

THE BULLETIN

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

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

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

The decisions are presented in the following way:

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

G. Buquicchio

Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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

Initially conceived as an instrument of emergency constitutional engineering against a background of transition towards democracy, the Commission since has gradually evolved into an internationally recognised independent legal think-tank. It acts in the constitutional field understood in a broad sense, which includes, for example, laws on constitutional courts, laws governing national minorities and electoral law.

Established in 1990 as a partial agreement of 18 member states of the Council of Europe, the Commission in February 2002 became an enlarged agreement, comprising all 45 member States of the organisation and working with some other 12 countries from Africa, America, Asia and Europe.

Secretariat of the Venice Commission
Council of Europe
F-67075 STRASBOURG CEDEX
Tel: (33) 3 88413908 - Fax: (33) 3 88413738
Venice@coe.int

Editors:

Sc. R. Dürr, D. Bojic-Bultrini

S. Matrundola, H. Zyman

A. Gorey, M.-L. Wigishoff

Liaison officers:

Albania	S. Sadushi / L. Pirdeni	Kyrgyzstan	K. E. Esenkanov
Andorra	M. Tomàs Baldrich	Latvia	D. Pededze
Argentina	R. E. Gialdino	Liechtenstein	I. Elkuch
Armenia	G. Vahanian	Lithuania	S. Stačiokas
Austria	R. Huppmann	Luxembourg	J. Jentgen
Azerbaijan	R. Guliyev	Malta	A. Ellul
Belgium	A. Rasson Roland / R. Ryckeboer	Mexico	E. Ferrer Mac-Gregor Poisot / C. Bolivar Galindo
Bosnia and Herzegovina	D. Kalember	Moldova	M. Iuga
Bulgaria	K. Manov	Netherlands	S. Van Den Oever
Canada	C. Marquis	Norway	A. M. Samuelson
Croatia	T. Kic	Poland	B. Banaszkiwicz
Cyprus	N. Papanicolaou	Portugal	A. Duarte Silva
Czech Republic	E. Wagnerova / B. Laznickova / S. Matochová	Romania	G. Dragomirescu
Denmark	N. Grønbaek Ringsted	Russia	E. Pyrickov
Estonia	K. Kont-Kontson	Slovakia	G. Fet'kova
Finland	A. Niemi / G. Möller	Slovenia	A. Mavčič
France	M. Pauti	South Africa	S. Luthuli / K. O'Regan / C. Lemboe
Georgia	M. Chikobava	Spain	I. Borrajo Iniesta
Germany	B-O. Bryde / S. Kassel	Sweden	M. Ahrling / C. Lokrantz
Greece	T. Ziamou / O. Papadopoulou	Switzerland	P. Tschümperlin / J. Alberini-Boillat "The former Yugoslav Republic of Macedonia"
Hungary	P. Paczolay / K. Kovács	M. Lesevska
Iceland	H. Torfason	Turkey	B. Sözen
Ireland	B. Conroy	Ukraine	V. Ivaschenko / O. Kravchenko
Israel	Y. Mersel	United Kingdom	M. Kay / N. De Marco
Italy	G. Cattarino	United States of America ..	F. Lorson / S. Rider / P. Krug
Japan	N. Iwai		
Kazakhstan	M. Berkaliyeva		
Korea	S. D. Kim		

European Court of Human Rights	S. Naismith
Court of Justice of the European Communities	Ph. Singer
Inter-American Court of Human Rights	S. Garcia-Ramirez / M. Ventura Robles / T. Antkowiak

CONTENTS

Albania	209	Liechtenstein.....	292
Andorra	211	Lithuania	293
Argentina.....	213	Luxembourg.....	297
Armenia.....	216	Moldova	299
Austria.....	218	Poland.....	302
Azerbaijan	221	Portugal.....	317
Belgium	222	Romania.....	317
Bosnia and Herzegovina.....	228	Slovakia	320
Bulgaria	232	Slovenia	323
Canada	234	South Africa	326
Croatia	239	Switzerland	334
Czech Republic.....	249	“The former Yugoslav Republic of Macedonia”.....	338
Denmark	259	Turkey.....	343
France.....	260	Ukraine.....	347
Germany	268	United States of America	353
Hungary	278	Court of Justice of the European Communities	357
Ireland	281	European Court of Human Rights.....	374
Italy	284	Systematic thesaurus.....	377
Korea	287	Alphabetical index.....	395
Latvia	289		

There was no relevant constitutional case-law during the reference period 1 May 2004 – 31 August 2004 for the following countries:

Cyprus, Finland (Supreme Administrative Court), Japan, Norway.

Précis of important decisions of the reference period 1 May 2004 – 31 August 2004 will be published in the next edition, *Bulletin* 2004/3 for the following countries:

Estonia, Russia.

Albania

Constitutional Court

Important decisions

Identification: ALB-2004-2-002

a) Albania / b) Constitutional Court / c) / d) 27.05.2004 / e) 11 / f) Constitutionality of the law / g) *Fletore Zyrtare* (Official Gazette), 39/04, 2835 / h) CODICES (English).

Keywords of the systematic thesaurus:

- 3.4 **General Principles** – Separation of powers.
- 4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.
- 4.7.4.1.6 **Institutions** – Judicial bodies – Organisation – Members – Status.
- 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.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
- 5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Independence.
- 5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Impartiality.

Keywords of the alphabetical index:

Judge, disciplinary measure / Judiciary, independence / Judicial Council, competences.

Headnotes:

The High Council of Justice is the only body that has the authority to take disciplinary measures against judges, regardless of which body carries out verification of alleged infringements by judges and presents proposals for taking disciplinary measures. The High Council of Justice is free not to accept any proposals for taking disciplinary measures, if it is convinced that there has been no violation. The Council proceeds by guaranteeing judges due process of law, in accordance with all democratic

standards. It also has the right to carry out inspections if it considers them necessary. Therefore, the fact that the Minister of Justice has the right to make inspections and the right to present proposals as to disciplinary proceedings against judges is not unconstitutional. The Minister of Justice has no right to vote. He or she may only propose disciplinary measures to the High Council of Justice. It is always the High Council of Justice that decides, guaranteeing impartiality during the decision-making process, an important principle of due process of law.

Summary:

In the course of proceedings involving an appeal against a decision of the High Council of Justice, the Supreme Court stayed the proceedings and made a reference to the Constitutional Court with a request to strike out Article 6/9 of the Law “on the organisation and function of the Ministry of Justice,” as well as Articles 31/1, 31/3 and 16/1.c of the Law “on the organisation and functioning of the High Council of Justice”, on the ground of incompatibility with the Constitution of the Republic of Albania. In its reference, the Supreme Court stated that the Minister of Justice’s right to control the activity of ordinary courts and his or her right in relation to disciplinary proceedings against judges ran counter to the independence of the judicial power and could be considered as an infringement of the separation of powers because the body competent for disciplinary proceedings against judges is the High Council of Justice.

Assessing the content of the impugned provisions, the Constitutional Court held that the Albanian Constitution guarantees the independence of the judicial power, granting judges the right of being untouchable and irremovable from office without reasonable grounds, as well as the prohibition of criminal proceedings without the authorisation of the High Council of Justice. Only courts have the right to review judicial decisions. The High Council of Justice may take disciplinary measures against judges only in cases where their court decisions are associated with acts and conduct that seriously discredit the profession and position of judge and the authority of the judicial power. That being so, the Constitutional Court considered that the provisions dealing with the subject of control did not speak of control of the decision-making activity, but of inspection as to the administration of justice. The Constitutional Court dismissed as unfounded the Supreme Court’s claim that the Minister of Justice’s right to carry out inspections in the courts and his or her right to make proposals for the dismissal of judges violated the principle of the separation of powers. According to the Constitutional Court, the principle of separation of

powers not only implies their separation, but also their balance. Thus, those powers should cooperate in order to accomplish their goals, and should respect and control each other. Those powers should cooperate with and control each other to the extent that their constitutional functions are not affected.

The decisions of judges should conform only to the Constitution and laws. In order to ensure the best results, mechanisms have been introduced to ensure that pressure is not applied from inside or outside the judicial power. The Albanian Constitution has entrenched the independence of the different state powers, putting the emphasis on the independence of the judicial power. The establishment of the High Council of Justice is a component element of that principle. The fact that the Minister of Justice carries out verification of alleged violations by judges and presents proposals for disciplinary proceedings is not unconstitutional because the Minister has no right to vote and the High Council of Justice is free to decide on his or her proposals, thereby guaranteeing judges due process of law in disciplinary proceedings.

Languages:

Albanian.



Identification: ALB-2004-2-003

a) Albania / **b)** Constitutional Court / **c)** / **d)** 12.07.2004 / **e)** 13 / **f)** Constitutionality of the law / **g)** *Fletore Zyrtare* (Official Gazette), 47/04, 3312 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

4.7.1 **Institutions** – Judicial bodies – Jurisdiction.

4.16 **Institutions** – International relations.

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

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:

Reciprocity, principle / Judgment, of foreign country, recognition / Constitutional Court, Constitution, interpretation, competence, exclusive.

Headnotes:

The reciprocal recognition of court decisions of other countries serves to strengthen mutual assistance between states. The principle of reciprocity implies the implementation of reciprocal legal means in interstate relations. Thus, cooperation in the field of criminal law could be realised even in situations where there are no bilateral treaties. The acceptance of the prosecutor's request for the recognition of a foreign criminal judgment even in cases where there is no special agreement for this purpose is not contrary to the Constitution and international conventions.

Summary:

The appellant A.G., who has been sentenced by the Appellate Court of Milan, Italy, to life imprisonment for the crimes wilful murder and illegally carrying a firearm, applied in absentia by way of an individual complaint to the Constitutional Court, alleging that during the process of recognition by the Albanian courts of the foreign criminal judgment, he had not been guaranteed a fair trial in court.

Having been informed that A.G., a person convicted by an Italian court, was living in Albania, the Italian authorities requested the initiation of the process of recognition of the Italian criminal judgment. No bilateral agreement on the subject exists between Italy and Albania. An Albanian court recognised the criminal sentence.

The appellant applied to the Supreme Court. Interpreting the provisions of the Code of Criminal Procedure, the Supreme Court reached the conclusion that the recognition of a foreign criminal judgment is related to the "conversion" of a criminal sentence delivered by a foreign court into one delivered by an Albanian Court, which is always done on condition of having the preliminary consent of the convicted person and only if the judgment has been delivered by a foreign court against an Albanian citizen who is living within the territory of Albania.

According to the appellant's claim, the foreign criminal judgment should not have been recognised since there was no bilateral agreement between states on that subject.

The Constitutional Court considered that the grounds stated by the Supreme Court in its decision are in conformity with the Constitution and conventions.

It also considered that interpretations made by the Supreme Court, unlike the claims made by the appellant, are not unconstitutional because the interpretation of legal provisions in accordance with the spirit of the Constitution falls under the competences of the Supreme Court, whereas the interpretation of the Constitution falls under the exclusive competence of the Constitutional Court.

As to the Supreme Court's dismissal of the appellant's application, the Constitutional Court considered that it could neither serve as a substitute for the legal and constitutional prerogative of the courts in the judicial system nor evaluate the opinions of courts in a specific case.

The Constitutional Court rejected the complaint as unfounded.

Languages:

Albanian.



Andorra Constitutional Court

Important decisions

Identification: AND-2004-2-001

a) Andorra / **b)** Constitutional Court / **c)** / **d)** 01.06.2004 / **e)** 2004-1-RE / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 36, 2004 / **h)** CODICES (Catalan).

Keywords of the systematic thesaurus:

1.6.6 **Constitutional Justice** – Effects – Execution.
 4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
 5.3.13.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope.
 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
 5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial/decision within reasonable time.

Keywords of the alphabetical index:

Res iudicata, principle / Court, discretion, lack / Company, shareholders, general meeting.

Headnotes:

The ordinary courts may not exercise discretion in respect of the merits; instead, they are obliged to apply the law and convene a General Meeting of a company's shareholders. The decision to do so, which they are under an obligation to take, is considered by the Constitutional Court to constitute *res iudicata* and is not subject to appeal.

By failing to apply the mandatory provisions of the law, the ordinary court violated the right to a hearing guaranteed by the Constitution.

Summary:

In response to an initial application for protection, the Constitutional Court had held that, under Article 34.3 of the Companies Act, the Court was required to

convene a General Meeting of a company's shareholders if such a meeting had not been convened within the statutory time-limit set by that law.

When finding in favour of the defendant, the Civil Division of the High Court of Justice considered that in view of the persistent disputes and differences of opinion between the parties, these non-contentious court proceedings should be converted into contentious proceedings.

A second application for protection was filed with the Constitutional Court against the decision of the Civil Division of the High Court of Justice on the ground of a violation of the right to a fair hearing within a reasonable time guaranteed by Article 10 of the Constitution, because the High Court had failed to apply a judgment of the Constitutional Court.

There was no need therefore to examine the particular question of whether the non-contentious proceedings should be converted into contentious proceedings or not if there was of a dispute (which would have had the effect of rendering Article 34.4 of the Companies Act meaningless) or to examine the right to a fair hearing in the presence of both parties during the non-contentious proceedings.

As far as the protection of the shareholders was concerned, the Court was obliged therefore to convene the General Meeting, pursuant to the Constitutional Court's initial decision and in accordance with the mandatory provisions of Article 34.4 of the Companies Act; otherwise it would have been denying the applicants their constitutional right to a fair trial.

Languages:

Catalan.



Identification: AND-2004-2-002

a) Andorra / **b)** Constitutional Court / **c)** / **d)** 29.06.2004 / **e)** 2004-6-RE / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 41, 2004 / **h)** CODICES (Catalan).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Notary, powers / Officially recorded instrument, right of objection.

Headnotes:

It is not for the Constitutional Court to determine whether the first-instance court was right or wrong to find as it did; it does not have jurisdiction to oversee the exercise of discretion by the judges in the Court below and cannot take the place of those judges by giving its opinion on the merits of the various stages of their reasoning. Its sole duty is to consider whether the judges have violated one of the rights protected by the Constitution.

Summary:

The applicant had sued a solicitor (*notaire*) for damages as the result of the annulment of a document which had been officially recorded by the latter before the entry into force of the Andorran Constitution.

The Civil Division of the High Court of Justice had dismissed her case, holding that, under the old system, solicitors had acted more like notaries (*greffiers publics*) than solicitors within the current meaning of a legal professional and adviser to parties to a case. Their main role therefore had been to draw up agreements between parties in the proper form and give them public legitimacy through their signature but they had not had a professional duty to guarantee in any way that the officially recorded document would then be binding.

An appeal against this decision was filed with the Constitutional Court on the ground of violation of the right to a fair trial.

The Court found that if the arguments put forward were examined one by one, they each cast doubt on the discretion that could be exercised by the Court below. The applicant's arguments had been taken into consideration, examined very thoroughly and ultimately rejected, as the Court had considered them to be unfounded. The court's ruling had come at the

end of a procedure which had unquestionably met all the formal requirements.

The Constitutional Court is not a Court of cassation. It refrains from reviewing legal interpretations made by the ordinary courts. In the instant case, it did not appear, after thorough analysis of the applicant's claims, that there was anything untoward about the proceedings. The right to a hearing had been respected, the trial had been fair, there had been due process and the High Court had given sufficient reasons for its decision.

Languages:

Catalan.



Argentina

Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-2004-2-002

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 21.09.2004 / **e)** A. 2652. XXXVIII / **f)** Aquino, Isacio c/ Cargo Servicios Industriales S.A. s/ accidentes ley 9688 / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nation* (Official Digest), 327 / **h)**.

Keywords of the systematic thesaurus:

5.5 **General Principles** – Social State.
 5.1.2.2 **Fundamental Rights** – General questions – Effects – Horizontal effects.
 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
 5.4.17 **Fundamental Rights** – Economic, social and cultural rights – Right to just and decent working conditions.

Keywords of the alphabetical index:

Accident, attributable to employer, compensation / Compensation, full.

Headnotes:

The Industrial Hazards Act is unconstitutional because it states that workers who have an accident at work or contract an occupational disease owing to action taken by, or failure to act on the part of, their employer may be awarded only a lump sum in compensation and are not entitled to claim full compensation under civil law.

The Argentine Constitution lays down the principle that no-one may infringe the rights of others. Where workers suffer damage because their employers have violated this principle, they are entitled to full compensation.

For full compensation to be awarded, it is not sufficient to assess damage in financial terms alone. Any materialistic notion must give way to an understanding not just of material values but of the spiritual values which are inherent to all human life

and which the justice system should seek to protect. Compensation is fair only if it makes good all the damage and loss sustained.

Workers enjoy preferential constitutional protection.

Among the obligations imposed on states by the International Covenant on Economic, Social and Cultural Rights is the “protection” of human rights, that is to say the obligation to adopt measures intended to prevent companies or private individuals from denying people their rights.

As the rule should be that human rights are progressively realised, there will always be a strong presumption that regressive measures are at variance with the International Covenant and hence with the Constitution.

The fundamental basis of human rights is human dignity, which is not something that can be recognised or granted by the authorities as a favour since it is an intrinsic feature of all human existence.

The impugned Act undermines human dignity in so far as, when determining the amount of compensation, it attempts to treat human beings as objects, considering them as no more than a means of production or servants of the labour market. It is of course not for the market to govern people but for people to govern the market, and the market will only have any meaning or validity if it helps to secure human rights.

Social justice is enshrined in the Argentine constitution. It should be regarded as the highest form of justice, being the means by which we achieve – or at least attempt to achieve – well-being, that is to say living conditions in which human beings are allowed to develop fully, with due regard for their supreme dignity.

Summary:

The Industrial Hazards Act (hereinafter: “the Act”), passed in 1995, introduced new liability rules for industrial accidents and occupational diseases. Employers are required to insure themselves against these risks with particular insurance companies. Damage suffered by an employee is made good by compensation, the amount of which is determined according to the victim's salary, age and degree of unfitness for work, but may not exceed a maximum prescribed by the law. Furthermore, except in cases of malicious intent, such compensation frees the employer of any obligation under the Civil Code. In the instant case, the employee questioned the constitutionality of the Act because it prevented him

from claiming the full compensation provided for by the Civil Code.

The Court allowed the employee's appeal. It began by pointing out that Article 19 of the Constitution establishes the general principle that no-one may infringe the rights of others (*alterum non laedere*). It added that, in providing for full compensation for victims in such cases, the Civil Code merely confirmed this general principle, which governs all legal matters.

The Court stipulated that for full compensation to be granted, it was not sufficient to assess damage in financial terms alone. Materialistic notions had to give way to an understanding not just of material values but of the spiritual values which were inherent to all human life and which the justice system should seek to protect. The aim therefore was not simply to determine the earning potential of victims in monetary terms according to their ability to generate profits through their work but also to assess the non-pecuniary harm done to victims' private lives, which had an impact on their relationships in the social, sporting, artistic and other fields.

The Court considered that an unfair award was unconstitutional because the only way of making good all the damage and harm suffered was through full compensation. If, under the Constitution, expropriation of material assets had to be compensated for on the basis of the true value of those assets even if such expropriation was in the public interest, then there was all the more reason for physical, psychological and other non-pecuniary damage incurred by an employee to be made good, especially as there had been no material assets at stake in this case and the only person to benefit from the exemption from civil liability had been the employer.

Consequently, the Court found that the Act had an effect that violated established principles, because it established a compensation system under which, even if the *alterum non laedere* rule was applied, damages were assessed only according to the victim's salary, age and unfitness for work.

The Court found that this failing was all the more serious in that employees enjoy preferential constitutional protection, as the Constitution provides that labour, in its diverse forms, must be protected by law and that the law must ensure that workers enjoy fair working conditions (Article 14bis). The Court also referred to the rules established by international human rights law, particularly those enshrined in Articles 7 and 12 of the International Covenant on Economic, Social and Cultural Rights and in other international treaties with constitutional status. In this connection, it pointed out that according to general

comments nos. 12 to 15 of the Committee on Economic, Social and Cultural Rights, one of the duties that the Covenant imposes on states is to “protect” human rights, i.e. to take steps to ensure that companies or private individuals could not deny others these rights. Reference was also made to general comment no. 5 of the Committee, relating to the special protection that must be afforded to persons with disabilities.

Looking at the issue from another angle, the Court emphasised that the possibility for employees to make claims under the Civil Code was as old as the Code itself, which had been adopted in the mid-nineteenth century, and that both the first Industrial Accidents Act, passed in 1915, and the relevant acts passed since had secured workers’ rights to claim either compensation according to the scale established by these Acts or, where the damage was caused by the employer, full compensation for the damage under the Civil Code. The fact that the 1995 Act removed the second option was a backwards step for human rights protection – a step that was prohibited in principle under Article 2.1 of the International Covenant on Economic, Social and Cultural Rights, which provided that these rights should be progressively realised. The Court held that there was a strong presumption that regressive measures were contrary to this treaty and cited general comments nos. 14 and 15 of the United Nations committee, referred to above. In support of this notion of progressiveness, the Court referred to the case-law of the Belgian Court of Arbitration (Judgment no. 33792 of 5 May 1994 and Judgment no. 40/94 of 19 May 1994), the Portuguese Constitutional Court (Judgment no. 39/84 of 11 April 1984) and the French Constitutional Council (Decision no. 94-359 DC of 19 January 1995).

The Court also held that the limits imposed by the law on the establishment of damage incurred by workers violated the “fundamental basis” of human rights, namely human dignity, which was not something that could be recognised or granted by the authorities as a favour since it was an intrinsic feature of all human existence. Furthermore, Article 14bis of the Constitution guaranteed not just fair working conditions but also “dignified” ones.

The Court also held that the Act undermined social justice, which entailed organising relations between members of the community and the resources on which they could each rely in such a way that each person was able to take advantage of civilisation’s material and spiritual assets. Social justice was justice of the highest order, being the means by which people achieved – or at least attempted to achieve – well-being, that is to say living conditions in which

human beings were allowed to develop fully, with due regard for their supreme dignity. The Court noted that social justice was a principle that had been enshrined in the Constitution since its very beginnings (1853-1860), that it was referred to in the preambles to the Constitution of the International Labour Organisation, the Charter of the Organisation of American States and the American Convention on Human Rights, and that it had been reiterated when the Argentine Constitution had been amended in 1994, being reflected in the provision to the effect that it was for Congress to enact laws to promote economic progress against a background of social justice (Article 75.19). Lastly, the Court, referring to the opinion of the judge of the Inter-American Court of Human Rights, Mr Antônio A. Cançado Trindade, emphasised that, in the historical development of the law, there was an undeniable trend for social justice to become an increasingly judicial matter (Provisional Measures in the case of the Peace Community of San José Apartadó, Decision of 18 June 2002). The Act in question had taken a line that was at odds with social justice as it had compounded the inequalities which frequently obtained in employment relationships and it had established a form of preferential treatment that ran contrary to social justice by exempting employers from their civil liability.

Supplementary information:

Among other fundamental texts, the Court mentioned the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights and the American Convention on Human Rights. It also referred to various Concluding Observations by the UN Committee on Economic, Social and Cultural Rights, on the regular reports by states parties to the International Covenant, the judgment by the Inter-American Court of Human Rights in the case of *Bamaca Velásquez v. Guatemala* (22 February 2002) and the encyclical letters *Redemptor hominis* and *Quadragesimo anno*.

Four concurring opinions were appended to the Court’s decision.

Languages:

Spanish.



Armenia

Constitutional Court

Statistical data

1 May 2004 – 31 August 2004

- 16 referrals made, 15 cases heard and 15 decisions delivered.
- All 15 decisions concern the conformity of international treaties with the Constitution. The obligations assumed under the Rome Statute of the International Criminal Court were declared incompatible with the Constitution.

Important decisions

Identification: ARM-2004-2-004

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 13.08.2004 / **e)** DCC-502 / **f)** On the conformity with the Constitution of the obligations set out in the Rome Statute of the International Criminal Court / **g)** to be published in *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

3.1 **General Principles** – Sovereignty.

4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.

4.16.1 **Institutions** – International relations – Transfer of powers to international institutions.

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

5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

International Criminal Court, statute, ratification / Convicted person, pardon, right to apply, amnesty.

Headnotes:

The provision that the jurisdiction of the International Criminal Court is complementary to national criminal jurisdiction (“complementarity”), set out in part 10 of the Preamble and Article 1 of the Statute, does not conform to Articles 91 and 92 of the Constitution of Armenia insofar as Chapter 9 of the Constitution, which includes provisions on the judiciary and sets out precisely the judicial system of the Republic of Armenia, does not contain any provision that may be taken as a basis for permitting the system of judicial bodies exercising criminal jurisdiction to be complemented with an international judicial body of criminal jurisdiction by way of an international treaty.

Because of its obligation to protect human rights and freedoms laid down by Article 4 of the Constitution, Armenia cannot assume any obligations that are not provided for by the Constitution and that involve restricting human rights in such a way as to create a less-favourable situation for persons under the jurisdiction of Armenia as to the guarantee of human rights and freedoms.

It would be possible to adopt an amendment to the Constitution recognising the obligations provided for by the Statute of the International Criminal Court or the jurisdiction of that Court as a body complementing the system of national courts.

Summary:

On the basis of an appeal lodged by the President of the Republic, the Constitutional Court considered the conformity of the obligations set out in the Rome Statute of the International Criminal Court (ICC) with the Constitution.

In its preamble, the Constitution of Armenia confirms the Armenian nation’s faithfulness to universal values. Article 4 of the Constitution provides for the State’s obligation to ensure the protection of human rights and freedoms in accordance with the principles and norms of international law. The aforementioned provisions of the Constitution establish the legal bases for involvement in the protection of universal values such as peace, security and well-being. The idea of the establishment of the permanent International Criminal Court aims to protect those values.

The Statute provides for the principles of the relationship between the states and the ICC that are aimed at harmonising the state’s obligation to recognise that Court’s jurisdiction with the principle of state sovereignty. This issue is resolved, in particular,

in Article 12 of the Statute, according to which the Court may exercise its jurisdiction if the state on the territory of which the conduct in question occurred, or the state of which the person accused of the crime is a national, is a party to the Statute. The issue of harmonisation of the state's obligation to recognise the Court's jurisdiction with the principle of state sovereignty is also resolved by the main principle, which is the basis of the Court's jurisdiction: the Court's exercise of its jurisdiction over persons for the most serious crimes provided for by the Statute is complementary to national criminal jurisdiction. This principle stems particularly from Article 17 of the Statute, according to which the Court is entitled to administer justice over a crime provided for by the Statute if a state, which has jurisdiction over the crime, is unwilling or unable genuinely to carry out the investigation or prosecution. At the same time, Article 17 precisely lays down the factors, which form an objective basis for assessing the lack of the will of a state, as well as the existence of inability to carry out the investigation or prosecution. Article 19 of the Statute gives the state with jurisdiction over the given case the opportunity to challenge the jurisdiction of the Court and the admissibility of the case on the ground that the state is investigating or prosecuting the case.

Another issue concerning the relationship between state sovereignty and the Court's jurisdiction relates to Articles 54.2, 57.3.d and 99.4 of the Statute. Articles 54, 57 and 99 give rather wide powers to the Prosecutor and at the same time provide for certain guarantees, which take into account the state's sovereignty and prevent abuse by the Prosecutor of his or her powers. In particular, the Prosecutor may directly take specific investigative steps within the territory of a State Party on the authorisation of the Pre-Trial Chamber. The latter, when giving such authorisation, whenever possible takes into consideration the views of the state concerned. The Pre-Trial Chamber may give an authorisation to the Prosecutor only if it has determined in that case the state is clearly unable to execute a request for taking some investigative steps due to the unavailability of any authority or any component of its judicial system competent to execute the request. The Prosecutor may take such investigative steps within the territory of the State Party, without the presence of authorities of that state, if those steps can be executed without any compulsory measures and if essential for the execution of a request for assistance. Moreover, specific investigative steps may be taken only following all possible consultations with the State Party concerned. Thus, it may be considered that Articles 54.2, 57.3.d and 99.4 of the Statute derive from the principle of complementarity and do not undermine the sovereignty of the State Party.

The Constitutional Court identified the following areas in which obligations assumed under the Statute do not comply with the Constitution.

Firstly, the provision setting out that the jurisdiction of the International Criminal Court is complementary to national criminal jurisdiction, found in paragraph 10 of the Preamble and Article 1 of the Statute, does not derive from norms set out in Articles 91 and 92 of the Constitution. Article 91 of the Constitution sets out that in the Republic of Armenia, justice shall be administered solely by the courts in accordance with the Constitution and the laws. According to Article 92 of the Constitution, the courts of general jurisdiction, including criminal jurisdiction, in the Republic of Armenia shall be the courts of first instance, the appellate courts and the court of cassation.

Chapter 9 of the Constitution, which includes provisions on the judiciary and precisely sets out the judicial system of the Republic of Armenia, does not contain any provision that may be taken as a basis for permitting the system of judicial bodies exercising criminal jurisdiction to be complemented with an international judicial body of criminal jurisdiction by way of an international treaty.

According to Article 105 of the Statute, the Court's sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it. This provision presumes that persons who are under the general jurisdiction of the Republic of Armenia, in case of conviction by the Court for the crimes provided for by the Statute, may not enjoy the right to ask for pardon, as well as the opportunity of release from serving the sentence or reduction of term of sentence by way of amnesty. Accordingly, the President of the Republic cannot exercise his or her right to grant a pardon and the National Assembly its right to declare amnesty in regard to those persons.

Where national courts exercise criminal jurisdiction over persons who have committed the crimes provided for by the Statute, the persons sentenced to imprisonment by those courts may enjoy the opportunity to ask for pardon or release from serving the sentence, and the term of their sentence may be reduced by way of amnesty. While persons who fall under the general jurisdiction of the Republic of Armenia and convicted by the ICC for the same crimes are deprived of the right to ask for pardon and the opportunity to benefit from amnesty, if granted.

Because of its obligation to protect human rights and freedoms laid down by Article 4 of the Constitution, the Republic of Armenia cannot assume any obligations that are not provided for by the Constitution and that

involve restricting human rights in such a way as to create a less-favourable situation for persons under the jurisdiction of Armenia as to the guarantee of human rights and freedoms.

Languages:

Armenian.



Austria Constitutional Court

Statistical data

Session of the Constitutional Court during June 2004

- Financial claims (Article 137 B-VG): 5
- Conflicts of jurisdiction (Article 138.1 B-VG): 0
- Disputes as to jurisdiction – Board of Audit (Article 126.a B-VG): 7
- Review of regulations (Article 139 B-VG): 24
- Review of laws (Article 140 B-VG): 46
- Challenge of elections (Article 141 B-VG): 3
- Complaints against administrative decrees (Article 144 B-VG): 487
(258 inadmissible)

Important decisions

Identification: AUT-2004-2-001

a) Austria / **b)** Constitutional Court / **c)** / **d)** 30.06.2004 / **e)** G 218/03 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.3 **General Principles** – Democracy.
 4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
 4.9 **Institutions** – Elections and instruments of direct democracy.
 5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
 5.3.41.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.
 5.3.41.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Local unit, basic / Election, municipal / Election, homogeneity, principle / Representative body, popular / Foreigner, residence, citizenship.

Headnotes:

The districts of Vienna form the lowest level of political and administrative organisation. Under Community law (Council Directive 96/30/EC of 13 May 1996 amending Directive 94/80/EC), they are also regarded as 'basic local units'.

The representative bodies of the districts of Vienna (*Bezirksvertretungen der Stadt Wien*) are the representative organs of the districts. They are popular representative bodies whose activity clearly falls within the scope of the democratic principle (Article 1 of the Constitution).

The right to vote and to stand for election to the *Bezirksvertretungen* is therefore reserved to Austrian citizens, apart from one exception for citizens of the Union provided by Community law. Statutes extending the right to vote and to stand as candidate to third country nationals are unconstitutional.

Summary:

A third of the members of the Viennese Parliament (*Wiener Landtag*) brought an application to the Court seeking the review of several statutes of the Municipal Electoral Code of Vienna (*Wiener Gemeindewahlordnung*). They alleged that the statutes of the Code granting the right to vote or to stand for elections to the *Bezirksvertretungen* to everyone residing in a district were inconsistent with the Constitution. Since *Bezirksvertretungen* had to be considered as popular representative bodies, elections to those bodies had to be subject to the principle of homogeneity laid down by the Constitution, a principle according to which the right to vote and to stand for elections is reserved to citizens only. Voters and candidates who were third country nationals at the time of the election therefore had to be excluded from the election.

The Government of Vienna (*Wiener Landesregierung*) contested both the applicability of the above-mentioned electoral principle and the legal qualification of the *Bezirksvertretungen* as popular representative bodies. Pointing out the very marginal sovereign activity (*hoheitliche Tätigkeit*) of the *Bezirksvertretungen*, the Government emphasised that these bodies could only contribute to the living conditions of the districts' inhabitants by recommendation. That being so, it was objective and appropriate for the legislator of the Land to give foreigners permanently residing in Vienna for a minimum of five years the right to vote and to stand for elections. The idea of extending the exercise of those political rights

to such foreigners would above all demonstrate a serious political desire of their integration.

Regarding those arguments, the Court stated that elections to the National Council (first chamber of parliament; *Nationalrat*) are based on universal, equal, direct, secret and personal suffrage (Article 26 of the Constitution). Those electoral principles are also valid for elections to the parliament of a *Land* (*Landtag*; Article 95) and for elections to the municipal council (*Gemeinderat*; Article 117 of the Constitution). By referring to the principle of national electoral law for *Land* and municipal elections, the constitutional legislator created another electoral principle: the principle of homogeneity.

That principle however does not apply to popular representative bodies that are not explicitly named in the Constitution, such as the representative bodies of the districts of Vienna (*Bezirksvertretungen der Stadt Wien*).

Yet Articles 26, 95 and 117 of the Constitution, reserving the right to vote for citizens, have another essential significance as they specify the democratic principle. This fundamental principle is enshrined in Article 1 of the Constitution, which stipulates that Austria is a democratic republic whose law emanates from the people. Austrian citizenship is the decisive criterion for being part of the people.

The "Charter of the City of Vienna" (*Wiener Stadtverfassung*), having in part the rank of ordinary law and in part the rank of constitutional law, divides – for administrative reasons – the municipality of Vienna into 23 districts. In each district, a representative body known as a *Bezirksvertretung* is established by law. It consists of a minimum of 40 and a maximum of 60 members who are elected for a five-year term on the basis of equal, direct, secret and personal suffrage. Many different tasks are allocated to them.

The Court has consistently qualified *Bezirksvertretungen* as popular representative bodies. As it is the nature and the essence of popular representative bodies to be established by law and to represent the interests of all persons living in a certain area, *Bezirksvertretungen* are the representative organs of such entities.

In that context, the Court explicitly cited Community law on municipal elections (see the Directives mentioned above), according to which the districts of Vienna are classified as 'basic local units' and *Bezirksvertretungen* as their representative organs.

The Court concluded that apart from Community law granting citizens of the Union residing in a Member

State the right to vote and to stand as candidates in municipal elections, those rights are reserved to the citizens of Austria only.

Languages:

German.



Identification: AUT-2004-2-002

a) Austria / **b)** Constitutional Court / **c)** / **d)** 30.06.2004 / **e)** G 27/04 et al. / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.13 **General Principles** – Legality.
- 4.6.9 **Institutions** – Executive bodies – The civil service.

Keywords of the alphabetical index:

Civil servant, retirement, early / Civil servant, retirement, involuntary / Law, degree of determination / Administrative authority, conduct / Administrative authority, discretionary power.

Headnotes:

The rule of law embodied in Article 18 of the Constitution requires that the contents of laws must determine the conduct of the authorities. As a result of Article 130.2 of the Constitution, the ordinary legislator may refrain from adopting a statute that binds the administrative authorities' conduct, thereby giving them discretionary power. However, in such cases the legislator must establish relevant criteria for the use of discretion within the meaning of the law.

A statute empowering the administrative authority to send civil servants – after having reached the minimum age and sufficient years of service – *ex officio* into early retirement “where no important reasons of the service speak against it” establishes only a limit but not a relevant criterion. In such cases, it is for the authority to choose, which contradicts the rule of law.

Summary:

Several civil servants who were forced into early retirement on the basis of the above-mentioned statute (§ 15a Law on the Civil Service; *Dienstrechts-Novelle* 2001) filed complaints in both the Constitutional Court as well as the Administrative Court. Upon applications of the latter and *ex officio*, the Constitutional Court reviewed the statute.

The government argued that the public service was bound to the economical and cost-effective use of personnel. Measures of reorganisation, task-simplification or reduction, out-sourcing and other measures with similar effects had resulted in a surplus of irremovable civil servants to whom the legislator had granted in 1997 the possibility of (voluntary) early retirement. In 2001 the legislator had simply amended that possibility to include all civil servants having reached 61 and a half years of age. Although the authorities could arbitrarily apply that statute, abstractly possible conduct could not make a constitutional law unconstitutional.

The Court noted that that reasoning merely explained why the impugned statute had been adopted, but it did not at all show that the statute determined the conduct of the authorities to a sufficient degree so as to bring the statute into conformity with the rule of law. The statute was struck down, with no time-limit set for the entry into force of the judgment.

Supplementary information:

In connection with extensive reorganisation measures of some ministries, several high-ranking officers of the constabulary and the military were – among others – sent into early retirement. Those compulsory retirements provoked a certain political interest as well as the interest of the media in this case.

Languages:

German.



Azerbaijan

Constitutional Court

Important decisions

Identification: AZE-2004-2-002

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 17.06.2004 / **e)** 5-123 / **f)** / **g)** *Azerbaijan, Respublika, Khalg gazet, Bakinski rabochiy* (Official Gazettes), *Azerbaijan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.7.1 **Institutions** – Judicial bodies – Jurisdiction.

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

5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Civil proceedings.

Keywords of the alphabetical index:

Justice, proper administration.

Headnotes:

From the point of view of the legal nature of the additional cassation procedure in the framework of these proceedings, any variation of court of cassation decisions should pertain to matters that are not related to the merits of case. Thus, varying a court of cassation decision does not fall within the exceptional competences of the Plenum of the Supreme Court to examine the legal issues of cases. The Plenum of the Supreme Court may vary court of cassation decisions only on the basis of matters examined by the lower courts. The Plenum of the Supreme Court does not have the competence to vary the parts of court of cassation decisions that relate to matters on the merits of the case that have not been examined in the lower courts.

Summary:

The court of first instance dismissed the claim of the first party against the Union of the Development and Exploitation of Country Farming (UDESCF) concerning the recognition of that party's right to a rural lot.

The court allowed the claim of the complainant against the first party and others, and held that the lease and privatisation contract concluded by the first party was null and void.

The Judicial Board on Civil Cases (JBCC) of the Court of Appeal upheld the decision of the court of first instance, without variation.

In cassation proceedings, the JBCC of the Supreme Court upheld the decision of the JBCC of the Court of Appeal, without variation.

On 14 February 2003 a decision of the Plenum of the Supreme Court varied the decision of JBCC of the Supreme Court and accordingly the decision of the JBCC of the Court of Appeal. The decision of the Plenum of the Supreme Court allowed the claim of the first party and recognised her rights to rural lot N 231 "a". The Plenum of the Supreme Court ordered the UDESCF to enter into a lease with the first party for that rural lot and ordered the UDESCF to annul lease no. 20491, which it had concluded with the complainant for that lot.

The complainant applied to have the decision of the Plenum of the Supreme Court set aside on the grounds that it was unlawful and unfounded. In particular, the grounds for the complaint were as follows. In violation of the requirements of Article 429 of the Code of Civil Procedure (CCP), the Plenum of the Supreme Court had assumed the competences of the court of first instance and had assessed the facts of the case. The Plenum of the Supreme Court had varied the decision of the Court of Appeal without having the competence to do so. Consequently, the Plenum of the Supreme Court had violated the right to legal protection laid down by Article 60 of the Constitution.

The CCP lays down the competence of the Supreme Court to hear cases by way of the additional cassation procedure (Article 429 of CCP). It is necessary to note that neither that article nor another provision provides for the competence of the Plenum of the Supreme Court to adopt a decision on the merits of case on the basis of the facts.

The legislation on procedure gives the Plenum of the Supreme Court the competence to vary court of cassation decisions (Article 429.0.2 of CCP).

In the case under review, contrary to the provisions of legislation and exceeding the limits of its competence, the Plenum of the Supreme Court adopted a new decision on merits of the case on the ground that the conclusions in the decisions of the court of first and appellate instance were not supported by the facts.

Moreover, contrary to Article 429 of CCP giving the Plenum of the Supreme Court the competence to vary only court of cassation decisions, the Plenum of the Supreme Court varied the decision of the Court of Appeal in the case under review.

The Plenum of the Constitutional Court concluded that the decision of the Plenum of the Supreme Court on the case under review contradicted the requirements of Articles 424.1 and 429 of CCP. In turn, that contradiction resulted in a violation of the principle of the proper administration of justice, which constitutes the significant element of judicial protection of human rights and freedoms and is defined by legislation, relevant case-law and laid down by Article 60 of the Constitution.

Given the fact that the decision of the Plenum of the Supreme Court of Azerbaijan Republic recognising of the right of the first party to use the rural lot and declaring the lease with the complainant to be void was contrary to Article 60 of the Constitution and Articles 424.1 and 429.1 of CCP, that decision is void and shall be varied in accordance with the procedure set out under the legislation on civil procedure.

Languages:

Azeri.



Belgium Court of Arbitration

Important decisions

Identification: BEL-2004-2-005

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 19.05.2004 / **e)** 92/2004 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 20.09.2004 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.
5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship or nationality.
5.2.2.8 **Fundamental Rights** – Equality – Criteria of distinction – Physical or mental disability.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Foreigner, disabled, allowance, right / Foreigner, social assistance.

Headnotes:

The constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), possibly taken in conjunction with Article 191 of the Constitution, Article 14 ECHR and Article 1 Protocol 1 ECHR, is not violated if certain foreigners are refused disability allowances, provided that they are entitled to social assistance if they require it.

Summary:

The Act of 27 February 1987 on disability allowances initially provided that these might be granted only to Belgian nationals, refugees, stateless persons and persons of indeterminate nationality.

The personal scope of the disability allowance scheme was gradually extended, for three reasons: to

satisfy Belgium's international commitments; to maintain a certain parallelism with the minimum income scheme and the guaranteed income scheme for elderly persons; and to avoid abandoning the practice whereby the public authorities took account of the disabilities of foreign children who received larger family allowances because of those disabilities.

The Brussels Labour Court asked the Court of Arbitration to decide whether Article 4 of the Act of 27 February 1987, which withheld the disability allowance, solely on grounds of nationality, from foreigners resident in Belgium but not mentioned in that provision, was compatible with the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken on its own or in conjunction with Article 191 of the Constitution, Article 14 ECHR and Article 1 Protocol 1 ECHR.

The Court stated, first, that Article 191 of the Constitution did not allow the legislator to ignore the fundamental principles enshrined in the Constitution, in making distinctions of this kind. It in no way authorised him, in introducing less favourable treatment for foreigners, to disregard the need to ensure that the difference was not discriminatory, whatever the nature of the principles concerned.

The Court held, as it had for the other residuary and non-contributory social security schemes (the minimum income scheme and the guaranteed income scheme for elderly persons), that the legislator could make the payment of disability allowances conditional on the recipients' having sufficient ties with Belgium.

It also noted that foreigners lawfully resident in Belgium, who were not entitled to the disability allowance, and who were in need or lacked adequate means of subsistence, were entitled to social assistance. Social assistance was designed to enable everyone to live in a manner consistent with their human dignity. In principle, everyone was entitled to it, regardless of nationality, and this included lawfully resident foreigners. The special needs of people with disabilities were taken into account by the social welfare centres when their assistance was sought.

In this connection, the Court referred to the *Koua Poirrez v. France* case (*Reports of Judgments and Decisions* 2003-X), on which the European Court of Human Rights gave judgment on 30 September 2003. That case also concerned a lawfully resident foreigner, who had been refused a disability allowance on grounds of nationality. The Court emphasised that, unlike the applicant in that case, the foreigner referred to in the preliminary question, who

had been refused a disability allowance, could apply for social assistance, allowing for his disability.

The Court accordingly concluded that the difference in treatment was not manifestly unfair, and that this remained true when it was considered with reference to Article 191 of the Constitution, Article 14 ECHR and Article 1 Protocol 1 ECHR.

Languages:

French, Dutch, German.



Identification: BEL-2004-2-006

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 16.06.2004 / **e)** 106/2004 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 02.07.2004 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

- 1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
- 1.6.5.5 **Constitutional Justice** – Effects – Temporal effect – Postponement of temporal effect.
- 3.9 **General Principles** – Rule of law.
- 3.15 **General Principles** – Publication of laws.
- 5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Law, publication / Document, official, access / Official Gazette, publication, solely via the Internet.

Headnotes:

Ceasing to produce a printed version of the *Moniteur belge* (Official Gazette), and publishing it on a website instead, constitutes disproportionate interference with a right inherent in a law-governed state, since it deprives certain persons of effective access to official texts, unless related measures, enabling them to consult it, are taken.

Summary:

Article 190 of the Constitution provides that laws become binding only when they have been published in the form prescribed by law. The Directorate of the *Moniteur belge* is responsible for publishing all laws and various official texts.

Until the end of 2002, a paper version of the *Moniteur belge* was published daily. This was available in numerous institutions and libraries, and subscribers could also receive it at home (over 50,000 pages per annum). Since 1997, the full text has also been available free of charge on the *Moniteur belge* website, and subscriptions have fallen off sharply.

For economic reasons, a decision to stop distributing the paper version was taken in 2002. Under the Act of 24 December 2002, the *Moniteur belge* was to be published only on the website and in three paper copies, deposited at the Royal Library of Belgium, the Ministry of Justice and the *Moniteur belge* offices.

A non-profit-making association, the "Group for Study and Reform of the Administrative Service", brought an action for repeal of the Act in the Court of Arbitration.

Although the Council of Ministers argued that the contested provisions had no direct link with the association's objectives, the Court accepted that any individual or legal person had an interest in challenging a law which altered the mode of publication of texts which might affect that person's situation. Publication was an essential condition of the binding force of official texts, and the right of any person to consult them at any time was vital in a law-governed state, since consulting those texts allowed everyone to comply with them.

After rejecting a plea relating to the division of powers within Federal Belgium, the Court examined a second plea, alleging breach of the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution): it was argued that the contested provision would discriminate between citizens on the basis of their financial and social position, since only the rich and the skilled would have access to the *Moniteur belge* website.

The Court accepted that the measures were motivated by a desire to make savings, but went on to consider whether they did not interfere disproportionately with the right of certain persons to consult official texts with which they were required to comply.

In considering this point, the Court noted, after studying the preparatory documents regarding the Act, that the copy deposited at the *Moniteur belge* offices could be consulted by any interested person, that municipalities and libraries were required to invest in computer facilities, and that persons without such facilities would be able to obtain a certified copy of any act or document they wished to consult from the *Moniteur belge*, within 24 hours of requesting it.

This last measure was considered insufficient, since no one without computer facilities could identify the documents he/she required. The copy deposited at the *Moniteur belge* offices could certainly be consulted, but the Court did not consider that this would give everyone access to the official texts without undue difficulty.

The Court further observed that there was no guarantee that municipalities and libraries would acquire computer facilities, or indeed have the infrastructure and resources needed to do so.

Internet access to official texts might be quicker and easier for some people, but many others would be left with no effective access, particularly if no related measures were taken to make consultation possible. The Court concluded that the contested legislative provisions were contrary to the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution).

In principle, repeal takes effect retroactively. In this case, however, the Court decided that texts published under the repealed Act would remain fully and finally effective until 31 July 2005, which would also make it possible to adopt and implement measures to put an end to the discrimination.

Languages:

French, Dutch, German.



Identification: BEL-2004-2-007

a) Belgium / b) Court of Arbitration / c) / d) 22.07.2004 / e) 136/2004 / f) / g) *Moniteur belge* (Official Gazette), 19.10.2004 / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.3 **Constitutional Justice** – Jurisdiction.

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

2.2.1.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.

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

3.13 **General Principles** – Legality.

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

4.7.1 **Institutions** – Judicial bodies – Jurisdiction.

5.2 **Fundamental Rights** – Equality.

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

Keywords of the alphabetical index:

Res iudicata, principle / Court, discretion / Urban planning, unlawful construction, penalty / International law, observance.

Headnotes:

Since the legislative amendment of 9 March 2003, the Court of Arbitration has been competent to review the constitutionality of laws directly with reference to all provisions of Title II of the Constitution, including Articles 12 and 14 embodying the principle of “*nulla poena, nullum crimen sine lege*”. It is also competent to take into account those provisions of international law which secure analogous rights or freedoms (Article 7 ECHR and Article 15 of the International Covenant on Civil and Political Rights).

Notwithstanding the principle that there can be no penalty or offence except as provided by law, the law may assign a degree of discretion to the court, and criminal law may show some flexibility to allow for change in the circumstances. The specific requirements of precision, clarity and predictability must nevertheless be fulfilled.

No circumstance can justify a legislative provision that would impinge on final judicial decisions.

Summary:

In Belgium construction work must comply with the applicable regulations on town and country planning. A decree of the Flemish Region (a federate entity) dated 18 May 1999 governing spatial planning prescribes penalties under criminal law for a series of infringements of these town planning regulations.

Following the amendments made by the decree of 4 June 2003, such penalties for committing certain infringements would no longer be enforceable in cases where “operations, works, alterations or infringing uses are not located in zones classified as spatially sensitive, provided that they do not cause urban nuisances intolerable to the neighbours or constitute a serious breach of the essential town planning standards with regard to intended use under the land use plan or development plan” (Article 146.3 of the decree).

In criminal proceedings brought against persons suspected of engaging in construction of unauthorised works, the criminal courts referred preliminary questions of their own motion to the Court of Arbitration.

The first preliminary question concerns the conformity of the aforementioned Article 146.3 to the principle of defining and punishing offences strictly in accordance with the law (*nullum crimen, nulla poena sine lege*) secured in Articles 12 and 14 of the Constitution and in Article 7 ECHR and Article 15 of the International Covenant on Civil and Political Rights.

The Court is competent to review laws in the light of several articles of the Constitution. However, where a treaty provision that binds Belgium is similar in scope to one or more of the aforementioned constitutional provisions, the guarantees established by that treaty provision form an inseparable whole with the constitutional guarantees. Moreover, the violation of a fundamental right is *ipso facto* a breach of the principle of equality and non-discrimination.

In its examination, the Court therefore had regard to the provisions of international law securing analogous rights or freedoms.

On the merits, the Court firstly recalled the effect of the above principle: criminal law could indeed show some flexibility to allow for change in the circumstances, but must still be formulated in such terms that anyone about to engage in an act could tell whether or not it was punishable.

The Court's reply to the first preliminary question was that the concept of "urban nuisances intolerable to the neighbours" and the concept of "serious infringement" of the "essential" town planning regulations did not have a sufficiently precise substantive content to be capable of defining an offence.

In reply to the second preliminary question, the Court pointed out that any breach of the principle that offences must be defined and punished strictly in accordance with the law (see first preliminary question) also involved [...] a violation of the principle of equality and non-discrimination embodied in Articles 10 and 11 of the Constitution.

The Court was also to determine whether Article 146.3 of the decree infringed the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) in making "presence of neighbours" the determinant of whether the persistence of an infringement of town planning regulations was punishable (see the above partial quotation from Article 146.3). It replied that the fact of personal interests being unaffected in the absence of neighbours failed to justify the conclusion that the persistence of a town planning infraction would be harmless to spatial planning. Thus presence of neighbours was not a relevant criterion.

The final preliminary question prompted the Court to weigh against Articles 10 and 11 of the Constitution Article 149 of the decree enabling the court to order in addition to the penalty either restoration of the site to its original condition or adaptation work, or to order payment of a sum of money equal to the appreciation of the property subsequent to the infringement, thereby establishing differences in treatment. The Court found that this article embodied discrimination of several kinds.

One of the provisions in the article impinged on the judicial decisions which had acquired the force of *res iudicata*, declaring the measures of redress imposed without judicial action to be unlawful. The Court observed that the legislator thereby denied a category of persons the benefit of judicial decisions which had become final, and no circumstance could justify this.

Supplementary information:

The Court of Arbitration originally had jurisdiction to review the federal and regional communities' legislation in the light of the constitutional and legislative rules determining the apportionment of powers in federal Belgium. Since the 1988 constitutional revision and the special law of 6 January 1989, the Court has also been competent to verify compliance with the constitutional principle of equality

and non-discrimination (Articles 10 and 11 of the Constitution) and with the rights and freedoms relating to education (Article 24 of the Constitution).

By way of the constitutional principle of equality, the Court also verifies compliance with other constitutional provisions, provisions of international law and general principles of law. The special law of 9 March 2003 enables the Court to perform direct review of compliance with Articles 8 to 32 of the Constitution (Title II – rights and freedoms), Articles 170 and 172 of the Constitution (fiscal guarantees) and Article 191 of the Constitution (rights of aliens). In Judgment no. 36/2004 of 22 July 2004 the Court determines, for the first time since the most recent amendment, its competence to perform direct review of compliance with the constitutional principles *nullum crimen sine lege* (Article 12 of the Constitution) and *nulla poena sine lege* (Article 14 of the Constitution). In so doing it declares itself competent to "take account", in its review, of provisions of international law securing analogous rights or freedoms (in this instance, Articles 7 ECHR and Article 15 of the International Covenant on Civil and Political Rights of 1966).

The other courts in Belgium are not competent to review the constitutionality of the laws but, following a judgment delivered by the Court of Cassation on 27 May 1971 (in the case of S.A. Fromagerie Franco-Suisse "Le Ski"), any court is competent to determine the compliance of laws with the directly enforceable provisions of international law.

Languages:

French, Dutch, German.



Identification: BEL-2004-2-008

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 22.07.2004 / **e)** 140/2004 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 05.10.2004 / **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.

5.2.2.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.

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

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

5.3.44 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Child, born out of wedlock, right to inherit / Equality, of birth, strict review.

Headnotes:

The review of the Court of Arbitration is more stringent where the fundamental principle of equality of birth is at issue. Children cannot be disadvantaged by the fact that their parents have chosen not to marry.

Summary:

A dispute over the estate of a married woman who had two children born of a prior relationship was brought before the court of first instance of Louvain. Article 1465 of the Civil Code protects “children of a previous marriage”. The court found that legal opinion was divided as to the interpretation of this phrase. It referred questions to the Court of Arbitration in order to establish whether this article infringed the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) if it was construed as safeguarding only the rights of children of a previous marriage, not children born out of wedlock.

The Court of Arbitration considered this distinction to be founded on an objective criterion but had still to ascertain the relevance of the criterion having regard to the subject-matter of the provision under review. The Court went on to point out that its review was more stringent when the fundamental principle of equality of birth was at issue.

Next, the Court specified that as the impugned provision purported to safeguard the interests of a deceased mother's or father's children who were not the legal heirs of the stepfather or stepmother, it did not discern any basis on which this protection could be withheld from children born out of wedlock before the marriage. Indeed, children could not be disadvantaged by the fact that their parents had chosen not to marry. According to this construction, Article 1465 of the Civil Code infringed the constitutional rules.

As it often does, the Court then considered whether or not the provision could be construed otherwise. Since it protected the rights not only of offspring of a previous marriage but also of children born out of wedlock before the present marriage, the provision did not disregard the constitutional rules. Furthermore, as required by Articles 10 and 11 of the Constitution, Article 334 of the Civil Code did indeed provide that however descent from a parent might be established, children and their descendants had the same rights and the same obligations vis-à-vis the father, mother and relatives by blood or marriage, and vice versa.

Supplementary information:

The Court delivered two further judgments in 2004 concerning family law.

Judgment no. 79/2004 of 12 May 2004 concerns the suit for maintenance that a child can file against its natural father. The Court held that Article 337.1 of the Civil Code making this type of action subject to a time limit of three years infringed the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution).

Judgment no. 81/2004 of 12 May 2004 concerns Article 232 of the Civil Code under which grant of divorce on the ground of having lived apart for over two years is subject to the condition that “grant of divorce on this ground does not significantly worsen the material circumstances of the under-age children born to or adopted by the spouses”. The Court held that the provision in question thereby infringed the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) because the criterion of the manner of divorce had no cogent link with the legislator's intention to prevent significant worsening of the under-age children's material circumstances in the event of divorce on the ground of living apart.

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2004-2-004

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 25.06.2004 / **e)** U 68/02 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 38/04 / **h)** CODICES (English, Bosnian).

Keywords of the systematic thesaurus:

3.8 **General Principles** – Territorial principles.
 3.25 **General Principles** – Market economy.
 4.8.1 **Institutions** – Federalism, regionalism and local self-government – Federal entities.
 4.8.2 **Institutions** – Federalism, regionalism and local self-government – Regions and provinces.
 5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
 5.3.43 **Fundamental Rights** – Civil and political rights – Right to self fulfilment.
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Free movement of goods, obstacles / Tax, excise, local / Tax, luxury / Tax, refund / Market, unity / Protectionism, administrative.

Headnotes:

Any measure that would impede the movement of goods in the entire territory of the state without reasonable justification amounts to a violation of the constitutional principle of free movement of goods, services, capital and persons.

Summary:

The Deputy Speaker of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina submitted a request to the Constitutional Court for a review of the provisions of Articles 41 and 48 of the Law on Excise Tax and Turnover (Sales) Tax of the Republika Srpska. The applicant claimed that the provision of Article 41.3 of that Law discouraged trade between the Entities and the Brcko District because it

put a foreign importer of goods to the Republika Srpska in a more favourable position as to excise tax than a supplier of the same goods from the other Entity or the Brcko District. The applicant argued that a distinction had been made between a foreign importer and a supplier from the other Entity or the Brcko District: an importer was obliged to make payment of excise tax within the time limit and in the manner envisaged for payment of customs duties and other import fees, whereas a supplier of goods produced in the Federation of Bosnia and Herzegovina (hereinafter: “the Federation”) or the Brcko District was obliged to make payment of excise tax prior to transporting the goods. Such a legal position led to the creation of three separate economic areas in Bosnia and Herzegovina.

Furthermore, the applicant contended that the provision of Article 48.1.2 of the Law interfered with the free movement of goods subject to the payment of excise tax between the Entities and the Brcko District, since the obligation to pay the tax arises according to the location the office of the purchaser in the Republika Srpska. Goods subject to payment of excise tax that were purchased in the Federation and in the Brcko District would be subject to double taxation, resulting in an increase in the price of the goods.

Pursuant to Article III of the Constitution of Bosnia and Herzegovina, the regulation of payment of excise tax and turnover tax on goods subject to payment of excise tax is a competence of the Entities in Bosnia and Herzegovina.

Having examined the said regulations, the Constitutional Court noted that imposition of an obligation to make payment of the excise tax represents a measure of administrative protectionism of a fiscal nature and allows for an additional collection of budget revenues from turnover of luxury goods. An obligation to make payment of the excise tax exists in both Entities and in the Brcko District, and it includes the overall turnover of these goods, regardless of whether they are imported from abroad, produced locally or exchanged between the Entities.

There are three categories of persons under the obligation to make payment of the excise tax in both Entities and in the Brcko District:

1. a producer of goods subject to payment of excise tax;
2. an importer of goods subject to payment of excise tax; and

3. a buyer of goods subject to payment of excise tax from a supplier from the other Entity or the Brcko District.

The place of payment of the excise tax and turnover tax is the office of the producer or the importer, i.e. the office of the purchaser for products procured in the other Entity or the Brcko District. Excise tax on inter-Entity turnover is ultimately paid in the Entity where the final consumption takes place. However, the allocation of excise tax to the Entity of final consumption by its very nature involves payment of excise tax by both the seller and the purchaser, but with the seller receiving a refund of the excise tax on products sold for final consumption in the other Entity.

The constitutional principle of "single market" imposes an obligation on the state to implement its goals: full freedom of movement of persons, goods, services and capital throughout Bosnia and Herzegovina. The Entities are obliged not to prevent the fulfilment of this principle although this does not restrict the state from acting positively so as to accomplish its goal. The concept of "single market" implies that the internal market of Bosnia and Herzegovina should be created by repealing all technical, administrative and other measures which constitute barriers to or controls on the free movement of goods. Full freedom of movement of goods presupposes free exchange of goods in the entire and single customs territory of the state.

In order to guarantee the constitutional principle of the single market efficiently, it would be necessary to link it with Article II.4 of the Constitution, which prohibits discrimination. The concept of prohibition of discrimination may entail the adoption not only of technical measures, but also of positive legislation and a positive obligation of the state to guarantee institutional protection of prohibition of discrimination. Furthermore, the prohibition of discrimination encompasses both formal and substantive discrimination.

The facts that the state must ensure an efficient single market (Article I.4 of the Constitution) and that the Entities regulate certain areas do not automatically mean that the principle of a single market has been compromised. To that end, the state has a wide margin of appreciation as to how to organise a single market within its borders in the most adequate way. Although the constitutional division of competences under Article III of the Constitution allocates certain competences to the Entities that may influence the creation of a single market in accordance with the state's obligation, the autonomous status of the Entities is subject to the hierarchically superior competences of the state, which include protection of the Constitution and its

principles. In the particular case, primacy had to be given to the principle of the single market and the exercise of its related freedoms, and to the principle of state sovereignty. In that respect, the supremacy of the state over the Entities and the Brcko District, which follows from Article III.3.b of the Constitution, allows it to take appropriate measures to enable all persons to enjoy constitutional rights.

Moreover, the Constitutional Court found that the treatment of the "inter-Entity purchaser and seller" of goods subject to payment of excise tax, lacks affirmation. Namely, excise tax is paid in inter-Entity trade in the Entity of final consumption. However, the very manner of allocation of excise tax toward the Entity of final consumption includes payment of excise tax by the seller and the purchaser, the seller then receiving a refund of the excise tax paid in respect of products sold in the other Entity. In this way, the turnover of goods are burdened at one point with two payments of excise tax and two procedures of collection. Furthermore, the possibility of obtaining a refund of excise tax paid is complicated by the need for submission of evidence of the purchaser's subsequent payment in another territorial unit. In this way, the state avoids in part its obligation to organise an effective excise tax collection system, placing responsibility instead on the seller. If the seller cannot obtain the evidence to establish all the facts, the seller cannot obtain a refund of the money paid. Finally, goods intended for consumption are not treated in the same way as goods which are not being sold to the end consumer, although the principle of final consumption should be applied to both categories. In this way, the various parts of the chain of movement are treated differently. Such a system represents an administrative obstacle that impedes access to the market of Bosnia and Herzegovina because it does not create equal conditions actors who appear on the market, which represents one of important conditions of a single market, and because it is not in line with Article I.4 of the Constitution.

Languages:

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



Identification: BIH-2004-2-005

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 25.06.2004 / **e)** U 8/04 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 40/04 / **h)** CODICES (English, Bosnian).

Keywords of the systematic thesaurus:

1.3.4 **Constitutional Justice** – Jurisdiction – Types of litigation.

1.3.4.9 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of the formal validity of enactments.

4.3.1 **Institutions** – Languages – Official language(s).

4.3.2 **Institutions** – Languages – National language(s).

4.5.6 **Institutions** – Legislative bodies – Law-making procedure.

4.5.6.3 **Institutions** – Legislative bodies – Law-making procedure – Majority required.

5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.

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

5.3.40 **Fundamental Rights** – Civil and political rights – Linguistic freedom.

Keywords of the alphabetical index:

Education, higher, in national language / People, constituent, vital interest / Constitutional Court, law-making, blocked, review.

Headnotes:

Any legal provision which would violate the principle of equality of all languages of the constituent peoples on the whole territory of Bosnia and Herzegovina would constitute a serious violation of that principle and could raise the issue of destructiveness to the national interest of any of the constituent peoples of Bosnia and Herzegovina.

The manner in which the Framework Law provides for the use of only one or two official languages in institutions of higher education and the statute-making process of institutions of higher education is destructive of a vital interest of the constituent peoples, since it does not provide for the possibility of equal use of the official languages of all three constituent peoples in Bosnia and Herzegovina.

Summary:

The Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina submitted to the Constitutional Court a request for a

review of procedural regularity in order to establish the constitutional grounds for the statement made by the Croat Caucus that the Proposal for the Framework Law on Higher Education in Bosnia and Herzegovina was destructive of a vital interest of the Croat People.

The Croat Caucus claimed that the Framework Law did not provide for a clearly defined, unquestionable and unequivocally guaranteed provision stipulating that in the future the Croats would be allowed to have at least one University in Bosnia and Herzegovina with the Croat language as official language and the other two constituent peoples their respective languages.

According to Article IV.3.e of the Constitution, “a proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniac, Croat, or Serb people by a majority of, as appropriate, the Bosniac, Croat or Serb Delegates”. A decision may be declared destructive by a reference made by the majority of delegates of the Caucus of one people from the House of Peoples (at least three candidates) to Article IV.3.e of the Constitution. The consequences of that are stricter voting criteria compared to those set out in Article IV.3.c of the Constitution, or more precisely, “such a proposed decision shall require for approval in the House of Peoples a majority of the Bosniac, Croat and Serb Delegates present and voting”. In this way, the proposed law may continue through the parliamentary stages only under stricter democratic requirements because the parliamentary majority is given an additional dimension. Where the proposed law does not obtain the required majority in the House of Peoples, the law may not be passed in the House, since it did not obtain its confidence.

When a majority of the Bosniac, Croat, or Serb Delegates objects to the reference to Article IV.3.e of the Constitution, the Chair of the House of Peoples shall immediately convene a Joint Commission, consisting of three Delegates selected by the Bosniac, Croat and Serb Delegates, to resolve the issue. If the Commission fails to do so within five days, the matter will be referred to the Constitutional Court, which shall review it for procedural regularity in an expedited procedure.

The role of the Constitutional Court, if a request is made to it, should be to ensure that the aforementioned procedure is being followed. On the other hand, it clearly follows from the above-mentioned provisions that this kind of dispute arises out of a situation in which the representatives of constituent peoples cannot reach an agreement on whether or not a decision is destructive of the vital

interest of one of its peoples. This results in the work of the Parliamentary Assembly being blocked, since the proposed decision cannot obtain the confidence of a majority of the delegates of a certain people or peoples. In this regard, the role of the Constitutional Court is to assist in the unblocking of the work of the Parliamentary Assembly of Bosnia and Herzegovina by its decision on the merits of the question as to whether a provision is destructive of a vital interest of a people where the Parliamentary Assembly is not capable of overcoming the problem by itself.

Article IV.3.e and IV.3.f and Article V.2.d of the Constitution introduce the principle of protection of the vital interest of constituent peoples as an additional safeguard of constitutional protection.

The Constitutional Court emphasised that “the effective possibility of the equal use of the Bosnian, Croatian and Serbian languages, not only before the institutions of Bosnia and Herzegovina but also at the level of the Entities and any subdivisions thereof with regard to the legislative, executive and judicial powers and in public life” is one of the group rights which is protected, *inter alia*, by Article II.4 of the Constitution in conjunction with Articles I.4, II.3.m and II.5 of the Constitution as well as the European Charter for Regional and Minority Languages.

The concept of vital interest of one constituent people falls into the functional category and has to be approached as such. On the other hand, the protection of those vital interests must not endanger the implementation of the theory of efficiency and rationality of the state, which is closely connected to the neutral and essential understanding of the term of citizenship, as the criterion of belonging to a “nation”. In other words, the protection of a vital interest must not lead to the unnecessary disintegration of civil society as a necessary element of modern sovereignty.

The Constitutional Court found that in a wider sense the official use of a language certainly includes education in that language.

Unlike the Constitution of Bosnia and Herzegovina, the Constitutions of the Entities that is to say, the Constitution of the Republika Srpska (Amendment LXXVII) and the Constitution of the Federation (Amendment XXXVII) define the vital national interests of the constituent peoples, and both provide for “equal rights of the constituent peoples in decision-making process, education, religion, language, culture, tradition and cultural inheritance”.

The Constitutional Court concluded that the Framework Law raised the questions inherent to the term of vital interest of all constituent peoples and the Croat People in the particular case.

Article 18 of the Framework Law provides that institutions of higher education shall, in accordance with provisions of this law have, *inter alia*, the rights to determine as their official language or languages, one or more languages of the constituent peoples of Bosnia and Herzegovina. The aforementioned provision provides for the possibility of determining all three, or one or two official languages of the constituent peoples as official language of an institution of higher education if the statute providing for such a provision is approved.

However, the Constitutional Court held that such an approach to the issue of the official use of a language, whose consequence would be that some institutions of higher education would have only one or two of the official languages of the three constituent peoples as official language, constituted a limitation of the right to equal use of the official languages of all three constituent peoples. In a multinational state such as Bosnia and Herzegovina neither assimilation nor segregation on the ground of language is a legitimate aim in a democratic society. The Constitutional Court had already noted in its Fourth Partial Decision in Case no. U-5/98, paragraph 34 that “the legislation of BiH must account for the effective possibility of the equal use of the Bosnian, Croatian and Serbian languages in public life. The highest standards of Articles 8 through 13 of the European Charter for Regional and Minority Languages should thus serve as a guideline for the three languages mentioned and the lower standards mentioned in the European Charter might – taking the appropriate conditions into consideration – be sufficient only for other languages.”

The Constitutional Court emphasised that its decision taken on the matter referred to it under the procedure set out in Article IV.3.f of the Constitution of Bosnia and Herzegovina did not aim to review the constitutionality of the proposed legal provisions which constituted the background to the proceedings before it. The aim of its decision was to give a final answer to the question which neither the House of Peoples nor the Joint Commission of the House of Peoples could answer, namely whether the Framework Law was destructive of a vital interest of one or more peoples. In accordance with the courts decision, the House of Peoples is obliged to resume and complete its hitherto blocked procedure with

respect to the Framework Law according to the procedure set out in Article IV.3.e of the Constitution of Bosnia and Herzegovina.

Languages:

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



Bulgaria Constitutional Court

Statistical data

1 May 2004 – 31 August 2004

Number of decisions: 1

Important decisions

Identification: BUL-2004-2-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 05.07.2004 / **e)** 03/04 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 61, 13.07.2004 / **h)**.

Keywords of the systematic thesaurus:

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

4.1.1 **Institutions** – Constituent assembly or equivalent body – Procedure.

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

4.5.2.1 **Institutions** – Legislative bodies – Powers – Competences with respect to international agreements.

4.16.1 **Institutions** – International relations – Transfer of powers to international institutions.

Keywords of the alphabetical index:

European Union, accession, constitutional amendment / State, organisation, change / International Criminal Court, extradition, citizen, constitutional revision.

Headnotes:

The revision of the Constitution of the Republic of Bulgaria necessary for its accession to the European Union may be approved not only by the Grand National Assembly but also by the ordinary National Assembly.

Summary:

The proceedings opened on 21 April 2004, following a request from the President for a binding interpretation of Articles 153 and 158 of the Constitution to establish which of the two procedures for revising the Constitution must be followed in the case of the following amendments:

- a constitutional provision authorising organs of the European Union to take decisions and draw up legal instruments with supranational, direct and universal effect on Bulgaria;
- repeal of the constitutional provision preventing European Union citizens from owning land;
- provision for European citizenship and its resulting consequences;
- provisions authorising the national organs of state to exercise representative functions in the organs of the European Union;
- a provision authorising the National Assembly to exercise prior scrutiny during the process of drawing up legal instruments adopted by the organs of the European Union;
- a provision authorising the handing over of Bulgarian citizens to a foreign state or international court to face criminal prosecution if such handing over is provided for in an international agreement to which Bulgaria is party;
- further references to equal rights for citizens in accordance with the European Union's Charter of Fundamental Rights.

The Court was also asked to rule on whether these constitutional amendments, which were necessary for Bulgaria's admission to the European Union, represented changes in the form of state structure or form of government.

