

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

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Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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

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Court of Justice of the European Communities

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Inter-American Court of Human Rights

S. Garcia-Ramirez / F. J. Rivera Juaristi

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There was no relevant constitutional case-law during the reference period 1 May 2007 – 31 August 2007 for the following countries:

Japan, Luxembourg, Netherlands (Supreme Court), Norway, Russia, Sweden (Supreme Administrative Court), Ukraine.

Précis of important decisions of the reference period 1 May 2007 – 31 August 2007 will be published in the next edition, *Bulletin 2007/3*, for the following countries:

Finland (Supreme Administrative Court), Latvia, Turkey.

Albania

Constitutional Court

Statistical data

1 January 2006 – 31 December 2006

Total number of decisions: 251

Kinds of decisions

- Final decisions rendered in plenary: 31
- Decisions of inadmissibility: 221

Final decisions on receivable petitions

- Rejection (one partially rejected): 11
- Acceptance: 15
- Interpretation (partially): 2
- Deferred: 0
- Resolution of conflict of competences: 2
- Stay of proceedings: 1

Effects of decisions (decisions rendered on the basis of receivable petitions and examined by the Constitutional Court in session)

- *Ex tunc*: 1
- *Ex nunc*: 30
- *Erga omnes*: 6
- *Inter partes*: 23
- Immediate: 0
- Deferred: 0

Claimants (only statistics on claimants for whom a request was admissible)

- President of the Republic: 0
- Prime Minister: 0
- 1/5 of Members of Parliament: 2
- President of the Supreme Court of Audit: 0
- Ordinary jurisdictions: 1
- Ombudsman: 0
- Self-government bodies: 1
- Religious communities: 0
- Parties, associations and other organisations: 3
- Individuals, companies: 23

Subject of control

- Constitution (interpretation): 2
- Laws: 4
- International treaties: 0
- Decisions of Parliament: 2
- Acts of the Council of Ministers: 2
- Decisions rendered by jurisdictions: 22
- Other administrative acts: 0

Types of litigation

- Fair trial: 23
- Conflict of competences: 2
- Electoral disputes: 0
- Constitutionality of political parties: 0
- Destitution of the President of the Republic: 0
- Constitutionality of normative acts issued from organs of central administration: 5
- Constitutionality of law: 2
- Interpretation of the Constitution: 2
- Constitutionality of international treaties: 0
- End of the constitutional judge mandate: 0

Kind of control

- Concret control: 26
- Abstract control: 4
- *A priori* control: 0
- *A posteriori* control: 30

Important decisions

Identification: ALB-2007-2-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 11.07.2006 / **e)** 20/06 / **f)** Administrative acts on the avoidance of nepotism / **g)** *Fletore Zyrtare* (Official Gazette), 76, 2204 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 3.10 **General Principles** – Certainty of the law.
- 3.13 **General Principles** – Legality.
- 3.16 **General Principles** – Proportionality.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.38 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law.
- 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:

Administrative act, judicial review / Employment, termination, proportionality / Nepotism, fight, dismissal.

Headnotes:

The rationale behind the constitutional guarantees of the right to work and freedom of profession is to protect individuals from unjustified restrictions by the state. Sometimes, normative acts are attributed retroactive

effects. In such cases, whichever authority issued the act must be careful to respect the principle of proportionality, should be aiming to achieve legitimate goals, and should try to avoid any consequences that might infringe the exercise of rights.

Summary:

A constitutional review took place, of three decisions by the Council of Ministers. Their purpose was the elimination of nepotism, the strengthening of measures against corruption in public administration, and the establishment of certain restrictions regarding the recruitment and career progression of public administration officials, especially in the customs services. Two NGOs and the People's Advocate of the Republic of Albania asked the Constitutional Court to carry out the review.

The Municipality of Tirana reported to the Court on certain disagreements over the exercise of constitutional power that had arisen within local government. Article 49.1 of the Constitution is an individual right, comprising the right to choose one's profession, place of work and method of professional qualification, with the goal of exercising a lawful activity in order to earn a living. The guarantees set out in the Constitution have the purpose of protecting individuals from unjustified restrictions by the state.

Article 49.1 of the Constitution defines the right to work as one of the economic and social rights and freedoms of the individual. The Court considered that if this right was to be properly understood and applied, it should be perceived as both a positive and a negative obligation. As a positive obligation, it requires the engagement of the state to create appropriate conditions for the realisation of the right. As a negative obligation, it implies non-interference by the state, which would violate the effective exercise of this right.

The Court observed that the decisions by the Council of Ministers regarding the avoidance of nepotism in public administration also have an impact on existing relationships. They result in certain employees from the sectors defined in those decisions having to leave their employment, if any nepotism is identified. The Court emphasised that where a competent body has adopted a certain decision with a view to achieving a legitimate goal, it must take care not to violate rights and freedoms. If this proves impossible, any such encroachment must be minimal. The Court accordingly set out the requirements to help ensure that measures undertaken which restrict rights and freedoms remain in line with the main constitutional principles, including proportionality.

The Municipality of Tirana asked the Court to assess a claim arising from disagreements between local government bodies, over the exercise of their constitutional powers. Article 17 of the Constitution provides that rights and freedoms sanctioned by the Constitution can only be restricted by law. The Court disagreed with the government representative's argument, and observed that those drafting the Constitution had attributed to the Assembly alone (as the representative organ), the power to enact legislation which may encroach upon those rights and freedoms. Article 101 of the Constitution sets out those instances where the Council of Ministers has the power to issue acts with the force of law, and the criteria which must be met. However, such power does not extend to cases of restrictions upon rights. The Court therefore held that the decisions under constitutional review ran counter to the principle of legality.

The Court also took the opportunity of emphasising the importance of respecting general constitutional principles, such as the rule of law, separation of powers, legality, certainty of law and proportionality.

Cross-references:

- Decision no. 26, dated 02.11.2005, *Fletorja Zyrtare* (Official Gazette), 91, 2927; *Bulletin* 2005/3 [ALB-2005-3-004].

Languages:

Albanian.



Identification: ALB-2007-2-002

a) Albania / **b)** Constitutional Court / **c)** / **d)** 04.12.06 / **e)** 26/06 / **f)** Decision on initiation of destitution's procedure of general prosecutor / **g)** *Fletore Zyrtare* (Official Gazette), 131, 5140 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
 4.5.2.2 **Institutions** – Legislative bodies – Powers – Powers of enquiry.
 4.7.4.3.1 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel – Powers.

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:

Parliament, inquiry, commission, appointment / Parliament, prosecutor, dismissal, review of individual cases / Prosecutor, power / Prosecutor, responsibility.

Headnotes:

A commission of inquiry is set up with a view to recognising and verifying a phenomenon, an event or activity in depth, in order to draw conclusions about the need to approve, amend or add to particular legislation. The exercise of this prerogative by the Assembly is subject to certain limitations. The inquiry should respect constitutional principles, such as separation of powers and the presumption of innocence. The Assembly does have the power to resolve to set up a commission of inquiry to investigate certain issues. However, it should be careful to exercise this competence within the framework of its constitutional functions and to respect the constitutional principles that regulate the activity of the organ under investigation.

Summary:

I. A group of deputies called for the setting up of a commission of inquiry for the initiation of the procedure for relieving the Prosecutor-General of his post. The group put forward a number of reasons in support of a claim that the Prosecutor-General had broken the law whilst carrying out his duties. These violations included using his position to carry out political blackmail against the deputies, tampering with the charges in certain high profile cases, and undue delay in the investigation of serious crime against the person.

