if the single contribution into the Guarantee Fund were envisaged for all the participants of the market. Thus, the differentiated approach towards the participants of LIOR market was not objective, had no reasonable ground and had to be declared unlawful.

The Court declared the impugned norm as not in conformity with Article 91 of the Constitution *(Satversme)* and null and void as of the moment of its adoption.

Cross-references:

- Cf. decision in Case no. 2000-07-0409, *Bulletin* 2001/1 [LAT-2001-1-002].

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2004-1-003

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 09.03.2004 / **e)** 2003-16-05 / **f)** On the Compliance of the Minister of Regional Development and Municipal Affairs' Order no. 2-02/57 of 27 May 2003 on Suspension of the Enforcement of the Jūrmala City Dome's Binding Regulation no. 17 of 24 October 2001 on the Jūrmala Detailed Land-Use Plan for the Territory between the Bulduri Prospect, Rotas Street and 23-25 Avenues; the Minister of Regional Development and Municipal Affairs' Order no. 2-02/60 of 2 June 2003 on Suspension of the Enforcement of the Jūrmala City Dome's Binding Regulation no. 10 of 9 October 2002 on the Confirmation of the Detailed Land-Use Plan for the Public Centre "Vaivari" as well as the Minister of Regional Development and Municipal Affairs' Order no. 2-02/62 on Suspension of the Enforcement of the Jūrmala City Dome's Binding Regulation no. 18 of 7 November 2001 on the Confirmation of the Detailed Land-Use Plan for the Plot Bulduri 1001, Jūrmala with Article 1 of the Constitution *(Satversme)* / **g)** *Latvijas Vestnesis* (Official Gazette), 38 (2986), 10.03.2004 / **h)** CODICES (English, Latvian).

Keywords of the systematic thesaurus:

3.3 **General Principles** – Democracy.
3.10 **General Principles** – Certainty of the law.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.6.2 **Institutions** – Executive bodies – Powers.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.

Keywords of the alphabetical index:

Local self-government, regulation, suspension / Good administration, principle / Procedural economy, principle / Land, use, plan.

Headnotes:

The principle of legal certainty and the principle of good administration require that the Minister of Regional Development and Municipal Affairs use his/her authority to suspend an illegal binding regulation or another normative act issued by the city dome (rural district council) within a reasonable period of time. However, the State Administration, having found a violation of essential public interests, has not only the right but also the duty to act. The elimination of a violation of essential public interests shall be given priority over the principle of legal certainty.

Summary:

This is the first judgment to be delivered under Article 16.5 and 17.7.1 of the Constitutional Court Law. Even though there are no statements in the judgment about procedure, the judgment deals with matters that show the Court's appreciation for those very specific types of cases.

Three cases were joined into one case, dealing with three applications brought by the submitter, the Jūrmala City Dome (Council). The Jūrmala City Dome (Council) had adopted several binding regulations on the Detailed Land-Use Plan in Jūrmala concerning different territories. The Minister of Regional

Development and Municipal Affairs (hereafter – the Minister) subsequently passed three orders suspending the enforcement of those regulations. As reason for passing those orders, the Minister stated that the above-mentioned regulations of the Jūrmala City Dome (Council) violated the requirements of legal norms.

The Jūrmala City Dome (Council) contended that the Minister's orders did not comply with the principles of a law-based state, *inter alia*, the principles of legitimate trust, proportionality and legal security, all of which follow from Article 1 of the Constitution.

The submitter argued that the principle of proportionality limited the freedom of performance and arbitrariness of the executive power, and was based on certain criteria. The submitter contended that in light of that principle, the Minister had failed to adequately assess the effect of his orders on the rights of private persons, rights that had lawfully arisen on the basis of the suspended binding regulations of the municipality.

The Minister argued that the detailed land-use plans, confirmed by the suspended binding regulations of the municipality, had not been drawn up in conformity with several legal acts.

The Minister argued that the principle of legal security had not been violated as no normative act concerning land-use planning established a time-limit within which the Minister had to exercise his/her right to suspend an illegal binding regulation or another normative act issued by the city dome (rural district council).

The Court reiterated that several fundamental principles of a law-based state, including the principles of proportionality and trust in law follow from the concept of the democratic republic, which is enshrined in the Article 1 of the Constitution.

The Court stressed that the main function of the above-mentioned principles was to protect a private person from an unfounded use of public power, and those principles were to be applied only as far as permitted by the specific rules pertaining to public-law subjects. The principle of trust in law regarding the legal relations in the dispute protects individuals, who − trusting in the lawfulness of the adopted Dome regulations − have carried out certain activities. Therefore, the Constitutional Court, when taking a decision on the conformity of the orders with the Constitution, must consider the following issues:

1. whether the orders in question of the Minister comply with the law; and
2. whether the procedure of the drawing-up and adoption of the Dome documents in question comply with normative acts.

The Court pointed out that under the State Administration Structure Law, supervision means the rights of higher institutions or officials to examine the lawfulness of decisions taken by lower institutions and to revoke unlawful decisions, as well as to issue an order to take a decision in case of an unlawful failure to act. Thus, in the sphere of supervision of autonomous functions, the institution named by the Cabinet of Ministers has the right to review the legality of the decisions (regulations) issued by a Dome.

The Court held that unlike decisions taken by a public-law subject that are addressed to private persons and whose legal argumentation must be exhaustive, relations of legal persons of public rights shall be guided by the principle of procedural economy; therefore, direct or indirect reference to a previously-mentioned factor may be permissible.

The Court examined in detail whether each Dome act suspended by Minister met the requirements of the law and found that the Dome regulations in question did not in substance comply with the specific legal status of the protected zone of the dunes as well as the principles of territorial principles, environmental protection and state administration.

The Court made a declaration that the impugned orders of Minister were in conformity with Article 1 of the Constitution.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2004-1-004

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 23.04.2004 / **e)** 2003-15-0106 / **f)** On the Compliance of Items 9 and 94 of the Cabinet of Ministers' Regulation no. 211 of 29 April 2003 on the Internal Order of the Investigation Prisons with Articles 91 and 111 of the Constitution *(Satversme)* / **g)** *Latvijas Vestnesis* (Official Gazette), 65 (3013), 27.04.2004 / **h)** CODICES (English, Latvian).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
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.
5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Prisoner, food, right to buy / Detention, conditions, nutrition / Prison, solitary confinement cell.

Headnotes:

The state has the duty of ensuring that prisoners receive good food. When the state fails to do so, it must look for means other than prohibiting the receipt of food parcels to reach the legitimate aim of securing order in places of detention. The prohibition on the receipt of food parcels does not conform to Article 111 of the Constitution where the Cabinet of Ministers fails to ensure that the prisoners' daily food meets the requirements set out in "The Recommended Nutrient Requirements for the Inhabitants of Latvia".

Restricting the purchase of food from the prison shop by persons placed in a punishment cell does not restrict the fundamental rights guaranteed by Article 111 of the Constitution.

Summary:

Two persons (the submitters) against whom the security measure of arrest was applied brought a constitutional claim. They challenged Items 9 and 94 of the Cabinet of Ministers' Regulation no. 211 of 29 April 2003 on the Internal Order of Investigation Prisons (henceforth – "the impugned act"). The prohibition on the receipt of food parcels by prisoners flows from Item 9 of the impugned act. Item 94 lays down several restrictions, including that of buying products in the prison shop, which may be imposed on prisoners who have been placed in a punishment cell as a disciplinary penalty. The submitters argued that the impugned items violated their fundamental right to health.

Referring to its 22 October 2002 judgment, the Court reiterated that Article 111 of the Constitution, particularly the provision laying down the norm that "the State shall protect human health," gave rise to the obligation that the state not only undertake measures protecting the health of the people but also abstain from activities that limit the possibility of persons to take care of their own health. Consequently, in accordance with Article 111 of the Constitution, every person has to a certain extent the right to undertake the measures that he/she considers necessary to protect his/her health. Protection of health is connected with food.

Still referring to its 22 October 2002 judgment, the Court also reiterated that the rights mentioned in Article 111 were not absolute. However, the Court had to assess whether the restriction of the right to the protection of health imposed by the impugned items met the following requirements:

1. whether the restriction had been determined by the law;
2. whether it complied with the legitimate aim that the state wanted to reach by laying down the restriction; and
3. whether it complied with the principle of proportionality.

The Court found that the impugned act had been passed in conformity with Article 76.6 of the Code of Criminal Procedure, had been promulgated under the procedure provided by law and had entered into force. Consequently, the restrictions of the fundamental rights of persons had been determined on the basis of the law.

The Court held that by laying down restrictions applying to persons placed in a punishment cell on receiving food parcels and buying food in the prison shop, the Cabinet of Ministers advanced the aim of maintaining order in a place of detention. Thus, the impugned items had a legitimate aim.

The Court held that maintaining order in a place of detention also included guaranteeing the security of the place. The duty of the state, when applying arrest as a means of security, is not only to take care of the persons so that they do not influence the investigation and evade justice, but also to ensure that the persons under arrest are not subjected to harm. Food parcels per se (by themselves) cannot endanger the security of the place of confinement; however, the contents of the parcels may create danger.

The Cabinet of Ministers pointed out that there was no possibility of finding out the origin and quality of the foodstuffs placed into the food parcels; therefore, the possibility of delivering narcotic and psychotropic substances to prisoners existed. The Constitutional Court did not deny the existence of the problem; however, it stressed that the problem should be solved in a more complex way.

The Court held the state had the duty of ensuring that prisoners received good food. Where that duty cannot be fulfilled, the state must look for means other than the prohibition on the receipt of food parcels to reach the legitimate aim of securing order in places of detention. Moreover, the Food Centre of the Ministry of Welfare has acknowledged that the daily food received by prisoners, approved by the Cabinet of Ministers, is insufficient. Over a long period of time, the unbalanced diet may cause health problems.

The Court declared the prohibition on the receipt of food parcels, following from the impugned act, was not in conformity with Article 111 of the Constitution and null and void as of 1 July 2004, if by that time the Cabinet of Ministers failed to ensure that the daily food of prisoners complied with the requirements set out in "The Recommended Nutrient Requirements for the Inhabitants of Latvia".

The Court found that Item 94 of the impugned act, laying down restrictions on persons placed in the punishment cell to buy food in the prison shop, was to be read together with Items 91, 93 and 96 of the impugned act. The items set out that prisoners placed in a punishment cell are to be supplied with food and drinking water, and − in cases of special health needs − also with the food recommended by a doctor. Moreover, a special list sets out the essential items that may be taken by a prisoner to a punishment cell. The prisoners placed in a punishment cell receive the same food and under the same procedure as do prisoners against whom a disciplinary penalty has not been imposed. Consequently, there was no reason to conclude that food requirements had been decreased for prisoners placed in a punishment cell or that conditions had been created that restricted those persons' fundamental rights, which are guaranteed by Article 111 of the Constitution.

The Court declared Item 94 of the impugned act to be in compliance with Article 111 of the Constitution.

Cross-references:

- Cf. decision in Case no. 2002-04-03, *Bulletin* 2002/3 [LAT-2002-3-008].

Languages:

Latvian, English (translation by the Court).

Liechtenstein
State Council

Important decisions

Identification: LIE-2004-1-001

a) Liechtenstein / **b)** State Council / **c)** / **d)** 02.03.2004 / **e)** StGH 2003/35 / **f) / g) / h)** CODICES (German).

Keywords of the systematic thesaurus:

4.7.2 **Institutions** – Judicial bodies – Procedure.
4.7.4.1 **Institutions** – Judicial bodies – Organisation – Members.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Court, composition / Judge, absence, justification / Judge, lawful / Judge, challenging / Judge, substitute.

Headnotes:

The flexibility with which substitute judges of the Supreme Court try cases – insofar as the ordinary judges are replaced by substitutes without there being any reason for the latter to be withdrawn, challenged or unable to attend – does not constitute a violation of the entitlement to a lawful judge as provided for in Article 33.1 of the Constitution, in the absence of any clear legal regulations and where such substitution is pursuant to the considered assessment of the President of the Court or where there are objective reasons.

In contrast, the practice of not giving prior notification of the composition of the Court to the parties does constitute a violation of entitlement to a lawful judge, and in particular the right of appeal provided for in Article 43 of the Constitution. However, it does not constitute a serious violation except where this has substantively influenced the decision against which a constitutional appeal has been brought. This is not the case where this would not have resulted in a different composition of the Court had the information been provided in good time.

Summary:

The constitutional appeal, ultimately rejected, against a decision of the Supreme Court submitted, among other things, that the composition of the Supreme Court had not been in conformity with the law, as two substitute judges had been involved in the impugned decision, whereas there had clearly been no grounds for the ordinary judges to be withdrawn, challenged or unable to attend.

In conformity with the legal doctrine of the Swiss Federal Tribunal, consulted for comparative law purposes, the State Council considered that the random allocation of trials among the divisions and reporting judges may appear ideal in theory, but in practice it was a system with numerous disadvantages. More specifically, the State Council considered that without the formal establishment of a second division of the Supreme Court, limiting the opportunities for substitute judges to try cases would inevitably lead to delays and adversely affect the quality of the case-law. This undoubtedly represented a graver danger for the smooth functioning of the rule of law than the risk of abuse arising from the involvement of substitute judges of the Supreme Court. In any event, such abuses were unlikely given the coherent and objectively based allocation – as described in a published article – of criminal and civil cases between the president and the vice-president. The legislature is, moreover, aware of this practice and, at the very least, allows it to continue.

Languages:

German.

Lithuania
Constitutional Court

Statistical data
1 January 2004 – 30 April 2004

Number of decisions: 4 final decisions (of which 3 are important).

All cases − *ex post facto* review and abstract review, with the exception of one conclusion.

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

Important decisions

Identification: LTU-2004-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 26.01.2004 / **e)** 3/02-7/02-29/03 / **f)** On the Republic of Lithuania Law on the Control of Alcohol / **g)** *Valstybės Žinios* (Official Gazette), 15-465, 29.01.2004 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
3.25 **General Principles** – Market economy.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Advertising, commercial / Advertising, restriction / Alcohol, production, sale, regulation / Monopoly, unconstitutionality.

Headnotes:

Advertising is considered a specific kind of information, which is usually called commercial information.

Alcohol and products containing alcohol are products of a special nature because their consumption may damage the health of people. Article 53.1 of the Constitution provides that the state shall take care of people's health and guarantee medical aid and services in the event of sickness. In accordance with the constitutional requirements, the state may restrict the advertising of alcohol: such restrictions must be established by the law; they must pursue and defend another constitutional value − in the case under review, the protection of human health.

The state has a duty to establish legal responsibility for violations of restrictions on the advertising of alcohol and the established procedure. However, this does not mean that the legislator may introduce penalties of any kind or fines of any size for violations of the laws regulating the procedure of production and realisation of the advertisement of alcoholic beverages. While establishing responsibility for violations of the restriction on the promotion of the trade of alcoholic beverages and the restriction on advertising alcohol, the legislator is bound by the constitutional principles of justice and a state governed by the rule of law, as well as by other constitutional requirements.

Production of alcoholic beverages is a sphere of economic activity. Although this economic activity has a very special character, the state and its institutions have the discretion to establish a special legal regime regulating the production and marketing of alcohol. However, they may not do so by choosing means inadequate to the objectives sought or means by which they would introduce a monopoly in the production and the marketing of these products. Such means would amount to an unfounded restriction on the freedom of economic activity and fair competition.

Summary:

The petitioner, the Vilnius Regional Administrative Court, applied (three applications by that Court were joined into one) to the Constitutional Court requesting it to investigate whether certain provisions of the Law on the Control of Alcohol and certain provisions of the Rules for Licensing the Production of Products Containing Alcohol as approved by the Government of Lithuania Resolution no. 67 "On the Approval of the Rules for Licensing the Production of Products Containing Alcohol" of 22 January 2001 were in conflict with the Constitution. In the opinion of the petitioner, in establishing restrictions on the advertisement of alcohol, in introducing a monopoly into the legal regulation, and in establishing disproportionate responsibility for violations of the restriction on the promotion of the trade of alcoholic beverages and the restriction on the advertisement of alcohol, the state violated requirements of the Constitution.

The Constitutional Court recalled that under the Constitution, human rights and freedoms may be restricted where the following conditions are met: it is done by the law; the restrictions are necessary in a democratic society in order to protect the rights and freedoms of other persons and values entrenched in the Constitution, as well as constitutionally significant objectives; the restrictions do not deny the nature and the essence of rights and freedoms; and the constitutional principle of proportionality is observed.

The freedom to express convictions, to obtain and impart information is one of the fundamental human freedoms. This freedom is not absolute. The provisions of Article 25.2 of the Constitution providing that a person must not be hindered from seeking, obtaining, and imparting information and ideas may not be construed as permitting the use of the freedom of information in a manner which would violate the values set out in Article 25.3 of the Constitution: health, honour and dignity, private life, or morals of a person, or for the protection of the constitutional order.

In accordance with constitutional requirements, the state may impose restrictions on the advertisement of alcohol, set out the responsibility for violations of the restriction on the promotion of the trade in alcoholic beverages and the restriction on the advertisement of alcohol. In the case under review, the restrictions on advertisement were adequate to the objective sought, i.e. they did not violate the requirements of proportionality and were of a partial nature.

According to the Constitution, the introduction of a monopoly is to be considered an unfounded granting of privileges to a certain economic entity, discrimination against other economic entities and the restriction of the latter's freedom of economic activity.

The Constitutional Court ruled that Article 44.4 (wording of 20 June 2002) of the Law on the Control of Alcohol to the extent that it does not provide for the consideration of the nature of a violation of the law and other circumstances when imposing a fine was in conflict with the constitutional principles of justice and a state governed by the rule of law. The Court ruled that the provision "the objective of the Law on the Control of Alcohol shall be [...] to establish legal grounds for the introduction of state monopoly on the production of products containing alcohol [...] and the granting of the right of state monopoly to produce [...] products containing alcohol specified in this Law to economic entities" of Article 2.1 (wording of 18 April 1995), Item 2 (wording of 18 April 1995) of Article 3.1,

Article 4.2 (wording of 10 December 1998) and Article 13 (wording of 18 July 2000) of the Law on the Control of Alcohol as well as Items 7 and 9 (wording of 22 January 2001) of the Rules for Licensing the Production of Products Containing Alcohol as approved by Government of the Republic of Lithuania Resolution no. 67 "On the Approval of the Rules for Licensing the Production of Products Containing Alcohol" of 22 January 2001 were in conflict with Articles 29, 46.1 and 46.4 of the Constitution. The other impugned provisions of the Law on the Control of Alcohol were held to be in accordance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2004-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 31.03.2004 / **e)** 14/04 / **f)** On the compliance with the Constitution of acts carried out by President of the Republic of Lithuania, Rolandas Paksas, against whom an impeachment case has been instituted / **g)** *Valstybės Žinios* (Official Gazette), 49-1600, 02.04.2004 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.7.4 **Constitutional Justice** – Jurisdiction – Types of litigation – Restrictive proceedings – Impeachment.
4.4.4.1.2 **Institutions** – Head of State – Status – Liability – Political responsibility.
4.5.2 **Institutions** – Legislative bodies – Powers.

Keywords of the alphabetical index:

President, impeachment.

Headnotes:

In conformity with the Constitution, a decision on whether specific acts carried out by the President of the Republic against whom impeachment proceedings have been instituted are in conflict with the Constitution is final and not subject to appeal. The parliament *(Seimas)* does not enjoy the powers to decide whether the conclusion of the Constitutional Court is founded and lawful − the legal fact that the acts carried out by the President of the Republic are in conflict (or are not in conflict) with the Constitution can be established only by the Constitutional Court.

Under Article 74 of the Constitution, only the parliament may remove the President of the Republic from office for gross violation of the Constitution. Under Article 107.3 of the Constitution, the parliament enjoys powers to decide whether to remove the President of the Republic from office, but not whether specific acts carried out by the President of the Republic are in conflict with the Constitution.

The Constitution is grossly violated in cases where the President of the Republic holds his/her office in bad faith, acts in a way that is not in the interests of the Nation and the State but in his/her personal interests, those of individual persons or groups, carries out acts for purposes and in interests that are incompatible with the Constitution and laws, with public interests, and thereby knowingly fails to discharge the duties of the President of the Republic laid down by the Constitution and laws.

The Constitution is also grossly violated in all cases where the President of the Republic breaches the oath.

Summary:

By its 23 December 2003 Resolution "On the Formation of the Special Investigation Commission", the parliament *(Seimas)* formed the Special Investigation Commission in order to investigate the reasonableness and seriousness of the charges brought against the President of the Republic, Rolandas Paksas, and to reach a conclusion regarding the proposal to institute the impeachment proceedings.

On 19 February 2004 the Special Investigation Commission reached the conclusion that the charges brought against the President of the Republic, Rolandas Paksas, in the proposal by a group of members of the parliament *(Seimas)* were founded and serious (only part of the charges were not sufficiently founded and serious) and formed a basis for instituting impeachment proceedings; consequently, there were grounds for instituting impeachment proceedings in the parliament. On 19 February 2004 the Conclusion "On the Proposal to Institute Impeachment Proceedings against the President of the Republic, Rolandas Paksas" was submitted to the parliament.

On 19 February 2004 the parliament adopted Resolution "On the Commencement of Impeachment Proceedings" whereby it decided to institute impeachment proceedings against the President of the Republic, Rolandas Paksas.

On 19 February 2004 the parliament adopted the Resolution "On the Application to the Constitutional Court of the Republic of Lithuania", whereby it applied to the Constitutional Court for a conclusion whether specific acts carried out by the President of the Republic, Rolandas Paksas, which were set out in the charges in the conclusion of the Special Investigation Commission, were in conflict with the Constitution.

In the 19 February 2004 the parliament Resolution "On the Application to the Constitutional Court of the Republic of Lithuania", the following charges against the President of the Republic, Rolandas Paksas, were set out:

Charge 1. Rolandas Paksas, while holding the office of President of the Republic and having no right to undertake or have any commitments incompatible with the interests of the Nation and the State of Lithuania in favour of private persons, undertook such commitments in favour of Jurij Borisov, and was, while in the office of the President of the Republic of Lithuania, influenced by the latter and acted in a way that was not in the interests of the Nation and the State of Lithuania, but in the interests of that private person.

Charge 2. Rolandas Paksas, while holding the office of President of the Republic, did not safeguard the protection of state secret.

Charge 3. Rolandas Paksas, while holding the office of President of the Republic, made use of his status by giving unlawful orders to his advisors and by other actions to exert unlawful influence on decisions of private persons and private economic entities in the area of property relations.

Charge 4. Rolandas Paksas, while holding the office of President of the Republic, did not coordinate public and private interests in his activities.

Charge 5. Rolandas Paksas, while holding the office of President of the Republic, discredited public authority.

Charge 6. Rolandas Paksas, while holding the office of President of the Republic, gave unlawful orders to his advisors and did not take any action to prevent abuses by some of his advisors in the discharge of their duties.

Impeachment is a special procedure provided for in the Constitution for taking a decision on the issue of constitutional responsibility of the officials indicated in Article 74 of the Constitution, i.e. their removal from office for committing the acts set out in the Constitution, namely, gross violation of the Constitution, breach of oath and commission of a crime.

Under the Constitution, one of the state officials who may be removed from office by way of the procedure of impeachment proceedings is the President of the Republic.

Under Article 105.3.4 of the Constitution, the Constitutional Court issues a conclusion on whether specific acts of the President of the Republic against whom an impeachment case has been instituted are in conflict with the Constitution.

The Constitutional Court concluded that:

1. The acts of President Rolandas Paksas of the Republic of Lithuania, when he, by Decree no. 40 of 11 April 2003, unlawfully granted citizenship of the Republic of Lithuania to Jurij Borisov in exchange for financial and other support by the latter were in conflict with the Constitution of Lithuania. By those acts, President Rolandas Paksas of Lithuania grossly violated the Constitution.

2. The acts of President Rolandas Paksas by which he knowingly hinted to Jurij Borisov that the authorities of law and order were conducting an operational investigation against him and tapping his telephone conversations were in conflict with the Constitution of Lithuania. By the said acts, President Rolandas Paksas of Lithuania grossly violated the Constitution.

3. The acts of President Rolandas Paksas, by which he, seeking to promote the property interests of private persons close to him by making use of his status, gave orders to his advisor, Visvaldas Račkauskas, to use his official position to influence through the authorities of law and order the decisions of heads and shareholders of the company "*Žemaitijos keliai*" UAB concerning the transfer of shares to persons close to Rolandas Paksas, were in conflict with the Constitution, as were the acts of Rolandas Paksas in 2003 by which he sought to promote the property interests of private persons close to him and used his status to exert influence on decisions of heads and shareholders of the company "*Žemaitijos keliai*" UAB concerning the transfer of shares to persons close to him. By carrying out the said acts, President Rolandas Paksas of Lithuania grossly violated the Constitution.

4. The statements publicly made by President Rolandas Paksas of the Republic of Lithuania during his meetings with residents on 26 November 2003 in Kretinga, on 1 December 2003 in Alytus and on 15 December 2003 in Telšiai concerning conclusions of the parliament Provisional Commission for Investigation into Possible Threats to Lithuanian National Security were not in conflict with the Constitution.

Cross-references:

- See also Precis [LTU-2004-1-003].

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2004-1-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 15.04.2004 / **e)** 17/04 / **f)** On the right to institute impeachment proceedings / **g)** *Valstybės Žinios* (Official Gazette), 56-1948, 17.04.2004 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.4.1 **Institutions** – Head of State – Powers.
4.4.4.1.2 **Institutions** – Head of State – Status – Liability – Political responsibility.
4.5.2 **Institutions** – Legislative bodies – Powers.

Keywords of the alphabetical index:

Impeachment, proceedings, initiative, right.

Headnotes:

Under the Constitution, the Parliament *(Seimas)* of Lithuania conducts impeachment, while the Constitutional Court issues conclusions on whether the specific acts of the state official or the member of the parliament against whom an impeachment case has been instituted are in conflict with the Constitution. No other institutions are granted powers by the Constitution to participate in the conduct of impeachment proceedings. Impeachment may therefore be initiated only in the parliament, and the initiative of impeachment may come only from members of the parliament.

Summary:

On 12 March 2004 the President of the Republic issued Decree no. 397 "On the Proposal to Institute Impeachment Proceedings Against the Member of the Parliament *(Seimas)* of the Republic of Lithuania, Artūras Paulauskas" (hereinafter – Decree), whereby the President applied to the parliament with the proposal that impeachment proceedings be instituted against the member of the parliament, Artūras Paulauskas, on the following charges:

"1. on the grounds that he knowingly revealed information comprising a state secret to persons who did not have authorisation to work with or become familiar with classified information, thereby violating the laws of Lithuania and exceeded the powers that the laws had granted to him, and he thus grossly violated the Constitution of Lithuania and breached the oath taken as a member of the Parliament of Lithuania; and

2. on the grounds that he discredited the authority of the President of the Republic of Lithuania as one of institutions of state power, and thus grossly violated the Constitution and breached the oath taken as a member of the Parliament of Lithuania."

The petitioner, the parliament, by its Resolution no. IX-2062 "On the Application to the Constitutional Court of the Republic of Lithuania with a Petition Requesting the Constitutional Court to Investigate whether the Decree of the President of the Republic 'On the Proposal to Institute Impeachment Proceedings Against the Member of the Parliament of the Republic of Lithuania, Artūras Paulauskas' is in Conflict with the Constitution of the Republic of Lithuania" of 16 March 2004 requested that the Court investigate whether the Decree was in conflict with the principle of a state governed by the rule of law entrenched in the Constitution and whether Article 4 of Decree was in conflict with the principle of a state governed by the rule of law entrenched in the Constitution and Article 7.2 of the Constitution.

The petitioner argued that in proposing the Decree to institute impeachment proceedings against Artūras Paulauskas (President of the parliament), the President of the Republic did not seek to attain the purposes that impeachment proceedings are designed to attain, i.e. revoking the mandate of a member of the parliament who has grossly violated the Constitution or breached the oath of the member

of the parliament, as indicated in the Decree of the President of the Republic. In the opinion of the petitioner, in issuing the impugned decree, the President of the Republic attempted to destabilise the situation in the State and the parliament, and abused the powers granted to him by the Constitution and laws.

The Constitutional Court *ex officio* investigated whether Article 230.1 of the Statute of the Parliament of Lithuania providing for the initiation of impeachment proceedings was in compliance with the Constitution. The Constitutional Court emphasised that impeachment may be initiated only in the *Seimas* and that the initiative of impeachment may come only from members of the parliament.

The Constitutional Court held that Article 230.1 of the Statute of the Parliament of the Republic of Lithuania, to the extent that it sets out that the right to bring a proposal to the parliament for the initiation of impeachment proceedings against an individual belongs the President of the Republic and the Judicial Court of Honour where the case concerns the Justices of the Supreme Court and the President and Judges of the Court of Appeal, was in conflict with Article 74 of the Constitution of Lithuania and the constitutional principle of a state under the rule of law. The Court also held that the President of Lithuania Decree no. 397 "On the Proposal to Institute Impeachment Proceedings Against the Member of the Parliament of the Republic of Lithuania, Artūras Paulauskas" of 12 March 2004 was in conflict with Article 74 of the Constitution and the constitutional principle of a state governed by the rule of law.

Cross-references:

- See also Precis [LTU-2004-1-002].

Languages:

Lithuanian, English (translation by the Court).

Luxembourg
Constitutional Court

Important decisions

Identification: LUX-2004-1-001

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 30.01.2004 / **e)** 19/04 / **f)** / **g)** to be published in *Mémorial, Recueil de législation* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Tender, public, exclusion, duration, limit.

Headnotes:

The statutory provision allowing the terms and conditions drawn up on the occasion of public tenders to contain sanctions providing for even the temporary exclusion from participation in public contracts of successful tenderers who fail to comply with the provisions of the contract was held to be inconsistent with Article 14 of the Constitution, which states that "no penalty may be fixed or applied except in pursuance of the law".

Summary:

The Administrative Court requested the Constitutional Court to examine the compatibility of Article 36.5 of the Law of 27 July 1936 on the accounts of the State ("the Law") with Article 14 of the Constitution.

Article 36.5 of the Law provides that "terms and conditions may have penalty clauses appropriate to the nature and size of the contracts. These clauses may include fines and coercive penalties, termination of the contract and temporary exclusion from participation in public contracts. Likewise, early completion premiums may be provided for."

In the case before the Administrative Court, a company had been excluded from all public contracts for a period of six months. The Administrative Court raised the question whether such a measure prescribing a sanction without fixing a maximum period is to be assimilated to a penalty, which must satisfy the principle laid down in Article 14 of the Constitution that penalties must be defined by law.

The Constitutional Court noted that cancellation of the contract is not in itself a penalty but a decision to sever the contractual ties between the parties. However, even temporary exclusion for participation in public contracts is not a means of compensating the loss sustained as a result of failure to observe the conditions laid down in the terms and conditions but a penalty within the meaning of Article 14 of the Constitution.

Languages:

French.

Moldova
Constitutional Court

Important decisions

Identification: MDA-2004-1-001

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 19.02.2004 / **e)** 2 / **f)** Constitutionality of certain provisions of Articles 416 and 444 of the Code of Civil Procedure / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

4.7.7 **Institutions** – Judicial bodies – Supreme court.
4.7.15 **Institutions** – Judicial bodies – Legal assistance and representation of parties.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Supreme Court, legal representation, obligatory / Lawyer, submission, limited duration.

Headnotes:

The Constitution and the Code of Civil Procedure authorise parties to take procedural steps on their own initiative and to opt to defend themselves in all stages of the proceedings. Articles 444.3 and 416.3 of the Code establish exceptions to these rules that limit parties' right to defend themselves, by making it obligatory for counsel or other legally qualified representatives to appear at the examination of applications to the Supreme Court of Justice.

The Court considered that the time limit on the submissions of parties' representatives in hearings was unjustified. Under Article 6 ECHR, everyone is entitled to a hearing within a reasonable time. The Court found that Article 6 ECHR is also applicable to the impugned provisions of the Code concerning the

submissions of parties' representatives before the courts.

Summary:

The Ombudsman asked the Court to rule on the constitutionality of certain provisions of Articles 416 and 444 of the Code of Civil Procedure. Article 416 refers to the submissions of participants to proceedings seeking remedies against decisions and judgments against which no ordinary appeal lies. The impugned sub-paragraph 3 states that “the provisions of this article are applicable to the examination of applications to the Supreme Court of Justice, except that in this court the parties must be represented by counsel or another legally qualified representative, who shall present their case on grounds of fact or law. The representatives' submissions shall not exceed thirty minutes, the president of the sitting being empowered to limit the submissions”.

Article 444 of the Code of Civil Procedure, which lays down the procedure for examining applications for remedies against appeal court decisions, contains similar provisions. The impugned sub-paragraph 3 states that “the parties appearing in the proceedings must be represented by counsel or another legally qualified representative. The parties' representatives shall present their case on grounds of law. The submissions shall not exceed thirty minutes, the president of the sitting being empowered to limit the submissions”.

According to the Ombudsman, these provisions were incompatible with Article 4 of the Constitution (human rights and freedoms), Article 15 of the Constitution (universality), Article 20 of the Constitution (free access to justice), Article 26 of the Constitution (right to defence) and Article 54 of the Constitution (restriction on the exercise of certain rights or freedoms).

The Constitutional Court noted that Article 20 of the Constitution enshrined the principle of free access to justice. This was a complex principle comprising several relationships and fundamental rights, through which its exercise could be safeguarded. A general right to free access to justice was part of the right to effective remedies from the courts.

Under Article 26 of the Constitution, everyone was entitled to respond independently by appropriate legitimate means to an infringement of his/her rights and freedoms. Throughout the proceedings the parties were entitled to be assisted by a lawyer, either chosen or appointed *ex officio*.

The Constitution gave people the freedom to choose the arrangements for their defence and the right to defend themselves in accordance with the legally defined grounds.

To satisfy the constitutional principle of free access to justice and safeguard the right to defence, the Code of Civil Procedure laid down the principles governing the administration of justice in civil cases and the arrangements for exercising the right to defence. Article 8 of the Code authorised the parties and other participants in cases to be assisted in court by a lawyer, and in cases specified in law the lawyer could appointed by any court.

The Court found that in the case in question, what was relevant was parties' access to the right under civil procedure, in accordance with Article 27 of the Code, to choose the arrangements for and grounds of their defence. The state's and the courts' explicit obligation to provide effective legal assistance to persons derived from the Constitution and Articles 8 and 27 of the Code of Civil Procedure.

The Court rejected the argument that the Supreme Court only considered questions of law and that it was therefore necessary to confine participation in its proceedings to legal specialists, with parties having the opportunity to express any objections in writing.

When deciding on applications concerning decisions and judgments against which no ordinary appeal lay, the Supreme Court considered questions of fact as well as questions of law.

Similarly, under Article 6.3.c ECHR everyone charged with a criminal offence had the right to defend himself in person or through legal assistance of his own choosing or, if he did not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so required.

Pursuant to its constitutional jurisdiction, the Constitutional Court therefore declared unconstitutional the words “except that in this court the parties must be represented by counsel or another legally qualified representative, who shall present their case on grounds of fact or law. The representatives' submissions shall not exceed thirty minutes” in Article 416.3 of the Code of Civil Procedure and “must be represented by counsel or another legally qualified representative. The parties' representatives shall present their case on grounds of law. The submissions shall not exceed thirty minutes” in Article 444.3 of the Code of Civil Procedure.