The Constitutional Court found that the constitutional changes set out in the President's request and linked to Bulgaria's accession to the European Union could be approved by the ordinary National Assembly. The amendments did not fall within the Grand National Assembly's exclusive prerogative.

The Constitutional Court decided that any constitutional amendments concerning:

- a constitutional provision authorising organs of the European Union to take decisions and draw up legal instruments with supranational, direct and universal effect on Bulgaria;
- repeal of the current constitutional provision preventing European Union citizens, whether individuals or legal persons, from owning land;

- a legal provision on European citizenship and its resulting consequences;
- a provision authorising national organs of state to exercise representative functions in the organs of the European Union;
- authorisation for the National Assembly to exercise prior scrutiny during the process of drawing up legal instruments approved by the organs of the European Union;
- authorisation for the handing over of Bulgarian citizens to a foreign state or international court to face criminal prosecution pursuant to an international agreement to which Bulgaria is party;
- further references to equal rights for citizens in accordance with the European Union's Charter of Fundamental Rights,

did not constitute changes in the form of state structure or form of government.

Changes and amendments to the Bulgarian Constitution such as those referred to above could be approved not only by the Grand National Assembly but also by the ordinary National Assembly.

Languages:

Bulgarian.



Canada

Supreme Court

Important decisions

Identification: CAN-2004-2-002

a) Canada / **b)** Supreme Court / **c)** / **d)** 18.05.2004 / **e)** 29618 / **f)** Harper v. Canada (Attorney General) / **g)** *Canada Supreme Court Reports* (Official Digest), [2004] 1 S.C.R. 827, 2004 SCC 33 / **h)** Internet: <http://www.droit.umontreal.ca/doc/csc-scc/en/index/html>; 239 *Dominion Law Reports* (4th) 193; 320 *National Reporter* 49; [2004] S.C.J. 28 (Quicklaw); CODICES (English, French).

Keywords of the systematic thesaurus:

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

3.16 **General Principles** – Proportionality.

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

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

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

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

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

Keywords of the alphabetical index:

Election, campaign, restrictions / Election, campaign, spending limits / Election, third party election advertising.

Headnotes:

For the majority of the Court, although the limits on third-party election advertising expenses set out in Section 350 of the Canada Elections Act infringe the right to freedom of political expression, they are justified under Section 1 of the Charter. The objectives of the scheme are threefold:

1. to promote equality in political discourse;

2. to protect the integrity of the financing regime applicable to candidates and parties; and
3. to ensure that voters have confidence in the electoral process.

These objectives are pressing and substantial. The limits on third-party advertising expenses are rationally connected to the objectives and minimally impair the right to free expression. The limits allow third parties to inform the electorate of their message in a manner that will not overwhelm candidates, political parties or other third parties while precluding the voices of the wealthy from dominating political discourse. The salutary effects of Section 350, namely that it promotes the fairness and accessibility of, and increases Canadians' confidence in, the electoral system outweighs its deleterious effect, namely that the spending limits permit third parties to engage in informational but not necessarily persuasive campaigns.

Section 350 does not infringe the right to vote protected by Section 3 of the Charter. Nor does it interfere with the right of each citizen to play a meaningful role in the electoral process. The right to meaningful participation in Section 3 does not guarantee unimpeded and unlimited electoral debate or expression. Equality in political discourse is necessary for there to be meaningful participation in the electoral process, and it ultimately enhances the right to vote. In the absence of spending limits, it is possible for the affluent, or for a number of people or groups pooling their resources and acting in concert, to dominate political discourse, thereby depriving their opponents of a reasonable opportunity to speak and be heard and undermining the voter's ability to be adequately informed of all views.

Section 351 is ancillary to Section 350 and its primary purpose is to preserve the integrity of the advertising expense limits established under Section 350. It does not violate freedom of expression, the right to vote or freedom of association. With respect to freedom of association, Section 351 does not prevent individuals from joining to form an association in the pursuit of a collective goal but rather precludes an individual or group from undertaking an activity, namely circumventing the limits on third-party election advertising set out in Section 350.

Sections 352-57, 359-60 and 362 do not infringe Section 3 of the Charter, as they enhance the right to vote. However, because they restrict the political expression of those who do not comply with the scheme, these sections have the effect of limiting free expression. The infringement of Section 2.b is justified under Section 1. The disclosure and reporting requirements vary depending on the

amount spent on election advertising, and the personal information required of contributors is minimal. By increasing the transparency and accountability of the electoral process, they discourage circumvention of the third-party limits and reinforce the confidence Canadians have in their electoral system.

Section 323 infringes the right to free expression by prohibiting third parties from advertising on polling day, but the infringement can be saved under Section 1. The objective of Section 323 – to provide an opportunity to respond to any potentially misleading election advertising – is pressing and substantial. The section is rationally connected to this objective and is minimally impairing. It has not been demonstrated to have any deleterious effects. Lastly, while Section 323 also engages the informational component of the right to vote, it does not infringe Section 3 of the Charter as it does not have an adverse impact on the information available to voters.

Summary:

H. brought an action for a declaration that Section 323.1 and 323.3, Sections 350-57, 359-60 and 362 of the Canada Elections Act were of no force or effect for infringing Sections 2.b, 2.d and 3 of the Canadian Charter of Rights and Freedoms (freedom of expression, freedom of association, right to vote, respectively). Section 350 limits third-party election advertising expenses to \$ 3000 in a given electoral district and \$ 150,000 nationally; Section 351 prohibits individuals or groups from splitting or colluding for the purposes of circumventing these limits; Sections 352-57, 359-60 and 362 require a third party to identify itself in all of its election advertising, appoint financial agents and auditors, and register with the Chief Electoral Officer; and Section 323 provides for a blackout on third-party advertising on polling day. The trial judge concluded that Sections 350 and 351 were in prima facie violation of Sections 2.b and 2.d and that neither was justified under Section 1 of the Charter. The Court of Appeal upheld the decision at trial that Sections 350 and 351 were unconstitutional and also struck down Sections 323, 352-57, 359-60 and 362 on the basis that the provisions “must all stand or fall together as part of the same design”. The majority of the Supreme Court of Canada set aside the Court of Appeal’s judgment, holding that the provisions of the federal election legislation:

1. restricting third-party election advertising expenses,
2. prohibiting individuals or groups from splitting or colluding to circumvent these limits,

3. obliging a third party to identify itself in all its election advertising, appoint financial agents and auditors and register with the Chief Electoral Officer, and
4. providing for a blackout on third-party advertising on polling day, are constitutional.

Dissenting opinion

A group of three judges dissented in part. They found that Section 350 prevents citizens from effectively communicating their views on election issues and infringes Section 2.b of the Charter. The right of a citizen to hold views not espoused by a registered party and to communicate those views is essential to the effective debate upon which our democracy rests and lies at the core of the free expression guarantee. The limits imposed on citizens amount to a virtual ban on their participation in political debate during the election period, except through political parties, and it was not demonstrated that limits as draconian as these are required to meet the perceived dangers. The dissenting judges also found that Section 351 is invalid, since it is keyed exclusively to the spending limits in Section 350.

Languages:

English, French (translation by the Court).



Identification: CAN-2004-2-003

a) Canada / **b)** Supreme Court / **c)** / **d)** 23.06.2004 / **e)** 29872 / **f)** Application under Section 83.28 of the Criminal Code (Re) / **g)** *Canada Supreme Court Reports* (Official Digest), [2004] 2 S.C.R. 248, 2004 SCC 42 / **h)** Internet: <http://www.droit.umonreal.ca/doc/scc-csc/en/index.html>; 240 *Dominion Law Reports* (4th) 81; 322 *National Reporter* 205; 184 *Canadian Criminal Cases* (3d) 449; 21 *Criminal Reports* (6th) 82; [2004] S.C.J. no. 40 (QuickLaw); CODICES (English, French).

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.4 **General Principles** – Separation of powers.

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

3.20 **General Principles** – Reasonableness.

5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.

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

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

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

Keywords of the alphabetical index:

Terrorism / Hearing, investigative / Hearing, *in camera*.

Headnotes:

When correctly interpreted and properly applied, the antiterrorist provisions of the Criminal Code authorizing the issuance of an order for the gathering of information and a judicial investigative hearing do not infringe the right against self-incrimination or the principles of judicial independence and impartiality.

The wide ambit given to the judiciary by the Criminal Code to set or vary the terms and conditions of a Section 83.28 of the Criminal Code order enables the judge to respond flexibly to the specific circumstances of each application and ensures that constitutional and common law rights and values are respected. As to the threshold for relevance and admissibility, when viewed purposively, the judicial investigative proceeding can be regarded as a criminal proceeding. The common law evidentiary principles clearly apply as does the Canada Evidence Act. More importantly, the judge is present to ensure that the procedure is carried out in accord with constitutional protections.

Summary:

Two accused were charged with several offences in relation to the explosion of Air India Flight 182 and the intended explosion of Air India Flight 301. Shortly after the beginning of their trial, the Crown brought an *ex parte* application seeking an order that a Named Person, a potential Crown witness at the Air India trial, attend a judicial investigative hearing for examination pursuant to Section 83.28 of the Criminal Code, which is one of the new provisions added to the Code as a result of the enactment of the Anti-

terrorism Act in 2001. The application judge granted the order and set a number of terms and conditions to govern the conduct of the investigative hearing, among others, the hearing was to be conducted *in camera* and notice of the hearing was not to be given to the accused in the Air India trial, to the press or to the public. Counsel for the accused became aware of the proceedings and informed the application judge that they wished to make submissions. Counsel for the Named Person also applied to challenge the constitutional validity of Section 83.28. The constitutional challenge and the application to set aside the order were heard *in camera*. The judge presiding at the hearing concluded that the initial Section 83.28 order had been validly issued and that Section 83.28 was constitutionally sound. She varied the initial order to permit counsel for the accused to attend the investigative hearing and examine the Named Person under certain conditions. A majority of the Supreme Court of Canada dismissed the Named Person's appeal.

The majority of the Court found that Section 83.28, when correctly interpreted and properly applied, is constitutional. Counsel for the witness is not restricted to objections on specified grounds in light of the wide ambit given to the judiciary by the Criminal Code to set or vary the terms and conditions of a Section 83.28 order.

Although statutory compulsion to testify and the consequences for a named person of failing to comply with Section 83.28 both clearly engage liberty interests under Section 7 of the Canadian Charter of Rights and Freedoms, Section 83.28 does not infringe the right against self-incrimination. Section 83.28.10 provides both use immunity and absolute derivative use immunity and a constitutional exemption is provided by the principle that testimonial compulsion is precluded where its predominant purpose is to determine penal liability.

Judges acting under Section 83.28 do not lack institutional independence or impartiality, nor are they co-opted into performing an executive function. Section 83.28 requires the judge to act judicially, in accordance with constitutional norms and the historic role of the judiciary in criminal proceedings. Section 83.28 is consistent with the judiciary's role, which in this context is to protect the integrity of the investigation and the interests of the named person. A reasonable and informed person, viewing the relevant statutory provisions in their full historical context, would conclude that the court is independent. The conclusion in the *Vancouver Sun* appeal [CAN-2004-2-004] that hearings are presumptively to be in open court also supports a conclusion that the judiciary is independent and impartial.

The purpose of the hearing in this case was to investigate a terrorism offence, not to obtain pre-trial discovery. However, because the investigative hearing was sought in the midst of an ongoing trial and in total secrecy, some pre-trial advantage might have been given to the Crown. The ruling in the *Vancouver Sun* appeal that there is a presumption favouring open hearings and the participation of counsel would have overcome these concerns.

Dissenting opinion

Three dissenting judges concluded that the Crown's resort to Section 83.28 in this case was at least in part for an inappropriate purpose, namely, to bootstrap the prosecution's case in the Air India trial by subjecting an uncooperative witness, the Named Person, to a mid-trial examination for discovery before a judge other than the Air India trial judge. The Named Person had been equally uncooperative with the defence, and in the circumstances resort to the Section 83.28 procedure was unfair to the accused and an abuse of process.

Two of those three judges also concluded that Section 83.28 is unconstitutional. They were of the view that this section compromises the institutional dimension of judicial independence. Although a judge may be independent in fact and act with the utmost impartiality, judicial independence will not exist if the court of which he is a member is not independent of the other branches of government on an institutional level. In this case, Section 83.28 requires judges to preside over police investigations; as such investigations are the responsibility of the executive branch. This cannot but leave a reasonable, well-informed person with the impression that judges have become allies of the executive branch.

Languages:

English, French (translation by the Court).



Identification: CAN-2004-2-004

a) Canada / b) Supreme Court / c) / d) 23.06.2004 / e) 29878 / f) Vancouver Sun (Re) / g) *Canada Supreme Court Reports* (Official Digest), [2004] 2 S.C.R.332, 2004 SCC 43 / h) Internet: <http://www.droit.umontreal.ca/doc/scc-csc/en/index.html>; 240 *Dominion Law Reports* (4th) 147; 322 *National Reporter* 161; 184 *Canadian Criminal Cases* (3d) 142; 21 *Criminal Reports* (6th) 142; [2004] S.C.J. no. 41 (QuickLaw); CODICES (English, French).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
5.3.13.9 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Public hearings.

Keywords of the alphabetical index:

Terrorism, hearing *in camera* / Hearing, investigative, public / Open court, principle.

Headnotes:

An application by the Crown for an order to hold a judicial investigative hearing pursuant to the anti-terrorism provisions of the Criminal Code is properly made *ex parte* and heard *in camera*, but there is a presumption that the investigative hearing should be held in open court. The presumption of openness should be displaced only upon proper consideration of the competing interests at every stage of the process.

Summary:

Two accused were charged with several offences in relation to the explosion of Air India Flight 182 and the intended explosion of Air India Flight 301. Shortly after the beginning of their trial [CAN-2004-2-003], the Crown brought an *ex parte* application seeking an order that a Named Person, a potential Crown witness at the Air India trial, attend a judicial investigative hearing for examination pursuant to Section 83.28 of the Criminal Code, which is one of the new provisions added to the Code as a result of the enactment of the Anti-terrorism Act in 2001. The application judge granted the order and set a number of terms and conditions to govern the conduct of the investigative hearing, among others, the hearing was to be conducted *in camera* and notice of the hearing was not to be given to the accused in the Air India trial, to the press or to the public. Counsel for the accused became aware of the proceedings and the application judge held that they could make submissions on the validity of the initial order to the judge

presiding over the Section 83.28 hearing. The presiding judge began to hear the accused's submissions and a challenge to the constitutional validity of Section 83.28 by the Named Person *in camera*. A reporter of the Vancouver Sun, who had recognized lawyers from the Air India trial entering a closed courtroom, was denied access to the proceedings. The Vancouver Sun filed a notice of motion before the presiding judge seeking an order that the court proceedings be open to the public. Prior to hearing the motion, the presiding judge concluded, *in camera*, that the initial Section 83.28 order had been validly issued and that Section 83.28 was constitutionally sound. She varied the initial order to permit counsel for the accused to attend the investigative hearing and examine the Named Person under certain conditions. The judgment was sealed until the conclusion of the investigative hearing. When the courtroom was finally opened to the public, the presiding judge delivered, in open court, a synopsis of her reasons for judgment. The Vancouver Sun then made its motion, which was dismissed. A majority of the Supreme Court of Canada allowed in part the Vancouver Sun's appeal from the order dismissing its motion.

A majority of the Court noted that Section 83.28.2 provides that applications for an investigative hearing are *ex parte*, and by their nature, they must be *in camera*, but that there is no express provision for any part of the investigative hearing to be *in camera*. This hearing requires full judicial participation in the conduct of the hearing itself, and the proper balance between investigative imperatives and openness will best be achieved through the discretion granted to judges to impose terms and conditions on the conduct of a hearing under Section 83.28.5.e. In exercising that discretion, judges should reject the presumption of secret hearings. Parliament chose hearings of a judicial nature and they must contain as many of the guarantees and indicia that come from judicial involvement as is compatible with the task at hand. The existence of an order for an investigative hearing, and as much of its subject-matter as possible, should be made public unless, under the balancing exercise of the *Dagenais/Mentuck* test, secrecy becomes necessary.

In this case, the level of secrecy was unnecessary. While the Section 83.28.2 application was properly heard *ex parte* and *in camera*, there was no reason to keep secret the existence of the order or its subject-matter. The identity of the Named Person was properly kept confidential in light of the position taken by the Named Person at that stage, but that should have been subject to revision by the hearing judge. Since a potential Crown witness in the Air India trial was the subject of the investigative order, third party interests ought to have been considered and notice

should have been given promptly to counsel for the accused in the Air India trial. As much information about the Named Person's constitutional challenge as could be revealed without jeopardizing the investigation should have been made public, subject, if need be, to a total or partial publication ban. The constitutional challenge should not have been conducted *in camera* since much of it could have been properly argued without the details of the information submitted to the application judge being revealed.

The Named Person now takes the position that the investigative hearing should be public, and the only factors now favouring secrecy relate to the protection of an ongoing investigation or other vital but unstated reasons. In a case in which so much of the information relating to the offence is already in the public domain, and in which recourse to an investigative hearing is sought in the midst of an ongoing non-jury trial, the case for extensive secrecy is a difficult one to make and was not made out here. Accordingly, the name of the Named Person should be made public and the order made by the presiding judge should be varied so that the investigative hearing is held in public, subject to any order of the hearing judge that the public be excluded and/or that a publication ban be put in place regarding aspects of the anticipated evidence to be given by the Named Person. At the end of the investigative hearing, the hearing judge should review the need for any secrecy and release publicly any gathered information that can be made public without unduly jeopardizing the interests of the Named Person, third parties or the investigation.

Two judges dissented in part. They were of the view that, although openness of judicial proceedings is the rule and covertness the exception, where the rights of third parties would be unduly harmed and the administration of justice rendered unworkable by the presence of the public, a court may sit *in camera*. Such is normally the case for investigative proceedings under Section 83.28 of the Criminal Code. It is only after the information and evidence has been gathered by the Crown at the investigative hearing that the hearing judge will be able to balance the competing interests at stake and release non-prejudicial information.

Languages:

English, French (translation by the Court).



Croatia

Constitutional Court

Important decisions

Identification: CRO-2004-2-005

a) Croatia / b) Constitutional Court / c) / d) 11.05.2004 / e) U-I-2495/2002 / f) / g) *Narodne novine* (Official Gazette), 69/04 and 99/04 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.

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.

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

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

5.3.41 **Fundamental Rights** – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Election, presidential, result, complaint / Electoral commission, ruling, appeal.

Headnotes:

The principles of an objective legal order must be respected in the procedure for the protection of an electoral right (electoral dispute), in particular the principles of integral proceedings and the legitimacy of the parties, because they are the foundations of general procedural law of the Republic of Croatia and the guarantees of legal certainty.

Persons authorised to lodge a complaint with the competent electoral commission (the first-instance body competent for resolving the electoral disputes) have to be the same as the persons authorised to file an appeal with the Constitutional Court (the second-instance body competent for resolving electoral disputes), because they are integral legal proceedings and consequently the circle of entities authorised

to apply for legal remedies in electoral disputes must be the same.

Summary:

The Constitutional Court accepted the proposal of a non-governmental organisation (the applicant) to initiate proceedings for reviewing the constitutionality of the Act on the Election of the President of the Republic of Croatia (*Narodne novine*, nos. 22/92, 42/92-correction and 71/97, hereinafter: “the AEP”) in the part referring to the provisions of Articles 44.1 and 2 and 47.1 of the Act. It did not accept the alternative proposal for instituting a review of constitutionality of the Act in its entirety.

The applicant submitted that the disputed provisions of Article 44.1 and 2 of AEP were not in accordance with the provision of Article 91.1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, as Article 91.1 permits a larger circle of persons to institute proceedings for the protection of an electoral right than the provisions of the impugned Act.

Article 47 of the AEP prescribes that the entity which lodged the complaint with an electoral commission and a candidate for President of the Republic may bring an appeal to the Constitutional Court against a ruling by an electoral commission. The applicant stated that Article 91.2 of the Constitutional Act prescribed that the appeal was to be submitted through the competent electoral commission within 48 hours from the receipt of the impugned ruling. The applicant argued that because voters could not participate in the proceedings leading to a delivery of a ruling, voters could not receive a ruling. Consequently, voters were denied the right to appeal to the Constitutional Court.

The Constitutional Court Act is, by virtue of Article 131.2 of the Constitution, a regulation with the legal power of the Constitution, since it has been adopted and amended under the procedure for passing and amending the Constitution of the Republic of Croatia itself. By contrast, the AEP is, under Article 83.2 of the Constitution, an organic law passed by a majority vote of all representatives, and therefore has legal power that is inferior to that of the Constitutional Court Act. Pursuant to the provision of Article 5 of the Constitution, the AEP has to be in accordance with the Constitution, and also with the relevant provisions of the Constitutional Court Act, which has the power of the Constitution.

Article 91.1 of the Constitutional Court Act stipulates:

“Article 91.1

Political parties, candidates, not less than 100 voters or not less than 5% of voters of the

constituency in which elections are held shall have the right to appeal to the Constitutional Court against a ruling of the competent electoral commission (electoral dispute).”

According to that provision, the following have the right to submit an appeal against the ruling of the competent electoral commission to the Constitutional Court:

- political parties;
- candidates;
- not less than 100 voters; and
- not less than 5% of voters of the constituency in which elections are held.

However, the disputed provision of Article 44.1 of the AEP defines the circle of persons authorised to lodge a complaint for irregularity in the nomination procedure as:

- the political party that nominated a presidential candidate;
- two or more political parties that proposed a presidential candidate;
- voters who nominated a presidential candidate; and
- presidential candidates.

Furthermore, the disputed provision of Article 44.2 of the AEP permits the following to lodge a complaint regarding the electoral procedure:

- a political party whose candidate was voted for in the elections;
- the voters whose candidate was voted for in the elections; and
- the presidential candidate who was voted for in the elections.

It is obvious that in both cases the legislator gave a smaller circle of entities the right to lodge a complaint than those authorised in the relevant provision of Article 91.1 of the Constitutional Act, which gives the right to lodge a complaint to a larger circle of entities. The Constitutional Court found that those authorised to lodge a complaint with the competent electoral commission have to be identical with those authorised to file an appeal with the Constitutional Court, as they are integral legal proceedings and so the circle of entities authorised to apply for legal remedies in electoral disputes must be the same.

The Court reaffirmed the opinion expressed in its Decision no. U-VII-226/2004 of 23 January 2004 (*Narodne novine*, no. 11/04).

Since the disputed provisions of Article 44.1 and 2 of AEP were contrary to the provision of Article 91.1 of the Constitutional Court Act because they granted a smaller circle of entities the right to lodge a complaint and an appeal to protect an electoral right, the Constitutional Court found that the disputed provisions were not in compliance with the principle of constitutionality and legality stipulated by Article 5 of the Constitution, and for that reason struck them down.

According to the Constitutional Court, the legislator's obligation in the AEP is to ensure that the right to submit complaints and appeals in electoral disputes is granted to all legal entities, which have the right to do so under the Constitutional Act, regardless of the stage of the electoral dispute proceedings.

The disputed provision, therefore, gives a presidential candidate a right of appeal against the ruling of the competent electoral commission rendered in proceedings which the candidate did not initiate or to which he was not a party.

The Constitutional Court found that the principles of an objective legal order must be also honoured in the procedure for the protection of an electoral right (electoral dispute), and especially the principles of integral proceedings and the legitimacy of the parties, because they are the foundations of general procedural law of the Republic of Croatia and the guarantees of legal certainty.

For the reasons stated above, the Court struck down part of Article 47.1 so that the provision now reads: “An appeal against the Electoral Commission of the Republic of Croatia may be submitted to the Constitutional Court of the Republic of Croatia by the applicant in the complaint.”

Languages:

Croatian, English.



Identification: CRO-2004-2-006

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 09.06.2004 / **e)** U-I-323/2004 / **f)** / **g)** *Narodne novine* (Official Gazette) / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

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

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

4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.

5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Company, public, privatisation, privileged terms / Share, acquisition, gratuitous / Share, acquisition, privileged terms.

Headnotes:

The issues of privatisation and the privatisation models to be implemented are economic and political issues and thus fall within the explicit exclusive competence of the legislator (Article 2.4.1 of the Constitution).

Therefore, it is the legislator's right, within the stated Constitutional and legal bounds, to regulate a privatisation process and define categories of citizens who shall receive a certain percentage of shares free of charge, or who may buy shares under special privileged terms.

Bearing in mind that the Croatian Post and Telecommunications Enterprise was founded as a public enterprise with unlimited liability owned by Croatia, the legislator has, in regulating the right of Croatian Defenders, members of their families and CT employees to acquire CT shares under favourable conditions, regulated a legal relationship within the bounds of constitutionally stipulated authority.

Summary:

The Constitutional Court of Croatia examined the applicant's proposal to initiate proceedings for the review of the constitutionality of Articles 2.1.1 and 2 of the Croatian Telecommunications Ltd Privatisation Act (*Narodne novine*, nos. 65/99 and 68/01, hereinafter: "the CTPA").

The applicant claimed that the disputed provisions of the CTPA were not in accordance with Articles 3 and 14.2 of the Constitution since they placed, without justification, certain groups of citizens (defenders, members of their families, employees of the Croatian Telecommunications Ltd) in a privileged position in relation to others.

Bearing in mind that the applicant's reasons were not identical with the reasons considered by the Court in previous proceedings, and that in the applicant's view the disputed provisions had the purpose of enabling "someone to acquire that property in an easy way", the Constitutional Court found that the applicant's allegations were not well-founded.

The disputed provisions read:

"Article 2

Privatisation of the Croatian Telecommunications Ltd (hereinafter: "the CT") in Article 1.2 of this Act shall be carried out as follows:

- the allotment free of charge of 7% of CT shares to the Croatian Defenders and members of their families; and
- the sale of 7% of CT shares to CT employees and former CT and Croatian Post Ltd employees, and to former employees in the Public Enterprise for Postal and Telecommunications Traffic, CPT – Croatian Post and Telecommunications (hereinafter: "the employees and former employees"), under special favourable terms, which shall be laid down by the Government of the Republic of Croatia [...]."

The Croatian Telecommunications Ltd Privatisation Act was the subject of previous constitutional proceedings in which the Constitutional Court rendered Ruling no. U-I-628/99 *et al.*, of 12 July 2001 (unpublished), whereby the proposal to initiate the proceedings to review the constitutionality of that Act was not accepted.

Pursuant to the provision of Article 54 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (*Narodne novine*, no. 49/02, consolidated text, hereinafter: "the Constitutional Act"), the Constitutional Court may review the constitutionality of a law even if the law has already been the subject of Constitutional Court review.

While examining the applicant's allegations, the Constitutional Court held that the relevant provision of the Constitution, namely Article 2.4.1 of the Constitution, empowers the Croatian Parliament to decide on the regulation of economic, legal and political relations

in the Republic of Croatia in accordance with the Constitution and laws. While doing so, the legislator is obliged to take into account the requirements set out by the Constitution, in particular those emerging from the principle of the rule of law and those that protect certain constitutional values and rights. The issues of privatisation and choice of privatisation models are both economic and political issues, and therefore fall within the above-mentioned exclusive competence of the legislator.

The contested provisions are thus not contrary to Articles 3 and 14.2 of the Constitution.

Languages:

Croatian, English.



Identification: CRO-2004-2-007

a) Croatia / b) Constitutional Court / c) / d) 09.06.2004 / e) U- II-929/2003 / f) / g) *Narodne novine* (Official Gazette) / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
 3.16 **General Principles** – Proportionality.
 3.18 **General Principles** – General interest.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.2 **Fundamental Rights** – Equality.
 5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Association, membership, obligatory / Diving, activity, requirements.

Headnotes:

The Court found that a diving activity with proper diving equipment might only be engaged in after completing the necessary training and obtaining the necessary qualifications, which are recognised by the competent administrative bodies, since the risk for

persons engaged in such activity is unrivalled with that in other sports.

The restrictions prescribed by the disputed Ordinance are legitimate because they are aimed at the protection of people's health and are therefore not in conflict with the provision of Article 16.1 of the Constitution. They are also proportional to the nature of the need for limitation, in accordance with Article 16.2 of the Constitution.

The funds acquired by collection of a prescribed fee for engaging in diving go to the state budget and are used to finance specialised health services connected with underwater activities and to enhance coastguard services.

Summary:

The Constitutional Court did not accept the proposals to review the constitutionality and legality of the Ordinance on the Revisions and Amendments of the Ordinance on Underwater Activities (*Narodne novine*, no. 23/2003, hereinafter: "the Ordinance").

The proposals did not contain any reasons in support of the allegation of a violation of the provisions of Articles 14 and 32 of the Constitution, and therefore the Constitutional Court did not find justification to initiate the proceedings.

The applicants, individuals and diving clubs, challenged the Ordinance as a whole as well as some of its provisions.

Pursuant to the provision of Article 1.b of the Ordinance, a diving organiser is obliged to issue a diving logbook for each dive-team leader who shall enter all the requisite diving data, *inter alia*, the data about health examinations, and the logbook has to be certified by the competent port authority or its branch office.

Article 2.a of the Ordinance stipulates as follows:

"Organised diving in the Republic of Croatia shall be performed by legal and natural persons possessing a concession permit for engaging in underwater activities (training divers, organising diving excursions etc.)
 Diving shall be performed in accordance with the Individual Diving Permit."

Article 5.a.1 of the Ordinance stipulates as follows:

"The permit in Article 2.a.2 shall be issued by the Port Authority or its branch office. The permit shall

be issued to persons with a valid Diving Card under Article 5 of the Ordinance, for a period of one year from the date of issue.”

The applicants contended that the disputed Ordinance was contrary to Articles 14, 16 and 32 of the Constitution. They argued that diving for the purpose of pleasure and sport could not be characterised as a dangerous activity because it, by its nature, caused no harm to third persons, and they substantiated that argument with data on recorded diving accidents. They further claimed that the above-mentioned provisions had been passed for the purpose of ensuring a privileged position for legal and natural persons possessing a concession permit for underwater activities in relation to persons engaging in individual diving. They considered the following conditions to be a violation of the individual's rights: mandatory membership in an association, including payment for an annual membership card; an assessment as to whether a person was qualified to dive for the purpose of recreation and sport; and payment for an individual diving permit. Moreover, the applicants claimed that they were in an unequal position in relation to all other persons involved in other recreational sports and emphasised that the Croatian Diving Federation had unreasonably been placed in a privileged position since it alone was authorised to issue diving cards to persons having the requisite diving qualifications. Some applicants deemed that the challenged Ordinance did not secure any more protection of the seabed and diving safety than could have been achieved by rigorously applying previous laws and regulations.

Relying on Articles 25 and 42 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (*Narodne novine*, no. 49/02, consolidated text, hereinafter: “the Constitutional Act”) the Court requested information from the body that had issued the disputed Ordinance – the Minister of Maritime Affairs, Transport and Communications of the Republic of Croatia, which stated that the Ordinance had been issued in accordance with the Constitution and Maritime Code.

The subject of the constitutional review was a regulation issued to implement a law; therefore, it had the nature of delegated legislation. An implementing regulation must firstly be in accordance with the law on the basis of which it was passed, and secondly, with the Constitution. During the review of the constitutionality of a regulation, the Court examines whether it has been passed by the competent entity, whether that entity had the legal authority to pass that regulation and whether that regulation fell within the framework set out by the law.

The Constitutional Court found that the disputed ordinance had been issued in accordance with the enabling act by the legally authorised body. It also found that the applicants' allegations were not founded in the part that related to the restriction of the rights and freedoms of citizens in such a way as to make it impossible for individuals to engage in diving for pleasure and sport, since the Ordinance stipulates the conditions under which anyone, under equal conditions, may engage in the activity. The Ordinance relates only to diving with diving equipment with an underwater breathing apparatus; it does not refer to breath-hold diving, which may continue to be practised without fees and or conditions.

The disputed Ordinance stipulates the conditions for performing underwater activities (diving) for pleasure and sport in the internal waters and the territorial sea of the Republic of Croatia, and distinguishes between organised and individual diving.

Article 1a of the Ordinance defines organised diving as diving under the permanent supervision of an authorised professional person (dive-team leader), diving centre or diving association (diving organiser), and which is recorded in the diving logbook. It defines individual diving as any diving that is not organised.

It emerges from the provisions of the Ordinance that individual diving activity may be engaged in by every individual, if he/she possesses a diving card issued by the Croatian Diving Federation, and a permit for individual diving. Article 5.4 of the Ordinance stipulates that a diving card may only be issued to a person with the requisite diving qualifications that are recognised by the Ministry of Education and Sport.

The Court found that the activity defined by the Ordinance could not be compared with other kinds of sports mentioned by the applicants because persons who have received the necessary training and obtained the requisite qualifications recognised by the competent administrative bodies may only engage in diving with diving equipment. The risk to the person engaged in this activity is incomparable with that of other sports.

The Ordinance increases the safety of both organised and individual diving since the Croatian Diving Federation card may only be obtained together with the requisite diving qualifications in accordance with the rules of the profession of the Croatian Diving Federation, which are coordinated with the rules of international diving organisations.

The Court found the restrictions provided for in the disputed enactment (e.g. the obligation to provide the data relating to the dive-team leader's health, to keep

a diving logbook etc.) legitimate and aimed at the protection of human health. The restrictions were not contrary to the provision of Article 16.1 of the Constitution, which stipulates that the freedoms and rights may be restricted only by law in order to protect the freedoms and rights of others, public order, public morality and health. The provision of Article 16.2 of the Constitution, setting out that every restriction of freedom or right has to be proportional to the nature of the need for limitation in each individual case, had to be established before those restrictions could be found to be proportional to the nature of the necessity of issuing them.

The applicants' basic objection aimed at the prescribed fee for engaging in diving activity was not a reason for annulling the Ordinance, since the funds acquired by collection of the prescribed fee go to the state budget and are used to finance the specialised health services connected with underwater activities and the enhancement of coastguard services.

Languages:

Croatian, English.



Identification: CRO-2004-2-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 30.06.2004 / **e)** U-I-3115/2003 / **f)** / **g)** *Narodne novine* (Official Gazette), 95/04 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
 3.21 **General Principles** – Equality.
 3.23 **General Principles** – Equity.
 4.5.2 **Institutions** – Legislative bodies – Powers.
 4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

Keywords of the alphabetical index:

Tax, exemption / Tax, health services.

Headnotes:

Health institutions and companies are legal entities in different legal positions. They are created and perform their activities, as a rule, on the basis of different regulations. Consequently, it is not contrary to the Constitution to prescribe different obligations for their activities, even where the activities themselves are partly the same.

Summary:

As to the proposal lodged by the Private Employers in Health Association to institute proceedings to review the constitutionality of Article 11.1.5 of the Law on Value Added Tax (*Narodne novine*, nos. 47/95, 106/96, 164/98, 105/99, 54/00 and 73/00, hereinafter: “the LVAT”) because of its alleged non-compliance with the provisions of Articles 3, 48 and 49 of the Constitution, the Constitutional Court found that the disputed provision of Article 11.1.5 of the LVAT was in accordance with the Constitution. In deciding so, it took into account the opinion it had expressed earlier (in the Decisions nos. U-I-607/1996 etc. of 5 May 2000, *Narodne novine*, no. 68/00, and U-I-1021/2000 of 6 June 2001).

The applicant submitted that some tax exemptions were unfair and contrary to the Constitution because they included some but not all entrepreneurs. The Court found that those statements were not relevant in constitutional law for instituting proceedings to review conformity with the Constitution of the disputed legal provision and its striking down.

The Court did not review the applicant's claim that the disputed provision was contrary to that of Article 2 of the LVAT because the mutual agreement of legal provisions was not subject to Constitutional Court review in the sense of Article 128 of the Constitution.

The disputed provision reads:

“Article 11

The following shall be exempted from paying the Value Added Tax: [...]

5. medical services provided in health institutions, medical centres, emergency medical aid, polyclinics, general and special hospitals and clinics, and medical services provided by health institutions for home care, and the supply of goods by the above-mentioned institutions.”

The Constitutional Court may, in accordance with the provision of Article 54 of the Constitutional Act on the Constitutional Court, review the constitutionality of a law even if this law has already been the subject of

Constitutional Court review. By virtue of Article 2.4.1 of the Constitution, the Croatian Parliament may, in accordance with the Constitution and law, independently decide on the regulation of economic, legal and political relations in the Republic of Croatia. This particular constitutional provision was the basis on which the Law on Value Added Tax was adopted regulating a part of the taxation system in the Republic of Croatia.

In accordance with Article 51.2 of the Constitution the taxation system has to be based on the principles of equality and equity. This implies that tax liabilities have to be determined for and distributed among all taxpayers in proportion to their capacity and ability to pay tax. Determining the kind of tax, tax rates, tax assessment, method of paying tax, taxpayers and other issues important for the taxation system is part of the taxation policy and the taxation system in general, which is regulated by law and regulations passed on the basis of laws and must conform to the Constitution and law (Article 5.1 of the Constitution).

Value Added Tax is calculated and paid in accordance with the provisions of the LVAT (Article 1.1). The Act also establishes the cases of exemption from VAT and regulates in detail prerequisites for that exemption.

Article 11 of the LVAT specifies the legal subjects and the conditions under which those subjects are exempt from paying VAT for particular services performed and goods supplied in the Republic of Croatia. The disputed provision extends this exemption to health institutions that provide medical services in medical centres, emergency medical aid, polyclinics, general and special hospitals and clinics, and medical services provided by the institution for home care.

Health protection is regulated by the Health Protection Act (Article 1.1). According to the provision of Article 23.1 of that Act, the supply of services and products related to health protection is an activity that is in the interest of the Republic of Croatia, and is performed as a public service. However, activities related to health protection, pursuant to Article 34.1 of the Health Protection Act, may be engaged in by health institutions, companies and self-employed health workers under conditions and in the manner prescribed in that Act, the Health Insurance Act, (*Narodne novine*, nos. 1/97, 109/97, 13/98, 88/98, 10/99 and 34/99), Institutions Act and Companies Act (*Narodne novine*, nos. 111/93, 34/99, 121/99 and 118/03).

According to the provision of Article 2.4 of the Companies Act, a company may be founded for the purpose of engaging in business or other activities.

Pursuant to the provisions of that Act, the company is a trader, regardless of whether it engages in business or other activities, and a trader is a legal or natural person who independently and permanently engages in a certain business activity to make a profit by producing goods, selling goods or providing services (Articles 1.1 and 2.5).

Article 111 of the Health Protection Act stipulates that a company may be founded for the purpose of engaging in activities related to health protection. Article 112 of the same Act provides that the company mentioned under Article 111 of the Act may not engage in the full activities of health institutions such as clinical hospital centres, clinical hospitals, general hospitals, health institutes, medical centres and emergency medical aid institutions. Therefore, such a company is not covered by the disputed tax exemption.

The Court found that the applicant's allegations in the specific case cast no doubt on the earlier finding of the Constitutional Court with respect to the constitutionality of the provisions of Article 11 of the LVAT, and no changes had occurred in the legal order demanding a different approach.

Languages:

Croatian, English.



Identification: CRO-2004-2-009

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 08.07.2004 / **e)** U-IIIB-1005/2004 / **f)** / **g)** *Narodne novine* (Official Gazette), 96/04 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.4.4 **Constitutional Justice** – Procedure – Exhaustion of remedies.
 1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.
 1.6.6 **Constitutional Justice** – Effects – Execution.
 1.6.9 **Constitutional Justice** – Effects – Consequences for other cases.

4.7.15.1.2 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Powers of ruling bodies.

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

5.4.9 **Fundamental Rights** – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Bar, admission, requirements / Constitutional Court, decision, binding force.

Headnotes:

With regard to the actions of competent bodies in renewed proceedings, pursuant to the provision of Article 31.1 of the Constitutional Act on the Constitutional Court, the decisions and rulings of the Constitutional Court are binding and every individual or legal person shall follow them. In renewed proceedings, the competent judicial or administrative body, the body of a unit of local and regional self-government, and a legal person with public authority are obliged to follow the legal opinion of the Constitutional Court expressed in the decision annulling the act.

In renewed proceedings the Management and Executive Board of the Bar Association (the competent body) grossly violated the applicant's constitutional rights by not following the legal opinion of the Constitutional Court and by not respecting the binding legal standards laid down by the Constitutional Court in case-law regarding Article 49.2 of the Legal Profession Act. The disputed ruling is an absolute obstacle to the applicant's being able to practice law in Croatia and amounted to grave and irreparable consequences that endanger the applicant's constitutional right to be accepted in all public services in Croatia, under equal conditions for all, as guaranteed by Article 44 of the Constitution.

Summary:

The constitutional complaint was submitted pursuant to Article 63.1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (hereinafter: "the Constitutional Act") under which constitutional court proceedings may be initiated before all legal remedies have been exhausted in cases where the disputed individual act grossly violates the applicant's constitutional rights. It must be completely clear that if the Constitutional Court proceedings are not initiated, grave and irreparable consequences may arise for the applicant.

The matter for review before the Constitutional Court related to a decision of the Management and Executive Board of the Croatian Bar Association, rejecting the applicant's request to have his name entered in the Register of Attorneys and Trainee Lawyers of the Croatian Bar Association. The decision was contrary to the views of the Constitutional Court, expressed in its Decision no. U-III-706/2003 of 8 July 2003 (*Narodne novine*, no. 120/03).

In its Decision no. U-III-706/2003, the Court found that the competent bodies of the Croatian Bar Association had established, as the only legally relevant factors to the application of the provision contained in Article 49.2 of the Legal Profession Act (*Narodne novine*, no. 120/03), that the applicant in that case had not performed his duties as an attorney for more than six months in 1991 (behaviour which competent bodies of the Croatian Bar Association had found unjustified). For that reason, the Court found that "...establishing whether a person is worthy of being an attorney cannot be grounded on one mistake made by the person in the past, because this may become an absolute obstacle for acquiring the right to practice law as a public service, which contravenes Article 49 of the Legal Profession Act, as well as Articles 44 and 54 of the Constitution."

According to Article 49.2 of the Legal Profession Act, a person is not worthy of being an attorney when his/her previous behaviour or activity does not guarantee that he/she will conscientiously practise the profession of attorney.

A new ruling of the Executive Board of the Croatian Bar Association, delivered after the decision of the Constitutional Court, explained that in the renewed proceedings the new ruling was based on the negative opinion of the Management Board of Osijek Local Bar Association regarding the entry of the applicant's name in the Register of Attorneys of the Croatian Bar Association and on the negative opinion of the Commission for Examining the Worthiness of Candidates for inclusion in the Register of Attorneys and Trainee Lawyers. The Executive Board of the Croatian Bar also noted that it accepted the views of the Constitutional Court on interpreting legally undefined terms, in the specific case "worthiness", expressed in the Decision no. U-III-439/1995 of 20 December 1995. Consequently, the decision on denying the request for inclusion in the Register of Attorneys in the renewed proceedings had not been based only on the fact that the applicant had not performed his duty for longer than 6 months, but also on the following facts; he had abandoned his clients and left for an unknown destination during war conditions at a time when

clients had increased concern for their interests: had made it impossible to be called upon to defend his country in a war because he had not been available to state bodies; and instead of defending his country, he had engaged in entrepreneurial activities in his companies in H.

Having considered the reasons for the decision in the renewed proceedings, the Constitutional Court found that the grounds for refusing the request for inclusion in the Register of Attorneys were connected with the reasons stated by the Constitutional Court in its Decision no. U-III-706/2003 in its finding of insufficient reasons for determining that the applicant was unworthy of performing the duty of attorney. For the reason that he had not practised as attorney for a period longer than six months during 1991, his name had been struck from the Register of Attorneys; therefore, the Court held as especially unacceptable the part of the explanation for the disputed decision in which the Executive Board of the Croatian Bar Association had found that “in that whole period, from the state of war to the state of truce to the state of peace, the applicant did not show any care for his clients who had given him his confidence.” When his name had been struck from the Register of Attorneys, the applicant ceased to be an attorney; therefore, the emphasis on his duty to care for his clients in the period after 1992 (through the period of truce to the state of peace) reflected an impermissible degree of arbitrary decision-making by a competent body. Equally, connecting the evaluation of worthiness to practise as an attorney with the work the applicant performed after his name had been struck from the Register of Attorneys was not, and could not be, a justified reason for refusing his request for entering his name in the Register as long as the applicant performed his new work in accordance with the law and the competent governmental bodies did not sanction his absence from the country in 1991 as illegal behaviour.

With regard to the actions of the competent bodies in the renewed proceedings, the Court recalled the binding force of the decisions and rulings of the Constitutional Court (Article 31.1 of the Constitutional Act). On the grounds of the provision of Article 77 of the Constitutional Act, the Constitutional Court, where it allows a constitutional complaint and annuls the disputed act, it states the reasons for which a particular constitutional right has been violated and the elements of that violation, and pursuant to the provision of Article 76.2 of the Constitutional Act, the competent judicial or administrative body, body of a unit of local and regional self-government, and legal person with public authority are obliged in the renewed proceedings to follow the legal opinion

expressed by the Constitutional Court in the decision annulling the act.

The Constitutional Court found that the Executive and Management Board of the Croatian Bar Association did not follow the legal opinion expressed by the Constitutional Court in Decision no. U-III-706/2003, even though the Board had stated in the disputed ruling that the opinion of the Court regarding interpretation of the legally undefined concept of “worthiness” expressed in the Decision no. U-III-439/1995 of 20 December 1995 had been taken into account. However, the content of the decision showed the opposite.

By not following the legal opinion of the Constitutional Court and by not respecting the binding legal standards laid down by constitutional case-law regarding Article 49.2 of the Legal Profession Act, the Executive Board of the Croatian Bar Association had grossly violated the applicant’s constitutional rights, guaranteed in Articles 14.2, 29.1, 44 and 54 of the Constitution. However, the Court did not find a violation of Article 35 of the Constitution, as alleged by the applicant in the supplement to the constitutional complaint.

The Constitutional Court partly accepted the reasons stated by the applicant as to the grave and irreparable consequences that might arise as being relevant in constitutional law. The fact that the applicant had no other employment or source of income in the Republic of Croatia, and the impossibility of taking over his father’s office did not qualify as leading to grave and irreparable consequences in the sense of Article 63.1 of the Constitutional Act on the Constitutional Court, a requirement for his being able to institute the constitutional court proceedings before exhausting all legal remedies. On the other hand, the fact that the disputed rulings – and the reasons for making them as given by the first-instance body – would become an absolute obstacle to the applicant’s being able to practice law in the Republic of Croatia represented a grave and irreparable consequence and endangered the applicant’s constitutional right to be accepted in all public services in the Republic of Croatia, under equal conditions for all, as guaranteed in Article 44 of the Constitution.

Languages:

Croatian, English.



Identification: CRO-2004-2-010

a) Croatia / b) Constitutional Court / c) / d) 08.07.2004 / e) U-III-2028-2002 / f) / g) *Narodne novine* (Official Gazette), 102/04 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

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

5.3.13.9 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Public hearings.

5.3.13.20 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Adversarial principle.

Keywords of the alphabetical index:

Summons, issue, rules.

Headnotes:

The principle of equal means is only one expression of the concept of a fair trial, which includes also the party's basic right for the proceedings to be adversarial. Only adversarial proceedings enable parties access to and the ability to express their opinion about the views or evidence presented by the opposite party.

A party to the proceedings has not been duly served with a summons for trial where service has been performed in such a way that the server, upon not finding the party at home, leaves notification that the party may collect the summons at the post office within a specific deadline.

Summary:

The Constitutional Court quashed the disputed lower courts' decision and returned the case for renewed proceedings because it found the applicant's constitutional right in Article 29.1 had been violated. Article 29.1 reads:

"Everyone shall have the right to an independent and fair trial provided by law which shall, within a reasonable term, decide on his rights and obligations, or upon the suspicion or the charge of a penal offence."

The Court did not find the provisions of Articles 14.2 and 26 of the Constitution relevant for deciding the applicant's complaint.

The right to the fair trial was infringed in the procedural sense because the applicant had not been given the opportunity to present facts and to adduce evidence at the hearing on 16 April 2002. The competent court did not secure the applicant's right to make the submissions that he considered important for deciding the case, because the trial had been concluded at that hearing, and judgment had been rendered mainly on the basis of the submissions of one side – the plaintiff. Therefore, there was an infringement of the principle of equal means, which must be available to both parties in the trial.

In those proceedings, both the plaintiff and the publisher of the publication in which the information that insulted the plaintiff's reputation and honour had been published had to have the same procedural guarantees and enjoy the same procedural rights. If their rights were not equal, as found in the case, the proceedings to correct the information would be a direct infringement of the right to a fair trial guaranteed by Article 29.1 of the Constitution.

In the Constitutional Court proceedings, it was found that at the hearing scheduled for 16 April 2002 the applicant's attorney had not been present, and the summons for that hearing, which had been sent to him, had been returned with the stamp of the post office – "Informed, did not collect the mail". The first instance court had decided to hold the hearing in the absence of the defendant and had only considered the evidence adduced by the plaintiff before concluding the hearing.

At appeal, the applicant had alleged a fundamental infringement of civil procedure, prescribed by Article 354 of the Civil Procedure Act, which reads:

"...

The fundamental infringement of civil procedure shall always exist if: [...]

7. any of the parties are by any unlawful proceedings, and especially by omitting the service of summons, not provided with the opportunity to attend a trial in the court."

Also relevant are the provisions on the service of summons and communications of the Civil Procedure Act:

“Article 141

Where the person on whom the written communication is to be served is not at home at the time of service, service shall be performed by handing over the communication to an adult member of the household, who is obliged to accept the communication. Where there is no such person at home, the communication shall be handed over to the concierge or a neighbour, if they agree to accept it.

Where service is to be performed at the workplace of the person on whom the written communication is to be served, and that person is not there at the time of service, service may be made on a person in the same workplace, if the person agrees to accept the communication.”

“Article 142.2

Where the person on whom the written communication has to be served in person is not at the place where the service is to be performed, the server shall enquire as to when and where he may find this person and leave for him, with one of the persons in Article 141.1 and 141.2 of this Act, written notification to be at home or at his workplace on a specific day and hour to receive the written communication. Where after doing so, the server does not find the person on whom the communication is to be served, the server shall act according to the provisions of Article 141 of this Act, and it shall be considered that the communication has been duly served.”

The Constitutional Court held that the following amounted to an infringement of relatively fundamental importance: the second instance court’s dismissal of the applicant’s appeal on the grounds that the procedural steps at the first instance hearing had been completed in accordance with the law, and that the failure to collect the summons for the main hearing (first hearing) was at a party’s risk and fell within the sphere of the party’s power of disposition at the trial. Moreover, the Constitutional Court held that the second instance court’s dismissal departed from an earlier Decision no. Rev-2747/94 of 6 April 1995:

“The party has not been duly served with a summons for a trial if service is performed in such a way that the server, upon not finding the party at home, leaves notification that he may collect the summons at the post office within a specific deadline.”

Languages:

Croatian, English.



Czech Republic Constitutional Court

Statistical data

1 May 2004 – 31 August 2004

- Judgments by the plenary Court: 2
- Judgments by chambers: 45
- Other decisions of the plenary Court: 12
- Other decisions by chambers: 812
- Other procedural decisions: 98
- Total: 969

Important decisions

Identification: CZE-2004-2-007

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 04.05.2004 / **e)** I. US 113/04 / **f)** Free will and free individual action / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

4.7.1 **Institutions** – Judicial bodies – Jurisdiction.

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

5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Law, interpretation, implications / Contract, parties, autonomy / Freedom of action, general.

Headnotes:

On the constitutional level free will and free individual action must be understood in a double sense. In its first dimension it represents a structural principle according to which state authority may be asserted in relation to the individual solely in cases where an individual’s conduct violates an explicitly formulated prohibition laid down in a law. Such prohibition must in addition only reflect the requirements of preventing the individual from encroaching upon the rights of

others and of attaining the public good and must be both legitimate and proportional.

In its second dimension, free will and free individual action signifies an individual right to have state authorities respect the autonomous manifestation of one's personhood, including manifestations of the will, which are reflected in specific conduct, to the extent that such conduct is not expressly prohibited by law. In this second dimension, it is an individual right which operates immediately in relation to state authority and thus must be directly applied. When the state bodies apply ordinary law, they must interpret the norms of that law in such a way that they do not encroach upon the right of the individual's free will. This also applies to norms which govern the interpretation of the individual's manifestation of the will.

Summary:

The complainant contested a Regional Court ruling, upholding a ruling by a Municipal Court in which the latter court held that it was not the proper venue for a case dealing with a loan agreement. In its ruling the Municipal Court expressed the view that a jurisdiction agreement (an agreement conferring jurisdiction upon a particular court) is invalid to the extent it lays down "the court in city X" as the proper venue for the hearing of mutual disputes. There are two courts in city X (the Municipal Court and the District Court), so that in the Municipal Court's view it is not clear from the agreement which of these two courts is meant to be the proper venue in the matter. On these grounds, the Court considered the agreement to be indefinite and thus invalid. The Regional Court upheld this conclusion.

In the jurisdiction agreement, the complainant stipulated, as the proper venue, the court in X which has subject-matter jurisdiction to hear the matter. The complainant is of the opinion that, in the present state of the law, such court can be no other than the Municipal Court in X. On these grounds, the complainant considers the court's conclusions to be legal formalism and believes that exaggerated demands regarding the formulation of a jurisdiction agreement significantly intrude upon the liberty of contract flowing from the principle of the priority of the citizen before the State, as well as from the principle of contractual freedom. The complainant considers that the contested Regional Court ruling constitutes a violation of her constitutionally-guaranteed fundamental rights, in particular the right to act in accordance with the principle of contractual freedom, the right to a lawful judge and the right to equal status in judicial proceedings. For all of the above-stated reasons, she proposed that the Constitutional Court quash the contested rulings.

The Regional Court in X reacted to the Constitutional Court's request for its views by proposing that the constitutional complaint not be granted.

The Constitutional Court came to the conclusion that the constitutional complaint is well-founded. Apart from the flagrant failure to respect a mandatory norm, another of the conditions for the Constitutional Court to intervene in ordinary court decision-making, and thereby in the application of ordinary law, is excessive formalism in the ordinary courts' interpretation of ordinary legal norms. A state body violates the right of individual free will where, by means of a formalistic interpretation of ordinary legal norms, it denies consequences to a contract to which one of the parties, intended to give rise.

The Constitutional Court came to the conclusion that the given case represents just such a situation where the ordinary courts interpreted the provisions of the Civil Code and Civil Procedure Code in an excessively formalistic manner.

In interpreting the provisions of ordinary law, ordinary courts must act in such a way that they do not encroach upon the right of the individual to do anything which is not expressly prohibited by law and do not compel individuals to do that which is not expressly imposed by law. This applies as well to norms which govern the interpretation of the individual's manifestation of will, where formalism, consisting in the interpretation solely of the contractual text itself without regard to the purpose of the underlying transaction when interpreting an individual's legal transaction, can in consequence also be related to the formalism of the interpretation of the legal norm itself.

In the case under consideration, the Regional Court in X interpreted the manifestation of the will of the complainant and the second party such that it determined it to be indefinite, without even affording them the opportunity to express their views. That manifestation was found to be indefinite due to the fact that there are two courts with subject matter jurisdiction over the matter, both of which have their seat in X. Moreover, in the ordinary court's view, such an indefinite manifestation of will renders the jurisdiction agreement invalid, which means that it refused to recognize the consequences to which both parties, by manifesting their will, intended to give rise.

As the Constitutional Court has already held in its Judgments I. ÚS 546/03 and I. ÚS 43/04, it does not agree with the formalistic approach of the Regional Court in X, the main aim of which is evidently to eliminate for the future the situation where it would be the proper venue and proper instance to hear all

disputes arising from the complainant's loan agreement, or for any appeal in such matters. In the Constitutional Court's view the decisive factor is, above all, that the parties to the contract referred to the venue, which is always determined by the appropriate judicial district, and not by the place in which a court is located, and further, as indicated above, the parties expressed their will that they intended to construe the proper venue such that it would always be the complainant's ordinary court.

By means of the interpretation the ordinary court adheres to, which is strictly a grammatical interpretation, the ordinary court incorrectly applied the provisions of ordinary law, thus it restricted the impact of free will in determining the ordinary court that will be the proper venue in a civil proceeding.

For the above-stated reasons, the Constitutional Court thus granted the constitutional complaint and quashed the contested decisions.

Languages:

Czech.



Identification: CZE-2004-2-008

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 20.05.2004 / **e)** II. US 198/04 / **f)** The restriction of personal freedom / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

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

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:

Detention, provisional, legal grounds, strict interpretation / Criminal charge.

Headnotes:

Nobody may, by court decision, be placed in custody, or otherwise limited in his personal liberty, except upon grounds laid down in a statute. The legal grounds upon which personal freedom may be restricted by the action of state bodies must always be interpreted strictly. The grounds for the restriction of personal freedom may be expanded solely by statute and not by the interpretation thereof. This is justified first by the fact that the right to personal liberty is a value which takes precedence and is irreplaceable and further by the fact that restriction upon personal liberty in the form of pre-trial custody in criminal proceedings is always in the nature of a preliminary measure enabling a due and fair criminal proceeding to be held and is not predominantly of a preventive nature, and in no sense of a compensatory or repressive nature.

In accordance with the statutory provisions of the Criminal Procedure Code, when deciding about pre-trial custody, the courts must limit their consideration solely to such continuance of criminal activities which occurs after the criminal prosecution has been initiated.

Summary:

In his constitutional complaint, the complainant sought the quashing of the Regional Court's ruling, which rejected on the merits his complaint against the District Court's ruling placing him in pre-trial custody. The complainant asserts that his placement in custody constituted a violation of the provisions of the Charter of Fundamental Rights and Basic Freedoms providing that a person may not be placed in custody on grounds other than those laid down in a statute and on the basis of a court decision.

In his constitutional complaint, the complainant requested that his case be given expedited treatment. The Constitutional Court came to the conclusion that the conditions therefore have been met, since it is undesirable for the consideration of a constitutional complaint to result in the prolongation of the complainant's custody.

The complainant contests the courts' decisions concerning his placement in custody on the basis of the fact that, after his criminal prosecution had been initiated, he engaged in conduct similar to that for which

he was already being prosecuted. In the complainant's view, a broad interpretation of the cited statutory provision is impermissible because the previous conduct of an accused person for which he has already been convicted cannot be taken into consideration.

The Constitutional Court ascertained from the resolution of the police body that the complainant was being prosecuted for the criminal offence of violence against a group of inhabitants or against an individual. Within the limits of that criminal prosecution, the complainant was placed in custody by virtue of the District Court ruling. The reason given for this decision, among others, was that, if the complainant were released from custody, there was a risk of him repeating the criminal conduct for which he was being prosecuted. The complainant is alleged to have engaged in the criminal activity during the trial period of his suspended sentence for the same criminal activity. The Regional Court, in its ruling, rejected on the merits the complainant's complaint against the first instance court's ruling. The appellate court adopted the interpretation whereby the relevant provisions of the Criminal Procedure Code apply as well to cases in which the accused was convicted for the same criminal offence. In the appellate court's view, the intent of the provision is to prevent the commission of the same criminal activity, even if of lesser seriousness, in those cases in which there is a real danger they will be committed repeatedly. The complainant is alleged to have engaged in the proscribed conduct less than three months after he was convicted of the same conduct and sentenced to eight months imprisonment, a sentence which was suspended for a trial period of two years and six months.

As a party to the proceeding, the regional court did not, in its submission on the constitutional complaint, state anything that was not already contained in its ruling contested by the constitutional complaint. The regional state attorney relinquished its status as a second party to the proceedings.

The Constitutional Court does not adjudge the legality of an issued decision (unless constitutionally guaranteed rights are violated thereby), as that is within the ordinary courts' competence. As a matter of constitutional law, the only question which it may adjudge is that as to whether the applications of law put forward by the ordinary courts are in accordance with the Constitution or whether, on the contrary, they represent an encroachment by public authorities of certain constitutionally guaranteed fundamental rights and basic freedoms. Such an encroachment occurred in this case, therefore the constitutional complaint is well-founded.

The complainant is facing, as the outcome of the present criminal prosecution against him, a possible sentence of imprisonment of up to one year, or a monetary fine. An accused may not be placed in pre-trial custody where he is being prosecuted for a criminal offence the maximum prescribed sentence for which does not exceed two years, in the case of intentional criminal acts, or three years, in the case of negligent criminal acts. This restriction does not apply if, among other things, the accused continues in the criminal activity for which he is being prosecuted. But this ground for pre-trial custody may not, however, be extended to include the case of criminal prosecution against an accused who has already in the past been convicted of the same criminal offence.

The Constitutional Court came to the conclusion that the contested ruling by the appellate court violated the complainant's fundamental rights; therefore, it quashed the contested ruling of the appellate court.

Languages:

Czech.



Identification: CZE-2004-2-009

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 30.06.2004 / **e)** Pl. US 23/02 / **f)** The constitutionality of the concept of a "contractual family" / **g)** *Sbírka zákonů* (Official Gazette), 476/2004 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.4 General Principles – Separation of powers.
3.10 General Principles – Certainty of the law.
3.12 General Principles – Clarity and precision of legal provisions.
4.6.3.2 Institutions – Executive bodies – Application of laws – Delegated rule-making powers.
5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – Minors.
5.3.44 Fundamental Rights – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Family, contractual, definition / Child, best interest / Regulation, implementing statute, illegal.

Headnotes:

The contested provisions introduce into the Czech legal order the concept of a “contractual family”, without defining in more detail the content thereof. The degree of uncertainty is so great that the possibility of determining the legal content of this provision by means of the usual methods of interpretation can simply be ruled out. It is thus in conflict with the principle of legal certainty and the principles of the legal order.

The possibility for a child to be placed with a contractual family on the basis of a contract between a diagnostic institution and the contractual family without a sufficient and complete statutory basis for doing so, including judicial supervision, violates the fundamental rights and freedoms of the child.

Summary:

The petitioner, the President of the Republic, submitted a petition seeking the annulment of certain provisions of the Act on Children in Institutional Care and Protective or Preventive Care in Educational Facilities on the ground that they conflicted with the Constitution and the Charter of Fundamental Rights and Basic Freedoms.

This Act introduces into the legal order of the Czech Republic the new concept of the contractual family, without defining its content in more detail. It contains no provisions governing the contractual family’s rights and duties, or even the extent of its responsibility. It permits a diagnostic institution to place a child with a contractual family despite the fact that the institution has undertaken full responsibility for the child’s care under a court decision. The petitioner considered it to be an encroachment upon the protection of the fundamental rights and basic freedoms of children.

The Act empowers the Ministry of Labour and Social Affairs (hereinafter: “the Ministry”) to issue a ministerial regulation laying down the nature of contracts between diagnostic institutions and contractual families, as well as the content and extent of rights and duties thereunder. That regulation would necessarily have to contain the authorisation and the procedure which are required by the statutory rules. Such an empowerment is in direct conflict with the Constitution, according to which the ministries may

issue regulations solely on the basis of and within the bounds of a statute. Thus, it is a prerequisite that such statute contain at least the basic framework for the sub-statutory enactment.

The Constitutional Court requested the views of both the Assembly of Deputies and the Senate of the Parliament of the Czech Republic. The Chairman of the Assembly of Deputies declared that at the time the Act had been adopted, the legislative body had acted in the conviction that the Act was in conformity with the Czech Constitution and with the legal order of the Czech Republic. The Chairman of the Senate of the Czech Republic Parliament stated that he was in favour of the petition submitted by the President of the Republic. In the view of the Public Defender of Rights, the provisions of the Act were in conflict with the Constitution and the Charter. The Ministry concurred in principle with the petitioner’s conclusions.

The Constitutional Court Plenum came to the conclusion that the petition was well-founded. The contested provisions permit a diagnostic institution, on the basis of a contract, (the details of which are not further specified), and without a court order, to place a child with a contractual family. This is a change in the manner of a child’s care on which no court has decided, to which no court has given its consent. Consequently, a diagnostic institution is permitted to vary the decision of a court ordering institutional or protective care. This results in a significant encroachment upon judicial decision-making power. In this way, a child would be placed with a contractual family solely on the basis of a contract entered into by the selected family and the diagnostic institution, without any statutory basis whatsoever or any judicial supervision. Such a legal rule also violated the Czech Republic’s obligations arising, in particular, from Article 9 of the Convention on the Rights of the Child.

The Constitutional Court had declared in an earlier decision: “the indefiniteness of legal provisions must be considered to conflict with the requirements of legal certainty, and thereby also those of the state governed by the rule of law if they are indefinite to such a degree that the possibility of determining the legal content of this provision by means of the usual methods of interpretation can simply be ruled out.” The provisions of the Act, which the petitioner sought to have annulled, met the above stated requirements. A definition of the concept, “contractual family”, was entirely missing from the Act, as was the delineation of the requirements placed upon such family. In order for that concept to become functional, it would have to be regulated in detail in a ministerial regulation. That would, however, constitute an impermissible

delegation to an executive body of the legislative function and would allow restrictions to be placed upon a fundamental right or basic freedom by a sub-statutory enactment.

The Constitution empowers the ministries to issue legal enactments solely on the basis of a statute and within the bounds set out in that statute. The contested provisions of the Act were in conflict with that article of the Constitution because the Ministry was empowered to regulate on a matter with which the Act itself was not at all concerned.

The Constitutional Court adhered to the view that the legal regulation of the selection, preparation and supervision of contractual families had to pursue one basic aim, i.e. the protection of children in the sense that when receiving care within the contractual family they did not suffer any detriment. The Constitutional Court thus decided to annul the said provisions of the Act on Children in Institutional Care and Protective or Preventive Care in Educational Facilities, on the ground that they conflicted with the Constitution of the Czech Republic and the Charter of Fundamental Rights and Basic Freedoms.

Languages:

Czech.



Identification: CZE-2004-2-010

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 14.07.2004 / **e)** I. US 185/04 / **f)** A legitimate expectation as a fundamental right / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
 4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
 5.1.2.2 **Fundamental Rights** – General questions – Effects – Horizontal effects.
 5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.
 5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.
 5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Pacta sunt servanda / Contract, parties, acquired rights / Contract, termination, benefit.

Headnotes:

The courts and the judiciary in general must ensure the protection of the rights of individuals in a law-based state as well as the protection of fundamental rights. Not all fundamental rights are directly enforceable rights that operate immediately in relation to the individual. Some rights operate through individual rules of ordinary law in the sense that they “radiate” through the ordinary law. Such is the case in horizontal relations between private subjects. When interpreting and applying ordinary law to such relations, the courts are obliged to carefully weigh and take into consideration this radiation, so that they may simultaneously respect the obligation to ensure protection both of the rights on the level of ordinary law and of the fundamental rights.

A legitimate expectation as a fundamental right does not operate horizontally, but rather in relation to the state authorities, that is, to a court, which is bound by the duty to provide the protection of such a legitimate expectation, and to do so by means of the interpretation and application of the relevant rules of ordinary law.

Summary:

In a constitutional complaint, the complainant challenged decisions of ordinary courts dismissing his action on the merits against commercial Firm X for the payment of a certain sum. The Municipal Court had rejected the complainant’s appeal and upheld the first instance court’s judgment. The Supreme Court of the Czech Republic had ruled that the complainant’s subsequent extraordinary appeal against the Municipal Court’s judgment was inadmissible.

The heart of the dispute before the ordinary courts concerned the claim for remuneration agreed upon with Firm X, following from the part of the agreement designated as the “addendum on target remuneration”. The defendant firm and the complainant had entered into an agreement, under which the complainant would be entitled to remuneration dependent on the profit of a project overseen by the complainant. Despite the fact that all the conditions for payment of that agreement were fulfilled, Firm X did not pay.

The view of the ordinary courts was that the defendant firm was not obliged to pay the complainant the agreed remuneration because it followed from

“addendum on target remuneration” that “completion of the project” was understood to be “a decision of the managing board on the completion of the project”. The managing board had not adopted any such decision. In the complainant’s opinion, the above-mentioned bilateral legal transaction could not be interpreted in such a way that even though all conditions for payment had in fact been met, Firm X was not obliged to pay the complainant the agreed remuneration as long as the managing board of the defendant firm remained inactive and did not take the purely formal decision on the completion of the project.

The complainant was, therefore, of the view that the ordinary courts’ decisions constituted encroachments upon his constitutionally guaranteed rights, in particular, on his right to fair remuneration for work. He asked the Constitutional Court to quash the contested decisions.

At the Constitutional Court’s request, the District Court, the Municipal Court and the Supreme Court of the Czech Republic gave their views on the constitutional complaint. The District Court and Municipal Court informed the Constitutional Court that they considered the complaint unfounded. The Supreme Court of the Czech Republic stated that the complainant made what he knew to be an erroneous personal assessment of the factual circumstances of the case and, on that differing basis, constructed a differing view of the law applicable to the matter. Firm X proposed that the Constitutional Court reject the complaint on the merits in its entirety.

The Constitutional Court declared that the constitutional complaint was well-founded, although on different grounds than those advanced by the complainant.

The Constitutional Court reviewed, first and foremost, whether the contested decision encroached upon the complainant’s basic right guaranteed by Article 1 Protocol 1 ECHR, and specifically upon the right to the protection of property, with consideration given to the legitimate expectation that his property claim would not be ignored. According to case-law of the European Court for Human Rights (judgment in the matter of *Beyeler v. Italy*, 1996 (*Bulletin* 1999/3 [ECHR-1999-3-012]; *Reports of Judgments and Decisions*, 2000-I), *Zwierzynski v. Poland*, 1996 (*Reports of Judgments and Decisions*, 2001-V), *Broniowski v. Poland*, 2002, etc.) and that of the Constitutional Court of the Czech Republic (for example, Pl. ÚS 2/02), such a legitimate expectation is an integral part of the protection of property rights.

The protection of legitimate expectations is reflected in the individual rules of ordinary law, in the given case, those of labour law. A legitimate expectation did not operate directly between the complainant and Firm X (i.e. between private law subjects), rather it was a constitutionally-guaranteed basic right which operated on the complainant’s relations toward state authorities, i.e. towards a court.

In the course of the proceedings before the ordinary courts, evidence had been adduced showing that the project had been completed and that Firm X profited from it. If the actual conditions for a claim to performance arose, then in the Constitutional Court’s view, a decision of Firm X’s managing board had to be considered as a merely formal confirmation that those conditions existed, and not as an actual condition in itself. The fact that Firm X had not yet decided upon those facts and its failure to do so appeared arbitrary. The coming into being of the claim could not be tied to such a decision, precisely due to the fact that such an attitude on the part of the second party could be considered as the abuse of the exercise of a right and its status in its labour law relations. The Constitutional Court considered that such conduct was also subject to the provisions of the Labour Code laying down that a legal transaction must be considered as unconditional where one of the parties thereto, and whom the failure of the condition benefits, intentionally thwarts its fulfilment. Such conduct also violated the legal principle of “*pacta sunt servanda*”.

That being so, the Constitutional Court reached the conclusion that by adopting the interpretation of ordinary law, those courts had failed to respect their obligation to protect the complainant’s basic rights in the form of his legitimate expectation in obtaining the performance that he demanded from Firm X on the basis of the “addendum on target remuneration”, and those courts had thus encroached upon the complainant’s basic right under Article 1 Protocol 1 ECHR. The Constitutional Court allowed the above-mentioned constitutional complaint and quashed the contested decisions.

Languages:

Czech.



Identification: CZE-2004-2-011

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 18.08.2003 / **e)** Pl. US 7/03 / **f)** The constitutionality of a legal enactment / **g)** *Sbírka zákonů* (Official Gazette), 512/2004 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

1.4.1 **Constitutional Justice** – Procedure – General characteristics.

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

3.13 **General Principles** – Legality.