When the Assembly resolved to set up a commission of inquiry, it defined the object of inquiry as the verification of data, facts and circumstances about actions or omissions on the part of the Prosecutor-General that constituted serious violations of the law as well as legal justification for discharging him from his duty. The Prosecutor-General asked the Court to repeal, on unconstitutional grounds, decision no. 31, dated 02.05.2006, of the Assembly of Albania "On the initiation of the procedure of the discharge of the Prosecutor-General from duty," and to rule upon the conflict of powers.

II. The Court took note of the constitutional functions of the Assembly and of the prosecutor's office,

especially those relating to its own commissions of inquiry, the constitutional position of the prosecutor's office within structure of the organs of the state and the constitutional and legal powers of the prosecutor's office. It also examined the development of the role, before, during and after the 1990s. As to the functioning of the Assembly and of its commissions of inquiry, the Court referred to its own case law. A commission of inquiry is set up with a view to recognising and verifying a phenomenon, an event or activity in depth, in order to draw conclusions about the need to approve, amend or add to particular legislation. The exercise of this prerogative by the Assembly is subject to certain limitations. The inquiry should respect constitutional principles, such as separation of powers and the presumption of innocence. The Assembly does have the power to resolve to set up a commission of inquiry to investigate certain issues. However, it should be careful to exercise this competence within the framework of its constitutional functions and to respect the constitutional principles that regulate the activity of the organ under investigation.

The Constitution has attributed the functions of criminal prosecution and of representing the interests of the prosecution on behalf of the state to the Prosecutor-General's office. The Constitution also provides that prosecutors, in the exercise of their duties, should be subject to the Constitution and the law. In order to strengthen the independence of this office, the Constitution made changes to the procedure for appointing the Prosecutor-General and for relieving him of his duties. It also sets out reasons for discharge from duty.

There is a special constitutional link between the institutions of the Assembly and the Prosecutor's Office. This is demonstrated by the fact that, under Article 80.3 of the Constitution, the Prosecutor-General, to the extent permitted by law, is obliged to supply information and explanations to the Assembly or the parliamentary commissions about his or her activities. He or she is also obliged to keep the Assembly informed as to the situation of criminality. See Article 149.4 of the Constitution. However, although the Assembly gives its assent to the appointment of the Prosecutor-General (or proposes his discharge), this does not mean that he or she is directly responsible to the Assembly.

The Court observed that the Prosecutor-General, as director of the prosecutor's office, does not have political responsibility before the Assembly. This is so in order to bring about a prosecution service based on professionalism, with the Prosecutor-General a professional manager of the prosecutor's office, rather than a political manager. These characteristics

ensure the professional independence of the office. One should not construe the obligation of the director of the prosecutor's office to keep the Assembly informed about its activity as a limitation of the independence in the exercise of its functions. Neither the Assembly, nor its commissions of inquiry, is empowered to review decisions made by the prosecutor's office or to compel it to change them. In this context, the Court noted that methods of parliamentary control over the Prosecutor's Office cannot be used as an instrument to examine and evaluate decisions taken by prosecutors on concrete cases. The Assembly can only influence the prosecutor's office through its legislative powers.

The purpose of a commission of inquiry should be to decide upon the need to amend legislation, to complete the legal framework surrounding a matter under investigation, or to define the responsibilities within the sphere in which the investigation is taking place. However, the object of investigation of a commission of inquiry created on this premise may give rise to certain constitutional difficulties, and may affect the constitutional principles and functioning of the prosecution service. The Court accordingly concluded that the Assembly's decision was *ultra vires*. Not only did it fail to respect constitutional principles, it also encroached upon the competences of the prosecutor's office. Cases that are the object of parliamentary investigation, under the Constitution and the relevant legislation, fall within the sphere of functions of the prosecutor's office, which is the only authority with the power to verify them professionally and to take decisions. The Court held that no other institution, and especially not the Assembly, should interfere by checking and taking decisions on them.

The Court has stressed in its jurisprudence that a parliamentary investigation cannot be totally free from restrictions. For instance, the object of investigation must respect constitutional principles, it must have regard to the activity of the legislative power, and it is not to be used in an abusive manner. In this instance, there has been an encroachment by the legislative body into the constitutional and legal powers of the prosecution service, giving rise to a conflict of competences.

On the basis that constitutional jurisdiction covers conflicts of competences between powers in cases that are related to the exercise of their respective competencies, the Court rejected an argument evinced by one of the parties, that the Prosecutor-General does not have authority to set the Court in motion. It also pointed out that the necessary conditions existed, characterising disagreements of competences. The disagreement has arisen between organs that belong to different powers; the

disagreement has arisen between competent organs that are the final arbiter of the will and power of the sphere to which they belong; the disagreement has arisen as to the determination of the sphere of competences defined by the constitutional norms for the relevant powers.

The Court therefore decided to resolve the disagreement of competencies between the Assembly and the Prosecutor-General's Office and to declare that the Assembly of Albania did not have the power to check and evaluate decisions by prosecutors related to the exercise of criminal prosecution and the representation of the prosecution in the name of state.

Cross-references:

- Decision no. 18, dated 14.05.2003, in *Vendime të Gjykatës Kushtetuese* 2003, Tirana 2004, p. 84; *Bulletin* 2003/2 [ALB-2003-2-003].

Languages:

Albanian.



Identification: ALB-2007-2-003

a) Albania / b) Constitutional Court / c) / d) 21.12.2006 / e) 29/06 / f) Resolution of disagreements over powers between central and local government, interpretation of Article 13 of the Constitution / g) *Fletore Zyrtare* (Official Gazette), 140, 5533 / h) CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between State authorities.

1.3.4.4 **Constitutional Justice** – Jurisdiction – Types of litigation – Powers of local authorities.

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

2.1.1.4.14 **Sources** – Categories – Written rules – International instruments – European Charter of Local Self-Government of 1985.

3.4 **General Principles** – Separation of powers.

4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.

4.8.4.2 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Subsidiarity.

Keywords of the alphabetical index:

Autonomy, local / Powers, separation and interdependence, principle / *Res judicata*, definition / Local self-government, legislative power / Decentralisation, principle / Decentralisation, administrative / Decentralisation, financial.

Headnotes:

Conflicts of laws arising from issues related to disputes about power between constitutional organs are issues which should be resolved through the exercise of constitutional review.

Local government is established and should function on the basis of the principle of decentralisation of power. The principles of decentralisation of power and of the autonomy of local government are pivotal to the establishment and functioning of a democratic state under the rule of law. Abusive exercise of central power may lead to the impediment or reduction of competence that the Constitution has attributed to the local government authorities. The government may issue acts with the force of law, but it should be careful not to hinder the exercise of legal and constitutional competence by local government authorities. On the basis of the principle of devolution of power, the legislator may modify the competences assigned by it to local government, but it should be careful not to encroach upon the main competences that the Constitution has vested in local government.

Restrictions on the field of activity of local authorities carry the risk of substantially diminishing their status and role, which would run counter to the constitutional principles upon which the local government has been established and functions.

Summary:

The Municipality of Tirana referred a claim to the Court regarding disagreements in the exercise of constitutional competences between local and central government. The appellant had identified the exercise by several organs of central government of competences of the organs of local government in the field of planning and urban management, as well as supervision of the territory. The exercise of competences had come to light when some subordinate legislation was issued, bestowing upon

the prefect the power to call a meeting of the Council of the Regulation of the Territory (CRT) at the municipality. The enactment of this legislation had blocked the activity of the Municipality of Tirana and the CRT and was at the root of disagreements of competences arising between the central and local government the field of city planning and supervision of the territory.

The Court began by analysing in depth the meaning of a disagreement of competences between the powers, (including disputes between central and local government), and to give an extensive definition of those subjects who have the right to start constitutional proceedings in these circumstances.

The Constitution provides that the Court should decide upon disagreements of competence between powers, including disagreements between central and local government. This includes disagreements arising in the sphere of the separation of powers on the horizontal plane (legislative, executive and judicial) as well as the vertical plane (central and local government).