Languages:

Romanian, Russian.

Identification: MDA-2004-1-002

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 18.03.2004 / **e)** 7 / **f)** Interpretation of the Constitution / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

2.3.5 **Sources of Constitutional Law** – Techniques of review – Logical interpretation.
2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.
4.7.4.1.4 **Institutions** – Judicial bodies – Organisation – Members – Term of office.

Keywords of the alphabetical index:

Supreme Court, President, term of office.

Headnotes:

The basic principles governing the organisation of the courts and the functioning of the judicial system are the same for all courts, irrespective of their nature. Article 116.3 of the Constitution expressly stipulates that presidents and vice-presidents of courts shall be appointed for four-year terms. This applies equally to the President and Vice-President of the Supreme Court.

Restricting the term of office does not infringe the constitutional safeguards concerning the independence, impartiality and irremovability of judges, enshrined in Article 116.1 of the Constitution. It is only concerned with courts' administrative functions.

Summary:

The case was referred to the Constitutional Court by a member of parliament, Mr Mihai Petrache.

Mr Petrache sought an interpretation of the relevant constitutional provisions, namely whether the four-year term of office for which presidents and vice-presidents of courts were appointed applied to all courts, including the Supreme Court of Justice.

The basic principles governing the organisation and functioning of the judicial system can be defined as general rules governing how courts are structured and carry out their legal responsibilities.

Article 115 of the Constitution states that justice shall be administered by the Supreme Court of Justice, courts of appeal and courts of law. Under Article 116.4 of the Constitution, presidents, vice-presidents and judges of the Supreme Court of Justice shall be appointed by Parliament following a proposal submitted by the Judicial Service Commission.

The article makes no explicit reference to the length of term of office of presidents and vice-presidents of the Supreme Court.

Under Article 115.1 of the Constitution, the Supreme Court of Justice is one of three judicial tiers for administering justice. Article 116.3 of the Constitution, laying down the four year period of appointment for court presidents and vice-presidents, is generally applicable to the sub-paragraph 4 that follows it, which governs the appointment of presidents, vice-presidents and judges of the Supreme Court.

The imposition of a legal time limit for the exercise of certain official duties of public or political importance is based on the traditional doctrine of separation of powers. In accordance with this basic principle, Article 63.1 of the Constitution lays down that parliament shall sit for four years, Article 80.1 of the Constitution establishes a four-year mandate for the president, starting on oath-taking day, Article 103.1 of the Constitution states that the government shall exercise its mandate up to the date of validation of the new parliamentary elections and Article 116.3 of the Constitution, the subject of this judicial interpretation, that court presidents and vice-presidents are appointed for a four-year term.

The need to establish a time limit on the exercise of the duties of president and vice-presidents of the Supreme Court is undoubtedly the logical consequence of the aforementioned constitutional provisions.

The Court found that the provision establishing a four year period of appointment for court presidents and vice-presidents also applied to the president and vice-presidents of the Supreme Court of Justice.

Cross-references:

In its Decision no. 26 of 23 May 2002 on the constitutionality of Act no. 583-XV of 25 October 2001 on the application of Article 16 of Act no. 514-XIII of 6 July 1995 on the organisation of the courts, the Constitutional Court found that the position of president or vice-president of a court cannot be considered to be a permanent and established right.

On 25 October 2001, the Constitutional Court gave a favourable ruling on the draft legislation to amend and supplement certain provisions of the Constitution, including Article 116.2, 116.3 and 116.4.

Languages:

Romanian, Russian.

Identification: MDA-2004-1-003

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 30.03.2004 / **e)** 9 / **f)** Review of constitutionality of Article 1.22 of Act no. 358-XV of 31 July 2003 to amend and supplement certain legislation / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.11 **General Principles** – Vested and/or acquired rights.
3.13 **General Principles** – Legality.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
5.3.37.3 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Social law.
5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Pension, scheme, harmonisation / Pension, upgrading / Pension, insurance principle / Parliament, member / Government, member.

Headnotes:

Since entitlement to a pension is a constitutional right, it cannot be subject to restrictions. Persons with other incomes sufficient for a decent standard of living cannot be deprived of a previously established right to a fixed pension.

Under the new legislation, the length of service pension for members of parliament, members of the government, public officials and local elected representatives is paid in full, subject only to the condition that they cease to exercise their functions. It therefore reduces the social protection of these categories of persons, which is incompatible with their right to a length of service pension and the universal principle of respect for lawfully acquired rights.

Summary:

Parliament approved Act no. 358-XV of 31 July 2003 amending and supplementing the Public Social Insurance Pensions Act, no. 156-XV of 14 October 1998, which added a further chapter on the pensions for certain categories of citizens.

Under the disputed provisions, in order to harmonise the law on pensions, the legislation modified the level of pension payable to persons who had reached pensionable age, had completed the total contributions period and had performed the duties of member of parliament or member of the government. The amount payable was 42% of the average monthly income during their period of office. In the case of public officials and local elected representatives it was 42% of the average monthly income.

Under the new provisions, the pension level set before 1 January 2004 for members of parliament, members of the government and persons who had held posts in the public service was only to be paid in full if they had no income from the public social insurance system. After they reached pensionable age, they would receive 50% pensions.

The complainants argued that parliament had violated a series of constitutional rules concerning the legal status of members of parliament, members of the government, public officials and local elected representatives, by introducing new arrangements when these persons ceased their functions, thus reducing their entitlement to full pensions at that point (the pensions of that category of persons were previously to be paid in full if those persons ceased to exercise their functions).

Under the Constitution, citizens are equal before the law and the public authorities, with no distinction as to race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, property or social origin.

Articles 43.1 and 47 of the Constitution safeguard and protect persons' right to work and employment protection, and to assistance and social protection in the event of unemployment, sickness, invalidity, widowhood, old age and other cases of loss of means of subsistence as a result of circumstances outside their control.

Article 54 of the Constitution prevents parliament from enacting legislation that might curtail or restrict the fundamental rights and liberties of the person and citizen. The pursuit of rights could only be restricted by the law.

The impugned provisions were discriminatory and incompatible with the constitutional principles of equity and universal equality before the law, and the non-retroactive nature of legislation.

When laying down the legal basis for pensions and the arrangements for determining and paying them, the law has to take account of the fact that previously established social insurance benefits made only be withdrawn if they are replaced with equivalent measures. The new legal provisions are only be applicable in the future and only to persons who ask for the pension after they come into force, and do not adversely affect previously established pension rights.

The current legislation also entitles citizens to a length of service pension, whose level depends directly on their wage or salary and the nature of the job performed.

Because of the importance of their public activities, the legal and organisational status of the bodies where they perform these activities, the nature and complexity of these activities and the responsibilities and required qualifications they entail, members of parliament, members of the government, public officials and local elected representatives have been granted special status in the Constitution and legislation, which also establishes the insurance and pensions arrangements for these groups.

Subjective rights established under prior legislation cannot be infringed by a subsequent act. The new law is not applicable to situations established in the past.

By making those changes, parliament established new arrangements for the cessation of functions and introduced new conditions for determining and paying pensions for members of parliament, members of the government, public officials and local elected representatives.

Cessation of functions takes place in particular circumstances specified in the aforementioned legislation. That legislation does not make the determination of the pension a legal basis for the cessation of functions. Even the Labour Code does not include such a provision.

That being so, the provisions in question were ruled unconstitutional.

Languages:

Romanian, Russian.

Norway
Supreme Court

Important decisions

Identification: NOR-2004-1-001

a) Norway / **b)** Supreme Court / **c)** / **d)** 25.02.2004 / **e)** 2003/1169 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
3.15 **General Principles** – Publication of laws.
5.3.37.1 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Penalty, heavier, imposing / Law, application, not publicly announced.

Headnotes:

A conviction pursuant to a legal provision that had not been publicly announced did not violate Article 97 of the Constitution, which provides that no law shall be given retroactive effect. However, it did constitute a violation of Article 7 ECHR.

Summary:

A. was convicted in the District Court and in the Court of Appeal pursuant to a provision in Section 192 of the Penal Code, which at the time of the criminal act had been adopted but not been announced in the Norwegian Legal Gazette. The Supreme Court had dismissed A.'s appeal against the sentence pronounced by the Court of Appeal of two years' imprisonment.

A. petitioned to the Court of Appeal for the case to be reopened, and referred to Article 97 of the Constitution and Article 7 ECHR. The Court of Appeal dismissed the petition on the grounds that the act committed by A. was also a criminal one prior to the statutory amendment, at that time pursuant to Section 93 of the Penal Code.

A. appealed the ruling of the Court of Appeal to the Appeals Selection Committee of the Supreme Court by way of interlocutory appeal. The Committee referred the case to a chamber of the Supreme Court, which allowed the appeal. The Supreme Court found that the application of the unannounced provision did not violate Article 97 of the Constitution, which provides that no law shall be given retroactive effect. The Court stated that it was established in court practice that Article 97 of the Constitution does not prevent the application of a legal provision immediately upon it being adopted. However, the Court found that the application of the provision did constitute a violation of Article 7 ECHR as interpreted in the practice of the European Court of Human Rights and in legal theory. The problem in relation to the European Convention was not that A. had been found guilty of a criminal act – the act was criminal also prior to the statutory amendment – but related to sentencing, since the statutory amendment provided for much stricter sentences. The imposition of heavier penalties than those that applied at the time of the criminal act was a violation of Article 7 ECHR.

The sentence was linked to the wrongful application of law and the Supreme Court found that the case should be reopened pursuant to Section 392.2 of the Criminal Procedure Act. A. had submitted an alternative plea that the Supreme Court's previous interlocutory decision be reopened. This alternative plea was allowed, so that the verdict was amended to a conviction for offences against Section 193.1, first sentencing alternative of the Penal Code, and the sentence was fixed at 10 months' imprisonment, on the basis of the sentence applicable immediately prior to the statutory amendment.

Languages:

Norwegian.

Identification: NOR-2004-1-002

a) Norway / **b)** Supreme Court / **c)** / **d)** 23.03.2004 / **e)** 2003/1485 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.20 **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.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Photo, out of the courthouse, reporting.

Headnotes:

It is prohibited to photograph a person who is accused or convicted of a crime on his or her way to or from a court hearing, or to publish such photographs. The provision also protects the accused or convicted person on his or her way out of the courthouse and into a waiting civil police car. The prohibition does not however apply where there are exceptional circumstances.

Summary:

The issue in the case was whether the editors of two newspapers were guilty of a criminal offence for publishing photographs of C. on her way out of the courtroom following a conviction in the District Court for triple murder. The photographs were published without C.'s consent.

Two photographs of C. crying on her way out of court and into a waiting civil police car were published in one of the newspapers on 22 and 23 June 2001, and one photograph was published in the other newspaper on the 23 June 2001. Summary fines were issued against the editors and the photographers who had taken the pictures for breach of Section 198.3, cf. subsection 131a of the Court of Justice Act. Both the editors and the photographers refused to accept the fines, and the case was referred to the District Court where all of them were acquitted. The Director of Public Prosecutions appealed directly to the Supreme Court against the acquittal of the two editors. The Supreme Court found that the editors should be convicted. The Court stated that the legal position was clear. Section 131a.1 of the Court of Justice Act prohibits the photographing of an accused or convicted person on his or her way to or from a court hearing. The only exception to this rule is where the accused or convicted person gives his or her consent. The provision covered the present situation and protected C. on her way out of the courthouse and into a waiting civil police car. The legal position was unchanged by the fact that C. was arrested immediately after the conviction.

The right to freedom of expression in Article 10 ECHR could not lead to another result. In the decision in *Rt* 2003, page 593 [NOR-2003-2-004], the Supreme Court had found that the prohibition against taking photographs would not apply where exceptional circumstances dictate that there must be a right to take photographs and to publish them. No such exceptional circumstances were present in the case. The admissibility decision of the European Court of Human Rights of 6 May 2003 in the case of *P4 v. Norway*, which concerned the rejection of an application to broadcast the main hearing in this very murder case, shows that that national authorities have a wide margin of appreciation in assessing what amounts to the "fair administration of justice". The Supreme Court found that the prohibition against taking photographs not only protects the individual against being identified and against being depicted in circumstances where his or her self-control is diminished, but also promotes a confidence-inspiring and considerate procedural system. The dignity and reputation of the courts is also an important factor. The murder case was horrifying and the subject of immense interest, and C.'s identity was to a large extent already revealed. Notwithstanding, she was at the very core of what the prohibition was designed to protect, and the Supreme Court found that there were no other factors that entitled the press to take photographs or for the public to see them.

Both editors were given fines of NOK 10 000, alternatively 15 days' imprisonment. C. had claimed compensation for non-pecuniary loss, but the Supreme Court did not find sufficient cause to make an award.

Cross-references:

- *Bulletin* 2003/2 [NOR 2003-2-004].

Languages:

Norwegian.

Poland
Constitutional Tribunal

Statistical data
1 January 2004 – 31 March 2004

I. Constitutional review

Decisions**:**
- Cases decided on their merits: 20
- Cases wholly or partly discontinued: 6

Types of review:
- *Ex post facto* review: 20
- Preliminary review: 0
- Abstract review: 16
- Court referrals ("legal questions"): 4

Challenged normative acts:
- Cases concerning the constitutionality of statutes: 20
- Cases on the legality of other normative acts under the Constitution and statutes: 20

Holdings:
- The statutes in question to be wholly or partly unconstitutional (or the acts of lower rank to violate the provisions of superior laws and the Constitution): 8
- Upholding the constitutionality of the provision in question: 12

Precedent decisions: 6

II. Universally binding interpretation of laws

- Resolutions issued under Articles 2 and 3 of the Constitutional Tribunal Act: 20
- Motions requesting such interpretation rejected: 6

Important decisions

Identification: POL-2004-1-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 04.11.2003 / **e)** SK 30/02 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2003, no. 194, item 1906; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 8/A, item 84 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
4.8.8.3 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Supervision.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Local self-government, decision, appeal, conditions / *Res iudicata*.

Headnotes:

The principle of *res iudicata* is particularly strong in a case where the review of an appeal against an administrative act and the ascertainment of its conformity with the law by an administrative court affirmed that the act did not violate the legal interests and rights of citizens and is valid *erga omnes*. In such a case there are no reasons for the re-examination of the case, which would be conducted on the basis of the same charges.

If every citizen was entitled, at any time, to file successive complaints against a self-government resolution irrespective of the fact that such a resolution has been already subject to a final decision made by an administrative court would lead to a violation of the principle of certainty of the law.

Summary:

The Tribunal examined the case as a result of a constitutional complaint.

Article 101.2 of the Act on Local Self-Government precludes the possibility of filing an appeal against a decision of the local self-government where an administrative court has already issued a decision and rejected the appeal.

In its decision, the Tribunal recalled that it may be necessary to limit access to courts for reasons commonly respected in a state of law such as certainty of law, the rule of law or confidence in the law.

The questioned provision does not prevent the right of access to court or the right to pursue violated freedoms or rights. It solely limits the right of access to courts in a manner permitted by the Constitution. It is therefore in conformity with the principle of access to court (Article 45.1 of the Constitution) and the right to be heard before a court (Article 77.2) in connection with the principle of a democratic state of law and social justice (Article 2).

Cross-references:

- Decision of 19.09.1994 (W 5/94);
- Decision of 10.05.2000 (K 21/99), *Bulletin* 2000/2 [POL-2000-2-013];
- Decision of 09.06.1998 (K 2/97).

Languages:

Polish.

Identification: POL-2004-1-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 18.11.2003 / **e)** P 6/03 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2003, no. 206, item 2011; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 9/A, item 94 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.21 **General Principles** – Equality.
5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Communist regime, persecution, compensation, conditions.

Headnotes:

The fundamental burden of proof as to the reasons for the persecutions lies with the Polish courts, which today adjudicate in cases concerning the awarding of benefits. This cannot lead to decisions contrary to the constitutional principle of equality, that is to deprive Polish patriot activists who continued their activity on the Polish lands in the east, even after such territories were legally incorporated into the USSR, of compensation.

The limitation of the liability of the Polish State for the persecution of persons for patriotic activities is justified by the purpose of the legislation, i.e. avoiding a situation where Poland would need to pay compensation to persons persecuted by the Soviet authorities on the territory of the USSR formerly within the borders of Poland for activities which had no connection with patriotic activities conducted to the benefit of Poland.

Summary:

The Tribunal examined the case as a result of a referral made by the District Court, III Criminal Department, in Jelenia Góra.

According to Article 8.2.a in connection with Article 8.2.b of the Act on the recognition as invalid of decisions issued with respect to persons persecuted for activities conducted for the benefit of the sovereign existence of the Polish State, the group of persons entitled to benefits is understood as also covering persons who, after 5 February 1946, continued their earlier activities for the benefit of the sovereign existence of the Polish State on the territory of Poland lying within the borders set in the Treaty of Riga outside the present borders of Poland, and were persecuted by the Soviet prosecuting and judicial authorities or extrajudicial authorities for doing so. The criteria applied are the persecuting authority (a Polish or Russian authority) and the territory of the country on which the persecuted activity was conducted.

The Tribunal drew attention to a major difference in the conditions of the payment of compensation to persons persecuted by the Polish and Soviet authorities. In the case of persons persecuted by the Polish authorities, the basic condition for applying for compensation is the recognition of the decision issued by the Polish authorities as being invalid. On the other hand in the case of persons persecuted by the Soviet authorities there is no condition of being sentenced or the annulment of the judgment at all. The only condition in the latter case is the fact of persecution and the grounds for the application thereof, i.e. “activity for the benefit of the sovereign existence of the Polish State or due to such activity”. Such a differentiation in the legal situation does not need to be discriminatory nor contradict the constitutional principle of equality.

Article 8.2.a in connection with Article 8.2.b of the Act on the recognition as invalid of decisions issued with respect to persons persecuted for activities conducted for the benefit of the sovereign existence of the Polish State was considered conform to the principle of equality (Article 32 of the Constitution).

Cross-references:

- Decision of 30.04.1996 (W 18/95);
- The resolution of the Supreme Court dated 24.11.1999 (OSNKW 2000, no. 1-2, item 8).

Languages:

Polish.

Identification: POL-2004-1-003

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 25.11.2003 / **e)** K 37/02 / **f)** / **g)** *Dziennik Urzędowy Rzeczypospolitej Polskiej "Monitor Polski"* (Official Gazette), 2003, no. 56, item 877; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 9/A, item 96 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.38.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Inheritance, right / Testator, will, respect / Defence, national.

Headnotes:

The right to inheritance, like other protected constitutional property rights, is not an absolute right. In previous judicial decisions certain significant requirements were laid down which the legislator should respect when drafting rules governing disposals in the event of death. One of these is the need to respect the true will of the testator, expressed in the form of a testament or otherwise.

Article 15.2 of the Act on recognizing part of the Hel Peninsula as an area of particular importance for national defence which provides that testamentary heirs must obtain a permit to inherit an estate comprising real property located on the Hel Peninsula cannot be regarded as necessary or in reasonable proportion to the intended purpose of the legislator. There are also no grounds for refusing appropriate compensation to an heir who was precluded from acquiring real property.

Summary:

The precedence of testamentary inheritance in relation to statutory inheritance undoubtedly follows the constitutional guarantees of the right to property and the right to inheritance, a component of which is the freedom to make a will.

The basic measure of the permissibility of the introduction of specific mechanisms limiting the use of constitutional substantive rights is the constitutional principle of proportionality, which makes it possible to examine whether the same effect may be achieved through less detrimental methods, i.e. interfering less with the constitutionally protected rights and freedoms. All limitations of rights and freedoms should satisfy the conditions of statutory form and must be necessary for the realization of specific goals.

The contested provisions are contrary to the right to property (Article 64.1 and 64.2) in connection with Articles 21.1 and 31.3 of the Constitution.

Cross-references:

- Decision of 03.07.2001 (K 3/01);
- Decision of 16.02.1999 (SK 11/98), *Bulletin* 1999/1 [POL-1999-1-003];
- Decision of 31.01.2001 (P 4/99), *Bulletin* 2001/1 [POL-2001-1-006];
- Decision of 21.05.2002 (K 30/01);
- Decision of 03.10.2000 (K 33/99), *Bulletin* 2000/3 [POL-2000-3-020];
- Decision of 26.04.1994 (K 11/94);
- Decision of 30.10.1996 (K 5/96);
- Decision of 02.06.1999 (K 34/98), *Bulletin* 1999/2 [POL-1999-2-019];
- Decision of 09.04.2002 (K 21/01);
- Decision of 24.02.2003 (K 28/02);

- Decision of 14.03.2000 (P 5/99), *Bulletin* 2000/1 [POL-2000-1-009];
- Decision of 08.05.1990 (K 1/90);
- Decision of 12.01.2000 (P 11/98), *Bulletin* 2000/1 [POL-2000-1-005];
- Decision of 12.04.2000 (K 8/98);
- Decision of the European Court of Human Rights dated 23.09.1982, case *Sporrong and Lönnroth v. Sweden*, *Special Bulletin ECHR* [ECH-1982-S-002]; Vol. 52, Series A of the Publications of the Court.

Languages:

Polish.

Identification: POL-2004-1-004

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 26.11.2003 / **e)** SK 22/02 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2003, no. 206, item 2012; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 9/A, item 97 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Clarity and precision of legal provisions.
3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
4.7.15.2 **Institutions** – Judicial bodies – Legal assistance and representation of parties – Assistance other than by the Bar.

Keywords of the alphabetical index:

Criminal liability, elements, precision / Offence, criminal, exact definition.

Headnotes:

The scope of application of the constitutional concept of criminal liability covers not only criminal liability in the narrow meaning of the term, i.e. liability for criminal offences, but also other forms of liability associated with the meting out of any punishment to persons.

Article 59.1 of the Code of Petty Offences, which was repealed by the Act on Commercial Activity in connection with the Act on Legal Advisors, making it possible to apply criminal sanctions to persons with a higher legal education rendering legal assistance who do not meet the requirements set forth for the performance of the profession of legal advisor or advocate, is unconstitutional insofar as its drafting does not allow acts which are considered as a punishable offence to be precisely defined by way of interpretation.

Summary:

The Tribunal examined the case as a result of constitutional complaint.

The grounds for the lack of conformity of the questioned provision with the constitutional concept of criminal liability is the lack of precision while defining a punishable offence.

The Act on Legal Advisors and the Law on the Bar, which were intended to specify more precisely the scope of exclusivity of rendering legal assistance, do not make it possible to unequivocally state what types of activity or what actions forming part of legal services understood broadly are reserved for the profession of legal advisors or advocates. Consequently, it is not possible to establish clearly when performance of such activity or actions by persons who are not legal advisors or advocates constitutes a punishable offence.

The defectiveness of the questioned provision results from the impossibility of precisely defining the contents thereof by way of an interpretation.

Cross-references:

- Decision of 25.09.1991 (S 6/91);
- Decision of 19.06.1992 (U 6/92);
- Decision of 13.06.1994 (S 1/94);
- Decision of 20.02.2001 (P 2/00);
- Decision of 21.05.2002 (K 30/01);
- Decision of 08.07.2003 (P 10/02).

Languages:

Polish.

Identification: POL-2004-1-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 08.12.2003 / **e)** K 3/02 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2003, no. 218, item 2150; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 9/A, item 99 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.13 **General Principles** – Legality.
4.5.2 **Institutions** – Legislative bodies – Powers.
5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Deposit, national securities, powers / Broker, compensation system, annual contribution / Broker, activity, regulations.

Headnotes:

A reference in the provisions of laws to other norms, rules and principles which are not law does not make them law by the exclusive fact of referral. Nevertheless, the observance of such rules may be an obligation imposed by the reference norm, in particular in contractual relationships. In this way the law not only fulfills the role of a direct regulator of social relationships, but may also constitute a link to other regulators.

Only a limited group of entities are entitled to create law and the catalogue of sources of law is exhaustively set forth in the Constitution. The National Securities Deposit is not among the entities authorized to create law, and the by-laws it establishes are not sources of law. The type of relationship linking the National Securities Deposit with entities engaged in brokerage activities (an agreement, civil law relationships) make it possible to classify the examined situation as a contractual model.

Summary:

The Tribunal examined the case as a result of a motion filed by the Board of Association of Brokers and Advisors.

Article 122.1.1 of the Act on Public Trading in Securities is in conformity with the principle of a democratic state of law and the principle of social justice.

Articles 121.6 and 146.a of the Act on Public Trading in Securities, which authorize the National Securities Deposit to set the annual contribution made by the brokerage houses to the compensation system and inform brokerage houses thereof and which authorize the National Securities Deposit to adopt by-laws on the functioning of compensation are in conformity with the constitutional catalogue of the sources of law (Article 87.2 of the Constitution).

The type of relationship linking the National Securities Deposit with entities engaged in brokerage activities (an agreement, civil law relationships) make it possible to classify the examined situation as a contractual model. It is a situation in which a professional civil law entity shapes certain elements of the system of compensation in the form of a civil law institution. Therefore, the questioned provision of law is not contrary to the constitutional catalogue of the sources of law (Article 87.1 of the Constitution).

Cross-references:

- Decision of 07.12.1999 (K 6/99), *Bulletin* 2000/1 [POL-2000-1-001].

Languages:

Polish.

Identification: POL-2004-1-006

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 09.12.2003 / **e)** P 9/02 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2003, no. 218, item 2151; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 9/A, item 100 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.4.6 **Constitutional Justice** – Procedure – Grounds.
3.4 **General Principles** – Separation of powers.

4.8.8.3 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Supervision.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Local self-government, act, legality, supervision / Court, ordinary, primacy.

Headnotes:

Claims of unconstitutionality cannot consist in stating that the provision does not contain a specific regulation, the existence of which would satisfy the applicant. If it were possible to appeal a rule of law on the basis that it does not contain regulations which, in the applicant's opinion, should have been incorporated therein, every act or any provision thereof could be appealed on such a basis.

The issuance of a decision in accordance with the expectations of the court filing the referral would give the provision in question a totally new content. The Tribunal would have changed the legal norm, making a significant modification to the Polish legal order. Thus, the Tribunal would have transformed itself from a court of law into a legislative body. Such powers, which would violate the principle of the separation of powers, have not been envisaged for the Tribunal.

Summary:

The Tribunal examined the case as a result of a referral made by the Supreme Administrative Court.

Article 91.1.2 of the Act on Local Self-Government states that a resolution or ordinance of a self-government authority that violates the law is invalid, and the invalidity thereof is decided upon by a supervisory body.

An analysis of the case leads to the conclusion that the principle of the primacy of ordinary courts as a model of control, which was indicated by the court in the referral, is not actually at issue.

The principle of the primacy of ordinary courts pertains to a division of powers within the structure of judicial bodies while the provisions in question concern the power of supervisory bodies to ascertain the invalidity of resolutions or ordinances of local self-government authorities.

The contested provision is not contrary to the principle of the primacy of ordinary courts expressed in Article 177 of the Constitution.

Cross-references:

- Decision of 19.11.2001 (K 3/00);
- Decision of 09.06.1998 (K 28/97), *Bulletin* 1998/2 [POL-1998-2-013].

Languages:

Polish.

Identification: POL-2004-1-007

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 10.12.2003 / **e)** K 49/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2003, no. 217, item 2142; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 9/A, item 101 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Clarity and precision of legal provisions.
3.13 **General Principles** – Legality.
4.5.2.4 **Institutions** – Legislative bodies – Powers – Negative incompetence.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Regulation, implementing statute, validity / Statute, necessary elements / Notary, fee, determination.

Headnotes:

All basic issues concerning future regulations should already be decided in the statutory act. The statute has a protective function which, particularly in the field of civil rights and duties, cannot be replaced by sub-statutory acts. Guidelines as to the contents of the sub-statutory act may be contained not only in the provision of statute containing the authorization, but also in other provisions of the statute, providing that

this is possible on the basis of an analysis of the whole statutory act.

Summary:

The Tribunal examined the case as a result of a motion filed by the Ombudsman.

Article 5 of the Act on Notaries contains an authorization to issue a regulation determining the maximum fees for actions performed by notaries, and the regulation of the Minister of Justice on notarial fees.

The reason for fixing maximum rates of notarial fees is to protect participants in trade, ensure greater accessibility of notarial services and prevent exorbitant notarial costs.

The provision in question, constituting an authorization for the Minister to set maximum notarial fees, does not contain any guidelines concerning the content of the regulation and does not make it possible to specify what elements and criteria should be taken into consideration when determining the maximum notarial fee. It is therefore contrary to Article 92.1 of the Constitution (the principle that there must be precise specification to issue sub-statutory acts in the statute of the authorization).

As a result of the fact that the provision containing the authorization to issue regulation on notarial fees was declared unconstitutional and without binding effect, the regulation issued on the basis of such an authorization also lost its binding effect.

The provisions mentioned became invalid on 30 June 2004.

Cross-references:

- Decision of 10.09.2001 (K 8/01);
- Decision of 06.05.2003 (P 21/01).

Languages:

Polish.

Identification: POL-2004-1-008

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 16.12.2003 / **e)** SK 34/03 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2003, no. 220, item 2190; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 9/A, item 102 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.12 **General Principles** – Clarity and precision of legal provisions.
5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Civil proceedings.
5.3.13.3 **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, fees / Court, fee, non property rights cases.

Headnotes:

The only way of guaranteeing access to court for all citizens is the introduction of flexible principles for setting court fees.

Summary:

The Tribunal examined the case as a result of a constitutional complaint.

Article 32 in connection with Article 31.2 of the Act on Court Fees in civil law cases regulates the principles for setting court fees in property and non-property rights cases with an undetermined value at the time of the initiation of the case.

In cases concerning property and non-property rights with an undetermined value at the time a case is initiated a temporary court fee is set when the proceedings are initiated and a final court fee is fixed in the decision at the end of the case. In determining the final court fee, the court takes into consideration the financial standing of the party who has to pay costs and the manner and degree of complexity of the case.

In cases concerning non-property rights, in which the outcome of the court proceedings has no direct effect on the financial standing of the parties, the court decision constitutes an indispensable condition for

defining the parties' situation at law. The only way of guaranteeing access to court for all citizens is the introduction of flexible principles for setting court fees. This is served by the solution adopted in the questioned provisions.

The criteria adopted by the legislator in the provisions in question have been appropriately selected, are comprehensible, objective and can be verified. Moreover, the Act on court fees in civil law cases provides for a verification of their application in the appeal court instance. As a result, the formulation of the provisions is in conformity with the principle of precise legal provisions and does not allow for arbitrary court decisions. It thus also complies with the principle of access to courts (Article 45.1 of the Constitution) in connection with the principle of a democratic state of law and the principle of social justice (Article 7 of the Constitution).

Cross-references:

- Decision of 14.12.1999 (SK 14/98).

Languages:

Polish.

Identification: POL-2004-1-009

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 13.01.2004 / **e)** SK 10/03 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 9, item 75; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 1/A, item 2 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
3.12 **General Principles** – Clarity and precision of legal provisions.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Proceedings, summary, appeal, grounds.

Headnotes:

The efficiency and speed of summary proceedings does not constitute a sufficient justification for the applied mechanism of appeal in summary proceedings and is not a value for which fundamental rights may be sacrificed. The simplification and acceleration may be applied to formal issues (e.g. the introduction of forms or the shortening of the deadlines of appeal), however, under no circumstances whatsoever can it be applied to the rights of the parties, in particularly the defence of their rights and interests.

Limiting appeals from the decisions of courts of first instance as a result of subordinating the general principles of appeal proceedings to the principles of the efficiency of proceedings and, more precisely, the speed of proceedings, violates the constitutional right of appeal.

Summary:

The Tribunal examined the case as a result of a constitutional complaint regarding Article 505[9] of the Code of Civil Procedure.

The provision in question contains a closed catalogue of the grounds for appeal which significantly limits the chances of the admissibility of an appeal in summary proceedings in comparison with the general principles on introducing appeals in civil proceedings.

The use by the legislator of unspecific, unclear criteria in listing the grounds for appeal and the introduction of a hierarchy in the provisions may lead to discrepancies in court decisions as to whether there are grounds for appeal. Such regulation constitutes an uncertainty and gives rise to a high level of unpredictability regarding whether courts of appeal will accept appeals.

The laws on court proceedings must, in particular, precisely regulate the rights of the parties and the appealing of court decisions. The remedy at law should be effective, meaning it should facilitate the substantive settlement of the case in appeal proceedings. The goal of the double degree of jurisdiction is to prevent mistakes and arbitrariness. The objective and real control of decisions issued by

the courts of first instance is guaranteed by appeal proceedings not cassation proceedings.

Article 505[9] of the Code of Civil Procedure concerning the possibility of filing an appeal in summary proceedings is not in conformity with the principle of a democratic state of law and the principles of social justice (Article 2 of the Constitution) and the right to appeal against court decisions (Article 78) in connection with the principle of double degree of jurisdiction (Article 176.1).

The Tribunal decided that the provision in question would lose its force on 13 July 2005.

Cross-references:

- Decision of 16.11.1999 (SK 11/99), *Bulletin* 1999/3 [POL-1999-3-029];
- Decision of 12.03.2002 (P 9/01), *Bulletin* 2002/3 [POL-2002-3-022];
- Decision of 12.06.2002 (P 13/01), *Bulletin* 2002/2 [POL-2002-2-019].

Languages:

Polish.

Identification: POL-2004-1-010

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 20.01.2004 / **e)** SK 26/03 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 11, item 101; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 1/A, item 3 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
4.15 **Institutions** – Exercise of public functions by private bodies.
5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Court, decision, forced execution / Bailiff, liability.

Headnotes:

The rule of law cannot be applied to a situation where the liability for an unlawful act committed by a private body exercising public functions which is carrying out such functions on its own account (as in the case of a bailiff) is restricted to a certain extent (as for the liability of this private body towards the State), while the State is held liable for actions of public authorities, including the unlawful actions of a bailiff.

A situation in which liability for damage caused by a bailiff acting on his own account as a result of conducting enforcement in an unlawful manner and contrary to constitutional standards would be finally imposed on the State is contrary to the principle of the State's liability for unlawfully caused damage.

Summary:

The Tribunal examined the case as a result of a constitutional complaint.

The right to compensation for unlawful actions of public authorities also applies where the damage is caused by the action of a private body exercising public functions even if this body cannot be regarded as a public authority. This includes a bailiff performing functions imposed by the law on the enforced execution of court decisions. However, there is a difference between a bailiff and a public officer because the bailiff exercises public functions on his own account within the framework of a bailiff's office.

The constitutional right to compensation for damage caused by an unlawful act of a public authority is not only a source of substantive law for the injured person. It is also the constitutional guarantee of the principle of the rule of law that the public authorities act on the basis and within the limits of the law.

Article 769 of the Code of Civil Procedure which regulates the liability of bailiffs for damages is contrary to the principle of the State's liability for damage caused unlawfully by public officers (Article 77.1 of the Constitution).

Cross-references:

- Decision of 04.12.2001 (SK 18/00), *Bulletin* 2002/2 [POL-2002-2-012];
- Decision of 24.02.2003 (K 28/02);
- Decision of 23.09.2003 (K 20/02), *Bulletin* 2003/3 [POL-2003-3-031].

Languages:

Polish.