3.16 **General Principles** – Proportionality.

3.22 **General Principles** – Prohibition of arbitrariness.

4.5.2.3 **Institutions** – Legislative bodies – Powers – Delegation to another legislative body.

4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

5.2.1.2.1 **Fundamental Rights** – Equality – Scope of application – Employment – In private law.

Keywords of the alphabetical index:

Amendment, legislative, judicial review / Norm, sub-constitutional, constitutionality / Legislation, subordinate, limits / Tax, modification of taxation rates / Regulation, executive, rules for adoption.

Headnotes:

An amendment to a legal enactment does not enjoy an independent normative existence rather it becomes an addendum and its constitutionality is adjudged as such. If in a judicial review of a legal enactment the ground for annulment is the lack of competence to adopt the legal enactment or the violation of the constitutionally prescribed means for the adoption of the legal enactment, then it is the constitutionality of the addendum itself which is adjudged.

The observance of the constitutional safeguards of the legislative process must be distinguished from the constitutional definition of the competence to adopt legal enactments. If the rules of the legislative process, which form a part of ordinary law, do not express a constitutional principle, then even their possible violation does not establish a ground for annulment based on the failure to observe the constitutionally-prescribed manner of adoption of a law or another legal enactment.

Summary:

A group of Senators of the Senate of the Czech Republic Parliament petitioned the Constitutional Court for the annulment of the Ministry of Finance Regulation amending the Ministry of Finance Regulation Laying Down the Conditions and the Rates for Statutory Insurance against the Liability of Employers for Damage arising from Work Injuries or Occupational Illnesses. The petitioners argued that the contested regulation conflicted with the constitutional order by violating the manner prescribed by the Constitution for its adoption.

According to the provisions of the Labour Code, draft legal enactments which affect the important interests of employees must be discussed with the appropriate main trade-union bodies. The petitioners alleged a violation of the Labour Code in that the draft regulation had not been submitted to trade-union organisations. The petitioners also asserted that there was a conflict with the constitutional principles of equality and proportionality in that the increase in insurance premiums had been executed in a non-uniform manner. They proposed that the Constitutional Court annul that regulation.

At the Constitutional Court's request, the Minister of Finance submitted his views, in which he rejected as unfounded the arguments advanced by the petitioners and proposed the annulment of the relevant provisions of the Labour Code due to their conflict with the Constitution.

The Constitutional Court pointed out the safeguards according to which a state body, which is authorised to issue a sub-statutory legal enactment, "must act, *secundum et intra legem*", and not outside of the law (*praeter legem*"). The provisions of the Labour Code do not, however, establish legislative competence in the trade-union bodies and employer organisations. These provisions merely enshrine the principle of tripartitism even within the confines of the legislative process.

The Constitutional Court reached the conclusion that the contested regulation had been adopted and issued within the bounds of the competences laid down in the Constitution and in the constitutionally prescribed manner.

In the judicial review of a legal enactment, if there is an allegation of a violation of the safeguards on competences and the legislative process as delimited in the constitutional order, that allegation and the remedy sought extend to the group of all provisions forming the legal enactment. However, the Constitutional Court has repeatedly emphasised that in

adjudging whether there is a conflict between a statute, or individual provisions thereof, with the constitutional order, it is bound solely by the issues raised in the petition and is not limited by the reasoning supporting them (Judgment no. Pl. ÚS 16/93 and others). That does not lead to the conclusion that petitioners who assert in proceedings for judicial review that a statute's content is in conflict with the constitutional order do not bear the burden of proof. In the context of a review, the Constitutional Court is limited solely by the proposed disposition, not by the scope of the review for the reasons advanced in the petition for judicial review. Should the petitioners in proceedings for judicial review not carry the burden of proving the allegation of unconstitutionality, then such a petition could only be deemed as not eligible to be heard on the merits.

In the matter under consideration, the petitioners sought the annulment of the regulation partly on the ground that the constitutional and statutory rules concerning the legislative process of a body authorised to adopt legal enactments were violated and partly on the substantive ground of a conflict with the principle of equality and proportionality in relation to the rate of insurance premiums. The petitioners thus combined the ground of the constitutional defects in the legislative process with the substantive objection of unconstitutionality. Therefore, the Constitutional Court considered the validity of the entire regulation contested by the petitioners solely on the ground that the constitutional safeguards of the legislative process were violated, to the extent that the review of the substantive ground was restricted solely to those provisions of the regulation in relation to which the petitioners carried the burden of proof.

In connection with the petitioners' assertion of inequality and the violation of the principles of proportionality, the Constitutional Court rejected the absolute conception of the principle of equality. The principle of equality is thereby brought into the question of the acceptability under constitutional law of drawing distinctions between subjects and rights. The first perspective, which might be designated by the term, non-accessory inequality, is defined by the exclusion of arbitrariness in drawing such distinctions. The second perspective in adjudging the constitutionality of a legal enactment introducing inequality is whether this inequality affects certain fundamental rights or freedoms (accessory inequality).

However much a tax, fee or fine constitutes an obligatory, public-law monetary obligation to the state (therefore an intrusion into the property substratum, and thus even the property rights of the person), unless it meets other conditions, it does not amount

to an adverse effect upon a person's position vis-à-vis property, as protected in the constitutional order (Article 11 of the Charter of Fundamental Rights and Basic Freedoms, Article 1 Protocol 1 ECHR).

The constitutional review of taxes, fees and fines includes an assessment from the perspective of observing the safeguards flowing from the constitutional principle of equality, and from both a non-accessory inequality perspective (Article 1 of the Charter), flowing from the requirement of excluding arbitrariness when drawing distinctions between subjects and rights, and an accessory inequality perspective.

If accessory inequality is the subject of constitutional review, that review is, in view of the exclusion of discrimination as to property, restricted to cases in which the adjudicated tax, fee or fine has as a consequence a confiscatory impact in relation to a person's total assets. Consequently, the petitioners' arguments fell within the category of non-accessory inequality. As to non-accessory equality, in order for the legal rules under consideration to be deemed constitutional, it is sufficient for the classification in question to bear some rational relation to the aim of the statute.

That being so, the Constitutional Court did not find that the prescribed rate of statutory insurance in relation to employers had a confiscatory impact in relation to their total assets, and thus found the objections of adverse effect on the right to property ill-founded. For those reasons, the Constitutional Court rejected the petition of the group of Deputies of the Senate of the Czech Republic Parliament on its merits.

Languages:

Czech.



Identification: CZE-2004-2-012

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 23.08.2004 / **e)** II. US 516/03 / **f)** Standing of an administrative body to submit a constitutional complaint / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.2.1.3 **Constitutional Justice** – Types of claim – Claim by a public body – Executive bodies.

1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.

5.1.1 **Fundamental Rights** – General questions – Entitlement to rights.

Keywords of the alphabetical index:

Administrative act, judicial review / Constitutional complaint, admissibility.

Headnotes:

An administrative body, whose decision has been successfully contested by means of an administrative action, does not have standing to submit a constitutional complaint against the decision of the Administrative Court. Only subjects who have the capacity to be bearers of fundamental rights and basic freedoms have standing to submit a constitutional complaint.

Summary:

In its constitutional complaint, the Ministry of Finance (hereinafter: “the Ministry”) sought to have quashed the judgment of the Supreme Administrative Court, in which the Ministry’s decision was annulled and the matter returned for further proceedings. The complainant argued that its constitutionally guaranteed rights had been infringed, in particular, the right flowing from the Charter of Fundamental Rights and Basic Freedoms that provides that expropriation is permitted solely in the public interest on the basis of the law and for compensation, and that taxes and fees shall be levied only pursuant to that law. The Ministry was of the view that the Supreme Administrative Court had erred in its decision because it had based its decision on incorrect arguments from a previous Constitutional Court judgment.

Before considering the merits of the petition, the Constitutional Court reviewed whether the conditions were met for consideration of the matter on the merits in proceedings before the Constitutional Court. In that connection, the Constitutional Court dealt with the issue as to whether the petition was submitted by a person who was authorised to do so.

The Constitutional Court had already stated in a previous judgment that an administrative body whose decision had been successfully contested by means of an administrative action did not have standing to submit a constitutional complaint against the decision of the administrative court. The reason is that an

encroachment by a public authority upon constitutionally guaranteed fundamental rights and basic freedoms is part of the definition of the concept of a constitutional complaint under the Constitution, as well as the Act on the Constitutional Court. It follows that only subjects who have the capacity to be bearers of fundamental rights and basic freedoms have standing to submit a constitutional complaint. However, in the case under consideration, the Ministry acted in its capacity as public authority and did not have the requisite legal personality to have standing to take part in proceedings on a constitutional complaint. In the given situation, it acted as a state entity, which, as a subject of public law or bearer of public power, was not and could not at the same time be a subject of fundamental rights or basic freedoms.

Therefore, the Constitutional Court rejected the petition as it was brought by a person manifestly unauthorised to do so.

Languages:

Czech.



Denmark

Supreme Court

Important decisions

Identification: DEN-2004-2-002

a) Denmark / b) Supreme Court / c) / d) 20.08.2003 / e) 158/2003 / f) / g) / h) *Ugeskrift for Retsvæsen* 2003, 2438; CODICES (Danish).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship or nationality.
- 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Restaurant, service, refusal, political expression.

Headnotes:

The refusal by a restaurant owner to serve French and German customers cannot be regarded as an exercise of freedom of expression, conveying a disagreement with the political views of France and Germany on the war in Iraq.

Summary:

The appellant used to own and run a pizzeria by the name of "Aages Pizza" on the Danish island of Fanø. On 10 February 2003 the appellant started what he called a "boycott," where he refused to serve pizzas to French and German citizens visiting Fanø. In the beginning, the appellant informed his customers orally about the boycott. About a week after starting the boycott, the appellant installed signs on the door communicating the boycott. Whenever customers would enter the pizzeria, the appellant would ask them if they spoke German, and whether they were from France or Germany.

The appellant's reason for the boycott was to express his strong disagreement with the political views of the French and German governments on the US-led war in Iraq. According to the appellant, the two countries had caused dissension in NATO and the UN, by acting disloyally towards the United States. The applicant stated that he would continue his boycott, as long as the two countries refused to support the United States in the war on terror.

On 2 May 2003 a Danish-German couple visited the appellant's pizzeria; the Danish husband ordered pizzas in fluent Danish, but the appellant still suspected that the couple might be German. When he overheard the couple speaking together in German, while they were still eating, he took their pizzas from them, threw the pizzas away, and gave the couple their money back.

The appellant was indicted on two separate counts of violation of Section 1.1 of the Danish Racial Discrimination Act: firstly, a general violation of the law caused by the boycott of French and German customers; and secondly, a specific violation of the law caused when he removed the two pizzas ordered by the Danish-German couple on 2 May 2003.

In a judgment delivered on 10 June 2003, the City Court of Esbjerg found the appellant guilty on both counts. The appellant presented two arguments. Firstly, that the anti-racial discrimination law only applied in instances of discrimination against minorities, and thus did not apply to the situation in question, since French and German nationals were not racial minorities in Denmark. Secondly, in case the anti-racial discrimination law did apply, the applicant's actions constituted a symbolic gesture, conveying a political opinion, which was consequently protected by his freedom of expression pursuant to Section 77 of the Constitution and Article 10 ECHR.

The City Court rejected the appellant's first argument and held that according to the Racial Discrimination Act, the law not only applied to cases of discrimination against minorities, but also to all cases of discrimination based on race or nationality.

With respect to the appellant's second argument, the Court acknowledged that his actions were indeed symbolic and thus a manifestation of an expression falling under the sphere of application of Section 77 of the Constitution and Article 10 ECHR. The Court found, however, that the protection of freedom of expression did not prohibit a State from enacting anti-discrimination laws; and, despite the fact that the appellant might have succeeded in bringing even international attention to his views, the appellant's

discriminative actions were not exempted from legal consequences.

On 10 June 2003 the High Court of Western Denmark upheld the judgment of the City Court. The High Court agreed with the City Court that the Racial Discrimination Act did not limit its sphere of application to racial minorities. As regards the question of freedom of expression, the High Court noted that freedom of expression could be restricted where the restriction is prescribed by law and necessary in a democratic society to protect the rights of others. The Danish Racial Discrimination Act had been enacted to implement the 1965 UN International Convention on the Elimination of All Forms of Racial Discrimination. After weighing the appellant's right to freedom of expression against the general protection in the Racial Discrimination Act, the Court concluded that the infringement of the applicant's freedom of expression was justified. Furthermore, the size of the fine imposed was proportional, when the number of French and German nationals that had been discriminated against was taken into account.

Languages:

Danish.



France

Constitutional Council

Important decisions

Identification: FRA-2004-2-004

a) France / **b)** Constitutional Council / **c)** / **d)** 10.06.2004 / **e)** 2004-496 DC / **f)** Law on confidence in the digital economy / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 22.06.2004, 11182 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.3.4.14 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between Community and member states.

1.3.5.2.2 **Constitutional Justice** – Jurisdiction – The subject of review – Community law – Secondary legislation.

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

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

2.3.1 **Sources of Constitutional Law** – Techniques of review – Concept of manifest error in assessing evidence or exercising discretion.

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

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

5.3.36.3 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Electronic communications.

Keywords of the alphabetical index:

Internet, law / Digital economy / Electronic mail, nature / Media, press, criminal offence, limitation period, reply, time-limit / Internet, host, civil and criminal liability / European Community, directive, transposition / Message, on paper, electronic, arrangements for reply.

Headnotes:

Disputes as to whether or not electronic mail is private must be resolved by the courts, since the law merely defines a technical process.

A “host” does not incur civil or criminal liability simply by failing to withdraw information denounced as unlawful by a third party, but only when the unlawful nature of the information complained of is manifest, or removal has been ordered by a court.

Under Article 88-1 of the Constitution: “The Republic shall participate in the European Communities and in the European Union constituted by States which have freely chosen, by virtue of the Treaties that establish them, to exercise some of their powers in common”. The Constitutional Council has concluded from that provision, for the first time, that the transposition of Community directives into domestic law is a constitutional requirement, to which the only obstacle is an express provision to the contrary in the Constitution.

In the absence of such a provision, the Community courts alone may verify, possibly in response to a request for a preliminary ruling, whether a Community directive is consistent with the powers defined by the Treaties and also with the fundamental rights guaranteed by Article 6 EU.

In itself, making distinctions on the basis of the time required to access messages in printed or electronic form does not violate the principle of equality. However, the difference in the arrangements governing the right to reply and the time-limit for doing so, which clearly exceeds that necessary to allow for the special nature of messages available in electronic form only, is unacceptable.

Summary:

The Act on “confidence in the digital economy” was twice referred to the Constitutional Council, once by the National Assembly and once by the Senate. It transposes Community Directive 2000/31/EC of 8 June 2000 on electronic commerce into French law, and is intended to give France an Internet law. The old concepts of telecommunications, audio-visual communications and telematics are replaced by those of electronic communications, electronic communication with the public, and on-line communication with the public.

The Constitutional Council annulled a provision in the Act relating to the time at which the period allowed for replying begins, and the limitation period for press

offences. Although differences in the conditions of reception applying to written and online communications might justify different arrangements, it found that the legislator had violated the principle of equality by permitting civil and criminal proceedings during periods which clearly differed too widely, depending on the medium used.

The Constitutional Council also found it necessary, in considering a provision which transposed a Community directive and covered the civil and criminal liability of hosts, to define its role in respect of Community law and the Community courts. It pointed out that France, in accepting the Community legal system, had agreed that the substance of instruments which transposed Community law would – insofar as they drew the necessary conclusions from precise and unconditional provisions in a directive (which was the case here) – be assessed by the Community courts only. This meant that such instruments had constitutional immunity. Transposing Community directives was not only a Community obligation, but a constitutional obligation as well, and the only obstacle to doing so was an express provision to the contrary in the Constitution. This was not the case here, since the section complained of merely drew the necessary conclusions from the unconditional and precise provisions of the directive transposed by the Act, and the Constitutional Council accordingly held that it had no authority to give a ruling. The applicants’ complaints could not therefore succeed before it.

Cross-references:

- See also Decision 2004-497 DC of 01.07.2004, Law on electronic communications and on audio-visual communication services [FRA-2004-2-005] and Decision 2004-498 DC of 29.07.2004, Law on bioethics [FRA-2004-2-006].

Languages:

French.



Identification: FRA-2004-2-005

a) France / **b)** Constitutional Council / **c)** / **d)** 01.07.2004 / **e)** 2004-497 DC / **f)** Law on electronic communications and on audiovisual communication services / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 10.07.2004, 12506 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.3.4.14 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between Community and member states.

1.3.5.2.2 **Constitutional Justice** – Jurisdiction – The subject of review – Community law – Secondary legislation.

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

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

4.13 **Institutions** – Independent administrative authorities.

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

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

5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Communication, electronic / Communication, audiovisual / Media, audiovisual council, decision, reasons / Media, telecommunications regulatory authority, powers / Media, programmes, local / Advertising, commercial / Media, television, free, service, operator / Media, pluralism, concentration, rules / European Community, directive, transposition.

Headnotes:

Constitutional rules and principles do not in themselves require administrative authorities to give reasons for decisions which do not impose punitive sanctions.

Pluralism of thought and opinion is in itself a constitutional objective, and respect for it is a condition of democracy.

Under Article 88-1 of the Constitution: “The Republic shall participate in the European Communities and in

the European Union constituted by States which have freely chosen, by virtue of the Treaties that establish them, to exercise some of their powers in common”. Transposing Community directives into domestic law is thus a constitutional requirement, and the only obstacle to doing so is an express provision to the contrary in the Constitution. When no such provision exists, verifying that a Community directive is consistent with the powers defined by the Treaties, and also with the fundamental rights guaranteed by Article 6 EU, is a matter for the Community courts alone, possibly in response to a request for a preliminary ruling.

This means that complaints directed at national laws which merely draw the necessary conclusions from the unconditional and precise provisions of a Community directive are ineffective.

On the other hand, complaints directed at national laws which do not merely draw the necessary conclusions from the unconditional and precise provisions of a Community directive are not ineffective.

Summary:

The Act on electronic communications and audiovisual services draws conclusions in domestic law from five Community directives which radically alter the rules applying to the telecommunications sector (now known as electronic communications).

The Constitutional Council upheld the five contested provisions or groups of provisions.

Specifically, it held that:

- the power to determine charges for the universal “electronic communications” (a term which replaces “telecommunications”) service conferred on the Telecommunications Regulatory Authority (ART) by Article 13 of the Act referred to the Council was regulated sufficiently precisely and, in view of its limited scope and content, did not infringe the regulatory power conferred on the Prime Minister by Article 21 of the Constitution;
- the fact that local programme variants specially authorised by the Supreme Audiovisual Council (CSA), could, under Article 41 of the Act, be interrupted by commercials broadcast nationwide did not interfere with media pluralism at local level;
- the CSA could, as provided for in Article 58 of the Act, give its reasons for rejecting applications to

operate radio services “by referring to a summary report on the invitation for applications” without violating any constitutional requirement;

- the fact that Article 70 of the Act required audiovisual service providers to give operators of free television service access, on request, to their decoders and electronic programme guides “on fair, reasonable and non-discriminatory terms” did not interfere unduly with entrepreneurial freedom or freedom to contract. In any case, as far as access to decoders for digital television services was concerned, the contested provision drew the necessary conclusions from precise and unconditional provisions in a Community directive, and so could not be challenged before the Constitutional Council;
- last, the relaxation of the rules limiting concentration in the communications field, introduced by Articles 72 to 76 of the Act, did not remove the legal guarantees attaching to the constitutional aim of pluralism of thought and opinion, which still governed the issuing of licences by the CSA.

Cross-references:

- See Decision 2004-496 DC of 10.06.2004, Law on confidence in the digital economy [FRA-2004-2-004] and Decision 2004-498 DC of 29.07.2004, Law on bioethics [FRA-2004-2-006].

Languages:

French.



Identification: FRA-2004-2-006

a) France / **b)** Constitutional Council / **c)** / **d)** 29.07.2004 / **e)** 2004-498 DC / **f)** Law on bioethics / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 07.08.2004, 14077 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.3.4.14 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between Community and member states.

1.3.5.2.2 **Constitutional Justice** – Jurisdiction – The subject of review – Community law – Secondary legislation.

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

5.3.4.1 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity – Scientific and medical treatment and experiments.

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

5.4.12 **Fundamental Rights** – Economic, social and cultural rights – Right to intellectual property.

Keywords of the alphabetical index:

Bioethics / Biotechnology, invention / Human body, component, function / Patent, gene / European Community, directive, interpretation / European Community, directive, transposition, act.

Headnotes:

Under the terms of Article 88-1 of the Constitution, “The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that have instituted those bodies, to exercise some of their powers in common.” Thus the transposition of a Community directive into domestic law follows from a constitutional stipulation to which there is no admissible impediment but the existence of a specific express and contrary provision in the Constitution. In the absence of such a provision it is for the Community judicial authority alone to determine, possibly by ruling on a preliminary question, whether a Community directive is in keeping with the powers defined by the treaties and with the fundamental rights secured by Article 6 EU.

Article 11 of the Declaration of Human Rights of 1789 relating to freedom of expression is not an express and specific provision of the Constitution since this freedom is also protected by Article 10 ECHR as a general principle of Community law.

Consequently, the complaint of a violation of freedom of expression cannot be successfully brought before the Constitutional Council to challenge legislative provisions which do no more than to draw the logical

inferences from the precise and unconditional provisions of a directive.

It is not for the Constitutional Council to rule, in the absence of a specific, express and contrary provision in the Constitution, on provisions relating to the conditions of issuance of a patent for inventions that comprise the technical application of a function specific to a component of the human body. In fact these provisions do no more than to draw the logical inferences from the precise and unconditional provisions of Article 5 of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, as interpreted by the Court of Justice of the European Communities.

Summary:

The Constitutional Council had before it two applications contesting the law on bioethics.

Section 17 of this law, providing as follows, was challenged:

“The human body at its various formative and developmental stages, and likewise the plain discovery of one of its components, including a complete or partial gene sequence, cannot constitute patentable inventions.

Only an invention that comprises the technical application of a function specific to a component of the human body may be protected by patent. This protection applies to the component of the human body only in so far as is necessary to generate and utilise that particular application, which must be factually and accurately described in the request for a patent.”

In accordance with its precedents of 10 June 2004 (Decision 2004-496 DC) and 1 July 2004 (Decision 2004-497 DC) concerning the transposition of Community directives, the Constitutional Council dismissed as unsustainable the complaints against Section 17 of the impugned law.

Cross-references:

- See Decision 2004-496 DC of 10.06.2004, law to promote confidence in the digital economy [FRA-2004-2-004] and decision 2004-497 DC of 01.07.2004, law on electronic communication and audiovisual communication services [FRA-2004-2-005].

Languages:

French.



Identification: FRA-2004-2-007

a) France / **b)** Constitutional Council / **c)** / **d)** 29.07.2004 / **e)** 2004-500 DC / **f)** Organic Law on the financial autonomy of territorial authorities / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 30.07.2004, 13562 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.6 **General Principles** – Structure of the State.
 3.12 **General Principles** – Clarity and precision of legal provisions.
 4.5.2 **Institutions** – Legislative bodies – Powers.
 4.5.2.4 **Institutions** – Legislative bodies – Powers – Negative incompetence.
 4.8.6.1 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Deliberative assembly.
 4.8.7.2 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Arrangements for distributing the financial resources of the State.

Keywords of the alphabetical index:

Territorial authority, overseas, type, special status / Territorial authority, deliberative assembly / Territorial authority, own resources, threshold, global resources, decisive share / Law, constitutional objective, accessibility, intelligibility.

Headnotes:

In implementing the Act referred to the Constitutional Council, the legislator did not distort Article 72.2 of the Constitution (Title XII) by assimilating the special status territorial authorities (particularly the overseas authorities) to the three types – communes, departments and regions. However, in so far as the Act was to apply to the provinces of New Caledonia, covered by Title XIII of the Constitution, the legislator should first have consulted the Deliberative Assembly

of New Caledonia, as required by Article 77 of the Constitution (Title XIII).



Laws express the general will. They are intended to lay down rules, and must therefore have standard-setting scope. The legislator must fully exercise the powers conferred on him by the Constitution. In this connection, the principle of clarity of the law, laid down in Article 34 of the Constitution, and also the constitutional objectives of intelligibility and accessibility of the law, derived from the Declaration of Human Rights of 1789, require him to adopt sufficiently precise provisions and unambiguous wording.

Summary:

In pursuance of Article 46 of the Constitution, the Prime Minister referred the Organic Law on the financial autonomy of territorial authorities, adopted under Article 72.2 of the Constitution, to the Constitutional Council. Article 72.2 of the Constitution, based on the Constitutional Act of 28 March 2003, provides that the tax revenue and other own resources of territorial authorities are to represent, for each type of authority, a decisive share of their resources.

The Organic Law adopted to implement that principle was required to define the concept of own resources for each type of territorial authority, and also the threshold below which those own resources did not constitute a decisive part of their global resources.

The Constitutional Council annulled two provisions in the Act:

- concerning the types of authority, it held that the Organic Law was not automatically applicable to the provinces of New Caledonia, which were institutions covered by Title XIII of the Constitution, and not institutions covered by Title XII (the only ones to which Article 72.2 applied automatically).
- moreover, the uncertain standard-setting scope and tautological character of the first criterion used to define "decisive share of own resources" in the Organic Law (Article 4.3) meant that the legislator had failed to exercise the powers conferred on him by Article 72.2 of the Constitution fully.

Languages:

French.

Identification: FRA-2004-2-008

a) France / **b)** Constitutional Council / **c)** / **d)** 05.08.2004 / **e)** 2004-501 DC / **f)** Law on the public electricity and gas utilities and on electricity and gas enterprises / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 11.08.2004, 14337 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
 3.25 **General Principles** – Market economy.
 4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.
 4.15 **Institutions** – Exercise of public functions by private bodies.
 5.2.1 **Fundamental Rights** – Equality – Scope of application.
 5.3.39.4 **Fundamental Rights** – Civil and political rights – Right to property – Privatisation.
 5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Electricity, transmission / Public service, equality, principle / Public service, continuity / Public service, purpose, contract / Legislative procedure, amendment, law, object, connection, absence.

Headnotes:

The Law on public electricity and gas utilities provides that the aims of the public service missions assigned to the enterprises *Électricité de France* and *Gaz de France* and the means of achieving them shall be covered by a contract with the State. It further provides that the State may conclude contracts defining these missions with the other enterprises in the electricity and gas sector that perform public service functions.

The bulk of these functions in the electricity and gas sector are performed by *Électricité de France* and *Gaz de France*. Other operators participating in their performance are not placed in the same position.

Where these other operators are concerned, the public authorities' decision whether or not to conclude a contract setting out the means of achieving the

public service missions must be founded on objective, rational criteria. In particular, the State should take into account the importance of these enterprises together with the nature of their activities.

The circumstance that enterprises performing public service functions have not concluded a contract with the State does not affect the obligation to abide by the principles of equality and continuity inherent in public service.

The Law on public electricity and gas utilities and on electricity and gas enterprises provides that the public electricity transmission grid, whose make-up is determined by Article 12 of the Law of 10 February 2000, shall be entrusted to a single manager whose capital is wholly owned by the public sector. Under Articles 14 and 15 of the said law, the manager is required to maintain and develop the grid and may not transfer ownership of any assets or installations necessary for its proper functioning, security or safety.

The complaints against the privatisation and deterioration of this public utility therefore lacked substance.

Summary:

The Law on public electricity and gas utilities and on electricity and gas enterprises was the subject of two referrals. Some ten provisions were challenged.

The Constitutional Council dismissed the case put to it on the merits. As to the legislative procedure, it censured an amendment on the age limit applicable to managers of the public agencies and public sector companies in that it had no connection with the object of the law. It also censured of its own motion certain provisions introduced by the Commission mixte paritaire (a committee made up of equal numbers of parliamentarians from the two chambers of the French Parliament which, when the two chambers disagree, prepares a compromise text capable of being adopted by them) but lacking a direct connection with the provisions still under discussion at that stage of the legislative procedure.

A breach of equality between public and private operators was invoked.

The Constitutional Council held that these various operators were not in the same position. The differences in treatment must nevertheless be founded on objective, rational criteria.

The complaints that the law undertook the privatisation of a national public utility were dismissed as lacking in substance:

- firstly, in providing for the newly formed companies' retention of the public service functions formerly vested in the public Law corporations Electricité de France and Gaz de France, the legislator had confirmed their status as national public utilities. The legislator had guaranteed majority shareholding by the State or other public sector enterprises or bodies in the capital of these companies. Relinquishment of this share could only be the outcome of a subsequent law.
- secondly, the public electricity transmission grid, whose make-up was determined by Article 12 of the Law of 10 February 2000, was entrusted to a single manager whose capital was wholly owned by the public sector. Under Articles 14 and 15 of the said law, the manager was required to maintain and develop the grid and could not transfer ownership of assets or installations necessary for its proper functioning, security or safety.

Languages:

French.



Identification: FRA-2004-2-009

a) France / **b)** Constitutional Council / **c)** / **d)** 12.08.2004 / **e)** 2004-504 DC / **f)** Law on health insurance / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 17.08.2004, 14657 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.3.1 Sources of Constitutional Law – Techniques of review – Concept of manifest error in assessing evidence or exercising discretion.

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.

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

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

5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

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

Keywords of the alphabetical index:

Health, insurance, reform / Health, protection / Social security, financial equilibrium / Physician, attending, free choice / Insurance, insured person, cost-sharing, standard rate / Insurance, insured person, reimbursement, reduction / Medical record.

Headnotes:

It behoves the legislator to ensure that the right to respect for private life, requiring special vigilance to be exercised in the collection and processing of personnel medical data, is reconciled with the interests of constitutional importance attaching to health protection, which presupposes co-ordination of care, to the prevention of needless or dangerous prescribing, and to the financial equilibrium of social security.

The purposes of Article 3.I of the Law on health insurance (which provides for the introduction of a medical record containing personal data) are to improve the quality of care and also to reduce the financial imbalance of health insurance. Having regard to these aims and to all the guarantees of confidentiality embodied in this provision, the legislator has reconciled the constitutional requirements at issue in a way which does not appear manifestly disproportionate.

The impugned provisions concerning the “attending physician” do not impede free choice of a doctor by the insured person. The complaint raised in this respect therefore lacked substance. The Council did not rule as to whether the principle of free choice of doctor had constitutional force.

Since the obligation to name an attending physician applied to all social insurance members, the complaint of a breach of equality must be dismissed.

It is allowable for the legislator, in order to serve the interest of constitutional significance attaching to the financial equilibrium of social security, to compel social insurance members to pay a standard share of costs for items of service or consultations covered by health insurance. In introducing a standard-rate variety of cost-sharing, the legislator did not transgress the principle of equality.

In making reference to the equilibrium sought by the “multi-annual financial programming of health insurance expenditure” for which the health insurance funds were required each year to propose the applicable measures, the legislator implicitly referred to the “development prospects” which must be appended to the finance bill in accordance with Article 50 of the Law of 1 August 2001 establishing the institutional framework for finance legislation, as part of the “report on the economic, social and financial situation and prospects”. In that respect, the legislator therefore did not remain *intra vires*.

However, according to Article 34 of the Constitution, the finance laws pertaining to social security lay down the general requirements for its financial equilibrium and contain income estimates with reference to which they set its spending targets, subject to the requirements and specifications prescribed by an organic law [institutional legislation]. Thus, in the absence of an amendment of the Law of 22 July 1996 establishing the institutional framework for social security finance legislation, the “multi-annual financial programming” prescribed by the impugned provision could not be approved by a social security finance law.

Summary:

The Constitutional Council was asked to rule on the health insurance Law by over sixty National Assembly members.

The law made major changes, in particular by introducing a medical record comprising the data specific to an insured person who, except in emergencies, had sole authority to withhold it from health professionals. Refusal of disclosure resulted in a lower rate of reimbursement.

To ensure co-ordination of care, insured persons were required to give their insurance fund the name of the attending physician chosen by them, being a general practitioner or specialist attached to a hospital or in private practice. This would not prevent them from consulting other doctors, at a lower rate of reimbursement.

With some exceptions and within certain limits, each insured person was required to pay a standard contribution of one euro per consultation.

Various constraints were prescribed to enforce compliance with all the rules in question by health professionals, employers, supplementary insurance carriers and health insurance members. In addition, multi-annual programming of the national health

insurance funds' expenditure was introduced. Lastly, the law reorganised the competent bodies in the sphere of health insurance.

The Constitutional Council dismissed the appeal against all the above provisions. It held that the introduction of the personal medical record, an "attending physician" and a standard share of costs for insured persons incurred no criticism on constitutional grounds, since those measures:

- met the constitutional requirements associated with protection of health (through better co-ordination of care) and with the financial equilibrium of health insurance (by assigning more responsibility to all concerned);
- carried safeguards as to medical confidentiality and availability of care.

It nevertheless expressed two specifications as to the constitutional interpretation:

- The first was that the insured person's standard share of costs (Article 20), the reduction of the reimbursement rate where patients refused to allow disclosure of their medical record (Article 3), the increase in the patient's share of costs for consulting a doctor without a referral by the attending physician (Article 7) and where a specialist consulted without the attending physician's referral exceeded the approved level of fees (Article 8) ought not to be so large as to prejudice the requirements of the eleventh paragraph of the Preamble to the 1946 Constitution to the effect that the Nation shall secure health protection to all, particularly children, mothers and aged workers.
- The second recalled that the "multi-annual programming of expenditure" by the national health insurance funds referred to in Article 39 of the impugned law could not be approved by a social security finance Law without the prior passage of an organic Law.

Languages:

French.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2004-2-004

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 05.11.2003 / **e)** 1 BvR 1778/01 / **f)** / **g)** / **h)** *Europäische Grundrechte-Zeitschrift* 2004, 216-262; CODICES (German).

Keywords of the systematic thesaurus:

- 1.3 **Constitutional Justice** – Jurisdiction.
- 1.3.5.2 **Constitutional Justice** – Jurisdiction – The subject of review – Community law.
- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.18 **General Principles** – General interest.
- 4.8.8 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2 **Fundamental Rights** – Equality.
- 5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
- 5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.
- 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Dog, dangerous / Dog, breeding, ban / Free movement of goods / Dog, introduction from other EU member states and from third countries / Freedom of action, principle / Animal, welfare, protection / Safety, public, danger.

Headnotes:

The ban on introducing specified dogs from member states of the European Union and third countries into the domestic territory is compatible with Basic Law to the extent that it refers to dogs of the breeds specified therein. Although in its consequences, the ban encroaches upon the freedom to practice an occupation or profession, which is guaranteed by

Article 12.1 of the Basic Law, of those complainants who are professional breeders of dogs of the specified breeds, the restriction is justified under constitutional law. The challenged provision is sufficiently clear and definite and serves important public interests. It complements provisions under *Land* law that are supposed to protect the life and health of people from the dangers that emanate from dangerous dogs and from their owners' behaviour. The legislature, however, is to monitor further developments and is to examine whether the assumptions on which the provision is based will actually prove to be correct.

The ban on the breeding of dogs set out in § 11.b.2.a of the Animal Welfare Act (*Tierschutzgesetz*) in conjunction with § 11 of the Animal Welfare Ordinance on Dogs (*Tierschutz-Hundeverordnung*), which is aimed at avoiding descent that shows a hereditary increase in aggressiveness, does not serve animal welfare within the meaning of Article 74.1.20 of the Basic Law.

The sanctioning under criminal law of widely different bans on breeding, or trading dangerous dogs that exist under *Land* (state) law does not comply with the requirements set out in Article 72.2 of the Basic Law.

Summary:

I. The complainants are keepers or breeders of dogs of specific breeds that are classified as "dangerous" in the Fight against Dangerous Dogs Act (*Gesetz zur Bekämpfung gefährlicher Hunde – BgefHundG*) and in the Act Restricting the Introduction of Dangerous Dogs from Member States of the European Union and Third Countries into the Domestic Territory (*Hundeverbringungs- und -einfuhrbeschränkungsgesetz – HundVerbrEinfG*) of 12 April 2001. Repeated incidents with aggressive dogs prompted the legislature to tighten existing regulations and to newly regulate the ways of handling specific types of dogs. The definition of the characteristic feature of "dangerousness" that is made in this context mainly focuses on the dog's breed. This definition is applied e.g. to pit bull terriers, American Staffordshire terriers, and Staffordshire bull terriers. Pursuant to the *Hund-VerbrEinfG*, dogs of these breeds, and crossbreeds with such dogs, may not be introduced into Germany from other member states of the European Union or from third countries.

The complainants directly challenged:

1. the ban on introducing specified dogs from member states of the European Union and third

countries into the domestic territory (§ 2.1 of the *HundVerbrEinfG*);

2. provisions in this context that regulate the control of compliance with the Act or impose fines or sanctions; and
3. the ban on breeding pursuant to § 11.b.2.a (second alternative) of the Animal Welfare Act (*Tierschutzgesetz – TierschG*). They challenged the infringement of Articles 12.1 and 14.1 of the Basic Law and the infringement of prior-ranking European Community law.

II. The First Senate partly granted the relief sought by way of the constitutional complaint. However, the constitutional complaint was held to be inadmissible. In particular, rights that are based on European Community law cannot be challenged by a constitutional complaint. Apart from this, the Court of Justice of the European Communities has not yet passed a judgment concerning the alleged violation of the free movement of goods. The Federal Constitutional Court also need not request a preliminary ruling from the Court of Justice of the European Communities in this matter.

To the extent that the constitutional complaint is admissible, it is well founded only in part.

The ban on introducing specified dogs from member states of the European Union and third countries into the domestic territory is compatible with Basic Law to the extent that it refers to dogs of the breeds specified therein.

The federal legislature had sufficient reasons to act. It had supposed that dogs of the specified breeds are so dangerous to life and limb that their introduction from member states of the European Union and third countries into the domestic territory must be prevented. This assumption is justifiable and not patently incorrect. The same applies to the legislature's other assumption that the dangerousness of dogs of other breeds, such as German shepherds and Great Danes, is lower. It is true that according to the present state of scientific knowledge, the mere fact that a dog is of a specific breed does not permit conclusions to be drawn with regard to the dog's dangerousness because its dangerousness also depends, for instance, on the dog's training, on the conditions in which it is kept and on surrounding influences, but above all on its keeper's reliability and expertise. As regards dogs of the breeds that are affected by the law, there has been sufficient evidence that they can pose a special danger, if only due to the interaction of factors of the kind that have been mentioned, to the interests of human life and health, which are worthy of protection. Admittedly, reliable statistics on biting incidents, and exact data

that indicates the total number of dogs of specific breeds, has obviously been lacking on the federal and *Länder* level. Nevertheless, the data on which the regulation submitted for review has been based is sufficient for taking measures that are aimed at preventing damage caused by dogs of the mentioned breeds.

The degree of probability that is required for the assumption of dangerousness depends on the legal interest that is at risk and on the type of damage that is suspected. In this context, the high importance of the protection of life and health and the possible serious consequences of biting incidents that involve dogs of the specified breeds is to be taken into account. In view of these findings, the ban is also proportionate. The regulation contributes to reducing the number of dogs in the federal territory that are regarded as dangerous, and thus prevents biting incidents with such dogs. The ban is also necessary. To achieve this aim, the legislature did not have an equally effective means at its disposal that would have restricted the freedom to practice an occupation or profession to a lesser extent or not at all. Behaviour tests cannot be regarded as an equally suitable means because they are a snapshot of the behaviour of the animal that is submitted to the test, and as such, they do not constitute a completely reliable basis on which a sufficiently safe prognosis of the dog's dangerousness can be made. Finally, the ban on introducing specified dogs from member states of the European Union and third countries into the domestic territory is appropriate and can be reasonably imposed on the persons affected.

The effects of the encroachment upon the fundamental right to practice an occupation or profession that the ban constitutes are limited. The complainants will be allowed to practice the occupation of a dog breeder also in the future. In comparison, human life and health have a particularly high rank. This public interest is considerably more important than the economic and non-material interests of the dog breeders who are affected by the provision, who wish to continue to be permitted to buy dogs of their preferred breeds abroad in the future. The legislature, however, is to monitor further developments and is to examine whether the assumptions on which the provision is based will actually prove to be correct. If necessary, the legislature will have to adapt its regulation to the latest findings.

The ban on introducing specified dogs from member states of the European Union and third countries into the domestic territory is also compatible with the guarantee of property under Article 14.1 of the Basic Law and with the general freedom of action under Article 2.1 of the Basic Law. Should the scope of

protection of these Articles be affected at all, the ban determines the content and limits of property.

Finally, the ban is also compatible with the general principle of equality before the law under Article 3.1 of the Basic Law. The legislature assumed, within its scope for evaluation and prognosis, and in a constitutionally unobjectionable manner, that dogs of the specified breeds pose a particular danger to life and limb because in the years before the challenged law was enacted the frequency with which such dogs were involved in biting incidents was disproportionate in comparison to their number. The legislature's other assumption that dogs of other breeds such as German shepherds, Great Danes, Dobermans, Rottweilers or boxers, which have not made themselves conspicuous in the same manner, are less dangerous was not refuted in the oral hearing, and there was otherwise no sufficient evidence showing the incorrectness of the assumption. However, the legislature must review its regulation, also with a view to Article 3.1 of the Basic Law, to ascertain whether it will be justified in the future. Depending on the further development of dogs' biting behaviour, it is possible that the present regulation will be rescinded or extended to breeds that are currently not specified therein.

Against this background, the criminal-law enforcement of the ban set out in § 2.1.1 of the *HundVerbrE-infG* and the possible confiscation of dogs are also constitutionally unobjectionable.

However, there is no legislative competence at the federal level as concerns the regulation of the ban on breeding under § 11.b.2.a, second alternative, of the Animal Welfare Act in conjunction with § 11.3 of the Animal Welfare Ordinance on Dogs (*Tierschutz-Hundever-ordnung – TierSchHundVO*) because the ban does not serve animal welfare. As regards the regulation of the ban on breeding (§ 11.b.2.a, second alternative, of the Animal Welfare Act in conjunction with § 11.3 of the Animal Welfare Ordinance on Dogs), the Federal Government assumes that it has the competence to pass legislation on animal welfare. This view is not shared by the Senate. Whereas animal welfare primarily makes it possible to enact provisions that are supposed to spare animals, as far as possible, pain, suffering or damage connected with breeding, keeping, transport, experiments and slaughter, the challenged regulation serves other purposes. It is not primarily aimed at preventing pain, suffering or damage of animals but at protecting people from the dogs that are covered by the provision. This follows from the reasons that were given for the law and from the wording of the regulation. It therefore falls under the legislative competence of the *Länder*, which are competent for the law of public safety and order. The

Senate extended the declaration of unconstitutionality to § 11 of Animal Protection Ordinance on Dogs in its entirety.

§ 143.1 of the German Criminal Code (*Strafgesetzbuch – StGB*) do not satisfy the requirements that must be complied with pursuant to Article 72.2 of the Basic Law for the federal legislature to become active. There is a violation of the freedom to practice an occupation or a profession of those complainants, who, contrary to a ban under *Land* law, breed or trade dangerous dogs as a profession, and of their fundamental right to property. It is true that the Federal Government has concurrent legislative competence for criminal law. However, the Federal Government would only have legislative power as concerns the challenged criminal-law provision if, and, should the occasion arise, to the extent that the regulation could be regarded as necessary for the establishment of equal living conditions in the federal territory or for the preservation of legal and economic unity in the interest of the state at large. This is not the case. § 143.1 of the Criminal Code are not necessary to achieve any of these aims. It penalises infringements of bans on the breeding or trading of animals that exist under *Land* law. Thus, the federal legislature has created a framework exclusively for the criminal-law consequences of such infringements. The ways in which the constituent elements of such infringements are determined differ so widely in the different *Land* laws that uniform provisions throughout the Federal Republic as regards sanctions under criminal law cannot be achieved. Instead, sanctioning through criminal law will even increase the existing heterogeneity.

Languages:

German.



Identification: GER-2004-2-005

a) Germany / b) Federal Constitutional Court / c) Second Panel / d) 10.02.2004 / e) 2 BvR 834/02 2 BvR 1588/02 / f) / g) *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 109, 190-255 / h) *Neue Juristische Wochenschrift* 2004, 750 – 761; CODICES (German).

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 4.8.1 **Institutions** – Federalism, regionalism and local self-government – Federal entities.
 4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.
 5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.

Keywords of the alphabetical index:

Detention, preventive, subsequent to imprisonment / Detention, placement, legal grounds / Legislative powers, concurrent.

Headnotes:

The area covered by the *Land* statutes regulating the placement of criminals in detention is one subject matter of the concurrent legislative powers of the Federation. It involves criminal law within the meaning of Article 74.1.1 of the Basic Law. The term “criminal law” in connection with the question of jurisdiction to legislate covers the regulation of all, even subsequent, repressive or preventive state reactions to crimes, which use the crime as a connecting factor, which is aimed exclusively at the criminal and which is factually justified by the original offence.

The *Länder* do not have power to make laws on the placement of criminals in detention because the Federation has exhausted its concurrent legislative power in this area.

Summary:

I. Between 2001 and 2003 the *Land* parliaments of Bavaria and Saxony-Anhalt passed legislation, which made it possible to place dangerous criminals in preventive detention at the end of their imprisonment if their dangerousness first became apparent during penal detention. In doing so the *Länder* were reacting to the Federation’s refusal to enact corresponding legislation. The Federation did not consider itself to have jurisdiction and made reference to the general right to ward off dangers, which is within the jurisdiction of the *Länder*.

The complainants in the proceedings upon which this decision is based are prisoners who were sentenced

to long-term prison sentences for sexual offences or homicides. Orders were made that they be placed in preventive detention after they had served their prison sentences. The orders were based on the statutes of Bavaria and Saxony-Anhalt referred to above. After their attempts to obtain legal protection from the ordinary courts were unsuccessful, the complainants lodged a constitutional complaint. In particular, they alleged that the respective *Land* legislatures did not have jurisdiction.

II. The Second Senate admitted the constitutional complaints and declared that the statutes of the *Länder* of Bavaria and Saxony-Anhalt were incompatible with the Basic Law. The Court's reasoning was as follows.

The area covered by the statutes regulating the placement of criminals in detention is one subject matter of the concurrent legislative powers of the Federation. It involves criminal law within the meaning of Article 74.1.1 of the Basic Law. This is evident if one interprets the statutory provisions in accordance with their wording, legislative history, structure and purpose.

The placement of criminals in detention pursuant to the Bavarian Placement of Criminals in Detention Act and the Placement in Detention Act of Saxony-Anhalt relates to criminal law within the meaning of Article 74.1.1 of the Basic Law.

The placement of criminals in detention under *Land* law is a subsequent preventive sanction, which applies exclusively to criminals and draws its factual justification from the original offence. The original offence continues to be a determining factor for the prognosis of future dangerousness as a prerequisite for placement in detention. This understanding of the enabling laws does not conflict with their wording. It is in keeping with the intention of the legislature, the purpose of the statute and an interpretation in conformity with the constitution, which is unavoidable for reasons of substantive constitutional law. It is only on the basis of a prognosis, which includes the original offence as a factor, that the far-reaching encroachment of unlimited detention could be justified from the aspect of proportionality. This classification is confirmed upon a comparison with the preventive detention provisions contained in the Criminal Code (*Strafgesetzbuch*). The placement of criminals in detention has far-reaching similarities both procedurally and in its content with preventive detention.

The *Länder* do not have the power to legislate on the placement of criminals in detention because the Federation has exhausted its concurrent legislative power in this area. In doing so, the Federation has assumed complete responsibility for this legal area.

The federal legislature has legislated exhaustively on the law of preventive detention within the meaning of Article 72.1 of the Basic Law. It also had the power to do so within the framework of Article 72.2 of the Basic Law. Consequently, the effect of the provisions of the Criminal Code is to block the enactment of further legislation; they stand in the way of a *Land* enacting legislation in this area. The federal legislature's statutory intention was most recently manifested in the Act for Combating Sexual Offences and other Dangerous Offences (*Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten*) of 26 January 1998. This Act was intended to take into account the entire need for reform that was expressed at the time and it deliberately refrained from a further extension of preventive detention as a measure of correction and prevention. The federal legislature did not wish to include subsequent preventive detention in the reform because it incorrectly assumed that the *Länder* had jurisdiction to legislate. The Federation has also not subsequently opened the law of preventive detention for amendment by the *Länder*. An opening of such kind would have required federal legislation as its basis.

The fact that the *Länder* did not have jurisdiction to legislate does not result in the contested statutes being void. Instead, they are incompatible with the Basic Law. The Second Senate ordered the continued application of the *Land* statutes until 30 September 2004. This kind of legal consequence is possible if the immediate invalidity of the contested law would remove the basis for protection of paramount interests related to the public good and if the result of weighing [those interests] against the fundamental rights affected is that the encroachment can be accepted for a transitional period. This is the case here. If the statutes were declared void, the release of all those detained on the basis of those statutes would be unavoidable. Persons would have to be released in whose cases a court had determined based on two expert opinions that they currently pose a considerable danger to the life, physical integrity, freedom of self-determination of others.

In the event of the statutes being declared void, persons who are actually extremely dangerous at the present time would have to be released without the federal legislature's having made the decision imposed upon it (because it mistakenly assumed it had no jurisdiction to do so) as to whether it is necessary to enact federal legislation. This would be to deprive the federal legislature of the chance to decide – on the basis of its jurisdiction which has been clearly established now – on the necessity for federal legislation to protect against the further commission of crimes by the persons affected and to enact the legislation it considers necessary.

Personal freedom has a high position among the fundamental rights. The statutes concerning the placement [of criminals] in detention, which is the subject of review, must withstand being measured against the principle of proportionality. This leads to an interpretation in conformity with the constitution of the prerequisites for an order, which must be complied with during the continued application of the legislation. In addition, the persons concerned may not be put in a worse position during the transitional period than those criminals who are subject to preventive detention on the basis of the Criminal Code. The details of the requirements for an interpretation in conformity with the constitution are listed individually in the decision. The courts responsible for enforcing the sentences will have to examine immediately whether the orders for placement in detention based on the *Land* statutes can also be upheld if the bases of the orders are interpreted in conformity with the constitution. To this extent, the discretion to review the necessity for continued placement in detention at any time, which the courts were given by the *Land* enabling laws, has developed into a duty to review.

Supplementary information:

Three members of the Senate have attached a dissenting opinion to the decision. They put forward the following arguments: The fact that the *Land* statutes were incompatible with the Basic Law should have led to their being declared void and thus to the success of the complainants. The order that they continue to apply is incompatible with Article 104.1.1 of the Basic Law. According to that article, a person's liberty may only be restricted by virtue of a formal statute and only in compliance with the forms prescribed therein. The order that the statutes continue to apply is based on customary law, which does not justify the deprivation of liberty at all. Under no circumstances can the continued application of the *Länder* statutes regulating the placement of criminals in detention be considered valid because the federal legislature has legislated exhaustively on the deprivation of liberty as a consequence for the commission of crimes.

Languages:

German.



Identification: GER-2004-2-006

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 27.07.2004 / **e)** 2 BvF 2/02 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2004, 2803-2814; *Europäische Grundrechte-Zeitschrift* 2004, 503-520; 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.
 3.6.3 **General Principles** – Structure of the State – Federal State.
 4.5.2 **Institutions** – Legislative bodies – Powers.
 4.8.1 **Institutions** – Federalism, regionalism and local self-government – Federal entities.
 4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
 4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.

Keywords of the alphabetical index:

University, professor, junior, qualifications / University, lecturing, post-doctoral / Education, higher, reform / Framework law, federal, powers / Law, economy, uniformity / Federation, entity, legislature, autonomy / Federation, legislature, powers exceeding.

Headnotes:

Federal German framework legislation is drafted with the intention that it is put into specific terms and structured by the *Länder* (states). The *Länder* must retain their own area of political planning that has fundamental weight. The *Land* legislature must be given latitude to create law. It is not admissible for the federal parliament to legislate in full for an area subject to framework legislation.

A provision that goes into detail or that applies directly must be restricted in scope if the federal Act is to preserve its framework character. If it would not be possible to promulgate the framework provisions reasonably without the provisions that go into detail or apply directly, that is, if the latter are virtually indispensable, this constitutes an exception from the rule in the meaning of Article 75.2 of the Basic Law (*Grundgesetz*).

Summary:

I. The applicants, the governments of the *Länder* Thuringia, Saxony and Bavaria, challenge the Fifth Act for the Amendment of the Post-Secondary Education Act and Other Provisions (*Fünftes Gesetz zur Änderung des Hochschulrahmengesetzes und anderer Vorschriften – 5. HRGÄndG*) of the year 2002.

The Federal Government pursued the aim of fundamentally reforming the staff and salary structure at universities in order to counter the long period of qualification for young academics, the lack of independence of postdoctoral students, the advanced age of professors on their first appointment and failure of the professorial pay scale to encourage achievement. The main item of the Act passed by the Bundestag in November 2001 is the introduction of a junior professorship, giving the holder the right to undertake independent research and teaching as requirements for a professorship with life tenure. The details of this instrument are laid down in detail in the Act. In the legislative procedure, the Bundesrat, the body through which the *Länder* participate in the legislation of the Federation, took the view that under Article 84.1 of the Basic Law, the Act required the consent of the Bundesrat, because some of its provisions governed the administrative process of the *Länder*. It therefore passed a resolution refusing to consent to the Act, which in its view required consent. The Act was given the final consent of the Federal President in February 2002 and promulgated in the Federal Law Gazette.

In their application for judicial review, the applicants challenged the Act on the ground that it was incompatible with the Basic Law.

II. The Second Panel of the Federal Constitutional Court held that the application for judicial review was well-founded and that the Act challenged was void. In its statement of grounds it holds as follow.

The Fifth Act for the Amendment of the Post-Secondary Education Act and Other Provisions of 16 February 2002 is incompatible with Articles 70 and 75 of the Basic Law in conjunction with Article 72.2 of the Basic Law and therefore void. The Fifth Amendment Act does not satisfy the requirements that the Basic Law imposes upon a framework statute. The competence of the Federal Government to pass framework legislation is restricted in four ways.

Under Article 75 of the Basic Law, the Federal Government is restricted by law to framework legislation. Framework provisions are addressed in the first instance to the *Land* (state) legislature. The

Basic Law permits detailed provisions and directly applicable provisions to be contained in a framework statute only in justified exceptional cases. In Article 75.2 of the Basic Law, introduced in the year 1994, the constitution-amending legislature restricted the competence of the federal parliament to pass framework legislation in order to put more emphasis once again on the cooperative nature of the competence to issue framework legislation.

The federal parliament's competence to pass framework legislation is further restricted by the need for federal-law provisions. Article 72.2 of the Basic Law makes the Federal Government's legislative competence subject to particular substantive requirements. It provides that federal legislation is necessary only to the extent that without it, it would be impossible to create equal living conditions, or to guarantee the uniformity of law or the economy that is in the interest of the whole country.

In addition, Article 75.1.1.a of the Basic Law restricts the Federal Government's framework competence for the higher education system to general principles. The Federal Government must accept a lesser degree of authority to legislate here in contrast to the other framework legislations.

The drafting scheme of the Fifth Amendment Act does not satisfy this constitutional criterion. Article 75.1.1.a of the Basic Law, with its stricter requirements, is the provision that governs legislative competence with regard to the Act challenged. The reorganisation of the staff structure aimed at by the Act, in the provisions on the qualification of young academics, the homogeneity of groups in academic self-government, the possibility of appointment to a professorship within one's original university and the procedure for determining the academic and pedagogical suitability of the teaching staff, relates in an elementary sense to the order and inner structure of universities.

Civil service law functions for the federal legislature as a means to fundamentally restructure the staff organisation of the universities and thus the higher education system as a whole. The main item of the Amendment Act, the provisions on the qualification and appointment of professors, exceeds the scope of admissible federal-law legislation on the higher education system. So numerous and comprehensive are these provisions that the *Länder* are prevented from organising this central area of the higher education system independently. The federal legislature has laid down the requirements for appointment to a professorship comprehensively and conclusively. Under the new provisions, the junior professorship is defined as the standard requirement

for appointment; at the same time it is laid down that the additional academic work should not be the subject of an examination procedure. The legislature intended to reduce the value of the post-doctoral lecturing qualification, so that it would lose its previous function. Nor is the method of qualifying on the basis of the post-doctoral lecturing qualification provided as an exception from the rule. The discretion of the *Länder* is further restricted by the fact that the qualification of young academics can now be tested only within a specific procedure and by a specific authority. The requirements for the Federal Government, exceptionally, to legislate in full under Article 75.2 of the Basic Law are not satisfied.

The Federal Government has not adequately shown that the introduction of the junior professorship and at the same time effectively abolishing the post-doctoral lecturing qualification is indispensable after reasonable consideration and is the only possible way to ensure that scholars are appointed to professorships at an earlier age and are more independent both personally and professionally. In addition, the provisions on the junior professorship are not necessary (Article 72.2 of the Basic Law) to create equal living conditions or to safeguard the uniformity of law. This would apply only if varying law in the *Länder* were the specific cause of a dangerous situation. But this is not the case. Nor are the requirements giving the federal parliament legislative competence satisfied from the point of view of preservation of uniformity of the economy. The statement of reasons given by the federal legislature with regard to the central provisions of the Amendment Act on the staff structure of the universities and on the career path leading to a professorship does not suggest that possible deficiencies in the qualification of young academics can be corrected exclusively by introducing the junior professorship nationwide and that the uniformity of the economy can be guaranteed only in this way. On the contrary, in the opinion of the expert witnesses summoned to the oral hearing, the aims of the reform can be realised without uniform legislation for the whole of Germany. Nor is the federal parliament authorised under Article 125.a of the Basic Law to effect a fundamental reorganisation of the staff structure at universities.

Since the federal parliament has exceeded its competence to issue framework legislation, the Fifth Amendment Act is void as a whole. The alteration of the staff structure shapes the reform of the higher education system and is closely connected to other complexes of legislation in the Act. The whole Act, therefore, depends upon the central provisions. In view of the uniform legislative reform concept, it is not possible for individual provisions to continue in operation.

Subject to the conditions of Articles 72 and 75 of the Basic Law, the Federal Government may pursue its aims of university reform, *inter alia*, by the means of framework legislation. A Post-Secondary Education Framework Act could present a model for the German higher education system and in particular lay down what duties should be discharged and what position the German higher education system should take in international competition. The *Länder* would have to decide whether to accept these concepts and incentives specified by the Federal Government, paying due regard to the requirements of fundamental rights, in particular, the fundamental right of freedom of scholarship.

Supplementary information:

Three members of the Panel added a dissenting opinion to the decision. They are of the opinion that the majority of the members of the Panel define federal competence in framework legislation too narrowly. They hold that the Federal Government is able to realise its political goals by the means of framework legislation as well as in other ways and is not restricted to using framework legislation merely as a coordinating instrument for the political decisions of the *Länder*.

Languages:

German.



Identification: GER-2004-2-007

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 27.07.2004 / **e)** 1 BvR 801/04 / **f)** **g)** **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Appeal, civil proceedings / Judge, replacement during procedure / Court, composition, change during proceedings.

Headnotes:

The replacement of an associate judge between the time when the court gives a warning pursuant to § 522.2.2 of the Code of Civil Procedure (*Zivilprozessordnung*) and the time when it rejects an appeal pursuant to § 522.2.1 of the Code of Civil Procedure does not violate Article 101.1.2 of the Basic Law.

The right to one's lawful judge does not require generally that the composition of a court remain unchanged from the beginning of proceedings until a decision is handed down, as this would seriously impede the administration of justice.

Summary:

The constitutional complaint related to the rejection of an appeal in an order pursuant to § 522.2 of the Code of Civil Procedure in the version of 27 July 2001.

The complainant lost at first instance in a civil dispute and then lodged an appeal. The appellate court was intending to reject the appeal and gave the necessary warning pursuant to § 522.2.2 of the Code of Civil Procedure. Prior to the court's order to reject the appeal, one of the judges who had given the warning was replaced by another judge. The complainant was of the opinion that *inter alia* her fundamental right to a fair trial had been violated.

The Third Chamber of the First Senate did not admit the constitutional complaint for decision. It gave the following reasons.

Pursuant to Article 101.1.2 of the Basic Law it must be known in advance with as much certainty as is possible, which court and which panel with which judges is competent to decide a case. However, any unavoidable uncertainty connected with the circumstances has to be accepted. This applies, in particular, to situations where one or more judges retire from the bench, are ill, are indisposed, are on holiday or are replaced. The most that can be derived for civil litigation from Article 101.1.2 of the Basic Law is that those judges who were involved in the hearing of a case should determine it (cf. § 309 and § 156.2.3 of the Code of Civil Procedure). Where the court adjudicates on the basis of the documents it has before it, all that is significant is that there is certainty about the judge involved in handing down the decision.

The order to reject an appeal pursuant to § 522.2 of the Code of Civil Procedure is a decision by the court on the basis of the documents it has before it. All judges involved in making the decision must form

their own opinions about the case on the basis of the documents before them. While doing so they must also take note of a warning pursuant to § 522.2.2 of the Code of Civil Procedure. Article 101.1.2 of the Basic Law does not require that they were already members of the appellate court at the time the warning was given. This is apparent from the fact that the warning can also be given as a direction by the presiding judge alone. If after the warning has been given it transpires that a member of the court assesses the statutory prerequisites for the rejection of an appeal pursuant to § 522.1.1 of the Code of Civil Procedure differently or changes his or her view, the case must be heard orally. If, however, a judge who has just joined the bench agrees with the reasons for the warning, an order to reject the appeal can be made, even if the order simply makes reference to the warning (this is allowed by § 522.2.3 of the Code of Civil Procedure). This was obviously the case in the original proceedings. Otherwise the appeal could not have been rejected unanimously.

Languages:

German.

**Identification:** GER-2004-2-008

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 29.07.2004 / **e)** 1 BvR 737/00 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2004, 2662-2663; *Europäische Grundrechte-Zeitschrift* 2004, 503-520; CODICES (German).

Keywords of the systematic thesaurus:

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

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

3.16 **General Principles** – Proportionality.

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

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

4.7.15.2.1 **Institutions** – Judicial bodies – Legal assistance and representation of parties – Assistance other than by the Bar – Legal advisers.

5.1 **Fundamental Rights** – General questions.

Keywords of the alphabetical index:

Legal Advice Act / Advice, legal, definition / Freedom to act, protection / Law, interpretation, evolution / Legal service, gratuitous provision / Law, social context, change.

Headnotes:

The reservation of the power to permit acts otherwise prohibited with regard to provision of legal services for the legal matters of another person under the Legal Advice Act (*Rechtsberatungsgesetz – RBerG*) is constitutional.

What constitutes legal advice given in a business capacity in the meaning of Article 1.1.1 of the Legal Advice Act must be determined on a case by case basis. In the interpretation of the Act and the application of the law, the interests protected by the Legal Advice Act and the civil rights and liberties of the individual must be balanced.

The fact that the judge is bound by the law does not mean that he is bound to the letter of the law, but that he is bound by the meaning and purpose of the law. Where there is more than one possibility of interpretation of a provision, preference is to be given to the interpretation that corresponds to the value decisions of the constitution.

Summary:

I. The complainant is a retired judge. In regulatory fine proceedings held before the Local Court (*Amtsgericht*), he was admitted by the court as counsel of choice of a person concerned. After the conclusion of these proceedings, the complainant reported himself to the public prosecutor's department. He said that not only in the proceedings in question, but also in the past, he had "frequently and on a large scale" provided legal services and repeatedly "given individual and detailed advice to other citizens in legal matters". He did not have authorisation under the Legal Advice Act. Further, he said he would provide such legal services in the future too. A regulatory fine in the amount of 600 German marks was imposed upon him for a regulatory offence under the Legal Advice Act. Appeals were unsuccessful. In his constitutional complaint, the complainant challenged, *inter alia*, the violation of his personal freedom to act. He submitted that the legal services that he provided free of charge were not rendered in a "business" capacity in the meaning of the Legal Advice Act. When judgment was given against him, he stated, that insufficient account was taken of the constitutional framework conditions with regard to the interpretation of the concept of business.

The Third Chamber of the First Senate allowed the constitutional complaint. The court decisions violate the complainant's fundamental right of personal freedom to act (Article 2.1 of the Basic Law (*Grundgesetz*)). The grounds of the decision are as follows.

Under the case-law of the Federal Constitutional Court (*Bundesverfassungsgericht*), the reservation of power to permit acts otherwise prohibited is constitutional with regard to the provision of legal services for another under the Legal Advice Act. The Legal Advice Act provides protection for those seeking justice and a well-organised administration of justice. It is necessary and appropriate to attain these goals.

However, the court decisions challenged do not fulfil the constitutional requirements that follow from the fundamental right of personal freedom to act considered in conjunction with the principle of proportionality. Like other statutes, the Legal Advice Act is subject to the process of ageing. As social circumstances and socio-political opinions change, the content of legislation may also change. The courts must therefore determine whether there are now gaps in the statutory provisions.

The fundamental right of personal freedom to act is violated in particular if the interpretation and application of non-constitutional law disproportionately restricts the freedom of the fundamental right. The Federal Constitutional Court is not in principle obliged to examine the interpretation and application of non-constitutional law. However, if there are errors of interpretation in a decision that are based upon a fundamentally incorrect view of the significance of a fundamental right, and in particular of its scope, the Federal Constitutional Court must correct a violation of constitutional law.

The decisions challenged do not satisfy these constitutional standards. The principle of proportionality was not sufficiently taken into account. When the courts interpreted and applied the provisions of the Legal Advice Act, they did not consider whether the concept of business, taking into consideration the interests protected by the Legal Advice Act and the complainant's fundamental right to personal freedom to act, in the present case constitutionally requires an interpretation that does not include the gratuitous provision of legal services by a lawyer with professional experience. It is possible that the activity of the complainant in providing legal services does not impinge upon the protective purposes of the Legal Advice Act. Specific circumstances that have previously not been taken into account suggest that this is likely. Thus, for example, there has been no examination as to whether a prohibition of the

individual legal services provided by the complainant was appropriate and necessary in order to look after the legal interests protected by the Legal Advice Act, and whether less onerous measures would have sufficed for this purpose. The interpretation of the term “business”, in the meaning given to it by the consistent practice of the non constitutional courts, does not do justice to the particular circumstances of the present individual case. In view of the complainant’s professional education and training, his many years of experience in various legal spheres of activity, and the specific circumstances in which he provided legal services in various cases, it is doubtful that the protective purposes of the Legal Advice Act were touched at all. It would further need to be examined whether, in view of the fact that the complainant was admitted as defence counsel and of his legal qualification, sufficient account had not already been taken of the objects protected by the Legal Advice Act.

In addition, it has as not yet been examined as to whether a change in everyday life has now taken place that has made it necessary and possible to amend the Legal Advice Act. The wording of the provision of the Legal Advice Act on the reservation of power to permit acts otherwise prohibited might, in the present case, exceed the meaning and purpose of the statute, and therefore it is constitutionally advisable to interpret it narrowly.

Languages:

German.



Hungary Constitution Court

Important decisions

Identification: HUN-2004-2-005

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 25.05.2004 / **e)** 17/2004 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2004/70 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

3.13 **General Principles** – Legality.

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

Keywords of the alphabetical index:

Agriculture, surplus stock, taxation / European Union, Commission, regulation, implementation.

Headnotes:

An Act that provides for inventory to be taken to establish stock as of and on 1 May, while the earliest possible entry into force of the Act is three weeks later, contradicts the requirements of legal certainty for failing to provide for the requisite constitutional adjustment period. A legal rule is unconstitutional if it cannot be known in due time and for that reason does not enable persons to avoid the negative consequences of such a rule upon its entry into force.

Summary:

On 5 April 2004 parliament enacted a law “on measures concerning agricultural surplus stocks” (henceforth: the Surplus Act). That law was intended to implement Commission Regulation (EC) no. 1972/2003 of 10 November 2003 on transitional measures to be adopted in respect of trade in

agricultural products on account of the accession (as amended) and Commission Regulation (EC) no. 60/2004 of 14 January 2004 laying down transitional measures in the sugar sector (as amended). The President of the Republic did not promulgate the Surplus Act; instead, he submitted it to the Constitutional Court for “review of unconstitutionality”.

The Surplus Act and the relevant Commission regulations were intended to prevent the accumulation of surplus stocks of certain agricultural products. The legislative intent was to identify the operators or individuals involved in major speculative trade movements before the new member states entered the European Union. The core concern was to ensure that the new member states had a system in place on 1 May 2004 that would enable them to identify those responsible for such speculative developments.

Had the President signed the Surplus Act, it would have entered into force only on 25 May 2004, while the obligations set out in the Surplus Act were to come in effect on 1 May, the date of entry into force of the Accession Treaty. The regulations in question stipulated that the regulations would enter into force on 1 May 2004, subject to the entry into force of the Treaty of Accession, and required the new member states to develop and implement the relevant measures so that they would be applicable as of 1 May. The President claimed that the Surplus Act, with a date of entry into force of 25 May, would have been, at best, retroactive and, hence, unconstitutional.

The Constitutional Court agreed with the President that the Surplus Act was unconstitutional for failing to fulfil the requirement of legal certainty. According to the settled case-law of the Constitutional Court, it follows from the Constitution’s definition of Hungary being a state governed by rule of law that legal certainty, including a fair adjustment period and non-retroactivity, must be observed. In particular, the Surplus Act was retroactive in so far as the surplus stock was to be determined on the basis of the difference of the inventory on 1 May and the daily average of the product in 2002-2003. The Surplus Act required that transactions that occurred after 1 January 2004 not be considered for the reduction of stock. That was found to be retroactive, too. The Court also took into account the provision of the National Expenditure Act, under which tax obligations cannot come into effect before 45 days from promulgation. The regulations in question required that holders of surplus stock pay taxes on goods in free circulation. The taxes collected by national authorities were to be assigned to the national budget of the new member state.

Finally, the Court found that the Surplus Act delegated the definition of the taxpayers who were liable to pay the tax in question and the method of the determining the tax to executive decrees. That contradicts the constitutional requirement that fundamental rights and duties are to be determined by an Act of parliament.

Languages:

Hungarian.



Identification: HUN-2004-2-006

a) Hungary / b) Constitutional Court / c) / d) 19.06.2004 / e) 22/2004 / f) / g) *Magyar Közlöny* (Official Gazette), 2004/79 / h).

Keywords of the systematic thesaurus:

- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 4.5.2.4 **Institutions** – Legislative bodies – Powers – Negative incompetence.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
- 5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.
- 5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Search, personal baggage, vehicles / Security guard, private, powers.

Headnotes:

Checking baggage is exclusively aimed at preventing persons from taking into an area or onto premises any object that is capable of causing injury or panic in a crowd. The state has an objective and specific duty to protect other fundamental rights – in this case, the right to privacy – against any person violating those

rights. According to this requirement, a security guard acting in the name of a person entitled to the right of protection of property must conduct property checks of persons entering the area or premises in such a way that the security guard does not have access to the private and confidential information or personal data of the persons being checked.

By laying down an authorisation with no precise rules to ensure the proportionality of the limitation of the right to privacy, the impugned provision violated Article 59.1 of the Constitution guaranteeing the protection of privacy and secrecy in private affairs and personal data.

Summary:

The petitioners challenged some provisions of Act IV of 1998 on the Professional Chamber of Property and Security Guards and Private Investigation (henceforth: the Act).

For the purpose of securing an area in or premises on which a programme is being held, Article 14.3.b of the Act entitles security guards to check the property of persons entering the area or premises. The purpose of checking baggage is to prevent persons from taking into the area or onto the premises any object capable of causing injury or panic in a crowd. Article 14.1.b of the Act also makes it possible for security guards to check the baggage of persons present or leaving the above-mentioned area or premises.