The separation of powers is essentially nothing more than a separation of competences. A competence is a right that is legally given to an organ or a power in order to decide on specific issues. For a disagreement of competence to be included in constitutional jurisdiction, it should arise between organs that belong to different powers. Each of them should ask the other separately to materialise the will of the power to which it belongs, issuing acts that it considers to belong to its own sphere of competences.

Disagreements of competence can arise where legislation attributes the same competence to two or more institutions, or where different legislation attributes the same competence to two institutions, or where legislation prescribes a competence but does not specify the organ which should exercise it.

According to the organic law, a complaint before the Court is brought by the subjects in conflict or by the subjects directly affected by the conflict. Referring to the principle of the decentralisation of power and local autonomy, the Court held that the Municipality of Tirana had *locus standi* to bring a case of this nature.

The Court dismissed the claim by another party that the case could not be re-examined because of the legal impediment created by the principle of *res judicata*. *Res judicata* is recognised as one of the three forms of effects that a judicial decision has in the abstract procedure of supervision of the

constitutionality of legal norms. The Court concludes that, both in the formal aspect as well as in the substantial aspect, the case does not constitute *res judicata*.

The Municipality of Tirana and several authorities belonging to the central power had had a dispute, which resulted in failure to carry out their normal legal and constitutional activities. The Court took the view that the dispute had arisen because of a duality in the legislation designating the organs that should exercise competences in the field of city planning and supervision of the territory.

The Albanian normative system is not decentralised but hierarchical. In such a normative system, there is very precise detail of the separation of powers at local level. Local government slots into the system of a unitary state. The Albanian normative system is not based on the principle of devolution, which means granting of power by central government to the local units.

On the other hand, local governance means the right of people in a designated territorial community to govern their lives, either through bodies they themselves elect, or directly. The principle of decentralisation of power is pivotal to the establishment and functioning of local government, in a democratic state under the rule of law. It is exercised through the constitutional principle of local autonomy. The manner of organisation and functioning of local government, as well as the relationship that it has with the central power, depends on the constitutional and legal meaning given to the decentralisation of power, local autonomy and self-government.

Decentralisation is a process in which authority and responsibility for particular functions are transferred from central power to units of local government. The principle of subsidiarity is at the root of decentralisation. Under this principle, "the exercise of public responsibilities should, in general, belong more to the authorities that are closer to the citizens." Decentralisation is political and includes the transfer of political authority to the local level through a system of representation based on local political elections. Through administrative decentralisation, responsibility is transferred for issues of the administration of several functions to local units, while financial decentralisation refers to the transfer of financial power to the local level.

The Constitution has adopted a concept of decentralisation, which refers to the restructuring or reorganisation of power and which makes possible the creation and functioning, under the principle of subsidiarity, of a system of joint responsibility of

institutions of government at both the central and local level. This concept responds better to the need for substantial autonomy of local government, to the ability of the latter to facilitate central government, and to the beneficial resolution of local problems.

Autonomy is a legal regime in which the organs of local units operate independently in order to resolve those issues that fall within their competence, under the Constitution and the laws. Local government autonomy is most apparent in the separation of competences, in terms of the powers local government institutions have, or should have, to make their own decisions about problems within their jurisdiction.

Local self-governance is an institution by means of which the citizens' political right of self-government, as their political right, is manifested. Local government institutions cannot be hindered in carrying out their duties; neither can their powers be reduced, as their field of activity is set out within the Constitution. Local self-government is at the root of a democratic state under the rule of law, because of the role it plays in the separation and balance of powers.

The Court emphasised that local self-government is enshrined within the Constitution, and its independence is guaranteed through it. Local government can be described as the combination of *constitutional regime* with parliamentary devolution. The Constitution also connotes respect for two important criteria, exclusivity of competence and complementarity.

The Court viewed the legal provisions which had given rise to the dispute in the context of the constitutional concept of the principle of decentralisation of power and local autonomy and, specifically, against the background of the democratic standards recognised by the European Charter of Local Autonomy (ECLA). The purpose of ECLA is to create in its member states the necessary scope for local authorities to have a wide scope of responsibilities capable of being realised at a local level.

The Court noted that it would be considered a violation of the right to local self-government if the legislator, by removing power from local organs, were to weaken their role to such an extent that their existence or self-government became insignificant. The Court held that the polarisation of power to central government in respect of the approval of construction permits was out of line with constitutional principles and the standards of ECLA. The Court considered that Article 8 of the contested law was unclear and open to misinterpretation, as it did not give a clear technical and legal definition of the terms

“important objects” and “city centres”. As a result, it created a confusion of competences between local and central government.

The Court decided to resolve the dispute as to competences by determining the organ that is competent to examine the issues that are the object of disagreement. The Court declared some legal provisions of the contested law to be incompatible with the Constitution and with the standards of ECLA.

Three members expressed a dissenting opinion.

Languages:

Albanian.



Armenia Constitutional Court

Statistical data

1 May 2007 – 31 August 2007

- 87 applications have been filed, including:
 - 7 applications, filed by the President of the Republic of Armenia
 - 4 application, filed by political parties
 - 3 applications, filed by candidates for membership of Parliament
 - 73 applications, filed by individuals
- 17 cases have been admitted for review, including:
 - 7 applications, concerning the compliance of obligations stipulated in international treaties with the Constitution
 - 5 applications, concerning the issue of constitutionality of certain provisions of laws
 - 5 applications, concerning electoral disputes
- 14 cases heard and 14 decisions delivered (including the decisions on the applications filed before 1 May 2007), including:
 - 6 decisions on individual complaints (in one case the challenged provisions were declared unconstitutional and invalid)
 - 6 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution
 - 2 decisions on electoral disputes (4 applications of political parties have been joint in one case)
- Examination of 5 cases is pending (4 cases on individual complaints and 1 case concerning the compliance of obligations stipulated in international treaties with the Constitution)

Important decisions

Identification: ARM-2007-2-003

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 15.05.2007 / **e)** DCC-702 / **f)** On the compliance of sub-paragraph 1.3 of Article 231.2 of the Code of Civil Procedure and Article 300.2 of the Civil Code with the Constitution of the Republic of Armenia / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Contract, obligation to notarise / Notary, obligation to notarise, contract.

Headnotes:

The system of mandatory notarisation of written contracts and the legislative requirement for state registration of rights originating from or which have been changed or interrupted by these contracts is an essential safeguard of the effective realisation and protection of individual rights. It also serves to ensure the fair fulfillment of obligations assumed by the parties to contracts and, as a result, the guaranteed stability of commercial relations.

Summary:

I. The Applicant argued, that Article 300.2 of the Civil Code contradicted various articles of the Constitution, namely Articles 3, 8.1, 31.1 and 31.2 of the Constitution (the right to property).

Article 300.2 of the Civil Code provides:

“If one of the parties to a contract which requires ratification by a notary has fulfilled it, whether fully or in part, and the other party does not proceed with the notarisation, the Court may recognise the contract as being valid on the basis that one of the parties has fulfilled it”.

The Applicant argued that it derives from the principle of the voluntary nature of the conclusion of contracts. A party to a contract may refuse to conclude it for any reason, and may refuse to have it notarised. In such situations, the law allows a court to recognise the contract as valid. This merits examination, in the light

of the principles of equality and freedom of contract, contained in the Civil Code.

II. The Constitutional Court observed that the system of mandatory notarisation for certain written contracts and the legislative requirement for state registration of the rights originating from or which have been changed or interrupted by these contracts entailed an element of limitation on the realisation of civil rights. However, this was an essential safeguard of the effective realisation and protection of individual rights. It also served to ensure the fair fulfillment of obligations assumed by the parties to contracts and, as a result, the guaranteed stability of commercial relations.