Portugal
Constitutional Court

Statistical data
1 September 2003 − 31 December 2003

Total: 236 judgments, of which:

- Abstract *ex post facto* review: 10 judgments
- Appeals: 172 judgments
- Complaints: 52 judgments
- Electoral matters: 6 judgments
- Political parties' accounts: 1 judgment

Statistical data
1 January 2004 − 30 April 2004

Total: 297 judgments, of which:

- Preventive review: 1 judgment
- Abstract *ex post facto review*: 12 judgments
- Appeals: 197 judgments
- Complaints: 77 judgments
- Political parties and coalitions: 6 judgments
- Political parties' accounts: 3 judgments
- Referendums: 1 judgment

Important decisions

Identification: POR-2004-1-001

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 17.09.2003 / **e)** 406/03 / **f) / g)** *Diário da República* (Official Gazette), 247 (Serie I-A), 24.10.2003, 7094-7102 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

1.3.5.11.2 **Constitutional Justice** – Jurisdiction – The subject of review – Acts issued by decentralised bodies – Sectoral decentralisation.
3.18 **General Principles** – General interest.
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.
5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
5.4.9 **Fundamental Rights** – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Civil service, public competition, compulsory / Civil service, contract, work, system.

Headnotes:

Article 47.2 of the Constitution, which enshrines the right to equal access to the civil service, implies a right to a fair selection and recruitment procedure for the civil service. This generally takes the form of a public competition which, whilst upholding the principles of equal, free access to the civil service, gives general priority to criteria linked to candidates' merit and ability.

Given that the aim of the public competition system is to facilitate the exercise of the right to equal access, civil servants may only be recruited by other means for certain practical reasons – these may be specific to the post that needs to be filled (such as the selection of senior managers, which may be possible without a public competition).

Even in cases where employees may sign an employment contract, the civil service cannot consider itself as a private employer and its staff cannot be treated as normal workers. If the use of individual employment contracts offered total freedom of choice and a civil service recruitment system governed by general employment law, with no procedural requirement of respect for the principles of equality and impartiality, especially in cases where the individual employment contract system was linked to a public body, it would infringe the Constitution.

The constitutional requirement of equal, free access to the civil service, generally by means of a public competition, has two aspects. Firstly, from a subjective point of view, it involves the right of all citizens to access to the civil service; secondly, from an objective point of view, it is an institutional guarantee designed to ensure that civil servants are impartial, in other words that "the workers of public administrative authorities and other personnel of the State and other public bodies exclusively serve the public interest" (Article 269.1 of the Constitution). In fact, one of the features of selection and recruitment procedures that guarantee equal, free access to the civil service is that they prevent such selection and recruitment being based on criteria that would facilitate the recruitment of citizens belonging exclusively or almost entirely to a certain group or with particular leanings. If this were the case, there would be a risk of the civil service becoming dependent on these people and the need to exercise functions "in such a way as to respect the principles of equality, proportionality, fairness, impartiality and good faith" (Article 266.2 of the Constitution) would be called into question.

Summary:

The Principal State Prosecutor of the Republic asked for two provisions in the statutes of the National Civil Aviation Institute (NCAI) to be declared unconstitutional with general binding force, on the grounds that they were organically and materially unconstitutional.

With regard to organic unconstitutionality, it was alleged that Article 165.1.t of the Constitution had been violated. Under this article, except where legislative power is delegated to the government, the parliament has exclusive legislative powers with regard to the bases for the rules and jurisdiction of the civil service. It was also claimed that the general law regulating the means of constituting, amending and terminating the legal employment relationship for civil servants – a general law which also applied to public institutions – made no provision for indefinite-term employment contracts. However, the Court, confirming previous decisions, held that these rules were, to this effect, covered by legislation drawn up on the basis of a legislative delegation set out in the State Budget Act and were not therefore organically unconstitutional.

With regard to material unconstitutionality, the NCAI is essentially a public-law institution which exercises public authority through its organs and employees. In short, its employees fulfil a public function in the material sense of the term. Consequently, the responsibilities and nature of the NCAI, as well as the functions entrusted to its organs and employees, fully justify the application of the guarantees of freedom and equality of access in the recruitment and selection of its personnel, as enshrined in Article 47.2 of the Constitution, even if staff are offered individual employment contracts.

The Court therefore concluded that the rule in question – insofar as it empowers the management board of the NCAI to recruit and appoint employees subject to the legal regime of individual employment contracts, without making provision for any recruitment and selection procedure guaranteeing free, equal access – violates Article 47.2 of the Constitution. However, it limited the effects of its decision in

order to protect the validity of the employment contracts that had already been signed.

Languages:

Portuguese.

Identification: POR-2004-1-002

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 29.09.2003 / **e)** 433/03 / **f)** / **g)** *Diário da República* (Official Gazette), 260 (Serie II), 10.11.2003, 16809-16811 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.27.1 **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:

Foreigner, legal aid, reciprocity / Reciprocity, requirement, human rights, violation.

Headnotes:

According to the principle enshrined in Article 32.1 of the Constitution, criminal procedure should be a *due process of law*; any procedural rules which unreasonably limit the means of defence of the accused should therefore be considered unlawful.

The rule under which a foreign national who does not reside in Portugal, has no financial means and is accused in criminal proceedings pending before the Portuguese courts is refused legal aid in the form of exemption from court fees and other procedural costs, is unconstitutional. However, this unconstitutionality is not derived from any incompatibility, in the abstract, between the reciprocity rule and either the principle of equality or that of non-discrimination. Rather, the unconstitutionality lies in the fact that the lack of such reciprocity results in the practical, unacceptable limitation of the means of defence of the accused and, consequently, the restriction of "legal protection as a right to the safeguarding of rights" or of certain fundamental rights.

Summary:

This case concerns the constitutionality of the rule relating to the granting of the right to legal protection to foreign nationals who are not resident in Portugal. According to this rule, this right is only granted if the same right is granted to Portuguese nationals under the legislation of the countries concerned. In the present case, according to the decision appealed against, it is this requirement of reciprocity which is unconstitutional, insofar as it would deny a foreigner who had no financial means and was accused in criminal proceedings pending before the Portuguese courts legal aid in the form of total exemption from court fees and other procedural costs.

However, with regard to the decision appealed against, the restrictions based on issues of reciprocity and, in particular, the rule in question violate the principle of non-discrimination [Article 13.2 of the Constitution, which states that "nobody shall be [...] discriminated against [...] by reason of his or her [...] economic situation], the principle of equality [Article 15.1 of the Constitution, which states that "foreigners [...] resident in Portugal shall enjoy the same rights [...] as Portuguese citizens"] and the fundamental right of access to the courts [Article 20.1 of the Constitution, which states that "Everyone is guaranteed access to law and to the courts in order to defend his or her rights and legally protected interests; justice shall not be denied to a person for lack of financial resources"]. In view of the case-law of the Constitutional Court, it may be concluded that the rule in question is incompatible not only with the constitutional provisions governing the rights of the defence, including the right to appeal, but also with those guaranteeing access to the law.

Supplementary information:

The Constitutional Court has already ruled on the relationship between the constitutional provisions concerning foreign nationals and the question of legal aid. For example, in Judgment no. 962/96, it declared, with general binding force, that the rules prohibiting the granting of legal aid, in the form of legal assistance, to foreign nationals and stateless persons who seek to contest before the courts an administrative decision denying them asylum were unconstitutional because they violated the combined provisions of Articles 33.3, 20.1, 268.4 and 15.1 of

the Constitution. It therefore considered, in substance, that since the right to legal protection was a right to the safeguarding of rights, the right of access to the courts incorporated the irreducible core of the principle of equal treatment for nationals, foreigners and stateless persons, enshrined in Article 15.1 of the Constitution. This principle of equality, although it may be limited by exceptions imposed by parliament (Article 15.2 of the Constitution), may not be limited to such an extent that the constitutional status of foreigners is distorted.

More recently, in Judgment no. 365/00, the Court declared unconstitutional the rule denying access to legal aid to an Angolan citizen (who had lost his Portuguese nationality through decolonisation), who took court action to exercise his right to a pension in Portugal, where he did not live, on the grounds that he had worked as an official for the former Portuguese public administration overseas. The Court held that the combined provisions of Articles 13.1, 15.1, 20 and 268.4 of the Constitution had been violated.

Languages:

Portuguese.

Identification: POR-2004-1-003

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 14.10.2003 / **e)** 456/03 / **f)** / **g)** *Diário da República* (Official Gazette), 34 (Serie II), 10.02.2004, 2368-2370 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to family life – Descent.

Keywords of the alphabetical index:

Descent, right to know, time-limit / Identity, personal, right / Paternity, denial.

Headnotes:

The limitation of the right to have natural descent established should not be detrimental to that right. In other words, notwithstanding the fact that the imposition of limits, particularly time-limits, on the exercise of the right to bring an action to establish paternity may be criticised from a constitutional point of view, a restriction which, in practice, denies a person any possibility of establishing their natural descent is certainly not admissible.

The rule which, on the basis of objective time-limits, precludes the establishment of paternity in cases where the grounds for bringing the action do not become apparent until after those time-limits have passed, is disproportionate and violates the right to personal identity.

Summary:

This case concerns the constitutionality of a provision preventing a person who, during the limitation period, had no reason or ground to question or cast doubt on their descent, which was legally established and duly registered at the time, from bringing an action to establish paternity after the time-limit has passed. Is it therefore admissible from a constitutional point of view that a rule should prevent a person aged 20 or over (in this case, aged 31), who is surprised by the bringing of an action by a third party (in this case, the presumed father) to disclaim paternity, from seeking to establish paternity? The answer is no.

The right to personal identity is enshrined in Article 26 of the Constitution. The central element of this right is the possibility for every person to know their ancestry, particularly their natural descent. To this end, the law sets out legal mechanisms designed to enable people to exercise this right, allowing them to establish their descent (maternity, paternity), so that everyone can identify their ancestors in order, *inter alia*, to establish their legal descent on the basis of biological ties.

In this type of situation, the provision in question effectively prevents people from knowing who their father is, even though they would have been able to find out at a time when legal action “could not really” be brought because there was no reason to do so. It is therefore unconstitutional. Indeed, it is not admissible under the Constitution (in accordance with Articles 8.3 and 26.1 of the Constitution) that a person should be denied any possibility of legally establishing their biological descent following an action to disclaim paternity.

Supplementary information:

The Constitutional Court has already ruled on the constitutionality of the provisions in Article 1817 of the Civil Code, insofar as they lay down a time-limit for proceedings to establish paternity. It has always concluded that the time restriction on the exercise of the right to have paternity legally established (see Judgments nos. 99/88, 413/89, 451/89, 311/95 and 506/99) is not unconstitutional. In its previous rulings, the Constitutional Court has deemed the establishment, according to objective, inflexible criteria, of a deadline for the bringing of an action to establish paternity and the setting of a date *a quo* to be legitimate for reasons of legal certainty and security. However, the unusual situation in the case in question means that it differs substantially from those previously dealt with.

Languages:

Portuguese.

Identification: POR-2004-1-004

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 22.10.2003 / **e)** 498/03 / **f)** / **g)** *Diário da República* (Official Gazette), 2 (Serie II), 03.01.2004, 40-43 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
3.17 **General Principles** – Weighing of interests.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.38.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Land, register, financial claims, trust / Worker, protection.

Headnotes:

The inclusion of the right to a salary and the right to redundancy payments within the framework of constitutional protection, which covers the right to remuneration, is the most appropriate interpretation of the reference in the Constitution to the right of workers to a decent livelihood. It expresses the maintenance aspect as well as the pecuniary character of the right to a salary (as opposed to the financial claims of the holders of registered security interests).

The setting of limits on the trust associated with the register is an appropriate and necessary means of safeguarding workers' rights to remuneration; in fact, when an employer goes bankrupt, it is probably the only way of guaranteeing the effective exercise of a fundamental right for workers.

Summary:

The constitutionality issue concerns the rule under which the financial claims deriving from individual employment contracts are covered by the right to preferential payment out of all the debtor's immovables and, in accordance with Article 751 of the Civil Code, take precedence over a mortgage, even if it was registered before the aforementioned financial claims.

According to the general principle of the certainty of the law included in the principle of the rule of law, all citizens are entitled to know in advance that their actions or dealings will have certain effects. As far as the land register is concerned, this principle is closely linked to the principle of trust, insofar as people must, in general, be able to rely on the information contained in the register.

From the point of view of the mortgagee, the preservation of trust and of the certainty of the law, which are protected by Article 2 of the Constitution and guaranteed in particular by the land register, is called into question. On the one hand, the certainty provided by the register, when it is final, creates the presumption that the right exists and that it belongs to the registered holder (unless there is proof to the contrary). On the other hand, the legal certainty provided by the register protects third parties who have made acquisitions based on the presumption resulting from the previous entry in favour of the assignor. Therefore, the principle of the certainty of the law and the principle of trust, which are derived from the principle of the democratic rule of law enshrined in Article 2 of the Constitution, recognise the predominance of the register, which can work in

favour of a person acquiring property from a person who has no title to that property ("*a non domino*"), insofar as the principle of public notice which establishes that predominance provides for the extinction of incompatible rights.

However, the fundamental rights of workers include the constitutional right to remuneration for their work, so as to "guarantee them a decent livelihood", in accordance with Article 59.1.a of the Constitution. The Constitutional Court has already expressly held this right to be of a similar nature to rights, freedoms and guarantees (see Judgment no. 373/91).

The case in question therefore involves a conflict between a right having a similar nature to rights, freedoms and guarantees (the right of workers to remuneration for their work) and the general principle of the certainty of the law and trust in the law. Although it seems impossible to evaluate directly, in the light of Article 18 of the Constitution, the way in which the impugned rule has resolved this conflict by giving precedence to the right to remuneration, does not mean that it should not be examined in accordance with the criterion of proportionality.

The requirements of the principle of proportionality are derived not only from a specific article – Article 18.2 of the Constitution –, but also from the general principle of the rule of law, enshrined in Article 2 of the Constitution.

Although the bankruptcy of the employer is also the bankruptcy of the debtor, it is precisely remuneration, as a way of ensuring a decent livelihood for workers, which could justify, from a constitutional point of view, the solution offered by the impugned rule, according to the above-mentioned interpretation. However, this argument needs to be seen in relation to other aspects, particularly the scope of constitutional protection of remuneration (Article 59.1.a of the Constitution), in order to judge whether it only covers the right to a salary or whether it also includes, more broadly speaking, redundancy payments.

Nevertheless, since it is undeniable that the right to compensation is clearly meant to replace the right to loss of earnings, the Court ultimately concluded, firstly, that the restriction of the principle of trust is justified and, secondly, that the rule in question is constitutional insofar as it gives precedence to the financial claims resulting from individual employment contracts.

Supplementary information:

The Constitutional Court has already been asked to determine the constitutionality of rules which confer on certain financial claims the right to preferential payment out of all the debtor's immovables and predominance under the terms of Article 751 of the Civil Code, as well as whether such a right could, in the light of the principle of trust, take precedence over a previously registered mortgage relating to an asset covered by the right. Ruling on these questions, it stated that "the rule [...] according to which the right to preferential payment out of all the debtor's immovables, which it grants to the Treasury, takes precedence over the mortgage under the terms of Article 751 of the Civil Code" (Judgment no. 362/03) and "the rules [...] according to which the right to preferential payment out of all the debtor's immovables, which they grant to the social security authorities, take precedence over the mortgage under the terms of Article 751 of the Civil Code" (Judgment no. 363/02) were unconstitutional because they violated Article 2 of the Constitution.

Languages:

Portuguese.

Identification: POR-2004-1-005

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 10.02.2004 / **e)** 88/04 / **f)** / **g)** *Diário da República* (Official Gazette), 90 (Serie II), 16.04.2004, 5962-5967 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.19 **General Principles** – Margin of appreciation.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.2.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.
5.3.32.2 **Fundamental Rights** – Civil and political rights – Right to family life – Succession.
5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Maintenance, entitlement / Cohabitation, partner, survivor, inheritance tax / Family, protection, constitutional / Pension, survivor's, right, conditions.

Headnotes:

Entitlement to a survivor's pension is independent and separate from any right to a maintenance allowance enforced against either the family members themselves or the deceased partner's estate. This means that attribution of the right to a survivor's pension is a corollary of the right to social security (as set out in Article 63), rather than corresponding to any recognition of the family's need for protection (based on Article 67 of the Constitution).

Under the prevailing interpretation of the provisions in question, in order to qualify for a survivor's pension, payable by the public body to which the deceased partner had paid contributions throughout his or her career, the surviving partner must prove not only that he or she did indeed cohabit with the deceased partner and that he or she is in a state of need, but also, where proceedings are brought against the deceased person's estate, that he or she is unable to obtain a maintenance allowance from his or her family. In other words, in order to qualify for a survivor's pension the surviving partner must prove that he or she is in a state of absolute destitution.

The Court holds the measure in question to be manifestly inappropriate or excessive. Bearing in mind that the right to found a family (Article 36.1 of the Constitution) can be secured in the form of steady, lasting cohabitation, rather than exclusively by marriage (under the conditions set out in accordance with the legislator's discretionary powers), it is doubtful, to say the least, whether this restriction of the right to a survivor's pension can be deemed an acceptable, appropriate way to pursue the possible political aim of protecting or promoting marriage. Having regard to the three conditions set out in the proportionality rule to govern relations between measures adopted and the objectives pursued, although it might straightaway be affirmed that the interpretation of the provisions in question infringes the first of these conditions, i.e. appropriateness vis-à-vis whatever goal is being pursued, and even though it is extremely questionable whether it infringes the second condition, namely the necessary measure principle, it will always undeniably infringe the third, i.e. the principle of proportionality in the strict sense of the term, or the principle of a "fair measure". It must consequently be considered unnecessary, disproportionate and at variance with the principle of outlawing excessive measures.

Summary:

The main question was whether the obligation imposed on a surviving partner who had "cohabited" with a beneficiary of the *Caixa Geral de Aposentações* [Retirement pension fund] (an administratively and financially autonomous public-law legal entity responsible for managing the pensions branch of the civil service social security scheme) to prove – under proceedings mandatorily brought against the deceased partner's estate – in addition to the fact of cohabitation, that he or she not only is in a state of need but also is facing complete destitution because of an inability to obtain a maintenance allowance from his or her family (descendants, ascendants or collaterals) in order to qualify for a survivor's pension from the public body to which the deceased partner had paid contributions throughout his or her career, constitutes an excessive and disproportionate sacrifice, thus infringing the proportionality rule.

The Court points out that the provisions of the Constitution on the right to found a family and to marry can admittedly be interpreted as meaning that a family may be founded on the basis of a steady, lasting period of cohabitation (in the instant case the couple cohabited for at least 29 years), rather than exclusively on the basis of marriage. However, it cannot be taken for granted that this distinction between "founding a family" and "marrying" (Article 36.1 of the Constitution) and the protection to which the family is entitled "as a basic component of society" (Article 67.1 of the Constitution) necessarily requires the legislator to recognise and protect steady, continuous cohabitation on exactly the same bases as a matrimonial family. It might even be held that specific legislative regulations can be laid down for spouses and that "cohabitees", unlike spouses, cannot inherit.

The right to a maintenance allowance and that to a survivor's pension are fundamentally different: the right to maintenance derives from family or quasi-family relationships and is geared to meeting the needs of the beneficiary of such an allowance, whereas the right to a survivor's pension is based on compulsory contributions which the deceased civil servant was required to pay throughout his or her career (for a minimum period). The criteria for calculating the amount of the pension include both the total contributions paid and the period over which they were paid. Regard must also be had to the fact that the pension is awarded by a public body to which civil servants must pay their compulsory contributions. This makes the right to a survivor's pension separate and independent from any maintenance rights enforced against either the family members themselves or the deceased partner's estate. Accordingly, attribution of the right to a survivor's pension is a corollary of the right to social security (as set out in Article 63), rather than corresponding to recognition of the family's need for protection (based on Article 67 of the Constitution).

The proportionality rule is a restriction on the exercise of public authority, and in the specific field of rights, freedoms and guarantees this rule sets a limit on permissible restrictions. The proportionality requirement here is expressly mentioned in Article 18.2 of the Constitution, although broadly speaking, as a general restriction on the exercise of public authority, we might consider that it derives from the principle of the rule of law (set out in Article 2). The three principles underpinning the proportionality rule, in the broad sense, are the principle of appropriateness (any measures restricting rights, freedoms and guarantees must constitute appropriate means of pursuing the objectives in question, while safeguarding other constitutionally protected rights or interests); the necessary measure principle (the said restrictive measures must be necessary for the purposes of attaining the objectives pursued in the absence of any other less restrictive legislative means of attaining them); and the principle of a "fair measure", or proportionality in the strict sense of the term (avoidance of any excessive measures disproportionate to the aims pursued). This means that the relationship between the measures and the aims pursued must fulfil three requirements: firstly, the appropriateness of the said legislative measure in pursuing the underlying objective; secondly, an assurance that this option, as it stands, comprises the minimum level of disadvantage; and lastly, with reference to the strict sense of the proportionality rule, a guarantee that the result obtained is proportional to the burden which it imposes.

The legislator has wide-ranging discretionary powers in terms of law-making. Consequently, the court's assessment of whether a given provision is unconstitutional on the grounds that it violates the proportionality rule depends on whether it can pinpoint any obvious unsuitability of the measure taken, any manifestly erroneous option on the part of the legislator, any blatant excess in the measure or any drawbacks which are obviously disproportionate to the advantages obtained.

In the instant case, the Court held that, as interpreted by the Court in question, the provision at issue was unconstitutional on the ground that it violated the proportionality rule as set out in Article 18.2 and as also implied by the rule-of-law principle (Article 2), in conjunction with the provisions of Articles 36.1, 61.1 and 61.3 of the Constitution.

Supplementary information:

Re. Constitutional case-law on regulations regarding "cohabitation", cf. Judgment no. 275/02 of 19.06.2002 published in *Bulletin* 2002/2 [POR-2002-2-005] and Judgment no. 195/03 of 09.04.2003 published in *Bulletin* 2003/1 [POR-2003-1-004].

Languages:

Portuguese.

Identification: POR-2004-1-006

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 10.03.2004 / **e)** 139/04 / **f)** / **g)** *Diário da República* (Official Gazette), 90 (Serie II), 16.04.2004, 5967-5971 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.38 **Fundamental Rights** – Civil and political rights – Right to property.
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:

Trade name, right to create, nature / Property, guarantee, scope.

Headnotes:

The Constitutional guarantee of the right to private property as set out in Article 62.1 of the Constitution includes not only *proprietas rerum* (limited rights *in rem*, intellectual property and industrial property) but also such other rights as the right to credit and "social rights" (thus including shares, such as shares in companies or business associations). Irrespective of the exact nature of the right to a trade name as protected by the Constitution (and specifically, regardless of whether such protection derives solely from property right or is intended to protect the identity of legal persons), it is recognised that Constitutional protection of property rights also covers the right to a trade name (as a "distinctive trade emblem") that enables the holder to be identified and embodies specific commercial use interests). By the same token, it is acknowledged that protecting property rights or the right of access to property also

embraces the right to obtain or “acquire” a trade name.

The right of appropriation – or the right of access to property – is of a different nature from the rights, freedoms and safeguards set out in the Constitution. To that extent it lacks the legal force conferred by Article 18 of the Constitution.

Summary:

The instant case concerns practical verification of the constitutionality of the provision on the “General system of financial institutions and finance companies”, which is intended to protect the “veracity of trade names” and therefore only allows bodies officially recognised as financial institutions or finance companies to include in their trade or company name or to use in the context of their operations “expressions which suggest the specific activities of credit institutions or finance companies, such as 'bank', 'banker', 'credit', 'deposit', 'financial leasing', 'leasing' and 'factoring'”. According to the applicant, the right to private property secured under Article 62 of the Constitution is restricted by this provision, and this right to ownership includes the right to a trade or company name as a right similar to the rights, freedoms and guarantees set out in the Constitution, even though the above-mentioned restriction does not stem from any explicit Constitutional provision and is not confined to what is necessary in order to safeguard other rights or interests protected by the Constitution.

The point at issue is not the right to retain ownership of the trade name – or the protection of confidence in or even of the right to a previous trade name – but more specifically the right to create such a name by using specific terms. The fact is that the option of extending constitutional protection of property rights to the creation of a trade name is insufficient to answer the question whether the right to create the trade name can enjoy the specific protection granted to rights, freedoms and guarantees, particularly by the rules set out in Article 18 of the Constitution.

The Constitutional Court held that the provision in question was not unconstitutional in terms of violating the proportionality rule.

First of all, the restriction on non-banking institutions is the corollary of the obligation on banking institutions to use the same designations. In this case, the veracity principle (which has a quasi-absolute overriding effect in Portuguese law) applicable to company names, which is generally used to promote the defence and protection of consumers and other economic operators, is a means of promoting the consumer's right to information, helping the State and the Bank of Portugal to accomplish their specific duties, and also protecting citizens' savings. The restriction on the creation of trade names by non-banking institutions is therefore an appropriate means of pursuing the desired objectives.

Secondly, there is no guarantee that other restrictive or non-restrictive measures would be equally effective in protecting the veracity principle, particularly since this solution is based on traditions rooted in both Portuguese and other national legal systems and is even in line with the approach adopted by Community law (see Article 15 of Directive 2000/12/EC of the European Parliament and the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, Official Journal no. L-126 of 26 May 2000, pp. 1-59).

Thirdly, in connection with “fair measures” and proportionality in the strict sense of the term, it should be noted not only that certainty, security, clarity and veracity are essential values for the official names of banking institutions, but also that the obligation on some of these institutions to include specific terms in their company names and the prohibition on others of including the same terms in their company names clearly benefit both trading certainty and security and consumer information and protection.

Languages:

Portuguese.

Identification: POR-2004-1-007

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 24.03.2004 / **e)** 198/04 / **f)** / **g)** *Diário da República* (Official Gazette), 129 (Serie II), 02.06.2004, 8544-8551 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.17 **General Principles** – Weighing of interests.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.

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

Keywords of the alphabetical index:

Communication, phone tapping, evidence / Evidence, invalid, remote effect / Evidence, unlawful obtaining / Confession, value / Fruit of the poisonous tree, doctrine / Evidence, derivative / Evidence, "exclusion rule".

Headnotes:

The constitutional principle of guarantees in criminal proceedings (Article 32 of the Constitution) comprises a general clause embracing all the guarantees deriving from the principle of complete, comprehensive protection of the rights of the defence in criminal proceedings (which indubitably includes all the requisite and appropriate rights and instruments to ensure that accused persons can defend themselves against and deny the criminal charge). The right of access to evidence which is unlawful in terms of important constitutional values and which is excluded from the proceedings must constitute one of the rights of the defence. The "procedural formality requirement" is eminently applicable here. One further question is, aside from the invalidity of the rejected pieces of evidence, whether these ("all") "safeguards for the defence" also include the affirmation of the "remote effect" of the said invalid evidence on other valid pieces of evidence.

The purpose of a provision to the effect that the invalidity of the rejected document extends to all other documents depending on it or which it may affect (Article 122.1 of the Code of Criminal Procedure) is to pave the way for the underlying subject of the so-called "forbidden fruit" doctrine (*Fernwirkung des Beweisverbots* or "fruit of the poisonous tree"). Comparison with the scope of the safeguards for the defence as set out in Article 32 of the Constitution has led the Constitutional Court to consider that there are indeed certain situations involving the "remote effect" which constitute one of the aspects guaranteeing the lawfulness of criminal proceedings. These situations can demonstrate whether the natural link established on a case-by-case basis between invalid evidence and subsequent evidence is also an "illegal" link providing the basis for the "remote effect" or whether, on the contrary, the subsequent evidence is so independent from the invalid evidence that it differs from it in substantive terms.

The "fruit of the poisonous tree" doctrine is used to extend the "exclusion rule" to pieces of evidence that derive from other evidence. Nevertheless, since the very beginnings of this doctrine, such an extension of invalidity has been qualified by a series of circumstances in which the derivative evidence ("derivative" because linked to the invalid evidence) may nonetheless be admissible as valid evidence. After accumulating a great deal of relevant case-law, the Supreme Court of the United States of America has pinpointed the special circumstances in which derivative evidence must be excluded from the specific effect of the "fruit of the poisonous tree" doctrine. These circumstances basically break down into three categories: "independent source limitation", "inevitable discovery limitation" and "purged taint limitation".

The doctrine at issue facilitates a wide-ranging reflection on actual situations, that is to say an interpretation, which is far from justifying, through its mere mention, the sole option of invalidating all the pieces of evidence that follow on from an unlawful piece of evidence. On the other hand, the doctrine's aim is to identify model decisions based on criteria consistent with the balancing of interests, which, in certain circumstances, justifies extending the invalidity of a prohibited piece of evidence and, in others, rejects such an extension. For instance, when interpreting Article 122 of the Code of Criminal Procedure in the light of the "fruit of the poisonous tree", we must look for relations based on the creation of dependence or effect which, being based on rational criteria, necessitate extending the negative values attaching to the previous piece of evidence.

Summary:

The constitutional appeal concerns Article 122.1 of the Code of Criminal Procedure (CCP). Nevertheless, the alleged unconstitutionality takes a specific form: the unconstitutional point at issue concerns the interpretation or recognised scope of a specific legal provision in the decision complained of, rather than the provision as expressed in a declarative interpretation. That being the case, the investigation into the unconstitutionality in question presupposes determining the interpretation of the provision which is the subject of the accusations of non-conformity with the Constitution, as well as the meaning ascribed to this provision in the decision complained of.

The starting point was a court decision declaring null and void a piece of evidence produced during the preliminary investigations, which had involved intercepting a number of telephone calls. This declaration had led to a court ban on the use of those tapped telephone calls in evidence. Subsequently, the Court of appeal ruled that the "remote effect" deriving from the nullity of the tapped calls had to be

interpreted (meaning that Article 122.1 CCP had to be interpreted) as follows: firstly, nullity (the “remote effect”) did not prohibit using the outcome of straightforward consideration of the facts as they stood; secondly, the invalidity of the tapping procedure did not affect the cogent data; thirdly, the said nullity did not undermine the evidence as “transformed into a tangible object”; and fourthly, the nullity of the phone tapping procedure did not affect the status of the defendant's voluntary confession.

Apart from the judgment (in this constitutional appeal), the factual presuppositions in the decisions and the correspondence between the facts and the law deemed applicable, the Constitutional Court is only responsible for appraising the provision as interpreted and ascertaining whether the latter is compatible, in these circumstances, with the constitutional rules relied on. In other words, it is incumbent on the Court to assess the constitutionality of the provisions of Article 122.1 CCP, interpreted as authorising the use (in view of the nullity/invalidity of the phone tapping procedure conducted) of other separate, ulterior pieces of evidence where such pieces of evidence consist in declarations by the defendants themselves, particularly confessions by the latter.

The point at issue is therefore the use of evidence consisting in a confession or, more broadly, significant statements made by the defendants themselves. Such a piece of evidence (confession) functions as a veritable paradigm for an independent subsequent piece of evidence, because in fact it derives from a voluntary act by a person who has been informed of the significance of any statements he or she may make (the evidence in question was produced during the reading of the judgment) and who, lastly, is assisted by counsel. The applicant party had previously (during the adversarial proceedings) challenged the lawfulness of the telephone tapping procedure, and their arguments on this point had been accepted by the trial court.

The whole instant case therefore hinges on the interpretation of Article 122.1 CCP and the relationship between a piece of evidence which takes the form of a confession and another, prior piece of evidence deemed invalid and which is corroborated by a phone tapping procedure. In connection with the former aspect, the legal opinion to the effect that the “remote effect” is an interpretation which, under certain conditions, suggests that the legal bases for invalidating a piece of evidence subsist and must consequently be extended to any subsequent piece of evidence; under other conditions, it is acceptable to reject this possibility. As for the confession itself, it has been considered that such admissions are sufficiently independent to permit an access to facts, which is completely separate from any other access to evidence that has emerged previously and been rejected.

In conclusion, the interpretation of Article 122.1 CCP to the effect that it allows the Court to take account of the significance of subsequent pieces of evidence because it does not declare the latter invalid where they consist in statements taking the form of a confession, is compatible with the Constitution.

Languages:

Portuguese.

Romania
Constitutional Court

Important decisions

Identification: ROM-2004-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 09.03.2004 / **e)** 100/2004 / **f)** Decision on a plea of unconstitutionality in respect of the provisions of Article 362.1.c of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 261/24.03.2004 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Proceedings, criminal, injured party, right of appeal.

Headnotes:

In accordance with Article 21 of the Constitution (revised), free access to justice covers the bringing of appeals because protection of the rights, freedoms and legitimate interests of individuals also presupposes the possibility of taking action against judicial decisions considered to be unlawful or unfounded. Limitation of the right of certain parties in criminal proceedings to exercise the remedies provided for by law constitutes a restriction on free access to justice, which is unconstitutional because the restrictive conditions laid down in Article 53.1 of the Constitution (revised) are not met.

Summary:

An application was made to the Constitutional Court challenging the constitutionality of Article 362.1.c of the Code of Criminal Procedure, which provides that the injured party may lodge an appeal in cases where criminal proceedings were initiated following a complaint, but only with respect to the criminal-law aspects.

In the application, a legislative provision is challenged: it provides that in criminal cases where the criminal action was initiated *proprio motu*, injured parties taking part in the proceedings do not have the right to appeal against a judgment which they consider unlawful or unfounded, although, in their capacity as victims of the offence, they have a profound interest in the settlement of the case. Their access to justice is restricted and their right to a fair trial is infringed. This therefore constitutes a violation of Articles 16.1, 21.3, 24, 53.1 and 124 of the Constitution (revised).

In examining the plea of unconstitutionality, the Court found that Article 362.1.c of the Code of Criminal Procedure violates the revised Constitution, specifically Article 16.1 thereof, because it places the injured party, as victim of the offence, in a position of inferiority in relation to the accused, the perpetrator of the offence, who has the right to make unrestricted use of the available remedies. It is unacceptable that the accused should be able to bring an appeal, whereas the injured party in the proceedings does not have that right.

The fact of making the initiation of criminal proceedings conditional on the existence of a prior complaint by the injured party represents an exception to the general principle of *proprio motu* action in criminal proceedings and applies only to less serious and less dangerous offences. In the case of the most serious offences, the injured party's interest in proper application of the punitive measures provided for by law is more marked.

The direct personal exercise by the injured party of the right to challenge before a higher court a judicial decision which he or she considers erroneous supplements, in the interests of the proper application of the law, the role and functions of the public prosecutor, who is the person entitled to initiate criminal proceedings in cases concerning offences which it is in the public interest to punish.

Thanks to judicial review, it is possible to make good any errors made in the decisions of lower courts. It is possible that the public prosecutor might mistakenly fail to challenge an unlawful or unfounded decision in an appeal and, because the injured party does not have the right to bring an appeal, the judicial errors contained in those decisions cannot be removed.

Regarding the application of the principle of equality, the case-law of the Constitutional Court and the European Court of Human Rights stipulates that any

difference of treatment by the state between persons in similar situations must have an objective and reasonable justification.

Those requirements are not met where an injured party's right to exercise the ordinary remedies against criminal judgments is limited to cases where the criminal prosecution was initiated following a complaint.

Article 24.1 of the Constitution (revised), guaranteeing the right to defence, also covers the right to defence through use of the legal remedies against certain findings in fact or in law or certain solutions adopted by a trial court which one of the parties to the criminal proceedings considers erroneous. In a situation where injured parties are prevented from exercising ordinary remedies, they cannot assert and uphold their rights before the appellate court or at the appellate level.

The Court infers from a combined reading of Articles 129 and 126.2 of the Constitution (revised) that the legislature cannot abolish the right of an interested party to exercise remedies and can only restrict the exercise of that right under the restrictive conditions laid down in Article 53 of the Constitution (revised).