According to the petitioners, the checking of baggage and vehicles by security guards was equal to the checking of private property. It amounted to the inspection of the private sphere, and even though security guards were not official persons (e.g. police officers), they could, under the impugned provisions, still conduct checks that exceeded those that the police were authorised to do. That being so, the impugned provisions violated the constitutional right to human dignity set out in Article 54.1 of the Constitution, the presumption of innocence set out in Article 57.2 of the Constitution and the right to privacy set out in Article 59.1 of the Constitution.

The Constitutional Court stated that in the legal provisions under examination, the constitutional basis of the authorisation granted to security guards that affects the private sphere, that is to say, the necessity of restricting fundamental rights, is created by the protection of other constitutional rights relating to the protection of property.

The regulation set out in Article 14.3.b of the Act only entitles security guards for the purpose of securing an

area in or premises on which a programme is being held to check the baggage of persons entering that area or those premises. This regulation does not contain provisions relating to the checking of the property of persons already in the area or on those premises, and of persons leaving the area or premises. This manner of securing the protection of the right to privacy is weighed against the public interest of creating and maintaining public safety and the exercise of the right to life and personal security. In this regulation, the restriction of fundamental rights meets the requirement that it can only take place if the protection or exercise of another constitutional right cannot be secured otherwise. Checking property is of general validity, but at the same time any person affected may refuse to be checked on the basis of his or her own reflection and decision. In light of this, the restriction is proportionate. Consequently, the Constitutional Court rejected the petition to strike down the provision.

As opposed to this, Article 14.1.b makes it also possible to check the baggage of persons already present in the above-mentioned area or on the premises, and the persons leaving the area or premises.

In cases of persons entering an area or premises, certain circumstances may arise which force the persons to submit to a check, for example, for the purpose of managing their affairs they must enter a given area or premises, or they are forced to do so by the prospect of a legal disadvantage (e.g. the duty to appear upon being summoned). At the same time, the regulation does not contain provisions for the conditions (and thus the checking of property) not to be self-serving or abusive. Moreover, the regulation cannot aim at preventing justified entry. The regulation fails to indicate what kind of objects may be justifiably prevented from being brought into the area or onto the premises, and how the persons concerned are to be informed of this. As a result, the person whose baggage is being checked cannot know what objects may be taken away from him or her, and whether those objects are being safely kept.

In cases where the baggage is checked of a person who is already present in the area or on the premises, the person concerned cannot possibly refuse – on the basis of his or her own reflection and decision. A person leaving the area or premises amounts to no danger, and in such cases, the authorisation to check that person's property may only be based on the protection of property. An undifferentiated regulation of the matter results in the possibility of ordering property checks in any case, even where unnecessary.

The Constitutional Court distinctly examined the extent and nature of the legislature's responsibility of protecting the private sphere in cases where property checks are justified exclusively by the protection of property. The Court considered that legislature's undifferentiated regulation granted an excessively broad authorisation to limit the right to privacy in a similar way in different cases, and moreover, the authorisation did not even meet the requirement of employing minimal means. For that reason, the Constitutional Court held that Article 14.1.b of the Act violated Article 59.1 of the Constitution.

The Constitutional Court also emphasised that it did not declare the checking of property itself unconstitutional, but it did say that the legislature did not adequately regulate the authorisation granted to property and security guards.

The Court also held that the impugned provisions were unconstitutional insofar as they did not contain a regulation relating to the duty of secrecy and the handling of personal data.

While checking property, a security guard may gain access to private and confidential information or personal data. According to the Act on Data Protection, personal data may only be handled with a definite purpose. The Constitutional Court held that that requirement was not met by the Act. The legislature's failure to introduce a regulation relating to the duty of secrecy and the handling of personal data by personal and security guards, with special emphasis on property and identity checks, rendered the Act unconstitutional.

Languages:

Hungarian.



Ireland Supreme Court

Important decisions

Identification: IRL-2004-2-001

a) Ireland / **b)** Supreme Court / **c)** / **d)** 10.06.2004 / **e)** 44, 46 & 47/03 / **f)** White v. Dublin City Council / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

3.18 **General Principles** – General interest.

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

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

Keywords of the alphabetical index:

Judicial review, time limit / Property, right to enjoyment / Planning, Special Statutory Procedure / Saver, lack, unconstitutionality.

Headnotes:

In drafting a statute which delineates the extent of an individual's right to review the decision of a statutory body through the courts, the legislature is entitled to stringently restrict the period within which such a right is to be exercised. However, the legislature is required to balance the public interest involved in the avoidance of delayed claims with an individual's constitutional right of access to the courts. A legislative provision which does not contain a discretionary power to extend the time allowed in exceptional cases is unconstitutional because of its failure to have sufficient regard to the constitutional right of access to the courts.

Summary:

Section 82.3B.a.i of the Local Government (Planning and Development) Act 1963 as inserted by Section 19.3 of the Local Government (Planning and Development) Act 1992 required a person who wished to question the validity of a range of planning

decisions made by statutory authorities to do so within a period of two months commencing on the date of the decision. There was no provision for an extension of time in exceptional circumstances, for example where an aggrieved person did not know and could not reasonably have known within the period that a decision had been made affecting his interests. The applicants in this case were adversely affected by a decision of a statutory authority to grant planning permission to a Mr. Tracey (a notice party to this application) but it was accepted that they did not know and could not reasonably have known of the decision within the two-month period. In this application they argued that the provision breached their constitutional right of access to the courts by neglecting to include a saver allowing for applications to be made outside the two-month period in exceptional circumstances.

The Supreme Court stated that the right to litigate was a personal right guaranteed by the Constitution, but declined to adjudicate on the controversies in the earlier case law of the Court on the exact source and nature of the right. It was held that in creating a provision which set a limit on the time period within which recourse could be had to the courts to challenge the decision of a statutory body, the legislature was required to balance the constitutional right to litigate with the competing property right of an opposing party to be protected against burdensome claims and the public interest in avoiding stale or delayed claims. Whilst the task of reconciling these interests was essentially one for the legislature, the courts had a right and duty to intervene where the balance reached constituted an injustice to such an extent that it violated a constitutional right.

The Court went on to state that the right of an individual to have recourse to the remedy of judicial review, as opposed to another kind of legal remedy, was especially important in a state based on the rule of law. The essential difficulty with the provision in question stemmed from the absolute and inflexible nature of the time-limit therein placed on the right to judicially review a class of administrative decisions. In this case the applicants were deprived through no fault of their own of any reasonable opportunity to challenge the validity of an administrative decision adverse to their interests within the limitation period. The effect of the impugned section was to deny the applicants any opportunity to ask the courts to extend the period, even in the most extreme circumstances. This situation constituted an injustice to such an extent that it undermined the right of access to the courts guaranteed by the Constitution. Therefore the statutory provision in question was repugnant to the Constitution.

Cross-references:

- *Tuohy v. Courtney* [1994] 3 *Irish Reports* 1 [IRL-1994-2-004].

In the matter of Article 26 of the Constitution and in the matter of Sections 5 and 10 of the Illegal Immigrants Trafficking Bill, 1999 [2000] 2 *Irish Reports* 360.

Languages:

English.



Identification: IRL-2004-2-002

a) Ireland / **b)** Supreme Court / **c)** / **d)** 23.06.2004 / **e)** 39 & 53/04 / **f)** The Director of Public Prosecutions v. Leontjava / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
- 1.3.5.10 **Constitutional Justice** – Jurisdiction – The subject of review – Rules issued by the executive.
- 3.4 **General Principles** – Separation of powers.
- 3.13 **General Principles** – Legality.
- 3.15 **General Principles** – Publication of laws.
- 3.19 **General Principles** – Margin of appreciation.
- 4.5.6 **Institutions** – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Immigration, law / Government, law-making process, participation / Legislation, sphere / Regulation, implementing statute / Legislation, by reference.

Headnotes :

The legislature is entitled, when granting statutory effect to secondary legislation, to incorporate said legislation by reference rather than setting out the text verbatim within the body of the statute, provided the effect of said incorporation is not in conflict with any specific provision of the Constitution. This is because

of the wide latitude afforded to the legislature by the Constitution to adopt whatever form of legislation it considers appropriate in any given set of circumstances. It cannot be assumed that, merely because the incorporated provision was not set out in the body of the text, it was not the subject of the appropriate degree of legislative scrutiny before it was included within the statute. Any such assumption would be at variance with the deference which each organ of State owes the others.

Summary:

Section 2 of the Immigration Act 1999 purports to afford statutory effect to all orders made before the passing of the 1999 Act pursuant to Section 5 of the Aliens Act 1935, other than those orders or provisions of orders specified in the Schedule to the Act. On the 5 June 2003 the respondent was arrested and charged with the offence of contravening conditions imposed on her as an alien pursuant to Article 5 of the Aliens Order 1946 and Article 3 of the Aliens Order 1975. Having successfully applied by way of judicial review to the High Court for an order of prohibition restraining the further pursuance of her prosecution, the respondent was granted a declaration that Section 2 of the 1999 Act was repugnant to the Constitution and therefore invalid.

In granting an order setting aside this decision, the Supreme Court held that, due to the absence of any express provision in the Constitution prohibiting the enactment of legislation in the nature of the 1999 Act, the onus was on the respondent to establish clearly that Section 2 was invalid by reason of unconstitutionality. The Court accepted that, had the text of the orders made under the 1935 Act been set out within the body of the 1999 Act, the constitutionality of the latter could not have been challenged. Accordingly, the question at issue was whether the method of incorporation by reference was, in itself, repugnant to the provisions of the Constitution. The Court noted that, in light of Article 15 of the Constitution, it was clear that the legislature had been afforded a 'strikingly wide latitude' in adopting legislation and, as a result, it was difficult to envisage circumstances in which that body could be held to have exceeded or abused its role. Where it was the clear and unambiguous intention of the legislature that the provisions in question be given statutory effect, the decision to incorporate statutory instruments by reference rather than setting them out in the body of the Act was one it was entitled to make.

Further, there was no reason to imply a prohibition of the practice of incorporation by reference into the Constitution. It could not be assumed that such legislation when enacted would not be the subject of

scrutiny by the legislature, since the instruments referred to in the 1999 Act were, at all times, ascertainable by reference to the officially published texts of those instruments. To assume that such scrutiny would not be applied in these circumstances would be at variance with the respect which the three major organs of State owed to each other.

The Court also rejected as wholly unsustainable the proposition that the 1999 Act had contravened the requirements as to signature, promulgation and enrolling of legislation set out in Article 4 of the Constitution. These conditions had been met in the instant case and the mere fact that the enactment incorporated by reference could not deprive it of the character of a duly promulgated and enrolled Act. Moreover, to recognise such a proposition would have the consequence of invalidating, in its entirety, the procedure normally adopted for incorporating international conventions by reference.

Languages:

English.



Italy

Constitutional Court

Important decisions

Identification: ITA-2004-2-002

a) Italy / b) Constitutional Court / c) / d) 13.05.2004 / e) 147/2004 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 03.06.2004 / h).

Keywords of the systematic thesaurus:

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

4.7.1 **Institutions** – Judicial bodies – Jurisdiction.

5.2 **Fundamental Rights** – Equality.

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

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

Keywords of the alphabetical index:

Judge, party to proceedings / Civil proceedings, court, jurisdiction, *ratione loci* / Judge, withdrawal.

Headnotes:

Irrespective of the type of civil proceedings to which a judge is a party, each type having its own particular conditions, it is unconstitutional to apply Article 30bis of the Code of Civil Procedure to all such proceedings in so far as this may interfere with the right of action at law, secured under the Constitution. It must be possible for this right to be exercised in different ways according to the type of civil proceedings. Consequently, the rules applicable to the various types of civil proceedings still stand in cases where a judge is a party to them.

Article 30bis of the Code of Civil Procedure nevertheless continues to apply in two instances, firstly civil proceedings for redress of damage caused by a judge in the line of duty, and secondly civil proceedings for redress of damage consequential to an offence committed by a judge. In each instance,

transfer of the proceedings in accordance with the rules laid down by Article 11 of the Code of Criminal Procedure appears an altogether reasonable choice in order to prevent the impartiality of the judgment from being impaired by the personal relationships that may well exist between judges serving within the same judicial district.

Summary:

Two judges who were married to each other according to the rules of the Concordat in force between the Church and the Italian State had instituted proceedings to terminate the effects in civil law of their marriage before the Bari District Court, in which one of them held judicial office. The court refused jurisdiction to determine the case, relying on Article 30bis of the Code of Civil Procedure (CPC) which provides that civil proceedings to which a judge is a party, and which come within the purview of a judge serving in the Court of Appeal district where the aforesaid judge holds office, are referred to the judge who is competent to deal with the same subject-matter but sits in the Court of Appeal district's chief town "determined in accordance with Article 11 of the Code of Criminal Procedure (CPP)". This article provides that criminal proceedings in which a judge has the status of a person under investigation (*persona sottoposta ad indagini*), charged (*imputato*), or injured by an offence (*persona offesa o danneggiata dal reato*) and which fall under the jurisdiction of a judge serving in the Court of Appeal district where the judge under investigation, charged, or injured by an offence, holds office, are referred to the judge who is competent to deal with the same subject-matter but sits in the Court of Appeal district's chief town as "determined by law".

The Bari District Court raised the question of the constitutional legitimacy of Article 30bis of the Code of Civil Procedure as it considered that the provision at issue required the proceedings to be conducted before another judge than the one appointed to the place of residence of either or each spouse (according to the general rule) and thus made access to the courts more difficult and expensive wherever a judge was involved in proceedings to obtain a divorce or to terminate the effects in civil law of marriage contracted under the Concordat, in breach of the right to be heard in court (Article 24 of the Constitution) and the principle of equality (Article 3 of the Constitution).

Supplementary information:

In a previous decision, Judgment no. 444 delivered in 2002, the Court declared Article 30bis of the Code of Civil Procedure unconstitutional "in that part" which

permitted waiver of the general rule laid down by Article 26 of the Code of Civil Procedure (in the event of an execution on movable property, the court of the place where the property is located has jurisdiction) in cases where the execution was requested by or against a judge. On that occasion, the Court took the view that in the execution proceedings the creditor should be favoured above the debtor according to the rule in Article 26 of the Code of Civil Procedure; the application of Article 30bis of the Code of Civil Procedure was therefore contrary to Articles 3 and 24 of the Constitution.

The judgment referred to in the headnotes is an example of a “partial” judgment: it eliminates certain of the manifold cases covered by the provision under review, while leaving the text of the provision intact.

Languages:

Italian.



Identification: ITA-2004-2-003

a) Italy / b) Constitutional Court / c) / d) 24.05.2004 / e) 154/2004 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 03.06.2004 / h).

Keywords of the systematic thesaurus:

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

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

4.4.1.3 **Institutions** – Head of State – Powers – Relations with judicial bodies.

4.4.4.1.1.1 **Institutions** – Head of State – Status – Liability – Legal liability – Immunity.

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:

Head of State, declaration, liability / President, spontaneous declaration / Authority, conflict, parties to proceedings.

Headnotes:

The ordinary courts at each successive level of jurisdiction up to the Court of Cassation has full competence to determine whether liability of the President of the Republic arises in the instant case or whether it must be excluded because the President's act was performed “in the discharge of his office”, as provided by Article 90 of the Constitution.

Summary:

Although as a general rule the sole parties to proceedings concerning conflict of authority are the State powers competent to raise a conflict of authority before the Constitutional Court and to defend the proceedings (in this instance the President of the Republic and the Court of Cassation), in the present case the conflict concerned the assertion (or denial) of the right to take legal action to redress the consequences of an act of the President of the Republic in respect of which the applicability or inapplicability of the immunity prescribed in Article 90 of the Constitution had to be determined. Assuming that those who were parties to the proceedings on the issue of whether the President of the Republic could be called to account in civil law for his statements were excluded from the constitutional proceedings which might result in them being excluded from any court action whatsoever (if the statements of the President of the Republic were found to be covered by immunity), then their right to a defence was sure to be prejudiced, contrary to Articles 24 and 111 of the Constitution and Article 6 ECHR. In this connection the Court referred to the judgments of 30 January 2003, *Cordova v. Italy I*, *Reports of Judgments and Decisions* 2003-I, application no. 40877/98, and *Cordova v. Italy II*, *Reports of Judgments and Decisions* 2003-I (extracts), application no. 45649/99 of the European Court of Human Rights.

While the right of the Court of Cassation to defend legal proceedings could not be disputed, the right to bring an application must be recognised not only to the present incumbent of the office of President of the Republic but exceptionally also to a former president (in this case, Mr Cossiga), even though he had ceased to be President at the time when the acts which occasioned the conflict were adopted (Mr Cossiga's term of office ended on 28 April 1992 and the judgments of the Court of Cassation are dated 27 June 2000). The conflict (of a constitutional nature) over the President's prerogatives and a possible breach of them had in fact arisen as a result of a dispute over the application to a specific case of a constitutional rule in effect excluding or limiting the liability of a natural person (Mr Cossiga) holding office under the Constitution for acts which he had

performed. The person whose liability was substantively at issue in the proceedings held that office at the time when the act in respect of which immunity was claimed had occurred.

It would indeed be unreasonable to rule out the possibility of raising a conflict on the sole ground that the liability of the person who formerly held office as President of the Republic was only brought into question after he had completed his term of office. The subsequent office-bearer would indeed be able bring considerations of political expediency to bear on any legal action for asserting the immunity of the President of the Republic.

As to the merits, Mr Cossiga's appeal was deemed partly unfounded and partly inadmissible. Contrary to Mr Cossiga's assertions, the Constitutional Court held that the Court of Cassation had not encroached on the prerogatives of the Presidency and found as set out in the headnotes above. The Constitutional Court also dismissed the argument that the Court of Cassation should have invoked conflict of powers forthwith instead of referring the case to the ordinary courts. The conflict of powers procedure would always be available later to remedy any breaches of the constitutional rules that might have been committed by the courts and interfered with the prerogatives of the Head of State. The Court also rejected the applicant's contention that, regarding acts in the category of "spontaneous declarations" by the President of the Republic, it was impossible to distinguish those made "in the discharge of the presidential office" from the rest. The Court, while conceding the inherent practical difficulties, took the contrary view that since this distinction was drawn by the letter of the Constitution, it must be maintained.

The applicant submitted that the declarations for which he had been held liable were bound by a "functional nexus" (*nesso funzionale*) to the presidential duties, so that they were covered by immunity under Article 90 of the Constitution. Here the Constitutional Court observed that the Court of Cassation, in setting aside the two Court of Appeal decisions against Mr Cossiga, had merely fixed the "points of law" to be upheld by the court of referral. Thus any censure was untimely at that stage and moreover inadmissible, although it might if appropriate be raised against the decisions subsequently adopted by the courts. Likewise, the applicant's arguments that his statements had never exceeded the bounds of legitimate exercise of the right of political criticism could not be admitted in the present judgment but would be assessed by the court of referral and any courts hearing the case.

Supplementary information:

Whereas in Order no. 455 of 2002 [ITA-2002-3-004] the Constitutional Court made an initial positive determination as to the admissibility of the application, in the present judgment it gave a final ruling on admissibility after an adversarial hearing, and on the merits of the case.

Cross-references:

For the sequence of material events, see the summary of Order no. 455 of 2002 [ITA-2002-3-004].

The application was declared admissible by Order no. 455 of 2002 [ITA-2002-3-004].

The Court declared admissible the applications for joinder to the constitutional proceedings lodged by the parties (MM Flamigni and Onorato) who had filed the damages suits against Mr Cossiga (see summary of decision [ITA-2002-3-004]) in which the present application to the Constitutional Court originated.

Languages:

Italian.



Korea

Constitutional Court

Important decisions

Identification: KOR-2004-2-001

a) Korea / **b)** Constitutional Court / **c)** / **d)** 14.05.2004 / **e)** 2004Hun-Na1 / **f)** Presidential Impeachment Case / **g)** 93 *Korean Constitutional Court Gazette* (KCCG) 574 / **h)**.

Keywords of the systematic thesaurus:

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

1.3.4.7.4 **Constitutional Justice** – Jurisdiction – Types of litigation – Restrictive proceedings – Impeachment.

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

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

3.16 **General Principles** – Proportionality.

4.4.3.4 **Institutions** – Head of State – Term of office – End of office.

4.4.4.1 **Institutions** – Head of State – Status – Liability.

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

Keywords of the alphabetical index:

President, impeachment, ground / President, political neutrality / Referendum, purpose, constitutional.

Headnotes:

The President may be impeached and removed from office for violations of the Constitution and laws in the performance of official duties. However, the consequences of the removal of the President, stripping him of his democratic legitimacy directly granted by the people through the election, risk causing political turmoil arising from division and antagonism between those who support the President and those who do not, as well as a national loss caused by the discontinued execution of presidential authority and an interruption in state affairs. The violations, thus, should be grave enough to correspond to the substantial effects of impeachment.

A national referendum set out in Article 72 of the Constitution is a measure to effect direct democracy and applies to making decisions on specific national policies. A national referendum, however, cannot be called on the above mentioned issue since under the Constitution, electing the President and determining confidence in the President may only be done through elections.

Summary:

1. The National Assembly passed the presidential impeachment motion on 12 March 2004 by 193 votes out of a total of 271 parliamentary seats, which satisfied the two-third majority requirement stipulated in Article 65.2 of the Constitution. The powers of the President as head of the state and chief executive were suspended according to Article 65.3 of the Constitution. The Constitutional Court proceeded with the impeachment in order to determine whether to approve the motion and remove the President from office. The Court's decision is final and cannot be appealed.

2. The Constitutional Court held, *per curiam*, the opinion that while the President violated the duty to protect the Constitution and breached certain clauses of the Act on the Election of Public Officials and the Prevention of Unfair Practices in Elections (hereinafter: "the Election Law"), the violations were not serious enough to justify his removal from office.

The essential reasoning of the Court is as follows.

I. Impeachment clause of the Constitution

Article 65 of the Constitution sets out that certain high-ranking officials, including the President, may be impeached by the National Assembly for violations of the Constitution and laws in the performance of official duties. This article acts as a warning to such officials in advance about the consequences of such violations and prevents the excessive exercise of government powers beyond the constitutional limit authorised by the people.

II. Whether the President violated the Constitution or laws in the performance of official duties

A. The Constitution demands that all public servants be politically neutral and the Election Law expressly stipulates the obligation of political neutrality by public servants in Article 9. The President made certain public remarks at press conferences supporting a particular political party. With general elections approaching, there was a greater need for the political neutrality of public officials and the remarks

of the President, who should be at the forefront of holding fair elections, can only be regarded as exploiting his position in an attempt to influence public opinion. Therefore, his actions were unlawful and against the principle that public servants must be politically neutral.

B. The President released public statements casting doubt on the constitutionality and legitimacy of the Election Law following the National Election Commission's ruling that he had violated the duty of political neutrality required by the Election Law. The President, as a political figure, may express his opinions on the amendments of current laws, but releasing public statements calling into question the current election laws in response to the official warning from the National Election Commission, could not be deemed as respect for law. The President's engagement in such conduct had negative effects on the principle of the rule of law by significantly affecting other public servants, who should also respect and obey the law and by undermining general public obedience to law. Thus, it is against the principle of the rule of law and a violation of his duty to protect the Constitution as set out in Articles 66.2 and 69 of the Constitution.

C. The President suggested that he would hold a national referendum to ask whether he should remain in office. The President only proposed a national referendum and did not hold it, but making the suggestion itself was against Article 72 and violated the presidential duty to protect the Constitution.

D. Other charges brought by the National Assembly against the President as reasons for impeachment were groundless or were not subject to judicial review in an impeachment trial. Firstly, remarks supporting a certain political party other than the remarks with in A above, were within the constitutional boundaries permitting the President to freely express his political opinion. Secondly, corruption scandals involving his close aids were not accepted as grounds for impeachment, since either they had occurred before the President was inaugurated or there was no evidence indicating the President's involvement in the scandals. Thirdly, accusations alleging the President was incompetent and performed poorly in economic affairs were not subject to judicial review in an impeachment trial.

III. Whether or not the President should be removed from office

Article 53.1 of the Constitutional Court Act states that when a request for impeachment is upheld, the Constitution Court shall remove the accused from office. Theoretically it might be interpreted to mean

that in all cases where the cause for impeachment is upheld, an automatic dismissal follows. This, however, would make it possible for any trivial violation of the Constitution and laws that occurred in the line of duty to be grounds for dismissal, and this interpretation runs against the principle of proportionality that requires a constitutional sanction to be proportional to the seriousness of the violations. Thus, the clause should be understood in a way that a cause for impeachment is to be grave enough to justify the dismissal of a public servant. In this case, the consequences of the removal of the President are to deprive him/her of democratic legitimacy vested in that office through the general election. It may also lead to serious divisions and conflicts that may culminate in political turmoil and create a national loss derived from a vacuum in executive authority. The serious effects of the President's removal demand that the grounds for impeachment are equally grave. The President's violations of the Constitution and the Election Law as found in Part II above did not amount to a need for a constitutional order to remove the President from office.

Cross-references:

- Decision of 27.11.2003 (2003Hun-Ma694), *Bulletin* 2003/3 [KOR-2003-3-002].

Languages:

Korean.



Latvia

Constitutional Court

Important decisions

Identification: LAT-2004-2-005

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 21.05.2004 / **e)** 2003-23-01 / **f)** On the Compliance of Section 43 (Item 6 of the First Part) of the Law on Local Governments with Articles 91, 106 and 107 of the Constitution (*Satversme*) / **g)** *Latvijas Vestnesis* (Official Gazette), 82 (3030) / **h)** CODICES (English, Latvian).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.

4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

5.3.5.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Prohibition of forced or compulsory labour.

Keywords of the alphabetical index:

Property, private, public use, maintenance / Property, rights and duties / Forced labour, prohibition.

Headnotes:

The notion “forced labour” is to be systematically interpreted in conjunction with other fundamental rights enshrined in the Constitution (*Satversme*), in particular, Article 105 of the Constitution (the right to own property). On the one hand, property includes rights, but on the other hand it assigns duties as well. Even though the challenged norm gives the right to issue binding regulations regarding the maintenance of land for public use which is adjacent to private property and envisage liability for violation of the regulations, there is no reason to hold that it provides for forced labour. The maintenance of land for public use which is adjacent to private property shall not be regarded as forced labour but as a duty imposed by the property.

Summary:

The challenged norm, item 6 of the first part of Section 43 of the Law “On Local Governments”, provides that the local government (Council) is entitled to issue binding regulations “regarding maintaining sanitary cleanliness and maintenance of land which is adjacent to property (pavements, with the exception of public transport stops, ditches, drains or grassland up to the drive or road)”.

Those who submitted the constitutional claim requested an assessment of whether the challenged norm complied with Articles 91, 106 and 107 of the Constitution.

They pointed out that the challenged norm allowed local governments with the help of binding regulations to oblige the owners of real estate to perform forced labour on land not belonging to the owner but to the local authority. In addition, this work was not remunerated and the owners were not guaranteed the fundamental rights laid down in Article 107 of the Constitution – the right to holidays and to a paid annual vacation.

Those submitting the constitutional complaint claimed that the challenged norm was also at variance with the principle of non-discrimination, laid down in Article 91 of the Constitution. In their opinion, it was the duty of the local government itself to maintain cleanliness on its own land. Therefore, shifting the functions of the local governments had no logical substantiation and was not based on any legal principle.

The Court established that the challenged norm itself does not determine the procedure of maintaining sanitary cleanliness in the administrative territory of the local government. Every particular local government has to establish such procedure in its binding regulations. The challenged norm does not determine persons who have to maintain sanitary cleanliness in the administrative territory and does not indicate the person with the duty of maintaining land for public use which is adjacent to private property. Thus the challenged norm only delegates the right to issue binding regulations for the maintenance of sanitary cleanliness and maintaining of order of land for public use which is adjacent to private property to the local government but does not determine the procedure of doing it.

The Court pointed out that prohibition of forced labour, which is incorporated in Article 106 of the Constitution, covers both public rights and private rights. The Constitution also envisages several exceptional cases when labour shall not be considered forced labour. Exceptional cases, even

though they are determined in the interests of public welfare and safety, are only extraordinary cases. The above labour is of a public law nature; the accomplishment of such labour is required by subjects of public law and refusal to do it may result in administrative or criminal liability.

With reference to its 27 November 2003 judgment the Court reiterated that forced labour means any work or service which a person is compelled to do because of the threat of punishment and which the person has not volunteered to do as it is unjust or oppressive. To assess whether the challenged norm provides for forced labour, it is necessary to clarify whether the challenged norm complies with the definition of forced labour.

The Court stressed that the notion "forced labour" in this case shall be systematically interpreted in conjunction with other fundamental rights enshrined in the Constitution, in particular Article 105 of the Constitution. It concluded that the maintenance of land for public use which is adjacent to private property shall not be regarded as forced labour but as a duty imposed by the property.

The Court stressed that Article 107 of the Constitution refers to legal labour relations, i.e. relations which have been created between the employee and the employer on the basis of labour contract. Legal labour relations are commitments of a personal nature and they are regulated mainly by Labour Law. The challenged norm is of a public law nature. Besides, as indicated before, it does not concern particular persons. Even in cases when the binding regulations establish that the owner is responsible for ensuring maintenance of the land, they do not create legal labour relations between the local government and the owner. The particular duty is connected with a certain plot of land and not a certain person and the owner has the right of choosing in which way to maintain order in the territory and who will do it. Thereby the challenged norm is not at variance with Article 107 of the Constitution.

In assessing whether the challenged norm complies with Article 91 of the Constitution, the Court ascertained that the challenged norm and the binding regulations issued by the local governments on the basis of it equally concern the owners of apartments in apartment buildings and the owners of private houses and held that it had not been established that the owners of properties of different types were treated differently.

The Court decided to declare the challenged norm in conformity with Articles 91, 106 and 107 of the Republic of Latvia Constitution.

Cross-references:

- Case no. 2002-04-03, *Bulletin* 2004/1 [LAT-2002-3-008].

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2004-2-006

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 07.07.2004 / **e)** 2004-01-06 / **f)** On the Compliance of Article 1142 of the Administrative Violation Code with 9 April 1965 Convention on Facilitation of International Maritime Traffic / **g)** *Latvijas Vestnesis* (Official Gazette), 108 (3056), 09.07.2004 / **h)** CODICES (English, Latvian).

Keywords of the systematic thesaurus:

2.2.1.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.

2.2.1.6 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law.

Keywords of the alphabetical index:

Maritime Traffic, International, 1965 Convention on Facilitation / Foreigner, without documents, border crossing / Carrier, responsibility, administrative / Schengen, Convention.

Headnotes:

When there is a discrepancy between international legal norms ratified by the parliament (*Saeima*) and national legal norms, international legal norms shall be applied. Further, international liability, undertaken by Latvia on the basis of international agreements ratified by the parliament, are binding also on the parliament itself. Thus, it may not adopt legal acts which are at variance with the above liabilities.

Summary:

The Riga Northern District Court lodged an application to the Constitutional Court regarding the compliance of Article 1142 of the Administrative Violation Code with the 9 April 1965 Convention on Facilitation of International Maritime Traffic (hereafter “the Convention”).

The challenged norm envisages the responsibility of the carrier for carrying one or several persons by maritime traffic from foreign states to the Republic of Latvia if the above persons do not have valid travel documents for crossing the State border of the Republic of Latvia. Standard 3.15 of the Convention, however, envisages that public authorities shall not impose any penalty upon ship-owners in the event that any control document which a passenger is in possession of is found to be inadequate, or if, for that reason, the passenger is not allowed to enter the State.

The parliament points out that the challenged norm is necessary to observe Council Directive 2001/51/EC of 28 June 2001 (hereinafter: “the Directive”). Article 4 of the Directive includes reference to Article 26 of the Convention under which the Governments of the Benelux States, the German Federal Republic and the Republic of France implement 14 June 1985 Schengen Convention on gradual withdrawal of control on the connecting borders (hereafter “the Schengen Convention”). In accordance with the provisions of these acts carriers who transport to the territory of the EU third country nationals who are not citizens of the EU and who do not have the necessary documents shall be applied penalties.

To evaluate whether the challenged norm complies with the above norm of Standard 3.15 the Court ascertained:

1. that Standard 3.15 of the Convention is the legal norm binding on Latvia;
2. that the term “the carrier” used in the challenged norm and the term “the ship-owner” used in Standard 3.15 of the Convention refer to one and the same range of subjects;
3. that the term “valid travel documents” in the challenged norm and “control documents” in the Standard 3.15 of the Convention mean the same documents.

The Court held that the challenged norm envisages responsibility for the activities for which Standard 3.15 of the Convention prohibits the states to set out

responsibility, except where the state has notified about a different practice under the procedure determined by the Convention. As Latvia has not notified such a practice, the Latvian national norm is at variance with the international norm.

The Court stressed that every Member State of an international treaty shall observe fairness and appreciation, following from the treaties and other international legal sources. The State may not allow its national law to contradict international liabilities (law).

The Court analyzed Article 68 of the Constitution (*Satversme*), several laws and Article 26 of the Vienna Convention on Treaties and pointed out that in each particular case, if there arises a discrepancy between the international legal norms, ratified by the parliament, and the national legal norms of Latvia the international legal norms shall be applied.

After joining the European Union the Republic of Latvia has to honour the liabilities following from the Accession Treaty. In accordance with the above act the Directive is also binding on Latvia. Taking into consideration Article 4 of the Directive Member States shall take the necessary measures to ensure that the penalties applicable to carriers under the provisions of Article 26.2 and 26.3 of the Schengen Convention are dissuasive, effective and proportionate.

Article 26.2 of the Schengen Convention determines that Member States shall impose penalties on those carriers transporting persons from third countries to the territory of the EU who are not citizens of the EU and who do not have the necessary documents.

The Court established that there is variance between the national legal norm (the challenged norm) and the norm of the Directive as well as the norm of the international agreement (Standard 3.15).

The Court pointed out that Article 307 of the Foundation Agreement of the Consolidated European Community regulates the above cases, establishing that European laws do not affect earlier agreements, but that Member States shall try to eliminate any inconsistencies. Taking into consideration the European Court of Justice Judgment in the case *Commission v. Italy*, (Case 10/61, [1962] ECR, p. 11) as concerns relations with other Member States, the EU (Community) norms shall be applied, i.e., legal acts of the European Community shall be applied. Besides, if the Member State establishes that its international legal liabilities are not in conformity with the legal norms of the European Community, it shall undertake the necessary measures to eliminate the inconsistency.

The Court decided that:

1. from the time of adoption of the challenged norm till 1 May 2004 the challenged norm in the part setting out responsibility to those carriers of the States, which are the Contracting States of the Convention, was at variance with Standard 3.15 of the Convention;
2. in its turn in the period after 1 May 2004 if the State of Latvia does not inform about the different practice using the procedure set out in the Convention, the challenged norm in the part on determination of responsibility to the carriers of the States, which are Contracting States of the Convention, but are EU States, is at variance with Standard 3.15 of the Convention.

Cross-references:

- European Court of Justice Judgment in the case *Commission v. Italy*, Case 10/61.

Languages:

Latvian, English (translation by the Court).



Liechtenstein State Council

Important decisions

Identification: LIE-2004-2-002

a) Liechtenstein / **b)** State Council / **c)** / **d)** 29.06.2004 / **e)** StGH 2003/66 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.22 **General Principles** – Prohibition of arbitrariness.

4.16 **Institutions** – International relations.

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

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

Keywords of the alphabetical index:

Judicial assistance, mutual, international / Abuse, of rights / Good faith, principle / Criminal procedure, civil action.

Headnotes:

The grant to a foreign State of leave to take part as party claiming damages in domestic criminal proceedings brought on the basis of a commission rogatory requested by that State constitutes a use of the legal institution of the "party claiming damages" inconsistent with its purpose where the procedural and substantive provisions of the law on mutual judicial assistance are thus misused. The law on mutual judicial assistance is rendered nugatory and devoid of purpose if the domestic criminal proceedings and the mutual judicial assistance proceedings are so closely related that the requesting State and the party claiming damages defend the same interests and, that notwithstanding, that State is granted leave to take part in the domestic criminal proceedings as party claiming damages.

Summary:

In mutual judicial assistance proceedings, the State requesting mutual judicial assistance was also granted leave by the court to take part, as party claiming damages, in the related criminal proceedings, which, in theory, conferred on that State an extensive right to consult the documents in the file even before the mutual judicial assistance proceedings had been closed. The State Council allowed the appeal lodged against the decision of the Superior Court upholding that grant of leave, on the ground that it amounted to an infringement of the principle of the prohibition of abuse of law, an infringement that arose from a violation of the principle of good faith.

Languages:

German.



Lithuania

Constitutional Court

Important decisions

Identification: LTU-2004-2-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 25.05.2004 / **e)** 24/04 / **f)** On the Law on Presidential Elections / **g)** *Valstybės Žinios* (Official Gazette), 85-3094, 26.05.2004 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

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

3.16 **General Principles** – Proportionality.

4.4.2.2 **Institutions** – Head of State – Appointment – Incompatibilities.

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

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

Keywords of the alphabetical index:

Election, presidential / President, candidate, requirements / Oath, breach.

Headnotes:

Under the Constitution, where a person has grossly violated the Constitution, breached the oath or committed a crime whereby the Constitution has also been grossly violated and the oath has been breached, and the person has been removed – in accordance with the procedure for impeachment proceedings – from the office of the President of the Republic, President or a justice of the Constitutional Court, President or a justice of the Supreme Court, President or a judge of the Court of Appeal, or has had his or her mandate of member of the parliament (*Seimas*) revoked, that person may never be elected President of the Republic, or member of the parliament, and may never hold the office of justice of the Constitutional Court, justice of the Supreme Court, judge of the Court of Appeal, judge of another court, member of the Government or State Controller. Such a person may never hold the offices established

in the Constitution that require the taking of the oath provided for in the Constitution before taking office.

The Constitution does not establish that a person, who has been removed from office, or has had his or her mandate of a member of the parliament revoked in accordance with the procedure for impeachment proceedings for the commission of a crime by which the Constitution has not been grossly violated and the oath has not been breached, may not be elected President of the Republic.

Summary:

On 4 May 2004, the parliament (*Seimas*) adopted the Law supplementing the Law on Presidential Elections with Article 1¹ and supplementing Article 2 thereof. By Article 2.1 of the 4 May 2004 law, Article 2 (wording of 19 September 1996) of the Law on Presidential Elections was supplemented with the new paragraph 2 and it was established that a person, who had been removed from office or had his or her mandate of member of the parliament revoked by the parliament in accordance with the procedure for impeachment proceedings, could not be elected President of the Republic if less than 5 years had elapsed since his or her removal from office or of the revocation of his or her mandate of member of the parliament. Article 1 of the Law supplementing the Law on Presidential Elections with Article 1¹ and supplementing Article 2 thereof added Article 1¹ to the Law on Presidential Elections.

Article 1¹ states:

“Article 1¹. Purposes for Supplementing Article 2 of this Law.

Pursuant to the principles of an open, just and harmonious civil society and state under the rule of law enshrined in the Preamble to the Constitution of the Republic of Lithuania, as well as Articles 6, 34 and 74 of the Constitution, the Parliament of the Republic of Lithuania adopts this Law.”

The petitioners, a group of members of the Parliament of the Republic of Lithuania, applied to the Constitutional Court with a petition seeking a review firstly, whether Article 1 of the Law supplementing the Law on Presidential Elections with Article 1¹ and supplementing Article 2 thereof was not in conflict with the principle of a state under the rule of law enshrined in the Preamble to the Constitution of the Republic of Lithuania; and secondly, whether Article 2 of that law was in conflict with the principle of a state under the rule of law enshrined in the Preamble to the Constitution of the Republic of Lithuania, as well as

with Articles 1, 2, 3.1, 4, 5.1, 5.2, 6.1, 29.1, 33.1, 34.2, 67, 78.1, 79 and 109.1 of the Constitution. In the petitioners opinion, the law supplementing the Law on Presidential Elections with Article 1¹ and supplementing Article 2 thereof violated the principles and provisions enshrined in the Constitution and denied the Constitution as a value by establishing a restriction that did not exist in the Constitution, namely, that a person, who had been removed from office or had his or her mandate of member of the parliament revoked by the parliament in accordance with the procedure for impeachment proceedings, could not be elected President of the Republic if less than 5 years had elapsed since that removal from office or that revocation even though no such restriction existed in the Constitution, and by justifying that restriction with the argument of striving for an open, just and harmonious civil society and a state under the rule of law.

The petitioners submitted that Article 2 of the Law supplementing the Law on Presidential Elections with Article 1¹ and supplementing Article 2 thereof had established an additional sanction for a person who had been subject to impeachment proceedings because the passive electoral right of such a person was restricted by the legal regulation established in that article. Therefore, in the opinion of the petitioners, the restrictions were in conflict with the constitutional principles of a state under the rule of law, those of justice and proportionality.

The Constitutional Court concluded as follows.

The part of Article 2.2 (wording of 4 May 2004) of the Law on Presidential Elections that establishes that a person, who has been removed from office or has had his or her mandate of member of the parliament revoked by the parliament in accordance with the procedure for impeachment proceedings, may not be elected as President of the Republic is not in conflict with the Constitution. The provision of Article 2.2 setting out that “if less than 5 years have elapsed since his removal from office or the revocation of his mandate of the parliament member”, and the provision that a person, who has been removed from office or had his or her mandate of member of parliament revoked by the parliament in accordance with the procedure for impeachment proceedings for the commission of a crime by which the Constitution of the Republic of Lithuania has not been grossly violated or the oath has not been breached, is in conflict with the Constitution of the Republic.

The part of Article 2.2 (wording of 4 May 2004) that reads “if less than 5 years have elapsed since his removal from office or the revocation of his mandate of the parliament member” is in conflict with

Articles 34.2, 59.2, 59.3, 74, 82.1, 104.2 and 112.6 of the Constitution, Article 5 of the Law “On the Procedure of the Entry into Effect of the Constitution of the Republic of Lithuania” and the constitutional principle of a state under the rule of law.

Moreover, Article 2.2 (wording of 4 May 2004) to the extent that it provides that a person, who has been removed from office or had his or her mandate of member of parliament revoked by the parliament in accordance with the procedure for impeachment proceedings for the commission of a crime by which the Constitution of the Republic of Lithuania has not been grossly violated or the oath has not been breached, may not be elected President of the Republic, is in conflict with Articles 34.2, 56.2, 74 and 78.1 of the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2004-2-005

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 01.07.2004 / **e)** 04/04 / **f)** On creative activities of members of the parliament (*Seimas*) / **g)** *Valstybės Žinios* (Official Gazette), 105-3894, 06.07.2004 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.

Keywords of the alphabetical index:

Parliament, member, creative activities, remuneration.

Headnotes:

The principle of incompatibility of the duties of a member of the parliament (*Seimas*) with other offices or work means that the duties of a member of the parliament are incompatible with any other activity. This would encompass such activities as: taking office, performing work, performing a service, fulfilment of other functions, performing other tasks,

holding an honorary office in a state, municipal, international or private establishment, enterprise or organisation, including representing such an establishment, enterprise or organisation, with the exception of the duties *expressis verbis* or implicitly set out in the Constitution.

The Constitution prohibits members of the parliament from receiving any remuneration other than that of a member of the parliament, which means that a member of the parliament may not receive any other remuneration, with the exception of the remuneration *expressis verbis* specified or implicitly provided for in the Constitution.

The remuneration of a member of the parliament for “educational activities”, as provided for in the Statute of the parliament, cannot be considered to be remuneration for “creative activities” as provided for by the Constitution.

Summary:

The petitioners, a group of members of the parliament, petitioned the Constitutional Court of the Republic of Lithuania for a review as to whether the provisions of Article 15.4 of the Statute of the parliament (*Seimas*) (wording of 22 December 1998; hereinafter also referred to as the Statute of the parliament), which allow members of the parliament to receive remuneration for educational and creative activities if engaged in outside the times of the sittings of the parliament, its committees and commissions, were in conflict with the provisions of Article 60 of the Constitution, which prohibit members of the parliament from receiving any other remuneration, with the exception of remuneration for creative activities.

It is established in Article 15.4 of the Statute of the parliament that a member of the parliament may not receive any remuneration, except remuneration for creative activities, royalties for art and its performance, publications and books, material for radio and television broadcasts, as well as remuneration for educational and scientific activity taking place outside the time of the sittings of the parliament or its committees and commissions. Having compared the provisions entrenched in Article 113.1 of the Constitution with the provisions of Article 60.3 of the Constitution, the petitioners came to the conclusion that according to the Constitution, educational activities were separate from creative activities, whereas the definition of creative activities as per Article 15.4 of the Statute of the parliament comprised both educational and scientific activities and was broader than the definition in Article 60.3 of the Constitution. Therefore, in the opinion of the

petitioners, the provisions of Article 15.4 of the Statute of the parliament permitting members of the parliament to receive remuneration for educational and scientific activity taking place outside the times of the sittings of the parliament, its committees and commissions were in conflict with the Constitution.

The Constitutional Court emphasised that the principle of incompatibility of the duties of a member of the parliament with other offices or work means that the duties of a member of the parliament were incompatible with any other activity. This would encompass such activities as: taking office, performing work, performing a service, fulfilment of other functions, performing other tasks, holding an honorary office in a state, municipal, international or private establishment, enterprise or organisation, including representing such an establishment, enterprise or organisation, with the exception of the duties *expressis verbis* or implicitly set out in the Constitution as follows:

1. the duties of a member of the parliament specified in Article 60.1 of the Constitution, which comprise the office of President of the parliament, Deputy President of the parliament and the office of member of the parliament in the parliament, which are taken by a member of the parliament pursuant to the Statute of the parliament in the governing body of the parliament or when leading a structural sub-unit of the parliament, as well as other offices, which may be taken in the parliament only by a member of the parliament, also offices of a member of the parliament in inter-parliamentary and other international institutions, which may only be taken by a member of the parliament;
2. the office of Prime Minister or Minister specified in Article 60.2 of the Constitution; and
3. offices in the unions specified in the Constitution, which are linked with his membership in a respective union.

The Constitutional Court also emphasised that the Constitution prohibits members of the parliament from receiving any remuneration other than that of a member of the parliament, which means that a member of the parliament may not receive any other remuneration, with the exception of the remuneration *expressis verbis* specified or implicitly provided for in the Constitution:

1. remuneration for the duties of a member of the parliament, which comprise the office of President of the parliament and the Deputy President of the parliament, the office of member of the parliament in the parliament, which are taken by a member of the parliament pursuant to the Statute of the parliament in the governing body of the parliament

or when leading a structural sub-unit of the parliament, other offices which may be taken in the parliament only by a member of the parliament, as well as offices in inter-parliamentary and other international institutions, which may only be assumed by a member of the parliament;

2. remuneration for holding the office of Prime Minister or Minister; and
3. remuneration for creative activities engaged by him or her in which he or she does not act as a party in an employment, a service or similar relationship.

The Constitutional Court therefore ruled that Article 15.4 of the Statute of the parliament to the extent that it provides that remuneration of a member of the parliament for educational activities is considered to be remuneration for creative activities, was in conflict with Article 60.3 of the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Luxembourg Constitutional Court

Important decisions

Identification: LUX-2004-2-002

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 28.05.2004 / **e)** 20/04 / **f)** Article 115 of the Social Insurance Code / **g)** *Mémorial, Recueil de législation* (Official Gazette), A no. 94 of 18.06.2004 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

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

5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Compensation, damage, entitlement / Compensation, non-material damage / Social insurance, work accident, compensation / Work accident, compensation, eligible dependants, right to appeal.

Headnotes:

1. Article 115 of the Social Insurance Code, which precludes action in accordance with ordinary law for a category of persons, is a provision that regulates the functioning of the social insurance institution and thus does not affect the natural rights of the person and of the family.

2. Article 115 of the Social Insurance Code is not affected by the provisions of Article 12 of the Constitution securing the citizens' individual freedom.

3. Article 115 of the Social Insurance Code is not affected by the provisions of Article 16 of the Constitution securing the right to property.

4. Article 115 of the Social Insurance Code, in so far as it precludes action in damages under ordinary law for recipients of lump-sum compensation in the event of a work accident, is not contrary to Article 10bis.1 of the Constitution establishing the equality of citizens before the law.

5. On the other hand, Article 115 of the Social Insurance Code is contrary to Article 10bis.1 of the Constitution in so far as it makes the ordinary remedy unavailable to a dependant of the victim excluded from the work accident compensation arrangements.

6. The right of appeal established by Article 116 of the Social Insurance Code does not give rise to any inequality as regards the exclusions provided for in Article 115 of the same Code, since the accident insurance association's right of action is not comparable to that of the actual victims of the tort.

Summary:

The Luxembourg district court, examining an action in damages brought by indirect victims of a work accident, put the following preliminary questions to the Constitutional Court:

“1. Since Article 115 of the Social Insurance Code provides that certain persons “may not, by reason of the accident, seek damages in court”, is it in accordance with the Constitution and specifically with Articles 11.3, 12 and 16 thereof?

2. Is Article 115 of the Social Insurance Code, in excluding “the persons referred to in Articles 85, 86 and 90, (...) even where they are ineligible for the benefit” from the full compensation awarded under ordinary law to any other victim of an accident, contrary to the Constitution and specifically to Article 10bis thereof?

3. In excluding “their dependants (...), even where they are ineligible for the benefit” from the full compensation awarded under ordinary law to any other direct or consequential victim of an accident, is Article 115 of the Social Insurance Code contrary to the Constitution and specifically to Article 10bis thereof?

4. Since Article 115 of the Social Insurance Code grants the victim a right of appeal only in the event of an accident which was caused intentionally, whereas Article 116 of the same Code secures this right to the insurance association in respect of the same liable parties where an accident is caused either intentionally or by sheer

negligence, is Article 115 contrary to the Constitution and specifically to Article 10bis thereof?"

The questions were answered in keeping with the distinctions drawn in the headnotes to the case.

Languages:

French.



Identification: LUX-2004-2-003

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 18.06.2004 / **e)** 21/04 and 22/04 / **f)** Article 1 of the amended law of 18 May 1979 reforming staff representative bodies, Article 43 of the amended law of 24 December 1985 establishing the general conditions of service of municipal officials / **g)** *Mémorial, Recueil de législation* (Official Gazette), A nos. 116 and 117 of 12.07.2004 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.

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

5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.

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

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

Keywords of the alphabetical index:

Municipality, staff, representation / Employee, representative, qualification for election.

Headnotes:

Article 1.2 of the law of 18 May 1979 on staff representative bodies disqualifies a municipality's private-sector employees from participating in staff representation in both a representing and a represented capacity, and thus infringes Article 10bis of the Constitution which provides that "Luxemburgers shall be equal before the law".

Summary:

The Administrative Court, having before it an appeal against the refusal of the City of Luxembourg to place a private-sector employee on the electoral register drawn up for the reconstitution of the representative body of officials and employees of the City of Luxembourg, put the following preliminary question to the Constitutional Court:

"Do Article 1 of the amended law of 18 May 1979 reforming staff representative bodies and Article 43.5 and 43.9 of the amended law of 24 December 1985 establishing the general conditions of service of municipal officials, taken together or otherwise singly, comply with Articles 10bis and 11.5 of the Constitution either in combination or separately?"

The reply was that the first of these statutory provisions, on its own, did not comply in its second paragraph with Article 10bis of the Constitution.

Languages:

French.



Moldova

Constitutional Court

Important decisions

Identification: MDA-2004-2-004

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 18.05.2004 / **e)** 14 / **f)** Review of the constitutionality of Section 18.2 of Law no. 123-XV of 18 March 2003 on local government and of Government Decree no. 688 of 10 June 2003 on the structure and organisation of local government staff in villages (*communes*) and towns (*municipes*) / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

1.3.5.10 **Constitutional Justice** – Jurisdiction – The subject of review – Rules issued by the executive.

3.6.2 **General Principles** – Structure of the State – Regional State.

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

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

Keywords of the alphabetical index:

Local self government, freedom of administration / Local self government, organisation of staff, determination.

Headnotes:

The organisation and functioning of local government and the relations between the various tiers of government are based on the principles of local self-government, the decentralisation of public services, the elected status of local authorities and public consultation.

In accordance with Article 112.1 and 112.2 of the Constitution, parliament grants local councils the right to approve the staffing chart and the organisation of the staff of local authorities and subordinate public bodies and recommends that local councils base themselves on the model approved by the government with regard to the organisation of staff. This

provision is justified by the fact that all local authorities have the same status, powers and structures in all administrative and territorial entities.

With regard to local self-government, the passage in the impugned Article 18.2.f of Law no. 123-XV of 18 March 2003 reading “on the basis of model organisational charts approved by the government” is not a restrictive rule and does not require strict enforcement by local councils, as the expression “model organisational charts” implies only examples of the type of chart that may be used.

Summary:

An application was made to the Constitutional Court by a group of members of parliament requesting a review of the constitutionality of Law no. 123-XV of 18 March 2003 on local government and Government Decree no. 688 of 10 June 2003 on the structure and organisation of local government staff in villages (*communes*) and towns (*municipes*).

In order to implement Section 18.2.f of Law no. 123-XV of 18 March 2003, which provides that the local council must “approve, on the mayor’s proposal, the staffing chart and the organisation of the staff of the local authority, on the basis of model organisational charts approved by the government, along with its infrastructure and subordinate public bodies”, the government adopted Government Decree no. 688, by which it approved its model staff organisational charts and recommended that the mayors of Moldova’s villages (*communes*), towns (*municipes*) and the cities of Beltsy and Chisinau should draw up such charts for their own staff and that of the council’s subdivisions and that the councils concerned should approve them in accordance with appendices 1, 2, 3 and 4 of the Decree.

The applicants submitted that when these laws were adopted, no account was taken of the principles of local government enshrined in the Constitution, other relevant legislation and the international treaties to which Moldova is a party.

Article 112.1 of the Constitution states that local self-government is exercised by local elected councils and mayors, who operate, under the law, as autonomous administrative authorities, governing public affairs in villages and towns.

Article 4 of the European Charter of Local Self-Government provides that, within the limits of the law, local authorities have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence or assigned to any other authority.

Local authorities are the key to local government. As they are required to resolve problems of local interest, they play an important role in the development of administrative and territorial entities and in ensuring the activities of public services.

The principle of local self-government is one of the fundamental principles of any democratic regime governing local public administration and the activities of local authorities. It also provides for the election of the organs of local public administration by the inhabitants of the local authority, autonomy in establishing and managing local public finances, and the setting up of local public services according to the local authority's needs and financial means.

The Court found that the passage "on the basis of model organisational charts approved by the government" was in conformity with Article 102 of the Constitution and hence that the government could adopt model local-government staff organisation charts as recommendations to local councils. As it was only a recommendation to local authorities, Government Decree no. 688 was not statutorily binding. For this reason, it was not subject to constitutional review and so, under Article 60.c of the Constitutional Jurisdiction Code, the Court decided to suspend the proceedings in this respect.

The Court held that the passage of Law no. 123-XV of 18 March 2003 reading "on the basis of model organisational charts approved by the government" was in conformity with the Constitution, and suspended its review of the constitutionality of Government Decree no. 688 of 10 June 2003.

Dissenting opinion

Judges Victor Puscas and Mircea Iuga expressed the following dissenting opinion:

In Judgment no. 11 of 10 June 2003, the Constitutional Court found that the passage in Law no. 123-XV of 18 March 2003 on local public administration reading "on the basis of model organisational charts approved by the government" was in conformity with the Constitution, and suspended the review of the constitutionality of Government Decree no. 688 of 10 June 2003 on the structure and organisation of local government staff in villages (*communes*) and towns (*municipes*).

Section 7.1 of Law no. 123-XV expressly states that the local authorities enjoy the autonomy enshrined in and guaranteed by the Constitution, the international treaties to which the Republic of Moldova is a party and other statutory instruments. The European Charter of Local Self-Government provides that

without prejudice to more general statutory provisions, local authorities must be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management.

Under the provisions cited, statutory measures adopted directly by the government do not form part of the instruments that can be used to regulate the area of local self-government. Consequently, the government cannot impose a system for the appointment of staff on local councils.

The impugned provision of Section 18.2.f of the law in question infringes the constitutional and international law provisions under which local authorities independently determine the organisation of their staff and administrative structures.

According to the dissenting judges, the Constitutional Court should also have extended its constitutional review to the passage "under the model organisational chart approved by the government" in Sections 49.1.k and 58.2 of Law no. 123-XV and to Government Decree no. 688 of 10 June 2003, as they served the same purpose, and the Court should have declared them unconstitutional.

Languages:

Romanian, Russian.



Identification: MDA-2004-2-005

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 29.06.2004 / **e)** 18 / **f)** Review of the constitutionality of paragraphs 2, 3 and 4 of Article 174¹ of the Code of Administrative Offences / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
 3.12 **General Principles** – Clarity and precision of legal provisions.
 3.15 **General Principles** – Publication of laws.
 4.5.2 **Institutions** – Legislative bodies – Powers.

5.3.28 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

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

Keywords of the alphabetical index:

Meeting, public, authorisation / Meeting, illegal, active participants, penalty.

Headnotes:

The right to organise peaceful, unarmed meetings is a fundamental human right, enshrined in Article 40 of the Constitution and Article 11 ECHR. Like other fundamental rights, this right is universal and, under Article 55 of the Constitution, it must be exercised in good faith without violating the rights and freedoms of others.

Interpreting laws and ensuring the unity of laws throughout the country is one of parliament's main powers (Article 66.c of the Constitution). The impugned provisions of Article 174 of the Code of Administrative Offences meet the conditions of clarity, foreseeability, transparency and accessibility. The fact that the law does not state exactly what is meant by "active participation" in Article 174.4 is not a plausible argument for inferring that these provisions are unconstitutional. According to paragraph 4, only the active participants in an illegal meeting may be subject to administrative penalties, not all the participants, and in the Constitutional Court's opinion this does not amount to a violation of the freedom of peaceful assembly. The officially authorised bodies determine the degree to which people have participated – actively or passively – in a meeting held without first consulting or seeking permission from the mayor.

Summary:

The case originated in an application by 5 members of parliament requesting a review of the constitutionality of paragraphs 2, 3 and 4 of Article 174¹ of the Code of Administrative Offences, which penalises infringements of the fixed administrative arrangements in this area governed by Law no. 560-XIII of 21 July 1995 on the organisation and running of meetings (hereinafter: "the Law no. 560-XIII").

The applicants submitted that the statutory provisions under which it is compulsory to seek the mayor's permission or opinion before holding a meeting limited the exercise of the right guaranteed by Article 40 of the Constitution. According to the applicants, the introduction of an administrative

penalty under Article 174¹ of the Code of Administrative Offences was contrary to Article 54.2 and 54.4 of the Constitution as it constituted a restriction that was disproportionate to the situation to which it was responding and infringed the right to freedom of assembly. The applicants also asserted that paragraph 4 of Article 174¹ did not correspond to the accepted notion of a law, which should normally be transparent, clear and foreseeable, whereas the expression "active participation" did not have these characteristics and this enabled the law enforcement agencies to interpret it as they wished.

The right to hold peaceful meetings must be exercised in good faith without violating the rights and freedoms of others. As a legal principle, good faith was related to the need to exercise rights and freedoms properly and honestly showing due regard to the reasoning behind them. This constitutional principle was applied to the right of citizens to stage meetings, protests, demonstrations, marches and other gatherings.

The Constitutional Court held that the constitutional provisions concerning fundamental rights and freedoms, including freedom of assembly (Article 40), were in conformity with Article 54.2 of the Constitution, which states that the exercise of rights and freedoms cannot be subject to any other restrictions than those prescribed by law in accordance with universally recognised international legal standards and which are necessary in the interests of the country's national security, territorial integrity, economic prosperity or law and order, for the prevention of popular uprisings or offences, for the protection of the rights, freedoms and dignity of others, for the prevention of the disclosure of confidential information or for the defence of the authority and impartiality of the justice system.

Organic Law no. 560-XIII governs the means of exercising freedom of assembly at meetings, protests, demonstrations, marches and other gatherings of citizens in accordance with the Constitution.

The obligation to declare the meeting to the authorities, the arrangements for doing so and the conditions, venue and times of meetings are dealt with in Sections 5, 8, 9 and 11 of Law no. 560-XIII.

Section 20.1 states that meeting organisers and participants who breach the provisions of the law have administrative or criminal responsibility depending on the arrangements made.

Consequently, for Article 174¹ of the Code of Administrative Offences to apply, there had to have

been a violation of Law no. 560-XIII; however, that law had not been complained of by the applicants and so, by virtue of Article 7 of the Constitutional Jurisdiction Code, it had to be presumed constitutional.

The Constitutional Court could not agree with the applicants' submission that the punishment of the organiser of the unauthorised meeting violated the right to freedom of assembly, as, according to the Constitution, the citizens of the Republic, who enjoy the rights and freedoms enshrined in the Constitution and in other laws, are also bound by the duties laid down therein (Article 15); the State's foremost duty is to respect and protect the human person (Article 16.1); everyone is entitled to effective reparation in a court of law against acts violating his or her rights, freedoms or legitimate interests (Article 20.1); everyone whose rights are infringed by a public authority, an administrative act or the fact that his or her case has not been dealt with within the time set by the law, is entitled to obtain recognition of the asserted right, the setting aside of the disputed act and compensation for any loss or damage suffered (Article 53.1); and lastly, offences, penalties and the enforcement of penalties are governed by an organic law adopted by parliament (Article 72.1 and 72.3.n). Furthermore, under Article 54.3 of the Constitution, there can be no restriction of the rights enshrined in Articles 20 to 24 of the Constitution.

For the reasons set out above, the Court found paragraphs 2, 3 and 4 of Article 174¹ of the Code of Administrative Offences to be in conformity with the Constitution.

Languages:

Romanian, Russian.



Poland

Constitutional Tribunal

Statistical data

1 May 2004 – 31 August 2004

I. Constitutional review

Decision by type:

- Cases decided on their merits: 30
- Cases wholly or partly discontinued: 18 (9 fully, 9 partially discontinued)

Decisions by procedure:

- Abstract review *ex post facto*: 10 (8 cases discontinued, 3 fully, 5 partially)
- Questions of law referred by a court: 7 judgments, 3 cases discontinued (1 fully, 2 partially)
- Constitutional complaints: 13 judgments, 7 cases discontinued (5 fully, 2 partially)

Important decisions

Identification: POL-2004-2-011

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 28.01.2004 / **e)** Procedural decision Tw 74/02 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/B, no. 1, item 2 / **h)** CODICES (English, French, Polish).

Keywords of the systematic thesaurus:

- 1.2.2 **Constitutional Justice** – Types of claim – Claim by a private body or individual.
 1.3.2.3 **Constitutional Justice** – Jurisdiction – Type of review – Abstract review.
 1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.

Keywords of the alphabetical index:

Employer, private, confederation / Constitution, interpretation, extensive.

Headnotes:

A rational legislator wishing to provide special protection of economic interests, as would arise from the possibility of submitting applications to the Constitutional Tribunal, would grant such a right to organisations created to represent the interests of their members (e.g. chambers of commerce).

The fact that the challenged provision may have some impact on the applicant, or has already had such an impact, is not sufficient to confirm the applicant's *locus standi*. It is necessary to determine whether the relevant provision governs activities constituting the purposes of the applicant as defined in the Constitution, by statute or, in the case of private-law entities, by their Articles of incorporation. As the provisions challenged by the Polish Confederation of Private Employers concern the economic interests of their members, as opposed to the legal interests of the members in their capacity as employers, the Confederation may not initiate an abstract review on the basis of Article 191 of the Constitution.

The right to initiate proceedings before the Tribunal, vested in the subjects described in Article 191.1 of the Constitution, points 3-5, is an exceptional right granted in consequence of the special nature of the tasks assigned to the given subject by binding constitutional and statutory provisions. An expansive interpretation of the scope of this right is inadmissible.

Summary:

The Polish Confederation of Private Employers submitted an application to the Constitutional Tribunal for the "abstract review" of the provisions of a number of Acts and regulations governing the officially regulated prices of medicines, the manner of determining such prices and the list of medicines which were within the regime of officially regulated prices. It was argued that the challenged provisions "set a level of attainable profit on the trade in medical materials and therefore had a direct impact on the economic activities conducted by the members of the Confederation."

In accordance with Article 191.1 of the Constitution "national authorities of employers' organisations", as one of the subjects mentioned in points 3-5 of this provision, may initiate the abstract review of legal norms only when "the normative act [in question] relates to matters relevant to the scope of their activities".

The Tribunal refused to admit the complaint of the Polish Confederation of Private Employers against the preceding procedural decision refusing to proceed further with the application. This procedural decision was issued following the appeal against a previous decision of the Tribunal refusing to proceed with the application. A dissenting opinion was presented by one judge.

The Constitution substantially broadens the category of subjects entitled to initiate proceedings before the Constitutional Tribunal. This is indicated both by the creation of a new mechanism called "constitutional complaint" and by the decision to vest all courts with the right to refer questions of law to the Tribunal. Accordingly, there is no need to broaden the category of subjects entitled to institute the abstract review of norms by taking an expansive interpretation of the notion of "matters relevant to the scope of their activities", as described in Article 191.2 of the Constitution.

It is inadmissible for the Constitutional Tribunal to examine the merits of an application for the abstract review of legal norms where such an application has been submitted by a subject falling outside the scope of Article 191 of the Constitution or when, although the application has been submitted by one of the subjects listed in Article 191.1 of the Constitution, points 3-5, such an application concerns legal provisions dealing with matters falling outside the scope of activities of that subject (*cf.* Article 191.2 of the Constitution).

Main arguments of the dissenting opinion:

There is no causal link between the broadening of the sphere of subjects entitled to initiate proceeding before the Constitutional Tribunal, which took place in the Constitution of 1997, and the need to avoid an expansive interpretation of Article 191.1 of the Constitution, points 3-5 such as referred to in the Tribunal's ruling.

It has not been proved that the right to submit applications to the Tribunal granted to the subjects enumerated in Article 191.1 of the Constitution, points 3-5, should be viewed as having an "exceptional" character. The differentiation of the nature of the rights of different subjects listed in Article 191.1 of the Constitution is obvious, but it is not possible to infer from this that the initiation rights of subjects listed in Article 191.1 of the Constitution, points 3-5 is of an "exceptional" character when compared to the subjects specified in Article 191.1 of the Constitution, points 1, 2 and 6. On the contrary, the right of the subjects specified in Article 191.1 of the Constitution, points 3-5 is an "ordinary"

constitutional right, albeit subject to additional conditions. The mere fact that the Constitution specifies further conditions for these entities to enjoy the right to initiate proceedings before the Constitutional Tribunal is an insufficient basis on which to draw the conclusion that such a right has an "exceptional" character.

Cross-references:

- Procedural decision T 25/01 of 22.08.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/B, no. 1, item 40;
- Procedural decision K 23/02 of 16.10.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 5, item 76;
- Procedural decision Tw 56/02 of 16.12.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003/B, no. 2, item 70;
- Procedural decision Tw 2/04 of 09.06.2004;
- Procedural decision Tw 33/03 of 09.06.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/B, no. 4, item 227;
- Procedural decision Tw 10/03 of 30.03.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/B, no. 1, item 6;
- Procedural decision K 21/03 of 23.03.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 3, item 26;
- Procedural decision Tw 37/03 of 25.03.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/B, no. 3, item 163;
- Procedural decision Tw 22/03 of 14.04.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/B, no. 2, item 105.

Languages:

Polish, English (summary), French (summary).



Identification: POL-2004-2-012

a) Poland / b) Constitutional Tribunal / c) / d) 18.02.2004 / e) P 21/02 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 34, item 303; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 2, item 9 / h) CODICES (Polish).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
 3.16 **General Principles** – Proportionality.
 3.18 **General Principles** – General interest.
 4.5.2 **Institutions** – Legislative bodies – Powers.
 4.7.15.1 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar.
 4.7.15.1.2 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Powers of ruling bodies.
 5.1.3.2 **Fundamental Rights** – General questions – Limits and restrictions – General/special clause of limitation.
 5.2 **Fundamental Rights** – Equality.
 5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.
 5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Lawyer, admission to profession, conditions / Bar, council, pupil advocates, enrolment, rules and criteria / Legal advisor, traineeship / *Numerus clausus*.

Headnotes:

Self-regulatory professional societies whose members practise professions in which the public has confidence (Article 17.1 of the Constitution), unlike "other forms" of self-government (as referred to in Article 17.2 of the Constitution), may, and sometimes even should, restrict to a certain degree the freedom to pursue a profession or economic activity with regard to the purposes for the fulfilment of which they were created. They may, however, only do this within the confines of the public interest and for the protection of the public, on the basis of a statute and with regard to the conditions laid down in Article 31.3 of the Constitution (principle of proportionality).

The rules and criteria relating to the qualification and selection of candidates for advocate and legal advisor traineeships should be consistent with the conditions stemming from Article 65.1 of the Constitution, which guarantees the freedom to choose and pursue one's occupation and to choose a place of work. Such rules

and criteria should also be consistent with constitutional provisions limiting the extent to which an individual's ability to exercise their rights and freedoms may be restricted (Article 31.1 of the Constitution). In particular, the Constitution demands that any limitations upon the exercise of constitutional freedoms may only be imposed by statute.

Summary:

In order to obtain the right to pursue the profession of advocate or legal advisor in Poland, it is not sufficient merely to complete legal studies. Those wishing to join these professions must also complete several years of professional training, known as the legal advisors' or advocates' "traineeship" and subsequently pass a professional qualifications examination. The organisation of traineeships and professional examinations is conducted by the organs of the relevant self-regulatory legal societies.

Admission to the professional traineeship is based on the results of competitive examinations conducted by district Advocate or Legal Advisor Councils. The provisions challenged in the present proceedings stipulate that the decision as to the number of traineeships available in any given year, and the rules for holding the competitive examinations on which such traineeships are allocated, rests with the appropriate organs of advocate and legal advisor self-regulatory societies. These provisions, in the form in which they previously existed, left the organs of the self-regulatory societies a great deal of discretion in the manner in which they chose to regulate these matters. This had attracted criticism that professionally active advocates and legal advisors were restricting young lawyers from entering these professions.

The review of the constitutionality of the relevant statutes was initiated by two adjudicating benches of the Chief Administrative Court, which each referred a legal question to the Tribunal in the course of examining of the legality of decisions refusing admission to the traineeships.

The ability of self-regulatory professional societies to "concern themselves with the proper practice of a profession in which the public has confidence", within the meaning of Article 17.1 of the Constitution, does not entail the right to impose any restrictions whatsoever on the freedom to choose a given occupation, especially as regards persons not belonging to the professional body in question and wishing to obtain the necessary qualifications to enable them to choose this profession.

Internal regulatory rules governing the competitive examination of the relevant professional organisation have a restrictive effect on the ability of a candidate who is not a member of the relevant professional organisation to enjoy their right to choose their occupation or profession in accordance with Article 65.1 of the Constitution. In contravention with the constitutional requirement resulting from Article 31.3 of the Constitution, provisions of the law subject to constitutional control fail to indicate the constitutional value justifying the limitation of a constitutional right in such as way as to make these restrictions transparent and to allow an assessment of their proportionality. These provisions cede regulatory powers, unfettered by any statutory limitations, to organs of a self-regulatory professional society. The regulations adopted by such bodies by virtue of these statutory provisions have a *de facto* legal effect which is indistinguishable from norms contained in universally binding legal acts (e.g. statutes), despite the fact that these kind of regulations are not included in the exhaustive list of legal measures which may have such effect (Article 87 of the Constitution).