In providing for the compulsory ratification by a notary of certain contracts, Parliament also set out the legal consequences of breaches of that provision. Under Article 300 of the Civil Code, if a party has fulfilled the contract, either fully or in part, but the other party does not have the contract notarised, that party's abstention entitles the other party to assert his or her constitutional right of judicial protection of violated rights. The Court does also have the discretion to recognise the contract as valid.

The Constitutional Court examined the content, practical application and relationship with other legislation of challenged Article 300 of the Civil Code. It held it to be a safeguard for opportunities for the implementation of legitimate measures regarding the conclusion and satisfaction of those contracts that require notarisation, as well as an opportunity for judicial protection of violated rights. The Constitutional Court pronounced it compatible with the Constitution.

Article 231.2.1.3 of the Code of Civil Procedure was also challenged. The Constitutional Court dismissed the case, as Decision CCD-690 on the issue of constitutionality of this provision was available.

Languages:

Armenian.



Identification: ARM-2007-2-004

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 29.06.2007 / **e)** DCC-704 / **f)** On challenging the 18-A decision of 17 May 2007 of the Territorial Electoral Commission N36 on “The Election of the Deputies of the Republic of Armenia National Assembly under Majoritarian System in Constituency N 36 / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

4.9.1 **Institutions** – Elections and instruments of direct democracy – Electoral Commission.

4.9.9.8 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Counting of votes.

Keywords of the alphabetical index:

Election, proportional representation / Election, majority required / Election, vote count, irregularities / Election, Electoral Commission, composition.

Headnotes:

An Electoral Commission member cannot be a candidate for deputy nominated by a political party for the “proportional system”, even though he or she is not in a partisan relationship with the persons nominated as candidates for deputy under the “majoritarian system”.

Summary:

I. The applicant contended that a candidate for election as deputy of the National Assembly, Territorial Electoral Commission N 36, made an unlawful decision, and there were sufficient grounds to invalidate the results of the election. The applicant had calculated the number of discrepancies in Constituency N 36 to be 9632. Under paragraph 1, part 5 of Article 116 of the Election Code, this constituted grounds to invalidate the election, because this level of discrepancy predominated over the difference between the votes cast for the two candidates who received the maximum number of votes.

The applicant also argued that Sanasar Voskanyan was engaged as a commission member in Territorial Electoral Commission N 32. At the same time, he was a candidate for election as deputy, nominated by “*Azgayin Miabanutyun*” (National Unity) party for the proportional system, and was respectively included in the party’s candidate list. There was a breach of Article 34.4 of the Election Code.

II. The Constitutional Court held that the Precinct Electoral Commissions provided the proxies of the candidates with copies of protocols with incomplete data, rather than excerpts from protocols, as provided by the Electoral Code. The applicant had tried to count the discrepancies on the basis of these copies, which was practically impossible.

By examining information collected from the initial data of the voting results, the receipts of ballots and envelopes as distributed to the precincts, and the administrative registers from several precincts, the Constitutional Court was able to assess the true situation of the discrepancies in those precincts that had attracted the applicant’s particular attention, and the Constituency as a whole.

The Constitutional Court held that, under the system of calculation set out in the law, the total number of discrepancies from all precincts of Constituency N 36 was 364. This was 3.2 times less than the difference in the votes cast for the candidates who took first and second places under the “majoritarian system” in that particular Constituency and 2.3 times less than the difference between the votes of the candidates who took the third and the second places.

The Constitutional Court upheld the applicant’s argument that, in precinct N36/32, Sanasar Voskanyan was engaged as a Commission member, and at the same time was a candidate for election as a deputy, nominated by the “*Azgayin Miabanutyun*” party for the proportional system. Irrespective of the fact that this person was not in a partisan relationship with the persons nominated as candidates for deputy under the majoritarian system, the Constitutional Court held that the inadequate control exercised by TEC N 36 had resulted in a breach of Article 34.4 of the Election Code. This provides that, *inter alia*, a candidate for deputy cannot be a Commission member either. In the meantime, even if the TEC overturned the voting results in that precinct, in that case considering also the requirement of Article 40.13 of the Election Code, this could not be sufficient ground to make another decision on the election results on the basis stipulated by Article 116 of the Code.

The Constitutional Court of the Republic of Armenia decided to leave Decision no. 18-A of 17 May 2007 of the Territorial Electoral Commission N 36 on the Election of Deputies of the National Assembly of the Republic of Armenia under the Majoritarian System in Constituency N36 in force.

Languages:

Armenian.



Identification: ARM-2007-2-005

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 24.07.2007 / **e)** DCC-710 / **f)** On the compliance of paragraph 2 of Article 311 and paragraphs 1 and 3 of the first part of Article 414.2 of the Code of Criminal Procedure with the Constitution of the Republic of Armenia / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial/decision within reasonable time.

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.

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

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:

Hearing, adversarial / Criminal procedure, additional preliminary investigation, referral.

Headnotes:

When a court refers a case for additional preliminary investigation, it goes beyond the boundaries of its impartial role and directs the course of the preliminary investigation. Such a function is not compatible with that of the administration of justice.

The realisation of the requirement to interpret the remaining suspicions in favour of the defendant and the court's referral of the case for additional preliminary investigation are factually incompatible.

Summary:

I. Acting on an individual complaint, the Constitutional Court assessed the compliance of the provisions of Article 311.2 and paragraphs 1 and 3 of the first part of Article 414.2 of the Code of Criminal Procedure with the Armenian Constitution.

The Applicant argued that this provision did not comply with certain constitutional articles, including Article 18.2 of the Constitution (right to legal remedy), Article 19.1 of the Constitution (right to judicial protection) and Article 20 of the Constitution (right to review the judgment). It provides that courts may refer cases for additional preliminary investigation, upon the motion of the prosecutor, if there are grounds that strengthen the prosecution's case or factual circumstances that differ from those in the original prosecution case become known.

The applicant pointed out that the principle of adversarial proceedings, enshrined in Article 19 of the Constitution, requires the separation of the criminal prosecution, the conduct of the defence and the resolution of the matter. Different people must carry out these roles. The Court cannot act on the side of the prosecution or the defence. If the Court refers a case for additional preliminary investigation and gives indications to the body of preliminary investigation for the implementation of additional investigative measures, it is carrying out the role of the prosecution. This is contrary to the requirements of Article 19.1 of the Constitution. Moreover, in referring the case for extra investigation, the Court gives the prosecutor the opportunity of extending the period of preliminary investigation and measures of suppression. In such a situation, there will be a question mark over the innocence of the accused, and this is contrary to Article 21 of the Constitution (the principle of presumption of innocence).

II. In his application, the applicant only challenged one article of the Code of Criminal Procedure (Article 311.2 of the Code of Criminal Procedure). Nonetheless, on the basis of Article 68.9 of the Law on Constitutional Court, the Constitutional Court deemed it necessary to assess the constitutional compliance of other provisions of numerous articles of the Code of Criminal Procedure. All of them dealt with the referral of cases by courts for additional preliminary investigation and were closely linked to the challenged provision. The articles in question were Articles 292.5, 297, 363.2, 394.5, 398.6.2, 419 and 421.3.

The Constitutional Court observed that Article 19 of the Constitution requires, *inter alia*, the

implementation of trial on the basis of equality of arms and by an impartial court. When a court refers the case for additional preliminary investigation, it goes beyond the boundaries of its impartial role and directs the course of the preliminary investigation, thus implementing a function not compatible with that of the administration of justice. The Court also violates the equality between the parties in favour of the prosecution, thus violating the parties' rights to effective legal remedy and judicial protection. The Court also runs the risk of infringing other elements of the right to fair trial, namely the requirement to arrange a trial within a reasonable period.