Lastly, the Court holds that the impugned legal text is contrary to Article 21.3 of the Constitution (revised) and to Article 6.1 ECHR on the right to a fair trial and the right of a person to appeal to a higher court.

In the light of the foregoing, the Constitutional Court departs from previous case-law and finds that, in view of the unconstitutionality of the clause “in cases where criminal proceedings were initiated following a complaint, but only with respect to the criminal-law aspects” in Article 362.1.c of the Code of Criminal Procedure, it follows that an injured party may lodge an ordinary appeal whatever the means by which the criminal proceedings were initiated (*proprio motu* or following a complaint).

Supplementary information:

According to Article 147.1 of the Constitution (revised), “the provisions of the laws and ordinances in force, as well as those of the regulations, which are found to be unconstitutional, shall cease their legal effects within 45 days of the publication of the decision of the Constitutional Court if, in the meantime, the parliament or the government, as the case may be, cannot bring into line the unconstitutional provisions with the provisions of the Constitution. For this limited length of time the provisions found to be unconstitutional shall be suspended *de jure”*.

Decision no. 100 issued by the Constitutional Court on 9 March 2004 was published in the Romanian Official Gazette *(Monitorul Oficial)*, Part I, no. 261/24.03.2004.

Languages:

Romanian.

Slovakia
Constitutional Court

Statistical data
1 January 2004 – 30 April 2004

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 6
- Decisions on the merits by the panels of the Court: 138
- Number of other decisions by the plenum: 0
- Number of other decisions by the panels: 311

Important decisions

Identification: SVK-2004-1-001

a) Slovakia / **b)** Constitutional Court / **c)** Third Panel / **d)** 22.01.2004 / **e)** III. ÚS 204/02 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
3.16 **General Principles** – Proportionality.
3.22 **General Principles** – Prohibition of arbitrariness.
4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Search, body / Search, necessity / Personal data, consent / Remedy, effective.

Headnotes:

When performing their duties, the police must act in accordance with the laws and ensure that their actions do not arbitrarily infringe a person's right to liberty, integrity and private life.

Summary:

The Constitutional Court considered and determined a complaint brought by a natural person alleging a violation of the right of every individual to integrity and privacy under Article 16.1 of the Constitution; personal freedom under Article 17.2 of the Constitution; and the right to be protected against unjustified collection, disclosure and other misuse of one's personal data under Article 19.3 of the Constitution.

The Court found that the rights in question had been violated by the acts of the police at the time that the person had been brought to a police station in order to explain the purpose of a citizens' assembly. The police authorities had searched the person, made a record of her personal data, and improperly restricted her personal freedom. The applicant had no effective remedy against those acts.

The Constitutional Court allowed the complaint on the ground that the applicant, a person furnishing an explanation, had been subjected to certain interferences that did not have a legal basis, were inadmissible as to their extent and intensity, and had not been necessary for achieving the purpose of obtaining an explanation.

Searching the applicant, a person furnishing an explanation, was not permitted under the law and not consented to by the applicant. Given those circumstances, searching the applicant was an inappropriate infringement of her integrity and privacy and amounted to an arbitrary infringement by the public authority of a person's integrity and privacy.

Locking an individual who was to furnish an explanation in a room and keeping that person at a police station longer than longer than necessary under the law and for the purpose of furnishing an explanation amounted to a violation of the right under Article 17.2 of the Constitution on the ground that those acts amounted to a gross improper restriction of a freedom without any legal basis.

The Constitutional Court held that there had been an interference with the applicant's right to the protection of her personal data at the time the police made a record of her personal data, contrary to the law and without her consent.

The Constitutional Court ordered the police authority to destroy the unlawfully collected personal data of the applicant and awarded the applicant adequate financial compensation.

Languages:

Slovak.

Identification: SVK-2004-1-002

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 19.02.2004 / **e)** PL. ÚS 33/03 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

4.9.1 **Institutions** – Elections and instruments of direct democracy – Electoral Commission.
4.9.9.1 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Polling stations.
4.9.9.3 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Voting.
5.3.40.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Election, local, candidate / Election, electoral commission, chair, candidate / Election, vote, outside the polling station.

Headnotes:

In the organisation of local elections, the organisers shall abide by the Electoral Law in order to ensure the enforcement of the right to participate in the administration of public affairs, together with the right of access to any elected or public office under equal conditions.

Summary:

The applicant, who ran for the office of mayor in a local authority, filed an electoral complaint with the Constitutional Court challenging the constitutionality of the elections to the village council and the election of the council leader of the village. In his complaint, he alleged that a serious violation of the Electoral Law had taken place during the elections. The Constitutional Court admitted only the part of the complaint relating to the unconstitutionality of the election of the council leader. During the proceedings, the Court checked the electoral documentation and reviewed the number of votes cast for the candidates running for council leader. The Court also heard witnesses, members of the electoral committee and the registrar of the electoral committee.

The applicant argued that there had been a violation of the Electoral Law and the right to participate in the administration of public affairs, together with the right of citizens to access elected and public offices under equal conditions. The Constitutional Court found that voting outside the polling station did not amount to observance of the Electoral Law. Citizens unable to vote at the polling station had been visited by the chair of the electoral committee and the registrar, who did not have the status of member of the electoral committee. Under the law, two members of the electoral committee should have visited those voters. The chair of the electoral committee was also among the candidates running for the office of council leader of the village. Having taken into consideration the number of votes cast outside the polling station as well as the number of votes for the elected council leader and the applicant as the rival candidate, the Constitutional Court declared the election of the council leader void.

Languages:

Slovak.

Identification: SVK-2004-1-003

a) Slovakia / **b)** Constitutional Court / **c)** First Panel / **d)** 30.03.2004 / **e)** I. ÚS 193/03 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Public meeting, organisation, authorisation.

Headnotes:

The exercise of the fundamental freedom of peaceful assembly may not be restricted without a legal basis. A duly announced public meeting may not be sanctioned by the imposition of a fine that is not based on the applicable law.

Summary:

The applicant, a legal entity, alleged that a judgment of the Regional Court violated its fundamental freedom of peaceful assembly, guaranteed under Article 28 of the Constitution and Article 11 ECHR. The applicant had held a duly announced public meeting, a street demonstration in support of public transport and the resolution of the public transport situation in the capital. That led to administrative proceedings being brought against the applicant, which ended in a decision to impose a fine pursuant to the Law on Roads on the ground that the roads concerned had been used for a non-standard purpose without the permission of the relevant public authority. The authority hearing the appeal upheld the above-mentioned decision. The applicant then lodged a complaint with the Regional Court requesting the judicial review of the lawfulness and constitutionality of the decision. The Regional Court dismissed the complaint. The applicant alleged that that dismissal was an act that amounted to a violation of its rights.

The Constitutional Court, which exercised its jurisdiction (excluding the decision-making power of the general courts) over the protection of fundamental rights and freedoms guaranteed by the Constitution or by a relevant international treaty, held that prosecution of the applicant by the public authority for holding the convened meeting was a restriction of the applicant's freedom of peaceful assembly in relation to the freedom of expression and right to information. Those rights represent the fundamental values of a democratic society. Pursuant to the Constitution, it is impossible for the organisation of a public meeting to be subject to a condition, e.g. a "permission" of a public authority. However, the organisation of a public meeting may be subject to a notification duty by the convenor. The Constitutional Court examined the issues of whether the restriction of the applicant's freedom of peaceful assembly was based on the law; whether the restriction was sufficiently justified by the pursued aim; and whether the restriction was necessary in a democratic society for achieving the pursued aim. The Constitutional Court held that in the given circumstances it was not correct to apply the Law on Roads and impose a fine pursuant to that law. It was necessary to apply the Law on the Freedom of Peaceful Assembly as a *lex specialis*. The restriction of the applicant's freedom of assembly had not been based on the law; consequently, the Court held that there had been a violation of Article 28 of the Constitution and Article 11 ECHR. The Constitutional Court held that the sanctions imposed by the administrative authorities were neither necessary nor appropriate for achieving the pursued aim. The reasons put forward by the administrative authority for imposing the sanctions could not be considered relevant or adequate as to their respect of the significance of the freedom of assembly. The Constitutional Court held that the provisions of the Law on Roads governing the imposition and amount of the fine conflicted with the Law on the Freedom of Peaceful Assembly. For the reasons stated above, the Constitutional Court quashed the impugned judgment of the Regional Court and referred the case back to the Regional Court for further proceedings.

Languages:

Slovak.

Slovenia
Constitutional Court

Statistical data
1 January 2004 − 30 April 2004

The Constitutional Court held 30 sessions (18 plenary and 12 in chambers) during this period. There were 287 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 611 unresolved cases in the field of human rights protection (denoted Up- in the Constitutional Court Register) from the previous year at the start of the period (1 January 2004). The Constitutional Court accepted 119 new U- and 300 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 108 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court made:
  - 31 decisions and
  - 77 rulings;

- 15 cases (U-) cases joined to the above-mentioned for joint treatment and adjudication.

Accordingly the total number of U- cases resolved was 123.

In the same period, the Constitutional Court resolved 313 (Up-) cases in the field of the protection of human rights and fundamental freedoms (23 decisions issued by the Plenary Court, 290 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 delivered to the participants in the proceedings.

However, all decisions and rulings are published and submitted to users:

- in an official annual collection (Slovenian full text versions, including dissenting/concurring opinions, and English abstracts);

- in the *Pravna Praksa* (Legal Practice Journal) (Slovenian abstracts, with the full-text version of the dissenting/concurring opinions);

- since 1 January 1987 via the on-line STAIRS database (Slovenian and English full text versions);

- since June 1999 on CD-ROM (complete Slovenian full text versions from 1990 onwards, combined with appropriate links to the text of the Slovenian Constitution, Slovenian Constitutional Court Act, Rules of Procedure of the Constitutional Court and the European Convention for the Protection of Human Rights and Fundamental Freedoms – Slovenian translation);

- since September 1998 in the database and/or Bulletin of the Association of Constitutional Courts using the French language (A.C.C.P.U.F.);

- since August 1995 on the Internet, full text in Slovenian as well as in English http://www.us-rs.si;

- since 2000 in the JUS-INFO legal information system on the Internet, full text in Slovenian, available through http://www.ius-software.si; and

- in the CODICES database of the Venice Commission.

Important decisions

Identification: SLO-2004-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 26.02.2004 / **e)** U-II-1/04 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 25/04 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.
1.6.7 **Constitutional Justice** – Effects – Influence on State organs.
2.3 **Sources of Constitutional Law** – Techniques of review.
3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
3.12 **General Principles** – Clarity and precision of legal provisions.
3.13 **General Principles** – Legality.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.
5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.
5.3.37.1 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

"Erased", residence, discrimination / Foreigner, permanent residence, loss / Referendum, preliminary, legislative / Citizen, former state.

Headnotes:

The interpretation of Item III of the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (TUL) and Article 13 of Constitutional Act for the Implementation of the TUL (UZITUL), according to which the citizens of other Republics who were on the day of the plebiscite registered as permanent residents in the territory of the Republic of Slovenia and who failed to apply for citizenship before the expiry of the time limit under the Foreigners Act (Ztuj) but continued to actually reside in the Republic of Slovenia were not recognised as having any status and with the expiry of the time limit lost their status as permanent residents – for which they had to apply again as if they had just settled in the Republic of Slovenia, is legally incorrect and cannot be supported by any established method of interpretation known to the legal profession, and is clearly contrary to the principle of equality before the law (Article 14.2 of the Constitution).

In the regulation proposed in para. 1 of the referendum question, the part that defines the persons eligible for retroactively claiming permanent resident status as those persons who on 25 February 1992 were "transferred from the register of permanent residents to the register of foreigners having no permanent residence" is contrary to the principles of a State governed by the rule of law requiring legal norms to be clear, determined and unambiguous, and not to lend themselves to various interpretations.

The regulation proposed in para. 4 of the referendum question, allowing the Veterans of the War for Slovenia Association to make a proposal for the reopening of proceedings within a time limit of two years, is contrary to Article 2 of the Constitution, on the ground that it is inconsistent with the provisions of the Administrative Procedure Act establishing the reopening of proceedings as a "general" extraordinary legal remedy against final administrative decisions.

The provision in para. 5 of the referendum question, which excludes the possibility of issuing a permanent residence permit to persons who did not respond to the call of the Presidency of the Republic of Slovenia to leave the YPA and the bodies of Yugoslav federal authorities within a certain time limit, is clearly inconsistent with the Constitution, in particular, with the principle of trust in the law as one of the legal principles of a State governed by the rule of law determined in Article 2 of the Constitution, and that provision violates the right to equal treatment set out in Article 14.2 of the Constitution.

The exclusion of the possibility of claiming damages for the unlawful conduct of the State is contrary to Article 26 of the Constitution. The exclusion of any possibility of claiming the rights related to the retroactive recognition of the status of permanent resident is contrary to Article 15.4 of the Constitution, which guarantees the right to obtain redress for the consequences of violations of human rights and fundamental freedoms.

Where a referendum question refers to a future legislature's obligation to criminalise a certain activity, the guarantees provided by the principle of legality under Article 28.1 of the Constitution must be considered at the time of drafting the referendum question, and not only or just at the time of drawing up the criminal provision based on the results of the referendum.

Summary:

On 11 February 2004 the National Assembly sought a Constitutional Court decision on the constitutionality of the contents of a request for calling a preliminary legislative referendum on the Bill on the Permanent Residence of Foreigners having the Citizenship of Other State Successors to the Former Socialist Federal Republic of Yugoslavia (SFRY) in the Republic of Slovenia Registered as Permanent Residents in the Republic of Slovenia on 23 December 1990 and 25 February 1992. The initiative for voters to submit a request for calling a referendum came from the Slovenian Democratic Party (SDP) and New Slovenia (NSI). According to the National Assembly, the contents of the request

for calling a referendum were contrary to the Constitution.

The National Assembly noted that the initiative for calling a preliminary legislative referendum related to the above-mentioned Bill, whose contents aimed at ensuring the implementation of Items 1-4 of the operative provisions of Constitutional Court Decision no. U-I-246/02 dated 3 April 2003, by which the Court had decided to redress the injustices caused to the persons known as the "erased" inhabitants of Slovenia. Moreover, the National Assembly found that the contents of the referendum question actually exceeded the contents of that Bill and would consequently also have an impact on the implementation of the Act implementing Item 8 of the above-mentioned Constitutional Court decision, for which a subsequent legislative referendum had already been called. The National Assembly reasoned that the contents of the request for a preliminary legislative referendum on the Bill gave rise to a question on the admissibility of using a referendum to decide on the proposed (different) solutions in a case where the National Assembly is bound to enact a statute in conformity with Constitutional Court decisions, in the case under review, in conformity with Decision no. U-I-246/02. If the referendum were to result in vote for a proposed solution that did not follow the Constitutional Court decision, the National Assembly would be bound by two contradictory obligations – by the Constitutional Court decisions and the voters' will expressed at the referendum.

The Constitutional Court found the provisions contained in paras. 1 and 3 of the referendum question were based on the interpretation that from 25 February 1992 onwards, the citizens of other Republics should have brought their legal status into conformity with the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (TUL), the Constitutional Act for the Implementation of the TUL (UZITUL), the Foreigners Act (ZTuj) and other relevant regulations in the period after the Republic of Slovenia gained its independence.

The Constitutional Court held that that interpretation of Item III of the TUL and Article 13 of the UZITUL was contrary to the principle of equality before the law (Article 14.2 of the Constitution). Only an interpretation on the basis of which the citizens of other Republics would be granted permanent residence in the same way as it was granted to foreigners under Article 82.3 of the ZTuj would be in conformity with the principle of equality, which is found in Item III of the TUL.

The Constitutional Court held that the part of the regulation proposed in para.1 of the referendum that defined the persons eligible for retroactively claiming permanent resident status as those persons who on 25 February 1992 had been "transferred from the register of permanent residents to the register of foreigners having no permanent residence" was also contrary to the principles of a State governed by the rule of law requiring legal norms to be clear, determined and unambiguous, and not lend themselves to various interpretations. The regulation proposed in para. 1 of the referendum issue was inconsistent with Article 2 of the Constitution for the reason that if the definition of an eligible person under para. 1 of the referendum question were to be adopted in the referendum, it would mean that the legislature would have to enact a definition referring to a transfer to a non-existent register or a definition based on a legal situation that did not exist.

Para. 2 of the referendum question, which contains a provision that would bind the legislature to set a six-month time limit for submitting an application for the retroactive recognition of permanent resident status, was in itself not contrary to the Constitution, although the solution was less favourable than the one in the proposed statutory regulation.

In para. 5 of the referendum question, the proposition that would exclude the possibility of a permanent residence permit being acquired by a person who did not respond to the call of the Presidency of the Republic of Slovenia to leave the Yugoslav People's Army and the bodies of Yugoslav federal authorities within a certain time limit would be clearly inconsistent with the Constitution, in particular, with the principle of trust in the law as one of the legal principles of a State governed by the rule of law determined in Article 2 of the Constitution, and would violate the right to equal treatment determined in Article 14.2 of the Constitution. However, according to the Constitutional Court, the proposition in the same paragraph of the referendum question, which provides for denying the grant of a permanent residence permit to those persons who acted against the values that are in accordance with the provision in Article 4.1 of the UZITUL protected by the criminal legislation of the Republic of Slovenia, would not be inconsistent with the Constitution. The Constitutional Court based its reasoning on the interpretation of Article 4 of the UZITUL, in conjunction with Article 20 of the UZITUL. The Court also noted the rule that any such activity had to contain all the elements of the criminal offence to which the above-mentioned provision referred.

The regulation proposed in para. 6 attempted to exclude any possibility of compensation for the

damage incurred by the citizens of other Republics arising from their inability to claim rights related to permanent residence. The Constitutional Court held that the exclusion of the possibility of claiming damages for the unlawful conduct of the State was contrary to Article 26 of the Constitution, and that the exclusion of any possibility of claiming the rights related to the retroactive recognition of permanent resident status was contrary to Article 15.4 of the Constitution, which guarantees the right to obtain redress for the consequences of violations of human rights and fundamental freedoms.

In para. 7 of the referendum question, a regulation was proposed to criminalise the unlawful and unconstitutional delivery of decisions on permanent residence with retroactive effect. The Constitutional Court held that the proposed regulation, which amounted to a new criminal offence that interfered with an existing criminal offence, was contrary to Article 28.1 of the Constitution. Where a referendum question refers to a future legislature's obligation to criminalise a certain activity, the guarantees provided by the principle of legality under Article 28.1 of the Constitution must already be considered at the time of drafting the referendum question, and not only or just at the time of drawing up the criminal provision based on the results of the referendum.

Supplementary information:

Legal norms referred to:
- Articles 2, 14.2, 15, 26 and 28 of the Constitution (URS);
- Articles 16 of the Referendum and People's Initiative Act /ZRLI).

Languages:

Slovenian, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-2004-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 03.03.2004 / **e)** CCT 03/2004 / **f)** Minister of Home Affairs v. National Institute for Crime Prevention and the Re-integration of Offenders and Others / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.9.7.1 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Electoral rolls.
4.9.9.1 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Polling stations.
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.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.3.40.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Vote, prohibition / Prisoner, right to vote.

Headnotes:

The Court held that the Minister of Home Affairs had failed to justify the limitation on the prisoners' right to vote and therefore declared the challenged provisions invalid. The limitation based on cost and logistical constraints was not supported by the evidence. Moreover, the majority rejected the government's argument that making special provision for convicted prisoners to vote would, in the context of the alarming level of crime in South Africa, send an incorrect message that the government was "soft" on crime. The fear that the public may misunderstand the

government's attitude to crime is no basis for depriving prisoners of their fundamental rights.

Summary:

Section 19.3 of the Constitution entitles every citizen to the right to vote. Provisions were introduced into the Electoral Act 73 of 1998 (the Act) which in effect deprive convicted prisoners serving sentences of imprisonment without the option of a fine of the right to participate in the elections.

The National Institute for Crime Prevention and the Re-Integration of Offenders and two prisoners serving sentences without the option of a fine brought an application to the Cape High Court challenging the Constitutionality of these provisions. The Minister of Home Affairs (the Minister), the Electoral Commission (the Commission) and the Minister of Correctional Services were the respondents in the matter.

The changes introduced into the Act curtail the right of convicted prisoners to vote in elections in two ways: convicted prisoners serving sentences of imprisonment without the option of a fine are precluded from registering as voters whilst they are in prison. Convicted prisoners who on the day of the elections are serving a sentence of imprisonment without the option of a fine are precluded from voting.

The applicants contended that the challenged provisions are inconsistent with the founding provisions of the Constitution which are absolute and not subject to limitation. This contention was rejected by Chaskalson CJ writing for the majority. Chaskalson CJ held that the right to vote, which is vested in all citizens, is informed by these founding values. However, it is still subject to the limitation clause in Section 36 of the Constitution. This Section provides for the limitation of the rights in the Bill of Rights only in terms of a law of general application and to the extent that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The Minister advanced cost and logistical constraints as the rationale for limiting the right to vote. Chaskalson CJ held that there was nothing on the facts to suggest that expanding arrangements to include the affected prisoners would place an undue burden on the resources of the Commission.

It was also contended on behalf of the Minister that making special arrangements for convicted prisoners to vote would, in the context of the alarming level of crime in South Africa, send an incorrect message to the public that the government is "soft" on crime. The majority held that a fear that the public may misunderstand the government's true attitude to crime and criminals provides no basis for depriving prisoners of the fundamental rights that they retain despite their incarceration. The majority further held that in the circumstances the Minister failed to justify the limitation and that the challenge on the constitutionality of the legislation on the ground that it infringes the right to vote must be upheld.

In a dissenting judgment, Ngcobo J held that the right to vote is not absolute and can be limited provided that limitation is proportionate. The government has a legitimate purpose in pursuing a policy of denouncing crime and to promote a culture of the observance of civic duties and obligations. Furthermore the limitation of the right is temporary as it only applies whilst prisoners are serving their sentence. Despite this however, Ngcobo J found that the Act should have made a distinction between prisoners who had been finally sentenced, and those who were awaiting the outcome of the appeal. The latter could still have their convictions overturned and it is therefore unjustifiable to deprive them of the right to vote. To this extent alone he finds the provisions unconstitutional.

In another dissenting judgment, Madala J held that the suspension of the right to vote is temporary. This temporary removal of the right is in keeping with the objective of balancing individual rights with the values of society. It is anomalous to afford the right and responsibility of voting to persons who have no respect for the law. Accordingly, Madala J held that the limitation was justifiable.

Cross-references:

- *August and Another v. Electoral Commission and Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC); *Bulletin* 1999/1 [RSA-1999-1-002];
- *Sauvé v. Canada* (Chief Electoral Officer) 2000 2 FC 117, 2002 SCC 68; *Bulletin* 2002/3 [CAN-2002-3-003];
- *Sauvé v. Canada* (Attorney General) [1993] 2 S.C.R. 438.

Languages:

English.

Identification: RSA-2004-1-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 04.03.2004 / **e)** CCT 12/2003, CCT 13/2003 / **f)** Khosa and Others v. Minister of Social Development and Others; Mahlaule and Another v. Minister of Social Development and Others / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
3.20 **General Principles** – Reasonableness.
5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.
5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.
5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Child, welfare / Elderly person, social assistance / Social assistance, right, conditions.

Headnotes:

Foreigners are included in the word “everyone” in Section 27 of the Constitution and are thus entitled to its protection. Section 27 requires the state to take reasonable measures to achieve the realisation of the right to have access to, *inter alia,* social security. When the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness. The exclusion of permanent residents from the social welfare grants is unreasonable and thus represents a violation of Section 27.1.c of the Constitution. Moreover, the Court held that the exclusion of permanent residents from access to social security amounted to unfair discrimination and thus there was also a violation of Section 9 of the Constitution.

Summary:

The case dealt with the constitutionality of three provisions of the Social Assistance Act 59 of 1992 (the Act). Each of the provisions created different social welfare grants and extended them only to South African citizens. Section 3 created an old-age and disability grant, Section 4 created a child-support grant and Section 4B created a care-dependency grant.

The applicants argued that these provisions violated their right to equality (Section 9 of the Constitution) and their right of access to social security (Section 27.1.c of the Constitution). The respondents argued that non-citizens do not have a right to social security and that they were therefore excluded from the social welfare scheme.

Certain of the provisions had been introduced by the Welfare Laws Amendment Act 106 of 1997 but had not yet been brought into force. A preliminary issue was whether the Court could consider the constitutionality of these provisions. Mokgoro J, writing for the majority held that the Court could consider the provisions because they would be brought into force in the future and would then affect people similarly situated to the applicants.

The Court held that the provisions were constitutionally invalid to the extent that they did not extend welfare grants to permanent residents of South Africa.

To remedy the unconstitutionality, Mokgoro J read words into Sections 3.c, 4.b.ii and 4B.b.ii of the Act providing that the grants be extended to permanent residents.

Ngcobo J, writing for the minority, agreed that it was unconstitutional to exclude permanent residents from child-support and care-dependency grants. The way in which the provisions were constructed made it possible for children who were South African citizens to be excluded from the grants on the basis that their parents were not South African. Ngcobo J held, however, that while the exclusion of permanent residents from old-age grants did violate their right to social assistance, this violation was justified in terms of Section 36 of the Constitution.

Cross-references:

- *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC); *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC); *Bulletin* 2000/3 [RSA-2000-3-015]; *Minister of Health and Others v. Treatment Action Campaign and Others* (2), 2002 (5) SA 721; 2002 (10) BCLR 1033 (CC); *Bulletin* 2002/2 [RSA-2002-2-013]; *Larbi-Odam and Others v. Member of the Executive Council for Education* (North-West Province) and Another 1998 (1) SA 745 (CC); 1997 (12) BCLR 1655 (CC).

Languages:

English.

Identification: RSA-2004-1-003

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 11.03.2004 / **e)** CCT 40/2003 / **f)** Daniels v. Campbell NO and Others / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.3.7 **Sources of Constitutional Law** – Techniques of review – Literal interpretation.
2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.
5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
5.2.2.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.
5.3.32.2 **Fundamental Rights** – Civil and political rights – Right to family life – Succession.

Keywords of the alphabetical index:

Spouse, definition / Succession, right.

Headnotes:

The key issue before the Court was the interpretation of the word "spouse". The Court found that the ordinary meaning of the word "spouse" included parties to a Muslim marriage. The purpose of the Acts was held to be the protection of widows. The Court gave an inclusive interpretation of the provisions of the Acts in order to include people in the position of the applicant. The Court held that the question was not whether it had been open to the applicant to solemnise her marriage under the Marriage Act but whether in terms of 'common sense and justice' and the values of our Constitution, the objectives of the Acts would best be furthered by including or excluding her from the protection provided.

Summary:

In South African law a marriage has to be solemnised by a marriage officer appointed in terms of the Marriage Act 25 of 1961 (the Marriage Act) for it to be considered valid. In this case the applicant, a widow, married her husband by Muslim rites. The marriage was not solemnised in accordance with the provisions of the Marriage Act. Her husband died intestate and upon his death she was informed by the Master of the High Court that she could not inherit or claim maintenance from his deceased estate because she was not considered a "surviving spouse" in terms of the applicable law.

The Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 (the Acts) confer rights on spouses predeceased by their husbands or wives but neither of the Acts defines the word "spouse".

The Cape High Court (the High Court) held that the statutes were incapable of being interpreted to include parties to a Muslim marriage under the term "spouse". This was held to be discriminatory because it unfairly excluded such persons from the protection of the Acts. The provisions were declared unconstitutional and invalid and the remedy of reading in the omitted words was adopted.

Section 172.a of the Constitution provides that an order of unconstitutionality by the lower courts will have no force or effect until confirmed by the Constitutional Court. In the Constitutional Court the applicant not only applied for confirmation of the High Court order but also, in the alternative appealed against the judgment of the High Court in so far as it held that the words "spouse" and "survivor" could not be interpreted to include parties to a Muslim union.

The majority of the Court favoured an interpretation consistent with the ordinary meaning of the word "spouse" as such interpretation would be in line with the spirit of the Constitution and would further the objectives of the Acts.

It was found that the question of discrimination no longer arises once Muslim husbands and wives are able to enjoy the benefits provided by the Acts.

The order of constitutional invalidity by the High Court was not confirmed and the appeal was upheld. A declaratory order was made indicating that the applicant was a "spouse" and a "survivor" under the Acts.

Moseneke J, writing for the minority, held that the majority's interpretation of the legislation was impermissible as it was unduly strained, not reasonably available and distorted the text. Moseneke J found that the relevant Sections of the Acts infringed the applicant's rights to equality and dignity

and accordingly held that they should be declared unconstitutional and invalid. The order of the High Court was thus confirmed by Moseneke J and the appeal dismissed.

Cross-references:

- *Amod v. Multilateral Motor Vehicle Accidents Fund* (Commission for Gender Equality intervening) 1999 (4) SA 1319 (SCA); 1999 (4) All SA 421 (SCA).

Languages:

English.

Identification: RSA-2004-1-004

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 12.03.2004 / **e)** CCT 27/2003 / **f)** Bato Star Fishing (Pty) Ltd v. The Minister of Environmental Affairs and Tourism and Others / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.5.13 **Constitutional Justice** – Jurisdiction – The subject of review – Administrative acts.
2.1.1.1.1 **Sources of Constitutional Law** – Categories – Written rules – National rules – Constitution.
3.4 **General Principles** – Separation of powers.
3.20 **General Principles** – Reasonableness.
4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.
5.2.3 **Fundamental Rights** – Equality – Affirmative action.

Keywords of the alphabetical index:

Administrative act, judicial review, legal basis / Administrative authority, discretionary power / Fishing, industry, equality / Fishing, quota, allocation / Decision-making process, transparency.

Headnotes:

The courts' power to review administrative action no longer flows directly from the common law but from Section 33 of the Constitution, which provides that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair", and the Promotion of Administrative Justice Act 3 of 2000. The courts should be cautious in reviewing the decisions of administrative agencies to avoid attributing to themselves superior wisdom in relation to matters entrusted to other branches of government. The courts must nevertheless ensure that administrative decisions fall within the bounds of reasonableness required by the Constitution.

Summary:

The applicant, Bato Star Fishing (Pty) Ltd, is a black empowerment fishing company. In 2001 the Department of Environmental Affairs and Tourism (the Department) invited fishing companies to apply for allocations of quotas in the hake deep sea trawl sector for a specified period of time. These allocations are made in terms of the Marine Living Resources Act 18 of 1998 (the Act).

In terms of Section 79.1 of the Act, the Chief Director of the Department (Chief Director), acting on the authority of the Minister of Environmental Affairs and Tourism (the Minister), makes the final decision on the allocation of quotas. In the process the applicant had applied for 12 000 tonnes but was only allocated 856 tonnes. Upon review by the Cape High Court (the High Court) the allocation was increased to 873 tonnes. The Supreme Court of Appeal reversed this decision on appeal. Thereafter the applicant appealed to the Constitutional Court against this decision.

The applicant contended that when allocating fishing quotas, the Chief Director must have regard to the objectives and principles set out in Section 2.a to j of the Act. Section 2j identifies the need "to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry". According to the applicant, this Section must be read together with Section 18.5 of the Act which provides that when decisions to allocate fishing quotas are made, particular regard must be paid to "the need to permit new entrants, particularly those from historically disadvantaged sectors of society".

The applicant argued that in making the allocations, the Chief Director had failed to have regard to the objectives and principles set out in the Act. Thus his decision was unreasonable in the terms of Section 6.2.h of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). This Section deals with a court or tribunal's power judicially to review an administrative action. It was further argued that the Chief

Director failed to apply his mind to the quantum of hake applied for and that there was an undisclosed policy change by the Department that infringed the applicant's rights to procedural fairness.

The Court rejected the contention that the Chief Director failed to pay sufficient attention to the requirements set out in Section 2, read with Section 18.5 of the Act, and that therefore the decision was unreasonable. The Court held that the Chief Director had met the requirement that he "have regard to" the objectives set out in Section 2 of the Act.

Furthermore, the Court held that what constitutes reasonableness will depend on the circumstances of each case. A decision will be unreasonable if it is one that a reasonable decision-maker could not reach. A court should be cautious in reviewing the decisions of administrative agencies to avoid attributing to itself superior wisdom in relation to matters entrusted to other branches of government. However, the courts must ensure that administrative decisions fall within the bounds of reasonableness required by the Constitution. With regard to the quantum and the alleged undisclosed policy change, O'Regan J found that each application was carefully considered and rated according to a range of relevant criteria and that the policy guideline that was published made it clear that a number of factors were to be considered in making the allocations.

Supplementary information:

Ngcobo J, in a separate concurring judgment, outlined the constitutional context within which the Act must be construed and emphasised that the transformation of the fishing industry is a foundational principle of the Act. He held that since the industry has been dominated by companies controlled and owned by members of the community who were privileged under apartheid, the Department needs to ensure that access to the industry is opened to new companies mostly controlled and owned by members of the previously disadvantaged communities. This will ensure that equality is achieved. Therefore special measures should be put in place to achieve equality. Furthermore the goal of transformation does not entitle a court to tell the functionaries how to implement transformation where this could take place in various ways.

Cross references:

- *Premier, Province of Mpumalanga and Another v. Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC); *Bulletin* 1998/3 [RSA-1998-3-011];
- *Bel Porto School Governing Body and Others v. Premier of the Province, Western Cape and Another* 2002 (9) BCLR 891(CC); 2002 (3) SA 265 (CC); *Bulletin* 2002/1 [RSA-2002-1-002];
- *Permanent Secretary of the Dept of Education, Eastern Cape v. Ed-U-College* (PE) (Section 21) Inc 2001 (2) BCLR 118 (CC); 2001 (2) SA 1 (CC); *Bulletin* 2000/3 [RSA-2000-3-009].

Languages:

English.

Identification: RSA-2004-1-005

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 09.04.2004 / **e)** CCT 18/2003 / **f)** Lawyers for Human Rights and Another v. Minister of Home Affairs and Another / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.2.2.2 **Constitutional Justice** – Types of claim – Claim by a private body or individual – Non-profit-making corporate body.
1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.18 **General Principles** – General interest.
3.22 **General Principles** – Prohibition of arbitrariness.
5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.5.1.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Arrest.

Keywords of the alphabetical index:

Foreigner, border, deprivation of freedom / Criminal procedure, guarantees / Detention, duration / Detention, lawfulness / Foreigner, detention.

Headnotes:

The Lawyers for Human Rights have standing to represent the public interest. The way in which illegal foreigners are treated pending removal from the country was of immense public importance and that due to the level of vulnerability of the affected group it was in the public interest for the proceeding to be brought.

Illegal foreigners detained at ports of entry being physically inside the country, Sections 12 and 35.2 of the Bill of Rights also apply to them.

The detention of illegal foreigners on ships is a limitation of their rights to freedom and not to be detained without trial. The Court held such limitations to be justifiable under Section 36 of the Constitution except in so far as Section 34.8 of the Act fails to make provision for the detention on a ship to be reviewed by a court after 30 days.

Summary:

The case dealt with the constitutionality of two provisions of the Immigration Act 13 of 2002 (the Act). Each provision deals with the manner in which people suspected of being illegal foreigners are treated at ports of entry. The first provision, Section 34.8 allows an immigration officer to detain an illegal foreigner on the ship on which he or she arrived, pending deportation. Section 1.1 of the Act defines "ship" as 'any vessel, boat, aircraft or other prescribed conveyance'. The second provision, Section 34.2, limits the detention period of illegal foreigners, otherwise than on a ship and for purposes other than deportation, to forty-eight hours.