The mere fact of determining a maximum number of advocate traineeships within the district of a given Advocate Chamber does not, in itself, eliminate the freedom to choose and pursue the profession of advocate, although it does reduce the chances for practical enjoyment of this freedom and, furthermore, it has this effect for reasons which are at least partially unrelated to the personal qualities of individual candidates. The number of members of an Advocate Chamber, including the number of trainee advocates, is of significance to the proper practice of the profession, including the adequate training of advocates. The competence to determine the aforementioned limit of trainees need not contradict the principles of equality and justice (Articles 32 and 2 of the Constitution) provided that such limits are set, and subsequently applied, in accordance with rules which are defined in advance, adequately published and transparent, based on objective criteria and applied in a uniform manner. The principal elements of the conditions for determining this limit should be laid down by statute, given their effect on the scope of enjoyment of the freedom to pursue an occupation and to choose the place in which the occupation is pursued.

The function of the legislator in regulating an individual's freedoms ("freedom rights") is not to enact a norm permitting certain behaviour, but above all to enact prohibitions which prevent taking action that would hinder the beneficiary of a particular right from shaping his behaviour, in a given sphere, according to his choice.

In regulating a personal right which has the character of a “freedom”, the legislator must, in particular: define the beneficiaries of the right; indicate subjects having any obligations in respect of this right; define the scope of the given freedom, thereby indicating the sphere of behaviour which is subject to legal protection and with which other subjects may not interfere; define the conditions, procedure and character of interference which may be undertaken, in exceptional circumstances, for the protection of values of special importance and the State organs authorized to undertake such interference; create legal measures safeguarding against unlawful interference by a State organ or other entities; ensure, at least to a minimal extent, the conditions for the practical enjoyment of the particular freedom.

Cross-references:

- Judgment K 32/00 of 19.03.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 3, item 50;
- Judgment K 37/00 of 22.05.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 4, item 86;
- Judgment K 25/99 of 28.06.2000, *Bulletin 2000/2* [POL-2000-2-017];
- Procedural decision P 21/02 of 22.10.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003/A, no. 8, item 90;
- Judgment U 16/02 of 26.07.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 7, item 70.

Languages:

Polish, English (summary), French (summary).



Identification: POL-2004-2-013

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 21.04.2004 / **e)** K 33/03 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 109, item 1160; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 4, item 31 / **h)** CODICES (English, French, Polish).

Keywords of the systematic thesaurus:

- 1.3 **Constitutional Justice** – Jurisdiction.
- 2.2.1.6.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Primary Community legislation and constitutions.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 3.26.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship or nationality.
- 5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.
- 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:

Fuel, bio-components, obligation to sell / Free movement of goods / Employment, job-creating measure / Environment, protection / European Union, national, reverse discrimination.

Headnotes:

The principle of interpreting national law in a manner favourable to European law, based on Article 91.1 of the Constitution, relates in particular to interpretation of the constitutional basis of review performed by the Constitutional Tribunal (in this case – the principles of economic freedom and the protection of consumers).

The scope of the freedom enjoyed by the legislator in enacting regulations concerning restrictions on economic freedom, its delimitation and the interpretation of the notion of “important public reasons”, as contained in Article 22 of the Constitution, must be assessed in the light of Poland’s participation in the European Common Market. This has particular consequences in relation to the constitutional assessment of reverse discrimination – enacting restrictions on economic freedom which apply only to nationals, since their application to other EU citizens is prohibited by Community law. Whilst discrimination against national entities is irrelevant in the light of Community law, it is the constitutional duty of national authorities to protect against such discrimination.

The creation of jobs must constitute an element of State policy, as provided for by Article 65.5 of the

Constitution. However, there is no constitutional individual right to employment, which would justify, on the grounds of the principle of proportionality, the restriction of manufacturers' and consumers' rights as necessary to "protect the rights and freedom of others", as specified in Article 31.3. Furthermore, in the light of Article 65.5, State policy must not lead to a decrease in the number of jobs as a result of excessive restraints on economic activity and the hindrance of flexible employment in the private sector.

Summary:

The Bio-components Used in Liquid Fuels and Liquid Bio-fuels Act 2003 (hereafter: "the Act") is aimed at inducing producers and distributors of liquid fuels to manufacture and offer gasoline and diesel containing additives of biological origin (bio-components), obtained by processing rape-seed, cereal grain or other agricultural resources. The stated rationale for the solutions adopted in the Act was primarily the objective to create new jobs in agriculture and agribusiness, to increase farmers' incomes by stimulating demand for non-foodstuff agricultural products and to improve the quality of the environment.

The ombudsman challenged three individual provisions of the Act which, in his opinion, constituted substantial restrictions on economic freedom or were unfavourable from the perspective of consumer protection.

Article 12.1 of the Act made it obligatory for manufacturers to market in any given year the amount of bio-components specified in a Council of Ministers' Regulation issued yearly under Section 6 of that article. According to Article 14.1 of the Act, "normal" liquid fuels with bio-component additives could be sold through unmarked pumps. The obligation to sell from separate pumps, marked in such a manner so as to enable identification of the bio-component content, related only to bio-fuels in the strict sense. Finally, Article 17.1.3 prescribed an administrative fiscal penalty for undertakings failing to market bio-components or marketing them in lower quantities than those prescribed by the aforementioned Regulation. The penalty would amount to 50% of the value of marketed liquid fuels, bio-fuels and pure bio-components.

Applying the challenged provisions to all manufacturers (sellers) – not only national, but also foreign, including those established in other EU Member States – would constitute a restriction on the free movement of goods between Member States in contravention of European Community law. From the perspective of Community law, such a situation would

be treated as an example of the national legislator imposing restrictions by means of "a measure having equivalent effect" to quantitative restrictions on imports, which is expressly forbidden by Article 28 EC. Although such restrictions are allowed in exceptional circumstances, they are only permissible for reasons laid down in Article 30 EC. Employing this possibility, which requires a special procedure for establishing the derogation, may not amount to arbitrary discrimination or disguised restrictions on trade. In light of the jurisprudence of the Court of Justice of the European Communities, it is unlawful to enact restrictions in the internal legal order which hinder access to the national market of goods failing to comply with qualities or contents specified in national legislation for protectionist purposes. Conversely, limiting the applicability of the reviewed provisions to Polish manufacturers (sellers) – since legislators in other EU Member States have not imposed similar obligations – would lead to reverse discrimination. Since it is impossible for the reviewed provisions to apply to fuels produced abroad and placed on the Polish market, by reason of the country of origin (a consequence of Articles 28 and 30 EC), it is impossible to deem the obligations imposed thereby as consistent with the "important public reasons" referred to in Article 22 of the Constitution.

The criterion of the "necessity" for imposing restrictions on constitutional rights and freedoms with regard to the values enshrined in Article 31.3 of the Constitution (State security, public order, protection of the environment, public health and morality, the protection of the rights and freedoms of others) is inherent in the principle of proportionality. It implies that when the aim may be achieved by means that are less restrictive on rights and freedoms, the adoption of a more burdensome measure constitutes a breach of the requirement of necessity as contained in the aforementioned constitutional provision.

The Constitutional Tribunal is not competent to deliver a verdict in the dispute as to the effect of the production and use of bio-components on the natural environment. Having regard, however, to the fact that a variety of opinions have been expressed on this unclear issue, it is impossible to conclude that the restrictions on the freedom of economic activity imposed by the reviewed provisions are necessary in a democratic State in order to protect the environment.

Among the founding principles of the modern protection of consumers, implemented within the framework of the European Common Market, are: transparency, openness and the availability of clear, full and comprehensible product information. Consumers are not obliged to seek the necessary information in any particular way – it must, rather, be

made available to them. A cornerstone of the consumer's constitutional right to be informed is Article 54.1 of the Constitution. It would be wrong to limit this provision, especially as regards the scope of "obtaining information", to the traditionally perceived right to be involved in political discourse. Individuals occupy a variety of social roles in any given society and one of these is the role of consumer. From this perspective, Article 54 of the Constitution is a guarantee of the realisation of Article 76 of the Constitution in the scope of protecting consumers from unfair market practices. Whilst Article 76 does not in itself give rise to a subjective individual right, it does impose specific duties on the State that must be implemented by way of ordinary legislation.

Cross-references:

- Judgment K 28/97 of 09.06.1998, *Bulletin* 1998/2 [POL-1998-2-013];
- Judgment K 33/98 of 26.04.1999, *Bulletin* 1999/2 [POL-1999-2-010];
- Judgment P 11/98 of 12.01.2000, *Bulletin* 2000/1 [POL-2000-1-005];
- Judgment K 27/99 of 28.03.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 2, item 62; *Bulletin* 2000/2 [POL-2000-2-010];
- Judgment K 12/00 of 24.10.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 7, item 255; *Bulletin* 2000/3 [POL-2000-3-024];
- Judgment K 2/02 of 28.01.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003/A, no. 1, item 4.

Languages:

Polish, English (summary), French (summary).



Identification: POL-2004-2-014

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 04.05.2004 / **e)** K 8/03 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 109, item 1163; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 5, item 37 / **h)** CODICES (Polish, English).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 3.19 **General Principles** – Margin of appreciation.
- 4.10.7.1 **Institutions** – Public finances – Taxation – Principles.
- 5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Family, protection, constitutional / Family, financial situation / Tax, couple, married / Spouse, death / Fairness, principle.

Headnotes:

Tax burdens may not infringe the essence of the values protected by the Constitution.

From the rule of law principle (Article 2 of the Constitution) follows the prohibition on adopting laws that would surprise citizens by virtue of their content or form. Citizens should have the sense of relative legal stability in order to be able to arrange their affairs confident in the fact that, whilst taking certain decisions and undertaking certain actions, they do not expose themselves to adverse and unforeseeable legal consequences.

The recognition of family as a constitutional value protected and cared for by the State (Articles 18 and 71.1 of the Constitution) justifies the need to create legal provisions mitigating the risk of weakening economic bases for the existence of a family having suffered loss as the result of the death of one of the spouses, or even contributing to the strengthening of such bases.

Summary:

In relation to the community of property regime between spouses, legal provisions governing personal income tax (PIT) allow for a choice between the separate taxation of each individual spouse's income and joint taxation based on the so-called marital quotient method. The latter method consists in combining the incomes of both spouses (which is also the case when one of the spouses has no income, or an income below a level at which taxation applies), dividing this sum in half and determining the tax due as twice the amount due on the basis of this calculated half. Since the taxation rules envisage a non-taxable level of income and a progressive rate of taxation (i.e. the higher the income, the higher the tax in percentage terms), application of the marital

quotient often allows for a reduction of the tax burden compared with that which would exist in the event that each spouse's income was taxed separately.

The ombudsman challenged Article 6.2 of the Personal Income Tax Act 1991 which, in the wording in force when the judgment was delivered, made the possibility of joint taxation conditional upon, *inter alia*, the fulfilment of two requirements: continuation of the marriage during the entire tax year and submission of an application concerning joint taxation as part of the joint tax return for a given year. These returns are filed by taxpayers following conclusion of the tax year, and by 30 April of the subsequent year at the very latest. The existence of these two requirements meant that any taxpayer whose spouse died during the tax year, or even following its conclusion but prior to the filing of the annual tax return, was unable to benefit from the joint taxation scheme.

The Tribunal ruled that Article 6.2 of the Personal Income Tax Act 1991 did not conform to Article 2 of the Constitution (the rule of law), Article 18 of the Constitution (protection of marriage) and Article 71.1 of the Constitution (the good of the family) of the Constitution insofar as it deprived the following persons of the right to joint income taxation of spouses subject to the community of property regime:

- a. taxpayers who were married prior to commencement of the tax year and whose spouse died during that tax year;
- b. taxpayers who continued to be married during the entire tax year and whose spouse died following conclusion of the tax year but prior to filing a joint tax return.

The legislator is entitled to a broad discretion when deciding which issues require statutory regulation. However, where Parliament has reached such a decision, statutory regulation of the relevant area must respect constitutional principles.

The acceptance, under certain conditions, of the joint taxation of spouses based on the marital quotient method, as envisaged by Article 6.2 and 6.3 of the Personal Income Tax 1991, does not constitute an exception from the principle of the universality of taxation (Article 84 of the Constitution), nor a privilege or a type of tax reduction (Article 3.6 of the Tax Ordinance Act 2003) but is one of the two equivalent methods of income taxation of persons under the community of property regime (alongside the method of separate taxation of each spouse's income – Article 6.1 of the Personal Income Tax Act 1991). Joint taxation is justified on the grounds of values expressed in Articles 18 and 71.1 of the Constitution and is also consistent with the regulations of the

Family and Guardianship Code, stressing the economic dimension of the community formed by the family, in particular with the obligation of each of the spouses to contribute to fulfilment of the family's needs according to his/her abilities and earning capacity (Article 27 of the Family and Guardianship Code). It also corresponds to the fairness principle in taxation (expressed in Article 84 of the Constitution), according to which the tax burden should correspond to the taxpayer's financial capacity.

With the commencement of the tax year, spouses assume they will have the right to joint taxation and, acting on this assumption, they form plans regarding their level of income and expenditure. Where there exists a considerable difference between the personal incomes of spouses, or where one spouse does not earn any income, application of the marital quotient method is economically beneficial for them and justified from the perspective of the good of the family. However, as a result of the limitations stemming from Article 6.2 of the Act, the forecasting and shaping of spouses' life relations is accompanied by the risk of unexpected adverse financial consequences. The challenged provision allowed for a situation whereby, if the death of a spouse occurred during the tax year or following the conclusion of the tax year but prior to the filing of that year's annual tax return, the surviving spouse was deprived of the possibility to benefit from joint income taxation, contrary to their prior expectations. In enacting such a provision, the legislator adopted an excessively formalistic condition for the applicability of the joint taxation system: namely, requiring both spouses to submit an appropriate application as part of their joint tax return following conclusion of the tax year. Accordingly, the challenged provision created a peculiar trap for taxpayers and, for this reason, the claim that it fails to conform to Article 2 of the Constitution is justified.

It is the legislator's function to amend the challenged provision so as to ensure its conformity with the Constitution. The broad discretion enjoyed by the legislator when shaping the tax regime enables a choice between several possible solutions to the present problem, including for example the right to combine the deceased spouse's income with income acquired by the surviving spouse either during the whole tax year or merely from the commencement of the tax year until the death of the other spouse.

The addressee of the norms included in Articles 18 and 71.1 of the Constitution, formulated as principles of State policy, is primarily the legislator. These provisions do not constitute a basis for the pursuit of individual claims.

Cross-references:

- Judgment K 18/98 of 07.06.1999, *Bulletin* 1999/2 [POL-1999-2-020];
- Judgment P 3/00 of 14.06.2000, *Bulletin* 2000/2 [POL-2000-2-015];
- Judgment SK 21/99 of 10.07.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 5, item 144;
- Judgment K 13/01 of 25.04.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 4, item 81.

Languages:

Polish, English (summary).

**Identification:** POL-2004-2-015

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 05.05.2004 / **e)** P 2/03 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 111, item 1181; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 5, item 39 / **h)** CODICES (Polish, English, French).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
- 5.1.3.2 **Fundamental Rights** – General questions – Limits and restrictions – General/special clause of limitation.
- 5.2.1 **Fundamental Rights** – Equality – Scope of application.
- 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Media, press, written, right to response / Media, statement, response, rectification, definition / Media, editorial comments, publication.

Headnotes:

The requirement that any limitation imposed on constitutional rights and freedoms may only be imposed “by statute” (so-called legal reservation; Article 31.3 of the Constitution) signifies more than merely a reminder of the general principle of legal reservation in relation to regulating the legal situation of persons, which constitutes a classical element of the rule of law principle. It also introduces the requirement that such statutory provisions must be sufficiently precise. Behind the formulation stating that limitations to constitutional rights and freedoms may “only” be instituted by statute lies an order of completeness, allowing the complete extent of such restrictions to be identified on the basis of the interpretation of those statutory provisions.

Article 46.1, read in conjunction with Article 32.6 of the Press Act 1984, insofar as it prohibits, under threat of punishment, commenting on the text of rectifications published in the same periodical edition or broadcast, whilst failing to define the notions of rectification and response, does not conform to Articles 2 of the Constitution (rule of law principle) and 42.1 of the Constitution (*nullum crimen sine lege*), since it is insufficiently precise in specifying the elements of the prohibited act.

Article 54.1 of the Constitution regulates three personal freedoms: to express one’s opinions, to acquire information and to disseminate information. The notion of “opinions” should, in this case, be understood as broadly as possible, encompassing personal assessments of facts and phenomena in all aspects of life, viewpoints, suppositions and speculations, as well as informing about existing and presumed facts.

Summary:

The current Press Act 1984 imposes certain obligations, enforced by both civil and criminal sanctions, on editors-in-chief as regards their dealings with third parties. Such obligations include, in particular, the duty to publish free of charge “rectifications” and “responses” submitted by concerned persons, within a specified time frame and in a stipulated manner. In accordance with the 1984 Act, a “rectification” should be pertinent and relate to facts, with the subject-matter of the rectification relating to “an untrue or inaccurate message” contained in that work. Alternatively, a “response” is required to be pertinent and to possess a subject-matter relating to a “statement constituting a threat to personal interests”. Article 32.6 of the Press Act 1984 prohibits the publication, or announcing, of editorial comments on a rectification in the same edition of the

periodical or broadcast in which that rectification was published. The Act merely permits a periodical or broadcast to announce the inclusion of future explanations or polemics in subsequent editions or broadcasts. No equivalent prohibitions apply in respect of responses. Furthermore, the aforementioned legal classification is important from the perspective of criminal law. Article 46.1 of the 1984 Act prohibits, under threat of fine or restriction of liberty, failure to publish rectifications or responses, or publication thereof in a manner which does not conform to the Act – i.e. in particular by publishing a submitted rectification alongside a commentary thereon by the editorial board or the original author of the work to which the rectification relates.

The editor-in-chief of a local newspaper was accused of committing the offences specified in Article 46.1 of the Press Act 1984 by, *inter alia*, publishing rectifications accompanied by editorial comments. The District Court decided to refer a question of law to the Constitutional Tribunal.

The framework of permissible limitations on the freedom of expression, encompassing the freedom to hold one's opinions and to receive and impart information and ideas without interference from public authorities and regardless of State frontiers, is laid down in Article 10 ECHR in a similar formulation to Article 31.3 of the Constitution. In the light of Article 19.3 of the International Covenant on Civil and Political Rights, however, further limitations may be placed on the exercise of the right to freedom of expression, since this Covenant provision does not contain a reservation, similar to that contained in Article 31.3 of the Constitution, stating that such limitations must be "necessary in a democratic State".

In the light of Article 32.6 of the 1984 Act, the prohibition of publishing comments on submitted rectifications is not absolute, since it is permissible to include such comments in the next periodical edition or broadcast. The prohibition of commenting on rectifications alongside their publication is necessary in order to protect the freedom of expression of the person having submitted the rectification. It is permissible for the author of the original work, to which the rectification relates, to comment on the rectification; the only limitation on this right being the postponement of the moment at which the original author may take advantage of this possibility. The challenged provisions enable the maintenance of a balance of power between the media and persons submitting rectifications, with the latter generally having more limited possibilities of publicly expressing their views on a given issue, and do not infringe the norms indicated as the legal bases of review.

As regards the aforementioned provision, it is also not possible to speak of an infringement of society's right to reliable information. The challenged provisions permit, alongside the rectification, the publication of information announcing polemics or explanations in the subsequent periodical edition or broadcast. Any recipient interested in further debate concerning a certain topic is thus provided with information as to whether such debate will take place. Such information, furthermore, safeguards the recipient against the risk of assuming that the information presented in the rectification is objectively true.

The principle of specificity contained in Article 42.1 of the Constitution defines the acceptable limits for creating blanket norms of criminal law. Although a criminal law norm may be referential in nature, it is impermissible to fail to precisely specify each of the elements of such a norm that would prevent discretion in its application.

Since it is not possible to provide an unambiguous interpretation of the relevant criminal law norm, the challenged provision does not conform to the principles of appropriate legislation and specificity stemming from Articles 2 and 42.1 of the Constitution.

Cross-references:

- Judgment P 11/98 of 12.01.2000, *Special Bulletin Human Rights Limitations* [POL-2000-H-001];
- Judgment P 31/02 of 01.07.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003/A, no. 6, item 58.

Languages:

Polish, English (summary), French (summary).



Identification: POL-2004-2-016

a) Poland / b) Constitutional Tribunal / c) / d) 11.05.2004 / e) K 4/03 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 122, item 1288; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 5, item 41 / h) CODICES (English, Polish).

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.
 3.12 **General Principles** – Clarity and precision of legal provisions.
 4.10.7.1 **Institutions** – Public finances – Taxation – Principles.
 5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, avoidance / Tax, evasion.

Headnotes:

One of the elements of the principle of trust in the State and its laws, as derived from the principle of the rule of law (Article 2 of the Constitution), is the prohibition of sanctioning – in the sense of attributing negative consequences to, or refusing to recognise positive consequences of – the lawful behaviour of legal norms' addressees. Thus, where the addressee of a legal norm concludes a lawful transaction and thereby achieves a goal which is not prohibited by law, the objective (including the tax objective) accomplished in this manner should not be regarded as tantamount to prohibited objectives.

The constitutional obligation to pay taxes specified by statute (Article 84 of the Constitution) does not constitute an obligation for taxpayers to pay the maximum amount of tax, nor a prohibition on taxpayers seeking to take advantage of various lawful methods of tax optimisation. There is a fundamental difference between unlawful tax evasion, constituting an infringement of law, and the avoidance of tax as a result of lawful transactions concluded for this purpose.

Summary:

The President of the Supreme Administrative Court and the Ombudsman jointly requested the constitutional review of two provisions of the Tax Ordinance Act 1997 (hereafter "the Act").

According to Article 14.1.2 of the Act, the Minister of Finance is authorised to issue interpretations of tax law "taking into account the jurisprudence of the courts and the Constitutional Tribunal". Whilst the Minister's interpretations of law are binding on subordinate authorities, they do not bind taxpayers and, in particular, may not constitute a source of

taxpayers' obligations. Article 14.3 acts as a significant guarantee in this respect, stating that taxpayers shall not suffer adverse consequences as a result of their compliance with interpretations of law promulgated in the Official Journal although, as a rule, this would not release them from the obligation to pay the tax; exceptionally it may justify the remission of tax arrears.

According to Article 24b.1 of the Act where a tax or fiscal control authority demonstrates that, when concluding a particular transaction, "one should not have expected other significant benefits" (i.e. benefits other than the aforementioned tax benefits), the authority should "disregard the tax effects" of such a transaction. According to Article 24b.2, which states that where the parties have, in concluding a transaction, achieved an "intended economic result" for which a transaction other than that indicated by the parties is appropriate, the tax effects are to be deduced on the basis of that alternative ("appropriate") transaction.

The Tribunal ruled that:

- Article 14.2 of the Tax Ordinance Act, insofar as it states that interpretations of the Minister responsible for public finance affairs shall be binding on tax and fiscal control authorities, does not conform to Article 78 (the right to appeal) and the second sentence of Article 93.2 of the Constitution (decisions in respect of individuals cannot be based on the orders of the Prime Minister or of Ministers).
- Article 24b.1 of the Tax Ordinance Act does not conform to Article 2 of the Constitution (rule of law principle), read in conjunction with Article 217 of the Constitution (exclusivity of statutory regulation of tax issues).
- The Tribunal discontinued proceedings in relation to the review of Articles 18.2 and 59 of the Chief Administrative Court Act 1995 – by reason of loss of binding force of these provisions, pursuant to Article 39.1.3 of the Constitutional Tribunal Act.

Four judges presented a joint dissenting opinion.

From the principle of the rule of law, as expressed in Article 2 of the Constitution, stems the requirement for the legislator to comply with the principles of correct legislation. This requirement is functionally tied to the principles of legal certainty, legal security and protection of trust in the State and its laws. These principles have particular significance in the sphere of human and civil rights and freedoms.

The constitutional requirements of correct legislation are infringed, in particular, when the wording of a legal provision is so vague and imprecise that it creates uncertainty amongst its addressees as regards their rights and duties, by creating an exceedingly broad framework within which authorities charged with applying the provision are required, *de facto*, to assume the role of law-maker in respect of these vaguely and imprecisely regulated issues. Where legal provisions exceed a certain degree of ambiguity this may in itself constitute grounds for declaring such provisions to be unconstitutional, both in respect of constitutional provisions requiring statutory regulation in a certain field (so-called legal reservation), such as the placing of limitations on the exercise of constitutional rights and freedoms (the first sentence of Article 31.3), and also in respect of the rule of law principle as expressed in Article 2.

The principle of the specificity of legal provisions, as a constituent component of the principle of trust in the State and its laws, requires particular emphasis in certain fields of legal regulation. In addition to criminal law, one such field is the law relating to public levies. The principle of the specificity of legal provisions is made concrete in this field by the requirement that the constitutive elements of taxes and other public levies be defined by statute (Article 217 of the Constitution). The legislator's correct stipulation of all taxpayers' duties, together with the consequences of their actions from the perspective of instituted public-legal obligations, also represents an expression of compliance with the principle of legality (Article 7 of the Constitution), according to which all organs of public authority may only act within the limits of, and on the basis of, the law.

Use of the following ambiguous phrases in Article 24b.1 of the Act raises objections which do not permit one to assume that the interpretation of such phrases within jurisprudential practice will actually be uniform and rigorous, or that their wording will prevent organs applying the law from deducing that they may engage in law-making: "one could not have expected"; "other significant benefits"; "benefits stemming from the reduction of tax liability". The legislator's assumption that the taxpayer's transaction should bring not only tax benefits (i.e. reducing tax liability, increasing tax reimbursement, increasing the taxpayer's loss) but also other unspecified significant benefits unrelated to tax liability, is vague in itself.

An individual's constitutional right to have their case reconsidered following the lodging of an appeal is rendered illusory by the existence of binding abstract interpretations of tax law issued by the Minister. The binding nature of the official interpretation on all tax

and fiscal control authorities, in practice, reduces the two-instance review merely to a formal process for confirming that the first instance organ correctly complied with the instructions contained in the official interpretation. The fact that the binding official interpretation is abstract in nature (i.e. it does not apply only to the case of a particular taxpayer) does not alter the nature of its influence on the substance of decisions taken by fiscal organs in the cases of individual taxpayers.

In addition to its non-conformity with the second sentence of Article 93.2 of the Constitution, the approach adopted in Article 14.2.2 of the Act may lead to the unbalancing of the whole concept of the sources of law, as adopted by the constitutional legislator.

Taxpayers who abuse their economic freedom, as opposed to taxpayers who violate the law, do not directly avoid the payment of tax but merely seek to endow their economic behaviour with such features as to render it non-taxable, although the ultimate economic result is the same as in the event of taxable behaviour. The essence of such behaviour is the conclusion by taxpayers of transactions which, although permitted by law, have been entered into for purposes which are not permitted by law. A specific feature of this behaviour – referred to as "inadequacy" – is the application of means that do not lead in the simplest way to achieving the intended economic goal.

The decision to deprive a particular provision of binding force as a result of its ambiguity should be treated as a last resort, utilised only in the event that other methods of removing the consequences of such ambiguity, in particular by way of judicial interpretation by the courts, prove insufficient. In the present case, the content of financial law doctrine and the jurisprudence of the courts are uniform to such an extent that no doubts are raised as regards the proper understanding of the challenged Article 24b.1 of the Act, despite its infelicitous drafting.

The removal of the challenged provision from the legal order may have a dangerous impact on the functioning of public finance by upsetting – contrary to Article 2 of the Constitution – the coherence of its statutory legal regulation. This may be taken advantage of in order to effectively "legalise" certain forms of tax misappropriations within transactions involving dishonest taxpayers.

Cross-references:

- Judgment K 39/97 of 10.10.1998, *Bulletin* 1998/3 [POL-1998-3-018];
- Judgment K 19/99 of 13.02.2001, *Bulletin* 2001/1 [POL-2001-1-008];

- Judgment K 6/02 of 22.05.2002, *Bulletin* 2002/3 [POL-2002-3-028];
- Judgment P 13/01 of 12.06.2002, *Bulletin* 2002/2 [POL-2002-2-019];
- Judgment K 41/02 of 20.11.2002, *Special Bulletin – Human Rights Limitations* [POL-2002-H-002];
- Judgment P 13/02 of 01.12.2002, *Bulletin* 2002/1 [POL-2003-1-008] – quoted in the dissenting opinion to the present judgment;
- Procedural decision SK 16/02 of 14.07.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 7 item 77.

Languages:

Polish, English (summary).



Identification: POL-2004-2-017

a) Poland / b) Constitutional Tribunal / c) / d) 18.05.2004 / e) K 15/04 / f) / g) *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 5, item 52 / h) CODICES (French, Polish).

Keywords of the systematic thesaurus:

1.3.5.6 **Constitutional Justice** – Jurisdiction – The subject of review – Decrees of the Head of State.
4.9 **Institutions** – Elections and instruments of direct democracy.

Keywords of the alphabetical index:

Election, European Parliament, presidential decision.

Headnotes:

The Decision of the President of the Republic calling European Parliamentary Elections is an “official act” within the meaning of Article 144.1 of the Constitution (power of the President to issue official acts), similar in nature to presidential Decisions calling elections to the *Sejm* and Senate. Such Decisions are not of a legislative nature, in contrast to presidential regulations and executive orders (Article 142.1 of the Constitution). Given the non-normative character of this Decision, it may not be reviewed in proceedings before the Constitutional Tribunal, since such

proceedings are limited to the review of normative acts and/or legal norms contained therein.

Summary:

On 23 January 2004, in view of Poland’s almost inevitable accession to the European Union (which came about on 1 May), the lower house of the Parliament (*Sejm*) adopted the Electoral Law to the European Parliament Act 2004. On the basis of this Act the President, on 9 March 2004, issued a Decision calling elections to the European Parliament. Subsequently, the Decision was published in the Journal of Laws.

A group of Deputies to the Polish Parliament initiated proceedings before the Constitutional Tribunal in which they challenged several provisions of the Electoral Law to the European Parliament Act 2004 and the President’s Decision calling such elections, alleging that these acts did not conform to Article 4.1 of the Constitution (the principle of sovereignty of the Polish People). The applicants’ claim of unconstitutionality concerned, in particular, allowing EU citizens not holding Polish nationality to participate in elections to be held on Polish territory. The claims against the Electoral Law to the European Parliament Act 2004 were examined by the Tribunal at a hearing on 31 May 2004 (the judgment of the Tribunal, delivered on the same day and having the same reference number as this decision, is summarised separately [POL-2004-2-018]).

The Tribunal discontinued proceedings concerning examination of the conformity of the President’s Decision of 9 March 2004, calling European Parliamentary elections, with Article 4.1 of the Constitution – by reason of the inadmissibility of delivering judgment on this question, pursuant to Article 39.1 of the Constitutional Tribunal Act 1997.

Cross-references:

- Procedural decision K 15/04 of 11.05.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 5, item 51;
- Judgment K 15/04 of 31.05.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 5, item 47.

Languages:

Polish, English (summary), French (summary).



Identification: POL-2004-2-018

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 31.05.2004 / **e)** K 15/04 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 130, item 1400; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 5, item 47 / **h)** CODICES (English, French, Polish).

Keywords of the systematic thesaurus:

- 3.1 **General Principles** – Sovereignty.
 4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.
 4.16.1 **Institutions** – International relations – Transfer of powers to international institutions.
 4.17.1.1 **Institutions** – European Union – Institutional structure – European Parliament.
 5.3.41.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.
 5.3.41.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Election, European Parliament / Nation, concept, definition / Electoral law, European Community, implementation.

Headnotes:

The Nation's decision to accede to the European Union (i.e. to delegate certain aspects of State authorities' competences to an international organisation) is justified in the light of Article 90.1 of the Constitution (delegation of State competence to an international organisation). The Nation's will, expressed in accordance with Article 90.3 of the Constitution (nationwide referendum), combined with the signing and ratification of the Accession Treaty by Poland's constitutional organs, was conclusive in Poland's acceptance of not merely the substantive norms contained in the Treaty, forming the basis of the integration process, but also the Union's decision-making procedures and institutional structure.

The Constitution of Poland is the supreme act establishing the legal basis for the existence of the Polish State, regulating the principles of exercising

public authority on its territory and the modes of establishing constitutional State organs, together with the functioning and competences thereof. Its provisions may not be directly applied to structures other than the Polish State, through which the Republic realises its interests.

Article 4 of the Constitution expresses the principle of the sovereignty of the Polish People, the substance of which is the assertion of the Nation's will as the sole source of power and sole means of legitimising authority. It follows from this principle that an individual, a social group or an organisation may not constitute the source of power in Poland.

The Constitution uses the notion of the Nation in a political, rather than an ethnic, sense. When referring in the Preamble to the Constitution to – “we, the Polish Nation, all citizens of the Republic” – the concept of the Nation denotes a community comprised of the citizens of the Republic.

The European Union is not a State and therefore all analogies with a State system of government are unfounded.

The means of legitimising the European Union's organs is not a matter for the Polish Constitution, but rather for EU law and Polish legal provisions enacted in order to implement the Union's principles within the jurisdiction of the Polish State. In particular, this concerns elections to the European Parliament, which is not an organ exercising authority in the Republic of Poland but, rather, an organ performing specified functions within the EU's institutional structure. For this reason it is unfounded to use Article 4.1 of the Constitution as the basis of review of the principles and procedure of elections to the European Parliament.

Whilst interpreting legislation in force, account should be taken of the constitutional principle of favourable predisposition towards the process of European integration and the cooperation between States.

Summary:

Electoral Law to the European Parliament Act of 23 January 2004 ensures implementation of the European Community electoral law principles and provides for the rules on elections to the European Parliament. Its adoption, and entry into force on 1 March 2004, prior to Poland's formal accession to the EU, was necessary in order to enable completion of all the preliminary procedures required for the proper holding of elections.

Articles 8 and 9 of the Act define the conditions under which foreigners holding the nationality of other EU Member States may acquire the right to vote and to stand as a candidate in elections to the European Parliament held in Poland.

Article 174 contains an interim terminological regulation: during the period until 30 April 2004 the terms “Member States of the EU” and “EU citizens not being Polish nationals” were to be interpreted as including not only existing EU Member States and their nationals but also those States that were to accede (and acceded) to the Union together with Poland on 1 May and the nationals of those States. This was intended to enable such persons to take part in procedures necessary for the exercise of their right to vote and to stand as a candidate in elections to the European Parliament (e.g. registration of voters and candidates) prior to 1st May.

The aforementioned provisions of the Electoral Law to the European Parliament Act 2004 were challenged before the Constitutional Tribunal by a group of Deputies of the lower house of the Parliament. In the same application, a challenge was brought against a Decision of the President calling the elections; this part of the application, however, was declared inadmissible by the Tribunal before delivery of the present judgment.

The Tribunal ruled that the challenged provisions are not inconsistent with Article 4.1 of the Constitution (principle of the sovereignty of the Polish People).

The Electoral Law to the European Parliament Act of 23 January 2004 implements the Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, which is clearly stated in the footnote to the Act's title.

The phrase “members of the European Parliament are representatives of the Nations of the States of the European Union” contained in Article 4 of the reviewed Act should be understood in the sense that the constituency of the European Parliament is not a homogenous society, but rather a collective body comprising the various Nations of the Union's Member States. This, however, does not imply that the electoral rights in European Parliament elections may only be exercised exclusively within the national community with which the person is bound by national citizenship.

The challenged provision is further supported by Articles 68 and 69 of the Europe Agreement

establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, concluded in Brussels on 16 December 1991, from which stems Poland's obligation to undertake all measures necessary to ensure the compatibility of its future legislation with Community legislation.

Cross-references:

- Judgment K 27/99 of 28.03.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 2, item 62; *Bulletin* 2000/2 [POL-2000-2-010];
- Judgment K 12/00 of 24.10.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 7, item 255; *Bulletin* 2000/3 [POL-2000-3-024];
- Judgment K 11/03 of 27.05.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003/A, no. 5, item 43;
- Procedural decision K 15/04 of 11.05.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 5, item 51;
- Procedural decision of 18.05.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 5, item 52.

Languages:

Polish, English (summary), French (summary).



Portugal Constitutional Court

Statistical data

1 May 2004 – 31 August 2004

Total: 256 judgments, of which:

- Abstract *ex post facto* review: 3 judgments
- Appeals: 197 judgments
- Complaints: 42 judgments
- Electoral matters: 4 judgments
- Political parties' accounts: 8 judgments



Romania Constitutional Court

Important decisions

Identification: ROM-2004-2-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 16.03.2004 / **e)** 120/2004 / **f)** Decision on the plea of unconstitutionality in respect of Article II.2 and II.3 of Government Emergency Order no. 58/2003 on amendments and additions to the Code of Civil Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 296/05.04.2004 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.15 **General Principles** – Publication of laws.
 4.5.2 **Institutions** – Legislative bodies – Powers.
 4.6.2 **Institutions** – Executive bodies – Powers.
 4.18 **Institutions** – State of emergency and emergency powers.
 5.3.38.2 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Civil law.

Keywords of the alphabetical index:

Emergency, order, effects.

Headnotes:

Statutory provisions under which legally competent authorities should continue to hear proceedings in progress on a date on which their jurisdiction is changed reflect the principle that civil law cannot have any retrospective effect, as do provisions whereby judgments handed down before the entry into force of a new law are still subject to the remedies and time-limits prescribed by the initial law under which they were delivered.

Emergency orders are adopted by the government by virtue of special powers and amount to administrative decisions, which are treated as ordinary legislation in respect of their effects.

Summary:

An application was made to the Constitutional Court challenging the constitutionality of Article II.2 and II.3 of Government Emergency Order no. 58/2003 on amendments and additions to the Code of Civil Procedure.

The Court found that these provisions violated Articles 15.2, 16.1, 53, 124, 126.2 and 129 of the revised Constitution in the following respects:

- i. the former law was still applicable in respect of time-limits and remedies when the judgment was delivered and prevented free access to the courts in so far as means of obtaining redress were concerned;
- ii. the restriction on the exercise of certain rights and freedoms in this case was the effect of an emergency order which had not been approved by parliament;
- iii. under Article 126.2 of the Constitution, the jurisdiction of the courts of law and the conduct of court proceedings could only be stipulated by law; and
- iv. under Article 124, justice was required to be rendered in the name of the law, in other words by virtue of institutional or ordinary legislation, not government orders.

As to the allegation of a violation of Article 15.2 of the revised Constitution, the Court noted that the impugned order did not in itself contain any provisions with retrospective effect, as the law was to be applied only from the date on which it came into force. Determining which legal situations were still subject to the old regulations and which were now governed by the new regulations entailed establishing how the law applied in temporal terms, and that was a matter for the courts alone to decide.

Under the principle of the non-retrospective effect of laws, a law only becomes binding once it is published in Part I of the Romanian Official Gazette, the *Monitorul Oficial*, and it remains in force until the publication of another law implicitly or explicitly repealing it. Deciding that the new law could contain provisions denying or altering former legal circumstances created by the effect of statutory instruments which were no longer in force would result in a violation of the constitutional principle of the non-retrospective effect of the law. However, the new law was immediately applicable to every situation that might arise, change or lapse after its entry into force and to all the effects produced by legal situations arising after the repeal of the old law.

As to the alleged violation of Article 16.1.2 of the revised Constitution, the Court found that, as the regulation under review applied without any discrimination to everyone in the situation provided for in the statutory rule, this objection was unfounded.

The Court also found that the impugned order was in conformity with Articles 124, 126 and 129 of the Constitution. The term "law", as used in the Constitution, had several meanings deriving both from formal and from substantive considerations.

Within its first meaning, a law is an instrument adopted by parliament, subject to promulgation by the President of Romania, and coming into force three days after its publication in the *Monitorul Oficial*, unless a later date is set in the law itself. Viewed in substantive terms, a law is defined by its content.

Through orders, the executive, i.e. the government, exercised special, delegated powers, which, by their very nature, came within the sphere of the parliament's legislative powers. Accordingly, orders were not laws in the strictest sense but administrative measures taken in the legal field and equated with legislation on account of their effects, having respect for substantive considerations.

Likewise, the Court found that the delegation of legislative powers to the government, enabling it to issue orders, could be in keeping with Article 115.4 of the revised Constitution in the case of emergency orders or the special enabling laws provided for in paragraph 1 of Article 115.

Consequently, emergency orders amounted to statutory instruments adopted by government under a provision of the constitution, enabling it, under the parliament's strict supervision, to deal with certain exceptional circumstances for which regulations needed to be introduced immediately.

Languages:

Romanian.



Identification: ROM-2004-2-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 25.03.2004 / **e)** 147/2004 / **f)** Decision on the plea of unconstitutionality in respect of Articles 2.2, 4, 14.1, 14.2.d, 15.3 and 15.5 of the Trade Unions Act (Law no. 54/2003) / **g)** *Monitorul Oficial al României* (Official Gazette), 418/11.05.2004 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

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

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

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

Keywords of the alphabetical index:

Trade union, formation, restriction / Judiciary, trade union, formation, restriction / ILO, Convention no. 87.

Headnotes:

Article 9 of the Constitution states that there are several different types of association with varying activities and goals. The formation of associations and the running of their activities is determined by their statutes and subject to the law. The law may establish certain binding conditions with regard to the establishment of associations and the running of their activities, including rules on the categories of persons allowed to be members of various associations, which cannot be overridden in their statutes. The right to freedom of association of categories of persons who are not allowed to form or join certain types of association as they may be members of other types of association is not infringed.

The right of the founding members of trade union organisations to apply to the courts through the intermediary of a specially authorised person amounts to a privilege granted to such persons by parliament, not a violation of the right of free access to the courts. Founding members may waive this privilege whenever they so wish, carrying out procedural formalities directly and individually and appearing in court in person.

Summary:

An application was made to the Constitutional Court challenging the constitutionality of Articles 2.2, 4, 14.1, 14.2.d, 15.3 and 15.5 of the Trade Unions Act (Law no. 54/2003, hereafter “the Act”).

The applicants alleged the following:

- i. Article 4 violated Articles 11.1 and 20.2 of the Constitution since it complied neither with Article 9.2 of International Labour Organisation (ILO) Convention no. 87/1948 and Article 5 of the revised European Social Charter, which stated that restrictions to the right to freedom of association could only apply to members of the armed forces and the police, nor with Articles 37 and 49 of the Constitution, as the restriction of the right of association of members of the judiciary was not necessary in a democratic society;
- ii. Articles 14.1, 15.3 and 15.5 restricted free access to the courts in a discriminatory manner, violating Articles 21 and 16.1 of the Constitution;
- iii. Article 14.2.d of the Act contravened Articles 2, 3, 4 and 7 of ILO Convention no. 87/1948 because they were unconstitutional within the meaning of Article 20.2; and
- iv. Article 2.2 was unconstitutional within the meaning of Article 20.2 because it violated Articles 2, 3, 4 and 7 of ILO Convention no. 87/1948.

With regard to the allegation that Article 4 of the Act prohibited members of the judiciary from setting up trade union organisations, the Court found that Article 40.1 of the Constitution provided that citizens could associate freely in political parties, trade unions, employers' associations and other forms of association. This fundamental social and political right was not an absolute right but it was exercised through participation in the formation of associations. The Constitution allowed for the formation of several different types of association, which were not listed exhaustively, and for the possibility of statutory restrictions on the categories of persons able to form or join them, depending on the types of activity and aims that they pursued. The restriction took account of the objectively different situation of certain categories of persons without infringing the principle of equality before the law enshrined in Article 16.1 of the Constitution. The Constitution itself set certain limits to the right of association, pertaining to the aims, activities, members and nature of the association concerned, which depended on the way in which it was set up. Article 40.3 of the Constitution and other institutional laws listed certain categories of persons who could not be members of political parties, while membership of certain professional

associations was confined to persons engaged in the professional activity concerned.

The possibility of limiting by law the categories of persons who were allowed to form or join certain types of association did not infringe the constitutional principle of the equality of all citizens before the law or the right to freedom of association provided for in Article 40.1 of the Constitution.

With regard to the complaints that Articles 14.1, 15.3 and 15.5 of the Act were unconstitutional, the Court found that there was no infringement of the right of founding members to take their case directly to the courts. The impugned Act made provision for the appointment of a specially authorised person with the aim of simplifying proceedings by making it unnecessary for large numbers of persons to appear in court and allowing the court's decision to be served on one person only.

Languages:

Romanian.



Slovakia

Constitutional Court

Statistical data

1 May 2004 – 31 August 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: 144
- Number of other decisions by the plenum: 0
- Number of other decisions by the panels: 232

Important decisions

Identification: SVK-2004-2-004

a) Slovakia / **b)** Constitutional Court / **c)** Third Panel / **d)** 10.06.2004 / **e)** III. ÚS 135/04 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Gazette) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Detention on remand, lawfulness / Detention, judicial review.

Headnotes:

If a Court deciding on a complaint against detention on remand has not settled the applicant's legally relevant argumentation in an adequate and reviewable way or has not declared irrelevant the

applicant's legal argumentation, the applicant's constitutionally guaranteed right to be prosecuted or deprived of liberty only for reasons and by means laid down by law will be infringed.

Summary:

The applicant claimed a violation of his fundamental right as set out in Article 17.2 and 17.5 of the Constitution of the Slovak Republic, under which no one shall be prosecuted or deprived of liberty, save for reasons and by the means laid down by law. Pre-trial detention may only be imposed on a person on the grounds provided by law and for the period determined by the court.

The applicant had been held in detention under a resolution of the District Court. He appealed against that decision by objecting to the unlawfulness of his detention. The Regional Court rejected the application. In a further application filed with the Constitutional Court of the Slovak Republic, the applicant claimed that the Regional Court did not consider the written reasons in his application before rejecting it.

The Constitutional Court reviewed whether the regional court had respected the law while adjudicating the reasonableness of the detention. The Constitutional Court cited the case-law of the European Court of Human Rights and also its own case-law, under which a person prosecuted, has the right to seek a review of the detention imposed. This also includes the alternative of replacing the detention by a pledge, voucher or bail. The Regional Court in the capacity of the appellate court claimed in its reasoning that it had fulfilled its obligation defined by law, in that it had reviewed the correctness of the assertions of the challenged decision and the previous proceedings. The Constitutional Court, however, found that the regional court had not mentioned either the applicant's arguments or the way that it had evaluated them. The Regional Court's assertions presented in the comments to the application as to how it reviewed the significant facts both for and against the detention were not accepted by the Constitutional Court. The latter had found the reasoning of the decision impossible to review. The Constitutional Court did not consider whether the applicant should have been taken into detention. It reviewed however whether the detention and the previous proceedings fulfilled the requirements of the constitutionality.

The Constitutional Court quashed the challenged resolution of the Regional Court and returned the case for further proceedings indicating that the Constitutional Court's opinion is binding upon the

Regional Court. The Constitutional Court considers that the recognition of the violation right, the quashing of the challenged resolution and the return of the case to the Regional Court for further proceedings to be sufficient redress for the damage caused to the applicant. For that reason, the Constitutional Court did not grant the applicant's request to award him adequate financial satisfaction.

Languages:

Slovak.



Identification: SVK-2004-2-005

a) Slovakia / **b)** Constitutional Court / **c)** First Panel / **d)** 24.06.2004 / **e)** I. ÚS 59/04 / **f)** / **g)** Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky (Official Gazette) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

- 3.22 **General Principles** – Prohibition of arbitrariness.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
- 5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.
- 5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.
- 5.3.13.18 **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 information.

Keywords of the alphabetical index:

Administrative act, judicial review.

Headnotes:

By not providing reasons for its judgment, the Supreme Court acted in an arbitrary manner, which led to the violation of the applicant's right to judicial review of the public authority's decision and consequently violated the right to information.

Summary:

The organisation Greenpeace Slovakia submitted to the Constitutional Court an application in which it challenged the violation of the right to information in connection with the right to judicial review of a public authority's decision. The Supreme Court of the Slovak Republic committed this error when reviewing part of the decision of the Office of the Nuclear Supervision of the Slovak Republic (*Úradu jadrového dozoru Slovenskej republiky*). The applicant's request concerned access to information about the reconstruction of a nuclear power station. The Office refused to provide some information because it was in part a business secret of the *Slovenské elektrárne* (electricity generating company), which is an entity not legally obliged to provide information under the law no. 211/2000 on free access to information. The applicant made use of the procedure laid down in law and before filing its application to the Constitutional Court exhausted all remedies – a complaint to the Office of the Nuclear Supervision and subsequently a submission requesting a legal review of the latter's decision to the Supreme Court. The Supreme Court, which decided the case as a first instance court and also an appellate court, had initially rejected the complaint and subsequently, as an appellate court, upheld the first instance judgment. That act, in the applicant's opinion, violated the right to judicial review of the public authority's decision.

The Constitutional Court accepted the Supreme Court's opinion, as expressed in the latter's decision delivered in the second instance. The Supreme Court held that the decisions delivered by the two-instances should be considered as a whole unit. The Office of the Nuclear Supervision justified the refusal of providing information in that that information was covered by commercial secrecy. In the second instance decision, the Office also claimed that providing that information would be regarded as an abuse of the law because the company *Slovenské Elektrárne* as a legal entity was not obliged by law to provide information.

Greenpeace, in its complaint filed with the Supreme Court, challenged the unlawfulness of the decision of the Office of the Nuclear Supervision only on the issue of the commercial secrecy because the Office in its decision on the complaint merely stated the reason for the refusal to provide information as a fact and did not cite the relevant provisions of the law.

It was the opinion of the Constitutional Court that the first instance senate of the Supreme Court (respecting the principles of the fair proceedings) should have provided the applicant with an opportunity to comment, before delivering its decision on the lawfulness of the decision of the Office. The senate should have done

so also from the aspect of the provisions of § 11.1.a of the Law on Information, which the Office in its decision on the complaint merely stated that decision as a fact. Further, the Constitutional Court was of the opinion that the principles of fair proceedings were not respected in court procedures in which a party to the proceedings cannot predict and adequately respond to those procedures with arguments. That failure of the Supreme Court was corrected during the appellate proceedings before this court, and for that reason the Constitutional Court did not accept the applicant's objection and find a violation of the rights in question. The Constitutional Court did not agree with the applicant that the general courts had acted improperly when they adjudicated the case on issues of commercial secrecy. If the reason for refusal to give the requested information were right, it would not be necessary to deal with the issue of the commercial secrecy. The Constitutional Court did not accept the applicant's objections that the Supreme Court had erred in its interpretation of the provisions of the law on information. Therefore, the Constitutional Court upheld that the decision that interpretation of the laws pertaining to the general judiciary and the way as the Supreme Court had acted in the present case considered logical, convincing and legitimate.

The Constitutional Court considered the applicant's objection that the Supreme Court had not explained how it arrived at its conclusions. It did not follow from the Supreme Court decision that it dealt with the case regarding those aspects, although, in order to take a legal decision, such a procedure was necessary. The Constitutional Court found that inadequacy a mark of arbitrariness of the Supreme Court judgment and also a violation of the right under Article 46.2 of the Constitution. Because it contained serious legal-procedural errors with the nature of arbitrariness the Supreme Court judgment could not sufficiently guarantee the protection of the applicant's fundamental right to information under Article 26.2 of the Constitution, and for that reason the Constitutional Court held that this was a violation of that constitutional right. The Constitutional Court for that reason overturned the appellate decision of the Supreme Court and returned the case for further proceedings.

The Constitutional Court did not award the applicant financial compensation as the damage was compensated through the fact that the Constitutional Court overturned the challenged judgment and returned the case for further proceedings.

Languages:

Slovak.



Slovenia

Constitutional Court

Statistical data

1 May 2004 – 31 August 2004

The Constitutional Court held 19 sessions (9 plenary and 10 in chambers) during this period. There were 319 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 604 unresolved cases in the field of human rights protection (denoted Up- in the Constitutional Court Register) from the previous year at the start of the period (1 May 2004). The Constitutional Court accepted 121 new U- and 313 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 62 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court made:
 - 20 decisions and
 - 42 rulings;
- 27 cases (U-) cases joined to the above-mentioned cases for common treatment and adjudication.

Accordingly the total number of U- cases resolved was 89.

In the same period, the Constitutional Court resolved 302 (Up-) cases in the field of the protection of human rights and fundamental freedoms (12 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 made available to interested persons:

- 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-2004-2-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 20.05.2004 / **e)** U-I-296/02 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), 68/04 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.16 **General Principles** – Proportionality.
- 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.

5.3.13.20 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Adversarial principle.

5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Property, claim, securing, court order, interim.

Headnotes:

Human rights and fundamental freedoms as well as the principle of a State governed by the rule of law laid down by the provision of Article 2 of the Constitution ensure every individual freedom and protection against indiscriminate, unlawful and excessive interferences by the bodies of the State. Individuals are ensured freedom and protection against interferences by criminal law enforcement bodies unless the individuals themselves have interfered with the legally protected welfare of others or of society as a whole in a manner prohibited and punishable by criminal law. Whether an individual has violated the legally protected welfare of others is to be established in criminal proceedings. Interferences by the criminal law enforcement bodies of the State with an individual's human rights and fundamental freedoms are in principle allowed only in cases where a court has delivered a judgment convicting the individual of unlawful conduct. Every person is presumed innocent until found guilty by a final judgment. Moreover, the presumption of innocence has additional functions of a specific criminal procedure nature. Consequently, guilt must be alleged and proven by a prosecutor. Where after examining the evidence adduced in hearings the court has doubts and the accused's guilt has not been indisputably proved, the Court must acquit the accused.

The prohibition against interferences with the sphere of an individual before the delivery of a judgment convicting the individual is not absolute. Just as the presumption of innocence does not prevent criminal proceedings from being instituted, it also does not prevent compulsory measures being taken before their completion, provided that the requisite conditions are fulfilled. The important functions of criminal law and criminal proceedings (e.g. ensuring evidence, the appearance in court of persons charged, the effectiveness of compulsory measures following conviction and protecting the human rights and fundamental freedoms of others) render various measures interfering with the human rights and fundamental freedoms of the accused necessary even before the delivery of a judgment and,

exceptionally (directly or indirectly), also render measures interfering with the human rights and fundamental freedoms of third persons necessary. Regarding the basis on which a decision to order such measures is made, the rules of criminal procedure must lay down substantive conditions and procedures that strike a balance between, on the one hand, human rights and fundamental freedoms and, on the other hand, the above-mentioned functions of criminal procedure. A rule on a specific restrictive measure must definitively and in compliance with the Constitution regulate the substantive conditions and procedures for taking decisions on the ordering, duration and termination of such a measure. The Constitution does not directly regulate interim measures for securing a claim for the deprivation of a pecuniary advantage, and consequently, the Constitution does not directly regulate substantive conditions for ordering such measures. Nevertheless, this does not mean that the statutory regulation of such measures need not fulfil the important conditions set out in the Constitution in order to be constitutional. An interim measure for securing a claim for the deprivation of a pecuniary advantage is an interference with human rights and fundamental freedoms.

The rules of the Code of Criminal Procedure (hereinafter: "the CCP") allowing for the above-mentioned interim measures are an interference with the right to private property set out in Article 33 of the Constitution. According to established Constitutional Court case-law, the first condition of the permissibility of an interference with human rights and fundamental freedoms is that the interference must be based on a legitimate, objectively justified goal. Moreover, a decision must always be made as to whether an interference is consistent with the principles of a State governed by the rule of law (Article 2 of the Constitution), and consequently, with the principle prohibiting excessive interferences by the State even in cases where a legitimate goal is pursued (the general principle of proportionality). An evaluation of whether there may be a case of excessive interference is carried out by the Constitutional Court on the basis of the test known as the strict test of proportionality.

The aforementioned test includes a review of three aspects of the interference:

- whether the interference is at all necessary (needed) for achieving the goal pursued;
- whether the interference in question is appropriate for achieving the goal pursued, *i.e.* that that goal can in fact be achieved by that interference; and

- whether the weight of the consequences of the interference with the human right is proportionate to the value of the goal pursued, i.e. to the resulting benefits (the principle of proportionality in a narrower sense or the principle of proportionality).

Only an interference that passes all three aspects of the test is constitutionally permissible.

In criminal procedural law, a restriction of human rights and fundamental freedoms by means of ordering measures before the delivery of a judgment is to be considered in light of the probability that a person whose rights are to be restricted has committed a criminal offence. The balance of proportionality between the right interfered with and the goal pursued by the interference is to be assessed on the basis of a standard of evidence. This standard is as strict as the interference is burdensome and as high as the importance of the right interfered with. This is a fundamental condition for cases where the presumption of innocence is denied to such an extent so as to permit an interference with an individual's rights. The Code of Criminal Procedure is inconsistent with the Constitution, as it does not lay down the standard of evidence or the degree of probability that a criminal offence was committed by which a pecuniary advantage was unlawfully obtained as a substantive condition for ordering interim measures for securing a claim during the police investigation stage.

Aside from the standard of evidence, fundamental to a review of proportionality in the narrower sense within the scope of a review of the constitutionality of the substantive conditions of restrictive measures in criminal procedure are the conditions limiting the scope of the restrictive measures so that those measures do not become disproportionate. As an interim measure for securing a claim for the unlawful deprivation of a pecuniary advantage is a continuous restrictive measure, it is necessary for its duration to be definitively restricted at the statutory level. The Code of Criminal Procedure does not contain any explicit provisions doing so; consequently, it permits excessive interferences with the right to property set out in Article 33 of the Constitution. Any interim securing measure must correspond to the assessed value of the pecuniary advantage that has been allegedly obtained by the commission of the criminal offence. The objective scope of interim measures for securing such claims is adequately restricted in relation to the alleged pecuniary advantage obtained.

The petitioners failed to substantiate their allegation that the impugned provision of the Code of Criminal Procedure and the provisions restricting execution in the Execution of Judgments in Civil Matters and

Securing of Claims Act allowed for a constitutionally impermissible threat to one's social security and dignity by allowing interim orders for securing a claim of a pecuniary advantage.

In case no. U-I-18/93 of 11.04.1996, *Special Bulletin Leading Cases 1* [SLO-1996-S-003], the Constitutional Court explained the procedural guarantees inherent in the fact that individual restrictive measures are imposed by a judicial decision. Those guarantees are: the right to judicial protection set out in Article 23 of the Constitution; the right to equal protection of rights set out in Article 22 of the Constitution; the legal guarantees which follow from Article 29 of the Constitution; the presumption of innocence set out in Article 27 of the Constitution; and the right to legal remedies set out in Article 25 of the Constitution.

The impugned provision of Article 502.1 CCP sets out, *inter alia*, that such interim securing measures are to be ordered by a court *ex officio*. The Code of Criminal Procedure is thereby inconsistent with the presumption of innocence or, more precisely, with its requirement that the burden of allegation and proof is borne by the prosecutor. Moreover, that provision is inconsistent with the requirement of an impartial judge laid down by Article 23.1 of the Constitution.

As the impugned regulation provides that such interim securing measures may be ordered *ex officio*, a motion brought by a prosecutor is not needed. Consequently, a person who is affected by the measures imposed does not have an opportunity to present arguments against such interim measures and adduce evidence to support his or her arguments. The legislature thereby interfered with the following rights of persons against whom the measures are ordered: the equal protection of rights (Article 22 of the Constitution); judicial protection (Article 23 of the Constitution); and the fundamental legal guarantees in criminal proceedings (Article 29 of the Constitution). The legislature must provide for a method that will adequately make up for the absence of adversarial proceedings prior to a decision being taken on interim securing measures.

In cases where a panel of judges at a hearing decides to order such interim securing measures, it is explicitly set out that no appeal or other legal remedy lies against such a decision. Moreover, the nature of the matter is such that an error in or the unlawfulness of such an order cannot be raised in an appeal against a judgment because at the end of the first-instance proceedings, the measures are either entirely withdrawn or replaced by an order compelling a person to surrender the unlawfully obtained pecuniary advantage. Consequently, it amounts to an interference with the individual's right to legal

remedies, which is set out in Article 25 of the Constitution. The objective of this regulation is not clear from the regulation itself or from the nature of the matter. As the Constitutional Court was not aware of the objective of the restriction, it could not establish the restriction's necessity, adequacy and proportionality in the narrower sense.

For reasons of organisation, a court decides on the measure to be ordered for interim security in each case; this situation is consistent with the requirements set out in Article 23.1 of the Constitution. Consequently, the provision in Article 109.2 CCP providing that judicial bodies have the competence to take such a decision is not inconsistent with the Constitution.

Moreover, the petitioners challenged the constitutionality of Article 506.a.1 CCP, which regulates the treatment of the property that is the subject of interim securing measures for a claim for the deprivation of an unlawfully obtained pecuniary advantage. In that respect, an especially speedy decision by a court is required. That requirement is in accordance with the provision of Article 23.1 of the Constitution on deciding without undue delay. Another requirement is that the standard of care in dealing with that property is the standard of care that would be taken by a good manager. That requirement introduces a civil standard of care, the purpose of which is to minimise the seriousness of the interference with the right to private property (Article 33 of the Constitution) so that the seriousness of the interference is not any greater than absolutely necessary. Consequently, the impugned provision is consistent with the principle of proportionality.

Languages:

Slovenian, English (translation by the Court).



South Africa Constitutional Court

Important decisions

Identification: RSA-2004-2-006

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 29.07.2004 / **e)** CCT 63/03 / **f)** The Minister of Finance and Another v. Van Heerden / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

5.2.2.2 **Fundamental Rights** – Equality – Criteria of distinction – Race.

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

Keywords of the alphabetical index:

Parliament, member, pension, affirmative action.

Headnotes:

Remedial measures or “affirmative action” measures envisaged in Section 9.2 of the Constitution are not a derogation from the right to equality in Section 9 of the Constitution, but a substantive part of it. The differentiation inherent in such remedial measures is warranted, provided the measures meet the requirements of Section 9.2 of the Constitution. If a restitutionary measure properly falls within Section 9.2 of the Constitution, even if it is based on a prohibited ground of differentiation listed in Section 9.3 of the Constitution, it cannot be presumed to be unfair. However, if a measure does not fall within Section 9.2 of the Constitution, it will be necessary to apply the test of Section 9.3 of the Constitution to determine whether it constitutes unfair discrimination.

Summary:

The issues in this case arose within the context of a challenge to the constitutionality of Rule 4.2.1 of the Political Office-Bearers Pension Fund (the Fund) that provided for differentiated employer contributions in respect of members of Parliament and other political

office-bearers between 1994 and 1999. The case raised important constitutional issues in relation to equality, restitutionary measures and unfair discrimination.

The respondent mounted the constitutional attack in the High Court, amongst other things, on the ground that the relevant rules of the Fund offend the equality provisions of the Constitution because they are unfairly discriminatory. The equality challenge was contested on the basis that the differentiation in the rules of the Fund is not unfairly discriminatory because it constitutes a “tightly circumscribed affirmative action measure” permissible under the Constitution.

The High Court found that Rule 4.2.1 was not a measure designed to advance a previously disadvantaged group. It was arbitrary and overhasty and amounted to unfair discrimination.

In the Constitutional Court, the appellants’ complaint was that the High Court misconceived the true nature of the equality protection recognised by the Constitution, by resorting to a formal rather than a substantive notion of equality. They argued that the purpose of the differentiated scheme of employer benefits was to advance equality. The respondent contended that the scheme is unfair because the state does not allege that in order to benefit the favoured group it was essential that the disfavoured group should receive lower employee benefits.

The Constitutional Court unanimously upheld the appeal and finding that the order of the High Court declaring Rule 4.2.1 unconstitutional and invalid must be set aside.

Moseneke J, writing for the majority, found that legislative and other measures that properly fall within the requirements of Section 9.2 of the Constitution are not presumptively unfair. He found that remedial measures are not a derogation from, but a substantive and composite part of Section 9 of the Constitution and of the Constitution as a whole. Furthermore, the differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by Section 9.2 of the Constitution. It was further held that if a restitutionary measure, even based on any of the grounds of discrimination listed in Section 9.3 of the Constitution, passes muster under Section 9.2 of the Constitution, it cannot be presumed to be unfairly discriminatory.

The Section 9.2 enquiry is threefold. First, an overwhelming majority of members of the favoured class must be persons disadvantaged by unfair

discrimination. Secondly, the measure must be “designed to protect or advance” those disadvantaged by unfair discrimination. This requires that the measures be reasonably capable of attaining the desired outcome. The third requirement is that the measure “promotes the achievement of equality”, which requires that it should not constitute an abuse of power or impose such an undue burden on those excluded from its benefits that our long-term constitutional goal would be threatened.

The Court found that the impugned rule does pass muster as a restitutionary measure. It is directed at achieving equality between old and new parliamentarians, the overwhelming majority of whom have been disadvantaged by past unfair discrimination. The measure was therefore held not to be unfairly discriminatory.

In a separate judgment, Mokgoro J held that the impugned measure was not restitutionary in nature, as the class of members of Parliament who benefited from the higher contributions in the Pension Fund included people who had not previously been disadvantaged by unfair discrimination. However, Mokgoro J, after considering the question of unfair discrimination under Section 9.2 of the Constitution, concurred in the order of the main judgment upholding the appeal because she was of the view that the challenged measure did not constitute unfair discrimination.

In a concurring judgment, Ngcobo J agreed on the requirements that must be met under Section 9.2 but expressed some doubts as to whether on the facts of the case, the persons targeted by the measure are persons or categories of persons who have been disadvantaged by unfair discrimination. He considered it unnecessary to reach any firm conclusion, in particular because he was satisfied that the rules of the Pension Fund do not discriminate unfairly against the old members of Parliament.

Sachs J supported both the majority and minority judgments, finding that, although they follow different paths, they are united by the same constitutional logic based on achieving substantive equality. In his view, the fairness inherent in affirmative action measures under Section 9.2 of the Constitution is no different from the fairness required by Section 9.3 of the Constitution.

Cross-references:

- *Harksen v. Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC); *Bulletin* 2001/3 [RSA-2001-3-015];

- *Pretoria City Council v. Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC); *Bulletin* 2001/1 [RSA 2001-1-001].

Languages:

English.



Identification: RSA-2004-2-007

a) South Africa / b) Constitutional Court / c) / d) 04.08.2004 / e) CCT 23/04 / f) Samuel Kaunda and Others v. The President of the Republic of South Africa and Others / g) / h).

Keywords of the systematic thesaurus:

- 1.3.5.14 **Constitutional Justice** – Jurisdiction – The subject of review – Government acts.
 3.4 **General Principles** – Separation of powers.
 3.19 **General Principles** – Margin of appreciation.
 4.16 **Institutions** – International relations.
 5.1.1.1 **Fundamental Rights** – General questions – Entitlement to rights – Nationals.
 5.3.8 **Fundamental Rights** – Civil and political rights – Right to citizenship or nationality.

Keywords of the alphabetical index:

Foreign policy, government, discretionary power / Constitution, direct application, extraterritorially / Diplomatic protection, right / Jurisdiction, territorial / Territoriality, diplomatic protection.

Headnotes:

All citizens are entitled in terms of Section 3.2 of the Constitution to the rights, privileges and benefits of citizenship. This amounts to an entitlement to request the government for protection against wrongful acts of a foreign state. The government has a corresponding obligation to consider the request and deal with it consistently with the Constitution.

Summary:

The applicants in this matter were 69 South African citizens held on various charges in Zimbabwe. In fear

of extradition from Zimbabwe to Equatorial Guinea, where they were accused of plotting a coup, the applicants contended that they would not get a fair trial and, if convicted, that they stood the risk of being put to death. Therefore the relief sought aimed at orders compelling the government to make certain representations on their behalf to the governments of Zimbabwe and Equatorial Guinea and to take steps to ensure that their rights to dignity, freedom and security of the person and fair conditions of detention were at all times respected and protected in Zimbabwe and Equatorial Guinea.

The decision of the Court was delivered by Chaskalson CJ with whom Langa DCJ and Moseneke, Skweyiya, van der Westhuizen, and Yacoob JJ concurred. Concurring judgments were delivered by Ngcobo and Sachs JJ. A dissenting judgment was delivered by O'Regan J, with whom Mokgoro J concurred.

All the judgments recognised that as a nation South Africa has committed itself to uphold and protect fundamental rights which are the cornerstone of its democracy. South Africa recognises a common citizenship and all citizens are entitled, in terms of Section 3.2 of the Constitution, to the rights, privileges and benefits of citizenship. A privilege and benefit of South African citizenship is an entitlement to request the South African government for protection against wrongful acts of a foreign state. The government has a corresponding obligation to consider the request and deal with it consistently with the Constitution. The difference between the majority and the dissenting judges concerned the nature and extent of this obligation.

The majority held that decisions as to whether, and if so, what protection is given, is an aspect of foreign policy which is essentially the function of the executive. However, the exercise of all public power is subject to constitutional control. This also applies to an allegation that government has failed to respond appropriately or at all to a request for diplomatic protection. In dealing with a dispute that may arise in that regard, however, courts must give particular weight to the government's special responsibility for and particular expertise in foreign affairs. The South African government has a wide discretion in deciding how best to deal with such matters.

Government's stated policy concerning the conditions of detention and the conduct of trials of nationals in foreign countries is to ensure that all South Africans citizens are detained in accordance with international law standards, have access to their lawyers and receive a fair trial. The majority held that these policies are not inconsistent with international law or

any obligation that government has under the Constitution.

In a separate judgment, Ngcobo J found that the right of citizenship includes the right of a citizen to request diplomatic protection from the government when any of his or her rights are violated or threatened with violation. Diplomatic protection is one of the benefits, if not a right, of citizenship. Diplomatic protection is an important weapon in the arsenal of human rights protection. The government is under a constitutional duty to provide diplomatic protection to South African nationals abroad in terms of Section 3.2.a of the Constitution read with Section 7.2 of the Constitution. Diplomatic protection invariably implicates foreign relations, which is within the province of the executive. Therefore states are allowed a wide discretion in deciding whether, when and how to grant diplomatic protection. This does not mean that the judiciary cannot review the decision of the executive refusing diplomatic protection.

In a dissenting judgment O'Regan J (with Mokgoro J concurring) held that there is a duty, in terms of Section 3.2 of the Constitution, for the state to provide diplomatic protection to its nationals in order to prevent the violation of their fundamental human rights under international law. It was held that because the duty can only be carried out by the government in its conduct in foreign relations, it must be afforded a wide degree of latitude to determine how the duty ought to be discharged. Given that there was ample evidence that the applicants might find themselves in Equatorial Guinea and that they were at risk of receiving an unfair trial which might result in the death sentence, O'Regan J found that it was appropriate to issue a declaratory order holding that the government is under a duty to afford diplomatic protection to the applicants to protect them from egregious violations of international law.

Sachs J concurred in the main judgment, while agreeing with the additional points of substance in the separate judgments.

Cross-references:

- *R v. Cook* [1998] 2 SCR 597, *Bulletin* 1998/3 [CAN-1998-3-003];
- *Mohamed and another v. President of the Republic of South Africa and Others* (Society for the Abolition of the Death Penalty in South Africa and another Intervening) 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC); *Bulletin* 2001/2 [RSA-2001-2-007].

Languages:

English.



Identification: RSA-2004-2-008

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 05.10.2004 / **e)** CCT 76/03 / **f)** *Mabaso v. Law Society of the Northern Provinces and The Minister for Justice and Constitutional Development* / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

4.7.15.1.4 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Status of members of the Bar.

5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.

Keywords of the alphabetical index:

Appeal, leave to appeal / Lawyer, admission, simplified.

Headnotes:

Section 9.3 of the Constitution prohibits unfair discrimination. It is important that bars to entry into the legal profession that constitute unfair discrimination be removed. In this context, it is unfair to differentiate between attorneys admitted in former “homelands” and attorneys admitted in the former “Republic of South Africa”.