One of the elements of the principle of presumption of innocence enshrined in Article 21 of the Constitution is the requirement to interpret the remaining suspicions in favour of the defendant. The realisation of this requirement and referral by the Court of the case for extra preliminary investigation are factually incompatible. Where the case is referred, the above requirement is breached.

The Constitutional Court pronounced the referral by the Court of a case for extra preliminary investigation to be incompatible with those elements of the right to fair trial guaranteed by Article 6 ECHR, namely trial by an impartial court, the adversarial principle and equality of arms. The procedure set out in the criminal procedural legislation for referral was also pronounced to be out of line with judicial reforms resulting from constitutional amendments: these reforms were directed at the guarantee of the independence and impartiality of courts and to avoiding propensities towards the prosecution by courts.

The Constitutional Court held the challenged provision and the above-mentioned provisions (which were closely linked to the challenged provision) inconsistent with the Constitution and invalid.

A challenge had also been mounted in respect of paragraphs 1 and 3 of the first part of Article 414.2 of the Code of Criminal Procedure. The Constitutional Court dismissed the case, as a Decision CCD-691 on the issue of constitutionality of this provision was available.

Languages:

Armenian.



Azerbaijan Constitutional Court

Important decisions

Identification: AZE-2007-2-002

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 29.06.2007 / **e)** / **f)** / **g)** Azerbaijan, *Respublika, Khalq gazetii, Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.14 **Sources** – Categories – Written rules – International instruments – European Charter of Local Self-Government of 1985.

4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.

4.8.8 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers.

Keywords of the alphabetical index:

Notary, absence, function, exercise by municipality.

Headnotes:

Although Articles 15 and 18.1 of the Law on Notaries do not make provision for certification of testaments by municipalities, they do not rule out the possibility of local institutions being able to certify testaments, in the absence of a notary, as stipulated in Article 1179.2 of the Civil Code.

Summary:

A district court asked the Constitutional Court for an interpretation of certain provisions of the Law on Notaries, which had given rise to difficulties in the certification of testaments by notaries.

The complainant applied to the district municipality for the certification of her testament. She was informed that this lay within the powers of the state notary's office, rather than those of the municipality. The complainant filed a complaint with the district court, citing the district municipal it's failure to certify

and making allegations about actions by local government officials.

At her instigation, the District Court referred the matter to the Constitutional Court, with a request for an interpretation of Articles 15 and 18.1 of the Law on Notaries. The District Court stated in the referral that Article 1179.2 of the Civil Code allows for the certification of testaments by institutions of local government in the absence of a notary. Article 1181 of the Civil Code enumerates those on an equal footing with a notary. Article 15 of the Law on Notaries indicates those subjects who carry out notarial functions in official bodies, whilst Article 18 indicates notarial functions carried out by officials from corresponding authorities. Article 18.1 indicates those who are equal to a notary. However, there is no provision for the performance of that particular notarial function by local government institutions.

The Plenum of the Constitutional Court observed that under Article 142.1 of the Constitution, local government is to be carried out by municipalities. Article 144.2 of the Constitution allows for additional legislative and executive powers for municipalities. Article 1 of the Law on the Status of Municipalities describes local self-government as a system of organisation of citizens' activities which allows them the right to free and independent decision-making on questions of local interest (within the limits of the law). It also allows for part of the work of the state to be carried out in the interests of the local population. The Constitutional Court also observed that the transfer of certain concrete powers to institutions of local government by the legislative and executive authorities is also allowed in international treaties. One example is to be found in Article 4 of the European Charter of Local Self-Government of 15 October 1985. Moreover, under Article 94.1.1 and 94.1.12 of the Constitution, the Parliament is to set out general rules as to individual rights and freedoms, as specified in the Constitution, and state guarantees of these rights and liberties, transactions, civil and legal agreements, representation and inheritance.

Languages:

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



Belgium Court of Arbitration

Important decisions

Identification: BEL-2007-2-004

a) Belgium / b) Court of Arbitration / c) / d) 07.06.2007 / e) 81/2007 / f) / g) *Moniteur belge* (Official Gazette), 19.07.2007 / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

2.1.1.4.18 **Sources** – Categories – Written rules – International instruments – Charter of Fundamental Rights of the European Union of 2000.

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

3.16 **General Principles** – Proportionality.

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

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

5.2 **Fundamental Rights** – Equality.

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

5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Fine, right to property / Circumstance, mitigating, consideration, impossible / Community law, enforcement by member state, penalty under national law / Criminal law, mitigating circumstance / Penalty, individualisation / Customs, penalty / Court, powers / Penalty, mitigation / Penalty, disproportionate / Penalty, minimum / Penalty, maximum / Penalty, proportionality / Right to a fair trial, court, power to take account of a mitigating circumstance.

Headnotes:

The constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), read in conjunction with the right to a fair trial (Article 6.1 ECHR), are violated by a legislative provision requiring the courts to impose fines equivalent to ten times the amount of excise duties evaded, doubled for a repeat offence, in that the provision does not permit the criminal courts to

reduce the fine in any way in the event of mitigating circumstances and may have disproportionate effects, since it fails to set a maximum fine or a minimum fine.

Summary:

I. Defendants were being tried in the criminal court for theft of diesel in breach of the law of 22 October 1997 concerning the structure and rates of excise duties on mineral oil on the ground that, by reason of the theft, they also evaded paying the excise duties. Under Section 23 of that law the penalty for these offences was a fine equivalent to ten times the amount of excise duties evaded, but no less than 250 euros.

The criminal court, whose discretion was fettered by this provision, since it set no minimum and maximum limits on the penalty between which it could decide and it was unable to take account of mitigating circumstances, raised three preliminary questions before the constitutional court as to whether the provision violated the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) and Article 6 ECHR, taken together.

II. The Constitutional Court first noted that the provision was part of criminal-customs law, which is a special branch of criminal law, through which parliament sought, on the basis of a specific system of investigation and prosecution of offences, to combat the extent and frequency of fraud in a particularly technical field concerning activities often of a cross-border nature and governed in large part by numerous European regulations.

In its constitutional review, the Court argued that it was in principle for parliament to determine whether it was desirable to oblige the courts to be strict with respect to offences which are particularly harmful to public interests, especially in a sphere susceptible, as in the instant case, to large-scale fraud. Such strictness could be applied not only to the level of the fine, but also to the courts' possibility of reducing the fine below the prescribed limits where there are mitigating circumstances. The Court added that it could denounce such a decision only if it was clearly unreasonable or the effect of the contested provision was to deprive a category of defendants of the right to a fair hearing before an impartial and independent court, as guaranteed by Article 6.1 ECHR.

The Court began by answering the second preliminary question, which called for a comparison between the obligation for the criminal court to impose a fine equivalent to ten times the amount of duties evaded, without being able to take account of mitigating circumstances, and the situation under

Section 263 of the General Customs and Excise Law, whereby the authorities were allowed to bargain with a defendant (until reaching agreement on the amount of the fine) where mitigating circumstances existed. As in a number of earlier judgments, the Court held that this difference in treatment contravened the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) and the right to a fair trial guaranteed by Article 6 ECHR, taken together.

The Court then jointly examined the first and the third preliminary questions. The first of these questions concerned the difference in relation to ordinary criminal law, which indeed set minimum and maximum penalties and allowed the criminal courts to determine a sentence below the legal minimum to take account of mitigating circumstances. The third preliminary question concerned the difference between the type of fine imposed under the contested provision (invariably equivalent to ten times the amount of duties evaded) and the type of fine provided for under Section 239 of the General Customs and Excise Law (which could vary according to certain conditions).