The government raised two preliminary points regarding the parties' standing and the applicability of the Bill of Rights. The first was that the applicant, Lawyers for Human Rights (LHR), was unable to act in the public interest. Yacoob J, writing for the majority, held that LHR was acting in the public interest. Key factors in this decision were the constitutional importance of the provisions at issue, the vulnerability of the class of people affected and their difficulty in bringing the action themselves.

The second preliminary issue was whether the Bill of Rights applies to illegal foreigners. The government argued, on the basis of Section 7.1 of the Constitution, that the Bill of Rights applies only to people "in our country" to the exclusion of illegal foreigners not formally admitted. Yacoob J rejected this argument and held that illegal foreigners are physically inside the country. Thus they are entitled to the protection of Section 12 of the Constitution (the right to freedom and security of the person) and Section 35.2 of the Constitution (the rights of detained persons).

The Court held that the Act was invalid to the extent that it did not provide for review of detention on a ship lasting longer than 30 calendar days.

To remedy this unconstitutionality, Yacoob J read into Section 34.8 of the Act words providing that no detention on a ship can be for longer than 30 days without an order of court to that effect. Furthermore, he held that a court may extend the detention for an additional period not exceeding 90 calendar days.

Supplementary information:

In a dissenting judgment, Madala J held that the various provisions of the Act governing the detention and deportation of illegal immigrants must be read together. To that extent, the procedural safeguards afforded to a person detained in terms of one subsection should be understood as applying to a person detained in terms of the other subsections. This was held to be in line with the Constitution and thus there was no violation of the applicants' rights as contended.

Cross-references:

- *Ferreira v. Levin NO and Others; Vryenhoek and Others v. Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC); *Bulletin* 1995/3 [RSA-1995-3-010].

Languages:

English.

Switzerland
Federal Court

Important decisions

Identification: SUI-2004-1-001

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 14.01.2004 / **e)** 2P.251/2003 / **f)** X. v. Social Welfare Committee of the Municipality of Schaffhausen, Department of the Interior and Cantonal Court of the Canton of Schaffhausen / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 130 I 71 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Social welfare, entitlement, conditions / Employment, employment and integration measure / Assistance, benefit, suspension.

Headnotes:

Article 12 of the Federal Constitution (right to assistance in situations of hardship); social assistance; participation in employment and integration measures.

Principle of subsidiarity. Constitutional law guarantees only the subsistence minimum, i.e. the resources needed for survival (point 4.1).

Anyone who is objectively in a position to obtain the resources needed for survival by his or her own means – in particular by accepting suitable employment – does not fulfil the conditions of the right (point 4.3).

The provision of material assistance may be combined with the requirement to participate in employment and integration measures. In principle, these measures or programmes must be regarded as suitable employment even if the income they provide amounts to less than the assistance benefits (point 5).

In the event of a refusal to participate in employment and integration measures which would guarantee the subsistence minimum, (financial) assistance benefits may be suspended in full (point 6).

Summary:

The Social Welfare Committee of the Municipality of Schaffhausen granted X. a monthly amount of approximately 620 francs in 2003. It made this assistance subject to the condition of the appellant participating in employment and integration measures. In the event of a refusal, the assistance would be suspended. The Cantonal Department of the Interior and the Cantonal Court of Schaffhausen upheld the decision of the Social Welfare Committee.

X. filed a public-law appeal in which he asked the Federal Court to set aside the Cantonal Court's judgment. He relied on the federal and cantonal constitutional guarantees of being helped and assisted and receiving the means that are essential for leading a life in keeping with human dignity. In particular, he challenged the obligation imposed on him to participate in employment and integration measures and the full suspension of assistance in the event of a refusal. The Federal Court dismissed the public-law appeal.

Anyone who is in a situation of hardship and unable to see to his or her own maintenance has the right to be helped and assisted and to receive the means that are essential for leading a life in keeping with human dignity. This constitutional guarantee grants only the right to essential means, but does not guarantee a minimum income. It is governed by the principle of subsidiarity and individual responsibility and applies only to the situation of hardship of a person who is objectively unable to secure the resources needed for survival.

The obligation to participate in employment and integration measures has a sufficient legal basis in cantonal law. In principle, it is compatible with the constitutional guarantee of the right to assistance in situations of hardship. Individuals must do everything possible to remedy a difficult situation. In particular, they are obliged to accept suitable employment in line with their abilities, previous jobs held, their personal situation and their state of health. Anyone who refuses such employment is not contributing towards finding a way out of hardship and cannot ask for assistance.

The question to be considered is therefore whether participation in employment and integration programmes is suitable for the appellant. The purpose of these programmes is to promote a sense of

responsibility and personal effort on the part of the participants and to encourage their return to the labour market. The programmes offered by the authorities in the case in point amply satisfy those requirements and are therefore in conformity with the constitutional guarantee. It is immaterial that the appellant claims to be unable to work full time, because the employment and integration programmes will take account of his state of health. Neither is it crucial that the salary from such employment should attain the level of social assistance; even a partial contribution can achieve the desired aim.

For these reasons, the obligation to participate in employment and integration programmes is in conformity with the constitutional guarantee of obtaining assistance in situations of hardship. It follows that the cantonal social assistance authority may also consider suspending assistance completely if the appellant refuses to participate in the programmes offered and does not show willingness to make a personal effort to improve the situation.

Languages:

German.

Identification: SUI-2004-1-002

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 27.01.2004 / **e)** 1P.708/2003 / **f)** X. v. Management of Champ-Dollon Prison and Administrative Court of the Republic and Canton of Geneva / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 130 I 65 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
5.2 **Fundamental Rights** – Equality.
5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.

Keywords of the alphabetical index:

Prison, visitor, checks.

Headnotes:

Article 10.2 of the Federal Constitution (personal freedom) and Article 36 of the Federal Constitution (limitations of fundamental rights); obligation on visitors to undergo security checks (metal detector) upon entering the prison; Article 8.1 of the Federal Constitution (equality of treatment).

The obligation on visitors to prisons to undergo security checks, involving passing through a metal detector and taking off their shoes or belt if the device continues to indicate the presence of metal, does not constitute a serious limitation of personal freedom.

The conditions that there should be a legal basis and that proportionality should be respected are satisfied in the case in point.

It is justified that prison warders, police officers and judges should not be subject to these checks, unlike other visitors and, in particular, lawyers. This difference does not constitute prohibited inequality of treatment.

Summary:

Maître X., a lawyer practising in Geneva, went to Champ-Dollon Prison (in the canton of Geneva) to confer with one of his clients. At the entrance to the prison, he was asked to submit to security checks, which involved passing through a metal detector. Several times in succession, this device emitted a sound indicating the presence of metal, even after X. had emptied his pockets. He was then asked to take off either his belt or his shoes, which he refused to do. X. was denied access to the area of the prison reserved for visitors and left the premises.

X. made an application to the Administrative Court of the Canton of Geneva challenging the refusal to allow him access to the prison and to meet his client. The Court dismissed his application, holding that the obligation on visitors to prisons to undergo security checks was not a violation of fundamental rights.

X. brought a public-law appeal asking the Federal Court to set aside the Administrative Court's judgment; he relied in particular on the guarantees of personal freedom and equality of treatment. The Federal Court dismissed the appeal.

All human beings are entitled to personal freedom, and especially to physical and mental integrity and freedom of movement. However, this right is not absolute; restrictions are permissible if they have a legal basis, are ordered in the public interest and respect the principle of proportionality. The obligation to remove one's belt, then one's shoes, if a metal detector continues to indicate the presence of metal, violates the privacy of the person in question. In the case in point, such a measure also restricts the lawyer's economic freedom, but a complaint on this ground cannot stand individually; lastly, the right to confer freely with the defendant cannot be relied upon by the lawyer.

A serious violation of a constitutional right must have a formal basis. Failing that, the Federal Court considers the existence of a legal basis from the limited standpoint of arbitrariness. The obligation to remove one's belt or shoes cannot be regarded as a serious limitation of a person's privacy. It has a legal basis in the prison's internal rules, laid down by the prison management on the basis of a regulation issued by the cantonal executive.

X. does not deny that the measure complained of is in the public interest, but regards it as disproportionate. According to the principle of proportionality, a limitation of fundamental rights must be confined to what is necessary to achieve the aim pursued, be appropriate and not be unduly burdensome for the person concerned. To assess the extent to which these requirements are met in the case in point, the various stages in the security checks carried out at the entrance to the prison must be considered: persons wishing to enter the prison are not searched before passing through the metal detector; if the metal detector goes off, they are invited to remove any metal objects they are carrying on them; if the device continues to indicate the presence of metal, it may be assumed that this is due to metal parts in the person's belt or shoes. Lastly, the officer carries out a final check by means of a portable metal detector. In the case in point, the appellant was asked to submit to security checks carried out in stages, meeting the dual requirement of effectiveness and protection of privacy. Given that the appellant was obliged to remove his belt and shoes only after several unsuccessful attempts to pass through the metal detector, the cantonal authority acted with as much respect as possible for the right to personal freedom. The body search to which X. proposed to submit would have restricted personal freedom to a much greater extent. The checks are therefore in keeping with the principle of proportionality.

In addition, they satisfy the requirements of equality of treatment; the situation of certain visitors exempted from checks, such as judges, police officers or prison warders, cannot be compared with that of lawyers.

Languages:

French.

Identification: SUI-2004-1-003

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 29.01.2004 / **e)** 2A.110/2003 / **f)** X. v. Lawyers' Supervisory Board of the Canton of Zurich and Cantonal Court of the Canton of Zurich / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 130 II 87 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
4.7.15.1.4 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Status of members of the Bar.
5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Lawyer, conditions for practising / Lawyer, independence / Lawyer, register, inclusion / Lawyer, salaried employee.

Headnotes:

Federal law on free movement of lawyers (law on lawyers); inclusion on the cantonal register of lawyers, precondition for the independence of lawyers.

Locus standi of the Bar Association (point 1).

The profession of lawyer in a context of monopoly is protected by the fundamental right of economic freedom; a refusal to include a lawyer on the register (because of a lack of independence) violates that right; this should be taken into account in interpreting the concept of independence (point 3). The lawyer's independence as a professional obligation recognised the world over, in the context of the profession's

(new) image (point 4.1). Content of the concept of independence (point 4.2), case-law of the Federal Court (point 4.3) and legal theory (point 4.4) relating to the question of the independence of salaried lawyers. Background to Articles 8.1.d and 8.2 of the law on lawyers; in the case of salaried lawyers, a lack of independence is presumed (point 5.1); the presumption is, however, rebuttable (point 5.2). Conditions under which a salaried lawyer may apply for inclusion on the register; obligation to create a clear situation (point 6). In the instant case, the lawyer provided insufficient information on his employment relationship and failed to rebut the presumption of lack of independence (point 7).

Summary:

X. holds a lawyer's certificate issued by the Canton of Aargau. He works as an employee in the legal department of bank Y SA; he is mentioned in the commercial register as deputy director of the bank with collective signature authority.

Following the entry into force of the federal law on free movement of lawyers (law on lawyers) on 1 June 2002, X. applied to the Lawyers' Supervisory Board of the Canton of Zurich for inclusion on the cantonal register of lawyers; he explained that he wished to practise as a lawyer alongside his work at the bank. The committee allowed the application and included X. on the register. Following an appeal by the Bar Association of the Canton of Zurich, the Administrative Commission of the Cantonal Court upheld this decision.

The Bar Association lodged an administrative-law appeal asking the Federal Court to set aside the cantonal decision. In the light of X.'s position as a salaried employee of bank Y., the appellant relied on the lawyer's lack of independence. The Federal Court allowed the application and set aside the impugned decision.

According to the law on lawyers, the Bar Association has *locus standi* to appeal against a lawyer's inclusion on the cantonal register.

A lawyer holding a cantonal lawyer's certificate who wishes to practise must apply for inclusion on the cantonal register. The supervisory authority includes the lawyer on the register if he or she satisfies the conditions laid down in the law on lawyers. This law sets conditions relating to training and also personal conditions. Among the personal conditions, the law requires lawyers to be able to practise independently; they may only be employed by persons who are themselves included on a cantonal register. Lawyers who are employed by an organisation recognised as promoting the public interest may apply for inclusion on the register if they confine their work as lawyers to cases that are strictly relevant to the organisation's aims.

The exercise of the profession of lawyer enjoys economic freedom within the meaning of Article 27 of the Federal Constitution. According to Article 36 of the Federal Constitution, any limitation of a fundamental right must have a legal basis, be in the public interest and respect the principle of proportionality. The criterion of the lawyer's independence required by the law must be interpreted from the standpoint of constitutional law and in the light of the case-law of the Court of Justice.

The principle of the independence of lawyers in the exercise of their profession is of paramount importance and recognised the world over. Lawyers act on behalf of their clients and must represent their interests freely and competently. The image one has of independent lawyers is that of lawyers practising their profession independently within their firm. But other forms of exercise of the profession have developed recently: lawyers group together in large firms and collaborate in various ways with specialists, such as fiduciary or tax experts, while others exercise their profession as employees of large companies, such as banks or insurance companies. This leads to an element of competition between lawyers practising independently and lawyers who are salaried employees of a company.

The law on lawyers requires lawyers to exercise their profession independently, in their own name and under their own responsibility, and to avoid all conflict between their client's interests and those of persons with whom they have relations of a professional or private nature. On the other hand, the law does not define in detail the concept of independence, which therefore needs to be clarified.

The independence of lawyers means the lack of any links which expose them, in the exercise of their profession, to any influence whatsoever from third parties (who do not practise at the bar). It is essential to ensure that lawyers do not come under the influence of third persons, but also to ensure that they are not dependent on their clients. It is essential, therefore, to distinguish between the situation where an employed lawyer represents his or her employer or the latter's clients and the situation where lawyers act on behalf of their own clients.

The legal concept of independence cannot be interpreted as meaning that all lawyers in an employment relationship are precluded from

representing a client in proceedings before the courts. The legislature did not wish to exclude lawyers employed on a part-time basis from exercising the profession. It is essential, however, that these cases should be unrelated to the lawyers' employment relationship with his or her employer. To this extent, a lawyer employed on a part-time basis therefore has the right to be included on the cantonal register of lawyers.

The same criterion is of decisive importance for lawyers employed on a full-time basis by a company. If they occasionally wish to represent private clients, it is essential for them to prove that the conditions enabling them to handle these cases independently and under their own responsibility are satisfied. The proof may take the form of the contract of employment or other agreements signed between the employer and the employee. It must be shown that the employer agrees to the salaried lawyer having private clients, that he or she exerts no influence over the lawyer's private activity and that the lawyer will not accept cases either against his or her employer or against the latter's clients. A further requirement is that the client's assets should be strictly separate from those of the employer and that the lawyer should be able to observe professional secrecy vis-à-vis the employer. Provided these conditions are met, even a lawyer employed on a full-time basis may be included on the cantonal register of lawyers.

In the case in point, X. fails to prove that these conditions ensuring independence are met. Consequently, he does not have the right to be included on the cantonal register of lawyers and thus to exercise the profession of lawyer generally throughout Switzerland. If he wishes to occasionally represent family members or friends before the courts, it is possible to request cantonal authorisation for specific cases.

For these reasons, the appeal lodged by the Bar Association is well-founded and the impugned decision is set aside.

Languages:

German.

"The Former Yugoslav Republic of Macedonia"
Constitutional Court

Important decisions

Identification: MKD-2004-1-001

a) "The Former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 06.03.2004 / **e)** SU.br. 133/2004 / **f)** / **g)** / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

1.2.4 **Constitutional Justice** – Types of claim – Initiation *ex officio* by the body of constitutional jurisdiction.
1.3.4 **Constitutional Justice** – Jurisdiction – Types of litigation.
4.4.3.4 **Institutions** – Head of State – Term of office – End of office.

Keywords of the alphabetical index:

President, end of office, conditions.

Headnotes:

According to Article 82.2 of the Constitution, the Constitutional Court decides on the fulfilment of conditions for the cessation of office of the President of the Republic. In case of death, resignation and permanent inability to perform his/her duties or in case of termination of the mandate in accordance with the provisions of the Constitution, it is up to the Constitutional Court to decide *ex officio* on the applicability of one of the conditions for the cessation of office of the President.

Summary:

After the tragic death of Mr Boris Trajkovski, the President of the Republic of Macedonia, the Court decided *ex officio* that due to death, he ceased to hold the office of President of the country.

Although not explicitly mentioned in Article 110 of the Constitution (which lists the competencies of the Court), the Court is vested with the jurisdiction to decide on the applicability of the conditions for cessation of office of the President of the Republic. That jurisdiction derives from Article 82 of the Constitution, which regulates the situation of cessation of office of the President of the Republic.

According to Article 82.1 of the Constitution, in case of death, resignation, and permanent inability of the President to perform his/her duties or in case of termination of a mandate in accordance with the provisions of the Constitution, until the election of the new President of the country, the President of the Assembly performs the office of President.

That happened in the case in question after the Court declared that Mr. Boris Trajkovski ceased to hold the office of President of the Republic of Macedonia.

Languages:

Macedonian.

Identification: MKD-2004-1-002

a) "The Former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 17.03.2004 / **e)** U.br. 123/2003 / **f)** / **g)** / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

4.7.4.1.6.2 **Institutions** – Judicial bodies – Organisation – Members – Status – Discipline.
4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.

Keywords of the alphabetical index:

Judge, disciplinary measure / Judge, dismissal, procedure / Judicial Council, competences.

Headnotes:

Where a disciplinary measure has been imposed in order to encourage the offender (the judge) not to commit an offence again, his/her committing that offence again shows that the judge in question does not react to the measure imposed and that there is a possibility that he/she will commit that offence again. Consequently, such a disciplinary measure should be taken as a criterion for the dismissal of a judge from his/her office.

While assessing the competence and ethics of a judge, the State Judicial Council acquires information from the Ministry of Justice on results achieved, the number of cases settled and the quality and timeliness of proceedings. Assessment of judges` work without taking into consideration decisions of higher courts delivered on appeals lodged against decisions of judges whose work is under scrutiny eliminates the possibility of the State Judicial Council's acting as a higher instance reviewing the decisions and work of higher courts.

Summary:

The Court did not uphold the alleged unconstitutionality of two provisions of the Law on the State Judicial Council dealing with the issue of the dismissal of judges from office.

In the petitioner's view, the first provision extended the constitutional basis for the dismissal of judges. In particular, Article 19.4 of the Law gives the State Judicial Council a right to examine a proposal for the dismissal of a judge. That proposal is subsequently delivered to the Assembly if a judge has received a warning for a disciplinary offence twice in a row or if he/she has had 15% of his/her monthly salary temporarily withheld. The petitioner claimed that the impugned provision fell outside the constitutional framework setting out the grounds for dismissing a judge from his/her office. Article 99.3 of the Constitution sets out the grounds for discharging a judge from his/her office. The petitioner argued that the impugned provision introduced an additional ground for dismissing a judge, a ground that had no constitutional background.

According to the second provision in question (Article 32.2 of the Law), the State Judicial Council assesses the competence and ethics of judges without taking into consideration decisions rendered by higher courts upon appeals lodged. In the petitioner's view, that provision did not correspond with Article 105.1.3 of the Constitution, which states that the State Judicial Council assesses the competence and ethics of judges in the performance of their office.

When judging the constitutionality of the impugned provisions, the Court took into consideration the powers of the State Judicial Council. Article 105 of the Constitution entrusts the Council with decisions

on the disciplinary answerability (accountability) of judges, without stating precisely what kind of disciplinary answerability. The Court considered that the Constitution vests the legislature with the powers to determine what kind of disciplinary offence is considered a flagrant violation of work discipline. Thus, a repeated warning notice or a temporary withholding of not more than 15% of the monthly salary may be considered criterion for finding a flagrant violation of work discipline. Consequently, the Court found Article 19.4 of the Law consistent with the Constitution.

Regarding the second provision dealing with the right of the State Judicial Council to assess the competence and ethics of a judge in performing his/her office without taking into consideration decisions rendered by higher courts on appeals lodged, the Court found that it eliminated the possibility of the State Judicial Council's acting as a higher instance reviewing the decisions of higher courts.

The Court rejected the alleged unconstitutionality of both provisions at issue.

Languages:

Macedonian.

Identification: MKD-2004-1-003

a) "The Former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 24.03.2004 / **e)** U.br. 189/2003 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 17/2004 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
4.10.7 **Institutions** – Public finances – Taxation.
5.3.37.4 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Taxation law.
5.3.41 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Housing, selling, tax / Citizen, rights and guarantees / Housing, policy / Legitimate expectation, principle, protection / Tax, preferential treatment, deadline.

Headnotes:

The principle of legal certainty implies full respect of the legitimate expectations of citizens, who presuppose the continuity of legal relations and their consequences in respect of taxes, which should be implemented in a way and manner prescribed by the law valid at the time of their imposition. A prohibition of the retrospective effect of laws means that the legal framework within which certain legal relations have been entered into should apply until their full completion. Statutory changes that have been subsequently adopted cannot apply retroactively to legal relations created under a different legal regime.

Summary:

After examining a petition lodged by an individual, the Court struck out the part of Article 24 of the Law amending the Law on Value-Added Tax (VAT) that bound investors to finish the construction of dwellings and put them on the market before the expiry of certain time-limits. These deadlines were incorporated as essential conditions, whose fulfilment would lead to the application of a preferential tax rate that came into effect after the commencement of the construction of the dwellings.

The impugned provision provides that "a preferential tax rate of 5% applies to the first sale of dwellings and apartments used for living purposes, where their construction has started before this Law enters into force and ended by 31 December 2003, and where they are sold by 31 March 2004". Taking the provision as a whole, the Court found that the time-limits imposed for ending the construction and sale of the dwellings violated the principle of legal certainty, the legitimate expectations of both citizens (as potential buyers) and constructors, and had a retroactive effect by regulating relations entered into in the past under a different legal regime. In considering the situation, the Court looked at not only in the provision in question, but also the Law as a whole.

Article 23 of the Law originally stated that dwellings were exempt from VAT, with the exception of the first sale if it took place within five years after the construction of the dwelling. Subsequently, an amendment was passed providing for a preferential tax rate of 5% to be applied to the first sale of dwellings only where that sale takes place within five years after

construction. As a result, a preferential tax rate of 5% has been incorporated as a substantive legal provision for the first sale of dwellings where that sale takes place within five years after construction.

The Court reviewed the legal provision incorporated into the Law by the amendment in mid-2003. As already stated, the amendment provided for the application of a preferential tax rate (5%) to the first sale of dwellings under construction before that amendment entered into force and sold within the time-limits. The Court found the time-limits imposed unconstitutional. In order for the preferential tax rate to apply, the construction of dwellings had to have been finished by the end of 2003 and they had to have been sold by the end of March 2004. Failure to observe those time-limits would result in the application of a tax rate of 18% to the dwellings that were under construction before the law in question entered into force.

The Court found that before the law in question entered into force, a preferential tax rate of 5% applied to the first sale of dwellings if they were sold within five years of their construction. The impugned Law introduced a general tax rate of 18% for the first sale of dwellings and provided for transitional provisions to regulate the tax treatment of dwellings already under construction before the new provision entered into force.

Bearing that in mind, the Court found that the situation was such so as to be foreseeable for all legal entities on the market and the situation was considered a predictable framework in accordance with which entities made their business decisions. In the Court's opinion, the impugned provision intruded into relations already set up on the basis of a predictable future legal situation. Market entities entered into certain business relations (construction or purchase of dwellings) at a time during which a tax regime was in effect that provided for a preferential tax rate. Consequently, those entities had legitimate expectations that the legal relations and their consequences would be regulated by the previous law. Since the Law did not respect the situation that had been previously guaranteed and, in fact, laid down new conditions and terms for preferential tax treatment, the Court held that it was unconstitutional and detrimental to the legitimate expectations of market entities.

By introducing new terms and conditions, the Law has significantly changed the legal situation (by imposing a general tax rate of 18% on the first sale of dwellings) in manner that is not favourable for citizens.

All those arguments led the Court to conclude that the impugned provision negatively affected the legitimate expectations of citizens, had retroactive effect and violated the principle of legal certainty and the rule of law. That being so, the Court struck out the part of Article 24 of the Law amending the Law on VAT providing for the application of new terms to the construction and sale of dwellings instead of the previous legal regime, which had more favourable conditions.

Languages:

Macedonian.

Turkey
Constitutional Court

Important decisions

Identification: TUR-2004-1-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 22.05.2003 / **e)** E.2003/28, K.2003/42 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 16.03.2004, 25404 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
4.18 **Institutions** – State of emergency and emergency powers.

Keywords of the alphabetical index:

Decree, legislative, validity.

Headnotes:

Where a provision of a decree having force of law is not a provision issued during a period of martial law or state of emergency, that provision must be based on an empowering law.

Summary:

The 5th Chamber of the High Administrative Court (Council of State) applied to the Constitutional Court alleging that the amended Article 7 of the Decree Having Force of Law 285 was contrary to the Constitution.

The amended Article 7 of the Decree Having Force of Law 285 sets out that an action for annulment may not be brought (to the Administrative Courts) against administrative decisions on the use of the competences granted to the Regional Governor during a state of emergency by the Decree Having Force of Law 285.

Article 91.1 and 91.2 of the Constitution states:

> "The Turkish Grand National Assembly may empower the Council of Ministers to issue decrees having the force of law. However, the fundamental rights, individual rights and duties included in the First and Second Chapter of the Second Part of the Constitution and the political rights and duties listed in the Fourth Chapter, cannot be regulated by decrees having the force of law except during periods of martial law and states of emergency.
>
> The empowering law shall define the purpose, scope, principles, and operative period of the decree having the force of law, and whether more than one decree will be issued within the same period."

Bearing those provisions in mind, decrees having the force of law may only be issued by the Council of Ministers only upon it being empowered to do so by a law. Since the amended Article 7 of the Decree Having Force of Law 285 was not based on an empowering law, it was contrary to Article 91 of the Constitution and had to be annulled.

Justices Akbulut, Huner, Ersoy and Tugcu delivered dissenting opinions.

Languages:

Turkish.

Identification: TUR-2004-1-002

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 08.10.2003 / **e)** E.2003/31, K.2003/87 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24.02.2004, 25383 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
3.11 **General Principles** – Vested and/or acquired rights.
5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.

5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.
5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.
5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Pension, social security / Social security, contribution, compulsory payment / Pension, deduction, increase.

Headnotes:

The State has the duty to ensure everyone under the social security system. In the operation of this system, an increase in the rate of a premium by a certain percentage is not contrary to the Constitution. But, once the premium has been collected and the individuals have retired, it is not constitutional to deduct an amount as "contribution on health payment" from the payment of the retirement pension.

Summary:

The main opposition party (at the material time, the Republican Party) applied to the Constitutional Court seeking the annulment of some provisions of Law 4838 amending the Law on Retirement (5434).

Article 1 of Law 4838 increased the rate of the retirement pension deduction by 1 percent, that is to say, from 15 percent to 16 percent. The opposition party claimed that that increase infringed legal stability and legal confidence. A State governed by the rule of law is a State that must respect human rights, preserve such rights, and establish a legal order appropriate to equality and justice in social life, and a State whose acts and actions are subject to legal review.

The Constitutional Court noted that when the Law on Retirement had been enacted, the retirement deduction rate had been 5 percent in 1949. That rate was amended several times afterwards. It was observed that the retirement deduction rate had been increased to respond to changes in the economic situation of the country and the problems faced by the retirement pension system. Even though the increase in question would place a heavy burden on the participants, a one-percent increase was not an unjust and unreasonable obligation as far as the principle of the rule of law was concerned.

Consequently, the increase in the retirement pension deduction was not contrary to the Constitution.

Another part of the application related to Article 6.1 of Law 4838, which provides for a deduction called "the contribution on health payment" on retirement pension payments. The amount of that deduction is not to exceed one percent of the total retirement payment.

Article 5 of the Constitution provides that the fundamental aims and duties of the state are: to safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy; to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, social and economic obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by the rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence. According to Article 60 of the Constitution, everyone has the right to social security and the state has the obligation to take the necessary measures and establish the organisation for the provision of social security.

The Court noted that social security organisations were under an obligation to ensure the future security of the beneficiaries. The actuarial balance of the security organisations must be preserved in order to continue their activities. The State is under an obligation to ensure everyone social security. In Turkey, the State carries out this obligation by way of the three social security organisations: namely, the Social Security Insurance Fund for workers, the Pension Fund for State Officials and the Self-Employed Insurance Fund. The term and the amount of the premiums paid by the beneficiaries of the social security organisations are determined by the relevant laws during the beneficiaries' years in the workforce. The essence of a social security system relying on premiums consists of a system under which the prepaid premiums are distributed to the beneficiaries.

That being so, making the beneficiaries pay an extra amount called "the contribution on health payment" infringed their right to social security because they had already paid the premiums during their years in the workforce. Moreover, that kind of obligation was contrary to the principles of the legal security, clarity and foreseeability and could run counter to the State's duty to ensure comfort and happiness to its citizens. Therefore, that provision was contrary to Articles 2, 5 and 60 of the Constitution.

Since Article 7 of Law 4838 had been abolished by Law 4919 of 8 July 2003, the Constitutional Court decided that there was no reason to deliver a decision on that article.

Languages:

Turkish.

Identification: TUR-2004-1-003

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 10.02.2004 / **e)** E.2004/1 (Official Reprimand), K.2004/1 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 13.03.2004, 25401 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

1.5.4 **Constitutional Justice** – Decisions – Types.
4.5.10 **Institutions** – Legislative bodies – Political parties.

Keywords of the alphabetical index:

Political party, name, emblem, sign / Political party, dissolved, symbol, use.

Headnotes:

The symbols, signs and names used by political parties that have been dissolved may not be used by other political parties. Any other political party using those symbols, signs and names shall be warned to stop using them.

Summary:

The Chief Public Prosecutor of the Republic requested that the Happiness Party (Saadet Partisi) be given an official reprimand for using the symbol "SP", the symbol once used by a party dissolved by the Constitutional Court.

On 10 July 1992 the Constitutional Court dissolved the Socialist Party. Under Article 96 of the Law on Political Parties, the names, emblems, symbols and similar signs of dissolved political parties may not be used by other political parties. According to Article 104 of the Law on Political Parties, where any political party acts contrary to the provisions of the Law on Political Parties other than Article 101 or obligatory provisions of other laws on political parties, the Chief Public Prosecutor of the Republic may bring an application to the Constitutional Court. Where the Constitutional Court finds that the political party has acted contrary to the above-mentioned provisions, the Court will warn the political party to remedy the situation.

Since the Socialist Party had used the symbol "SP", the Happiness Party could not use that symbol.

Therefore, the Constitutional Court unanimously warned the Happiness Party to remove the symbol "SP" within a six-month period.

Languages:

Turkish.

Identification: TUR-2004-1-004

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 17.03.2004 / **e)** E.2001/390, K.2004/35 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 30.04.2004, 25448 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.
5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.

Keywords of the alphabetical index:

Public service, entrance competition, security investigation / Civil servant, examination, professional, compulsory.

Headnotes:

A further examination is not obligatory for individuals who have passed the public official examination after 12 September 1980 but were not employed as a result of the security investigations conducted against them.

It would be contrary to the equality principle of the Constitution to require the candidates for public officials to take examinations if the reason they were not employed was the security investigations conducted against them.

Summary:

Ankara 3rd Administrative Court applied to the Constitutional Court alleging that provisional Article 1 of Law 4045 (the part relating to public officials) was contrary to the Constitution.

Some individuals who passed the examinations for public officials and public workers held by ministries or other public institutions after 12 September 1980 (date of the *coup d'état*) were not employed or were dismissed as a result of security investigations conducted against them.

In 1994 the impugned provision made it possible for those individuals to take the examinations held by the ministries or other public institutions provided that they had not lost the qualifications set out in the related regulations with the exception of that of the age-limit. Under the impugned provision, if they pass the examinations, the salaries and other benefits related to past will not be paid.

At the material time, Article 10 of the Constitution provided:

> "All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations.
>
> No privilege shall be granted to any individual, family, group or class.
>
> State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings."

According to that article, where individuals having the same legal status are subjected to different rules, the equality principle is violated. In other words, where the status of the individuals is equal, then those individuals must be subjected to the same rules. The characteristics in the legal status may require different rules. The Court recalled that it had annulled provisional Article 1 of Law 4045 (the part relating to public workers) on 21 May 1998. After that, a further examination was no longer necessary for candidates for public posts who had passed an examination after 12 September 1980 but had not been employed. The security investigation conducted against them was not to be taken into account. They had to be employed by the public institutions without fulfilling any other requirement, since they had once passed the examination for public officials.

Consequently, the part of the provisional Article 1 of Law 4045 relating to the public officials was contrary to the Constitution and was unanimously annulled.

Supplementary information:

After the *coup d'État* on 12 September 1980 in Turkey, some individuals passed the examinations either for public workers or public officials. Since the outcome of the investigations conducted against some of them were negative, they could not start to work. Provisional Article 1 of Law 4045 gave them the possibility to take another examination. Under that article, if they passed, they could start to work as a public official or public worker. On 21 May 1998 the Court annulled that article with regard to public workers. The present judgment removed the inequality between individuals who had passed the examinations for public workers and those who had passed the examinations for public officials after the *coup d'État*.

Languages:

Turkish.

Identification: TUR-2004-1-005

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 24.03.2004 / **e)** E.2002/43, K.2003/103 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 17.03.2004, 25405 / **h)**.

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.
5.3.26 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Association, dissolution / Association, autonomy / Association, state intervention, power, delegation to executive.

Headnotes:

Giving competence to the executive power to dissolve associations and their organs, establish temporary committees, amend or repeal the statutes of associations, and reorganise associations is contrary to the freedom of association. Associations may only be dissolved by court decisions.

Summary:

The 2nd Chamber of the Court of Cassation and the 10th Chamber of the Council of State (the 10th Chamber of the High Administrative Court) applied to the Constitutional Court alleging that Articles 1 and 2 of Law 4552 (the Law on Amendment of the Association Law) were contrary to the Constitution.

The Constitutional Court reviewed only Article 1.2 of Law 4552 and rejected other parts of the application since those parts were not applicable to the cases before the Court of Cassation and the Council of State.

The impugned provision of Law 4552 states that the Council of Ministers has the competence to dissolve the organs of the Red Crescent of Turkey and the Turkish Aeronautical Association, and to establish temporary organs in order to carry out the functions of the associations, as well as to amend or repeal the statutes of those associations and reorganise the associations on the basis of the reports by the relevant authorities with powers of inspection.

Since the plaintiff was the Turkish Aeronautical Association in the cases before the Court of Cassation and the Council of State, the Constitutional Court reviewed the application with respect to the Turkish Aeronautical Association, meaning that the judgment would apply only to the Turkish Aeronautical Association and not to the Red Crescent of Turkey.

Article 33 of the Constitution states:

> "Everyone has the right to form associations, or become a member of an association, or withdraw from membership without prior permission.
>
> No one shall be compelled to become or remain a member of an association.
>
> Freedom of association may only be restricted by law on the grounds of protecting national security and public order, or prevention of crime commitment, or protecting public morals, public health.
>
> The formalities, conditions, and procedures governing the exercise of freedom of association shall be prescribed by law.
>
> Associations may be dissolved or suspended from activity by the decision of a judge in cases prescribed by law. In cases where delay endangers national security or public order and in cases where it is necessary to prevent the perpetration or the continuation of a crime or to effect apprehension, an authority designated by law may be vested with power to suspend the association from activity. The decision of this authority shall be submitted for the approval of the judge in charge within twenty-four hours. The judge shall announce his decision within forty-eight hours, otherwise this administrative decision shall be annulled automatically."