Summary:

Section 20.1 of the Attorneys Act, 53 of 1979 (Attorneys Act) provides a short-cut route to enrolment for attorneys who have already been admitted “under this Act”. In effect, this short-cut route was available only to attorneys in the former Republic of South Africa admitted under the Attorneys Act. It excluded attorneys admitted in terms of other legislation in the former “homelands”. Mr Mabaso

(applicant) was admitted in terms of the Attorneys, Notaries and Conveyancers Act of the former Bophuthatswana.

The applicant successfully sought to be enrolled as an attorney in terms of Section 20 of the Attorneys Act. However the Law Society of Northern Provinces (Law Society) opposed his enrolment. In terms of this section, its opposition should have constituted a bar to that enrolment. When the Law Society discovered that he had been enrolled despite its objection, it approached the Pretoria High Court (High Court) for an order removing his name from the roll. The applicant opposed this relief on several grounds, including on the basis that Section 20 was unconstitutional in that it infringed his right to equality under Section 9 of the Constitution.

The High Court granted the order sought by the Law Society and dismissed the applicant's opposition including his application for an order declaring Section 20 to be inconsistent with the Constitution. The applicant unsuccessfully sought leave to appeal to the Supreme Court of Appeal (SCA). The applicant failed to comply with the rules of the SCA, the court refused to condone this non-compliance and as a result his appeal failed.

O'Regan J considered the application for leave to appeal, treating it as an application for leave to appeal against the decision of the High Court. There were two issues in the application for leave to appeal. The first related to the High Court decision removing the applicant from the roll of attorneys, and the second to the constitutional challenge to Section 20.

In relation to the first issue, O'Regan J noted that law societies have a duty to ensure that practitioners conduct themselves with integrity, and that courts will be astute to ensure that candidates to be admitted as attorneys are fit and proper persons. Given that the Law Society had objected to the applicant's admission, and that such objection constituted a bar to admission under Section 20, the Court held that it was not in the interests of justice to grant leave to appeal in relation to the High Court decision removing the applicant from the roll of attorneys.

In relation to the constitutional challenge to Section 20, the Court held that it was in the interests of justice to grant leave to appeal particularly in the light of the public interest in removing discriminatory bars to entry into the legal profession. It was held that in excluding attorneys admitted under "homeland" legislation from benefiting under the provisions of Section 20, the Attorneys Act clearly differentiated between those attorneys admitted in terms of

"homeland" legislation and those admitted in terms of the Attorneys Act.

The constitutionality of Section 20 must be considered in the light of the history of the former apartheid policy which created "homelands" in an attempt to allocate small and generally poor areas of South Africa to black people, which generally remain underdeveloped and poor. The Court held that this discrimination reinforces and perpetuates a pattern of disadvantage which exists between "homeland" areas and the rest of South Africa. Accordingly, the discrimination had the potential to impair the fundamental human dignity of those adversely affected. It therefore constituted unfair discrimination, and this limitation could not be justified in terms of Section 36 of the Constitution. The appeal against the High Court decision in respect of the constitutionality of Section 20 therefore succeeded.

The Court accordingly granted an order which read words in to Section 20 so as to permit attorneys admitted in the former "homelands" also to benefit from the short-cut procedure it provides.

Languages:

English.



Identification: RSA-2004-2-009

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 06.10.2004 / **e)** CCT 57/03; CCT 61/03; CCT 01/04 / **f)** Nokuthula Phyllis Mkontwana v. Nelson Mandela Metropolitan Municipality and Another; Peter William Bissett and Others v. Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v. Member of the Executive Council for Local Government and Housing in the Province of Gauteng and Others; together with KwaZulu-Natal Law Society and Msunduzi Municipality (*amici*) / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

3.20 **General Principles** – Reasonableness.

3.22 **General Principles** – Prohibition of arbitrariness.
 4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.

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

5.2 **Fundamental Rights** – Equality.

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

5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Decree, municipal / Housing, access / Property, transfer, limitation / Property, social obligation / Property, water and electricity charges, payment.

Headnotes:

Section 25.1 of the Constitution prohibits arbitrary deprivation of property. Section 118.1 of the Municipal Structures Act 32 of 2000 and Section 50.1.a of the Local Government Ordinance no. 17 of 1939 (the laws) preclude transfer of immovable property unless a clearance certificate issued by a municipality indicates that all water and electricity charges due in connection with that property for the preceding two years have been paid. The laws impact on a single incident of ownership of property, the right to transfer it. The laws allow for deprivation of property, however the deprivation is not arbitrary because there is sufficient reason. The laws do not infringe the rights to equality, access to housing and access to courts enshrined in Sections 9, 26 and 34 of the Constitution respectively. The laws can be interpreted to include procedural fairness.

Summary:

This case concerns Section 118.1 of the Municipal Structures Act 32 of 2000 and Section 50.1.a of the Local Government Ordinances no. 17 of 1939 (the laws), which precludes transfer of immovable property unless a clearance certificate issued by a municipality indicates that all water and electricity charges due in connection with that property for the preceding two years have been paid.

The South Eastern Cape High Court (Cape High Court) found Section 118.1 to be unconstitutional. Applicants approached the Constitutional Court for confirmation of this decision and respondents appealed it.

There was also an application for direct access to the Constitutional Court by an organisation, Transfer Rights Action Campaign (TRAC). They challenged

the laws and in addition Section 118.3 of the Act and various by-laws.

The Court granted direct access only in respect of Section 118.1 of the Act and Section 50.1.a of the Ordinance.

The laws, in effect, require the owner of property to bear the risk of non-payment of consumption charges by non-owner occupiers. Yacoob J, writing for the majority of the Court dismissed the application for confirmation and upheld the appeal against the judgment of the Cape High Court.

The complaint of individual property owners and TRAC (the applicants) was that when they seek to transfer their properties they may not do so if consumption charges have not been paid. The applicants argued that the refusal of municipalities to issue a clearance certificate when tenants' debts are not paid means that owners are arbitrarily deprived of their right to sell their property.

The applicants challenged the laws in various ways. It was said that the provisions:

- infringe the right against arbitrary deprivation of property contained in Section 25 of the Constitution because there is no connection between owners and their tenants' debts for electricity and water;
- are discriminatory against property owners and infringe the right to equality contained in Section 9 of the Constitution;
- are in breach of Section 26, the right to access to housing, and Section 34, the right of access to courts;
- are in breach of the right to procedural fairness contained in Section 33 of the Constitution because tenant arrears are allowed to accumulate without any timely warning by the municipalities to the owners;
- serve no legitimate government purpose and
- present a serious disadvantage to the property market.

The applicants also argued that effective debt collection and management by municipalities would preclude the need for these provisions.

Yacoob J found that the laws do constitute a substantive or permanent obstacle to transferring a property and therefore amount to a deprivation of property. In the further enquiry as to whether there is sufficient reason to defeat the challenge that the laws are arbitrary, he said that there would be sufficient

reason for the deprivation if the government purpose was both legitimate and compelling and if it would, in the circumstances, not be unreasonable to expect the owner to take the risk of non-payment. He found that the deprivation is not arbitrary because:

- the purpose of the laws, to provide a form of security for municipalities is important as it assists municipalities to collect debts and encourages owners of property to fulfil their civic responsibilities;
- there is a close connection between the owner, the services supplied to the property by the municipality and the debts incurred by tenants;
- the supply of electricity and water to a property is integral to its worth and benefits the owner even when he or she is not occupying the property;
- it is not unreasonable for the property owner to bear the risk when tenants and occupiers do not pay for consumption of electricity and water;
- the deprivation is concerned with a single aspect of ownership – the right to transfer the property and
- the deprivation is temporary except in cases where the debts exceed the market value of the property – but this can be avoided by careful monitoring of the tenant by the owner and by the municipality fulfilling its obligations to take reasonable steps to collect debts when they are due.

Yacoob J said that the law does not relieve municipalities of their duty to collect debts and to guard against an unreasonable accumulation of outstanding arrears. He found that the Section can be interpreted to include procedural fairness and declared that municipalities are obliged to provide copies of accounts to owners when they receive a written request to do so. He also found that there was no basis to the challenge that the laws infringe the rights to equality, access to housing and access to courts.

Writing separately, O'Regan J concurred with the order proposed by Yacoob J, but for different reasons. O'Regan J held that a court must consider the extent of the deprivation and evaluate it in the light of the purpose of the legislation that occasions the deprivation, in order to determine whether there is "sufficient reason" for the deprivation.

Cross-references:

- *First National Bank of SA Ltd t/a Wesbank v. Commissioner, South African Revenue Services and Another; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC); *Bulletin* 2002/2 [RSA-2002-2-006];

- *Chief Lesapo v. North West Agricultural Bank and Another* 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC); *Bulletin* 2000/3 [RSA-2000-3-016].

Languages:

English.



Identification: RSA-2004-2-010

a) South Africa / b) Constitutional Court / c) / d) 08.10.2004 / e) CCT 74/03 / f) Jaftha v. Schoeman and Others; Van Rooyen v. Stoltz and Others / g) / h) CODICES (English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
 5.3.38.1 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Criminal law.
 5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Debt, enforcement / Execution, immovable property / Housing, access / Housing, eviction / Judgment, execution / Court, intervention, necessity / Judicial protection of rights / Judicial supervision / Tenure, security.

Headnotes:

Provisions of the Magistrates' Courts Act 32 of 1944 (the Act) allowed the sale in execution of immovable property of judgment debtors without judicial oversight. The appellants challenged these provisions, arguing that they violated their right of access to adequate housing.

The Court held that there is an aspect of the right to adequate housing which prevents the government from enacting measures which deprive people of their

pre-existing access to adequate housing in unjustifiable circumstances.

It is inappropriate to attempt to establish all circumstances in which it would be unjustifiable for a debtor to lose access to his or her home for failure to pay a debt. The Act is overbroad to the extent that it allows execution in unjustifiable circumstances. An appropriate remedy is the provision of judicial oversight so that a court may balance the interests of the creditor and debtor to determine whether it would be justifiable to order execution.

Summary:

The appellants in this matter were two unemployed women with very little education. Neither was able to work owing to poor health. Both had borrowed small amounts of money from local creditors to pay for household supplies. When the appellants failed to repay the debts in full, the creditors referred the matter to the only firm of attorneys in the town. The firm initiated proceedings in the Magistrates' Court against the appellants, which ultimately resulted in the attempted sales in execution of their homes. The sales in execution were ultimately set aside. However, the appellants persisted in their claim that Sections 66.1.a and 67 of the Magistrates' Courts Act 32 of 1944 (the Act), the provisions dealing with sales in execution of property, were unconstitutional in that it is possible for the whole process of execution to occur without any judicial oversight. This lack of judicial oversight allowed executions to proceed in unjustifiable circumstances. Although the appellants had avoided the immediate threat of sale in execution, they still had outstanding debts and argued that should the provisions remain unchallenged, they would be vulnerable to the risk of their homes being sold in execution in the future.

The appellants appealed against their unsuccessful challenge to the provisions in the Cape High Court (the High Court). In the High Court the appellants argued that Section 26 of the Constitution, in which the right to have access to adequate housing is enshrined, contains a positive and negative aspect. The positive aspect requires the state, subject to its available resources, to provide access to adequate housing to all people in South Africa. The negative aspect requires the state not to enact measures which deprive a person of his or her pre-existing access to adequate housing. This negative aspect of the obligation arises, according to the argument, from Section 26 read with Section 7.2 of the Constitution, is unrelated to the resources available to the state and is not subject to progressive realisation.

The High Court rejected these arguments. It held that once a home has been sold in execution the debtor has two choices: he or she may vacate the home voluntarily or refuse to vacate the home. In the former situation, the loss of the debtor's home is a result of his or her voluntary Act of vacating the premises and not the provisions of the Act. In the latter situation, the new owner would need to use the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) to evict the debtor. The High Court held that the PIE Act contains sufficient safeguards to prevent the debtor from being evicted in unfair circumstances. It further held that Section 26 of the Constitution does not contain a right to ownership and to the extent that the Act resulted in a deprivation of ownership, it did not violate the right to have access to adequate housing. It concluded that due to the procedural safeguards present in the PIE Act, the scheme allowing for sales in execution was not unconstitutional.

Before the Constitutional Court, the appellants were successful and the Court unanimously upheld their appeal. Mokgoro J held that Section 26 does indeed contain a positive and negative aspect. The Court examined the international law understanding of the concept of adequate housing as well as the particular history of forced removals and insecure land tenure in South Africa. The Court gave particular focus to security of tenure for a proper understanding of the concept of adequate housing. In the light of this, the Court held that any measure which removes from a person his or her pre-existing access to adequate housing would limit Section 26 of the Constitution. Such a limitation may be justifiable in terms of Section 36 of the Constitution.

The Court found that it would be inappropriate to set out all the circumstances in which a sale in execution would be unjustifiable. The impugned provisions were unconstitutional to the extent of their over-breadth in that they were sufficiently wide as to allow sales in execution to proceed in unjustifiable circumstances. The Court made it clear that it is important for debtors to take responsibility for the debts that they incurred and for the interests of creditors to be taken into account. It pointed out that while it would often be unjustifiable to order execution where small amounts of money were involved, this would not always be the case, especially because what might seem like a small amount of money to some might not be insignificant to the creditor.

The Court held that an appropriate remedy would be the provision of judicial oversight over the execution process. A judicial officer must determine whether it is justifiable to order execution taking into account, but not limited to, the following factors: the circumstances

in which the debt was incurred; any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt and any other factor relevant to the particular facts of the case before the Court.

Languages:

English.



Switzerland Federal Court

Important decisions

Identification: SUI-2004-2-004

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 08.04.2004 / **e)** 2P.223/2003 / **f)** A. v. Senate of the University of Basel / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 130 I 113 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
 3.22 **General Principles** – Prohibition of arbitrariness.
 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
 4.10.7 **Institutions** – Public finances – Taxation.
 5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

University, entrance / University, half-yearly fees, amount / International Covenant on Civil and Political Rights, applicability.

Headnotes:

Articles 8 of the Federal Constitution (equality) and 9 of the Federal Constitution (protection against arbitrariness), Article 13 of the International Covenant on Civil and Political Rights, tuition fees at the University of Basel.

Regard being had to the Cantonal Law on Universities, the University of Basel's rules on fees have a sufficient formal legal basis for half-yearly fees to be increased as long as the increase remains within the customary limits. This was true of an increase of some 100 Swiss francs (CHF), which was the first increase since 1997. However, there is not currently a sufficient formal legal basis for future increases significantly exceeding general price inflation (point 2).

Affirmation of previous decisions to the effect that Article 13.2.c. of UN Covenant I may not be relied on directly by an individual in a dispute on university fees. In any event, the impugned increase does not appear to be unconstitutional in the light of this article (point 3).

Summary:

In 2003, the Basel University Senate decided to amend the rules on university fees. Fees for registered students were increased from CHF 600 to CHF 700 per semester, with a corresponding increase in the fees for other categories of students.

A., a student at the University of Basel, lodged a public-law appeal asking the Federal Court to set aside the decision to amend the rules on university fees. She submitted that the increase in fees did not have an adequate legal basis, was therefore contrary to the principle of the rule of law, and infringed some of the guarantees of the International Covenant on Economic, Social and Cultural Rights (UN Covenant). The Federal Court dismissed A's public-law appeal.

The collection of fees and contributions from the public must be conducted on a formal legal basis. If parliament decides to delegate the power to set fees to the executive, the legislation to this effect must at least specify who is required to pay, the purpose of the payment and how it is to be calculated. This rule may be relaxed, however, where other principles provide protection, such as cost-coverage and equivalence rules, which, to a certain extent, enable the amount of the contribution to be regulated. Nonetheless, these principles cannot entirely eliminate the need for a formal legal basis.

The Cantonal Law on the University of Basle lays down the conditions for university entrance and makes the University Senate responsible for setting university fees. It follows from this that the purpose of the fee and the persons required to pay it are specified by a formal law and so, in these respects, the need for a formal legal basis is met.

On the other hand, neither the method of calculation nor the maximum amount of fees that can be charged is prescribed by the law. However, in relevant previous decisions, the Federal Court has found that the legal bases for the calculation of university fees need not be specified, provided that the competent authority remains within the bounds set in the past and that the fees are in keeping with the standards applied in other Swiss universities. The Federal Court has, however, also pointed out that these unspecified legal bases do not entitle executive bodies to increase university fees as they see fit. Making

students pay a large share of universities' costs would be a landmark decision for university education, which should be parliament's prerogative.

This was not the case, however, with the impugned increase in fees. It was accounted for partly by general price inflation since the last fee amendment in 1997 and partly by additional services provided by the university in various fields. The rate was also similar to that applied at other universities, and the increase hardly altered the share of universities' costs that had to be borne by students. In view of all the circumstances, the increase in university fees in question was not contrary to the principle of the rule of law in respect of public contributions.

The applicant also alleged a violation of Article 13.2.c of the International Covenant on Economic, Social and Cultural Rights, under which the states parties recognise the right of everyone to education and, "with a view to achieving the full realisation of this right, higher education is required to be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education". In response, the Federal Court pointed out that the impugned increase did not make university entrance significantly more difficult and that a whole system of grants and loans was available to students with financial problems. According to its case-law, Article 13.2.c of the Covenant was not detailed enough, not directly applicable and did not grant individuals the right to a particular form of university education or to university entrance. It was for the state, which had a wide margin of discretion in the matter, to choose its means of achieving the Covenant's aims. The impugned university fees could not be considered in isolation but had to be viewed in a broader context along with other measures taken or to be taken. Even having regard to the International Covenant, the increase in fees as a whole did not seem contrary to the Constitution.

Languages:

German.



Identification: SUI-2004-2-005

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 12.05.2004 / **e)** 1P.148/2004 / **f)** G. v. Nyon District Prefect and La Côte district *Tribunal de police* / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 130 I 169 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.

Keywords of the alphabetical index:

Fine, conversion into imprisonment / Imprisonment, for debt, principle / Fine, part-payment / Court fee.

Headnotes:

Articles 7 of the Federal Constitution (human dignity) and 10.2 of the Federal Constitution (personal liberty); conversion of a fine into imprisonment; prohibition of imprisonment for debt.

The prohibition of imprisonment for debt is linked both with the human dignity enshrined in Article 7 of the Federal Constitution and with the personal liberty guaranteed by Article 10.2 thereof (point 2.2).

The use of a part-payment to cover court fees rather than a fine is incompatible with the prohibition of imprisonment for debt because it makes it possible to convert a fine into imprisonment (point 2.3).

Summary:

In a decision of 25 July 2003 the Nyon District Prefect ordered G. to pay a fine of 100 Swiss francs (CHF) and court fees for travelling twice on trains without a valid ticket, in contravention of the Federal Public Transport Act. G. paid a sum of CHF 72, specifying that this was an advance payment towards the fine.

On 16 December 2003, the Nyon District Prefect converted the fine of CHF 100 into three days' imprisonment, having put the payment made towards the costs in accordance with Section 15i.2 of the Law of the Canton of Vaud on the enforcement of criminal sentences and detention on remand (LEC). Under this Act payments are put first towards the court fees, and any surplus towards fines, when a part-payment

is made by a convicted person. G. appealed to La Côte district *Tribunal de police*, but it upheld the Prefect's decision.

G. filed a public-law appeal asking the Federal Court to set aside the decision of the *Tribunal de police*, alleging that the application of this provision was incompatible with the prohibition of imprisonment for debt – which he inferred from the guarantee of personal liberty enshrined in Article 10.2 of the Federal Constitution – in that the consequence thereof was a sentence of imprisonment.

The Federal Constitution of 18 April 1999 did not reaffirm the prohibition of imprisonment for debt enshrined in Article 59.3 of the Federal Constitution of 29 May 1874. The constituent assembly did not consider it necessary to spell out this principle in a separate provision of the new Constitution because it already followed from the principle of personal liberty and was established in federal legislation. Accordingly, the prohibition of imprisonment for debt is still a principle of constitutional rank, which is linked both with the human dignity guaranteed by Article 7 of the Federal Constitution and with the personal liberty guaranteed by Article 10.2 of the Federal Constitution. Furthermore, Article 11 of the International Covenant on Civil and Political Rights of 16 December 1966 (UN Covenant II) provides expressly that no-one may be imprisoned merely on the ground of inability to fulfil a contractual obligation.

In decisions given as early as 1875, 1877 and 1887, the Federal Court found that any imprisonment in lieu of an unpaid pecuniary debt had to be regarded as imprisonment for debt, which was prohibited under Article 59.3 of the old Federal Constitution. It pointed out that fines were a criminal penalty which could be enforced through imprisonment, but the same did not apply to court fees, which were merely a debt owed by the convicted person to the state. That being so, it held that it was not possible to decide unilaterally, without the debtor's consent, to put a sum paid to cover a fine towards court fees. The only aim of such a decision would be to use imprisonment, which was lawful *per se* in the event that a fine was not paid, as a means of collecting court fees, thus circumventing the application of Article 59.3 of the old Federal Constitution.

There is no reason to reconsider this case-law under the new Constitution and its provisions on human dignity and personal liberty. Putting a part-payment firstly towards court fees rather than the fine, as provided for in the cantonal legislation, is incompatible with the prohibition of imprisonment for debt. It is not acceptable for the conversion of a fine into imprisonment to depend on whether or not the debtor

has expressly stated that he or she intends a part-payment to be put towards the fine and not the court fees. Accordingly, the impugned decision upholding the conversion of the applicant's fine into three days' imprisonment infringes the prohibition of imprisonment for debt and must be set aside on this ground.

Languages:

French.



Identification: SUI-2004-2-006

a) Switzerland / **b)** Federal Court / **c)** Second Civil Chamber / **d)** 01.07.2004 / **e)** 5P.182/2004 / **f)** X. v. Aargau Cantonal Court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 130 I 180 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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:

Child, custody, decision / Child, interest.

Headnotes:

Right to an official defence counsel, Article 29.3 of the Federal Constitution (free legal aid).

A mother who loses custody of her child is entitled in principle to the assistance of an officially appointed defence counsel in an application by her to the guardianship office for custody to be restored.

Summary:

In 2001, the guardianship office withdrew a mother's right to custody of her daughter and placed the child in the custody of the mother's sister. In 2003, the mother asked the guardianship office to restore her right to custody. She also asked for legal aid and for an officially assigned defence counsel to represent her during the proceedings.

The guardianship office declared the mother's application for legal aid inadmissible. On appeal, the Aargau Cantonal Court rejected the application, mainly on the ground that guardianship procedures are governed by the inquisitorial principle and that a decision by the guardianship office that was contrary to the applicable rules and at odds with the child's interests would be automatically set aside.

The mother filed a public-law appeal asking the Federal Court to set aside the Cantonal Court's decision, relying on Article 29.3 of the Federal Constitution. The Federal Court allowed the mother's public-law appeal.

Under Article 29.3, anyone lacking the necessary means has the right to free legal aid, unless the case appears to be without any chance of success; such persons are also entitled to free legal representation, to the extent that this is necessary to protect their rights. The constitutional guarantee applies to any proceedings in which applicants are already involved or which it is necessary for them to initiate to protect their rights. A person without means has the right to an officially assigned defence counsel if his or her interests are significantly affected and the dispute involves difficulties with regard to the facts and the law which require the assistance of a representative. A representative must be appointed in all cases which threaten a person's legal position particularly seriously, but also in less important cases in which complicated questions with regard to the facts and the law are raised and a party is not in a position to defend him or herself. The question of whether legal aid is necessary must be determined on a case-by-case basis depending on the actual circumstances.

The assistance of counsel is not rendered superfluous merely by the facts that the procedure is governed by the inquisitorial principle, that the guardianship office examines the facts and applies the law automatically, and that a supervisory body may intervene even if no appeal proceedings are initiated. Even in cases like these, the parties are required to take part in the proceedings, and they also describe important facts and provide appropriate evidence. The outcome of proceedings relating to the restoration of custody rights to a mother will have long-term consequences and is of great importance to the mother (and to the child and foster parents). The possible restoration of custody rights raises some very delicate issues. To resolve these in the instant case, it was necessary among other things to assess the changes in the parties' personal circumstances since 2001 and the consequences of this for the child's well-being. This meant that the relevant facts had to be ascertained and examined in the light of the applicable rules. In view of these

circumstances, it cannot be said that the mother was capable of dealing with the difficulties of the proceedings without legal advice. Consequently, the refusal by the cantonal authorities to appoint an official defence counsel amounted to a breach of her constitutional guarantee.

Languages:

German.



“The Former Yugoslav Republic of Macedonia” Constitutional Court

Important decisions

Identification: MKD-2004-2-004

a) “The Former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 23.06.2004 / e) U.br. 40/2004 / f) / g) / h) CODICES (Macedonian).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
 3.25 **General Principles** – Market economy.
 4.5.2 **Institutions** – Legislative bodies – Powers.
 5.2 **Fundamental Rights** – Equality.
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Company, licence, condition / Economy, state regulation.

Headnotes:

The principle of equality of market entities implies an equal legal position of entities in performing their activities on the market. In this respect, the state is obliged to undertake certain measures in order to prevent monopolistic behaviour and positions in the market, thereby protecting thus the market rules and competition in a way that enables market entities equal opportunities for action. The contested law regulates the legal regime for engaging in tourist activities by laying down the necessary terms and conditions to be fulfilled for a travel agency to perform its activities on the market. Since the term in question, “at least two employees, each having a university degree and sufficient knowledge of foreign language” refers to all market entities that may obtain an “A” licence, it does not violate the freedom of market and entrepreneurship.

Summary:

Several petitioners lodged a petition with the Court challenging a provision in the Law on Tourist Activity that defines the terms and conditions to be met in order for a travel agency to obtain an “A” licence. According to the provision in question, in order to obtain an “A” licence, the applicant has to submit evidence that, *inter alia*, it has at least two employees with a university degree and sufficient knowledge of a foreign language. In the petitioners’ view, such a provision implied state interference in private enterprise, which contradicted the constitutional principle of freedom of market and entrepreneurship. Moreover, since the disputed provision did not define which type of university degree employees required, the petitioners claimed that the intention of the legislature was not to improve the quality of tourist services, but to interfere with their activity.

When adjudicating on constitutionality of the disputed provision, the Court took into consideration Articles 8 and 55 of the Constitution, both relating to the freedom of market and entrepreneurship, and stated that that freedom could not be treated as applicable in the case of market entities only. The state, as guardian of this freedom, also has a significant role as regulator of economic flows on the market.

The Court found that the freedom of market and entrepreneurship as set out by the Constitution was not restricted in a case where the legislature determines terms and conditions for exercising tourist activity of an “A” licence, which is applicable to all market entities on equal terms. Moreover, in further support of its findings, the Court held that there was no obstacle for “A” licence holders to employ, aside from the employees in question, other persons who do not meet statutory requirements related to their education.

Languages:

Macedonian.

**Identification:** MKD-2004-2-005

a) “The Former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 30.06.2004 / e) U.br. 40/2003 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 48/2004 / h) CODICES (Macedonian).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
 3.9 **General Principles** – Rule of law.
 3.12 **General Principles** – Clarity and precision of legal provisions.
 4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.
 4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
 4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
 5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
 5.3.35 **Fundamental Rights** – Civil and political rights – Inviolability of the home.

Keywords of the alphabetical index:

Police, financial, powers / Investigation, criminal / Detention, conditions and terms / Investigation, preliminary / Search, seizure, documents / Seizure, asset / Search, business premises.

Headnotes:

The principle of the separation of powers and the rule of law are put into question by providing the financial police with statutory rights to undertake investigative activities, procedural acts that fall within the competence of the courts.

The search of business premises by financial police officers without a warrant issued by a court endangers the principle of the inviolability of the home.

The detention of persons by financial police officers, which is in substance a restriction of freedom, must be carried out with strict observance of terms and procedure provided by law.

The temporary confiscation and seizure of objects could lead towards the permanent seizure of objects, which falls within the exclusive competence of the courts and cannot be undertaken by the financial police.

The right of financial police officers to use firearms in order to prevent a person from escaping by way of a vehicle could be abused or could prejudice the constitutional principle of irrevocability of human life, human physical and moral integrity and the human right to freedom.

Summary:

Taking the petition into account, the Court struck down several provisions of the Law on the financial police relating to the competencies of the financial police. The Court found that the law in question consisted of ambiguities and imprecise provisions, which ignored some fundamental values set out in the Constitution.

Namely, the law entrusted the financial police with the right to undertake investigation activities against persons under suspicion of being involved in illicit financial activities (money laundering, tax evasion etc.) against the economic interests of the country, of either a national or an international nature. The Court found that entrusting the financial police to undertake investigative activities contradicted the principle of the rule of law and the separation of state powers into legislative, executive and judicial. It confirmed that Law on criminal proceedings sets out the bodies competent to detect, prosecute and judge perpetrators of criminal offences in accordance with the principle of presumption of innocence. According to this law, investigation is a stage in criminal procedure in which competent state bodies take certain measures where there is suspicion that a person has committed a crime. The investigation is commenced after a public prosecutor's request has been submitted to the investigating judge, who decides whether or not to open or continue the investigation. Therefore, the Court held that an investigation falls exclusively within courts' competence, thereby making the financial police's authorisation to undertake investigative activities a contradiction of the above-mentioned principles, which are set out in the Constitution.

Moreover, the law defined the financial police's scope of reference as including the right to search upon its own initiative or that of the public prosecutor the business premises of persons under suspicion of having committed a crime.

Accepting the petitioner's arguments, the Court took into consideration the fundamental values of the constitutional order as set out in Articles 8.1.1, 6 and 11, as well as Article 26 of the Constitution, which guarantees the inviolability of the home. The Constitution provides for the maximum degree of, if not the absolute, inviolability of the home. The Court interpreted that term as encompassing inviolability of

other premises as well. Therefore, the Court held that the jurisdiction of the financial police to search business premises without a warrant issued by a court was not in compliance with the principle of the inviolability of the home.

The Law authorises the financial police to arrest persons under investigation or those who disturb or interfere with the investigation or procedure. Having regard to Article 12 of the Constitution, the Court stated that by guaranteeing the irrevocability of human freedom, the Constitution also provides for the basic conditions under which and the manner in which it may be restricted. Thus, the Constitution states that a person's freedom may not be restricted except by a court decision and in cases and procedures determined by law. This makes any interference and arbitrary action taken by any other body impossible. The Court is the specific guarantor of the irrevocability of human freedoms. The court acts as an independent and autonomous body in which the competence is vested to decide on the restrictions of human freedoms. That being so, the Court held that the statutory provisions entrusting the financial police with the power to arrest persons under suspicion were not in compliance with Article 12 of the Constitution.

The law in question also grants the financial police the statutory right to confiscate goods for failure to produce evidence that taxes have been paid or for a lack of documentation. Also, the police has been granted the right to seize electronic, technical and other devices, which might contain data and information constituting evidence. Since the Court found that the confiscation and seizure of objects were measures which could only be ordered by a court, the Court stated that financial police officers could not be authorised by statute to execute such measures. Financial police officers may only temporarily seize objects that have been used or are intended to be used for perpetrating a crime, and only when they are necessary as evidence in criminal procedure. However, financial police officers may not confiscate or seize objects on a permanent basis.

The Court turned its attention to the right of financial police officers to use firearms in order to prevent a person from escaping by way of a vehicle.

Article 10 of the Constitution lays down the irrevocability of the human right to life. The human right of physical and moral dignity is set out in Article 11 of the Constitution. According to Article 12 of the Constitution, the human right to freedom is irrevocable and no person's freedom may be restricted except by a court decision and in cases and procedures determined by law. When examining the constitutionality of the

provision at stake, the Court paid attention to the wording of Article 2 ECHR and concluded that the irrevocability of the human right to life and physical and moral integrity amounts to an essential precondition for attaining other human rights and freedoms. The attainment of that right cannot be at the cost of prejudicing its attainment by other persons. Consequently, every society reserves the right to use necessary force in the manner determined by law.

The justification of providing the police with the right to use certain elements of force should be sought in the compromise that should be created between freedom and security, as well as the necessity of striking a balance between the control of crime, as a public interest, and respect for human rights and freedoms. The use of ultimate force is not accepted by any society, which implies that even in the most extreme cases of criminal behaviour, the concept of the use of ultimate force by the police, i.e. the financial police, should be avoided. The right to use force is justified only if it aims at eliminating a force of higher magnitude i.e. in cases where it is used, the extent and scope of the force must comply with the aims to be achieved.

Since the right of financial police officers to use firearms in order to prevent escape of persons by way of a vehicle contains a certain level of risk of abuse and does not fit within measures and standards for the justified use of necessary force, the Court struck down the statutory provision that granted the financial police such a right.

Languages:

Macedonian.



Identification: MKD-2004-2-006

a) “The Former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 14.07.2004 / **e)** U.br. 100/2004 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 63/2004 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

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

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

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

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

4.5.4.4 **Institutions** – Legislative bodies – Organisation – Committees.

4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.

Keywords of the alphabetical index:

Immunity, parliamentary, limits / Detention, conditions / Arrest, condition.

Headnotes:

The right of the Standing Commission for Procedural, Mandate and Immunity and Issues of the National Parliament to decide upon a request for the detention of a member of parliament where the Parliament does not convene within a term of 15 days does not contradict the Constitution because the parliament retains its right to take the ultimate decision by either accepting or rejecting the Commission’s decision.

The Court is not competent to decide upon requests for human rights protection related to rights and freedoms aside from those as provided for in the Constitution.

Summary:

The Court did not allow the petition for judging the constitutionality and legality of certain provisions of the Rules of Procedure of the Assembly of the Republic of Macedonia, which deal with the issue of giving approval for the detention of a member of parliament. In the petitioners’ view, the Commission for Procedural, Mandate and Immunity Issues of the National Assembly was its working body, and it could not decide the issue. It could only adopt a report to be forwarded to the President of the Assembly. The only body competent to give approval for detention of a member of parliament could only be the Assembly itself. Since the provisions at stake did not determine the body competent to lodge a request for approval of the detention of a member of parliament, the petitioners claimed that they were imprecise and, as such, created legal uncertainty and enabled arbitrary and discretionary application.

The petitioners, acting on behalf of an MP, have also lodged a request for protection of his right of immunity, stating that an MP’s right of immunity is a necessary precondition for the efficient execution of his or her work.

The Court found that according to Article 66.4 of the Constitution, the Assembly adopts the Rules of Procedure by a majority vote of the total number of Representatives. Article 50 of the Rules of Procedure states that requests for approval of the detention of an MP or the notification that an MP has been arrested, are to be submitted to Assembly President. Article 51.4 of the Rules states that if the Assembly does not convene or the meeting is not anticipated to be convened within a term of 15 days, the Commission for Procedural, Mandate and Immunity Issues shall decide on such a request and shall notify the Assembly. In accordance with paragraph 5 of the article, the Assembly takes the ultimate decision of whether to accept or reject Commission's decision at its next meeting.

Article 8 of the Constitution lays down fundamental values of the constitutional order of the state. *Inter alia*, it provides for the basic freedoms and rights of the individual and citizen, as recognised in international law and set out in the Constitution, as well as providing for the rule of law and the division of state powers into legislative, executive and judicial powers as being amongst fundamental values of the system.

According to Article 12.2 of the Constitution, a person's freedom may not be restricted except by a court decision or in cases and procedures determined by law.

Article 64 of the Constitution states that MPs enjoy immunity. An MP may not be held to have committed a criminal offence or be detained because of the views he or she has expressed or the way he or she has voted in the Assembly. He or she may not be detained without the approval of the Assembly unless caught committing a criminal offence for which a prison sentence of at least five years is prescribed. The Assembly may decide to invoke immunity for an MP without his or her request, should it be necessary for the performance of the tasks of the MP's office.

The Court stated that paragraph 2 of the provision analyses what is known as substantial immunity, not as privilege enjoyed by those to whom it is attached, but as a necessary precondition for the efficient, free and responsible carrying out of their activities. This immunity should not be confused with what is known as procedural immunity, which regulates terms and conditions under which criminal proceedings may be commenced against an MP. Article 64.3 of the Constitution precisely sets out the details of an MP's immunity. It gives the procedural terms and conditions under which criminal proceedings may be commenced against an MP.

Article 66 sets out that the Assembly is in constant session and that it works at meetings. The Court

pointed out that certain distinctions should be made between terms "session" and "meeting". "Session" refers to the period of time when the Assembly might, in accordance with the Constitution, convene and perform activities falling under its competencies. By contrast, "meeting" refers to MPs' gatherings within the session with the intention of discussing and deciding issues on the agenda. The meeting lasts from the moment the Assembly's President opens it until it is closed.

Acknowledging the fact that detention is a measure of primary significance for efficient criminal proceedings, the Court stated that approving an MP's detention requires urgent and prompt action by the Assembly. In the Court's findings, the provisions at stake enable enforcement of the constitutional provisions referring to an MP's detention in a situation where the Assembly is not holding a meeting. They concern the procedural issues relating to giving approval for the detention of an MP and not the issue of a body competent to lodge a request for approval of notification of detention. That being so, the Court did not accept the alleged unconstitutionality of provisions in question.

With regard to the second part of the petition, the Court rejected the petitioners' request for protection of an MP's right of immunity. The Court based its findings on Article 110.3 of the Constitution, according to which the Constitutional Court of the Republic of Macedonia protects three groups of civil and political rights and freedoms: freedom of conviction, conscience, thought and public expression of thought; political association and activity; and the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation.

Bearing that in mind, the Court found that issues raised in the petition were criminal procedural law in nature and related to: the terms for MPs' detention; the terms, manner and procedure for lifting MPs' immunity; and furtherance of criminal proceedings. Since the Court confirmed that the issue raised by the petition fell outside of the Court's competence in relation to cases for human rights protection, the Court declared itself as not having the jurisdiction to decide on the merits of the case. Therefore, the Court rejected petitioners' request for protection of an MP's right to immunity.

Languages:

Macedonian.



Turkey

Constitutional Court

Important decisions

Identification: TUR-2004-2-006

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 17.02.2004 / **e)** E.2001/237, K.2004/16 / **f)** / **g)** *Resmi Gazete* (Official Gazette) / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.

5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.

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

Keywords of the alphabetical index:

Military, professional / Investigation, criminal, postponement.

Headnotes:

Since persons in the armed forces do not have the same status as civilians, the application of different rules of criminal investigation to soldiers in the field is not unconstitutional. The national duty may necessitate that some criminal investigations be postponed until the national duty has ended provided that the imprisonment term for the alleged crime does not exceed a certain time limit. Such a postponement is within the discretionary power of the legislation and does not infringe the Constitutional rules.

Summary:

Article 20 of the Law on the Establishment and Procedures of Military Courts, no. 353 was brought before the Constitutional Court by two different courts, with an allegation of unconstitutionality.

The Constitutional Court examined the constitutionality of the first paragraph of Article 20 of the Law since the

other parts of the Article were not related with the cases before the two courts.

According to the impugned provision of Article 20.1 of Law 353, procedures of criminal investigation against soldiers shall be postponed until they complete their military duty provided that the upper limit of the offence does not exceed one year of imprisonment and the offence has been committed before joining the army.

The principle of the rule of law, as regulated in Article 2 of the Constitution, means that the State shall respect and protect human rights and shall establish a legal order on the basis of equity and equality and its acts and actions shall be subject to judicial review. In a state governed by the principle of the rule of law, the lawmaker is not only under obligation to ensure the constitutionality of laws, but also under obligation to ensure that the constitution is harmonious with the universal rules of the law.

On the other hand, Article 10 of the Constitution provides: "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." This rule requires that the same rules be applied to persons who are in the same position and prevents creation of privileged societies and persons. When different rules are applied to the persons having the same status, it is contrary to the principle of equality and the rule of law. Some circumstances may require the application of different rules to some persons and societies having the same status.

Civil persons who are in the armed forces during the legal proceedings do not have the same status as civilians. Soldiers who are suspected of having committed an offence while they were civilians are not in the same position as civilians. When individuals join the army and serve their compulsory military duty, they will be in a different legal position. Then, if they are legally in a different position, applying different rules to those individuals does not infringe the Constitution.

According to the impugned provision, the criminal investigation against soldiers shall be postponed if some other conditions exist. On the other hand, the impugned provision is applied to acts punishable by not more than one year imprisonment. The acts punishable by less than one year imprisonment are

not of the same nature as the acts requiring more than one year imprisonment. The Lawmaker gave more importance to the military service in order not to impede national service as it is regulated in Article 72 of the Constitution. Under Article 72, the military service is the right and duty of every Turk. The impugned provision does not contain any rule that the State shall relinquish its power to penalise and it does not infringe the right to a fair trial and the right of litigation either as plaintiff or defendant (Article 36 of the Constitution).

Therefore, the allegation of unconstitutionality was rejected.

Supplementary information:

- Promulgated in the Official Gazette of 05.05.2004, no. 25453.

Languages:

Turkish.



Identification: TUR-2004-2-007

a) Turkey / b) Constitutional Court / c) / d) 21.02.2004 / e) E.2002/166, K.2004/3 / f) / g) *Resmi Gazete* (Official Gazette) / h) CODICES (Turkish).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.19 **General Principles** – Margin of appreciation.
 3.20 **General Principles** – Reasonableness.
 5.1.1.4.4 **Fundamental Rights** – General questions
 – Entitlement to rights – Natural persons – Military personnel.

Keywords of the alphabetical index:

Military, discipline, offence / Military, offence, sanctions.

Headnotes:

A determinant nature of military service in ensuring national security and its gravity may render some miscellaneous acts of civilians as military offences and it may be necessary to provide for heavy sanctions for those acts. However, imprisonment from 3 to 5 years for leaving the country without permission may not be regarded as a reasonable, acceptable and harmonious balance between the offence committed and the punishment in the area of military penal law.

Summary:

The First Army Military Court brought an action in the Constitutional Court alleging that article 67.1-A of Military Penal Code (as amended by the Law 4551) was contrary to the Constitution. The offending provision stipulated:

“the military persons who commit the following acts shall be deemed as having fled from the army and shall be imprisoned from 3 years to 5 years: a. personnel who spend 3 days in a foreign country for any reason in the absence of permission to go abroad even if they have leave within the country”.

The Constitutional Court held that the legislative power has the competence to determine which acts shall be deemed to be an offence provided that that offence is compatible with the Constitution and the general rules of penal law. The kind of sanctions to be applied to those acts, the terms of imprisonment and the aggravating and mitigating circumstances, are also comprised within the discretionary power of the legislation. When the discretionary power of the legislation used, it must be taken into account whether the offence is military or not. The military service may require some special sanctions for its members different than the sanctions applied to ordinary citizens. But, the rule of law within the meaning of Article 2 of the Constitution is the State respecting human rights, preserving and strengthening those rights and establishing equitable law in all areas. Consequently, it is the requirement of the rule of law to ensure a reasonable, acceptable and harmonious balance between the offence and punishment in the military penal law.

When it is taken into account that military personnel accepted military requirements, it may be concluded that the offending provision does not strike an acceptable just balance between the act committed and the penalty in a democratic society.

For those reasons, the Constitutional Court found that the impugned provision was in conflict with Article 2 of the Constitution and should be annulled.

Supplementary information:

- Promulgated in the Official Gazette of 02.07.2004, no. 25510.

Languages:

Turkish.



Identification: TUR-2004-2-008

a) Turkey / b) Constitutional Court / c) / d) 03.03.2004 / e) E.2003/98, K.2004/31 / f) / g) *Resmi Gazete* (Official Gazette) / h) CODICES (Turkish).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 4.7.14 **Institutions** – Judicial bodies – Arbitration.
- 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.
- 5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Independence.
- 5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Impartiality.

Keywords of the alphabetical index:

Bar, arbitration board, rules of procedure.

Headnotes:

Arbitration boards of bars may not be regarded as independent and impartial courts within the meaning of Articles 9 and 36 of the Constitution since composition of these boards and the procedural rules

applied, are not in conformity with the constitutional rules. The provisions related to independence, experience and procedural rules of the arbitration boards must be regulated by law.

Summary:

Article 167 of the Law on Lawyers, no. 1136 (as amended by the Law no. 4667) was brought before the Constitutional Court by three different courts, alleging its unconstitutionality.

The Constitutional Court examined the constitutionality of the first sentence of the first paragraph of Article 167 of the Law on Lawyers, since the other parts of the article were not related to the cases before the applying courts.

The first sentence of the first paragraph of Article 167 of the Law on Lawyers provides: “all conflicts issuing from the contracts of the profession of law and their fees shall be solved by the arbitration board of the bar where the legal services were performed”.

Examining the provisions in Article 167 of the Law on Lawyers, the Constitutional Court held that the arbitration boards of the bars are functioning as a branch of the judiciary. The decisions taken by those boards are final and binding. The Lawyers constitute a majority of the members of those boards, and the applications against the decisions taken may only be submitted for procedural reasons.

Article 9 of the Constitution provides that judicial power shall be exercised by independent courts on behalf of the Turkish Nation. In order to safeguard the right of litigation of the parties the following qualifications are indicated in Article 36 of the Constitution (as amended in 2001): “Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures. No court shall refuse to hear a case within its jurisdiction.” The duty to conclude trials as quickly as possible and at minimum cost is given to the judiciary in Article 141 of the Constitution. Where performance of this duty is aggravated under the pressure of a heavy workload, it may be deemed necessary to create alternative legal procedures in order to ensure the effectiveness of constitutional principles. In those circumstances, the legislative power may stipulate an obligation to apply to the arbitration board of the bars in order to resolve conflicts before applying to the courts. When the structure and the procedures of the arbitration boards are taken into account, application to ordinary or higher courts must be guaranteed according to the requirements of principle of the rule of law. Meanwhile, the nature of the decisions, the

independency and impartiality of the arbitration boards must be regulated by laws.

For those reasons the Constitutional Court found that the impugned provision was in conflict with Articles 9 and 36 of the Constitution and that it should be annulled.

Supplementary information:

- Promulgated in the Official Gazette of 10.07.2004, no. 25518.

Languages:

Turkish.



Identification: TUR-2004-2-009

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 31.03.2004 / **e)** E.2002/101, K.2004/44 / **f)** / **g)** *Resmi Gazette* (Official Gazette) / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.

5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Contract, obligation, inability to fulfil / Criminal act, intention to commit.

Headnotes:

If someone receives a service for which payment on the spot is expected at, for example, a restaurant, hotel or by means of transportation and knows that that payment cannot be made, imprisonment for those acts is not contrary to the Constitution. However, the perpetrator must have acted for his own or others' interest and must have intentionally and consciously committed the act in question.

Summary:

The Amasya Justice of the Peace Court applied to the Constitutional Court alleging that the phrase "... imprisonment from 15 days to 3 months ..." in Article 521.a of the Criminal Code was contrary to the Constitution. Article 521.a of the Criminal Code provides, *inter alia*:

- "1. Persons who stay at boarding-houses, hotels, guesthouses or similar places for temporary residence,
2. Persons who have received service at restaurants or similar places, and
3. Persons who have received service in taxis or by similar transportation means and depart without any payment in spite of his/her knowledge of his/her inability to pay shall be imprisoned from 15 days to 3 months and shall receive a high fine equal to the amount of imprisonment they have served."

Article 38.8 of the Constitution (as amended in 2001) stipulates: "No one shall be deprived of his liberty merely on the ground of an inability to fulfil a contractual obligation." In this provision, the phrase "inability to fulfil" means that anyone who is not able to fulfil an obligation even if he/she wants to fulfil it. So individuals who are able fulfil any contractual obligation and refuse to fulfil it may not benefit from this guarantee. Likewise, Article 1 Protocol 4 ECHR, the source of Article 38.8 of the Constitution, is related to an unintentional inability to fulfil a contractual obligation.

In order for the offending provision to fall within the meaning of Article 38.8 of the Constitution, that provision must state that the relationship must have followed from a contractual obligation and the deprivation of liberty must have been prescribed by law.

Imprisonment pursuant to Article 521.a of the Criminal Code is provided for acts that are committed intentionally. The intention to commit an act must have existed in order for a sentence to be imposed.

Therefore, the legal regulation in Article 521.a of the Criminal Code is not related to inability to fulfil a contractual obligation. On the contrary, in spite of his/her knowledge about his/her financial situation, the person has acted. This criterion is mentioned at the beginning of the Article as "in spite of his/her knowledge about his/her inability to pay". Therefore, the offending provision is not contrary to the Constitution. The Constitutional Court unanimously dismissed the allegation of unconstitutionality.

Supplementary information:

- Promulgated in the Official Gazette of 31.03.2004, no. 25497.

Languages:

Turkish.



Ukraine

Constitutional Court

Important decisions

Identification: UKR-2004-2-012

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 19.05.2004 / **e)** 11-rp/2004 / **f)** On an official interpretation of the provisions of Articles 90.2 and 106.1.8 of the Constitution (a case on conditions of termination of authorities of the parliament (*Verkhovna Rada*) prior to the expiry of term) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 22/2004 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

2.3.7 **Sources of Constitutional Law** – Techniques of review – Literal interpretation.

4.4.1.1 **Institutions** – Head of State – Powers – Relations with legislative bodies.

4.5.3.3 **Institutions** – Legislative bodies – Composition – Term of office of the legislative body.

Keywords of the alphabetical index:

Parliament, dissolution, conditions / Time-limit, in the Constitution, calculation.

Headnotes:

The word combination “within thirty days”, as used in Articles 90.2 and 106.1.8 of the Constitution, should be understood as a consecutive 30-day term, i.e. thirty calendar days. The calculation shall be such that the term shall start on the day on which the scheduled plenary meetings of a regular session fail to commence, and in the event that the last day of the term falls on a non-working day or a holiday, the term shall end on the next working day.

For purposes of the exercise of the President’s right to terminate the mandate of the parliament (*Verkhovna Rada*) prior to its expiry, the number of plenary meetings of the parliament that failed to commence shall not be taken into account. The only reason for terminating the mandate shall be a failure to commence any plenary meetings of the parliament during thirty calendar days.

The word combination “the plenary meetings fail to commence”, as used in Articles 90.2 and 106.1.8 of the Constitution, is to be understood as follows: the plenary meetings of the parliament fail to commence because of failure to comply with the agenda of the parliament, as established by the Constitution and the Rules of Procedure of the parliament, and that failure to comply prevents Parliament from exercising its constitutional powers as the sole body of legislative power.

Summary:

The President submitted a constitutional petition to the Constitutional Court seeking an official interpretation of the provisions of Articles 90.2 and 106.1.8. of the Constitution.

When interpreting the word combination “within thirty days”, as used in Articles 90.2 and 106.1.8. of the Constitution, the Constitutional Court proceeds from the fact that the Constitution applies the day-based concept of ‘a term’ in Articles 77.2, 82.3, 83.3, 94.2, 94.5, 103.5, 104.1, 104.4 and 115.5 of the Constitution, etc.

A term expressed as days is also used in Chapter XV “Transitional Provisions” of the Constitution. Thus, in accordance with paragraph 4 of that Chapter, the President, within three years after the Constitution enters into force, shall have the right to issue decrees approved by the Cabinet of Ministers and signed by the Prime-Minister on economic issues. The Constitution prescribes that such a decree of the President shall take effect, if within thirty calendar days from the day of submission of a draft law (except the days between sessions), the parliament (*Verkhovna Rada*) does not adopt the law or does not reject the submitted draft law with a majority of its constitutional composition. The above-mentioned decree shall be effective until a law adopted by the parliament on those issues enters into force.

When considering the issue of the term of office in a previous case initiated by way of a constitutional appeal by the President for the official interpretation of Articles 84.2, 84.3, 94.2, and 94.3 of the Constitution, the Constitutional Court proceeded from the fact that the Constitution established that the general procedure for the calculation of terms (to be applied to all public authorities) is one done on the basis of calendar days (Articles 77.2, 82.3, 85.1.31, 90.2 of the Constitution and others).

In the case at instance, the Constitutional Court took into account the common practice in the calculation of terms for the performance of certain acts by the state authorities, as adopted by law, in particular, the Law

on the Rules of Procedure of the parliament and the Code of Civil Procedure. The term “days”, as used in those statutes, means clearly and without exception calendar days.

According to the general rule, a term defined in days means inclusive of all the days that fall within that term. However, if the last day of the term falls on a non-working day, the term shall be deemed to end on the next working day.

In accordance with Articles 90.2 and 106.1.8 of the Constitution, the right of the President to terminate the authorities of the parliament prior to the expiry of its mandate depends on the number of days on which plenary meetings failed to commence, and not the number of plenary meetings that failed to commence.

When interpreting the word combination “the plenary meetings fail to commence”, as used in Articles 90.2 and 106.1.8 of the Constitution, the Constitutional Court proceeded from the fact that the Constitution gives no grounds for impossibility of commencement of the plenary meetings of the parliament.

The word “to commence”, as generally used, has the meaning “to begin or to start something, the beginning of an activity or an event”.

The parliament is the sole body of legislative power and shall exercise the authorities vested in it by the Constitution; plenary meetings are the principle form of activity of the parliament as the sole body of legislative power during its sessions. Meetings are the regular assemblies of the people’s deputies at pre-scheduled times at the determined place under established procedure. At plenary meetings, people’s deputies consider issues that fall under the competences of the parliament under the Constitution, and the people’s deputies make their decisions by voting.

Cross-references:

- Decision of the Constitutional Court dated 17.10.2002, 17-rp/2002, Bulletin 2002/3 [UKR-2002-3-016], on a case initiated by a constitutional petition of 50 people’s deputies for an official interpretation of the provisions of Articles 75, 82, 84, 91 and 104 of the Constitution (on the authorities of the parliament).

Languages:

Ukrainian.



Identification: UKR-2004-2-013

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 20.05.2004 / **e)** 12-rp/2004 / **f)** On an official interpretation of Article 12.4 of the Law On Local Self-Governance on combining the office of head of village, settlement or town council with the mandate of deputy of the Parliament (*Verkhovna Rada*) of the Autonomous Republic of Crimea (case on combining the office of head of village, settlement or town council with the mandate of deputy of the Parliament (*Verkhovna Rada*) of the Autonomous Republic of Crimea) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 22/2004 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

4.5.3.4.1 **Institutions** – Legislative bodies – Composition – Term of office of members – Characteristics.

4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.

4.8.6.1.1 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Deliberative assembly – Status of members.

Keywords of the alphabetical index:

Local self government, head, incompatibility, prohibition of dual representation.

Headnotes:

In light of the constitutional principles on local self-government, Article 12.4, in conjunction with Article 12.1 of the Law on Local Self-Governance, is to be understood as preventing a person that has been elected head of a village, settlement or town council from holding the office of deputy of the Parliament (*Verkhovna Rada*) of the Autonomous Republic of Crimea at the same time.

Summary:

Article 5.3 of the Law on the Parliament (*Verkhovna Rada*) of the Autonomous Republic of Crimea dated 10 February 2002, 90/98VR, provides that deputies of the Parliament of the Autonomous Republic of Crimea cannot hold other representative mandates.

The Constitutional Court regards that requirement as a general one covering all deputies of the Parliament of the Autonomous Republic of Crimea.

In accordance with the Constitution, the status of heads of village, settlement and town council is to be determined by law (Article 141.3 of the Constitution). This provision has been implemented by the above-mentioned law, which, in particular, establishes that the head of a village, settlement, or town council cannot be the deputy of another council, combine his or her service with other offices, including those occupied on a voluntary basis (except teaching, scholarly and creative activities in off hours) or carry on entrepreneurial activity for profit (Article 12.4).

A head of a town council is a chief official of the relevant territorial community and has a representative mandate. The mandate of head of a town council is obtained, firstly, by being directly elected by the territorial community of the town.

In accordance with the provisions of Articles 140, 141 and 142 of the Constitution, local self-governance in Ukraine comprises the following bodies: the territorial communities of villages, settlements and cities; the village, settlement, town, city district councils and their executive bodies; the heads of a village, settlement and town council; the district and oblast councils that represent the common interests of the territorial communities; and the bodies of popular self-organisation, created by the authority of village, settlement and city councils that have assigned such bodies part of their own competences, finances and property. Article 5 of the Law determines the system of local self-governance in accordance with the above-mentioned constitutional principles.

A systematic analysis of the provisions of the Constitution and laws on the representative bodies of the parliament, on the Parliament of the Autonomous Republic of Crimea and on village, settlement, city or city district councils shows that the legislation establishes a unified legal approach to the organisation and activities of such bodies. The provision in Article 38.1 of the Constitution, setting out that citizens have the right to freely elect and to stand for election to bodies of state power and bodies of local self-government, in light of provisions of Article 78.2 of the Constitution shall be construed as follows: a citizen is granted the right to freely stand for elections to the parliament and to the village, settlement, city, district or oblast councils, as well as the right to stand for the election of head of a village, settlement or city council; however, a citizen may hold a representative mandate either within one of the said bodies or in the capacity of head of a village, settlement or city council.

Cross-references:

- Decision of the Constitutional Court dated 06.07.1999, 7-rp/99, *Bulletin* 1999/2 [UKR-1999-2-006], on a case initiated by the constitutional petitions of 49 national deputies and the executive committee of Vinnytsa Town Council for an official interpretation of the provisions of Articles 38 and 78 of the Constitution as well as Articles 1, 10, 12 and 49.2 of the Law on Local Self-Governance (the case on combining the offices of people's deputy and head of a city council);
- Decision of the Constitutional Court dated 27.02.2001, 1-rp/2001, *Bulletin* 2001/1 [UKR-2001-1-001], on a case initiated by way of constitutional appeal by the President on the compliance with the Constitution (constitutionality) of the provisions of the Rules of Procedure of the Autonomous Republic of Crimea; the Regulation on the Auditor-General's Office of the Parliament (*Verkhovna Rada*) of the Autonomous Republic of Crimea; the Regulation on the Procedures of Administration of Property Owned by the Autonomous Republic of Crimea or Placed in Its Management, approved by the relevant resolutions of the Parliament of the Autonomous Republic of Crimea; and the Resolution of the Parliament of the Autonomous Republic of Crimea on Measures for the Improvement of the Manpower Policy in the Autonomous Republic of Crimea (a case on the legal acts of the Parliament of the Autonomous Republic of Crimea).

Languages:

Ukrainian.

**Identification:** UKR-2004-2-014

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 22.06.2004 / **e)** 3-rp/2004 / **f)** On the constitutionality of the provision of Article 16.2 of the Disciplinary Regulations pertaining to the Procuracy, adopted by the Resolution of the *Verkhovna Rada* on Approval of the Disciplinary Regulations pertaining to the Procuracy (the case on the Disciplinary Regulations pertaining to the Procuracy) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 26/2004 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

- 3.13 **General Principles** – Legality.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
- 4.7.2 **Institutions** – Judicial bodies – Procedure.

Keywords of the alphabetical index:

Resolution, parliamentary, annulment, incompetence.

Headnotes:

The jurisdiction of and right of appeal to a court shall be determined exclusively by statute and may not be established by other acts, including a resolution of the parliament (*Verkhovna Rada*).

Summary:

Authorised by law to submit constitutional petitions, 45 deputies appealed to the Constitutional Court for consideration of the issue of the constitutionality of Article 16.2 of the Disciplinary Regulations pertaining to the Procuracy, as adopted by the Resolution of the parliament (*Verkhovna Rada*) on Approval of the Disciplinary Regulations pertaining to the Procuracy dated 6 November 1991 no. 1796-XII (hereinafter: “the Regulations”).

According to Article 16.2 of the Regulations, an appeal to the Supreme Court within one month lies from the following: decisions by the President and the Procurator General on the deprivation of rank; orders by the Procurator General on the application of one of the disciplinary sanctions set out in Article 9.5 and 9.6 of the Regulations; and refusals of reinstatement to their former offices of officials of prosecutor's offices and investigating authorities dismissed by the prosecutors of the Autonomous Republic of Crimea, *oblasts*, Kiev City or other prosecutors with equivalent status.

In its consideration of the issue raised by the constitutional petition, the Constitutional Court proceeded as follows. In accordance with Article 92.1.14 of the Constitution, judicial proceedings are to be determined exclusively by statute. By implication, judicial proceedings cover, in particular, jurisdiction, that is to say, the establishment of the competences of and procedure relating to the courts of general jurisdiction, including matters such as the time-limit for filing applications and the time-limit for appealing against decisions, acts or negligence of public authorities, bodies of local self-government, officers and officials. In light of the above-mentioned constitutional provision, the Law on the Judicial

System provides for the following procedure: local courts shall consider cases over which they have been granted jurisdiction by the Law on Judicial Proceedings (Article 22) in the first instance; courts of appeal shall consider the cases determined by the Law (Article 26), and the Supreme Court shall consider other cases relating to exceptional circumstances as provided for by the Law (Article 47).

Supplementary information:

Judges V.D. Voznyuk, P.B. Yevhrafov, and M.D. Savenko delivered dissenting opinions.

Languages:

Ukrainian.



Identification: UKR-2004-2-015

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 07.07.2004 / **e)** 14-rp/2004 / **f)** On the constitutionality of Article 39.1.2 of the Law on Higher Education (the case on the age limit of applicants for the posts of heads of institutions of higher education awarding post-graduate degrees) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 28/2004 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.6.8 **Institutions** – Executive bodies – Sectoral decentralisation.

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

5.2.2.7 **Fundamental Rights** – Equality – Criteria of distinction – Age.

5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.

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

Keywords of the alphabetical index:

Education, institution, head, candidate, age limit.

Headnotes:

The work of heads of institutions of higher education awarding post-graduate degrees, as well as other academics and teaching staff, irrespective of their position, is subject to no specific requirements, conditions or rules of professional activities which would amount to a well-founded reason for the establishment of age limits for the performance of such work.

The impugned provision imposes the unequal legal requirement of age on applicants who would equally satisfy the professional qualification requirements for posts of heads of institutions of higher education awarding post-graduate degrees. That amounts to a restriction of the guarantee of equal opportunities in the execution of the constitutional right to labour, as guaranteed by the Constitution.

Summary:

Authorised by law to submit constitutional petitions, 56 national deputies appealed to the Constitutional Court for consideration of the issue of the constitutionality of Article 39.1.2 of the Law on Higher Education (hereinafter: “the Law”) establishing a maximum age limit of 65 years for candidates applying for the posts of head of institutions of higher education awarding post-graduate degrees.

In resolving the issue raised by the constitutional petition, the Constitutional Court proceeded as follows. According to Article 43 of the Constitution, everyone has the right to labour, including the possibility to earn one's living by labour that he or she freely chooses or to which he or she freely agrees (Article 43.1); and the State creates the conditions enabling citizens to fully realise their right to labour and guarantees equal opportunities in the choice of profession and of types of labour activity (Article 43.2).

Freedom of labour provides for the free choice of a person as to engagement in labour activity, free choice of the sphere of labour activity and non-discriminatory access to labour relations for the purpose of the realisation of the person's abilities. By its nature, the right to labour is an inalienable right and means, per se, the guarantee of equal opportunities for all persons in its execution. The execution of a citizen's right to labour is effected by entering into labour agreements and the performance of duties on the basis of his/her specialty, qualifications or post, as determined by the structure and employee list of an enterprise, institution or organisation.

The constitutional principle of equality allows the legislator the possibility of establishing some differences in the legal status of persons belonging to different kinds of occupations and in work conditions, including the possibility of introducing special rules relating to the reasons for those special rules and conditions for filling some posts, if required by the specific nature of the professional activities in question. The reasons for establishing the differences (requirements) in the legal status of workers should be valid, and the differences (requirements) established for pursuing a purpose should comply with the provisions of the Constitution, be well-founded, defensible and fair. Otherwise, the establishment of restrictions on the filling of some posts would amount to discrimination.

The above-mentioned interpretation of the provisions of Article 43 of the Constitution complies with international legal acts. In accordance with 1966 International Covenant on Economic, Social and Cultural Rights, the State may only limit such rights by establishing limitations that are determined by law only in so far as doing so is compatible with the nature of the rights and solely for the purpose of promoting the general welfare in a democratic society (Article 4).

Neither the provisions of the Law nor the arguments of the public authorities as to the established age limit (65 years) for candidates applying for the posts of head of institutions of higher education awarding post-graduate degrees enabled the Court to determine the purpose of such a restriction. However, in light of any of the possible purposes that might be implied by the Law, the said restriction could not be deemed to be justified, well-founded or fair. In any event, there were less burdensome ways of achieving those goals aside from the automatic unfounded deprivation of the right of persons who have reached 65 years of age to apply for a post of head of an institution of higher education awarding post-graduate degrees.

The impugned provision of the Law deprives a person who has reached 65 years of age of the possibility to apply for a post of head of an institution of higher education awarding post-graduate degrees, regardless of that person's abilities, experience, qualifications, and in particular, academic or doctoral degrees, scientific and creative abilities, reputation in the scientific and teaching community, business and other skills, state of health etc.

The conclusion complies with the International Labour Organisation Recommendation no. 162 Concerning Older Workers (1980) setting out that older workers should, without discrimination for the reason of their

age, enjoy equality of opportunity and treatment with other workers taking into account their personal qualities, experience and qualifications, as regards in particular, access to jobs both in the public and private sectors; however, in some exceptional cases, age limits may be imposed taking into account specific requirements, conditions or rules of certain types of work (paragraph 5).

According to the Law, the administrative functions of a head of an institution of higher education awarding post-graduate degrees are inseparably linked with his or her research and educational activities within that institution. The Law defines an institution of higher education as an educational and research institution offering education and professional training to individuals, and performing research, scientific and technical activities (Article 1.12). One of the main purposes of an institution of higher education is the execution of research and technical activities along with the execution of educational activities, the training of academics and teaching staff, and the awarding of post-graduate degrees, diplomas, certificates, etc. (Article 22.2 of the Law). The post of head of an institution of higher education awarding post-graduate degrees is one of the key positions occupied by academics and teaching staff in such an institution (Articles 32.1 and 48.2 of the Law and Article 22.2 of the Law on Research, Scientific and Technical Activities).

Academics and teaching staff are participants in the educational process in the institutions of higher education (Article 46.2), and academics are defined as persons whose principal place of business provides for the professional execution of pedagogical, scientific, research or technical activities within the institutions of higher education awarding post-graduate degrees (Article 47.2 of the Law, Article 1.10 of the Law on Research, Scientific and Technical Activities).

The Law establishes no age limit for academics and teaching staff, except for heads of institutions of higher education awarding post-graduate degrees and heads of departments of such institutions.

The imposition of an age limit on persons applying for posts of head of institutions of higher education awarding post-graduate degrees was not justified by any requirements specific to the execution of the posts, and the impugned provision resulted in discrimination in the execution of the right to labour and, as such, conflicted with the provisions of Articles 24.1, 24.2, 43.1 and 43.2 of the Constitution.

One of principles of management of an institution of higher education is that the autonomy and self-

governance of such an institution is to be exercised in accordance with the law, which grants the institution alone the right to determine the kind of education as well as the forms and types of teaching it chooses to offer, as well as the right to employ teaching staff, academics and other employees (Article 29.1 and 29.2 of the Law). The age limit imposed by the Law on candidates for posts of head of institutions of higher education awarding post-graduate degrees restricted the autonomy and self-governance of institutions of higher education in their selection of and relationship with staff members.

Cross-references:

- Decision of the Constitutional Court dated 18.04.2000, 5-rp, on a case initiated by a constitutional petition by 47 deputies on the compliance of Article 5.2 of the Law on the Authorised Human Rights Representative of the parliament (case on the age requirement) with the Constitution (constitutionality).

Supplementary information:

Judge V.M. Shapoval delivered a dissenting opinion.

Languages:

Ukrainian.



United States of America Supreme Court

Important decisions

Identification: USA-2004-2-003

a) United States of America / **b)** Supreme Court / **c)** / **d)** 28.06.2004 / **e)** 03-6696 / **f)** Hamdi v. Rumsfeld / **g)** 124 *Supreme Court Reporter* 2633 (2004) / **h)**.

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.1.4 **Fundamental Rights** – General questions – Emergency situations.
- 5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
- 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*.
- 5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.
- 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.

Keywords of the alphabetical index:

Guantanamo, prisoner / Combatant, enemy, classification, right to challenge.

Headnotes:

Absent legislative suspension, the power to invoke judicial review of an individual's detention, in the form of the writ of *habeas corpus*, remains available to every person detained within the territorially-based jurisdiction of the judiciary.

A detained citizen, seeking to challenge an "enemy combatant" classification justifying that detention, has

due process rights to notice of the factual basis for the classification and to a fair opportunity to rebut the government's factual assertions before a neutral decision-maker.

A detained citizen, seeking to challenge an "enemy combatant" classification justifying that detention, has a right of access to counsel.

Summary:

U.S. military forces took custody of Mr Yaser Esam Hamdi during the conflict in Afghanistan in late 2001 and he was transferred to the U.S. naval base in Guantanamo Bay, Cuba. In April 2002, upon learning that Mr Hamdi is a U.S. citizen, the U.S. authorities transferred him to a naval prison in the United States. The U.S. Government contended that Mr Hamdi was an "enemy combatant": a class of individuals alleged to be part of hostile forces in Afghanistan and engaged in armed conflict there against the United States. According to the government, a person in this classification may be subject to indefinite detention – without formal charges or proceedings – unless and until an official determination is made that access to counsel or further process is warranted.

In June 2002, Mr Hamdi's father filed a petition in a federal district court for issuance of a writ of *habeas corpus* (judicial review of executive branch action in regard to an individual's detention). The petition claimed that Mr Hamdi, as a citizen, enjoyed the full protection of the U.S. Constitution and that his detention without charges, access to an impartial decision-maker, or assistance of legal counsel was a violation of due process protections under the Fifth Amendment to the Constitution. The petition asked the court, among other things, to appoint counsel for Mr Hamdi and schedule an evidentiary hearing at which he could submit proof in support of his allegations. The District Court, after determining that Mr Hamdi's father had standing to present the petition, appointed counsel for Mr Hamdi and ordered that this attorney be granted access to him.

The U.S. Court of Appeals for the Fourth Circuit reversed the District Court's order. The Court of Appeals held that the District Court had failed to extend appropriate deference to the government's security and intelligence interests, and ordered the District Court to conduct a deferential inquiry, using the "most cautious procedures", to determine if Mr Hamdi was an enemy combatant. If Mr Hamdi was an enemy combatant captured during hostilities in Afghanistan, the Court of Appeals stated, his detention would be lawful and the petition should be dismissed on the grounds that *habeas corpus* requirements had been met.

On remand at the District Court, the government moved for dismissal of the petition, attaching a declaration from a U.S. defense department official. The declaration asserted facts regarding Mr Hamdi's activities in Afghanistan to demonstrate the basis for his detention. The District Court ruled that the declaration by itself did not support the detention, and ordered the government to turn over numerous materials for an in-chambers review.

The Fourth Circuit Court of Appeals reversed the District Court's order and dismissed the *habeas corpus* petition, holding that a factual inquiry or evidentiary hearing allowing Mr Hamdi to be heard or to rebut the government's assertions was not necessary or proper. The Court of Appeals concluded that Mr Hamdi was entitled only to a limited judicial inquiry under the war powers of the legislative and executive branches, and not to a searching review of the factual determinations underlying his detention.

The U.S. Supreme Court, while concluding that detention of "enemy combatants" in the circumstances relevant to the instant case had been authorized by legislative action of the U.S. Congress, vacated the Court of Appeals decision on due process grounds. The Court stated that the case presented a clash of substantial interests: the fundamental individual right to be free from involuntary confinement by one's own government without due process of law against the government's "weighty and sensitive" national security interests (particularly, preventing a detainee from re-joining the enemy) during a period of ongoing combat. The Court's controlling opinion concluded that Mr Hamdi's detention would be permissible if designation as an enemy combatant proved to be correct, but that he had the right to receive notice of the factual basis for his classification and a fair opportunity to appear before a neutral decision-maker to challenge the government's evidence and present his own evidence that he did not satisfy the definition of an enemy combatant. The opinion stated that these "essential constitutional promises may not be eroded," and that therefore the case must be remanded for further proceedings. The Court also ruled that an individual seeking to challenge an "enemy combatant" classification has a right of access to counsel in connection with those proceedings.