The Court noted that the law of 22 October 1997 to which the impugned provision belonged, had been passed pursuant to Community law. It pointed out that Article 10 EC establishing the European Community [...] provided that member states should take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations, while, if necessary, establishing effective, proportionate, dissuasive penalties under national law. In this respect, the Court referred to a number of judgments of the Court of Justice of the European Communities. It added that the member states were obliged to exercise this competency in accordance with Community law and its general principles and, consequently, in keeping with the principle of proportionality, set out *inter alia* in Article 49.3 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ C 364, p. 1), whereby "the severity of penalties must not be disproportionate to the criminal offence." The Court recognised that this Charter was not legally binding per se but added that it reflected the principle of the rule of law on which the Union was founded, by virtue of Article 6 of the Treaty on European Union, and constituted an illustration of the fundamental rights, as guaranteed by the European Convention on Human Rights and resulting from the constitutional traditions common to the member states, which the Union was bound to respect as general principles of Community law. It followed that penalties imposed for offences against provisions of Community law must not be disproportionately severe (the Court referred to the judgment of the Court

of Justice of the European Communities of 3 May 2007, C-303/05, ASBL (non-profit making association) "Advocaten voor de wereld", §§ 45 and 46).

In its arguments, the Court also relied on the right to respect for property, guaranteed under Article 1 Protocol 1 ECHR. It argued that a fine set at ten times the amount of the evaded excise duties could, in certain cases, be so severely detrimental to the financial situation of the person on whom it was imposed that it might be disproportionate to the legitimate aim being pursued and constitute a violation of the right to respect for property guaranteed under Article 1 Protocol 1 ECHR (in this connection the Court referred to the European Court of Human Rights' *Mamidakis v. Greece*, Judgment of 11 January 2007).

The Court held that a provision that prevented a court from avoiding a violation of this article disregarded the right to a fair trial guaranteed by Article 6.1 ECHR.

It ruled that the impugned legislative provision breached the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), read in conjunction with Article 6.1 ECHR, since it prevented the criminal courts from reducing the fine provided for therein in any way in the event of mitigating circumstances and could have disproportionate effects since it failed to institute a maximum fine and a minimum fine.

Languages:

French, Dutch, German.



Identification: BEL-2007-2-005

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 19.07.2007 / **e)** 106/2007 / **f)** / **g)** *Moniteur belge* (Official Gazette), 23.07.2007 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.3.2.2 **Constitutional Justice** – Jurisdiction – Type of review – Abstract / concrete review.

1.5.4.5 **Constitutional Justice** – Decisions – Types – Suspension.

5.2 **Fundamental Rights** – Equality.

5.4.1 **Fundamental Rights** – Economic, social and cultural rights – Freedom to teach.

Keywords of the alphabetical index:

Education, school, head / Education, grant, withdrawal / Education, freedom, entitlement to grants, conditions.

Headnotes:

Freedom of education entails the freedom, for the organising authority, to choose the staff responsible for implementing the specific teaching objectives it has set itself. It does not prevent the competent legislative authority from imposing restrictions, *inter alia* to guarantee the quality of education, on condition that these are reasonably justified and proportionate to the aim and effects of the measure.

Suspension by the Constitutional Court must make it possible to avoid a serious damage to the applicants resulting from the immediate application of contested legislation, which could not be repaired by the effect of any annulment or only with difficulty.

Summary:

The Constitutional Court received a request for suspension joined to an appeal for annulment of a provision of a decree of 2 February 2007 by the French-speaking Community governing the status of school heads.

The action was brought by the head of a primary school and a non-profit making association, the authority running this school, which belonged to the non-denominational free education movement and was in receipt of grants from the French-speaking Community. At this stage the Court acknowledged these parties' interest to act since it had been sufficiently shown that the contested provision was likely to have direct unfavourable consequences for them.

Section 20.1 of the Special Law of 6 January 1989 governing the powers, membership, functioning and procedure of the Constitutional Court stipulated two substantive conditions that must be met for the Court to be able to suspend legislation: sufficiently strong arguments must be put forward, and the immediate enforcement of the contested legislation must run the risk of causing serious damage that would be difficult to repair.

With regard to the seriousness of the arguments, the Court pointed out that a sufficiently strong argument was not the same as a well-founded argument. It was enough that the argument should appear founded following an initial examination of the elements in the Court's possession at this stage of the proceedings.

Based on its case-law, the Court reiterated that freedom of education (Article 24.1 of the Constitution) entailed that the organising authorities that are not directly part of a Community should be able, under certain conditions, to apply for grants from the Community concerned. Entitlement to grants was limited, firstly, by the Community's right to make them subject to public-interest requirements, *inter alia* concerning the quality of the education provided and in compliance with the rules concerning the school population and, secondly, by the need to distribute the available financial resources among the Community's various tasks. Freedom of education was accordingly subject to limits and did not prevent the decree-making authority from imposing conditions in matters of funding and the award of grants which restricted the exercise of that freedom. Such measures could not in themselves be considered to infringe freedom of education. Things would be otherwise if it were to be shown that the ensuing tangible restrictions on that freedom were inconsistent with the aim being pursued or disproportionate thereto.

Freedom of education includes freedom of the organising authority to choose the staff responsible for implementing the specific teaching objectives it had set itself. It did not prevent the competent legislative authority from imposing restrictions, *inter alia* to guarantee the quality of education, on condition that these were reasonably justified and proportionate to the aim and effects of the measure.

The Court pointed out that, as could be seen from the title of the previously cited decree, the French-speaking Community wished to give the office of head of school specific, appropriate status. The Court allowed that, with a view to guaranteeing the quality of education receiving public funding, the decree-making authority could require that a head of school should have certain capacities, qualifications and training guaranteeing that he/she had the necessary skills for the office, just as it could sanction the disregard of this requirement.

At this stage the Court did not consider whether, by withdrawing grants from a school which chose a head who was not a member of staff in receipt of an officially subsidised salary, the decree-making authority had shown appropriate respect for freedom of education. It reserved this question for a later stage of the proceedings, i.e. the examination of the appeal

for annulment. However, it observed already at this stage that the measure appeared to constitute a serious interference with freedom of education, since non-compliance with the requirement had been sanctioned by withholding of the grants awarded to the school with effect from 1 September 2007. Since it did not provide for any transitional measure in favour of the category of persons to whom the first applicant belonged as head of the school, the legislative authority treated this category differently from other heads, who were themselves able to benefit from the transitional provisions, without there being anything to show that there were reasonable grounds for this difference in treatment.

On the basis of the elements in its possession at this stage, the Court deemed that the arguments were sufficiently strong.

The Court also held that the risk of causing serious damage that would be difficult to repair was established. The contested provision indeed obliged the organising authority to appoint a new head to replace the first applicant, failing which it would lose the grants it received from the French-speaking Community. Loss of grants for a school which had so far been in receipt of them might seriously jeopardise the continuation of its activities and threatened its survival. Both applicants' interests would be harmed by this measure. Should the organising authority decide to appoint a new head, pursuant to the decree, both parties' interests would also be harmed: a change of head was suddenly imposed although the current head gave full satisfaction; this change would moreover take place just a few weeks before the beginning of the new school year, which entailed a real risk of disorganisation and of undermining the quality of the school's management.

The Court therefore decided to suspend the impugned provision since, for lack of a transitional provision in favour of the category of heads to which the first applicant belonged, its implementation with effect from 1 September 2007 was likely to cause the applicants serious damage, as described in the judgment.

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2007-2-003

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 30.03.2007 / **e)** AP-1785/06 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 57/07 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources** – Categories – Written rules – International instruments – Geneva Conventions of 1949.

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

2.1.2.2 **Sources** – Categories – Unwritten rules – General principles of law.

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

2.1.3.2.3 **Sources** – Categories – Case-law – International case-law – Other international bodies.

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

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

5.2 **Fundamental Rights** – Equality.

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

5.3.16 **Fundamental Rights** – Civil and political rights – Principle of the application of the more lenient law.