The right to form associations entails guarantees that the associations may freely constitute their statues, may change them, may determine their organs, and may be dissolved against their will only by court decisions. Detailed provisions on associations are contained in the Law on Associations and relate to their foundation, constitution of their organs, amendment of their statues, dissolution by court decision and prohibition.

The fundamental elements of associations are their statutes and their organs. Associations may freely constitute their statues, and may change and determine their organs. Associations may be dissolved against their will only by court decisions.

Article 13 of the Constitution provides that fundamental rights and freedoms may only be restricted by law, in conformity with the reasons mentioned in the relevant articles of the Constitution, and without infringing upon their essence. Moreover, the restrictions must not be in conflict with the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular Republic and the principle of proportionality.

It was a clear interference with the right of association to give the executive power the competence to dissolve the organs of the Turkish Aeronautical Association, to establish temporary committees or to change its statutes. Such interference had to be based on one of the reasons mentioned in the relevant article of the Constitution. Since none of the reasons mentioned in Article 33 of the Constitution that would have permitted restriction existed, the

impugned provision was contrary to the Constitution. Therefore, it was unanimously annulled.

Justices A. Hüner and F. Kantarciodlu delivered dissenting opinions on the reasoning of the judgment.

Languages:

Turkish.

Ukraine
Constitutional Court

Important decisions

Identification: UKR-2004-1-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 27.01.2004 / **e)** 1-rp/2004 / **f)** On the official interpretation of Article 34.3 of the Law on Compulsory Social Insurance against Occupational Accidents and Diseases Causing Loss of Employability (a case on reimbursement of non-pecuniary (non-material) damage by the Social Insurance Fund) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 5/2004 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Accident, work-related, compensation / Employment, professional employability, loss / Damage, material, compensation, conditions / Damage, non-pecuniary, compensation.

Headnotes:

The provisions of Article 34.3 of the Law on Compulsory Social Insurance against Occupational Accidents and Diseases Causing Loss of Employability are to be understood as laying down the regime, procedure, and the amount of compensation for non-pecuniary (non-material) damage caused by work-related accidents and diseases, to be paid by the Social Insurance Fund in individual cases where there is no loss of professional employability (see definition below) of the persons concerned. Determination by law of the duty of the Social Insurance Fund to pay out compensation for accidents and its duty to compensate non-pecuniary damage constitute a means for those who suffered such damage to exercise their right to be insured against occupational accidents and diseases (Article 3), a right which is guaranteed by the state to all insured citizens.

The provisions laid down by Article 34.3 do not deprive an insured employee who loses his or her professional employability of the right to compensation for non-pecuniary (non-material) damage caused by a work-related accident or disease, and those provisions do not rule out the responsibility of the Social Insurance Fund to compensate non-pecuniary damage caused by such accident or disease also in cases of temporary or permanent loss of the professional employability of the persons concerned (Articles 1, 5, 6.5, 13.2, 21.1.1.e and 28.3).

The term "damage resulting in no loss of professional employability to those who have incurred it" shall be understood as damage by which no loss of the employee's ability to work in his or her trade, his or her qualifications, or in an equivalent trade is caused.

Summary:

The Constitutional Court examined a constitutional appeal brought by the Department of the Executive Directorate of the Social Insurance Fund for Occupational Accidents and Diseases in the Kirovograd region, requesting an official interpretation of the provisions laid down in Article 34.3 of the Law on Compulsory Social Insurance Against Occupational Accidents and Diseases Causing Loss of Employability, and, in particular, the phrase "damage, caused by a work-related accident or disease and causing no loss of professional employability". The applicant also asked the Court to determine whether the Social Insurance Fund against Accidents should provide compensation for non-pecuniary (non-material) damage in cases of permanent loss of professional employability.

According to Article 9.1 of the Law on the Protection of Labour, compensation for damage caused to an employee due to impairment of health or death shall be provided by the Social Insurance Fund against Accidents in accordance with the Law on Compulsory Social Insurance Against Occupational Accidents and Diseases Causing Loss of Employability, hereinafter referred to as "the Law".

Taking into account the specific nature of health protection for those who have suffered damage, those persons shall be compensated for pecuniary as well as non-pecuniary damage, provided such damage was indeed caused to those persons (Articles 21.1.1.e and 28.3). The compensation of non-pecuniary (non-property) damage caused to the insured persons is independent of any compensation for property damage set out in Article, and amounts to one of the methods used to protect employees' personal non-property rights.

An examination of the provisions laid down by Articles 30 and 34 gives reason to distinguish between persons who have, under Article 34.1 and 34.2, permanently lost their professional employability, and those who have, under Article 34.4.2 and 34.4.3, temporarily lost their employability. Temporary loss of employability for the purposes of Article 34.4.2 and 34.4.3 means loss of employability only for a limited period of time (period of treatment, rehabilitation).

Judges V.I. Ivaschenko and P.M. Tkachuk delivered dissenting opinions.

Languages:

Ukrainian.

Identification: UKR-2004-1-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 05.02.2004 / **e)** 2-rp/2004 / **f)** Official interpretation of the term "transfer" used in Article 5.1.17 of the Law on Value Added Tax (a case on interpretation of the term "transfer of parcels of land") / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 6/2004 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

5.3.41 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Land, transfer, lease, sale / Land, parcel, taxation of transfer operations / Land, right.

Headnotes:

The term "transfer" used in the phrase "to exempt from taxation the transfer of parcels of land with or without buildings" in Article 5.1.17 of the Law on Value Added Tax means acquiring (passing) the rights to the said parcels of land (property rights, rights to use) by way of the relevant legal acts, including contracts of purchase and sale, where such transfer is allowed by the Land Code.

Summary:

The Constitutional Court considered a constitutional petition seeking an official interpretation of the term "transfer" used in Article 5.1.17 of the Law on Value Added Tax (hereinafter referred to as "the Law") and a determination whether the term "transfer of parcels of land" includes the sale or lease of parcels of land.

The Constitutional Court found that the resolution of the issue required an examination of the phrase "exempt from taxation the transfer of parcels of land with or without buildings" in the context of Article 5, which contains the list of operations exempt from value added tax.

Article 5 sets out a tax exemption for the transfer of parcels of lands with or without buildings in cases stipulated by the Land Code, hereinafter referred to as "the Code".

In the Code, the term "transfer" is used in many provisions and is related to the acquisition of the right to land. In particular, citizens and legal entities acquire property rights and rights to use parcels of land by way of decisions made by bodies of executive power or bodies of local self-government, acting within their powers, to transfer of parcels of land for the purpose of ownership or use (Article 116), permanent use (Articles 122, 123), lease (Article 124), sale of state or municipal property (Article 127), and by way of other civil-law agreements such as exchange, gift, succession, etc. (Article 131). Therefore, the term "transfer" used in the Code includes all kinds of acquisitions of the right to land, whether it be ownership based on the relevant decision of a landowner, a civil-law agreement, contract of purchase and sale (including one for market value), exchange, gratuitous privatisation of parcels of land and shares of land, the use (permanent or temporary) of land under lease agreements, etc.

At the same time, the term "transfer" used in the phrase "to exempt from taxation the transfer of parcels of land with or without buildings" in Article 5.1.17, does not include leasing, as the Law does not refer to lease transactions among the transactions exempt from value added tax. The transactions (Article 3.2.2) exempt from the value added tax pursuant to Article 5.1.19 include gratuitous privatisation of parcels of farmland and land shares and contracts for services (work).

Languages:

Ukrainian.

Identification: UKR-2004-1-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 24.02.2004 / **e)** 3-rp/2004 / **f)** On the official interpretation of the provisions laid down by Article 3.10 of the Law on Enforcement Proceedings (a case on the enforcement of decisions made by the Arbitration Tribunal) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 9/2004 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Arbitration, tribunal, decision, enforcement / Enforcement, proceedings, start / Execution, writ.

Headnotes:

The decisions of arbitration tribunals are deemed to have the same status as writs of execution, on whose basis the authorities responsible for the execution of judgments ensure the enforcement of a decision made by that tribunal.

The state bailiff in the regions, cities (cities at the regional level) and districts in the cities shall commence enforcement proceedings upon receipt of a decision of the arbitration tribunal and an application for enforcement of that decision by the creditor or his/her representative, unless otherwise stipulated by the law.

Summary:

An applicant, the enterprise "Mukachivsky Fruit and Vegetable Cannery", filed a constitutional appeal with the Constitutional Court seeking the official interpretation of the provisions laid down by Article 3.10 of the Law on Enforcement Proceedings, on the basis of which the State Bailiffs' Service enforces decisions of the arbitration tribunal in accordance with the laws of Ukraine. The applicant also sought the determination of whether a decision of the Consumer Arbitration Tribunal in Ukraine had the same status as a writ of execution.

In accordance with Article 2.1 of the above-mentioned law, the enforcement of judgments in Ukraine is entrusted to the State Bailiffs' Service. The task of the State Bailiffs' Service is the timely, full and unbiased enforcement of decisions taken in accordance with the law (Article 1.2 of the Law on the State Bailiffs' Service).

A condition precedent to taking enforcement proceedings based on a writ of execution as per Article 18 is the application by the creditor or his/her representative for the enforcement of the decision listed in Article 3 and the writ of execution. In the case in question, the writ of execution was the decision of the arbitration tribunal (Article 18.1.7).

Pursuant to Article 18.1, the state bailiff shall commence enforcement proceedings on the basis of a writ of execution and upon application of the creditor or his/her representative for enforcement of a decision set out in Article 3 of the said law. In accordance with Article 18.1.7, a decision of the arbitration tribunal made in pursuance of Ukrainian law is deemed to be such a writ of execution.

In accordance with Article 5.2.2, the state bailiff shall undertake actions that are necessary for the timely and full enforcement of the decision specified in the writ of execution and the application for enforcement of the decision, in the manner and procedure specified in the writ of execution.

The provisions laid down by Article 3.10 of the Law on Enforcement Proceedings, taken together with Article 18.1 of that law, are to be understood as meaning that a decision of the arbitration tribunal simultaneously constitutes the writ of execution, which together with the application of the creditor or his/her representative for enforcement of the decision, is the basis upon which the state bailiffs of the State Bailiffs' Service in regions, cities (cities at the regional level) and districts in the cities ensure the enforcement of the decisions made by that tribunal, unless otherwise stipulated by the law.

Languages:

Ukrainian.

Identification: UKR-2004-1-004

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 02.03.2004 / **e)** 4-rp/2004 / **f)** Official interpretation of the provisions laid down by Articles 1, 10, and 10.2 of the Law on the Privatisation of the State-Owned Housing Stock (a case on the rights of co-owners as to the common elements of apartment houses) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 10/2004 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.
5.3.38 **Fundamental Rights** – Civil and political rights – Right to property.
5.3.38.4 **Fundamental Rights** – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Apartment, common elements / Property, right, scope / Apartment, non-privatised, owner, rights.

Headnotes:

Common elements (basements, sheds, small pantries, attics, trolley rooms, etc.) are transferred free of charge into the joint property of citizens simultaneously with the privatisation of their apartments (or rooms within the apartments) in apartment buildings. The acknowledgement of property rights over the common elements does not require the taking of additional steps, such as the foundation of an apartment co-owners association and membership in that association.

An owner of a non-privatised apartment in an apartment building is a co-owner of the common elements equally with the owners of the privatised apartments.

The issues concerning the consent of the co-owners of common elements of the building in relation to the superstructure of the building, penthouses in apartment houses or other acts affecting the common elements (lease etc.) shall be addressed in accordance with the laws of Ukraine setting out the legal treatment of property.

Summary:

The Constitutional Court had before it a constitutional appeal and constitutional petition requesting an official interpretation of Articles 1 and 10 of the Law on the Privatisation of the State-Owned

Housing Stock, (hereinafter referred to as "the law"). The applicant and petitioner stated that, *inter alia*, the application of provisions laid down in Article 10.2 differed among the various public authorities, courts and bodies of local self-government, which resulted, in their opinion, in a violation of the rights of citizens to exercise their property rights and the right to protection thereof by the court (Article 55), as guaranteed by Article 41.1 and 41.4 of the Constitution.

Some authorities considered that the owners of privatised apartments were also the co-owners of the common elements of the apartment buildings (basements, attics, stairways, trolley rooms, etc.). The right, in their opinion, arose upon privatisation of the residence and, therefore, the consent of those co-owners was required in order to execute any legal acts relating to the common elements (sale, lease, transfer for use, reconstruction, etc.). Other bodies were of the opinion that in order to acquire the right of joint ownership of the common elements, the owners of the privatised apartments had to take some additional steps.

In deciding the case, the Constitutional Court proceeded from the following: co-owners of apartment buildings acquire, in accordance with Article 10.2, joint property rights to the common elements simultaneously with the privatisation of their apartments. Proof of the property rights to both the common elements and the apartments is to be found in a single document: the certificate of the property rights to the apartment. The recognition of such rights to the common elements does not depend on the performance of any other legal act. The owners of the apartments are not required to found co-owners associations for that purpose. The right to apartments of the former state-owned housing stock and the relevant common elements thus acquired by the citizens is an inviolable (Article 41 of the Constitution) one, provided by the state and protected by the court (Article 55 of the Constitution).

In accordance with the Constitution, persons enjoying property rights shall be equal before the law. Where not every apartment is privatised or completely privatised in an apartment building, the owners of the non-privatised apartments (or their assignees) and the owners of the privatised apartments in the apartment buildings are co-owners of the common elements and have equal rights. They are equal in their right to possess, use and dispose of the common elements.

Examining the issue of the rights of privatised and non-privatised apartment owners in apartment buildings and those of bodies of local self-government and local state administrations to dispose of the common elements and deal with the structural components of such houses (foundation, partition walls, floor slabs, stairways etc.), the Constitutional Court proceeded from the legal nature of the apartment owners' joint property, concretised in the Law on Apartment Co-owners Associations. Under Article 19 of that law, the joint property of the apartment owners consists of indivisible and common property. The indivisible property is subject to their common joint ownership and is not subject to disposal; the joint property is subject to joint part ownership. In accordance with the said law, the owners of the common elements have the right to dispose of them in the limits specified by the said law and civil law.

Languages:

Ukrainian.

Identification: UKR-2004-1-005

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 04.03.2004 / **e)** 5-rp/2004 / **f)** On the official interpretation of the provisions laid down in Article 53.3 of the Constitution "the state ensures accessible and free pre-school, complete general secondary, vocational and higher education in state and municipal educational institutions" (the case on accessible and free education) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 11/2004 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.
5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

Education, duty of the state / Education, free, limits / Education, primary, secondary and higher, accessibility.

Headnotes:

The provisions in Article 53.3 of the Constitution "the state ensures accessible and free pre-school, complete general secondary, vocational and higher education in state and municipal educational institutions" in the first part, second and fourth part of that article are to be understood as follows:

- accessible education as a constitutional guarantee of exercising the right to education based on the principles of equality set out in Article 24 of the Constitution means that nobody may be denied the right to education, and the state shall provide opportunities for exercising that right; and

- free education as a constitutional guarantee of exercising the right to education means an opportunity to obtain education in state and municipal educational institutions without payment of any kind being made for educational services falling within the legislatively-defined content, scope and types of education specified as being free in Article 53.3 of the Constitution.

Proceeding from the provisions laid down in Article 53.2 and 53.3 of the Constitution whereby complete general secondary education is obligatory and free, the costs of providing for the training and educational process in state and municipal general educational institutions shall be paid out of the funds of the relevant budgets in the full amount.

Free higher education means that citizens have the right to obtain free education in accordance with the standards of higher education on a competitive basis (Article 53.4 of the Constitution) within the limits of the scope of training specialists for general public needs (public order).

Summary:

The People's Deputies brought a constitutional petition to the Constitutional Court requesting an official interpretation of the provisions laid down in Article 53.3 of the Constitution, which ensure accessible and free pre-school, complete general secondary, vocational and higher education in state and municipal educational institutions.

A systematic analysis of the provisions laid down in the Constitution that use the term "accessible" gave reason to conclude that the concept of "accessible education" in the third part of Article 53 of the Constitution meant that the state must provide all persons with the opportunity to exercise the right to education.

Analysing the provisions laid down in the articles of the Constitution, the Court reached the opinion that "free" in the provisions laid down in Article 53.3 of the Constitution for the levels of education in state and municipal educational institutions had to be understood as an opportunity to obtain education in those institutions without payment, i.e. without payment in any form being made for educational services in accordance with the state standard within the limits of the types of education specified in those provisions as being free. Ensuring free education at all levels is one of the guarantees of accessibility thereof.

The Constitutional Court found that ensuring accessible and free pre-school education was assigned to the state only to the extent related to educational institutions that are state or municipal owned (Article 53.3 of the Constitution). In accordance with Article 3.2 of the Law "on pre-school education", the state only assists in the development and maintenance of pre-school educational institution networks with other forms of ownership.

The fact that gratuitousness and accessibility of complete general secondary education in the state and municipal educational institutions are connected with the compulsory nature of that kind of education means that the state should fully finance the process of educating students up to the level of the state standard of general secondary education.

In accordance with Article 43.2 of the Constitution, the state lays down the conditions for training staff in basic areas related to the public needs for whose satisfaction the Law on the State Budget must exclusively set out any budget costs of the state (Article 95.2 of the Constitution). The public training of specialists in higher education in areas and specialties up to the appropriate level and qualification is to be adopted on the basis of the public needs and the amount of the budget allocations specified in the Law on the State Budget.

Training specialists in higher education in areas and specialties up to the appropriate level and qualification in higher educational institutions that are state and/or municipal owned may also be implemented using other sources of financing not prohibited by the law, which are an additional means of acquiring and ensuring the right to higher education. The legislation sets out that in addition to students whose training is financed by budget funds, higher educational institutions may register students who pay the costs of training on a contractual basis within the limits of

the number of students specified in the licences of those institutions.

Cross-references:

- Decision no. 10-rp/2002 of the Constitutional Court dated 29.05.2002 on a case brought in a constitutional petition by 53 People's Deputies for the official interpretation of the provisions laid down in the third part of Article 49 of the Constitution "medical services shall be provided free of charge in the state and municipal healthcare establishments" (the case on free medical services).

Languages:

Ukrainian.

Identification: UKR-2004-1-006

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 16.03.2004 / **e)** 6-rp/2004 / **f)** Constitutionality of the provisions laid down by Article 9.2 of the Law "on the public support of mass media and social protection of journalists" (the case on printed periodicals) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 12/2004 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.
4.6.3 **Institutions** – Executive bodies – Application of laws.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
5.4.12 **Fundamental Rights** – Economic, social and cultural rights – Right to intellectual property.

Keywords of the alphabetical index:

Media, periodical, subscription, delivery, price / Tariff, limit, determination / Pricing, policy, fundamental principles.

Headnotes:

The parliament's setting a ceiling on the tariff charged for the service of executing and delivering subscriptions of publications to subscribers is not a direct regulation (setting) of prices. It is a pricing policy, which is a component of internal economic and social policies. It is first and foremost aimed at ensuring low income citizens social guarantees, including the system of compensatory payments and subsidies from the state budget, and at ensuring conditions for an effective exercise of the constitutional right to information, freedom of thought and speech, and must, therefore, be determined exclusively by law. Consequently, in accordance with Article 116 of the Constitution, while providing for the implementation of the pricing policies in this area, the Cabinet of Ministers is authorised to adjust prices (tariff) within the limits specified by the legislator.

Summary:

The People's Deputies brought an application to the Constitutional Court seeking a declaration of unconstitutionality of the provisions laid down in Article 9.2 of the Law "on the public support of mass media and social protection of journalists" (hereinafter: "the Law"), providing that the tariff for execution of subscriptions and delivery to the subscribers of printed periodicals should not exceed 40 percent of the cost price of manufacturing a copy of the publication in question. The applicants sustained that by enacting the said norm, the parliament acted beyond the limits of the powers set out in Articles 85 and 92 of the Constitution and encroached the powers of the bodies of executive power, as under the Article 116 of the Constitution, the implementation of pricing policies falls under the powers of the Cabinet of Ministers.

The Constitutional Court determined the issue as follows. The Constitution lays down that the following subjects must regulated exclusively by legislative law, *inter alia*, the determination of the rights and freedoms of persons and citizens; guarantees of such rights and freedoms; principles of social protection, education, training, culture, legal principles and guarantees of business; rules of competition and norms of antimonopoly regulation; and principles for the activities of mass media (Article 92.1.1, 92.1.6, 92.1.8 and 92.1.11 of the Constitution). The social importance of services such as the execution and delivery of a subscription of printed periodicals to subscribers is supported by the fact that these services affect the majority of the population. Therefore, the state regulation of their costs is a means of social protection of Ukrainian citizens.

The Constitutional Court established a relation between the contents of Article 4 of the Law as to the organisation of public financial and economic support of mass media and Article 9 of the Law, whose performance provides for such support. Therefore, Article 9.2 of the Law sets a limit on the tariff for execution of a subscription and delivery to the subscribers of printed periodicals, and Article 4.1, 4.2 and 4.3 of the Law stipulate the conditions and procedure for the provision of financial assistance by the state to the distributors of periodicals to cover the difference in cases when the fixed tariff is exceeded, as well as grant them economic support and financial assistance in other forms. At the same time, the funds necessary for financial assistance coming from the state budget and earmarked as such are to be used by the State Treasury, and used first and foremost to cover the difference between the cost price and fixed (Article 9 of the Law) tariff for delivery of printed mass media to subscribers.

The provision in Article 9.2 of the Law laying down that the tariff for the execution of the subscription and delivery to the subscribers of printed periodicals should be not more than 40 percent of the cost price of manufacturing a copy of the relevant publication is constitutional. In enacting that norm, the parliament acted within the limits set out in the Constitution (Article 92 of the Constitution).

Languages:

Ukrainian.

Identification: UKR-2004-1-007

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 16.03.2004 / **e)** 1-v/2004 / **f)** On compliance of the Draft Law "on introducing amendments to the Constitution of Ukraine" with the requirements laid down in Articles 157 and 158 of the Constitution (the case on Draft Law no. 4105 with amendments made thereto) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 112/2004 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

1.3.5.3 **Constitutional Justice** – Jurisdiction – The subject of review – Constitution.
1.5.4.2 **Constitutional Justice** – Decisions – Types – Opinion.

Keywords of the alphabetical index:

Constitution, amendment.

Headnotes:

The Draft Law "on introducing amendments to the Constitution of Ukraine" (Draft Law no. 4105) does not comply with the requirements laid down by Articles 157 and 158 of the Constitution.

Summary:

Relying on the Decree of the *Verkhovna Rada* "on the preliminary approval of the Draft Law on making amendments to the Constitution (Reg. no. 4105)" dated 24 December 2003 no. 1399-IV, the parliament *(Verkhovna Rada)* applied to the Constitutional Court seeking an opinion on the compliance of the Draft Law "on introducing amendments to the Constitution of Ukraine" (hereinafter referred to as "the Draft Law") with the requirements laid down in Articles 157 and 158 of the Constitution.

The Draft Law proposes, *inter alia*, to amend the wording of the Constitution in Articles 76, 77.1, 78, 81-83, 85, 87, 88.3, 89, 90, 93, 94.4, 98, 103, 106.1.8-12, 106.1.15, 106.1.16, 106.1.19, 106.1.22, 106.1.30, 106.4, 112-115, 116.1.9-93, 118, 120, 121.1.5, 122.2, 126, 128.1, 141.1 and 148.2, Chapter XVI; and to repeal Article 106.1.14.

A comparative analysis of the provisions set out in Articles 76.3, 76.4, 78.1, 78.3, 81.1, 81.2.1, 81.2.3, 82.1, 82.2, 82.3 first sentence, 83.1, 83.4, 85.1.1-3, 85.1.5, 85.1.6, 85.1.8-11, 85.1.13, 85.1.14, 85.1.17-23, 85.1.28-31, 85.1.33-35, 88.1, 89.2-5, 90.1, 93.2, 113.3, 114.5 and 120.3 of the Constitution proposed in the Draft Law indicated that they fully matched the relevant provisions laid down in Articles 76, 78, 81, 82, 83, 85, 88, 89, 90, 93, 113, 114 and 120 of the Constitution in effect.

As to the amendments and supplements to the Constitution set out in the Draft Law to Articles 76.1, 76.2, 76.5, 82.3 second sentence, 83.2, 83.3, 83.5, 85.1.15, 85.1.16, 85.1.24-26, 87.2, 88.3, 90.1, 90.2.3, 90.2.4, 93.1, 106.18, 106.1.10, 106.1.11, 106.1.15, 106.1.16, 106.1.22, 113.1, 113.2, 114.1, 114.2, 114.4, 115.1-3, 118.4, 118.9, 122.1, 141.1, 148.2.1, 148.2.2, 148.2.3 second paragraph, and Section 7 first paragraph of Chapter XVI "Final

provisions concerning the amendments to the Constitution", those amendments and supplements had been declared to be not in compliance with the requirements laid down in Articles 157 and 158 of the Constitution in an earlier opinion of the Constitutional Court (by Opinion no. 2-v/2003 of the Constitutional Court dated 5 November 2003).

A number of amendments and supplements to the Constitution set out in the Draft Law were introduced in accordance with the above-mentioned opinion of the Constitutional Court and did not contradict Articles 157 and 158 of the Constitution. The same was true for the new wording of Article 77.1, additional Article 83.10 and the new wording of Articles 112, 114.3, 120.2, 121.1.5 and the provisions laid down by Article 89.2-5 of the Constitution.

Some provisions set out in the Draft Law, which the Constitutional Court had already found as not being in compliance with the requirements laid down in Articles 157 and 158 of the Constitution, were amended in such a way that did not affect the previously proposed contents of the text of the Draft Law, and, therefore, still did not comply with the requirements laid down in Articles 157 and Article 158 of the Constitution. That concerns clarifications to the wording of Articles 78.4, 81.2.2, 81.2.4-7, 81.3-6, 83.6-9, 85.1.4, 85.1.12, 85.1.32, 85.1.36, 85.1.37, 85.2, 87.1, 90.2.1, 90.3, 98, 106.1.12, 106.1.19, 106.1.30, 116.1.91-93 additional section, 118.10, 120.1, 126.5.2, Section 3 first paragraph, and Section 7 second paragraph Chapter XVI of the Constitution.

The revisions made to the Draft Law after the delivery of Opinion no. 2-v/2003 by the Constitutional Court on 5 November 2003 resulted in amendments and supplements that had to be reviewed by the Court for compliance with the requirements laid down in Articles 157 and 158 of the Constitution.

The Constitutional Court reviewed the repeal of the provisions (previously proposed by the subject of the right to legislative initiative) in Section 9 of Chapter XVI of the Constitution "bodies of prosecutor's office shall exercise authorities set out in Section 5 of Article 121 of the said law for 5 years after the day they come into force", and the wording of the provisions in the Draft Law amending and supplementing the Constitution, in particular, Articles 78.2; 94.4; 106.1.9; 106.4; 114.4; 115.4; 118.8; and 120.2.

The following provisions were held not to be amendments and/or supplements to the Constitution in force, for the reason that they made no change to the provisions of the Constitution: no change to the provisions in effect set out in Articles 85.1.7, 85.1.27, 103, 126.4 and 128.1 of the Constitution; elimination of some of provisions previously proposed in the Draft Law; and alternative wordings of Articles 90.2.2, 90.4 and Chapter XVI, Sections 4, 5, 6 and 8.

The Constitutional Court also pointed out some inconsistencies between the text of the Draft Law and the provisions of the Constitution in force. However, the Court noted that it did not have the jurisdiction to order the striking out of an inconsistency unless that inconsistency cancelled or limited the rights and freedoms of persons and citizens or was aimed at the compromise of the independence of Ukraine or infringement upon the territorial integrity of Ukraine.

Supplementary information:

Judges V.M. Shapoval and M.D. Savenko delivered dissenting opinions.

Cross-references:

- Opinion no. 2-v/2003 of the Constitutional Court dated 05.11.2003 was delivered on a case in which the Chairman of the Parliament of Ukraine sought the Court's opinion on the compliance of the Draft Law "on introducing amendments to the Constitution of Ukraine" with the requirements laid down by Articles 157 and 158 of the Constitution (the case on making amendments to Articles 76, 78, 81 and other articles of the Constitution).

Languages:

Ukrainian.

Identification: UKR-2004-1-008

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 17.03.2004 / **e)** 7-rp/2004 / **f)** On compliance with the Constitution of the provisions laid down in Article 59.3 and 59.4 of the Law on the State Budget of Ukraine for 2003 on social protection of servicemen and employees of law enforcement bodies / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 12/2004 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.11 **Institutions** – Armed forces, police forces and secret services.
5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Privilege, material, right / Army, serviceman, social benefit / Police, officer, social benefit.

Headnotes:

Organisational, legal and economic measures specified in the Constitution and the law concerning the provision of social protection to servicemen and employees of law enforcement bodies which were not limited to invalidity or a lack of sufficient means for existence (Article 46 of the Constitution), including the right to earn material goods for themselves and their families allowing for a standard of living that is higher than a minimum level of subsistence, have their basis in the specific features of their professional duties, related to the risk for their lives and health, and certain limitations of their constitutional rights and freedoms.

Terminating such privileges, benefits and guarantees for servicemen and employees of law enforcement bodies without the corresponding material compensation represents a violation of their and their families' right to social protection guaranteed by the state.

Summary:

Article 59.3 and 59.4 of the Law on the State Budget for 2003 provide that privileges, benefits and guarantees, to which in compliance with the law of Ukraine individual employees (servicemen) of military units and law enforcement bodies have the right in respect of discounts for use of residence (apartment fees), fuel, phone and municipal services (supply of water, gas, electrical energy and heat), free travel on all types of city passenger transport (except for taxi) and public transport in rural districts, and also railway, water transport and buses on suburban routes, shall be provided only when the money income of such employees (servicemen) is less than the minimum level of subsistence, specified for employable individuals. The amount of the privileges given, in their money equivalent together with the money income of the said employees (servicemen), should not exceed the minimum level of subsistence specified for employable individuals.

In accordance with provisions of the Constitution, citizens have the right to social protection, which includes the right of provision in case of complete, partial or temporary loss of employability, loss of family provider, unemployment for circumstances outside their control, old age and other cases stipulated by the law (Article 46.1). Pensions, other types of social payments and assistance, which is a fundamental source of existence, should provide for a standard of living not lower than the minimum level of subsistence specified by the law (Article 46.3). In accordance with the said norm, the state undertakes to provide for those citizens who, owing to a loss of employability or other circumstances beyond their control, do not have sufficient means for existence.

The Constitution distinguishes certain categories of Ukrainian citizens who require additional guarantees of social protection from the state. They include those citizens serving in military units and law enforcement bodies of the state ensuring the sovereignty and territorial integrity of the state and its economic and information security, and in particular, in the armed forces, bodies of the Security Service, militia, prosecutor's office, protection of the state border, tax police, the State Fire Protection Service and the State Department for Enforcement of Punishments (Article 17).

The need for additional social security guarantees for these categories of citizens both at the time of their service and upon cessation thereof, is governed first and foremost by the fact that service in the armed forces, other military units and law enforcement bodies of the state entails risks for life and health and has higher requirements in relation to discipline, professional suitability and professional, physical, moral and other performance data.

The procedure for serving in the armed forces and other military units is governed by special regulatory and legal acts, which provide citizens who are on such service with additional responsibilities and duties.

In particular, citizens who are on military service and working in law enforcement bodies, hereinafter referred to as "servicemen and employees of law enforcement bodies", shall carry out their professional duties beyond their working hours or service (for instance, Article 199.3 of the Internal service regulations of the armed forces; Article 10.2 of the law "On the militia"; and Article 18.5 of the law "On fire safety").

Apart from this, servicemen and employees of law enforcement bodies in cases stipulated by the Constitution are subject to certain legislatively provided limitations of individual constitutional rights and freedoms. In particular, servicemen and employees of the armed forces may be limited in their freedom of movement, free choice of residence and

right to freely leave the territory (Article 33.1 of the Constitution, Article 17.4 of the law "On the armed forces"). Also, they may not be members of political parties and public organisations pursuing political purposes (Article 36.2 of the Constitution, Article 17.1 of the law "On the armed forces of Ukraine", Article 18.7 of the law "On the militia", Article 6.2 of the law "On the prosecutor's office", Article 6.2 of the law "On the Security Service of Ukraine").

In addition, such individuals are limited by the Constitution in their rights regarding business activities (Article 42), employment (Article 43) and other rights related to providing themselves and their families with a maximum achievable (in accordance with their abilities) standard of living and protecting their economic and social interests. In particular, combining service in the bodies of prosecutor's office and employment in enterprises, establishments or organisations, or in any business, is prohibited (Articles 42.2 and 44.4 of the Constitution, Article 46.5 of the law "On the prosecutor's office"). Participation in strikes is prohibited for servicemen and privates, commanders, employees and officers of the state fire protection service (Article 18.8 of the law "On militia", Article 17.7 of the law "On the armed forces of Ukraine", Article 20.5 of the law "On fire safety").

The provisions laid down in Article 59.3 and 59.4 were recognized unconstitutional and became null and void upon the day of making the decision by the Constitutional Court.

Cross-references:

- Decision no. 5-rp/2002 of the Constitutional Court dated 20.03.2002 based on a constitutional petition by 55 People's Deputies as to compliance with the Constitution of the provision laid down in Articles 58 and 60 of the law "On the state budget of Ukraine for 2001" and the Parliament Court on compliance with the Constitution of the provisions laid down in Sections 2, 3, 4, 5, 8 and 9 of the first part of Article 58 of the law "On the state budget of Ukraine for 2001" and subsection 1, Section 1 of the law "On some activities for economy of budget funds" (the case on privileges, indemnifications and guarantees).

Languages:

Ukrainian.

Identification: UKR-2004-1-009

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 31.03.2004 / **e)** 8-rp/2004 / **f)** Constitutionality of the Decree of the President "On the activities for introduction of a state monopoly in the sphere of control of production and turnover of alcohol, alcoholic drinks and tobacco products" (the case on the introduction of state monopoly in the area of control of individual product types manufacturing) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 14/2004 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.3 **Constitutional Justice** – Jurisdiction.
3.25 **General Principles** – Market economy.
4.4.1 **Institutions** – Head of State – Powers.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Monopoly, state / Tobacco, production, sale, distribution / Alcohol, production, sale.

Headnotes:

By referring to the monopoly of the State in its name, Articles 1 and 2.1 of the Decree of the President "On the activities for the introduction of a state monopoly in the sphere of control of production and turnover of alcohol, alcoholic drinks and tobacco products" violated Article 42.3 of the Constitution, which specifies that the type and limits of the monopoly shall be set by law.

Summary:

The People's Deputies approached the Constitutional Court with a request to recognize unconstitutional the Decree of the President "On the activities for the introduction of a state monopoly in the sphere of control of production and turnover of alcohol, alcoholic drinks and tobacco products", hereinafter referred to as "the Decree", asserting that, having introduced (by Article 1 of the Decree) a state monopoly in the said sphere, the President acted beyond the scope specified in the Constitution.