Supplementary information:

A majority of the nine Justices were not able to agree on a single opinion. Two different majorities agreed on the two holdings that legislative action provided the executive branch with authority to hold U.S. citizens as enemy combatants, but that due process required notice and a full hearing for a detained

person to challenge such determination. In all, eight Justices agreed on the constitutional (due process) holding, with four signing the Court's controlling opinion, two others subscribing to a separate opinion, and two others signing on to another separate opinion.

Article I.9.2 of the U.S. Constitution states in full: "The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The Fifth Amendment to the Constitution, which applies to the federal government, states in part: "No person shall... be deprived of life, liberty, or property, without due process of law."

Languages:

English.



Identification: USA-2004-2-004

a) United States of America / **b)** Supreme Court / **c)** / **d)** 29.06.2004 / **e)** 03-218 / **f)** Ashcroft v. American Civil Liberties Union / **g)** 124 *Supreme Court Reporter* 2783 (2004) / **h)**.

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Internet, pornographic material, child, protection / Child, protection against pornographic material / Burden of proof.

Headnotes:

In a free expression challenge to a content-based regulation, the burden is on the proponent of the regulation to prove that proposed alternatives will not be as effective as the provision in question.

A content-based regulation on speech will be invalid unless it is the least restrictive means, among available and effective alternatives, of advancing the governmental interest.

Summary:

To protect minors from exposure to sexually explicit materials on the Internet, the U.S. Congress enacted the Child Online Protection Act (COPA). COPA was enacted in response to the 1997 U.S. Supreme Court decision in *Reno v. American Civil Liberties Union*, in which the Court held that the federal Communications Decency Act of 1996, the first legislative attempt to make the Internet safe for minors by criminalizing certain Internet speech, was unconstitutional because it was not narrowly tailored to serve a compelling governmental interest and because less restrictive alternatives were available. Among other provisions, COPA imposed a \$50,000 fine and six months in prison for knowingly posting, for "commercial purposes," World Wide Web content that is "harmful to minors." COPA also provided an affirmative defense for persons engaged in commercial activity who restricted access to prohibited materials by requiring use of a credit card or "any other reasonable measures that are feasible under available technology."

A number of parties, on grounds of freedom of speech under the First Amendment to the U.S. Constitution, filed suit in U.S. District Court for a preliminary injunction against COPA's enforcement. After considering testimony presented by both respondents [that is to say, the parties acting as the respondents in the case before the Supreme Court were the parties that had filed suit in the U.S. District Court] and the government, the District Court granted the preliminary injunction, concluding that the respondents were likely to prevail on their argument that there were less restrictive alternatives to COPA, particularly blocking or filtering technology. The Federal Court of Appeals for the Third Circuit affirmed the preliminary injunction, but on different grounds. The Court of Appeals concluded that COPA would be unconstitutionally invalid due to the legislation's inclusion of an overly-broad "community standards" criterion in the definition of material that would be deemed "harmful to minors". In turn, the U.S. Supreme Court reversed that decision, holding that the "community standards" language did not, standing alone, make the legislation unconstitutionally overbroad. Because the Supreme Court's decision was limited to that issue, the Court remanded the case to the Court of Appeals to reconsider the correctness of the District Court's grant of a preliminary injunction. On remand, the Third Circuit again affirmed the District Court decision, concluding, among other things, that COPA was not the least

restrictive means available for advancing the interest of preventing minors from using the Internet to gain access to harmful materials.

The Supreme Court, reviewing the second Court of Appeals decision, also concluded that the opponents of the legislation had demonstrated that they were likely to prevail after a full examination of the merits. The Court viewed the legislation as establishing legal sanctions on the basis of the content of expression, and stated that in a challenge to content-based restrictions the proponent of the legislation bears the burden of proving that proposed alternatives will be less effective in advancing the governmental objective.

In arriving at its conclusions regarding COPA, the Court concluded that the government had not met its burden. The legislation's opponents had proposed that blocking and filtering software is a less restrictive alternative, and the Court agreed. In this regard, the Court examined a number of factors related to operation of the Internet. For example, the Court noted that filters impose selective restrictions on speech at the receiving end, not universal restrictions at the source. In addition, the Court observed, filters might be more effective than COPA for several reasons. First, according to the factual record, a filter can prevent minors from seeing all pornography, not just pornography posted to the World Wide Web from the United States. That COPA does not prevent minors from accessing foreign harmful materials alone makes it possible that filtering software might be more effective in serving Congress' goals. Thus, under COPA, providers of harmful material could evade the legislation's coverage simply by moving their operations outside the United States. The Court also noted that verification systems may be subject to evasion and circumvention – for example, by minors using their own credit cards. Finally, the Court noted that filters also might be more effective because they can be applied to all forms of Internet communication, including e-mail, not just the World Wide Web. In sum, the Court concluded that although filtering software is not a perfect solution because it may block some materials not harmful to minors and fail to catch some that are, the government did not satisfy its burden of introducing specific evidence proving that filters are less effective.

The Court also rejected the argument that filtering software is not an available alternative because Congress may not require its use. The Congress, the Court noted, may act to encourage such use by giving strong incentives to schools and libraries and by promoting the development of filters by industry and their use by parents.

In arriving at its conclusions, the Court cited as precedent its 2000 decision in *United States v. Playboy Entertainment Group, Inc.*, which also involved a content-based restriction designed to protect minors from viewing harmful material. In that case, the Court ruled that absent a showing that a less restrictive technological alternative already available to parents would not be as effective as a blanket speech restriction, the more restrictive option preferred by the legislature could not survive strict judicial scrutiny under the First Amendment.

Supplementary information:

The First Amendment to the U.S. Constitution, which states in part that “Congress shall make no law... abridging freedom of speech.”

Cross-references:

- *Reno v. American Civil Liberties Union*, 521 *United States Reports* 844, 117 *Supreme Court Reporter* 2329, 138 *Lawyer's Edition Second* 874 (1997);
- *United States v. Playboy Entertainment Group, Inc.*, 529 *United States Reports* 803, 120 *Supreme Court Reporter* 1878, 146 *Lawyer's Edition Second* 865 (2000).

Languages:

English.



Court of Justice of the European Communities and Court of First Instance

Important decisions

Identification: ECJ-2004-2-002

a) European Union / b) Court of First Instance / c) / d) 26.01.2001 / e) T-353/00 / f) Jean-Marie Le Pen v. European Parliament / g) *European Court Reports* II-00125 / h) CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

1.4.2 **Constitutional Justice** – Procedure – Summary procedure.

1.5.4.1 **Constitutional Justice** – Decisions – Types – Procedural decisions.

2.2.1.6 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law.

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

3.18 **General Principles** – General interest.

4.5.3.4.3 **Institutions** – Legislative bodies – Composition – Term of office of members – End.

4.5.4.1 **Institutions** – Legislative bodies – Organisation – Rules of procedure.

4.17.1.1 **Institutions** – European Union – Institutional structure – European Parliament.

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

Keywords of the alphabetical index:

Procedure, summary, admissibility, conditions / European Union, Parliament, President, act taken by the President of the parliament on its behalf / European Union, act, suspension of operation, conditions of granting / *Fumus boni juris* / European Union, Parliament, member, disqualification, in application of national law.

Headnotes:

The problem of the admissibility of the main action must not, as a rule, be examined in the course of interim relief proceedings because of the risk of pre-judging the main action. Such examination may, however, prove to be necessary, where the manifest inadmissibility of the main application to which the application for interim relief is related has been raised, to establish whether certain factors exist that would allow the conclusion, *prima facie*, that the main application is admissible (see para 58).

Measures producing binding legal effects affecting the interests of the applicant by bringing about a distinct change in his legal position are acts and decisions capable of being the subject of an action for annulment within the meaning of Article 230 EC. By contrast, the form in which such acts or decisions are adopted, is, in principle, irrelevant as regards the possibility of challenging them by such an action. The fact that an act was adopted, not by the parliament, but by its President on behalf of the parliament, does not affect the question whether the applicant may challenge its validity, inasmuch as it produces binding legal effects (see para 61).

The argument that the parliament's role in the context of a procedure for the disqualification of one of its members from holding office based on Article 12.2 of the 1976 Act is not restricted to an instance of a competence in the exercise of which there is no scope for discretion is a serious one and cannot *prima facie* be discounted. The urgency of an application for interim relief is to be determined by reference to the need for an interim ruling in order to avoid serious and irreparable harm to the party seeking the interim relief. The burden of proof is on the applicant to demonstrate that he cannot wait for the resolution of the main proceedings without suffering harm of that kind. Given that the term of office of a member of the parliament is restricted to five years and that the disqualification of the applicant from holding office as a result of a measure taken by the parliament makes it impossible for him to carry out his duties as a Member of the European Parliament, it is clear that, if the contested act is annulled by the Court in the main proceedings, the harm suffered by the applicant would be irreparable in the absence of suspension of the operation of that act (see paras 63, 85, 95-96).

Where, when hearing an application for the suspension of operation of an act, the Court weighs up the competing interests, it must determine whether the possible annulment of the contested act by the Court in the proceedings on the merits would make it possible to reverse the situation brought about by the

immediate implementation of that act and, conversely, whether the suspension of its operation would be such as to prevent it from being fully effective in the event of the main application being dismissed.

Whilst it is undeniably in the general interest that the composition of the parliament be in accordance with Community law, it is also in the general interest that its members be allowed to carry out the duties entrusted to them by their electors for the entire duration of their term of office, unless that term is brought to an end in conformity with the applicable rules of law. The general interest of the parliament in the maintenance of the application of a member's disqualification from holding office pursuant to national law cannot, in view of all the ensuing unfavourable consequences for that member, prevail over the specific interest of the member in resuming his seat in the parliament and his public duties until the decision of the Court on the substance of the case in the main proceedings, unless the parliament takes note of the disqualification in accordance with the rules laid down by Community law. However important may be the French Republic's interest in having its electoral legislation respected by the parliament, such an interest is still of a general nature and cannot prevail over the immediate and specific interest of the member concerned (see paras 100-104).

Summary:

The applicant was elected as a Member of the European Parliament on 13 June 1999. On 23 November of the same year, in France, he received a suspended sentence of three months' imprisonment and was ordered to pay a fine. By way of further sentence, he was declared ineligible for a period of one year. In the light of that conviction and pursuant to Article 5.2 of the 1977 Law on the election of representatives to the Assembly of the European Communities (Law 77-729), the Prime Minister of the French Government declared, by decree dated 31 March 2000, that the applicant's ineligibility brought to an end his term of office in the European Parliament. The file concerning the applicant's disqualification from office was then transmitted to the President of the European Parliament. After consulting its Legal Affairs Committee and discussing the matter in plenary session, the parliament nevertheless decided not to take formal note of the decree of disqualification from holding office until the period prescribed for bringing proceedings before the *Conseil d'État* had expired, or until that court had delivered a decision. On 5 June 2000 the applicant did indeed seek the annulment of the decree of 31 March in an application which the *Conseil d'État* dismissed on 6 October. On

23 October the parliament accordingly took note of the notification from the French Government confirming the applicant's removal from office.

By application lodged at the Registry of the Court of First Instance of the European Communities on 21 November 2000, Mr Le Pen sought the annulment of the above decision taken in the form of a declaration by the President of the parliament. In a separate document, he also applied for suspension of operation of the contested act. The Court's ruling in the present case concerns that application for interim relief.

The European Parliament challenged the admissibility of the application lodged by Mr Le Pen. The application for relief was to be dismissed having regard to the manifest inadmissibility of the application relating to the main issue. In so far as the parliament's role was confined to taking note of the ineligibility pursuant to national provisions, it was the decree of 31 March 2000, and not the impugned act, which would prejudice the applicant's interests. The Court disagreed with this analysis. It found that as the application concerning the main issue was admissible *prima facie*, the application for interim relief should be declared admissible. It therefore made an examination of the circumstances giving rise to urgency, and of the pleas of fact and law establishing a *prima facie* case (*fumus boni juris*) for granting stay of execution of the measure, and determined the balance of interests involved.

As to the *prima facie* case, the applicant firstly contested the external legality of the impugned measure. The illegality of the contested decision was alleged to arise from the impropriety of the procedure followed for its adoption: delay in hearing the applicant's submissions; infringement of the parliament's competence by its President; and breach of the obligation to put the Legal Affairs Committee's proposal to the vote in plenary session. The allegedly circumscribed competence of parliament in this matter was also contested. The foregoing arguments, the Court observed, were far from appearing devoid of merit. Firstly the facts tended to show that, contrary to what the parliament claimed, it had not considered itself bound to take note, at least not forthwith, of the decree of 31 March 2000. Secondly, it was not disputed that no vote had taken place in plenary session on the issue of the applicant's disqualification from holding office, although the President of the parliament had declared it to be competent in the matter. Lastly, it was clearly apparent from the Legal Affairs Committee's minutes and from the statement of its President at the plenary session on 23 October 2000 that that committee did not adopt any proposal capable of being put to a vote although, having

regard to Article 7.4 of the Parliament's Rules of Procedure, these formalities were clearly essential. The Court therefore considered the requirement that there be a *prima facie* case fulfilled, without there being any need to examine the merits of the applicant's other pleas.

On the question of urgency, the Court found that as the term of office of a member of the parliament was restricted to five years, Mr Le Pen would assuredly suffer serious and irreparable harm if the operation of the impugned measure was not suspended. The condition of urgency was therefore fully satisfied.

Finally, in weighing the interests involved, the Court observed that the general interest of the parliament in maintaining the applicant's disqualification from holding office pursuant to national law could not prevail over Mr Le Pen's specific interest in resuming his seat in the parliament and his public duties until such time as the decision of the Court on the substance of the case in the main proceedings was delivered, unless the parliament took note of the disqualification in accordance with the rules laid down by Community law.

In the light of the above findings, the Court ordered a suspension of operation of the impugned measure.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2004-2-003

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 15.02.2001 / **e)** C-239/99 / **f)** Nachi Europe GmbH v. Hauptzollamt Krefeld / **g)** *European Court Reports* I-01197 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

1.3.5.10 **Constitutional Justice** – Jurisdiction – The subject of review – Rules issued by the executive.

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

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.

1.6.4 **Constitutional Justice** – Effects – Effect *inter partes*.

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

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:

Illegality, plea, conditions / European Commission, regulation, challenge before a national court / European Community, act, individual, challenging, time-limit.

Headnotes:

Article 241 EC expresses a general principle of law under which an applicant must, in proceedings brought under national law against the rejection of his application, be able to plead the illegality of a Community measure on which the national decision adopted in his regard is based, and the question of the validity of that Community measure may thus be referred to the Court in proceedings for a preliminary ruling.

This general principle confers on 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 230 EC to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void.

However, this general principle, which has the effect of ensuring that every person has or will have had the opportunity to challenge a Community measure which forms the basis of a decision adversely affecting him, does not in any way preclude a regulation from becoming definitive as against an individual in regard to whom it must be considered to be an individual decision and who could undoubtedly have sought its annulment under Article 230 EC, a fact which prevents that individual from pleading the illegality of that regulation before the national court. Such a conclusion applies to regulations imposing anti-dumping duties by virtue of their dual nature as acts of a legislative nature and acts liable to be of direct and individual concern to certain traders.

An importer of a product subject to an anti-dumping duty who undoubtedly had a right of action before the Court of First Instance to seek the annulment of that anti-dumping duty but who did not exercise that right cannot subsequently plead the invalidity of that anti-dumping duty before a national court. In such a case, the national court is bound by the definitive nature of the anti-dumping duty (see paras 35 to 37, 39 and operative part).

Summary:

In order to protect the Community ball bearing industry against the unfair competition raised by imports at prices tantamount to dumping, the Council adopted several measures instituting anti-dumping duty, including Regulation 2849/92 concerning certain imports originating in Japan. Ruling on an application lodged by the companies NTN Toyo Bearing Ltd and Koyo Seiko Co. Ltd to have this regulation set aside, the Court of First Instance of the European Communities, in its judgment of 2 May 1995 (*NTN Corporation and Koyo Seiko v. Council*, T-163/94 and T-165/94, *European Court Reports* p. II-1381), set aside Article 1 of the impugned regulation in so far as it imposed an anti-dumping duty on these two companies. In its judgment of 10 February 1998 (*Commission v. NTN and Koyo Seiko*, C-245/95 P, *European Court Reports* p. I-401), the Court of Justice of the European Communities dismissed the appeal made by the Commission against the judgment of the Court of First Instance. Pursuant to the above decisions, importers of products manufactured by the companies NTN and Koyo Seiko had been invited to apply to the national customs authorities for reimbursement of the duty levied under the provision which had been set aside. This was the background against which the Nachi Europe company, a subsidiary of Nachi Fujikoshi, applied to the *Hauptzollamt* at Krefeld for reimbursement of the anti-dumping duty paid upon importing ball bearings manufactured by its parent company. When the application was rejected, it appealed to the Düsseldorf *Finanzgericht*.

Uncertainty as to the effect of the judgment of 2 May 1995 to set aside prompted the national court in the instant case to enquire of the Court of Justice whether Article 1.2 of Regulation no. 2849/92 was invalid in establishing an anti-dumping duty applicable to ball bearings manufactured by Nachi Fujikoshi.

The Court's reply addressed two issues in turn, firstly that where a regulation introducing an anti-dumping duty imposed different duties on a series of undertakings, each one could only request the annulment of those provisions affecting it individually. Thus, in

granting the applications made by the companies NTN Corporation and Koyo Seiko the Court could do no more, without exceeding the scope of the application, than to annul Article 1 of the impugned Regulation in so far as it imposed an anti-dumping duty on the two applicant companies. Therefore the judgment of 2 May 1995 could not have affected the validity of the anti-dumping duty applicable to ball bearings manufactured by Nachi Fujikoshi. The Court nevertheless pursued its line of reasoning and considered whether, irrespective of the effects of the partial annulment delivered by the Court of First Instance, Nachi Europe had *locus standi* to plead the invalidity of the anti-dumping duty in a dispute before a national court. On that issue, it found that according to settled case-law a decision adopted by a Community institution which had not been challenged by its addressee within the time-limit laid down in Article 230.5 EC became definitive in respect of that addressee. To the extent that Nachi Europe could undoubtedly have sought the annulment of Article 1.2 of Regulation no. 2849/92 inasmuch as it fixed an anti-dumping duty applicable to ball bearings manufactured by Nachi Fujikoshi, it could not have subsequently pleaded the invalidity of that provision before a national court. In that event, the Court concluded, the national court would have been bound by the definitive nature of the anti-dumping duty under challenge. Here it drew attention to the irrelevance of the applicant's argument that Article 241 EC allowed any party to plead the inapplicability of a regulation as an incidental issue, notwithstanding the expiry of the period laid down in Article 230.5 EC. Indeed, while Article 241 EC expressed a general principle of law guaranteeing that any party was or would have been able to challenge of a Community measure on which a decision against him was based, it could in no case be invoked to circumvent a mandatory provision of the Treaty.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2004-2-004

a) European Union / b) Court of Justice of the European Communities / c) / d) 06.03.2001 / e) C-274/99 / f) Bernard Connolly v. Commission of the European Communities / g) *European Court Reports* I-6983 / h) CODICES (English, French).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 3.19 **General Principles** – Margin of appreciation.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

European Union, Commission, official, loyalty, duty / European Union, Commission, official, dismissal / Publication, prior authorisation.

Headnotes:

Fundamental rights form an integral part of the general principles of law, whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention for the Protection of Human Rights has special significance in that respect.

Those principles have been restated in Article 6.2 EU.

According to the case-law of the Court of Human Rights, freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every person. Subject to Article 10.2 ECHR, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.

Freedom of expression may be subject to the limitations set out in Article 10.2 ECHR, which must be interpreted restrictively. The adjective “necessary” involves, for the purposes of Article 10.2, a pressing social need and, although the contracting States have a certain margin of appreciation in assessing whether such a need exists, the interference must be

proportionate to the legitimate aim pursued and the reasons adduced by the national authorities to justify it must be relevant and sufficient. Furthermore, any prior restriction requires particular consideration.

Moreover, the restrictions must be prescribed by legislative provisions which are worded with sufficient precision to enable interested parties to regulate their conduct, taking, if need be, appropriate advice (see paras 37-42).

Officials and other employees of the European Communities enjoy the right of freedom of expression, even in areas falling within the scope of the activities of the Community institutions. That freedom extends to the expression, orally or in writing, of opinions that dissent from or conflict with those held by the employing institution.

However, it is also legitimate in a democratic society to subject public servants, on account of their status, to obligations such as those contained in Articles 11 and 12 of the Staff Regulations. Such obligations are intended primarily to preserve the relationship of trust which must exist between the institution and its officials or other employees. The scope of those obligations must vary according to the nature of the duties performed by the person concerned or his place in the hierarchy. In terms of Article 10.2 ECHR, specific restrictions on the exercise of the right of freedom of expression can, in principle, be justified by the legitimate aim of protecting the rights of others. The rights at issue here are those of the institutions that are charged with the responsibility of carrying out tasks in the public interest. Citizens must be able to rely on their doing so effectively.

That is the aim of the regulations setting out the duties and responsibilities of the European public service. So an official may not, by oral or written expression, act in breach of his obligations under the Staff Regulations, particularly Articles 11, 12 and 17, towards the institution that he is supposed to serve. That would destroy the relationship of trust between himself and that institution and make it thereafter more difficult, if not impossible, for the work of the institution to be carried out in cooperation with that official.

In exercising their power of review, the Community Courts must decide, having regard to all the circumstances of the case, whether a fair balance has been struck between the individual’s fundamental right to freedom of expression and the legitimate concern of the institution to ensure that its officials and agents observe the duties and responsibilities implicit in the performance of their tasks. In that regard, whenever civil servants’ right to freedom of expression is in issue the duties and responsibilities

referred to in Article 10.2 ECHR assume a special significance, which justifies leaving to the authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim (see paras 43-49).

Article 17.2 of the Staff Regulations requires permission for publication of any matter dealing with the work of the Communities. Permission may be refused only where the proposed publication is liable to prejudice the interests of the Communities. That eventuality, referred to in a Council regulation in restrictive terms, is a matter that falls within the scope of the protection of the rights of others, which, according to Article 10.2 ECHR as interpreted by the European Court of Human Rights, is such as to justify restricting freedom of expression. The fact that the restriction at issue takes the form of prior permission cannot render it contrary, as such, to the fundamental right of freedom of expression. Article 17.2 of the Staff Regulations clearly provides that, in principle, permission is to be granted, refusal being possible only in exceptional cases. Indeed, in so far as that provision enables institutions to refuse permission to publish, and thus potentially interfere to a serious extent with freedom of expression, one of the fundamental pillars of a democratic society, it must be interpreted restrictively and applied in strict compliance with certain requirements, such as that there be a pressing social need, that it be proportionate to the aim pursued, and that relevant and sufficient reasons be advanced by the institution in its refusal decision. Thus, permission to publish may be refused only where publication is liable to cause serious harm to the Communities' interests.

As their scope is restricted to publications dealing with the work of the Communities, the rules are designed solely to allow the institution to keep itself informed of the views expressed in writing by its officials or other employees about its work and reflect the trust that must exist between an employer and its staff, especially when members of staff are carrying out duties of a public nature.

Remedies against a decision refusing permission are available under Articles 90 and 91 of the Staff Regulations and are amenable to effective judicial review enabling the Community Courts to ascertain whether the appointing authority has exercised its power under Article 17.2 of the Staff Regulations in strict compliance with the limitations to which any interference with the right to freedom of expression is subject. In that context, when applying Article 17.2 of the Staff Regulations, the appointing authority must balance the various interests at stake and is in a position to do so by taking account, in particular, of

the gravity of the potential prejudice to the interests of the Communities (see paras 51-57).

Summary:

Mr Connolly, an official holding a managerial post in the Commission, was dismissed for having published without permission and in circumstances proving his bad faith a book that reflected a personal opinion at variance with the line of conduct adopted by the institution to which he belonged. He contested the legitimacy of this measure and applied to the Court of First Instance of the European Communities to have it set aside. In a judgment of 19 May 1999 (*Connolly v. Commission*, T-34/96 and T-163/96, *European Court Reports* FP p. I-A-87 and II-463), it dismissed his application as unfounded. Mr Connolly then appealed to the Court of Justice of the European Communities against the judgment of the Court of First Instance.

The appellant complained in particular that the challenged judgment did not take account of the fact that Articles 12 and 17 of the Staff Regulations of Officials of the European Communities, through the procedure for authorising publications, introduced a system of prior censorship the principle of which conflicted with Article 10 ECHR.

After recalling the importance attached to fundamental rights in the Community legal system, the Court observed that freedom of expression was not unlimited. The letter of Article 10.2 ECHR allowed its exercise to be restricted in certain circumstances and under certain conditions. Such being the case, it was for the Community courts to determine whether a fair balance had been struck between the individual's fundamental right to freedom of expression and the legitimate concern of the institution to ensure that its officials and agents fulfilled the duties and responsibilities attaching to their office. In the present case, the Court went on, the Court of First Instance had found that the reason for the appellant's dismissal was not his failure to request prior permission to publish, or his expressing a dissenting opinion, but the fact that he had published without permission material in which he severely criticised and even insulted members of the institution to which he belonged, and challenged the fundamental objectives of Community monetary policy. The Court of First Instance was thus entitled to conclude, as it did, that the allegation of breach of the right to freedom of expression was unfounded.

As none of the pleas made by the appellant was accepted by the Court, his appeal was dismissed.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.

*Identification:* ECJ-2004-2-005

a) European Union / **b)** Court of Justice of the European Communities / **c)** Fifth Chamber / **d)** 10.05.2001 / **e)** C-144/99 / **f)** European Commission v. Kingdom of the Netherlands / **g)** *European Court Reports* I-03541 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
 2.2.1.6.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and domestic non-constitutional instruments.
 3.10 **General Principles** – Certainty of the law.
 3.12 **General Principles** – Clarity and precision of legal provisions.

Keywords of the alphabetical index:

European Community, directive, implementation by the Member States / European Community, directive, transposition, without legislative action, conditions / European Union, national from other Member States, rights / Consumer, protection / Contract, clause, abusive.

Headnotes:

Whilst legislative action on the part of each Member State is not necessarily required in order to implement a directive, it is essential for national law to guarantee that the national authorities will effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights and, where appropriate, may rely on them before the national courts. The last-mentioned condition is of particular importance where the directive in question is intended to accord rights to nationals of other Member States. That is the case of

Directive 93/13 on unfair terms in consumer contracts, which aims, in particular, according to the sixth recital in its preamble, to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own.

Even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty (see paras 17-18, 21).

Summary:

Considering that Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts had not been fully transposed into Netherlands law within the prescribed time, the Commission, relying on Article 169 of the EC Treaty (now Article 226 EC), brought an action complaining of non-compliance before the Court of Justice of the European Communities. The Commission complained that the Netherlands had made the assumption, erroneously in its opinion, that express transposition of Directive 93/13 was unnecessary since the national legal system already comprised provisions in keeping with the Directive.

After recalling the principle that legislative action on the part of each Member State is not necessarily required in order to implement a directive, the Court stressed, however, that it was essential for national law to guarantee that the national authorities would effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear and that individuals be made fully aware of their rights and, where appropriate, could rely on them before the national courts. In point of fact, the Court observed, the Kingdom of the Netherlands had evidently been unable to show that its legal system contained provisions equivalent to those of the Directive at issue. In that respect, settled case-law of a Member State interpreting the provisions of national law in a manner deemed to satisfy the requirements of a directive could not meet the requirement of legal certainty. Therefore the Court could only find that the Netherlands had failed to fulfil its obligations under Directive 93/13.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2004-2-006

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 31.05.2001 / **e)** C-122/99P, C-125/99 / **f)** D. and Kingdom of Sweden v. European Council / **g)** *European Court Reports* I-04319 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.2.1.6 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law.

5.2.2.11 **Fundamental Rights** – Equality – Criteria of distinction – Sexual orientation.

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

Keywords of the alphabetical index:

European Community, official, household allowance, conditions for granting / Marriage, definition / Homosexuality, registered partnership.

Headnotes:

The intention of the Community legislature was to grant entitlement to the household allowance under Article 1.2.a of Annex VII to the Staff Regulations only to married couples. Only the legislature can, where appropriate, adopt measures to alter that situation, for example by amending provisions of the Staff Regulations.

The fact that, in a limited number of Member States, a registered partnership is assimilated, although incompletely, to marriage cannot have the consequence that, by mere interpretation, persons whose legal status is distinct from that of marriage can be covered by the term married official as used in the Staff Regulations.

According to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex. Since 1989 an increasing number of Member States have introduced, alongside marriage, statutory arrangements granting legal recognition to various forms of union between partners of the same sex or of the opposite sex and conferring on such unions certain

effects which, both between the partners and as regards third parties, are the same as or comparable to those of marriage. It is clear, however, that apart from their great diversity, such arrangements for registering relationships between couples not previously recognised in law are regarded in the Member States concerned as being distinct from marriage. In such circumstances the Community judicature cannot interpret the Staff Regulations in such a way that legal situations distinct from marriage are treated in the same way as marriage (see paras 34-39).

Article 1.2.a of Annex VII to the Staff Regulations, which restricts the household allowance to married officials, cannot therefore be regarded as being discriminatory on grounds of the sex of the person concerned, or, therefore, as being in breach of Article 119 of the Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 to 143 EC).

It is irrelevant for the purposes of granting the household allowance whether the official is a man or a woman (see para 46).

The principle of equal treatment can apply only to persons in comparable situations. In assessing whether the situation of an official who has registered a partnership between persons of the same sex is comparable to that of a married official, the Community judicature cannot disregard the views prevailing within the Community as a whole.

Since the existing situation in the Member States of the Community as regards recognition of partnerships between persons of the same sex or of the opposite sex reflects a great diversity of laws and the absence of any general assimilation of marriage and other forms of statutory union, the situation of an official who has registered a partnership in a member state cannot be held to be comparable, for the purposes of applying the Staff Regulations, to that of a married official (see paras 48-51).

The refusal by the Community administration to grant a household allowance to one of its officials does not affect the situation of the official in question as regards his civil status and, since it only concerns the relationship between the official and his employer, does not of itself give rise to the transmission of any personal information to persons outside the Community administration. Such a decision is not therefore capable of constituting interference in private and family life within the meaning of Article 8 ECHR (see paras 59-60).

Summary:

D., an official of the European Communities serving with the Council, of Swedish nationality, had registered in Sweden a partnership with another Swedish national of the same sex. Subsequently, in order to secure entitlement to the household allowance prescribed by the Staff Regulations of Officials of the European Communities, he asked the Council to treat his status as a registered partner as equivalent to married status. The Council refused his request on the ground that the provisions of the Regulations could not be construed as allowing registered partnership to be equated to marriage. D. therefore applied to the Court of First Instance of the European Communities to have this decision set aside. In a judgment of 28 January 1999 (*D. v. Conseil*, T-264/97, *European Court Reports* FP p. I-A-1 and II-1), the Court found that the Council was under no obligation to treat as equivalent to marriage, within the meaning of the statutory provisions, the situation of a person having a steady relationship with a partner of the same sex even if it had been officially registered by a national administration. It therefore dismissed the appeal before it. D. and the Kingdom of Sweden thereupon appealed to the Court of Justice of the European Communities. By order of the President of the Court dated 24 September 1999, the two cases were joined for the purposes of the written and oral proceedings and of the judgment.

The appellants submitted that since civil status was an area of law placed under the sole jurisdiction of the Member States, terms such as “married official” or “spouse” used in the Regulations should be interpreted with reference to the law of the Member States and not be defined independently. Accordingly, where the legislation of a Member State had instituted a legal status such as registered partnership, assimilated to the state of being married as far as the attendant rights and duties were concerned, that assimilation should also prevail in the application of the Regulations. The Court rejected that argument.

D. further claimed that the impugned decision constituted not only discrimination on the ground of sex contrary to Article 119 of the EC Treaty (Articles 117-120 of the Treaty have been replaced by Articles 136-143 EC) but also a breach of equal treatment. With regard to the alleged violation of Article 119 of the Treaty, the Court found that the circumstance of an official being male or female was immaterial to the grant of household allowance. It concluded that the relevant provision of the Regulations could not be considered contrary to Article 119 of the Treaty. Turning to the alleged breach of equal treatment as between officials on the ground of their sexual orientation, the Court recalled that the

principle of equal treatment could only apply to persons in comparable situations. Since no Member State had actually equated the others forms of legal union to marriage, the situation of an official who had registered a partnership could not be deemed comparable to that of a married official for the purposes of applying the Staff Regulation.

D. lastly submitted that the protection of private life secured by Article 8 ECHR applied to homosexual relationships and, in compelling recognition of the existence and the effects of a lawfully acquired civil status, prohibited the interference constituted by transmitting incorrect data to third parties. This plea was also dismissed by the Court, which observed that the refusal to award household allowance in no way affected the civil status of the official concerned and did not occasion any transmission of personal particulars to individuals unconnected with the Community administration.

In the light of all the above findings, the Court rejected the joined appeals.

Supplementary information:

The new Staff Regulations of Officials of the European Communities (which came into force on 1 May 2004) recognises registered partnerships as equivalent to marriage subject to certain conditions. It provides in particular that couples having no access to legal marriage (i.e. same-sex couples) are entitled to household allowance.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2004-2-007

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 20.07.2001 / **e)** C-315/99 P / **f)** *Ismeri Europa Srl v. Court of Audit of the European Communities* / **g)** *European Court Reports* I-05281 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

4.10.6 **Institutions** – Public finances – Auditing bodies.

5.3.13.20 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Adversarial principle.

Keywords of the alphabetical index:

Court of Auditors, special report, preliminary hearing, lack, damage, serious.

Headnotes:

The principle of the right to a hearing is a general principle of law whose observance is ensured by the Court of Justice. It applies to any procedure which may result in a decision by a Community institution perceptibly affecting a person's interests.

Although the adoption and publication of reports of the Court of Auditors are not decisions directly affecting the rights of persons mentioned therein, they are capable of having consequences for those persons such that those concerned must be enabled to make observations on those points in such reports which refer to them by name, before those reports are definitively drawn up (see paras 28-29).

Summary:

Is the Court of Auditors of the European Communities required to uphold the principle of a right to a hearing *inter partes* in adopting the special reports referred to in Article 248.4.2 EC? This is the central question which the Court of Justice of the European Communities is asked to determine at appeal in the present case.

Owing to the unfitness of financial protocols and bilateral agreements for implementing the Community's Mediterranean policy, aid to Mediterranean non-member countries came to be administered through the MED programmes. As the Commission's own resources did not suffice for it to manage these programmes itself, it subcontracted their administrative management to the Agence pour les réseaux transméditerranéens (Agency for Trans-Mediterranean Networks, ARTM), a non-profit-making association created specifically for this task. The technical monitoring functions were contracted out to Technical Assistance Offices (BATs).

In a report published in the Official Gazette of the European Communities, the Court of Auditors formulated various criticisms concerning the management of the MED programmes. It found in particular that, of the four administrators on the ARTM's board of directors, two were directors of Technical Assistance Offices which had been awarded contracts for the monitoring of the programmes which they had helped to draw up within the ARTM. Ismeri Europa Srl, the applicant company, was one of those two Technical Assistance Offices.

After requesting, to no avail, that the Court of Auditors rectify a number of points concerning it in the report, Ismeri brought an action before the Court of First Instance for redress of the damage which it claimed to have sustained as a result of the publication of the said report. In a judgment of 15 June 1999 (*Ismeri Europa Srl v. Court of Auditors of the European Communities*, Case T-277/97, *European Court Reports* p. II-1825), the Court dismissed this application. Without replying to the question whether the applicant was entitled to rely before the Court of Auditors on the principle of a right to a hearing *inter partes*, it observed that the fact of not having been invited to submit its observations before the adoption and publication of the report implicating it could not have caused or aggravated the damage alleged by the applicant, since the Court of Auditors, having regard to the circumstances of the case, would not in any event have taken a different stance. Having failed to adduce evidence of a causal link between the alleged illegality and the damage complained of, Ismeri's application was dismissed. It therefore applied to the Court of Justice to have the judgment of the Court of First Instance set aside.

The applicant company's chief complaint against the Court of First Instance was that it evaded what to the applicant was a key issue, namely the application of the principle of the right to a hearing *inter partes* when the reports of the Court of Auditors were adopted and published. The Court of Justice met this complaint only in part, ruling that the *inter partes* principle should of course apply to the procedure for adopting the reports of the Court of Auditors given the consequences which the reports might have for the persons referred to therein. By omitting to invite Ismeri to express its views on passages concerning it in the report at issue, the Court of Auditors irrefutably violated this principle. However, the Court continued, in the present case the illegality committed was not capable of influencing the content of the published report. Given the flagrant and serious failure to observe the rules of sound management consisting in the prolonged presence on the board of the ARTM of persons representing private interests directly concerned by deliberations of that body, granting the

applicant a hearing could not have prompted the Court of Auditors to reconsider its decision to publish the impugned report as it stood. Upholding the decision of the Court of First Instance, the Court of Justice concluded that there was no causal link between the failure to give Ismeri a prior hearing and the damage which it claimed to have incurred as a result of the publication of the report reflecting upon it. As none of the applicant's other pleas was accepted, its application was dismissed.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2004-2-008

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 20.09.2001 / **e)** C-184/99 / **f)** Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve / **g)** *European Court Reports* I-06193 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Citizens of the European Union and non-citizens with similar status.
 5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship or nationality.
 5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

European Union, citizen, statute / Free movement of persons / Residence, permit / Student, foreign, social assistance, conditions for granting.

Headnotes:

Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.

A citizen of the European Union, lawfully resident in the territory of a host Member State, can rely on Article 6 of the Treaty (now, after amendment, Article 12 EC) in all situations which fall within the scope *ratione materiae* of Community law.

Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in another Member State, as conferred by Article 8a of the Treaty (now, after amendment, Article 18 EC).

The fact that a Union citizen pursues university studies in a Member State other than the State of which he is a national cannot, of itself, deprive him of the possibility of relying on the prohibition of all discrimination on grounds of nationality laid down in Article 6 of the Treaty. The Treaty on European Union has introduced citizenship of the European Union into the Treaty and added to Title VIII of Part Three a new chapter 3 devoted to education and vocational training. There is nothing in the amended text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union. Furthermore, the Council has also adopted Directive 93/96, which provides that the Member States must grant the right of residence to student nationals of a Member State who satisfy certain requirements (see paras 31-33, 35-36).

Article 1 of Directive 93/96 on the right of residence for students does not require, as a condition for obtaining the right of residence, resources of any specific amount, nor that they be evidenced by specific documents. The article refers merely to a declaration, or such alternative means as are at least equivalent, which enables the student to satisfy the national authority concerned that he has, for himself and, in relevant cases, for his spouse and dependent children, sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their stay.

That interpretation does not, however, prevent a Member State from taking the view that a student who has recourse to social assistance no longer fulfils the conditions of his right of residence or from taking measures, within the limits imposed by Community law, either to withdraw his residence permit or not to renew it. Nevertheless, in no case may such measures become the automatic consequence of a national of another Member State having recourse to the host Member State's social assistance system.

Indeed, Directive 93/96, like Directives 90/364 on the right of residence and 90/365 on the right of residence

for employees and self-employed persons who have ceased their occupational activity, accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary. Furthermore, a student's financial position may change with the passage of time for reasons beyond his control. The truthfulness of a student's declaration is therefore to be assessed only as at the time when it is made (see paras 40, 42-45).

Articles 6 and 8 of the Treaty (now, after amendment, Articles 12 EC and 17 EC) preclude entitlement to a non-contributory social benefit, such as a minimum subsistence allowance, from being made conditional, in the case of nationals of Member States other than the host State where they are legally resident, on their falling within the scope of Regulation no. 1612/68 on the freedom of movement for workers within the Community when no such condition applies to nationals of the host Member State (see paras 46 and operative part).

Summary:

Mr Grzelczyk, a French national, began a course of university studies in Belgium. During the first three years of his studies, he supported himself by taking on a variety of paid casual work and by obtaining credit facilities. At the beginning of his fourth and final year of study, he applied for award of the "minimex", a social welfare benefit intended to guarantee minimum means of subsistence to the recipient. After considering his application, the local public social welfare centre decided to grant him the minimex for the current academic year. The controlling authority nevertheless contested the propriety of the decision on the ground that the legal requirements for the grant of the minimex, and in particular the nationality requirement, had not been satisfied. It was by invoking Mr Grzelczyk's student status that the social welfare centre eventually withdrew the assistance which it had previously granted to him, since Directive 93/96 provided that students wishing to exercise the right of residence in a different Member State than their home country must have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence. Mr Grzelczyk challenged that decision before the Labour Tribunal of Nivelles (Belgium). Being unsure of the effect of several provisions of the EC Community and the derived Community law, that court decided to postpone its decision and refer a preliminary question to the Court of Justice of the European Communities.

The referring court asked the Court of Justice to determine in particular whether it was contrary to the principle of non-discrimination provided for in Article 6 of the EC Treaty (which became Article 12 EC after amendment) and to the European citizenship enshrined in Article 8 of the EC Treaty (which became Article 17 EC) – for entitlement to a non-contributory social benefit, such as the minimum subsistence allowance in question, to be granted only on condition that the person requesting it came within the scope of Regulation (EEC) no. 1612/68 of 15 October 1968 on the freedom of movement for workers within the Community, whereas no such condition applied to nationals of the host Member State. On that issue, the Court found that that a student of Belgian nationality, though not having the status of a worker within the meaning of Regulation no. 1612/68, who found himself in exactly the same circumstances as Mr Grzelczyk would satisfy the conditions for obtaining the "minimex". It was therefore a case of discrimination on the sole ground of nationality. The fact that a student who was a Union citizen pursued university studies in a Member State other than the State of which he was a national could not, of itself, deprive him of the possibility of relying on the prohibition of all discrimination on grounds of nationality. True, the Court acknowledged, Article 8a of the Treaty (which became Article 18 EC after amendment), proclaimed the right for citizens of the Union to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect. Accordingly, a Member State was entitled to take the view that a student who has recourse to social assistance no longer fulfils the conditions of his right of residence or to take measures, within the limits imposed by Community law, either to withdraw his residence permit or not to renew it. However, the Court added, in no case could such measures become the automatic consequence of a student who is a national of another Member State having recourse to the host Member State's social assistance system. Only an unreasonable burden to the public funds of the host State could warrant a measure of removal from the territory, as Directive 93/96 accepted a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States.

In the light of the foregoing, the Court ruled that Articles 6 and 8 of the Treaty precluded entitlement to a non-contributory social benefit, such as the "minimex", from being made conditional, in the case of nationals of Member States other than the host State where they lawfully resided, on their falling within the scope of Regulation no. 1612/68 when no such condition applied to nationals of the host Member State.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.

*Identification:* ECJ-2004-2-009

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 09.10.2001 / **e)** C-377/98 / **f)** Kingdom of the Netherlands v. European Parliament and the European Council / **g)** *European Court Reports* I-07079 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.2.3 **Sources of Constitutional Law** – Hierarchy – Hierarchy between sources of Community law.

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

5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.

Keywords of the alphabetical index:

European Community, act, validity, examination with regard to international agreements / Patent, granting, condition / Biotechnology, invention, definition / Human body, protection.

Headnotes:

1. As a rule, the lawfulness of a Community instrument does not depend on its conformity with an international agreement to which the Community is not a party, such as the Munich Convention on the Grant of European Patents of 5 October 1973. Nor can its lawfulness be assessed in the light of instruments of international law which, like the Agreement establishing the World Trade Organisation and the Agreements on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and on Technical Barriers to Trade which are part of it, are not in principle, having regard to their nature and structure, among the rules in the light of which the Court is to review the lawfulness of measures adopted by the Community institutions.

However, such an exclusion cannot be applied to the Rio de Janeiro Convention on Biological Diversity of 5 June 1992 which, unlike the Agreement establishing the World Trade Agreement, is not strictly based on reciprocal and mutually advantageous arrangements. Even if that convention contains provisions which do not have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement (see paras 52-54).

2. It is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed. As regards living matter of human origin, Directive 98/44 on the legal protection of biotechnological inventions frames the law on patents in a manner sufficiently rigorous to ensure that the human body effectively remains unavailable and inalienable and that human dignity is thus safeguarded.

First, Article 5.1 of the Directive provides that the human body at the various stages of its formation and development cannot constitute a patentable invention. Second, the elements of the human body are not patentable in themselves and their discovery cannot be the subject of protection. Only inventions which combine a natural element with a technical process enabling it to be isolated or produced for an industrial application can be the subject of an application for a patent. Thus, an element of the human body may be part of a product which is patentable but it may not, in its natural environment, be appropriated. That distinction applies to work on the sequence or partial sequence of human genes. The result of such work can give rise to the grant of a patent only if the application is accompanied by both a description of the original method of sequencing which led to the invention and an explanation of the industrial application to which the work is to lead, as required by Article 5.3 of the Directive. In the absence of an application in that form, there would be no invention, but rather the discovery of a DNA sequence, which would not be patentable as such. Thus, the protection envisaged by the Directive covers only the result of inventive, scientific or technical work, and extends to biological data existing in their natural state in human beings only where necessary for the achievement and exploitation of a particular industrial application.

Moreover, reliance on the right to human integrity, which encompasses, in the context of medicine and biology, the free and informed consent of the donor and recipient is misplaced as against a directive

which concerns only the grant of patents and whose scope does not therefore extend to activities before and after that grant, whether they involve research or the use of the patented products (see paras 70-75, 77-79).

Summary:

Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions requires the Member States, through their patent laws, to protect biotechnological inventions, whilst complying with their international obligations. To that end the it determines *inter alia* which inventions involving plants, animals or the human body may or may not be patented.

In view of opposition in its parliament to genetic manipulation, and of the desire expressed on that occasion to prevent as far as possible the issuing of patents for the products of biotechnological procedures liable to promote such manipulation, the Kingdom of the Netherlands sought the annulment of the directive.

Among the arguments submitted, it contended that the obligations created by the Directive for Member States were incompatible with those resulting from certain of their international undertakings. In particular, the Directive allegedly infringed the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the Agreement on Technical Barriers to Trade (TBT), the European Patent Convention signed in Munich (EPC) and the Rio Convention on Biological Diversity (CBD).

The parliament and Council contested this analysis. They submitted firstly that the EPC could not create obligations for the Community, which was not a party to it. Furthermore, the legality of a Community instrument could be called in question on grounds of breach of international agreements to which the Community was a party only if the provisions of those agreements had a direct effect which, it was argued, was not so in the case of the TRIPs, TBT and CBD agreements.

In another plea, the Kingdom of the Netherlands submitted that the patentability of isolated elements of the human body provided for by Article 5.2 of the Directive reduced living human matter to a means to an end, offending against human dignity. Moreover, the absence of a provision requiring verification of the consent of the donor or recipient of products obtained by biotechnological means undermined the right to self-determination.

The Court also dismissed this argument. It found that the Directive framed the law on patents with sufficient rigour to ensure that the human body effectively remained unavailable and inalienable and that human dignity was thus safeguarded.

As none of the pleas made by the Kingdom of the Netherlands availed, the application in its entirety was rejected.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2004-2-010

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 06.12.2001 / **e)** Opinion 2/00 / **f)** / **g)** *European Court Reports* I-09713 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.2.1.10 **Constitutional Justice** – Types of claim – Claim by a public body – Institutions of the European Union.

1.3.3 **Constitutional Justice** – Jurisdiction – Advisory powers.

1.3.4.14 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between Community and member states.

4.16 **Institutions** – International relations.

Keywords of the alphabetical index:

European Community, international agreement, conclusion, legal basis, choice / Court of Justice of the European Communities, preliminary opinion / Competence, shared / Biotechnology, Cartagena Protocol on biosafety.

Headnotes:

The opinion of the Court may be obtained, pursuant to Article 300.6 EC, in particular on questions concerning the division between the Community and the Member States of competence to conclude a given agreement with non-member countries.

The choice of the appropriate legal basis has constitutional significance. Since the Community has conferred powers only, it must tie an international agreement to a Treaty provision which empowers it to approve such a measure. To proceed on an incorrect legal basis is therefore liable to invalidate the act concluding the agreement and so vitiate the Community's consent to be bound by the agreement it has signed. That is so in particular where the Treaty does not confer on the Community sufficient competence to ratify the agreement in its entirety, a situation which entails examining the allocation as between the Community and the Member States of the powers to conclude the agreement that is envisaged with non-member countries, or where the appropriate legal basis for the measure concluding the agreement lays down a legislative procedure different from that which has in fact been followed by the Community institutions. Invalidation of the measure concluding the agreement because of an error as to its legal basis is liable to create, both at Community level and in the international legal order, complications which the special procedure of a prior reference to the Court, laid down in Article 300.6 EC, is specifically designed to forestall (see paras 3, 5-6).

The measure authorising signature of an international agreement and the measure concluding it are two distinct legal acts giving rise to fundamentally distinct legal obligations for the parties concerned, the second measure being in no way confirmation of the first. Accordingly, failure to bring an action for annulment of the first measure does not preclude such an action against the measure concluding the envisaged agreement or render inadmissible a request for an Opinion raising the question whether the agreement is compatible with the Treaty. In any event, the fact that certain questions may be dealt with by means of other remedies, in particular by bringing an action for annulment under Article 230 EC, does not constitute an argument which precludes the Court from being asked for a preliminary Opinion under Article 300.6 EC (see paras 11-12).

The procedure under Article 300.6 EC is not intended to solve difficulties associated with implementation of an envisaged agreement which falls within shared Community and Member State competences (see para 17).

Where it is apparent that the subject-matter of an international agreement falls in part within the competence of the Community and in part within that of the Member States, it is important to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to

cooperate flows from the requirement of unity in the international representation of the Community (see para 18).

Under the system governing the powers of the Community, the choice of the legal basis for a measure, including one adopted in order to conclude an international agreement, does not follow from its author's conviction alone, but must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure. If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component. By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure may be founded on the corresponding legal bases (see paras 22-23).

Even if the control procedures set up by the Cartagena Protocol on Biosafety are applied most frequently, or at least in terms of market value preponderantly, to trade in living modified organisms, the fact remains that the Protocol is, in the light of its context, its aim and its content, an instrument intended essentially to improve biosafety and not to promote, facilitate or govern trade. The fact that numerous international trade agreements pursue multiple objectives and the broad interpretation of the concept of common commercial policy under the Court's case-law are not such as to call into question the finding that the Protocol is an instrument falling principally within environmental policy, even if the preventive measures are liable to affect trade relating to living modified organisms.

It follows that conclusion of the Cartagena Protocol on behalf of the Community must be founded on a single legal basis, specific to environmental policy. Since the Cartagena Protocol does not merely establish arrangements for cooperation regarding environmental protection, but lays down, in particular, precise rules on control procedures relating to transboundary movements, risk assessment and management, handling, transport, packaging and identification of living modified organisms, Article 175.1 EC is the appropriate legal basis for conclusion of the Protocol on behalf of the Community.

In addition, since the harmonisation achieved at Community level in the Protocol's field of application covers in any event only a very small part of such a

field, the Community and its Member States share competence to conclude the Protocol (see paras 37, 40, 42-44, 46-47).

Summary:

Under Article 19.3 of the Rio Convention on Biological Diversity of 5 June 1992, the Contracting Parties undertook the negotiation of a protocol on trans-boundary movements of living modified organisms (LMOs), designed to prevent any damage to the environment by introducing control procedures. Uncertainty as to the legal basis for the decision concluding the protocol on behalf of the Community prompted the Commission to request an opinion of the Court of Justice in accordance with Article 300.6 EC. In that request, it asked the Court about the suitability of the choice, contested by the Council, of Articles 133 EC on common commercial policy and 174.4 EC on Community environmental policy as the foundation for the measure concluding the protocol. It also enquired of the Court whether the competence exercised by the Member States in matters of environmental protection constituted residual powers in relation to the competence held by the Community in this sphere.

Beginning with the admissibility of the application, the Court observed that the choice of the legal basis for the decision concluding the agreement had constitutional significance. To forestall the complications that would arise from invalidation of such a measure, it was possible to use the special procedure of prior reference to the Court, laid down in Article 300.6 EC, not only in case of doubt as to the compatibility of the agreement with the EC Treaty or as to the respective competence of the Community and the Member States to conclude the proposed agreement, but also where there were misgivings over which legal basis to adopt. Moreover, the choice of the legal basis for the agreement could, as in the instant case, directly affect the nature – whether exclusive or shared – of the Community's external competence. It was therefore of little consequence that this question regarding the legal basis could be addressed in the context of other actions, particularly an action for annulment; this circumstance could not prevent the Commission from referring a request for an opinion to the Court under Article 300.6 EC. On that basis it was not possible, however, for the Commission to question the Court about the extent of the respective powers of the Community and the Member States in relation to environmental protection. The procedure of prior referral to the Court was not in fact intended to solve difficulties associated with implementation of an envisaged agreement falling within shared Community and Member State competence. The Court therefore held the request for an opinion admissible

only in so far as it related to the question whether the Protocol fell within exclusive Community competence or within shared Community and Member State competence.

Turning next to the legal substance, the Court recalled that the choice of legal basis for a measure could not follow from its author's conviction alone, but must rest on objective factors which were amenable to judicial review, such as the aim and the content of the measure.

Supplementary information:

The Court of Justice ruled likewise in its judgments in the cases of *British American Tobacco* of 10.12.2002 (C-491/01, *European Court Reports* p. I-11453) and *Commission v. Council* of 12.12.2002 (C-281/01, *European Court Reports* p. I-12049).

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2004-2-011

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 13.12.2001 / **e)** C-340/00 / **f)** European Commission v. Michael Cwik / **g)** *European Court Reports* I-10269 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

European Community, official, loyalty, obligation / Publication, prior authorisation.

Headnotes:

Article 17.2 of the Staff Regulations clearly provides that, in principle, permission is to be granted and may be refused only in exceptional cases.

In so far as the provision enables institutions to refuse permission to publish, and thus potentially interfere to a serious extent with freedom of expression, one of the fundamental pillars of a democratic society, it must be interpreted restrictively, in such a way that permission to publish is refused only where publication is liable to cause serious harm to the Communities' interests.

When it applies Article 17.2 of the Staff Regulations, the appointing authority must balance the various interests at stake, taking account, first, of the freedom that an official has to express, orally or in writing, opinions that dissent from or conflict with those held by the employing institution – that freedom arising from the fundamental right of the individual to express himself freely – and, second, of the gravity of the potential prejudice to the interests of the Communities to which publication of the relevant text might give rise. In that connection, only where there is a real risk of serious prejudice to the interests of the Communities, established on the basis of specific, objective evidence, may the risk be taken into consideration for the purpose of applying Article 17.2 of the Staff Regulations.

In order to enable the Community courts to exercise their power of review as regards the legality of a decision refusing permission to publish and to provide the official concerned with sufficient information to enable him to understand the reasons for the decision, the official must be given such information with the decision refusing permission or, at the very latest, with the decision rejecting his complaint (see paras 17-20).

Summary:

Challenging the Commission decision refusing him permission to publish the text of a lecture which he had been authorised to give at a conference, Mr Cwik brought an action for annulment of the decision before the Court of First Instance of the European Communities. In its judgment of 14 July 2000 (*Michael Cwik v. Commission*, case T-82/99, *European Court Reports* p. FP-IA-155; FP-II-713, published in the *Bulletin* 2003/3 [ECJ-2003-3-020]), the Court allowed the application and set aside the challenged decision, after noting that the public expression by an official of points of view differing from those of the institution for which he works could

not, in cases such as the one before the Court, be regarded as liable to prejudice the Community's interests within the meaning of Article 17.2 of the Staff Regulations and thus warrant a restriction on the exercise of freedom of expression.

In the present case, the Court of Justice of the European Communities ruled on the Commission's appeal against the judgment of the Court of First Instance. In support of its application to have the judgment set aside, the Commission chiefly submitted that Article 17.2 of the Staff Regulations had been wrongly interpreted. The Court answered by recalling that a provision of this kind, potentially giving rise to serious infringements of the freedom of expression, was to be interpreted restrictively in such a way that permission to publish could only be refused where publication was liable to cause severe damage to the interests of the Communities. In that respect, it found that the Court of First Instance had rightly criticised the inadequacy of the reasons adduced by the Commission in support of the contested decision, which were confined to stating that the Communities' interests might be prejudiced. Having failed to substantiate on the basis of specific, objective factors that there was a real risk of serious prejudice to the interests of the Communities, the Commission, as the Court observed, could not justify refusing Mr Cwik permission to publish. It therefore rejected the ground of appeal alleging incorrect interpretation of Article 17.2 of the Staff Regulations. As the Court was equally unconvinced by the second complaint that the challenged judgment was not reasoned, the appeal was dismissed in its entirety.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



European Court of Human Rights

Important decisions

Identification: ECH-2004-2-004

a) Council of Europe / b) European Court of Human Rights / c) Chamber / d) 22.06.2004 / e) 47221/99 / f) *Pabla Ky v. Finland* / g) *Reports of Judgments and Decisions of the Court* / h) CODICES (English).

Keywords of the systematic thesaurus:

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

4.5.8 **Institutions** – Legislative bodies – Relations with judicial bodies.

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

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

Keywords of the alphabetical index:

Judge, lay, independence / Parliament, member, right to participate in court decision-making.

Headnotes:

Although the notion of the separation of powers has assumed growing importance in the European Court of Human Rights' case-law, the European Convention on Human Rights does not require States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction.

The participation of expert lay members in court decision-making is not in itself contrary to the principle of independence and impartiality. Moreover, the mere fact that an expert member of a court is at the same time a member of the legislature is insufficient to raise doubts as to the independence and impartiality of the court.

Summary:

The applicant company brought civil proceedings against the owner of the premises which it rented, claiming that certain renovations did not correspond to the agreed plans. The Housing Court found in

favour of the owner. The applicant company's appeal was dismissed by the Court of Appeal, composed of three judges and two expert members, one of whom was also a Member of Parliament. The Supreme Court refused leave to appeal.

In the application lodged with the Court, the applicant claimed that in the proceedings to which it was a party the Court of Appeal was not an independent and impartial tribunal. It relied on Article 6.1 ECHR.

The Court held that the Convention does not require States to comply with any theoretical constitutional concepts regarding the separation of powers.

In the present case, there was no indication that the expert concerned was actually biased against the applicant company, and the only issue was whether, due to his position as a member of the legislature, his participation cast legitimate doubt on the objective or structural impartiality of the Court of Appeal. In that respect, there is no objection *per se* to expert lay members participating in court decision-making. There was no indication in the present case that the expert's membership of a particular political party had any connection with any of the parties to the proceedings or with the substance of the case or that he had played any role in respect of the legislation at issue in the case.

Even assuming that participation of a Member of Parliament in the adoption of a general legislative measure could cast doubt on later judicial functions, it could not be asserted in the present case that the expert was involved in any other capacity with the subject matter of the applicant's case through his position as a Member of Parliament. The mere fact that he was a member of the legislature at the material time was insufficient to raise doubts as to the independence and impartiality of the Court of Appeal. There had therefore been no violation of Article 6.1 ECHR.

Cross-references:

- *Ettl v. Austria*, Judgment of 23.04.1994, Series A, no. 117;
- *Hauschildt v. Denmark*, Judgment of 24.05.1989, Series A, no. 154;
- *Holm v. Sweden*, Judgment of 25.11.1993, Series A, no. 279-A;
- *Debled v. Belgium*, Judgment of 22.09.1994, Series A, no. 292-B;
- *Procola v. Luxembourg*, 28.09.1985, Series A, no. 326;
- *Findlay v. the United Kingdom*, Judgment of 25.02.1997, *Reports of Judgments and Decisions* 1997-I;

- *McGonnell v. the United Kingdom*, no. 28488/95, ECHR 2000-II;
- *Morris v. the United Kingdom*, no. 38784/97, ECHR 2002-I;
- *Stafford v. the United Kingdom* [GC], no. 46295/99, ECHR 2002-IV;
- *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, ECHR 2003-VI.

Languages:

English, French.



Identification: ECH-2004-2-005

a) Council of Europe / b) European Court of Human Rights / c) Chamber / d) 24.06.2004 / e) 59320/00 / f) Von Hannover v. Germany / g) Reports of Judgments and Decisions of the Court / h) CODICES (English, French).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Public person, photo, publication, without consent / Media, public person, privacy, intrusion.

Headnotes:

Everyone has a “legitimate expectation” of protection and respect for private life, even if he or she is known to the general public.

The State has a positive obligation to protect private life and the right to control the use of one’s image.

The publication of photographs of a well-known individual engaged in purely private activities, taken in a public place without his or her knowledge or consent, falls within the scope of her “private life”. Moreover, if the individual is not a public figure exercising official functions, the publication of such

photographs does not contribute to a debate of general interest to society.

Summary:

The applicant is the eldest daughter of Prince Rainier III of Monaco. A number of German tabloid magazines published several series of photos, taken without her knowledge, showing her outside her home going about her daily business either alone or in company. The applicant sought an injunction in the German courts against any further publication of the photos in Germany. The lower courts held that, under the Copyright Act, the applicant, as a “figure of contemporary society *par excellence* (*eine “absolute” Person der Zeitgeschichte*) had to tolerate the publication without her consent of photos taken outside her home.

The Federal Court of Justice held that figures of contemporary society were entitled to respect for their private life even outside their home, but only if they had retired to a “secluded place” (*in eine örtliche Abgeschiedenheit*) where it was objectively clear to everyone that they wanted to be alone and where, confident of being away from prying eyes, they behaved in a given situation in a manner in which they would not behave in a public place (criterion of spatial isolation). In accordance with that criterion the applicant won her case regarding the photos showing her with her boyfriend at the far end of a restaurant courtyard.

That approach was upheld by a leading judgment of the Federal Constitutional Court. That court attached decisive weight to the freedom of the press and the public interest in knowing how a princess behaved outside her representative functions. The applicant lost her case against the publication of photos showing her outside her home going about her daily life, either alone or accompanied, in a “non-isolated place”.

In the application lodged with the European Court of Human Rights, the applicant claimed that the failure to prevent publication of the photographs constituted a violation of her right to respect for private life. She relied on Article 8 ECHR.

The Court held that the publication of photos showing the applicant, alone or in the company of an adult, engaged in purely private activities in her daily life fell within the scope of her “private life”. The photos and accompanying commentaries had been published for the purposes of an article designed to satisfy the curiosity of a particular readership regarding the details of the private life of the princess, who was not a public figure and did not fulfil any official function on

behalf of Monaco. In short, the publications in question had not contributed to any debate of general interest to society despite the applicant being known to the public.

The Court also stressed that everyone, even if they were known to the general public, had to have a “legitimate expectation” of protection and respect for their private life, which included a social dimension. The photos in question – which concerned exclusively details of the applicant’s private life – had been taken without her knowledge or consent and in the context of daily harassment by photographers. Moreover, increased vigilance in protecting private life was necessary to contend with new communication technologies which, among other things, made possible the systematic taking of photos and their dissemination to a broad section of the public.

In defining the applicant as a figure of contemporary society par excellence, the domestic courts did not allow her to rely on her right to protection of her private life unless she was in a secluded place out of the public eye and, moreover, succeeded in proving it (which could be difficult). In the Court’s view, the criterion of spatial isolation was in reality too vague and difficult for the person concerned to determine in advance. The State, which had a positive obligation under the Convention to protect private life and the right to control the use of one’s image, had failed to ensure the effective protection of the applicant’s private life. There had therefore been a violation of Article 8 ECHR.

Cross-references:

- *Handyside v. the United Kingdom*, Judgment of 07.12.1976, Series A, no. 24;
- *Artico v. Italy*, Judgment of 13.05.1980, Series A, no. 37;
- *X and Y v. the Netherlands*, Judgment of 26.03.1985, Series A, no. 91;
- *Observer and Guardian v. the United Kingdom*, Judgment of 26.11.1991, Series A, no. 216;
- *Niemietz v. Germany*, Judgment of 16.12.1992, Series A, no. 251-B;
- *Burghartz v. Switzerland*, Judgment of 22.02.1994, Series A, no. 280-B;
- *Keegan v. Ireland*, Judgment of 26.05.1994, Series A, no. 290;
- *Stjerna v. Finland*, Judgment of 25.11.1994, Series A, no. 299-B;
- *Friedl v. Austria*, Judgment of 31.01.1995, Series A, no. 305-B, Opinion of the Commission;
- *Prager and Oberschlick v. Austria*, Judgment of 26.04.1995, Series A, no. 313;

- *Halford v. the United Kingdom*, Judgment of 25.06.1997, *Reports of Judgments and Decisions* 1997-III;
- *Blådet Tromsø and Stensaas v. Norway [GC]*, no. 21980/93, ECHR 1999-III;
- *News Verlags GmbH & CoKG v. Austria*, no. 31457/96, ECHR 2000-I;
- *Amann v. Switzerland [GC]*, no. 27798/95, ECHR 2000-II;
- *Rotaru v. Romania [GC]*, no. 28341/95, ECHR 2000-V;
- *P.G. and J.H. v. the United Kingdom*, no. 44787/98, ECHR 2000-IX;
- *Jaime Campmany y Diez de Revenga and Juan Luis Lopez-Galiacho Perona v. Spain*, (dec.), no. 54224/00, 12.12.2000;
- *Tammer v. Estonia*, no. 41205/98, ECHR 2001-I;
- *Verliere v. Switzerland* (dec.), no. 41953/98, 28.06.2001;
- *Schüssel v. Austria* (dec.), no. 42409/98, 21.02.2002;
- *Krone Verlags GmbH & CoKG v. Austria*, no. 34315/96, 26.02.2002;
- *Peck v. the United Kingdom*, no. 44647/98, ECHR 2003-I;
- *Julio Bou Gibert and El Hogar y La Moda J.A. v. Spain*, (dec.), no. 14929/02, 13.05.2003;
- *Prisma Presse v. France* (dec.), nos. 66910/01 and 71612/01, 01.07.2003;
- *Plon (Société) v. France*, no. 58148/00, 18.05.2004.

Languages:

English, French.



Systematic thesaurus (V16) *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

1 Constitutional Justice¹

1.1 Constitutional jurisdiction²

1.1.1	Statute and organisation	
1.1.1.1	Sources	
1.1.1.1.1	Constitution	
1.1.1.1.2	Institutional Acts	
1.1.1.1.3	Other legislation	
1.1.1.1.4	Rule issued by the executive	
1.1.1.1.5	Rule adopted by the Court ³	
1.1.1.2	Independence	
1.1.1.2.1	Statutory independence	
1.1.1.2.2	Administrative independence	
1.1.1.2.3	Financial independence	
1.1.2	Composition, recruitment and structure	
1.1.2.1	Number of members	
1.1.2.2	Appointing authority	
1.1.2.3	Appointment of members ⁴	
1.1.2.4	Appointment of the President ⁵	
1.1.2.5	Subdivision into chambers or sections	
1.1.2.6	Relative position of members ⁶	
1.1.2.7	Persons responsible for preparing cases for hearing ⁷	
1.1.2.8	Staff ⁸	
1.1.3	Status of the members of the court.....	74
1.1.3.1	Term of office of Members	
1.1.3.2	Term of office of the President	
1.1.3.3	Privileges and immunities	
1.1.3.4	Professional incompatibilities	
1.1.3.5	Disciplinary measures	
1.1.3.6	Remuneration	
1.1.3.7	End of office	
1.1.3.8	Members having a particular status ⁹	
1.1.3.9	Status of staff ¹⁰	
1.1.4	Relations with other institutions	
1.1.4.1	Head of State ¹¹	
1.1.4.2	Legislative bodies	
1.1.4.3	Executive bodies	
1.1.4.4	Courts	161, 174

¹ This chapter – as the Systematic Thesaurus in general should be used restrictively, as the keywords in it should only be used if a relevant question is raised. This chapter is thus not used to establish statistical data; rather, the Bulletin reader or user of the CODICES database should only find decisions under this chapter when the subject of the keyword is an issue in the case.

² Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

³ E.g. Rules of procedure.

⁴ Including the conditions and manner of such appointment (election, nomination, etc.).

⁵ Including the conditions and manner of such appointment (election, nomination, etc.).

⁶ Vice-presidents, presidents of chambers or of sections, etc.

⁷ E.g. State Counsel, prosecutors, etc.

⁸ Registrars, assistants, auditors, general secretaries, researchers, etc.

⁹ E.g. assessors, office members.

¹⁰ Registrars, assistants, auditors, general secretaries, researchers, etc.

¹¹ Including questions on the interim exercise of the functions of the Head of State.

1.2	Types of claim	
1.2.1	Claim by a public body	
1.2.1.1	Head of State	
1.2.1.2	Legislative bodies	158
1.2.1.3	Executive bodies	257
1.2.1.4	Organs of federated or regional authorities	
1.2.1.5	Organs of sectoral decentralisation	
1.2.1.6	Local self-government body	
1.2.1.7	Public Prosecutor or Attorney-General	
1.2.1.8	Ombudsman	
1.2.1.9	Member states of the European Union	
1.2.1.10	Institutions of the European Union	370
1.2.1.11	Religious authorities	
1.2.2	Claim by a private body or individual	302
1.2.2.1	Natural person	357
1.2.2.2	Non-profit-making corporate body	136
1.2.2.3	Profit-making corporate body	
1.2.2.4	Political parties	
1.2.2.5	Trade unions	
1.2.3	Referral by a court ¹²	15, 42, 107
1.2.4	Initiation <i>ex officio</i> by the body of constitutional jurisdiction	71, 142
1.2.5	Obligatory review ¹³	
1.3	Jurisdiction	27, 161, 225, 268, 306
1.3.1	Scope of review	17, 42, 107, 133, 174, 210, 212, 241, 244, 251, 256, 287, 341, 359
1.3.1.1	Extension ¹⁴	167
1.3.2	Type of review	
1.3.2.1	Preliminary review	
1.3.2.2	<i>Ex post facto</i> review	
1.3.2.3	Abstract review	302
1.3.2.4	Concrete review	
1.3.3	Advisory powers	370
1.3.4	Types of litigation	142, 230
1.3.4.1	Litigation in respect of fundamental rights and freedoms	225, 276
1.3.4.2	Distribution of powers between State authorities ¹⁵	285
1.3.4.3	Distribution of powers between central government and federal or regional entities ¹⁶	
1.3.4.4	Powers of local authorities ¹⁷	
1.3.4.5	Electoral disputes	
1.3.4.5.1	Presidential elections	
1.3.4.5.2	Parliamentary elections	29
1.3.4.5.3	Regional elections	
1.3.4.5.4	Local elections	
1.3.4.5.5	Elections of officers in professional bodies	
1.3.4.5.6	Referenda and other consultations ¹⁸	
1.3.4.6	Admissibility of referenda and other consultations ¹⁹	68, 128
1.3.4.6.1	Referenda on the repeal of legislation	76
1.3.4.7	Restrictive proceedings	
1.3.4.7.1	Banning of political parties	
1.3.4.7.2	Withdrawal of civil rights	
1.3.4.7.3	Removal from parliamentary office	
1.3.4.7.4	Impeachment	92, 287
1.3.4.8	Litigation in respect of jurisdictional conflict	27

¹² Referrals of preliminary questions in particular.

¹³ Enactment required by law to be reviewed by the Court.

¹⁴ Review *ultra petita*.

¹⁵ Horizontal distribution of powers.

¹⁶ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁷ Decentralised authorities (municipalities, provinces, etc.).

¹⁸ This keyword concerns decisions on the procedure and results of referenda and other consultations.

¹⁹ This keyword concerns decisions preceding the referendum including its admissibility.