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

Keywords of the alphabetical index:

Crime against humanity / Criminal law, unreasonable discrimination / Criminal law, retroactive / Criminal law / Fairness, principle.

Headnotes:

A conviction resulting from the retrospective application of national law will not violate Article 7 ECHR if the conviction derives from a crime under “international law” at the time when it was committed.

There are no legal arguments to support an allegation of discrimination when no violation of constitutional rights or those guaranteed by the European Convention on Human Rights has been established.

Summary:

I. The appellant lodged an appeal with the Constitutional Court against the verdict of the Court of Bosnia and Herzegovina (hereinafter “the State Court”). He had been found guilty of violation of Article 3.1.b of the IV Geneva Convention and Article 173.1.e, in conjunction with Article 31 (War Crimes against Civilians) of the Criminal Code of Bosnia and Herzegovina (referred to here as “Criminal Law of BiH”). He was sentenced to five years in prison. At the root of the appellant’s argument was the relationship between the respective criminal proceedings and Article 7 ECHR. The appellant pointed out that he was sentenced under the Criminal Code of BiH, not under the Criminal Code of the SFRY. In his view, the Criminal Code of SFRY, in force at the time of the commission of the criminal offence of which he was convicted, was a more lenient law than the Criminal Code of BiH. That code prescribes a punishment of long-term imprisonment for the severest forms of that criminal offence. The philosophy of the SFRY Criminal Code was such that it did not provide for long-term imprisonment or life sentences but simply the death penalty for a serious crime or a fifteen-year maximum sentence for a less serious crime.

II. The Constitutional Court noted that Article 7.2 ECHR refers to “the general principles of law recognised by civilized nations”, and Article III.3.b of the Constitution establishes that “the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.” It follows from this provision that these principles constitute an integral part of the legal system in Bosnia and Herzegovina, even without ratification of conventions and other documents regulating their application. This accordingly also includes the 1993 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former SFRY (UN Document no. S25704).

The Constitutional Court also observed that the phrase “*travaux préparatoires*” refers to the formulation in Article 7.2 ECHR, which is calculated to “make it clear that Article 7 has no effect upon laws adopted in certain circumstances after World War II and directed at the punishment of war crimes, treason and collaboration with enemy. Neither is it aimed at either the moral or legal disapproval of such laws.” (See *X v. Belgium*, no. 268/57, 1 Yearbook 239 (1957); the translation in the Third Digest 34 cf. *De Becker v. Belgium* no. 214/56), 2 Yearbook 214 (1958)). In fact, the wording of Article 7 ECHR is not restrictive and it has to be construed dynamically so to encompass other acts which imply immoral behaviour generally recognised as criminal according to national laws.

In Case no. 51891/99, *Naletilic v. the Republic of Croatia*, the European Court of Human Rights took a decision on 4 May 2000. The applicant in those proceedings was charged by the Prosecutor’s Office of the International Criminal Tribunal for the former Yugoslavia with war crimes committed in the territory of Bosnia and Herzegovina and in fact submitted exactly the same complaints as those of the appellant in the present case. He too pointed out the application of “more lenient law”, i.e. he highlighted that the Criminal Code of the Republic of Croatia stipulates a more lenient criminal sanction than the Statute of the International Criminal Tribunal for the former Yugoslavia. He also mentioned the application of Article 7 ECHR.

In its Judgment, the European Court of Human Rights considered the application of Article 7 ECHR and took the following decision about the applicant’s claim that he might receive a harsher punishment from the ICTY than he might have received from domestic courts, if the latter exercised their jurisdiction to finalise the proceedings against him. “Even if one assumes Article 7 ECHR to apply to the present case, the specific provision that could be applicable to it would be paragraph 2 rather than paragraph 1. This means that the second sentence of Article 7.1 ECHR invoked by the applicant could not apply. It follows that the application is manifestly ill-founded ... and, therefore, must be rejected...”.

Finally, the Constitutional Court observed that the Nuremberg and Tokyo War Crimes Trials took place in 1945 and 1946, after World War II, for crimes that were only subsequently defined by the Geneva Convention as acts amounting to war crimes, crimes against humanity, crimes of genocide, etc. The International Law Commission in its Yearbook of 1957, Vol. II, confirmed aggressive war as an “international crime”. Related discussions on the principle “*nullum crimen nulla poena sine lege*” took

place at that time. The same applies to the 1993 Statute of International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former SFRY (UN document no. S25704).

In the view of the Constitutional Court, there is a very obvious and close relationship between the concept of individual criminal responsibility for acts committed contrary to the Geneva Convention or appropriate national laws and the concept of human rights protection. The human rights element and the Conventions cover the right to life, the right to physical and emotional integrity, prohibition of slavery and torture, prohibition of discrimination and others. In the Constitutional Court’s opinion, a lack of protection for victims, in the form of insufficient sanctions for perpetrators of crime, is contrary to the principle of fairness and the rule of law, which are enshrined in Article 7 ECHR, which, in paragraph 2 allows an exemption from the rule set forth in paragraph 1 of the same article. In view of the above, and having regard to the application of Article 4.a of the Criminal Code of BiH in conjunction with Article 7.1 ECHR, the Constitutional Court ruled that the application of the Criminal Code of BiH in the proceedings conducted before the State Court did not constitute a violation of Article 7.1 ECHR.

The appellant had also claimed to have been a victim of discrimination with regard to respect for the right to a fair trial and the application of Article 7 ECHR. He mentioned that his case was decided by the State Court differently compared to identical cases decided by Entities’ courts in other court proceedings. He argued that he was entitled to an identical judicial outcome.

On the discrimination point, the Constitutional Court emphasised that the criminal laws at the level of the Entities do not comprise any provisions relating to “criminal offences against humanity and values protected by international law” (those are contained in the Criminal Code of BiH). Neither did they contain a provision equivalent to Article 4.a of the Criminal Code of BiH. In effect, they did not incorporate Article 7 ECHR into their provisions.

The Constitutional Court took the view that this gap within the Entity laws imposed an even greater obligation on the courts of the Entities to apply the Criminal Code of BiH and other relevant laws and international documents applicable in Bosnia and Herzegovina when presiding over war crimes cases. It follows from the above that the courts of the Entities are also obliged to pursue the case law of the State

differentiated treatment by the courts of the Entities does not necessarily constitute discrimination against the persons subject to the proceedings at the level of Bosnia and Herzegovina unless it can be shown that that the laws applied at the level of Bosnia and Herzegovina are in violation of the Constitution or the European Convention on Human Rights. The Constitutional Court has observed such practice and differentiated legal arrangements at the level of the Entities but it cannot exercise its jurisdiction under Article VI.3.a of the Constitution since the parties to the present proceedings have not filed a request for a constitutional review in that regard.

Judge Tadic gave a separate dissenting opinion.

Languages:

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



Bulgaria Constitutional Court

Statistical data

1 May 2007 – 31 August 2007

Number of decisions: 2



Canada

Supreme Court

Important decisions

Identification: CAN-2007-2-002

a) Canada / **b)** Supreme Court / **c)** / **d)** 08.06.2007 / **e)** 30554 / **f)** Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia / **g)** [2007] x S.C.R. xxx / **h)** Internet: <http://www.droit.umontreal.ca/doc/csc-scc/en/index/html>; [2007] 7 *Western Weekly Reports* 191; 65 *British Columbia Law Reports* (4th) 201; 363 *National Reporter* 226; [2007] S.C.J. no. 27 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Union, right to bargain collectively / Discrimination, health care workers.

Headnotes:

Freedom of association guaranteed by Section 2.d of the Canadian Charter of Rights and Freedoms includes a procedural right to collective bargaining. However, only where the matter is both important to the process of collective bargaining and has been imposed in violation of the duty of good faith negotiation will Section 2.d be breached.