The Constitutional Court, deciding on the case, proceeded from the following. The fundamentals of the state policies regulating the production, export, import, wholesale and retail trade in alcoholic and

tobacco products and ensuring their high quality are specified in the law "On the state regulation of production and turnover of ethyl, cognac, fruit alcohols, alcoholic drinks and tobacco products", hereinafter referred to as "the law". The control of compliance with the norms of the said law is assigned to the bodies of executive power authorized by the Cabinet of Ministers and other bodies within the limits of their competence specified in the law (Articles 3 and 16). The provisions laid down in Article 2 of the Decree follow from the norms of the said law and are oriented towards performance of individual organisational and practical activities. They contain no provisions which wrongfully limit competition, allow unfair competition in business activities or abuse of exclusive position in the market. By their nature, the provisions of the said article in the Decree are assignments to the Cabinet of Ministers.

Article 150 of the Constitution does not empower the Constitutional Court to examine any issues regarding the legitimacy of the acts performed by bodies of state power, bodies of power of the Autonomous Republic of Crimea, bodies of local self-government or other issues which belong to the competency of the courts of general jurisdiction.

Languages:

Ukrainian.

Identification: UKR-2004-1-010

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 07.04.2004 / **e)** 9-rp/2004 / **f)** On compliance with the Constitution of the provisions laid down in subsection "a" of Article 5.2, Article 8 and the first and second paragraph of Article 23.2 of the law "On organisational and legal grounds to counteract organized crime", and the Decrees of the President "On the Coordination committee to counter corruption and organized crime" and "On increasing the efficiency of activities of the Coordination committee to counter corruption and organized crime" (the case on the Coordination committee) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
3.4 **General Principles** – Separation of powers.
4.4.1 **Institutions** – Head of State – Powers.
4.5.2 **Institutions** – Legislative bodies – Powers.

Keywords of the alphabetical index:

Abuse of powers / Crime, organised, fight / Corruption, fight.

Headnotes:

The establishment of a coordination committee to counter corruption and organized crime as a state body with special status under the aegis of the President is contrary to Articles 19, 85 and 106 of the Constitution. Consequently, the provisions of Article 8 of the Law on Organisational and Legal Grounds to counteract Organised Crime, empowering the parliament *(Verkhovna Rada)* to approve the Regulations of the Committee and to hear the reports on its work, were also declared unconstitutional.

Summary:

The cause for the examination of the case was the constitutional petition of the People's Deputies who approached the Constitutional Court with a request to recognize as unconstitutional the provisions laid down in subsection "a" of Article 5.2 and Article 8 of the Law on Organisational and Legal Grounds to Counteract Organized Crime" (hereinafter "the Law"), the provisions of paragraph 1 and 2 of Article 23.2 of the Law empowering the parliament *(Verkhovna Rada)* to hear the report from the Coordination committee to counter corruption and organised crime, the Decree of the President on the Coordination Committee to counter corruption and organized crime (hereinafter "the Decree no. 561 dated 26 November 1993"), and the Decree of the President on increasing the efficiency of the proceedings of the Coordination committee to counter corruption and organized crime (hereinafter "the Decree no. 402 dated 13 May 2003").

Under the law, the system of state bodies established to counteract organized crime, includes, among others, the President's Coordination Committee to counter corruption and organized crime (subsection "a" of Article 5.2 of the law), in charge of coordinating activities carried out by all state bodies, which, in accordance with the law, are assigned to ensure such counteraction (Article 8.1). The Regulations of the

Coordination Committee to counter corruption and organized crime as per Article 8.1 of the law are to be approved by the parliament. The said article specifies the composition, functions and powers, as well as the obligatory nature, of the decisions of the Coordination Committee to counter corruption and organized crime, and also provides for organisation in the Coordination Committee of the interdepartmental centre to counteract organized crime.

Under the Constitution, the state power in Ukraine shall be implemented based on its division into legislative, executive and judicial power, whose bodies shall exercise their authority within the limits specified by the Constitution and in accordance with the laws of Ukraine (Article 6 of the Constitution).

Any and all bodies of state power and bodies of local self-government, as well as their officials, shall act exclusively based on and within the limits of the authority and in a manner stipulated by the Constitution and the law (Article 19 of the Constitution). The authority of the parliament and the authority of the President are set forth in the Constitution (Articles 85 and 106).

The Constitutional Court considered that the provisions in subsection "a" of Article 5.2 which specify that the organisation of the President's Coordination Committee to counter corruption and organized crime is a state body with special status, are unconstitutional as they contradict Articles 19 and 85 of the Constitution.

In the period of examination of the case at the plenary session of the Constitutional Court, the President issued the Decree no. 362 "On the measures for further improvement of the activities of the President's Coordination Committee to counter corruption and organized crime" dated 24 March 2004, based on which the Decree no. 402 dated 13 May 2003 was amended and supplemented, and the Regulations of the President's Coordination Committee to counter corruption and organized crime were stated in the new wording. In connection with this, some provisions of Decree no. 402 dated 13 May 2003 in the previous wording, including those contested by the People's Deputies, became null and void.

Languages:

Ukrainian.

Identification: UKR-2004-1-011

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 15.04.2004 / **e)** 10-rp/2004 / **f)** On compliance with the Constitution of the provisions laid down in Articles 6 and 9 of the law "On the state regulation of production and sales of sugar" (the case on determination of the minimum price for sugar) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.25 **General Principles** – Market economy.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.10.7 **Institutions** – Public finances – Taxation.
5.3.38 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Price, regulation, state / Price, minimum, determination.

Headnotes:

State regulation related to pricing in the sugar beet complex introducing minimum prices for sugar beet and sugar cannot be deemed a failure on the part of the state to provide for the protection of the rights of owners and business, including those engaged in cultivation of sugar beet and production of sugar, and for social orientation of the economy (Article 13.4 of the Constitution). The need for such regulation arises from the broad sphere of the use of sugar, its significant influence on the level and dynamics of prices for finished products having considerable social importance and being oriented towards provision of the profitability of production and growth in production of sugar and, ultimately, the reduction in prices thereof.

The introduction by the law of the state regulation of production and sales of sugar may not be considered a limitation of the right of the subjects of business activities to possession, use and disposal of the property.

Summary:

The cause for the examination of the case was a constitutional petition made by 45 People's Deputies as to compliance with the Constitution of the provisions laid down in Articles 6 and 9 of the Law on the State Regulation of Production and Sales of Sugar dated 17 June 1999 (hereinafter "the Law").

The parliament *(Verkhovna Rada)*, having enacted the Law, exercised its authority to determine the grounds for internal policies in the economic sphere (Article 85.1.5 of the Constitution).

The preamble specifies that the Law sets forth legal, economic and organisational grounds for the state policies on production, export, import, wholesale and retail trade in sugar. The law specifies the state regulation of the amount of beet cultivation, production and sales of sugar and the mechanism for pricing in the sugar beet complex. Article 6 provides for regulation of pricing in the sugar beet complex by introducing minimum prices for sugar and sugar beet at the level providing for production profitability of the relevant product types (the third part), the procedure for determining the minimum price for sugar beet for the production and delivery of sugar in the home market and abroad with the purpose of fulfilling the obligations of the state under international agreements and also the minimum prices for sugar delivered in the home market in the relevant amount. At the same time, the determination of the minimum prices for sugar beet and sugar is assigned to the Cabinet of Ministers.

In accordance with Article 92.1.8 of the Constitution, the legal grounds and guarantees of business, rules of competition and norms of antimonopoly regulation shall be determined by the law. The state legislatively provides for freedom of competition among businessmen and protects consumers from unscrupulous competition and monopoly in any sphere of business activity, including businessmen engaged in the production of sugar and cultivation of sugar beet.

The provisions laid down in Article 6 on the introduction of minimum prices for sugar do not provide for any unlawful limitation of competition. They cover producers of sugar of different ownership forms. At the same time, producers of sugar are not prevented from competing with one another in the process of sales of sugar, fixing prices closest to the minimum prices for sugar specified in accordance with the law. Having introduced with the said law the regulation on pricing in the sugar beet industry, the parliament exercised their power of legislative determination of the legal grounds and guarantees of business, rules of competition and norms of antimonopoly regulation (Article 92.1.8 of the Constitution).

Therefore, the regulation by the law of minimum prices of sugar at the level providing for the profitability of production and making sale and purchase contracts in the home market does not contradict the provisions laid down in Article 42.3 of the Constitution.

In compliance with the Constitution, acts which are crimes or administrative or disciplinary offences and the responsibility for them are established exclusively by the laws (Article 92.1.22 of the Constitution) i.e. the parliament in the relevant law shall determine, among other things, the offence and the extent of responsibility for it.

Article 9 of the Law specifies that subjects of business activities shall be levied a fine equivalent to double the cost of sugar whose delivery in the home market or whose sales were carried out in infringement of the specified order, i.e. in excess of the specified quotas or at prices lower than those specified as minimum prices. The responsibility stipulated in this norm is not oriented towards limitation or denial of the property rights in respect of the relevant subjects of business activities.

Languages:

Ukrainian.

United States of America
Supreme Court

Important decisions

Identification: USA-2004-1-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 25.02.2004 / **e)** 02-1315 / **f)** Locke v. Davey / **g)** 124 *Supreme Court Reporter* 1307 (2004) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Religion, free exercise / Scholarship, access, restriction.

Headnotes:

Governmental treatment of religion will be presumptively unconstitutional if it reflects hostility toward religious practice.

A legislative policy choice not to provide funding for a distinct category of instruction associated with religious study is not in itself an indicator of hostility toward religion that triggers a presumption of constitutional invalidity.

Summary:

The State of Washington, through a program enacted by its legislature entitled the "Promise Scholarship Program," provides scholarship grants for university-level education expenses to academically gifted students. In accordance with the Constitution of the State of Washington, students may not use such scholarship funds to pursue university degrees in devotional theology.

Mr. Joshua Davey, a student at a private, church-affiliated educational institution in Washington, was awarded a grant under the Promise Scholarship Program; however, the institution subsequently informed him that he was not eligible for the funds because he had chosen to pursue an academic program in pastoral ministries. While acknowledging that his academic program involved the study of devotional theology, he challenged the denial of his scholarship, claiming that the state's refusal to provide financial support for such study violated the Religion Clauses of the First Amendment to the United States Constitution. The Religion Clauses provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Both of these − the "Establishment Clause" and the "Free Exercise Clause", respectively − apply to the states by means of incorporation into the Fourteenth Amendment to the U.S. Constitution.

The U.S. District Court rejected Davey's claims, but the U.S. Court of Appeals for the Ninth Circuit reversed that judgment. The Court of Appeals concluded that the state had singled out religion for unfavorable treatment, and that therefore, according to the U.S. Supreme Court's 1993 decision in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, the exclusion of theology studies was presumptively unconstitutional and could survive strict judicial scrutiny only if it was narrowly tailored to achieve a compelling state interest. Because it concluded that the state's anti-establishment concerns were not compelling, the Court of Appeals ruled that the Promise Scholarship Program was unconstitutional.

In a seven-two vote, the U.S. Supreme Court reversed the Court of Appeals and upheld the constitutionality of the Promise Scholarship Program. The Supreme Court concluded that this case was not governed by the precedent in Church of Lukumi because the state of Washington's treatment of religion in the Promise Scholarship Program was far milder in degree than the city ordinance in question in Church of Lukumi, which criminalized the ritualistic animal sacrifices of a particular religious group. The Court pointed out that the Washington program did not impose any criminal or civil sanctions, and did not single out any particular type of religious service or rite. Instead, the Court said, the state of Washington merely had made a policy choice not to provide funds for a distinct category of instruction. In all, because the Court found nothing in the history or the text of Washington's Constitution or the Promise Scholarship Program to suggest an animus toward religion, the decision to deny funding for vocational religious instruction was not inherently suspect under the Free Exercise Clause. Without a presumption of unconstitutionality, the Court said, the constitutional challenge must fail because the state's anti-establishment concerns were substantial and the exclusion of funding imposed a relatively minor burden on Promise Scholarship Program recipients.

Supplementary information:

The two dissenting members of the Court both filed separate opinions.

Cross-references:

- *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 United States Reports 520, 113 *Supreme Court Reporter* 2217, 124 *Lawyer's Edition Second* 472 (1993).

Languages:

English.

Identification: USA-2004-1-002

a) United States of America / **b)** Supreme Court / **c)** / **d)** 08.03.2004 / **e)** 02-1541 / **f)** Iowa v. Tovar / **g)** 124 *Supreme Court Reporter* 1379 (2004) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel.

Keywords of the alphabetical index:

Counsel, right, waiver / Waiver, of right, voluntary and knowing.

Headnotes:

Right to a fair trial, for any accused person who faces possible imprisonment, includes the right to counsel at all "critical stages" of the criminal process.

The entry of a guilty plea is a "critical stage" of the criminal process at which the right to counsel is guaranteed.

While the Constitution does not force an accused person to accept a lawyer's representation, the accused's waiver of the right to counsel must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances.

The amount of information required by the Constitution for an accused to waive counsel "intelligently" will be very case-specific and fact-intensive: it will depend, in each case, upon the particular facts and circumstances surrounding that case.

As a general rule, a waiver of a right will be made at a constitutionally-permissible level of knowledge if the accused fully understands the nature of the right and how it would likely apply in general in the circumstances, even though the accused might not know all the specific detailed consequences of invoking or not invoking that right.

Summary:

In 2001, Mr. Felipe Tovar was found guilty in a state court in the State of Iowa of driving a motor vehicle while intoxicated. He had been convicted of the same offense twice before, in 1996 and 1998. Under Iowa law, the first two offenses of driving while intoxicated are misdemeanors, while the third time is a felony crime that entails significantly greater penalties.

During the proceedings in 2001, Tovar filed a motion with the court that claimed the 1996 conviction could not be used to enhance the latest charge from the level of misdemeanor to felony. He argued that the judge in the 1996 proceeding had given him insufficient warnings, at the time of certain pre-trial proceedings, about the consequences of choosing to reject representation by a court-appointed defense counsel. Instead of accepting such representation, Tovar chose in 1996 to represent himself at his pre-trial arraignment and at the plea hearing, at which he pleaded guilty. During the plea hearing, the judge, as required by Iowa law, presented information to Tovar about the trial process if he chose to plead not guilty, as well as the consequences of a guilty plea. In his 2001 motion, Tovar did not allege that he was unaware during the 1996 proceedings of his right to counsel prior to pleading guilty; however, he did maintain that his decision to reject defense counsel representation was not full-knowing, intelligent, and voluntary. Therefore, that decision was invalid because the court never had made Tovar aware of the dangers and disadvantages of self-representation.

The trial court judge denied Tovar's 2001 motion, and the Iowa Court of Appeals affirmed that decision. The Iowa Supreme Court, however, reversed the Court of Appeals decision, agreeing that the trial court's 1996 warnings about the possible consequences of self-representation had been inadequate. Therefore, the Iowa Supreme Court ruled that Tovar's right to a fair trial under the Sixth Amendment to the United States Constitution had been violated. The Sixth Amendment states in relevant part: "In all criminal prosecutions, the accused shall…have the assistance of counsel for his defense." The Court remanded the case to the trial court for entry of a judgment that would not take into account Tovar's 1996 conviction.

The U.S. Supreme Court agreed to review the Iowa Supreme Court decision due to division of judicial opinion on the Sixth Amendment requirements in regard to waiver of counsel at a pre-trial plea hearing. In deciding the case, the Supreme Court stated that the Sixth Amendment guarantees a right to counsel, at all "critical stages" of the criminal process, to any accused person who faces possible imprisonment. In this regard, the Court added, the entry of a guilty plea is one of those "critical stages" at which the right to counsel is guaranteed. The Constitution does not force an accused person to accept a lawyer's representation. However, according to the Court, an accused's waiver of the right to counsel must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances.

The Court ruled that the Iowa Supreme Court's warnings were not required: the Sixth Amendment right to counsel does not require a trial court judge, before accepting an accused person's waiver of counsel at a pre-trial plea hearing, to present a rigid and detailed warning to the accused as to the benefits of representation by counsel. Instead, the Court stated that the Sixth Amendment is satisfied when the trial court informs the accused of the nature of the charges against him or her, of the right to have representation in regard to the plea-making decision, and of the range of possible penalties resulting from entry of a guilty plea. Therefore, the Court reversed the judgment of the Iowa Supreme Court.

Languages:

English.

Inter-American Court of Human Rights

Important decisions

Identification: IAC-2004-1-001

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 28.02.2003 / **e)** / **f)** "Five Pensioners" v. Peru / **g)** Secretariat of the Court / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
1.4.7 **Constitutional Justice** – Procedure – Documents lodged by the parties.
1.6.1 **Constitutional Justice** – Effects – Scope.
3.11 **General Principles** – Vested and/or acquired rights.
5.1.1.4 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
5.3.38 **Fundamental Rights** – Civil and political rights – Right to property.
5.4 **Fundamental Rights** – Economic, social and cultural rights.
5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Fact, new, allegiance before the Court / Pension, reduction.

Headnotes:

Although the right to an equalised pension is an acquired right, in accordance with Article 21 ACHR (American Convention on Human Rights, hereafter "the American Convention"), States may restrict the enjoyment of the right to property for reasons of public utility or social interest.

In the case of the patrimonial effects of pensions (the pension amount), States may reduce these only by the appropriate legal procedure and for the said reasons. Moreover, Article 5 of the Additional Protocol to the American Convention in the area of Economic, Social and Cultural Rights allows States to establish restrictions and limitations on the enjoyment and exercise of economic, social and cultural rights "by means of laws promulgated in order to preserve the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights."

It is not enough that legal recourses exist formally; they must be effective; that is, they must give results or responses to the violations of rights established in the American Convention.

The safeguard of the individual in the face of the arbitrary exercise of the powers of the State is the primary purpose of the international protection of human rights.

Economic, social and cultural rights have both an individual and a collective dimension. Their progressive development should be measured as a function of the growing coverage of economic, social and cultural rights in general, and of the entire population's right to social security and to a pension in particular, bearing in mind the imperatives of social equity, and not as a function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation.

It is not admissible to allege new facts before the Inter American Court of Human Rights, distinct from those presented in the Inter-American Commission on Human Right's application – except for those facts that may explain, clarify or reject the facts that have been mentioned in the application, or be consistent with the claims of the plaintiff. Supervening facts, on the other hand, can be forwarded to the Court at any stage of the proceeding before judgment has been delivered.

Regarding the incorporation of rights other than those included in the application filed by the Commission, the representatives of the alleged victims may invoke such rights before the Court. The victims are the holders of all the rights embodied in the American Convention and, if this were not admissible, it would be an undue restriction of their condition as subjects of international human rights law. It is understood that the foregoing, with regard to other rights, refers to facts that are already contained in the application.

The Court is empowered to examine the violation of American Convention articles that are not included in the application, the brief of the representatives of the alleged victims, and the State's answer to the application, based on the *iura novit curia* principle, which is solidly supported in international jurisprudence. In this sense, the judge has the power and even the obligation to apply the pertinent legal provisions in a case, even when the parties do not invoke them expressly.

The general obligation of each State Party to adapt its domestic law to the provisions of the American Convention, in order to guarantee the rights it embodies, implies that the measures of domestic law must be effective (the principle of *effet utile)*. This means that the State must adopt all measures so that the provisions of the American Convention are effectively fulfilled in its domestic legal system, as Article 2 ACHR requires. Such measures are only effective when the State adjusts its actions to the Convention's rules on protection.

The general duty of Article 2 ACHR implies the adoption of measures in two ways. On the one hand, derogation of rules and practices of any kind that imply the violation of guarantees in the American Convention. On the other hand, the issuance of rules and the development of practices leading to an effective enforcement of the said guarantees.

Summary:

In April 1992, a Peruvian state institution suspended payment of Reymert Bartra Vásquez's pension and, in September of the same year, reduced by approximately 78% the pensions of Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández and Maximiliano Gamarra Ferreyra, without any prior notice or explanation. All of the named individuals, state employees who had retired after working for at least 20 years, took legal measures to challenge the state's action and to demand restitution. As a result of these claims, various judgments were issued in national courts ordering the Superintendency of Banks and Insurance to pay the amounts owed to the above-mentioned individuals according to law.

On 4 December 2001, the Inter-American Commission on Human Rights brought the case before the Inter-American Court of Human Rights. In its Judgment of 28 February 2003, the Court ruled that, by arbitrarily modifying the victims' pensions and by not executing the judgments of the Constitutional and Social Law Chamber of the Peruvian Supreme Court of Justice until almost eight years after they had been delivered, the State violated both the right to property (Article 21 ACHR) and the right to judicial protection (Article 25 ACHR) of the American Convention with

respect to the abovenamed individuals. Furthermore, the Court declared that the State failed to comply with the general obligations of Article 1.1 ACHR (Obligation to Respect Rights) and Article 2 ACHR (Domestic Legal Effects), in relation to the violation of the substantive rights indicated above.

Languages:

Spanish, English.

Identification: IAC-2004-1-002

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 18.09.2003 / **e)** / **f)** Bulacio v. Argentina / **g)** Secretariat of the Court / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.22 **General Principles** – Prohibition of arbitrariness.
5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
5.3.13.3.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – *Habeas corpus*.
5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.
5.3.13.24 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to be informed about the reasons of detention.
5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel.
5.3.43 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Detainee, rights / Detention, conditions / *Razzia*, validity / Detention, record.

Headnotes:

It is part of human nature that a person subject to arbitrary detention experiences deep suffering, accentuated in the case of children.

The right to effective judicial protection requires that the judges direct the process in such a way that undue delays and hindrances do not lead to impunity, thus frustrating adequate and due protection of human rights.

With respect to the power of the State to detain persons under its jurisdiction, material and formal requirements must be observed in applying a measure or punishment that involves imprisonment, that is: no one may be imprisoned for causes, cases or circumstances other than those defined by law (material aspect), but, also, strictly subject to procedures objectively defined in the law (formal aspect).

The State, being responsible for detention centers, is the guarantor of the rights of the detainees, which involves, among other things, the obligation to explain what happens to persons who are under its custody. The way a detainee is treated must be subject to the closest scrutiny, taking into account the detainee's vulnerability; this function of the State is especially important when the detainee is a minor. This circumstance gives the State the obligation to exercise its function as guarantor, taking all care required by the weakness, the lack of knowledge, and the defenselessness that minors naturally have under those circumstances.

The detainee and those with legal custody or representation of the detainee have the right to be informed of the causes and reasons for his or her detention at the time it occurs, which constitutes a mechanism to avoid illegal or arbitrary detentions from the very moment of imprisonment and, at the same time, ensures the individual's right to defense; it also contributes, in the case of a minor, to lessen the impact of detention insofar as possible.

One measure that seeks to prevent arbitrary treatment or illegality is immediate judicial control, taking into account that under the rule of law the judge must guarantee the rights of the detainee, authorise taking precautionary or coercive measures when strictly necessary, and generally seek a treatment that is consistent with the presumption of innocence in favor of the accused until his or her responsibility has been proven.

The detainee has the right to notify a third party that he or she is under State custody. Notification regarding the right to establish contact with a relative, an attorney and/or consular information, must be made at the time the accused is imprisoned, but in the case of minors it is necessary to take such measures as may be required for notification to effectively take place.

The right of detainees to communicate with third parties, who provide or will provide assistance and defense, goes together with the obligation of the State agents to immediately communicate to said persons the minor's detention, even if the minor has not requested it.

To safeguard the rights of children detainees, and especially their right to humane treatment, it is indispensable for them to be separated from adult detainees. In addition, those in charge of detention centers for children must be duly trained for the performance of their tasks.

The detainees must be examined and given medical care. Results of any medical examination ordered by the authorities – and which must not be conducted in the presence of the police authorities – must be delivered to the judge, the detainee and his attorney, or to him and whoever exercises custody or representation of the minor according to the law.

Deficient medical attention of a detainee violates Article 5 ACHR.

Police detention centers must have a record of detainees to enable control of legality of detentions. This requires entry, among other data, of: identification of the detainees, cause for detention, notification to the competent authority, and to those representing them, exercising custody or acting as defense counsel, if applicable, and the visits they have paid to the detainee, the date and time of entry and release, information given to the minor and to other persons regarding the rights and guarantees of the detainee, record of signs of beating or mental illness, transfers of the detainee, and meal schedule. The detainee must also sign the register and, if he or she does not, there must be an explanation of the reason. The defense counsel must have access to this file and, in general, to actions pertaining to the charges and the detention.

Razzias (massive, indiscriminate detentions) are incompatible with fundamental rights, including presumption of innocence, necessity of a court order for detention − except in situations of flagrancy − and the obligation to notify those in charge of minors.

Summary:

This case concerns the illegal arrest on 19 April 1991 of seventeen year-old Walter David Bulacio, who sustained head injuries during his detention which subsequently caused his death on 26 April 1991. Bulacio was detained without a court order, and was not informed of his rights as a detainee; further, neither his parents nor the appropriate juvenile judge were notified of his arrest. Moreover, the State denied Bulacio's next of kin an effective judicial remedy by failing to:

1. clarify the causes of his detention and death,
2. punish those responsible, and
3. compensate for the damage caused.

On 24 January 2001, the Inter-American Commission on Human Rights brought the case before the Inter-American Court of Human Rights. In its Judgment of 18 September 2003, the Court declared, pursuant to the terms of the State's acknowledgment of international responsibility, that the latter violated the Article 4 ACHR (Right to Life), Article 5 ACHR (Right to Humane Treatment), Article 7 ACHR (Right to Personal Liberty) and Article 19 ACHR (Rights of the Child) to the detriment of Bulacio and the Article 8 ACHR (Right to a Fair Trial) and Article 25 ACHR (Right to Judicial Protection) to the detriment of both Bulacio and his next of kin, all the above in connection with Article 1.1 ACHR (Obligation to Respect Rights) and Article 2 ACHR (Domestic Legal Effects).

Furthermore, responding to the requests by the parties, the Court discussed in detail legal principles regarding the detention of children and, specifically, the imprisonment of children.

Languages:

Spanish, English.

Identification: IAC-2004-1-003

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 17.09.2003 / **e)** Advisory Opinion OC-18/03 / **f)** Legal Status and Rights of Undocumented Migrants / **g)** Secretariat of the Court / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.2.2 **Sources of Constitutional Law** – Categories – Unwritten rules – General principles of law.
2.2.1.3 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and other domestic legal instruments.
5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.1.2.2 **Fundamental Rights** – General questions – Effects – Horizontal effects.
5.2.1.2 **Fundamental Rights** – Equality – Scope of application – Employment.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.
5.2.3 **Fundamental Rights** – Equality – Affirmative action.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.4 **Fundamental Rights** – Economic, social and cultural rights.

Keywords of the alphabetical index:

Immigrant, labour rights / Immigrant, worker, status, irregular / Immigration, policy, national / Migrant worker, rights / Human right, *ius cogens* / Responsibility, international / *Ius cogens, erga omnes* effect.

Headnotes:

1. States have the general obligation to respect and ensure the fundamental rights. To this end, they must take affirmative action, avoid taking measures that limit or infringe a fundamental right, and eliminate measures and practices that restrict or violate a fundamental right.

2. Non-compliance by the State with the general obligation to respect and ensure human rights, owing to any discriminatory treatment, gives rise to international responsibility.

3. The principle of equality and non-discrimination is fundamental for the safeguard of human rights in both international law and domestic law.

4. The fundamental principle of equality and non-discrimination forms part of general international law, because it is applicable to all States, regardless of whether or not they are a party to a specific international treaty. At the current stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the domain of *ius cogens.*

5. The fundamental principle of equality and non-discrimination, which is of a peremptory nature, entails obligations *erga omnes* of protection that bind all States and generate effects with regard to third parties, including individuals.

6. The general obligation to respect and guarantee human rights binds States, regardless of any circumstance or consideration, including the migratory status of a person.

7. The right to due process of law must be recognised as one of the minimum guarantees that should be offered to any migrant, irrespective of his migratory status. The broad scope of the preservation of due process encompasses all matters and all persons, without any discrimination.

8. The migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature. When assuming an employment relationship, the migrant acquires rights that must be recognised and ensured because he is an employee, irrespective of his regular or irregular status in the State where he is employed. These rights are a result of the employment relationship.

9. The State has the obligation to respect and guarantee the labour human rights of all workers, irrespective of their status as nationals or foreigners, and not to tolerate situations of discrimination that are harmful to the latter in the employment relationships established between private individuals (employer-worker). The State must not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.

10. Workers, being possessors of labour rights, must have all the appropriate means to exercise them. Undocumented migrant workers possess the same labour rights as other workers in the State where they are employed, and the latter must take the necessary measures to ensure that this is recognised and complied with in practice.

11. States may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy

goals, whatever these may be, including those of a migratory character.

Summary:

Pursuant to Article 64.1 ACHR (American Convention on Human Rights – hereinafter "American Convention"), the State of the United Mexican States (hereinafter "Mexico") requested on 10 May 2002 that the Court exercise its advisory jurisdiction and emit an opinion on the following matters:

In the context of the principle of equality before the law embodied in Article II of the American Declaration on the Rights and Duties of Man (hereinafter "American Declaration"), Article 24 of the American Convention, Article 7 of the Universal Declaration on Human Rights and Article 26 of the International Covenant on Civil and Political Rights (hereinafter "ICCPR"):

1. Can an American State establish in its labour legislation a distinct treatment from that accorded legal residents or citizens that prejudices undocumented migrant workers in the enjoyment of their labour rights, so that the migratory status of the workers impedes *per se* the enjoyment of such rights?

2.1. Should Article 2.1 of the Universal Declaration of Human Rights, Article II of the American Declaration on the Rights on Duties of Man, Articles 2 and 26 ICCPR, and Article 1 ACHR and Article 24 ACHR be interpreted in the sense that an individual's legal residence in the territory of an American State is a necessary condition for that State to respect and ensure the rights and freedoms recognised in these provisions to those persons subject to its jurisdiction?

2.2. In the light of the provisions cited in the preceding question, can it be considered that the denial of one or more labour right, based on the undocumented status of a migrant worker, is compatible with the obligations of an American State to ensure non-discrimination and the equal, effective protection of the law imposed by the above-mentioned provisions?

Based on Article 2.1, 2.2 and Article 5.2 ICCPR,

3. What would be the validity of an interpretation by any American State which, in any way, subordinates or conditions the observance of fundamental human rights, including the right to equality before the law and to the equal and effective protection of the law without discrimination, to achieving migration policy goals contained in its laws, notwithstanding the ranking that domestic law attributes to such laws in relation to the international obligations arising from the International Covenant and other obligations of international human rights law that have an *erga omnes* character?

In view of the progressive development of international human rights law and its codification, particularly through the provisions invoked in the instruments mentioned in this request,

4. What is the nature today of the principle of non-discrimination and the right to equal and effective protection of the law in the hierarchy of norms established by general international law and, in this context, can they be considered to be the expression of norms of *ius cogens?* If the answer to the second question is affirmative, what are the legal effects for the OAS Member States, individually and collectively, in the context of the general obligation to respect and ensure, pursuant to Article 2.1 ICCPR, compliance with the human rights referred to in Articles 3.l and 17 of the OAS Charter?

Languages:

Spanish, English.

Identification: IAC-2004-1-004

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 25.11.2003 / **e)** / **f)** Myrna Mack Chang v. Guatemala / **g)** Secretariat of the Court / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.4.1 **Constitutional Justice** – Procedure – General characteristics.
1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.

5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.
5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

International responsibility, acknowledgment by a state / Secret, state / Information, access / Justice, obstruction / Reparation, determination by the Court.

Headnotes:

The Court, exercising its inherent authority of international protection of human rights, can establish whether an acknowledgment of international responsibility by a respondent State offers sufficient basis, in terms of the American Convention, to proceed or not with its hearing on the merits and establishment of possible reparations.

When a State acquiesces to the application, it must clearly state whether it does so only regarding the merits of the matter, or whether it also includes reparations and legal costs. When there is an acquiescence the State must clearly state whether the claims made by the alleged victims or their next of kin are also accepted.

The Rules of Procedure of the Court do not establish any specific moment for the respondent party to state its acquiescence. Therefore, if a State resorts to this procedural act at any stage of the proceeding, this Court, after hearing all the parties, must evaluate and decide its scope in each specific case.

The existence of a pattern of selective extra-legal executions fostered by the State, directed against individuals who are considered "internal enemies", coupled with the absence of effective judicial mechanisms to investigate human rights violations and to punish those responsible, gives rise to an aggravated international responsibility of the State.

In cases of human rights violations, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding.

The State, to ensure due process, must provide all necessary means to protect the legal operators, investigators, witnesses and next of kin of the victims from harassment and threats aimed at obstructing the proceeding and avoiding elucidation of the facts, as well as covering up those responsible for said facts.

The right to effective judicial protection requires that the judges direct the proceeding in such a way as to avoid undue delays and obstructions that lead to impunity, thus frustrating due judicial protection of human rights.

Summary:

On 11 September 1990, Myrna Elizabeth Mack Chang, a noted cultural anthropologist, was extra-legally executed in a Guatemalan military intelligence operation designed and carried out by the high command of the Presidential General Staff. In addition to Mack Chang's actual execution, the case deals with extensive judicial delays and a wide range of irregularities, owing to the active role of various government officials – including military officers, police and judges – to obstruct justice. Finally, the Court takes into account the suffering faced by Mack Chang's next of kin as a consequence of the severe threats, harassment, and intimidation that they endured, acts which were directed to dissuade them from continuing their efforts to prosecute all those responsible for the aforementioned execution.

On 19 June 2001, the Inter-American Commission on Human Rights brought the case before the Inter-American Court of Human Rights. In its Judgment of 25 November 2003, the Court, taking note of the State of Guatemala's acknowledgment of responsibility, ruled that the State's international responsibility for violations of the American Convention on Human Rights (hereinafter "American Convention") was established. However, since the State's acceptance of responsibility did not encompass reparation measures, the Court proceeded to render judgment in this regard. Furthermore, the Court decided to issue a judgment on the merits of the case because it considered that doing so constituted an additional form of reparation for the victims. As a result, the State of Guatemala was found to have violated to the detriment of Mack Chang Article 4.1 ACHR (Right to Life), as well as Article 5.1 ACHR, Article 8 ACHR and Article 25 ACHR (Right to Humane Treatment, Right to a Fair Trial, Right to Judicial Protection, respectively) to the detriment of Mack Chang's next of kin, all in combination with Article 1.1 ACHR (Obligation to Respect Rights).

With regard to reparations, the Court ordered, *inter alia*, that the State:

1. effectively investigate the facts of the instant case, with the aim of identifying, trying, and punishing all those responsible both for the extra-legal execution of Mack Chang and for the cover-up of the facts of the instant case; and that the results of the investigations must be made known to the public;
2. remove all *de facto* and legal obstacles and mechanisms that maintain impunity in the instant case; provide sufficient security measures to the judicial authorities, prosecutors, witnesses, legal operators and to the next of kin of Mack Chang; and resort to all other means available to it so as to expedite the proceeding;
3. publish within three months of notification of the instant Judgment, at least once, in the official gazette and in another national-circulation daily, certain specified parts of the Judgment;
4. carry out a public act of acknowledgment of its responsibility in connection with the facts of this case and of amends to the memory of Mack Chang and to her next of kin, in the presence of the highest authorities of the State;
5. publicly honor the memory of José Mérida Escobar, the police investigator killed investigating the facts of the instant case;
6. include in the training courses for members of the armed forces and the police, as well as the security agencies, education regarding human rights and International Humanitarian Law;
7. establish a scholarship in the name of Mack Chang;
8. name a well-known street or square in Guatemala City after Mack Chang and place a plaque in her memory where she died, or nearby, with reference to the activities she carried out;
9. pay pecuniary and non-pecuniary damages; and
10. pay legal costs and expenses.