1.3.4.9	Litigation in respect of the formal validity of enactments ²⁰	25, 26, 230
1.3.4.10	Litigation in respect of the constitutionality of enactments	
1.3.4.10.1	Limits of the legislative competence	
1.3.4.11	Litigation in respect of constitutional revision	
1.3.4.12	Conflict of laws ²¹	
1.3.4.13	Universally binding interpretation of laws	
1.3.4.14	Distribution of powers between Community and member states	260, 262, 263, 370
1.3.4.15	Distribution of powers between institutions of the Community	
1.3.5	The subject of review	357
1.3.5.1	International treaties	12, 25
1.3.5.2	Community law	174, 268
1.3.5.2.1	Primary legislation	
1.3.5.2.2	Secondary legislation	174, 260, 262, 263
1.3.5.3	Constitution ²²	63, 158
1.3.5.4	Quasi-constitutional legislation ²³	53
1.3.5.5	Laws and other rules having the force of law	65, 162, 273, 276, 282
1.3.5.5.1	Laws and other rules in force before the entry into force of the Constitution	
1.3.5.6	Decrees of the Head of State	314
1.3.5.7	Quasi-legislative regulations	
1.3.5.8	Rules issued by federal or regional entities	
1.3.5.9	Parliamentary rules	
1.3.5.10	Rules issued by the executive	282, 299, 359
1.3.5.11	Acts issued by decentralised bodies	
1.3.5.11.1	Territorial decentralisation ²⁴	
1.3.5.11.2	Sectoral decentralisation ²⁵	112
1.3.5.12	Court decisions	
1.3.5.13	Administrative acts	135
1.3.5.14	Government acts ²⁶	328
1.3.5.15	Failure to act or to pass legislation ²⁷	363
1.4	Procedure	
1.4.1	General characteristics	172, 256
1.4.2	Summary procedure	357
1.4.3	Time-limits for instituting proceedings	359
1.4.3.1	Ordinary time-limit	
1.4.3.2	Special time-limits	
1.4.3.3	Leave to appeal out of time	
1.4.4	Exhaustion of remedies	245
1.4.5	Originating document	
1.4.5.1	Decision to act ²⁸	
1.4.5.2	Signature	
1.4.5.3	Formal requirements	174
1.4.5.4	Annexes	
1.4.5.5	Service	
1.4.6	Grounds	45, 107
1.4.6.1	Time-limits	
1.4.6.2	Form	
1.4.6.3	<i>Ex-officio</i> grounds	

²⁰ 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.

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

1.4.7	Documents lodged by the parties ²⁹	167
1.4.7.1	Time-limits	
1.4.7.2	Decision to lodge the document	
1.4.7.3	Signature	
1.4.7.4	Formal requirements	
1.4.7.5	Annexes	
1.4.7.6	Service	
1.4.8	Preparation of the case for trial	
1.4.8.1	Registration	
1.4.8.2	Notifications and publication	
1.4.8.3	Time-limits	
1.4.8.4	Preliminary proceedings	
1.4.8.5	Opinions	
1.4.8.6	Reports	
1.4.8.7	Evidence	
1.4.8.7.1	Inquiries into the facts by the Court	
1.4.8.8	Decision that preparation is complete	
1.4.9	Parties	
1.4.9.1	<i>Locus standi</i> ³⁰	29, 136, 140, 239, 257, 302
1.4.9.2	Interest	223, 359
1.4.9.3	Representation	
1.4.9.3.1	The Bar	
1.4.9.3.2	Legal representation other than the Bar	
1.4.9.3.3	Representation by persons other than lawyers or jurists	
1.4.9.4	Persons or entities authorised to intervene in proceedings	
1.4.10	Interlocutory proceedings	
1.4.10.1	Intervention	
1.4.10.2	Plea of forgery	
1.4.10.3	Resumption of proceedings after interruption	
1.4.10.4	Discontinuance of proceedings ³¹	
1.4.10.5	Joinder of similar cases	
1.4.10.6	Challenging of a judge	
1.4.10.6.1	Automatic disqualification	
1.4.10.6.2	Challenge at the instance of a party	
1.4.10.7	Request for a preliminary ruling by the Court of Justice of the European Communities	
1.4.11	Hearing	
1.4.11.1	Composition of the bench	
1.4.11.2	Procedure	
1.4.11.3	In public	
1.4.11.4	In camera	
1.4.11.5	Report	
1.4.11.6	Opinion	
1.4.11.7	Address by the parties	
1.4.12	Special procedures	
1.4.13	Re-opening of hearing.....	45
1.4.14	Costs ³²	
1.4.14.1	Waiver of court fees	
1.4.14.2	Legal aid or assistance	
1.4.14.3	Party costs	
1.5	Decisions	174
1.5.1	Deliberation	
1.5.1.1	Composition of the bench	
1.5.1.2	Chair	
1.5.1.3	Procedure	
1.5.1.3.1	Quorum	

²⁹ Pleadings, final submissions, notes, etc.

³⁰ May be used in combination with Chapter 1.2 Types of claim.

³¹ For the withdrawal of the originating document, see also 1.4.5.

³² Comprises court fees, postage costs, advance of expenses and lawyers' fees.

	1.5.1.3.2	Vote			
1.5.2		Reasoning			
1.5.3		Form			
1.5.4		Types	148		
	1.5.4.1	Procedural decisions	357		
	1.5.4.2	Opinion	158		
	1.5.4.3	Finding of constitutionality or unconstitutionality ³³			
	1.5.4.4	Annulment			
		1.5.4.4.1	Consequential annulment		
	1.5.4.5	Suspension			
	1.5.4.6	Modification			
	1.5.4.7	Interim measures			
1.5.5		Individual opinions of members			
	1.5.5.1	Concurring opinions			
	1.5.5.2	Dissenting opinions			
1.5.6		Delivery and publication			
	1.5.6.1	Delivery			
	1.5.6.2	In open court			
	1.5.6.3	In camera			
	1.5.6.4	Publication			
		1.5.6.4.1	Publication in the official journal/gazette		
		1.5.6.4.2	Publication in an official collection		
		1.5.6.4.3	Private publication		
	1.5.6.5	Press			
1.6		Effects			
	1.6.1	Scope	167		
	1.6.2	Determination of effects by the court	172, 271, 320		
	1.6.3	Effect <i>erga omnes</i>	128, 245		
		1.6.3.1	<i>Stare decisis</i>		
	1.6.4	Effect <i>inter partes</i>	174, 359		
	1.6.5	Temporal effect			
		1.6.5.1	Entry into force of decision		
		1.6.5.2	Retrospective effect (<i>ex tunc</i>)		
		1.6.5.3	Limitation on retrospective effect		
		1.6.5.4	<i>Ex nunc</i> effect		
		1.6.5.5	Postponement of temporal effect	223	
	1.6.6	Execution	211, 245		
		1.6.6.1	Body responsible for supervising execution		
		1.6.6.2	Penalty payment		
	1.6.7	Influence on State organs	128		
	1.6.8	Influence on everyday life			
	1.6.9	Consequences for other cases	245		
		1.6.9.1	Ongoing cases		
		1.6.9.2	Decided cases	174	
2		Sources of Constitutional Law			
2.1		Categories³⁴			
	2.1.1	Written rules			
		2.1.1.1	National rules		
			2.1.1.1.1	Constitution	135, 232
			2.1.1.1.2	Quasi-constitutional enactments ³⁵	
		2.1.1.2	National rules from other countries		
		2.1.1.3	Community law	260, 262	
		2.1.1.4	International instruments		
			2.1.1.4.1	United Nations Charter of 1945	

³³ For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

³⁴ Only for issues concerning applicability and not simple application.

³⁵ 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.).

2.1.1.4.2	Universal Declaration of Human Rights of 1948	
2.1.1.4.3	European Convention on Human Rights of 1950 ³⁶	45, 174
2.1.1.4.4	Geneva Convention on the Status of Refugees of 1951	
2.1.1.4.5	European Social Charter of 1961	
2.1.1.4.6	International Covenant on Civil and Political Rights of 1966	
2.1.1.4.7	International Covenant on Economic, Social and Cultural Rights of 1966	
2.1.1.4.8	Vienna Convention on the Law of Treaties of 1969	
2.1.1.4.9	American Convention on Human Rights of 1969	
2.1.1.4.10	African Charter on Human and Peoples' Rights of 1981	
2.1.1.4.11	European Charter of Local Self-Government of 1985	
2.1.1.4.12	Convention on the Rights of the Child of 1989	
2.1.1.4.13	International conventions regulating diplomatic and consular relations	
2.1.2	Unwritten rules	
2.1.2.1	Constitutional custom	
2.1.2.2	General principles of law	171
2.1.2.3	Natural law	
2.1.3	Case-law	
2.1.3.1	Domestic case-law	
2.1.3.2	International case-law	
2.1.3.2.1	European Court of Human Rights	33, 45, 47, 58
2.1.3.2.2	Court of Justice of the European Communities	
2.1.3.2.3	Other international bodies	
2.1.3.3	Foreign case-law	
2.2	Hierarchy	
2.2.1	Hierarchy as between national and non-national sources	
2.2.1.1	Treaties and constitutions	12, 216
2.2.1.2	Treaties and legislative acts	225, 290
2.2.1.3	Treaties and other domestic legal instruments	171
2.2.1.4	European Convention on Human Rights and constitutions	
2.2.1.5	European Convention on Human Rights and non-constitutional domestic legal instruments	
2.2.1.6	Community law and domestic law	290, 357, 364
2.2.1.6.1	Primary Community legislation and constitutions	306
2.2.1.6.2	Primary Community legislation and domestic non-constitutional legal instruments	
2.2.1.6.3	Secondary Community legislation and constitutions	260, 262, 263
2.2.1.6.4	Secondary Community legislation and domestic non-constitutional instruments	278, 363
2.2.2	Hierarchy as between national sources	
2.2.2.1	Hierarchy emerging from the Constitution	
2.2.2.1.1	Hierarchy attributed to rights and freedoms	25, 26, 239
2.2.2.2	The Constitution and other sources of domestic law	
2.2.3	Hierarchy between sources of Community law	369
2.3	Techniques of review	128
2.3.1	Concept of manifest error in assessing evidence or exercising discretion	260, 266
2.3.2	Concept of constitutionality dependent on a specified interpretation ³⁷	13, 15, 120, 136, 226, 235, 266, 284, 329, 330
2.3.3	Intention of the author of the enactment under review	
2.3.4	Interpretation by analogy	
2.3.5	Logical interpretation	98
2.3.6	Historical interpretation	14
2.3.7	Literal interpretation	134, 347
2.3.8	Systematic interpretation	98, 349

³⁶

Including its Protocols.

³⁷

Presumption of constitutionality, double construction rule.

	2.3.9 Teleological interpretation	30, 32, 134
3	General Principles	
3.1	Sovereignty	216, 315
3.2	Republic/Monarchy	
3.3	Democracy	86, 218
	3.3.1 Representative democracy	5, 77, 293
	3.3.2 Direct democracy	
	3.3.3 Pluralist democracy ³⁸	234
3.4	Separation of powers	13, 17, 30, 107, 135, 162, 209, 235, 252, 282, 285, 287, 328, 339, 374
3.5	Social State ³⁹	49, 213, 304
3.6	Structure of the State ⁴⁰	264
	3.6.1 Unitary State	
	3.6.2 Regional State	299
	3.6.3 Federal State	273
3.7	Relations between the State and bodies of a religious or ideological nature ⁴¹	
3.8	Territorial principles	228
	3.8.1 Indivisibility of the territory	
3.9	Rule of law	25, 35, 74, 90, 103, 104, 107, 109, 110, 111, 116, 128, 144, 146, 220, 223, 241, 278, 287, 293, 308, 310, 311, 323, 339, 343, 344, 345
3.10	Certainty of the law ⁴²	25, 32, 60, 86, 103, 110, 116, 128, 144, 146, 174, 239, 252, 254, 278, 300, 308, 311, 341, 363, 375
3.11	Vested and/or acquired rights	99, 146, 167, 311
3.12	Clarity and precision of legal provisions	23, 32, 43, 54, 106, 108, 109, 110, 128, 220, 225, 252, 256, 264, 268, 279, 300, 310, 311, 339, 341, 363
3.13	Legality ⁴³	32, 81, 87, 99, 107, 108, 125, 126, 128, 138, 139, 146, 174, 220, 225, 242, 256, 278, 282, 334, 350
3.14	Nullum crimen, nulla poena sine lege ⁴⁴	54, 60, 95, 101, 106, 225, 251, 310
3.15	Publication of laws	101, 223, 282, 300, 317
	3.15.1 Ignorance of the law is no excuse	
	3.15.2 Linguistic aspects	
3.16	Proportionality	23, 30, 32, 33, 42, 51, 54, 60, 63, 86, 90, 117, 119, 125, 139, 180, 183, 234, 242, 256, 259, 271, 276, 279, 287, 293, 304, 306, 323, 332, 344, 361
3.17	Weighing of interests	23, 30, 32, 45, 54, 58, 83, 86, 101, 116, 119, 120, 131, 237, 259, 266, 271, 276, 281, 332, 344, 353, 357, 361, 372

³⁸ Including the principle of a multi-party system.

³⁹ Includes the principle of social justice.

⁴⁰ See also 4.8.

⁴¹ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

⁴² Including maintaining confidence and legitimate expectations.

⁴³ Principle according to which sub-statutory acts must be based on and in conformity with the law.

⁴⁴ Prohibition of punishment without proper legal base.

3.18	General interest ⁴⁵	30, 37, 51, 54, 57, 60, 72, 74, 86, 90, 101, 112, 131, 136, 139, 242, 265, 268, 279, 281, 289, 304, 306, 338, 353, 355, 357, 361
3.19	Margin of appreciation	42, 49, 77, 79, 117, 180, 183, 212, 235, 276, 282, 308, 328, 344, 361
3.20	Reasonableness	77, 79, 133, 135, 235, 330, 344
3.21	Equality ⁴⁶	104, 244
3.22	Prohibition of arbitrariness	32, 35, 43, 54, 125, 136, 169, 256, 292, 321, 330, 334
3.23	Equity	244
3.24	Loyalty to the State ⁴⁷	
3.25	Market economy ⁴⁸	84, 90, 161, 163, 228, 265, 338
3.26	Principles of Community law	359, 365
	3.26.1 Fundamental principles of the Common Market	306
	3.26.2 Direct effect ⁴⁹	
	3.26.3 Genuine co-operation between the institutions and the member states	
4	<u>Institutions</u>	
4.1	Constituent assembly or equivalent body ⁵⁰	
	4.1.1 Procedure	232
	4.1.2 Limitations on powers	
4.2	State Symbols	
	4.2.1 Flag	
	4.2.2 National holiday	
	4.2.3 National anthem	
	4.2.4 National emblem	
	4.2.5 Motto	
	4.2.6 Capital city	
4.3	Languages	
	4.3.1 Official language(s)	230
	4.3.2 National language(s)	230
	4.3.3 Regional language(s)	
	4.3.4 Minority language(s)	
4.4	Head of State	
	4.4.1 Powers	94, 161, 162
	4.4.1.1 Relations with legislative bodies ⁵¹	347
	4.4.1.2 Relations with the executive powers ⁵²	
	4.4.1.3 Relations with judicial bodies ⁵³	285
	4.4.1.4 Promulgation of laws	
	4.4.1.5 International relations	

⁴⁵ Including compelling public interest.

⁴⁶ Only where not applied as a fundamental right.

⁴⁷ Including questions of treason/high crimes.

⁴⁸ Including prohibition on monopolies.

⁴⁹ For the principle of primacy of Community law, see 2.2.1.6.

⁵⁰ Including the body responsible for revising or amending the Constitution.

⁵¹ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵² For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵³ For example, the granting of pardons.

4.4.1.6	Powers with respect to the armed forces	
4.4.1.7	Mediating powers	
4.4.2	Appointment	
4.4.2.1	Necessary qualifications	
4.4.2.2	Incompatibilities	293
4.4.2.3	Direct election	
4.4.2.4	Indirect election	
4.4.2.5	Hereditary succession	
4.4.3	Term of office	
4.4.3.1	Commencement of office	
4.4.3.2	Duration of office	
4.4.3.3	Incapacity	
4.4.3.4	End of office	142, 287
4.4.3.5	Limit on number of successive terms	
4.4.4	Status	
4.4.4.1	Liability	287
4.4.4.1.1	Legal liability	
4.4.4.1.1.1	Immunity	285
4.4.4.1.1.2	Civil liability	
4.4.4.1.1.3	Criminal liability	74
4.4.4.1.2	Political responsibility	92, 94
4.5	Legislative bodies	
4.5.1	Structure ⁵⁴	79
4.5.2	Powers ⁵⁵	49, 57, 92, 94, 107, 149, 157, 162, 163, 222, 232, 241, 244, 264, 273, 300, 304, 317, 338, 341, 350
4.5.2.1	Competences with respect to international agreements	232
4.5.2.2	Powers of enquiry ⁵⁶	
4.5.2.3	Delegation to another legislative body ⁵⁷	256
4.5.2.4	Negative incompetence ⁵⁸	108, 264, 279
4.5.3	Composition	
4.5.3.1	Election of members	5, 79
4.5.3.2	Appointment of members	
4.5.3.3	Term of office of the legislative body	347
4.5.3.3.1	Duration	
4.5.3.4	Term of office of members	
4.5.3.4.1	Characteristics ⁵⁹	349
4.5.3.4.2	Duration	
4.5.3.4.3	End	357
4.5.4	Organisation ⁶⁰	
4.5.4.1	Rules of procedure	357
4.5.4.2	President/Speaker	
4.5.4.3	Sessions ⁶¹	
4.5.4.4	Committees ⁶²	341
4.5.5	Finances ⁶³	
4.5.6	Law-making procedure ⁶⁴	230, 282
4.5.6.1	Right to initiate legislation	
4.5.6.2	Quorum	
4.5.6.3	Majority required	230
4.5.6.4	Right of amendment	
4.5.6.5	Relations between houses	

⁵⁴ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁵ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁶ In particular commissions of enquiry.

⁵⁷ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁵⁸ Obligation on the legislative body to use the full scope of its powers.

⁵⁹ Representative/imperative mandates.

⁶⁰ Presidency, bureau, sections, committees, etc.

⁶¹ Including the convening, duration, publicity and agenda of sessions.

⁶² Including their creation, composition and terms of reference.

⁶³ State budgetary contribution, other sources, etc.

⁶⁴ For the publication of laws, see 3.15.

4.5.7	Relations with the executive bodies	
4.5.7.1	Questions to the government	
4.5.7.2	Questions of confidence	
4.5.7.3	Motion of censure	
4.5.8	Relations with judicial bodies	13, 374
4.5.9	Liability	
4.5.10	Political parties	29, 39, 148
4.5.10.1	Creation	
4.5.10.2	Financing	
4.5.10.3	Role	
4.5.10.4	Prohibition	
4.5.11	Status of members of legislative bodies ⁶⁵	74, 295, 341
4.6	Executive bodies⁶⁶	
4.6.1	Hierarchy	
4.6.2	Powers	86, 317
4.6.3	Application of laws	157
4.6.3.1	Autonomous rule-making powers ⁶⁷	
4.6.3.2	Delegated rule-making powers	108, 112, 146, 161, 252, 256, 289, 334
4.6.4	Composition	
4.6.4.1	Appointment of members	
4.6.4.2	Election of members	
4.6.4.3	End of office of members	
4.6.4.4	Status of members of executive bodies	
4.6.5	Organisation	83
4.6.6	Relations with judicial bodies	135, 209, 339
4.6.7	Administrative decentralisation ⁶⁸	
4.6.8	Sectoral decentralisation ⁶⁹	351
4.6.8.1	Universities	
4.6.9	The civil service ⁷⁰	220
4.6.9.1	Conditions of access	112, 148
4.6.9.2	Reasons for exclusion	
4.6.9.2.1	Lustration ⁷¹	
4.6.9.3	Remuneration	
4.6.9.4	Personal liability	
4.6.9.5	Trade union status	
4.6.10	Liability	35
4.6.10.1	Legal liability	
4.6.10.1.1	Immunity	
4.6.10.1.2	Civil liability	
4.6.10.1.3	Criminal liability	74, 76
4.6.10.2	Political responsibility	
4.7	Judicial bodies⁷²	
4.7.1	Jurisdiction	210, 211, 221, 225, 249, 254, 284, 339, 350
4.7.1.1	Exclusive jurisdiction	17
4.7.1.2	Universal jurisdiction	
4.7.1.3	Conflicts of jurisdiction ⁷³	
4.7.2	Procedure	6, 35, 42, 89, 350
4.7.3	Decisions	

⁶⁵ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁶ For local authorities, see 4.8.

⁶⁷ Derived directly from the Constitution.

⁶⁸ See also 4.8.

⁶⁹ 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.

⁷⁰ Civil servants, administrators, etc.

⁷¹ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

⁷² Other than the body delivering the decision summarised here.

⁷³ Positive and negative conflicts.

4.7.4	Organisation	
4.7.4.1	Members	89
4.7.4.1.1	Qualifications	
4.7.4.1.2	Appointment	
4.7.4.1.3	Election	
4.7.4.1.4	Term of office	98
4.7.4.1.5	End of office	
4.7.4.1.6	Status	209, 319
	4.7.4.1.6.1 Incompatibilities	
	4.7.4.1.6.2 Discipline	143, 209
	4.7.4.1.6.3 Irremovability	
4.7.4.2	Officers of the court	
4.7.4.3	Prosecutors / State counsel ⁷⁴	6
4.7.4.3.1	Powers	
4.7.4.3.2	Appointment	
4.7.4.3.3	Election	
4.7.4.3.4	Term of office	
4.7.4.3.5	End of office	
4.7.4.3.6	Status	
4.7.4.4	Languages	
4.7.4.5	Registry	
4.7.4.6	Budget	
4.7.5	Supreme Judicial Council or equivalent body ⁷⁵	143, 209
4.7.6	Relations with bodies of international jurisdiction	17, 33, 216
4.7.7	Supreme court	96, 221
4.7.8	Ordinary courts	
4.7.8.1	Civil courts	
4.7.8.2	Criminal courts	54, 336
4.7.9	Administrative courts	
4.7.10	Financial courts ⁷⁶	
4.7.11	Military courts	
4.7.12	Special courts	
4.7.13	Other courts	
4.7.14	Arbitration	17, 153, 345
4.7.15	Legal assistance and representation of parties	96, 345
4.7.15.1	The Bar	304
4.7.15.1.1	Organisation	
4.7.15.1.2	Powers of ruling bodies	245, 304
4.7.15.1.3	Role of members of the Bar	
4.7.15.1.4	Status of members of the Bar	30, 140, 329
4.7.15.1.5	Discipline	
4.7.15.2	Assistance other than by the Bar	106
4.7.15.2.1	Legal advisers	276
4.7.15.2.2	Legal assistance bodies	
4.7.16	Liability	
4.7.16.1	Liability of the State	12, 33
4.7.16.2	Liability of judges	
4.8	Federalism, regionalism and local self-government	
4.8.1	Federal entities ⁷⁷	228, 271, 273
4.8.2	Regions and provinces	228
4.8.3	Municipalities ⁷⁸	21, 83, 86, 218, 298, 330, 349
4.8.4	Basic principles	
4.8.4.1	Autonomy	53, 83, 273
4.8.4.2	Subsidiarity	
4.8.5	Definition of geographical boundaries	

⁷⁴ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁵ For example, Judicial Service Commission, *Conseil supérieur de la magistrature*.

⁷⁶ Comprises the Court of Auditors in so far as it exercises judicial power.

⁷⁷ See also 3.6.

⁷⁸ And other units of local self-government.

4.8.6	Institutional aspects	
4.8.6.1	Deliberative assembly	264
4.8.6.1.1	Status of members	349
4.8.6.2	Executive	
4.8.6.3	Courts	
4.8.7	Budgetary and financial aspects	299
4.8.7.1	Finance	
4.8.7.2	Arrangements for distributing the financial resources of the State	264
4.8.7.3	Budget	
4.8.7.4	Mutual support arrangements	
4.8.8	Distribution of powers	83, 268, 299
4.8.8.1	Principles and methods	
4.8.8.2	Implementation	
4.8.8.2.1	Distribution <i>ratione materiae</i>	53, 271, 273
4.8.8.2.2	Distribution <i>ratione loci</i>	
4.8.8.2.3	Distribution <i>ratione temporis</i>	
4.8.8.2.4	Distribution <i>ratione personae</i>	
4.8.8.3	Supervision	103, 107, 182
4.8.8.4	Co-operation	
4.8.8.5	International relations	
4.8.8.5.1	Conclusion of treaties	
4.8.8.5.2	Participation in international organisations or their organs	
4.9	Elections and instruments of direct democracy⁷⁹	218, 314
4.9.1	Electoral Commission ⁸⁰	126
4.9.2	Referenda and other instruments of direct democracy	287, 315
4.9.3	Electoral system ⁸¹	5, 77
4.9.4	Constituencies	5, 77
4.9.5	Eligibility ⁸²	19, 29, 293
4.9.6	Representation of minorities	
4.9.7	Preliminary procedures	
4.9.7.1	Electoral rolls	131
4.9.7.2	Voter registration card	
4.9.7.3	Registration of parties and candidates ⁸³	
4.9.7.4	Ballot papers ⁸⁴	
4.9.8	Electoral campaign and campaign material ⁸⁵	39, 77
4.9.8.1	Financing	
4.9.8.2	Campaign expenses	29, 234
4.9.8.3	Protection of party logos	
4.9.9	Voting procedures	19
4.9.9.1	Polling stations	126, 131
4.9.9.2	Polling booths	
4.9.9.3	Voting ⁸⁶	126
4.9.9.4	Identity checks on voters	
4.9.9.5	Record of persons having voted ⁸⁷	
4.9.9.6	Casting of votes ⁸⁸	
4.9.9.7	Method of voting ⁸⁹	
4.9.9.8	Counting of votes	
4.9.9.9	Electoral reports	
4.9.9.10	Minimum participation rate required	
4.9.9.11	Announcement of results	

⁷⁹ See also keywords 5.3.41 and 5.2.1.4.

⁸⁰ Organs of control and supervision.

⁸¹ Proportional, majority, preferential, single-member constituencies, etc.

⁸² For aspects related to fundamental rights, see 5.3.41.2.

⁸³ For the creation of political parties, see 4.5.10.1.

⁸⁴ E.g. Names of parties, order of presentation, logo, emblem or question in a referendum.

⁸⁵ Tracts, letters, press, radio and television, posters, nominations, etc.

⁸⁶ Impartiality of electoral authorities, incidents, disturbances.

⁸⁷ E.g. signatures on electoral rolls, stamps, crossing out of names on list.

⁸⁸ E.g. in person, proxy vote, postal vote, electronic vote.

⁸⁹ E.g. *Panachage*, voting for whole list or part of list, blank votes.

4.10	Public finances	
4.10.1	Principles	
4.10.2	Budget	
4.10.3	Accounts	
4.10.4	Currency	
4.10.5	Central bank	
4.10.6	Auditing bodies ⁹⁰	365
4.10.7	Taxation	144, 163, 334
	4.10.7.1 Principles	65, 244, 308, 311
4.10.8	State assets	
	4.10.8.1 Privatisation	241, 265
4.11	Armed forces, police forces and secret services	159
4.11.1	Armed forces	343
4.11.2	Police forces	125, 339
4.11.3	Secret services	
4.12	Ombudsman⁹¹	
4.12.1	Appointment	
4.12.2	Guarantees of independence	
	4.12.2.1 Term of office	
	4.12.2.2 Incompatibilities	
	4.12.2.3 Immunities	
	4.12.2.4 Financial independence	
4.12.3	Powers	
4.12.4	Organisation	
4.12.5	Relations with the Head of State	
4.12.6	Relations with the legislature	
4.12.7	Relations with the executive	
4.12.8	Relations with auditing bodies ⁹²	
4.12.9	Relations with judicial bodies	
4.12.10	Relations with federal or regional authorities	
4.13	Independent administrative authorities⁹³	262
4.14	Activities and duties assigned to the State by the Constitution⁹⁴	
4.15	Exercise of public functions by private bodies	111, 265
4.16	International relations	7, 8, 9, 12, 210, 292, 328, 370
4.16.1	Transfer of powers to international institutions	17, 216, 232, 315
4.17	European Union	
4.17.1	Institutional structure	
	4.17.1.1 European Parliament	315, 357
	4.17.1.2 Council	
	4.17.1.3 Commission	174
	4.17.1.4 Court of Justice of the European Communities ⁹⁵	
4.17.2	Distribution of powers between Community and member states	
4.17.3	Distribution of powers between institutions of the Community	
4.17.4	Legislative procedure	
4.18	State of emergency and emergency powers⁹⁶	146, 317

⁹⁰ E.g. Auditor-General.

⁹¹ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁹² E.g. Court of Auditors.

⁹³ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

⁹⁴ *Staatszielbestimmungen*.

⁹⁵ Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

⁹⁶ Including state of war, martial law, declared natural disasters, etc. for human rights aspects, see also keyword 5.1.3.1.

5	<u>Fundamental Rights</u> ⁹⁷	
5.1	General questions	63, 276
5.1.1	Entitlement to rights	257
5.1.1.1	Nationals	328
5.1.1.1.1	Nationals living abroad	37
5.1.1.2	Citizens of the European Union and non-citizens with similar status	367
5.1.1.3	Foreigners	81, 133, 136, 171, 218, 222, 259
5.1.1.3.1	Refugees and applicants for refugee status	
5.1.1.4	Natural persons	167, 297
5.1.1.4.1	Minors ⁹⁸	169, 252
5.1.1.4.2	Incapacitated	
5.1.1.4.3	Prisoners	54, 60, 87, 131, 182, 183
5.1.1.4.4	Military personnel	344
5.1.1.5	Legal persons	
5.1.1.5.1	Private law	
5.1.1.5.2	Public law	
5.1.2	Effects	
5.1.2.1	Vertical effects	
5.1.2.2	Horizontal effects ⁹⁹	171, 213, 254
5.1.3	Limits and restrictions ¹⁰⁰	10, 19, 37, 51, 54, 58, 69, 72, 87, 90, 99, 101, 103, 105, 110, 115, 116, 117, 119, 131, 136, 183, 216, 234, 242, 259, 268, 306, 319, 323, 326, 330, 351, 353, 355, 361, 372
5.1.3.1	Non-derogable rights	
5.1.3.2	General/special clause of limitation	304, 310
5.1.3.3	Subsequent review of limitation	
5.1.4	Emergency situations ¹⁰¹	353
5.2	Equality	13, 15, 40, 74, 76, 84, 123, 139, 154, 155, 216, 223, 225, 241, 242, 268, 284, 304, 330, 334, 338
5.2.1	Scope of application	265, 310
5.2.1.1	Public burdens ¹⁰²	65, 228
5.2.1.2	Employment	171, 298
5.2.1.2.1	In private law	256
5.2.1.2.2	In public law	112, 148, 319
5.2.1.3	Social security	49, 99, 133, 146, 266, 297
5.2.1.4	Elections	19, 77, 79, 131, 298
5.2.2	Criteria of distinction	260
5.2.2.1	Gender	
5.2.2.2	Race	326
5.2.2.3	National or ethnic origin ¹⁰³	21, 68, 230, 329
5.2.2.4	Citizenship or nationality	81, 114, 128, 133, 171, 222, 259, 306, 367
5.2.2.5	Social origin	
5.2.2.6	Religion	134
5.2.2.7	Age	23, 351
5.2.2.8	Physical or mental disability	43, 222
5.2.2.9	Political opinions or affiliation	
5.2.2.10	Language	43, 230
5.2.2.11	Sexual orientation	364
5.2.2.12	Civil status ¹⁰⁴	15, 117, 134, 226
5.2.3	Affirmative action	135, 171, 326

⁹⁷ Positive and negative aspects.

⁹⁸ For rights of the child, see 5.3.44.

⁹⁹ The question of "Drittwirkung".

¹⁰⁰ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in chapter 3.

¹⁰¹ Includes questions of the suspension of rights. See also 4.18.

¹⁰² Taxes and other duties towards the state.

¹⁰³ Here, the term "national" is used to designate ethnic origin.

¹⁰⁴ For example, discrimination between married and single persons.

5.3	Civil and political rights	
5.3.1	Right to dignity	60, 72, 213, 222, 279, 336, 339, 369
5.3.2	Right to life	69, 169, 172, 339
5.3.3	Prohibition of torture and inhuman and degrading treatment.....	169
5.3.4	Right to physical and psychological integrity.....	23, 139, 369
5.3.4.1	Scientific and medical treatment and experiments	79, 263
5.3.5	Individual liberty ¹⁰⁵	139, 279
5.3.5.1	Deprivation of liberty	182, 336, 339, 346, 353
5.3.5.1.1	Arrest ¹⁰⁶	54, 69, 136
5.3.5.1.2	Non-penal measures	60, 271
5.3.5.1.3	Detention pending trial.....	169, 251, 320
5.3.5.1.4	Conditional release	
5.3.5.2	Prohibition of forced or compulsory labour	289
5.3.6	Freedom of movement ¹⁰⁷	19, 21, 37
5.3.7	Right to emigrate	
5.3.8	Right to citizenship or nationality.....	43, 68, 328
5.3.9	Right of residence ¹⁰⁸	19
5.3.10	Rights of domicile and establishment.....	33, 37
5.3.11	Right of asylum	
5.3.12	Security of the person	23
5.3.13	Procedural safeguards, rights of the defence and fair trial.....	33, 35, 37, 96, 169, 171, 172, 209, 210, 212, 248, 275, 321, 345
5.3.13.1	Scope.....	120, 211
5.3.13.1.1	Constitutional proceedings	
5.3.13.1.2	Civil proceedings	109, 221
5.3.13.1.3	Criminal proceedings.....	6, 54, 63, 74, 120, 123, 166, 182, 210, 235, 251, 343
5.3.13.1.4	Litigious administrative proceedings.....	35
5.3.13.1.5	Non-litigious administrative proceedings	47, 174
5.3.13.2	Effective remedy	47, 110, 167, 169, 172
5.3.13.3	Access to courts ¹⁰⁹	14, 47, 54, 81, 89, 96, 103, 107, 109, 114, 172, 182, 211, 239, 249, 281, 284, 285, 297, 319, 323, 332, 345, 359
5.3.13.3.1	<i>Habeas corpus</i>	169, 353
5.3.13.4	Double degree of jurisdiction ¹¹⁰	110, 123, 321
5.3.13.5	Suspensive effect of appeal	
5.3.13.6	Right to a hearing.....	63, 321, 353
5.3.13.7	Right to participate in the administration of justice ¹¹¹	248
5.3.13.8	Right of access to the file.....	174, 292
5.3.13.9	Public hearings	54, 237, 248
5.3.13.10	Trial by jury	
5.3.13.11	Public judgments	
5.3.13.12	Right to be informed about the decision	
5.3.13.13	Trial/decision within reasonable time	174, 211
5.3.13.14	Independence ¹¹²	209, 235, 345, 374
5.3.13.15	Impartiality.....	209, 235, 284, 345, 374
5.3.13.16	Prohibition of <i>reformatio in peius</i>	
5.3.13.17	Rules of evidence	120, 174
5.3.13.18	Reasoning	13, 174, 262, 320, 321
5.3.13.19	Equality of arms	174, 292
5.3.13.20	Adversarial principle.....	174, 248, 323, 365
5.3.13.21	Languages	

¹⁰⁵ This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

¹⁰⁶ Detention by police.

¹⁰⁷ Including questions related to the granting of passports or other travel documents.

¹⁰⁸ May include questions of expulsion and extradition.

¹⁰⁹ 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.

¹¹⁰ This keyword covers the right of appeal to a court.

¹¹¹ Including the right to be present at hearing.

¹¹² Including challenging of a judge.

5.3.13.22	Presumption of innocence	169, 174, 323
5.3.13.23	Right to remain silent	174
5.3.13.23.1	Right not to incriminate oneself	235
5.3.13.23.2	Right not to testify against spouse/close family	
5.3.13.24	Right to be informed about the reasons of detention	169, 353
5.3.13.25	Right to be informed about the charges	
5.3.13.26	Right to have adequate time and facilities for the preparation of the case	
5.3.13.27	Right to counsel	30, 166, 169, 337, 353
5.3.13.27.1	Right to paid legal assistance	114
5.3.13.28	Right to examine witnesses	
5.3.14	<i>Ne bis in idem</i>	174
5.3.15	Rights of victims of crime	60, 74, 172
5.3.16	Principle of the application of the more lenient law	
5.3.17	Right to compensation for damage caused by the State	104, 111, 128, 172
5.3.18	Freedom of conscience ¹¹³	165
5.3.19	Freedom of opinion	
5.3.20	Freedom of worship	
5.3.21	Freedom of expression ¹¹⁴	39, 58, 72, 81, 90, 101, 157, 234, 259, 263, 310, 355, 361, 372
5.3.22	Freedom of the written press	81
5.3.23	Rights in respect of the audiovisual media and other means of mass communication	39, 58, 101, 260, 262
5.3.24	Right to information	32, 63, 71, 157, 172, 306, 310, 321
5.3.25	Right to administrative transparency	13
5.3.25.1	Right of access to administrative documents	32, 71
5.3.26	National service ¹¹⁵	343
5.3.27	Freedom of association	10, 149, 234, 242, 319
5.3.28	Freedom of assembly	10, 126, 180, 300
5.3.29	Right to participate in public affairs	300
5.3.29.1	Right to participate in political activity	
5.3.30	Right of resistance	
5.3.31	Right to respect for one's honour and reputation	58, 81, 101
5.3.32	Right to private life	54, 101, 375
5.3.32.1	Protection of personal data	63, 125, 266, 279, 364
5.3.33	Right to family life ¹¹⁶	14, 15, 117
5.3.33.1	Descent	115, 226
5.3.33.2	Succession	117, 134, 226
5.3.34	Right to marriage	
5.3.35	Inviolability of the home	54, 63, 339
5.3.36	Inviolability of communications	
5.3.36.1	Correspondence	54
5.3.36.2	Telephonic communications	
5.3.36.3	Electronic communications	260
5.3.37	Right of petition	
5.3.38	Non-retrospective effect of law	
5.3.38.1	Criminal law	45, 60, 101, 128, 332
5.3.38.2	Civil law	317
5.3.38.3	Social law	99
5.3.38.4	Taxation law	144, 278
5.3.39	Right to property ¹¹⁷	33, 35, 40, 119, 154, 163, 167, 254, 279
5.3.39.1	Expropriation	40
5.3.39.2	Nationalisation	
5.3.39.3	Other limitations	105, 116, 225, 268, 281, 330
5.3.39.4	Privatisation	154, 265

¹¹³ Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

¹¹⁴ This keyword also includes the right to freely communicate information.

¹¹⁵ Militia, conscientious objection, etc.

¹¹⁶ Aspects of the use of names are included either here or under "Right to private life".

¹¹⁷ Including compensation issues.

5.3.40	Linguistic freedom.....	230
5.3.41	Electoral rights	239
5.3.41.1	Right to vote.....	19, 77, 131, 183, 218, 234, 298, 315
5.3.41.2	Right to stand for election ¹¹⁸	19, 29, 126, 218, 293, 298, 315, 357
5.3.41.3	Freedom of voting	
5.3.41.4	Secret ballot	
5.3.42	Rights in respect of taxation.....	65, 144, 152, 308, 311
5.3.43	Right to self fulfilment.....	51, 228
5.3.44	Rights of the child.....	14, 23, 169, 226, 252
5.3.45	Protection of minorities and persons belonging to minorities.....	180
5.4	Economic, social and cultural rights	167, 171
5.4.1	Freedom to teach	
5.4.2	Right to education	155
5.4.3	Right to work	57, 351
5.4.4	Freedom to choose one's profession ¹¹⁹	245, 268, 304, 351
5.4.5	Freedom to work for remuneration.....	116, 140, 254, 304
5.4.6	Commercial and industrial freedom	119, 228, 268, 306, 338
5.4.7	Consumer protection.....	119, 306
5.4.8	Freedom of contract.....	57, 107, 249, 254, 262, 265, 346
5.4.9	Right of access to the public service.....	112, 245
5.4.10	Right to strike	
5.4.11	Freedom of trade unions ¹²⁰	
5.4.12	Right to intellectual property.....	157, 263
5.4.13	Right to housing	33, 330, 332
5.4.14	Right to social security	49, 117, 133, 146, 151, 159, 266, 297, 367
5.4.15	Right to unemployment benefits	
5.4.16	Right to a pension	99, 133, 146, 167
5.4.17	Right to just and decent working conditions.....	57, 213
5.4.18	Right to a sufficient standard of living	33, 49, 138, 222
5.4.19	Right to health	87, 146, 266
5.4.20	Right to culture	
5.4.21	Scientific freedom	
5.4.22	Artistic freedom	
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	

¹¹⁸ For institutional aspects, see 4.9.5.

¹¹⁹ This keyword also covers "Freedom of work".

¹²⁰ Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

Keywords of the alphabetical index *

* The précis presented in this Bulletin are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

Page numbers of the alphabetical index refer to the page showing the identification of the decision rather than the keyword itself.

	Pages		Pages
Abuse, of powers	162	Bar, council, pupil advocates, enrolment, rules and criteria	304
Abuse, of rights	292	Bioethics	263
Accident, attributable to employer, compensation	213	Biotechnology, Cartagena Protocol on biosafety	370
Accident, work-related, compensation	151	Biotechnology, invention	263
Administrative act, judicial review	257, 321	Biotechnology, invention, definition	369
Administrative act, judicial review, legal basis	135	Broker, activity, regulations	107
Administrative act, statement of reasons	13	Broker, compensation system, annual contribution	107
Administrative authority, conduct	220	Building, right to occupy	15
Administrative authority, discretionary power	135, 220	Burden of proof	355
Advertising, commercial	90, 262	Carrier, responsibility, administrative	290
Advertising, restriction	90	Charge, principle	6
Advice, legal, definition	276	Child, best interest	14, 252
Agriculture, surplus stock, taxation	278	Child, born out of wedlock, right to inherit	226
Alcohol, production, sale	161	Child, custody, decision	337
Alcohol, production, sale, regulation	90	Child, grandparents, right to personal relationships	14
Amendment, legislative, judicial review	256	Child, interest	337
Animal, welfare, protection	268	Child, placement, measure of assistance	14
Apartment, common elements	154	Child, protection against pornographic material	355
Apartment, non-privatised, owner, rights	154	Child, punishment, corporal	23
Appeal, civil proceedings	275	Child, welfare	133
Appeal, leave to appeal	329	Circumstance, mitigating	42
Arbitration, award, judicial control	17	Citizen, former state	128
Arbitration, tribunal, decision, enforcement	153	Citizen, rights and guarantees	144
Army, serviceman, social benefit	159	Citizenship, acquisition, condition	43
Arrest, condition	341	Citizenship, acquisition, conditions	68
Assistance, benefit, suspension	138	Civil proceedings, court, jurisdiction, <i>ratione loci</i>	284
Association, autonomy	149	Civil proceedings, fee	109
Association, dissolution	149	Civil servant, examination, professional, compulsory	148
Association, membership, obligatory	242	Civil servant, retirement, early	220
Association, name, registration, refusal	180	Civil servant, retirement, involuntary	220
Association, registration, procedure	10	Civil service, contract, work, system	112
Association, state intervention, power, delegation to executive	149	Civil service, public competition, compulsory	112
Authority, conflict, parties to proceedings	285	Cohabitation, partner, survivor, inheritance tax	117
Autonomous territorial authority, overseas, status	53	Collective agreement, negotiation	57
Autonomous territorial authority, status, powers	53	Combatant, enemy, classification, right to challenge	353
Bailiff, liability	111		
Bar, admission, requirements	245		
Bar, arbitration board, rules of procedure	345		

Communication, audiovisual	262	Court, discretion.....	225
Communication, eavesdropping, electronic	63	Court, discretion, lack	211
Communication, electronic.....	262	Court, fee, non property rights cases.....	109
Communication, phone tapping, evidence.....	120	Court, intervention, necessity	332
Communist regime, persecution, compensation, conditions	104	Court, ordinary, primacy	107
Company agreement, branch agreement	57	Crime, organised, fight.....	162
Company, licence, condition	338	Criminal act, intention to commit.....	346
Company, public, privatisation, privileged terms.....	241	Criminal charge.....	251
Company, shareholders, general meeting.....	211	Criminal law	23
Compensation, damage, entitlement	297	Criminal liability, elements, precision.....	106
Compensation, full	213	Criminal offence, sanction, balance.....	42
Compensation, non-material damage	297	Criminal procedure, civil action.....	292
Competence, shared.....	370	Criminal procedure, guarantees	136
Competition, proceedings, formal error, remedy	174	Criminal proceedings	30
Confession, value	120	Criminal record, sexual offence	54
Constituent people, discrimination	21	Criminal, dangerous.....	60
Constitution, amendment	158	Criminal, violent	60
Constitution, direct application, extraterritorially	328	Damage, material, compensation, conditions.....	151
Constitution, interpretation, extensive	302	Damage, non-pecuniary, compensation	151
Constitutional complaint, admissibility	17, 29, 257	Dangerousness, prognosis	60
Constitutional Court, Constitution, interpretation, competence, exclusive.....	210	Data, collection	63
Constitutional Court, decision, binding force.....	245	Data, destruction.....	63
Constitutional Court, law-making, blocked, review	230	Data, public, access.....	71
Constitutional Court, President, criminal proceedings, suspension.....	76	Debt, enforcement	332
Constitutional Court, President, criminal proceedings, suspension, duration.....	74	Decision, adoption, authentication, lack	174
Consumer, protection.....	363	Decision, multiple addressees, annulment, effects.....	174
Contract, clause, abusive.....	363	Decree, legislative, validity	146
Contract, obligation, inability to fulfil.....	346	Decree, municipal	330
Contract, parties, acquired rights	254	Defamation, fact, allegation, proof.....	58
Contract, parties, autonomy	249	Defence, national.....	105
Contract, termination, benefit.....	254	Deposit, national securities, powers	107
Convicted person, pardon, right to apply, amnesty	216	Descent, right to know, time-limit.....	115
Conviction, following public prosecutor's request for acquittal	6	Detainee, rights.....	169
Corruption, criminal law	9	Detention on remand, lawfulness	320
Corruption, fight	162	Detention, after acquittal.....	182
Council of Ministers, President, criminal proceedings, suspension.....	76	Detention, condition	169
Council of Ministers, President, criminal proceedings, suspension, duration.....	74	Detention, condition, nutrition	87
Counsel, right, waiver	166	Detention, conditions	341
Couple, unmarried	15	Detention, conditions and terms	339
Court fee	336	Detention, duration	136
Court of Auditors, special report, preliminary hearing, lack, damage, serious	365	Detention, enforcement	60
Court of Justice of the European Communities, preliminary opinion.....	370	Detention, judicial review	320
Court, composition	89	Detention, lawfulness.....	136
Court, composition, change during proceedings	275	Detention, placement, legal grounds	271
Court, decision, forced execution.....	111	Detention, preventive.....	60
		Detention, preventive, subsequent to imprisonment	271
		Detention, provisional, legal grounds, strict interpretation	251
		Detention, record	169
		Detention, unlawful	182
		Digital economy	260
		Diplomatic protection, right	328
		Disability, discrimination	43
		Diving, activity, requirements.....	242
		Document, official, access	223
		Dog, breeding, ban	268
		Dog, dangerous	268
		Dog, introduction from other EU member states and from third countries	268

- Economy, state regulation **338**
- Education, duty of the state 155
- Education, free, limits 155
- Education, higher, in national language **230**
- Education, higher, reform **273**
- Education, institution, head, candidate,
age limit **351**
- Education, primary, secondary and
higher, accessibility 155
- Education, teacher, legal protection 23
- Elderly person, social assistance 133
- Election, campaign, restrictions **234**
- Election, campaign, spending limits **234**
- Election, candidate, registration procedure 29
- Election, candidate, requirements 29
- Election, candidate, status 29
- Election, constituency, boundary, demarcation 77
- Election, constituency, size, unequal 79
- Election, disqualification 19
- Election, electoral commission, chair,
candidate 126
- Election, European Parliament **315**
- Election, European Parliament,
presidential decision **314**
- Election, homogeneity, principle **218**
- Election, local, candidate 126
- Election, municipal **218**
- Election, presidential **293**
- Election, presidential, result, complaint **239**
- Election, third party election advertising **234**
- Election, vote, outside the polling station 126
- Electoral commission, ruling, appeal **239**
- Electoral law, European Community,
implementation **315**
- Electricity, transmission **265**
- Electronic mail, nature **260**
- Emergency, order, effects **317**
- Employee, representative, qualification
for election **298**
- Employer, private, confederation **302**
- Employment, employment and integration
measure 138
- Employment, job-creating measure **306**
- Employment, labour code, derogation,
conditions 57
- Employment, professional employability, loss 151
- Employment, work permit, requirement
for permit to possess weapons 51
- Enforcement, proceedings, start 153
- Entrepreneur, equal status 84
- Environment, protection **306**
- Equality, of birth, strict review **226**
- Erased*, residence, discrimination 128
- European Commission, regulation,
challenge before a national court **359**
- European Community, act, individual,
challenging, time-limit **359**
- European Community, act, validity, examination
with regard to international agreements **369**
- European Community, directive,
implementation by the Member States **363**
- European Community, directive,
interpretation **263**
- European Community, directive,
transposition **260, 262**
- European Community, directive, transposition, act **263**
- European Community, directive, transposition, without
legislative action, conditions **363**
- European Community, international
agreement, conclusion, legal basis, choice **370**
- European Community, official, household
allowance, conditions for granting **364**
- European Community, official, loyalty,
obligation **372**
- European Convention on Human Rights, violation,
ground for reopening proceedings 45
- European Court of Human Rights, decision,
effect in national law 47
- European Court of Human Rights, friendly
settlement, effects in national law 33
- European Union, accession,
constitutional amendment **232**
- European Union, act, suspension
of operation, conditions of granting **357**
- European Union, citizen, statute **367**
- European Union, Commission, official,
dismissal **361**
- European Union, Commission, official,
loyalty, duty **361**
- European Union, Commission,
regulation, implementation **278**
- European Union, national from other
Member States, rights **363**
- European Union, national, reverse
discrimination **306**
- European Union, Parliament, member,
disqualification, in application of national law **357**
- European Union, Parliament, President,
act taken by the President of the
parliament on its behalf **357**
- Evidence, derivative 120
- Evidence, exclusion 63
- Evidence, exclusion, rule 120
- Evidence, invalid, remote effect 120
- Evidence, unlawful obtaining 120
- Execution, immovable property **332**
- Execution, writ 153
- Fact, new, allegiance before the Court 167
- Fairness, principle **308**
- Family law 25
- Family, contractual, definition **252**
- Family, financial situation **308**
- Family, protection, constitutional 117, **308**
- Federation, entity, legislature, autonomy **273**
- Federation, legislature, powers exceeding **273**
- Fine, calculation 174
- Fine, conversion into imprisonment **336**
- Fine, part-payment **336**
- Fishing, industry, equality 135
- Fishing, quota, allocation 135
- Forced labour, prohibition **289**
- Foreign policy, government,

- discretionary power **328**
- Foreigner, border, deprivation of freedom 136
- Foreigner, detention 136
- Foreigner, disabled, allowance, right **222**
- Foreigner, humanitarian organisation,
activity 54
- Foreigner, legal aid, reciprocity 114
- Foreigner, permanent residence, loss 128
- Foreigner, residence, citizenship **218**
- Foreigner, social assistance **222**
- Foreigner, without documents,
border crossing **290**
- Framework law, federal, powers **273**
- Free movement of goods **268, 306**
- Free movement of goods, obstacles **228**
- Free movement of persons **367**
- Freedom of action, general **249**
- Freedom of action, principle **268**
- Freedom of expression, regulation 72
- Freedom to act, protection **276**
- Fruit of the poisonous tree, doctrine 120
- Fuel, bio-components, obligation to sell **306**
- Fugitive, abroad 37
- Fumus boni juris* **357**
- Good administration, principle 86
- Good faith, principle **292**
- Government, law-making process,
participation **282**
- Government, member 99
- Guantanamo, prisoner **353**
- Guilt, principle 60
- Guilt, prior acknowledgement 54
- Hatred, incitement 72
- Head of State, declaration, liability **285**
- Health, insurance, reform **266**
- Health, protection **266**
- Hearing, *in camera* **235**
- Hearing, investigative **235**
- Hearing, investigative, public **237**
- Heritage, cultural, preservation,
protection and development 83
- High Representative, competence 17
- Homosexuality, registered partnership **364**
- Housing, access **330, 332**
- Housing, benefit 49
- Housing, eviction **332**
- Housing, policy 144
- Housing, selling, tax 144
- Human body, component, function **263**
- Human body, protection **369**
- Human right, *ius cogens* 171
- Human right, violation, continued 47
- Hunting, self-fulfilment 51
- Identity, personal, right 115
- Illegality, plea, conditions **359**
- ILO, Convention no. 87 **319**
- Immigrant, labor rights 171
- Immigrant, worker, status, irregular 171
- Immigration, law **282**
- Immigration, policy, national 171
- Immunity, parliamentary, limits **341**
- Impeachment, proceedings, initiative, right 94
- Imprisonment, conditions 60
- Imprisonment, for debt, principle **336**
- Information, access 172
- Information, classified, access 30
- Information, classified, protection 32
- Information, denial 32
- Information, obligation to provide 32
- Inheritance, right 105
- Inheritance, testator, will, respect 105
- Institution, consultative 83
- Insurance, fund, contribution 84
- Insurance, insured person, cost-sharing,
standard rate **266**
- Insurance, insured person, reimbursement,
reduction **266**
- International Covenant on Civil and
Political Rights, applicability **334**
- International Criminal Court, extradition,
citizen, constitutional revision **232**
- International Criminal Court, statute,
ratification **216**
- International law, observance **225**
- International responsibility, acknowledgment
by a state 172
- Internet, host, civil and criminal liability **260**
- Internet, law **260**
- Internet, pornographic material, child,
protection **355**
- Internet, racist statements, dissemination 39
- Investigation, criminal **339**
- Investigation, criminal, postponement **343**
- Investigation, preliminary **339**
- ius cogens, erga omnes* effect 171
- Judge, absence, justification 89
- Judge, challenging 89
- Judge, disciplinary measure 143, **209**
- Judge, dismissal, procedure 143
- Judge, lawful 89
- Judge, lay, independence **374**
- Judge, party to proceedings **284**
- Judge, replacement during procedure **275**
- Judge, substitute 89
- Judge, withdrawal **284**
- Judgment, execution **332**
- Judgment, execution, right 182
- Judgment, of foreign country, recognition **210**
- Judicial assistance, mutual, international **292**
- Judicial Council, competences 143, **209**
- Judicial protection of rights **332**
- Judicial review, time limit **281**
- Judicial supervision **332**
- Judiciary, independence **209**
- Judiciary, trade union, formation, restriction **319**
- Jurisdiction, dispute, Constitutional
Court, competence, lack 27
- Jurisdiction, territorial **328**
- Justice, obstruction 172
- Justice, proper administration **221**
- Land, fund, land parcel, duty to transfer 35
- Land, parcel, taxation of transfer operations 152

Land, register, financial claims, trust.....	116	Media, media law.....	26, 81
Land, restitution	35	Media, periodical, subscription, delivery, price	157
Land, right	152	Media, pluralism, concentration, rules	262
Land, transfer, lease, sale.....	152	Media, press, criminal offence, limitation period, reply, time-limit.....	260
Land, use, plan	86	Media, press, written, right to response	310
Language, examination, exemption	43	Media, programmes, local	262
Law making, constitutional rules	25	Media, public person, privacy, intrusion.....	375
Law, application, not publicly announced	101	Media, statement, response, rectification, definition	310
Law, constitutional objective, accessibility, intelligibility.....	264	Media, telecommunications regulatory authority, powers	262
Law, degree of determination	220	Media, television.....	58
Law, economy, uniformity	273	Media, television, free, service, operator.....	262
Law, enforcement, deficit, unconstitutionality	65	Medical record	266
Law, enforcement, equality	65	Meeting, illegal, active participants, penalty	300
Law, interpretation, evolution	276	Meeting, public, authorisation	300
Law, interpretation, implications.....	249	Message, on paper, electronic, arrangements for reply.....	260
Law, of the country.....	53	Military, discipline, offence.....	344
Law, publication	223	Military, offence, sanctions	344
Law, social context, change.....	276	Military, professional	343
Lawyer, admission to profession, conditions	304	Minority, electoral privileges	180
Lawyer, admission, simplified	329	Minority, existence	180
Lawyer, conditions for practising.....	140	Monopoly, state	161
Lawyer, independence.....	140	Monopoly, unconstitutionality.....	90
Lawyer, information, access	30	Municipality, name, modification.....	21
Lawyer, register, inclusion	140	Municipality, staff, representation	298
Lawyer, salaried employee	140	Nation, concept, definition	315
Lawyer, submission, limited duration	96	Nationality, definition.....	68
Legal Advice Act	276	Naturalisation, preferential.....	68
Legal advisor, traineeship	304	Norm, sub-constitutional, constitutionality	256
Legal service, gratuitous provision.....	276	Notary, fee, determination	108
Legislation, by reference.....	282	Notary, powers.....	212
Legislation, sphere.....	282	<i>Numerus clausus</i>	304
Legislation, subordinate, limits.....	256	Oath, breach.....	293
Legislative powers, concurrent	271	Offence, criminal exceptional complexity and gravity	54
Legislative procedure, amendment, law, object, connection, absence	265	Offence, criminal, exact definition.....	106
Legitimate expectation, principle, protection.....	144	Offence, organised gangs.....	54
Local self government, freedom of administration.....	299	Offender, rehabilitation, duty.....	183
Local self government, head, incompatibility, prohibition of dual representation.....	349	Official Gazette, publication, solely via the Internet.....	223
Local self government, organisation of staff, determination	299	Officially recorded instrument, right of objection	212
Local self-government, act, legality, supervision	107	Open court, principle.....	237
Local self-government, decision, appeal, conditions	103	Organic law, adoption, vote	26
Local self-government, regulation, suspension.....	86	Organic law, definition	25, 26
Local unit, basic	218	<i>Pacta sunt servanda</i>	254
Maintenance, entitlement.....	117	Parent, legal protection.....	23
Maritime Traffic, International, 1965 Convention Facilitation.....	290	Parliament, chamber, speaker, criminal proceedings, suspension, duration.....	74
Market, unity	228	Parliament, dissolution, conditions	347
Marriage, definition	364	Parliament, member	99
Media, access	81	Parliament, member, creative activities, remuneration.....	295
Media, audiovisual council, decision, reasons	262	Parliament, member, mandate, premature termination.....	5
Media, editorial comments, publication.....	310	Parliament, member, pension, affirmative action	326

Parliament, member, replacement.....	5	payment.....	330
Parliament, member, right to participate in court decision-making	374	Prosecution, <i>in absentia</i>	37
Parliament, speaker, criminal proceedings, suspension	76	Prosecution, criminal	54
Parliament, staff	13	Prosecution, criminal, avoiding	37
Patent, gene.....	263	Protectionism, administrative	228
Patent, granting, condition	369	Public meeting, organisation, authorisation	126
Paternity, denial	115	Public order, threat	72
Penalty, heavier, imposing	101	Public person, photo, publication, without consent	375
Pension, deduction, increase	146	Public service, continuity	265
Pension, insurance principle	99	Public service, entrance competition, security investigation	148
Pension, reduction	167	Public service, equality, principle.....	265
Pension, scheme, harmonisation.....	99	Public service, purpose, contract.....	265
Pension, social security	146	Publication, prior authorisation	361, 372
Pension, survivor's, right, conditions.....	117	Punishment, corporal, aim	23
Pension, upgrading	99	Punishment, disproportionate	42
People, constituent, vital interest	230	Punishment, purpose.....	183
Personal data, consent	125	Racist statement	39
Photo, out of the courthouse, reporting.....	101	<i>Razzia</i> , validity	169
Physician, attending, free choice	266	Reciprocity, principle.....	210
Planning, Special Statutory Procedure	281	Reciprocity, requirement, human rights, violation..	114
Police, financial, powers	339	Referendum, abrogative, admissibility.....	76
Police, firearm, use	69	Referendum, initiative	68
Police, officer, social benefit	159	Referendum, preliminary, legislative.....	128
Political party, dissolved, symbol, use	148	Referendum, purpose, constitutional.....	287
Political party, name, emblem, sign	148	Region, autonomous, authority.....	182
President, candidate, requirements	293	Regulation, executive, rules for adoption.....	256
President, end of office, condition	142	Regulation, implementing statute	282
President, impeachment	92	Regulation, implementing statute, illegal	252
President, impeachment, ground	287	Regulation, implementing statute, validity	108
President, political neutrality	287	Religion, free exercise	165
President, spontaneous declaration.....	285	Remedy, effective	125
Price, minimum, determination	163	Reparation, determination by the Court.....	172
Price, regulation, state	163	Representative body, popular.....	218
Pricing, policy, fundamental principle.....	157	<i>Res iudicata</i>	103, 174
Prison, solitary confinement cell	87	<i>Res iudicata</i> , principle.....	211, 225
Prison, visitor, checks	139	Residence, acoustic monitoring.....	63
Prisoner, food, right to buy.....	87	Residence, permit.....	367
Prisoner, right to vote	131, 183	Residence, permit, requirement for permit to possess weapons	51
Privilege, material, right	159	Residence, place, return.....	21
Procedural economy, principle.....	86	Resocialisation, principle	60
Procedure, summary, admissibility, conditions	357	Resolution, parliamentary, annulment, incompetence	350
Proceedings, criminal, injured party, right of appeal	123	Responsibility, international	171
Proceedings, reopening	47	Responsibility, international relations	12
Proceedings, reopening, condition.....	45	Restaurant, service, refusal, political expression	259
Proceedings, summary, appeal, grounds	110	Safety, public, danger	268
Property, claim, securing, court order, interim	323	Saver, lack, unconstitutionality	281
Property, compensation, calculation	40	Schengen, Convention	290
Property, guarantee, scope.....	119	Scholarship, access, restriction	165
Property, illegally occupied	19	Search, body.....	125
Property, private, public use, maintenance.....	289	Search, business premises.....	339
Property, restitution	40	Search, necessity	125
Property, right to enjoyment.....	281	Search, night-time.....	54
Property, right, scope.....	154	Search, personal baggage, vehicles.....	279
Property, rights and duties	289	Search, seizure, documents	339
Property, social obligation.....	330	Secret, state.....	172
Property, transfer, limitation	330	Security guard, private, powers	279
Property, water and electricity charges,			

Security, national	30	Treaty, international, validity	25
Seizure, asset	339	UNESCO, World Heritage List.....	83
Share, acquisition, gratuitous.....	241	University, entrance	334
Share, acquisition, privileged terms	241	University, half-yearly fees, amount.....	334
Social assistance, individual character	49	University, lecturing, post-doctoral.....	273
Social assistance, right, conditions	133	University, professor, junior, qualifications	273
Social insurance, work accident, compensation.....	297	Urban planning, town, centre.....	83
Social security, contribution, compulsory payment	146	Urban planning, unlawful construction, penalty	225
Social security, financial equilibrium	266	Vote, prohibition.....	131
Social welfare, entitlement, conditions	138	Vote, right, municipality of last domicile.....	19
Spouse, death.....	308	Waiver, of right, voluntary and knowing.....	166
Spouse, definition	134	Weapon, acquisition, permit, condition	51
State administration, structure	83	Work accident, compensation, eligible dependants, right to appeal	297
State, organisation, change	232	Work, conditions, determination	57
State, party to a private law relationship.....	35	Worker, migrant, rights	171
Statute, necessary elements.....	108	Worker, participation, principle	57
Student, foreign, social assistance, conditions for granting.....	367		
Succession, right.....	134		
Summons, issue, rules.....	248		
Supreme Court, legal representation, obligatory	96		
Supreme Court, president, term of office	98		
Tariff, limit, determination.....	157		
Tax, avoidance.....	311		
Tax, burden, equality	65		
Tax, couple, married	308		
Tax, declaration	65		
Tax, duty to pay, income.....	65		
Tax, evasion.....	311		
Tax, excise, local	228		
Tax, exemption	244		
Tax, health services	244		
Tax, luxury	228		
Tax, modification of taxation rates	256		
Tax, preferential treatment, deadline	144		
Tax, refund.....	228		
Tax, securities, transactions	65		
Tax, speculative transactions.....	65		
Tender, public, exclusion, duration, limit.....	95		
Tenure, security	332		
Territorial authority, deliberative assembly	264		
Territorial authority, overseas, type, special status	264		
Territorial authority, own resources, threshold, global resources, decisive share.....	264		
Territoriality, diplomatic protection	328		
Terrorism.....	235		
Terrorism, bombing.....	8		
Terrorism, financing	7		
Terrorism, hearing <i>in camera</i>	237		
Time-limit, in the Constitution, calculation.....	347		
Tobacco, production, sale, distribution	161		
Trade name, right to create, nature	119		
Trade union, formation, restriction	319		
Transparency, decision-making process	71, 135		
Treaty, assenting act.....	12		
Treaty, constitutional requirement.....	7, 8, 9		
Treaty, European Union.....	12		

Sales agents for publications of the Council of Europe
Agents de vente des publications du Conseil de l'Europe

AUSTRALIA/AUSTRALIE

Hunter Publications, 58A, Gipps Street
AUS-3066 COLLINGWOOD, Victoria
Tel.: (61) 3 9417 5361
Fax: (61) 3 9419 7154
E-mail: Sales@hunter-pubs.com.au
<http://www.hunter-pubs.com.au>

AUSTRIA/AUTRICHE

Gerold und Co., Weihburggasse 26
A-1011 WIEN
Tel.: (43) 1 533 5014
Fax: (43) 1 533 5014 18
E-mail: buch@gerold.telecom.at
<http://www.gerold.at>

BELGIUM/BELGIQUE

La Librairie européenne SA
50, avenue A. Jonnart
B-1200 BRUXELLES 20
Tel.: (32) 2 734 0281
Fax: (32) 2 735 0860
E-mail: info@libeurop.be
<http://www.libeurop.be>

Jean de Lannoy
202, avenue du Roi
B-1190 BRUXELLES
Tel.: (32) 2 538 4308
Fax: (32) 2 538 0841
E-mail: jean.de.lannoy@euronet.be
<http://www.jean-de-lannoy.be>

CANADA

Renouf Publishing Company Limited
5369 Chemin Canotek Road
CDN-OTTAWA, Ontario, K1J 9J3
Tel.: (1) 613 745 2665
Fax: (1) 613 745 7660
E-mail: order.dept@renoufbooks.com
<http://www.renoufbooks.com>

**CZECH REPUBLIC/RÉPUBLIQUE
TCHÈQUE**

USIS, Publication Service
Havelkova 22
CZ-130 00 PRAHA 3
Tel.: (420) 2 210 02 111
Fax: (420) 2 242 21 1484
E-mail: posta@uvis.cz
<http://www.usiscr.cz/>

DENMARK/DANEMARK

Swets Blackwell A/S
Jagtvej 169 B, 2 Sal
DK-2100 KOBENHAVN O
Tel.: (45) 39 15 79 15
Fax: (45) 39 15 79 10
E-mail: info@dk.swetsblackwell.com

FINLAND/FINLANDE

Akateeminen Kirjakauppa
Keskuskatu 1, PO Box 218
FIN-00381 HELSINKI
Tel.: (358) 9 121 41
Fax: (358) 9 121 4450
E-mail: akatilaus@stockmann.fi
<http://www.akatilaus.akateeminen.com>

FRANCE

La Documentation française
124 rue H. Barbusse
93308 Aubervilliers Cedex
Tel.: (33) 01 40 15 70 00
Fax: (33) 01 40 15 68 00
E-mail: vel@ladocfrancaise.gouv.fr
<http://www.ladocfrancaise.gouv.fr>

GERMANY/ALLEMAGNE

UNO Verlag
Am Hofgarten 10
D-53113 BONN
Tel.: (49) 2 28 94 90 20
Fax: (49) 2 28 94 90 222
E-mail: unoverlag@aol.com
<http://www.uno-verlag.de>

GREECE/GRÈCE

Librairie Kauffmann
Mavrokordatou 9
GR-ATHINAI 106 78
Tel.: (30) 1 38 29 283
Fax: (30) 1 38 33 967

HUNGARY/HONGRIE

Euro Info Service
Hungexpo Europa Kozpont ter 1
H-1101 BUDAPEST
Tel.: (361) 264 8270
Fax: (361) 264 8271
E-mail: euroinfo@euroinfo.hu
<http://www.euroinfo.hu>

ITALY/ITALIE

Libreria Commissionaria Sansoni
Via Duca di Calabria 1/1, CP 552
I-50125 FIRENZE
Tel.: (39) 556 4831
Fax: (39) 556 41257
E-mail: licosa@licosa.com
<http://www.licosa.com>

NETHERLANDS/PAYS-BAS

De Lindeboom Internationale Publikaties
PO Box 202, MA de Ruyterstraat 20 A
NL-7480 AE HAAKSBERGEN
Tel.: (31) 53 574 0004
Fax: (31) 53 572 9296
E-mail: lindeboo@worldonline.nl
<http://home-1-worldonline.nl/~lindeboo/>

NORWAY/NORVÈGE

Akademika, A/S Universitetsbokhandel
PO Box 84, Blindern
N-0314 OSLO
Tel.: (47) 22 85 30 30
Fax: (47) 23 12 24 20

POLAND/POLOGNE

Główna Księgarnia Naukowa
im. B. Prusa
Krakowskie Przedmieście 7
PL-00-068 WARSZAWA
Tel.: (48) 29 22 66
Fax: (48) 22 26 64 49
E-mail: inter@internews.com.pl
<http://www.internews.com.pl>

PORTUGAL

Livraria Portugal
Rua do Carmo, 70
P-1200 LISBOA
Tel.: (351) 13 47 49 82
Fax: (351) 13 47 02 64
E-mail: liv.portugal@mail.telepac.pt

SPAIN/ESPAGNE

Mundi-Prensa Libros SA
Castelló 37
E-28001 MADRID
Tel.: (34) 914 36 37 00
Fax: (34) 915 75 39 98
E-mail: libreria@mundiprensa.es
<http://www.mundiprensa.com>

SWITZERLAND/SUISSE

Bersy
Route de Monteiller
CH-1965 SAVIESE
Tél.: (41) 27 395 53 33
Fax: (41) 27 385 53 34
E-mail: jprausis@netplus.ch

Adeco – Van Diermen
Chemin du Lacuez 41
CH-1807 BLONAY
Tel.: (41) 21 943 26 73
Fax: (41) 21 943 36 06
E-mail: mvandier@worldcom.ch

UNITED KINGDOM/ROYAUME-UNI

TSO (formerly HMSO)
51 Nine Elms Lane
GB-LONDON SW8 5DR
Tel.: (44) 207 873 8372
Fax: (44) 207 873 8200
E-mail: customer.services@theso.co.uk
<http://www.the-stationery-office.co.uk>
<http://www.itsofficial.net>

**UNITED STATES and CANADA/
ÉTATS-UNIS et CANADA**

Manhattan Publishing Company
468 Albany Post Road, PO Box 850
CROTON-ON-HUDSON,
NY 10520, USA
Tel.: (1) 914 271 5194
Fax: (1) 914 271 5856
E-mail: Info@manhattanpublishing.com
<http://www.manhattanpublishing.com>

STRASBOURG

Librairie Kléber
Palais de l'Europe
F-67075 Strasbourg Cedex
Fax: (33) 03 88 52 91 21

Council of Europe Publishing/Éditions du Conseil de l'Europe

F-67075 Strasbourg Cedex
Tel.: (33) 03 88 41 25 81 – Fax: (33) 03 88 41 39 10 – E-mail: publishing@coe.int – Web site: <http://book.coe.int>