Languages:

Spanish, English.

Court of Justice of the European Communities and Court of First Instance

Important decisions

Identification: ECJ-2004-1-001

a) European Union / **b)** Court of First Instance / **c)** Third Chamber, Extended Composition / **d)** 20.04.1999 / **e)** T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 et T-335/94 / **f)** Limburgse Vinyl Maatschappij E.A. v. Commission / **g)** / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other Institutions – Courts.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.5.2 **Constitutional Justice** – Jurisdiction – The subject of review – Community law.
1.3.5.2.2 **Constitutional Justice** – Jurisdiction – The subject of review – Community law – Secondary legislation.
1.4.5.3 **Constitutional Justice** – Procedure – Originating document – Formal requirements.
1.5 **Constitutional Justice** – Decisions.
1.6.4 **Constitutional Justice** – Effects – Effect *inter partes*.
1.6.9.2 **Constitutional Justice** – Effects – Consequences for other cases – Decided cases.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.10 **General Principles** – Certainty of the law.
3.13 **General Principles** – Legality.
4.17.1.3 **Institutions** – European Union – Institutional structure – Commission.
5.3.13.1.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Non-litigious administrative proceedings.

5.3.13.7 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right of access to the file.
5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial within reasonable time.
5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Reasoning.
5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Equality of arms.
5.3.13.19 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Adversarial principle.
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.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

Keywords of the alphabetical index:

Res iudicata / Competition, proceedings, formal error, remedy / Decision, multiple addressees, annullment, effects / Decision, adoption, authentication, lack / Fine, calculation.

Headnotes:

1. Under Article 44.1.c of the Rules of Procedure of the Court of First Instance, all applications must indicate the subject-matter of the proceedings and include a brief statement of the grounds relied on. The information given must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to give a ruling, if appropriate, without recourse to other information (see paras 39-40, 46).

2. Under Article 113 of its Rules of Procedure, the Court of First Instance may of its own motion consider whether there is any absolute bar to proceeding with an action. Accordingly, pleas in law which are set out for the first time at the reply stage and which are not based on matters of law or of fact coming to light in the course of the procedure, must be declared inadmissible under Article 48.2 of those Rules of Procedure (see paras 60, 64).

3. The principle of *res iudicata* extends only to the matters of fact and law actually or necessarily settled by a judicial decision.

The second sentence of the first paragraph of Article 54 of the Statute of the Court of Justice does not mean that, where the Court, in the exercise of its appellate jurisdiction, itself gives final judgment in a dispute by accepting one or more pleas raised by the appellants, it automatically settles all points of fact and law raised by the latter in the context of the case (see paras 77, 84).

4. Where the Court of Justice has annulled a Commission decision – finding that the competition rules have been infringed and imposing fines – because it has not been duly authenticated, without disposing of the substantive pleas in law raised by the applicant undertakings, and the Commission then adopts a fresh decision finding against those undertakings, thus merely remedying the formal defect found by the Court, the Commission cannot be said to be taking action against the applicants twice in relation to the same set of facts or to be penalising them twice in respect of the same infringement, contrary to the principle of *non bis in idem* (see paras 96-98).

5. Fundamental rights form an integral part of the general principles of Community law whose observance the Community judicature ensures. For that purpose, the Court of Justice and the Court of First Instance rely on the constitutional traditions common to the Member States and the guidelines supplied by international treaties and conventions on the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights, to which express reference is made in Article F.2 EC, has special significance in that respect (see para 120).

6. Infringement of the general principle of Community law that decisions following administrative proceedings relating to competition policy must be adopted within a reasonable time justifies annulment of a Commission decision only in so far as it also constituted an infringement of the rights of defence of the undertakings concerned. Where it has not been established that the undue delay has adversely affected the ability of the undertakings concerned to defend themselves effectively, failure to comply with the principle that the Commission must act within a reasonable time cannot affect the validity of the administrative procedure and can therefore be regarded only as a cause of damage capable of being relied on before the Community judicature in the context of an action based on Article 178 EC and Article 215.2 EC.

Whether the time taken for a procedural stage is reasonable must be assessed in relation to the individual circumstances of each case, and in particular its context, the conduct of the parties during the procedure, what is at stake for the various undertakings concerned and its complexity (see paras 121-122, 126).

7. A Commission decision finding that several undertakings have infringed Article 85 EC and imposing a fine on each of them must be treated as a series of individual decisions even though it is drafted and published in the form of a single decision.

Accordingly, if an addressee decides to bring an action for annulment, the Community judicature has before it only the elements of the decision which relate to that addressee. The unchallenged elements of the decision relating to other addressees, on the other hand, do not form part of the subject-matter of the dispute which the Court is called on to resolve. Consequently, the decision can be annulled only as regards the addressees who have been successful in such actions.

Where, on grounds of procedural irregularity, the Court has annulled a decision concerning competition matters, and the Commission subsequently addresses a fresh decision solely to the addressees of the annulled decision who were successful in their actions, the Commission does not thereby infringe the principle of non-discrimination (see paras 167, 169-170, 173-174).

8. Given that, where a Commission decision finding that the competition rules have been infringed is annulled by the Court of Justice on account of a procedural defect relating to lack of due authentication, the annulment does not affect the validity of the measures preparatory to that decision, taken before the stage at which the defect occurred (see paras 188-189), a new hearing of the undertakings concerned is required, prior to the adoption by the Commission of a new decision, only to the extent that the latter contains objections which are new in relation to those set out in the decision annulled. In that regard, the fact that the new decision is adopted in factual and legal circumstances different from those which existed at the time when the original decision was adopted does not in any sense mean that the new decision contains new objections (see paras 250-252).

9. Article 184 EC expresses a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision under challenge, if that party was not entitled under Article 173 EC to bring a direct action challenging those acts, by which it was thus affected without having been in a position to seek to have them declared void.

Article 184 EC must therefore be given a wide interpretation in order to ensure effective review of the legality of the acts of the institutions. Its scope must extend to acts of the institutions which, although not in the form of a regulation, produce similar effects. In particular, it must extend to internal rules of an institution which, although they do not constitute the legal basis of the contested decision, determine the essential procedural requirements for adopting that decision and thus ensure legal certainty for those to whom it is addressed.

Consequently, in the context of an action for annulment of a Commission decision on a competition matter, those of the Commission's Rules of Procedure which are designed to ensure the protection of individuals may be the subject-matter of a plea of illegality. However, there must be a direct legal connection between the contested individual decision and the rules of procedure alleged to be unlawful (see paras 284-291).

10. There is no general principle of Community law requiring continuity in the composition of an administrative body handling a procedure which may lead to a fine (see paras 322-323).

11. The annexes to the statement of objections not emanating from the Commission should be regarded not as `documents' within the meaning of Article 3 of Council Regulation no. 1 but as supporting evidence on which the Commission relies. They are therefore to be brought to the attention of the addressee as they are. The Commission thus commits no infringement of Article 3 of Council Regulation no. 1 by communicating those annexes in their original language versions (see para 337).

12. The rights of the defence do not require that undertakings involved in a proceeding under Article 85.1 EC be able to comment on the report of the hearing officer. Observance of the rights of the defence is sufficiently assured where the various authorities which contribute to the final decision are correctly informed of the arguments of the undertakings in reply to the objections communicated to them by the Commission and the evidence submitted by the Commission in support thereof. The report of the hearing officer is a purely internal Commission document, which contains only advice, and whose purpose is not to supplement or correct the argu-

ments of the undertakings, or to formulate new objections or to supply new evidence against them (see paras 375-377).

13. Decisions to investigate under Article 14.3 of Regulation no. 17 are in themselves measures which may be the subject-matter of an action for annulment on the basis of Article 173 EC.

Accordingly, in an action for annulment of a final decision adopted by the Commission pursuant to Article 85.1 EC, an undertaking cannot plead the illegality of an investigation decision addressed to it, and which it has not challenged within the time-limits. It may, on the other hand, in the context of such an action and in so far as documents obtained by the Commission are used against it, challenge the legality of investigation decisions addressed to other undertakings, whose actions to challenge the legality of those decisions directly, if brought, may or may not have been admissible. Likewise, in an action contesting the Commission's final decision, the undertaking may challenge the manner in which the investigation procedures were conducted (see paras 408, 410-411, 413-414).

14. It is apparent from Article 14.2 of Regulation no. 17 that investigations carried out on a simple authorisation are based on the voluntary cooperation of the undertakings. Where an undertaking has in fact cooperated in an investigation carried out on authorisation, a plea alleging undue interference by the public authority is unfounded, in the absence of any evidence that the Commission went beyond the cooperation offered by the undertaking (see paras 421-422).

15. Observance of the rights of the defence is a fundamental principle which must be respected, not only in administrative proceedings which may lead to the imposition of penalties, but also in preliminary inquiry procedures, such as requests for information pursuant to Article 11 of Regulation no. 17, which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings.

In order to ensure the effectiveness of Article 11.2 and 11.5 of Regulation no. 17, the Commission is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to the Commission, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct. Nevertheless, the Commission may not, by a decision to request information, undermine the undertaking's defence rights. Thus it may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (see paras 445-447, 449).

16. Having regard to Articles 14 and 20.1 of Regulation no. 17, information obtained during investigations must not be used for purposes other than those indicated in the authorisation or decision under which the investigation is carried out. That requirement is intended to protect both professional secrecy and the defence rights of undertakings.

On the other hand, it cannot be concluded that the Commission is barred from initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules in the Treaty. Moreover, the Commission, having obtained documents in one matter and used them as evidence to open another proceeding, is entitled, on the basis of authorisations or decisions concerning that second proceeding, to request fresh copies of those documents and to use them as evidence in the second matter.

The contrary approach would go beyond what is required to safeguard professional secrecy and the rights of the defence, and would thus constitute an unjustified hindrance to the Commission in the accomplishment of its task of ensuring compliance with the competition rules in the common market (see paras 472-477).

17. In competition cases, the purpose of providing access to the file is to enable the addressees of statements of objections to examine evidence in the Commission's file so that they are in a position effectively to express their views on the conclusions reached by the Commission in its statement of objections on the basis of that evidence.

Access to the file is one of the procedural safeguards intended to protect the rights of the defence, observance of which is a fundamental principle which requires that the undertaking concerned be afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts, charges and circumstances relied on by the Commission.

In the adversarial proceedings for which Regulation no. 17 provides, it cannot be for the Commission alone to decide which documents are of use for the defence. Having regard to the general principle of equality of arms, the Commission cannot be permitted to decide on its own whether or not to use

documents against the undertakings concerned, where the latter had no access to them and were therefore unable to take the relevant decision whether or not to use them in their defence.

However, access to the file cannot extend to internal documents of the institution, the business secrets of other undertakings and other confidential information (see paras 1011-1012, 1015).

18. In the context of an administrative proceeding in a competition case, breach of an undertaking's rights of defence as regards access to the Commission's administrative file does not warrant annulment of a decision finding that there has been an infringement unless the ability of that undertaking to defend itself has been affected by the conditions in which it had access to the Commission's administrative file. In that respect, it is sufficient for a finding of infringement of defence rights for it to be established that non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment.

Any infringement of the rights of the defence occurring during the administrative procedure cannot be remedied in the proceedings before the Court of First Instance, whose review is restricted to the pleas raised and cannot therefore be a substitute for a thorough investigation of the case in the form of an administrative proceeding (see paras 1019-1022).

19. The statement of reasons required by Article 190 EC must be appropriate to the measure at issue and disclose clearly and unequivocally the reasoning followed by the institution which adopted it in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review.

In the case of a decision imposing fines on several undertakings for an infringement of Community competition rules, the scope of the duty to state reasons must be assessed inter alia in the light of the fact that the gravity of the infringement depends on a large number of factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, and no binding or exhaustive list of the criteria to be applied has been drawn up. The Commission has a discretion when fixing the amount of each fine, and cannot be required to apply a precise mathematical formula for that purpose.

It is certainly desirable, in order to enable undertakings to define their position with full knowledge of the facts, for them to be able to determine in detail, in accordance with such system as the Commission might consider appropriate, the method whereby the fine imposed upon them has been calculated, without their being obliged, in order to do so, to bring court proceedings against the decision.

However, such calculations do not constitute an additional and subsequent ground for the decision, but merely translate into figures the criteria set out in the decision which are capable of being quantified (see paras 1172-1173, 1180-1181).

Summary:

By decision of 21 December 1988, adopted following an investigation lasting almost five years, the Commission of the European Communities ordered fourteen producers of PVC to pay heavy fines for participating in a prohibited cartel. The undertakings concerned – apart from one of them – sought annulment of the decision before the Court of First Instance. By judgment of 27 February 1992 in Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others v. Commission* [1992] ECR II-315, the Court of First Instance allowed the applicants' application and, owing to the major defects affecting the decision, held that it was non-existent. Upon appeal by the Commission, the Court of Justice set aside the judgment of the Court of First Instance on the ground that the irregularities found by that Court did not appear to be of such obvious gravity that the decision must be treated as legally non-existent. Taking the view that the state of the proceedings permitted it to give final judgment, the Court of Justice none the less decided to annul the Commission's decision for infringement of essential procedural requirements (Case C-137/92 P *Commission v. BASF and Others* [1994] ECR I-2555). Therefore, by a fresh decision of 27 July 1994, the Commission reiterated the objections against the majority of the undertakings concerned by the initial decision. Fresh actions for annulment followed and were determined in the present judgment of the Court of First Instance.

After considering the pleas of inadmissibility raised mainly by the Commission and setting out, in that regard, the requirements which must be satisfied both by the application initiating the proceedings and by the defendant's reply, the Court of First Instance referred to the rules governing the putting forward of new pleas in law in the course of proceedings. It then proceeded to answer the numerous pleas in law put forward by the parties alleging defects of form and procedure. It thus confirmed the Commission's power to adopt a fresh decision following the judgment annulling the original decision. In doing so, it defined the scope of the principle of *res iudicata* and of the principle *non bis in idem* and held that there had been

no infringement of the “reasonable time” principle in the administrative procedure preceding the adoption of the contested decision. It likewise rejected the arguments alleging breach of the principle of non-discrimination in that the Commission had addressed its new decision only to the undertakings which had validly brought an action against the previous decision and been successful. Although published in the form of a single decision, the 1988 decision in reality constituted a series of individual decisions and those decisions whose addressees were not concerned by the judgment of annulment remained fully valid. As they were not placed in a situation comparable with the latter undertakings, the producers who had been successful in their actions and were therefore referred to by the new decision could not plead breach of the principle of equality. Continuing with its examination of the scope of the judgment of 15 June 1994, the Court of First Instance also rejected the objections alleging the invalidity of the procedural acts preceding the adoption of the decision. The annulment of the 1988 decision could not affect the validity of the preparatory measures or of the oral stage of the administrative procedure prior to the stage at which the defect itself occurred. Only the existence of fresh complaints could justify a new hearing of the undertakings concerned.

Turning next to the alleged irregularities in the adoption and authentication of the decision, the Court of First Instance began by defining the scope of the plea of illegality provided for in Article 184 EC [now Article 241 of the EC Treaty]. It thus accepted that the internal rules of an institution might, on certain conditions, be the subject-matter of a plea of illegality. However, it refused in the present case to uphold the plea of illegality alleging failure to satisfy the requirement of legal certainty of the provision of the internal rules of the Commission laying down the procedure for the authentication of the contested decision. It likewise refused to annul the decision for infringement of, first, the principle that decisions must be made and deliberated by the same body and, second, the principle of immediacy. There is no general principle of Community law requiring continuity in the composition of an administrative body handling a procedure which may lead to a fine.

As regards, last, the alleged defects in the administrative procedure, the Court of First Instance rejected all of the claims put forward by the applicants. Thus, the annexes to the statement of objections not emanating from the Commission did not have to be communicated to the undertakings in the language of their own Member States pursuant to Article 3 of Regulation no. 1, nor did the rights of the defence require that the report of the hearing officer be brought to their attention.

Turning to the substantive pleas, the Court of First Instance began by answering a series of pleas relating to the evidence but did not accept the applicants' claims. Thus, although they were entitled to challenge the lawfulness of the decisions to investigate which were addressed to other undertakings but which adversely affected the applicants or to criticise, in the context of the action against the final decision of the Commission, the investigations carried out by the Commission, the applicants had not provided evidence of the arbitrary or disproportionate nature of the investigations carried out on the basis of authorisations. Likewise, although the Commission unlawfully compelled the applicants to provide it with answers which might involve an admission on their part of the existence of an infringement which it was incumbent on the Commission to prove, that illegality did not affect the legality of the decision, since the applicants had been unable to prove that they had actually answered the questions put to them. The Court defined, last, the rules governing the use by the Commission of the information received in an investigation and held that in the present case it had been entitled to require the applicants to produce documents already produced during a previous investigation procedure.

Continuing with its examination of the substance and concerning, this time, the claim that the prohibited cartel did not exist, the Court of First Instance upheld the Commission's appraisal of the facts and their legal characterisation. It adopted a less rigid approach when determining the applicant's participation in the infringement. Although the Court of First Instance confirmed the involvement of all the applicants in the impugned facts, it none the less found that the Commission had not correctly assessed the duration of the participation in the infringement of one of the applicants. It thus annulled the decision in part and reduced the fine payable by the undertaking concerned.

As regards the pleas relating to access to the file, the Court of First Instance proved equally flexible. After thus recalling that access to the file in competition cases is an aspect of respect for the rights of the defence, which is a fundamental principle of Community law which prohibits the Commission from deciding on its own what documents are of use to the defence, the Court of First Instance observed that irregularities in access to the file can lead to annulment of a decision finding an infringement only if the ability of the undertakings concerned to defend themselves were actually affected by the restrictions established. The Court of First Instance held that in this case the applicants had not demonstrated any breach of the rights of the defence.

As regards, last, the pleas relating to the annulment or reduction of the fines, although the Court of First Instance considered it desirable that the undertakings concerned be informed of the method used in calculating the fines imposed, it did not uphold any of the objections alleging failure to provide sufficient reasons for the decision. However, it upheld the submissions presented by two of the applicants and reduced their fines on the ground that the Commission had not correctly assessed their market share.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.

European Court of Human Rights

Important decisions

Identification: ECH-2004-1-001

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 17.02.2004 / **e)** 44158/98 / **f)** Gorzelik and Others v. Poland / **g)** *Reports of Judgments and Decisions* of the Court / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.19 **General Principles** – Margin of appreciation.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of assembly.
5.3.44 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Association, name, registration, refusal / Minority, existence / Minority, electoral privileges.

Headnotes:

The State enjoys a margin of appreciation in determining whether there is a pressing social need in regulating the free choice of an association to call itself an “organisation of a national minority”. Furthermore, the refusal to register such an association may be regarded as necessary in a democratic society where such registration would enable the association to claim special electoral status, provided such refusal does not prevent the individuals concerned from forming an association to express and promote the distinctive features of a minority.

Summary:

The applicants, together with other people, formed an association whose main aims were to awaken and strengthen the national consciousness of Silesians and to restore Silesian culture. They applied to the Regional Court for the association to be registered.

The regional governor argued that there was no distinct Silesian nationality, that the Silesians were a local ethnic group and could not be regarded as a national minority and that recognising them as such would afford them rights and privileges to the detriment of other ethnic groups. In order to avoid this, he asked for the association's name to be changed so that it was no longer described as an "organisation of the Silesian national minority". The Regional Court allowed the application for registration but, on an appeal by the governor, the Court of Appeal set aside that decision and dismissed the application. It held that the Silesians were not a national minority and that the association could not legitimately describe itself as an "organisation of a national minority", a description that would grant it unwarranted rights – in particular, electoral privileges – which would place it at an advantage in relation to other ethnic organisations. The Supreme Court dismissed an appeal on points of law by the applicants.

In their application lodged with the Court, the applicants complained that the refusal to register the association constituted a violation of their right to freedom of association. They relied on Article 11 ECHR.

The Court found that the interference with the applicants' right to freedom of association had had a basis in domestic law and had been intended to prevent disorder and to protect the rights of others.

As to whether it had been necessary in a democratic society, under Polish law the registration of the applicants' association as an "organisation of a national minority" had been capable by itself of granting it electoral privileges, subject only to voluntary action being taken to that end by the association and its members. The appropriate time for countering that risk, and thereby ensuring that the rights of other persons or entities participating in parliamentary elections would not be infringed, had been at the moment of the association's registration. The national authorities had therefore not overstepped their margin of appreciation in considering that there had been a pressing social need, at the moment of registration, to regulate the free choice of an association to call itself an "organisation of a national minority", in order to protect the existing democratic institutions and election procedures in Poland.

As to whether the measure had been proportionate, the refusal to register the association as an "organisation of a national minority" had not been a comprehensive, unconditional one directed against the cultural and practical objectives that the association wished to pursue. The authorities had not prevented the applicants from forming an association to express and promote distinctive features of a minority but from creating a legal entity which, through registration under the legislation on associations and the description it had given itself in its memorandum of association, would inevitably have been able to claim a special electoral status. Given that the national authorities had been entitled to consider that the interference in question had met a "pressing social need", and given that the interference had not been disproportionate to the legitimate aims pursued, the refusal to register the association had been "necessary in a democratic society". There had therefore been no violation of Article 11 ECHR.

Cross-references:

- *Young, James and Webster v. the United Kingdom*, Judgment of 13.08.1981, Series A, no. 44; *Special Bulletin ECHR* [ECH-1981-S-002];
- *United Communist Party of Turkey and Others v. Turkey*, Judgment of 30.01.1998, *Reports of Judgments and Decisions* 1998-I;
- *Socialist Party and Others v. Turkey,* Judgment of 25.05.1998, *Reports* 1998-III;
- *Sidiropoulos and Others v. Greece,* Judgment of 10.07.1998, *Reports* 1998-IV; *Bulletin* 1998/2 [ECH-1998-2-010];
- *Waite and Kennedy v. Germany* [GC], no. 26083/94, *Reports of Judgments and Decisions* 1999-I;
- *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, *Reports of Judgments and Decisions* 1999-III; *Bulletin* 1999/1 [ECH-1999-1-006];
- *Rekvényi v. Hungary* [GC], no. 25390/94, *Reports of Judgments and Decisions* 1999-III;
- *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, *Reports of Judgments and Decisions* 2003-II*; Bulletin* 2003/1 [ECH-2003-1-003].

Languages:

English, French.

Identification: ECH-2004-1-002

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 08.04.2004 / **e)** 71503/01 / **f)** Assanidze v. Georgia / **g)** *Reports of Judgments and Decisions* of the Court / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.8.8.3 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Supervision.
5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Detention, unlawful / Detention, after acquittal / Judgment, execution, right / Region, autonomous, authority.

Headnotes:

The failure of the authorities of an autonomous region to release a detainee following the quashing of his conviction by the national Supreme Court constitutes unlawful detention for which the responsibility of the State is engaged.

The failure to release a detainee following the quashing of his conviction by the Supreme Court deprives the right to a fair trial in criminal proceedings of all useful effect.

Summary:

The applicant was formerly the mayor of the capital of the Ajarian Autonomous Republic in Georgia and a member of the Ajarian Supreme Council. He was sentenced by the Ajarian High Court to twelve years' imprisonment on a charge of kidnapping in October 2000. He appealed on points of law. In January 2001 the Supreme Court of Georgia quashed the conviction and acquitted the applicant in a decision that was final and unappealable. It also made an order for the applicant, who was in the custody of the local Ajarian authorities, to be released immediately. The central Georgian authorities made various attempts through both legal and political channels to get the local Ajarian authorities to release the applicant. Nevertheless, he was still being held in the Ajarian Security Ministry prison when the Court adopted its judgment.

In his application lodged with the Court, the applicant complained that his continuing detention was unlawful. He relied on Articles 5 ECHR and 6 ECHR.

The Court concluded firstly that the applicant's complaints against the Autonomous Republic of Ajaria, a Georgian entity with autonomous status, came within Georgia's jurisdiction within the meaning of Article 1 ECHR. The central authorities had made repeated attempts through the available legal and political channels to obtain the applicant's release. Under the domestic system, the matters complained of were directly imputable to the local authorities of the Autonomous Republic of Ajaria, but only the Georgian State's responsibility was engaged under the Convention.

With regard to Article 5 ECHR, although the applicant had been acquitted and his immediate release ordered by the Supreme Court of Georgia and although his case had not been reopened and no further order had been made for his detention, he was still in custody. His detention was not founded on any statutory provision or judicial decision. There had therefore been a violation of Article 5 ECHR.

With regard to the right to a court in criminal proceedings under Article 6 ECHR, the failure to comply with a final and enforceable decision to acquit for more than three years had deprived that provision of all useful effect. There had therefore also been a violation of Article 6 ECHR.

Cross-references:

- *De Wilde, Ooms and Versyp v. Belgium*, Judgment of 18.06.1971, Series A, no. 12; *Special Bulletin ECHR* [ECH-1971-S-001];
- *Engel and Others v. the Netherlands*, Judgment of 08.06.1976, Series A, no. 22; *Special Bulletin ECHR* [ECH-1976-S-001];
- *Agee v. the United Kingdom*, Commission decision of 17.12.1976, *Decisions and Reports* 7, p. 165;
- *Ireland v. the United Kingdom*, Judgment of 18.01.1978, Series A, no. 25; *Special Bulletin ECHR* [ECH-1978-S-001];
- *Bertrand Russell Peace Foundation Ltd v. the United Kingdom*, Commission decision of 02.05.1978, *Decisions and Reports* 14, p. 117;
- *Winterwerp v. the Netherlands,* Judgment of 24.10.1979, Series A, no. 33; *Special Bulletin ECHR* [ECH-1979-S-004];

- *Foti and Others v. Italy*, Judgment of 10.12.1982, Series A, no. 56;
- *Zimmermann and Steiner v. Switzerland*, Judgment of 13.07.1983, Series A, no. 66;
- *Lingens v. Austria,* Judgment of 08.07.1986, Series A, no. 103; *Special Bulletin ECHR* [ECH-1986-S-003];
- *Weeks v. the United Kingdom,* Judgment of 02.03.1987, Series A, no. 114;
- *Barberà, Messegué and Jabardo v. Spain,* Judgment of 06.12.1988, Series A, no. 146; *Special Bulletin ECHR* [ECH-1988-S-008];
- *Loizidou v. Turkey* (preliminary objections), Judgment of 23.03.1995, Series A, no. 310;
- *Quinn v. France,* Judgment of 22.03.1995, Series A, no. 311;
- *Benham v. the United Kingdom,* Judgment of 10.06.1996, *Reports of Judgments and Decisions* 1996-III; *Bulletin* 1996/2 [ECH-1996-2-009];
- *Amuur v. France,* Judgment of 25.06.1996, *Reports* 1996-III; *Bulletin* 1996/2 [ECH-1996-2-011];
- *Chahal v. the United Kingdom,* Judgment of 15.11.1996, *Reports* 1996-V; *Bulletin* 1996/3 [ECH-1996-3-015];
- *Scott v. Spain,* Judgment of 18.12.1996, *Reports* 1996-VI;
- *Hornsby v. Greece,* Judgment of 19.03.1997, *Reports* 1997-II; *Bulletin* 1997/1 [ECH-1997-1-008];
- *Giulia Manzoni v. Italy,* Judgment of 01.07.1997, *Reports* 1997-IV;
- *United Communist Party of Turkey and Others v. Turkey*, Judgment of 30.01.1998, *Reports* 1998-I; *Bulletin* 1998/1 [ECH-1998-1-001];
- *Belziuk v. Poland,* Judgment of 25.03.1998, *Reports* 1998-II;
- *Matthews v. the United Kingdom* [GC], no. 24833/94, *Reports of Judgments and Decisions* 1999-I; *Bulletin* 1999/1 [ECH-1999-1-004];
- *Section de commune d'Antilly v. France* (dec.), no. 45129/98, *Reports of Judgments and Decisions* 1999-VIII;
- *Labita v. Italy* [GC], no. 26772/95, *Reports of Judgments and Decisions* 2000-IV; *Bulletin* 2000/1 [ECH-2000-1-002];
- *Ječius v. Lithuania*, no. 34578/97, *Reports of Judgments and Decisions* 2000-IX;
- *Ayuntamiento de Mula v. Spain,* (dec.), no. 55346/00, *Reports of Judgments and Decisions* 2001-I;
- *Cyprus v. Turkey* [GC], no. 25781/94, *Reports of Judgments and Decisions* 2001-IV;
- *Ilascu and Others v. Moldova and Russia* [GC], no. 48787/99, Decision of 04.07.2001;
- *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, *Reports of Judgments and Decisions* 2001-XII;
- *Burdov v. Russia*, no. 59498/00, *Reports of Judgments and Decisions* 2002-III;
- *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, Judgment of 14.05.2002;
- *Jasiuniene v. Lithuania*, no. 41510/98, Judgment of 06.03.2003.

Languages:

English, French.

Identification: ECH-2004-1-003

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 30.03.2004 / **e)** 74025/01 / **f)** Hirst v. the United Kingdom / **g)** *Reports of Judgments and Decisions* of the Court / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.19 **General Principles** – Margin of appreciation.
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.
5.3.40.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Prisoner, right to vote / Punishment, purpose / Offender, rehabilitation, duty.

Headnotes:

States enjoy a wide margin of appreciation with regard to the right to vote but any restrictions should pursue a legitimate aim, be proportionate and not impair the essence of the right.

Automatic disenfranchisement of convicted prisoners does not fall within the State's margin of appreciation.

Summary:

The applicant, who was sentenced to a term of discretionary life imprisonment for manslaughter, is barred by the Representation of the People Act of 1983 from voting in parliamentary or local elections. With a view to obtaining a declaration that this provision was incompatible with the Convention, the applicant issued proceedings in the High Court, together with an application for judicial review by two other prisoners who had applied for registration as electors. His application was heard by the Divisional Court, which acknowledged that whilst it was not easy to articulate the legitimate aim of disqualifying a convicted prisoner from his right to vote while serving a sentence, the view had been taken that for the period in custody prisoners have forfeited their right and lost the moral authority to vote. The applicant's claims were accordingly rejected, as were those of the other prisoners. His applications for leave to appeal were refused.

In the application lodged with the Court, the applicant claimed that the denial of his right to vote violated Article 3 Protocol 1 ECHR.

The Court recalled that whilst States had a wide margin of appreciation in the sphere of the right to vote, any restrictions in this area should pursue a legitimate aim, be proportionate and should not impair the essence of the right. The margin of appreciation could not justify restrictions which had not been the subject of considered debate in the legislature and which derived, essentially, from unquestioning and passive adherence to a historic tradition. The Court considered that there was no evidence in support of the claim that disenfranchisement deterred crime. Moreover, the removal of the vote could in fact be seen to run counter to the rehabilitation of the offender.

As regards the proportionality of the measure, the Court noted that the provision automatically stripped a large number of convicted prisoners of their right to vote. The restriction applied irrespective of the length of their sentence or the gravity of the offence. In practice, the actual effect of the ban would depend, somewhat arbitrarily, on whether there were elections during the period when the prisoner was serving the sentence. Moreover, if disqualification was seen as part of a prisoner's punishment, there was no logical justification for it in the present case given that the punishment element of the applicant's sentence had expired. In conclusion, whilst acknowledging that national legislatures were to be granted a wide margin of appreciation in determining restrictions on prisoner's rights, there was no evidence that the legislature in the United Kingdom had sought to assess the proportionality of the ban as it affected convicted prisoners. A blanket restriction on all convicted prisoners did not fall within the State's margin of appreciation, and since the applicant had lost his right to vote as a result of such a ban, he could claim to be a victim of the measure. There had therefore been a violation of Article 3 Protocol 1 ECHR.

Cross-references:

- no. 6573/74, Commission decision of 19.12.1974, *Decisions and Reports* 1, p. 87;
- *Golder v. the United Kingdom*, 21.02.1975, Series A, no. 18; *Special Bulletin ECHR* [ECH-1975-S-001];
- *Hamer v. the United Kingdom*, no. 7114/75, Commission report, 13.12.1979, *Decisions and Reports* 24, p. 5;
- *Draper v. the United Kingdom*, no. 8186/78, Commission report, 10.07.1980, *Decisions and Reports* 24, p. 72;
- *X. v. the United Kingdom,* no. 9054/80, Commission decision of 08.10.1982, *Decisions and Reports* 30, p. 113;
- *Silver and Others v. the United Kingdom*, Judgment of 25.03.1983, Series A, no. 61; *Special Bulletin ECHR* [ECH-1983-S-002];
- *Campbell and Fell v. the United Kingdom*, Judgment of 28.06.1984, Series A, no. 80; *Special Bulletin ECHR* [ECH-1984-S-005];
- *Mathieu-Mohin and Clerfayt v. Belgium*, Judgment of 02.03.1987, Series A, no. 113; *Special Bulletin ECHR* [ECH-1987-S-001];
- *Soering v. the United Kingdom*, Judgment of 07.07.1989, Series A, no. 161; *Special Bulletin ECHR* [ECH-1989-S-003];
- *T. v. the United Kingdom*, no. 8231/78, Commission report, 12.10.1983, *Decisions and Reports* 49, p. 5;
- *Wingrove v. the United Kingdom,* Judgment of 25.11.1996*, Reports of Judgments and Decisions* 1996-V.

Languages:

English, French.

Systematic thesaurus (V15) *

* 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.

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4 **Institutions**

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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.
51 For example the granting of pardons.
52 Bicameral, mono-cameral, 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 exemple, 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 5.3.40 and 5.2.1.4.
[77] Organs of control and supervision.

78 Proportional, majority, preferential, single-member constituencies, etc.
79 For aspects related to fundamental rights, see 5.3.40.2.
80 For the creation of political parties, see 4.5.10.1.
81 E.g. names of parties, order of presentation, logo, emblem or question in a referendum.
82 Tracts, letters, press, radio and television, posters, nominations, etc.
83 Impartiality of electoral authorities, incidents, disturbances.
84 E.g. signatures on electoral rolls, stamps, crossing out of names on list.
85 E.g. in person, proxy vote, postal vote, electronic vote.
86 E.g. *Panachage*, voting for whole list or part of list, blank votes.
87 E.g. Auditor-General.
88 Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

89 E.g. Court of Auditors.
90 The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.
91 *Staatszielbestimmungen.*
92 Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.
93 Including state of war, martial law, declared natural disasters etc; for human rights aspects, see also keyword 5.1.4.
94 Positive and negative aspects.
95 For rights of the child, see 5.3.43.
96 The question of "*Drittwirkung*".

97 See also 4.18.
98 Taxes and other duties towards the state.
99 Here, the term "national" is used to designate ethnic origin.
100 For example, discrimination between married and single persons.
101 This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.
102 Detention by police.
103 Including questions related to the granting of passports or other travel documents.
104 May include questions of expulsion and extradition.

105 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.
106 This keyword covers the right of appeal to a court.
107 Including the right to be present at hearing.
108 Covers freedom of religion as an individual right Its collective aspects are included under the keyword “Freedom of worship” below.
109 This keyword also includes the right to freely communicate information.
110 Militia, conscientious objection, etc.

111 Aspects of the use of names are included either here or under “Right to private life”.
112 Including compensation issues.
113 For institutional aspects, see 4.9.5.
114 This keyword also covers “Freedom of work”.
115 Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

5.5 **Collective rights**
- 5.5.1 Right to the environment
- 5.5.2 Right to development
- 5.5.3 Right to peace
- 5.5.4 Right to self-determination
- 5.5.5 Rights of aboriginal peoples, ancestral rights

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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