Summary:

I. The Health and Social Services Delivery Improvement Act was adopted as a response to challenges facing British Columbia's health care system. The Act was quickly passed and there was no meaningful consultation with unions before it became law. Part 2 of the Act introduced changes to transfers and multi-worksites assignment rights

(Sections 4 and 5), contracting out (Section 6), the status of contracted out employees (Section 6), job security programmes (Sections 7 and 8), and layoffs and bumping rights (Section 9). It gave health care employers greater flexibility to organise their relations with their employees as they see fit, and in some cases, to do so in ways that would not have been permissible under existing collective agreements and without adhering to requirements of consultation and notice that would otherwise obtain. It invalidated important provisions of collective agreements then in force, and effectively precluded meaningful collective bargaining on a number of specific issues. Furthermore, Section 10 voided any part of a collective agreement, past or future, which was or will be inconsistent with Part 2, and any collective agreement purporting to modify these restrictions. The appellants challenged the constitutional validity of Part 2 of the Act as violative of the guarantees of freedom of association and equality rights protected by, respectively, Sections 2.d and 15 of the Canadian Charter of Rights and Freedoms. Both the trial judge and the Court of Appeal found that Part 2 of the Act did not violate the Charter.

II. The Supreme Court of Canada, in a majority decision, held that Sections 6.2, 6.4 and 9 of the Act are unconstitutional and suspended this declaration for a period of 12 months.

The constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. Section 2.d of the Charter does not guarantee the particular objectives sought through this associational activity but rather the process through which those goals are pursued. It means that employees have the right to unite, to present demands to government employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2.d imposes corresponding duties on government employers to agree to meet and discuss with them. However, Section 2.d does not protect all aspects of the associational activity of collective bargaining. It protects only against "substantial interference" with associational activity. Determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries:

1. the importance of the matter affected to the process of collective bargaining, and more specifically, the capacity of the union members to come together and pursue collective goals in concert; and

2. the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

A basic element of the duty to bargain in good faith is the obligation to actually meet and to commit time to the process. The parties have a duty to engage in meaningful dialogue, to exchange and explain their positions and to make a reasonable effort to arrive at an acceptable contract.

In this case, Sections 4, 5, 6.2, 6.4 and 9 of the Act, in conjunction with Section 10, interfere with the process of collective bargaining, either by disregarding past processes of collective bargaining, by pre-emptively undermining future processes of collective bargaining, or both. The provisions dealing with contracting out (Sections 6.2 and 6.4), layoffs (Sections 9.a, 9.b and 9.c) and bumping (Section 9.d) deal with matters central to the freedom of association and amount to substantial interference with associational activities. Furthermore, these provisions did not preserve the processes of collective bargaining. Although the government was facing a situation of urgency, the measures it adopted constituted a virtual denial of the Section 2.d right to a process of good faith bargaining and consultation.

The Section 2.d infringement is not justified under Section 1 of the Charter. While the government established that the Act's main objective of improving the delivery of health care services and sub-objectives were pressing and substantial, and while it could logically and reasonably be concluded that there was a rational connection between the means adopted by the Act and the objectives, it was not shown that the Act minimally impaired the employees' Section 2.d right of collective bargaining. This was an important and significant piece of labour legislation which had the potential to affect the rights of employees dramatically and unusually. Yet, it was adopted rapidly with full knowledge that the unions were strongly opposed to many of the provisions, and without consideration of alternative ways to achieve the government objective, and without explanation of the government's choices.

Part 2 of the Act does not violate Section 15 of the Charter. The distinctions made by the Act relate essentially to segregating different sectors of employment, in accordance with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force, and do not amount to discrimination under Section 15 of the Charter. The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are. Nor does the evidence disclose that

the Act reflects the stereotypical application of group or personal characteristics.

In a partially dissenting opinion, one judge generally agreed with the majority's reasons concerning the scope of freedom of association under Section 2.d of the Charter and with their conclusion that no claim of discrimination has been established, but disagreed with their analysis relating to both the infringement of Section 2.d and the justification of the infringement under Section 1 of the Charter.

She indicated that a "substantial interference" standard for determining whether a government measure amounts to an infringement of Section 2.d should not be imposed. In this case, the freedom of association of health care employees has been infringed in several instances, because Sections 4, 5, 6.2, 6.4 and 9 of the Act (in conjunction with Section 10) interfere with their right to a process of collective bargaining with the employer. However, only Section 6.4 fails both the minimal impairment test and the proportionate effects test and is unconstitutional.

Languages:

English, French (translation by the Court).



Identification: CAN-2007-2-003

a) Canada / **b)** Supreme Court / **c)** / **d)** 28.06.2007 / **e)** 30611 / **f)** Canada (Attorney General) v. JTI-Macdonald Corp. / **g)** *Canada Supreme Court Reports* (Official Digest), [2007] x S.C.R. xxx / **h)** Internet: <http://scc.lexum.umontreal.ca/en/index.html> ; [2007] S.C.J. no. 30 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

- 2.3.3 **Sources** – Techniques of review – Intention of the author of the enactment under review.
 3.20 **General Principles** – Reasonableness.
 5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Tobacco, advertising, promotion / Expression, value / Advertising, limitation.

Headnotes:

The provisions of the Tobacco Act forbidding false or misleading advertising, lifestyle advertising and advertising appealing to young persons, and those of the Tobacco Products Information Regulations requiring mandatory warnings on packaging represent limits on the tobacco manufacturers' right to freedom of expression guaranteed by Section 2.b of the Canadian Charter of Rights and Freedoms. Those limits are justified under Section 1 of the Charter.

Summary:

I. In 1995, the Court struck down provisions of the Tobacco Products Control Act that broadly prohibited all advertising and promotion of tobacco products and required that unattributed warning labels be affixed on tobacco product packaging. In response to the Court's decision, Parliament enacted the Tobacco Act and the Tobacco Products Information Regulations. The scheme of the new legislation involves permitting information and brand-preference advertising, while forbidding lifestyle advertising and promotion, advertising appealing to young persons, and false or misleading advertising or promotion. In addition, the size of health warnings on packaging is increased from 33 percent to 50 percent of the principal display surfaces. The tobacco manufacturers challenged the new legislation, alleging that some provisions limited their right to freedom of expression under Section 2.b of the Canadian Charter of Rights and Freedoms and that those limits were not justified under Section 1 of the Charter. The Superior Court of Quebec determined that the impugned provisions were constitutional and dismissed the manufacturers' actions. The Quebec Court of Appeal upheld most of the scheme, but found parts of some of the provisions to be unconstitutional. The Attorney General of Canada appealed the findings of unconstitutionality, and the tobacco manufacturers cross-appealed on some of the provisions held to be constitutional. The Supreme Court found that all the provisions at issue were constitutional.

II. Section 19 of the Act bans the promotion of tobacco products, subject to specific exceptions. Section 18.2 excludes some forms of promotion from this ban, including scientific works that "use or depict" tobacco products, so long as no consideration is given for the use or depiction of the tobacco product. Properly construed, Sections 18 and 19 of the Act do

not have the effect of preventing the publication of legitimate scientific works sponsored by the tobacco manufacturers and do not unjustifiably restrict the manufacturers' right to freedom of expression. The word "promotion" in Section 18 should be read as meaning commercial promotion directly or indirectly targeted at consumers.

Section 20, which bans "false, misleading or deceptive" promotion, as well as promotion "likely to create an erroneous impression about the characteristics, health effects or health hazard of the tobacco product or its emissions", clearly infringes the guarantee of freedom of expression. However, the ban is justified. This phrase is directed at promotion that, while not literally false, misleading or deceptive in the traditional legal sense, conveys an erroneous impression about the effects of the tobacco product, in the sense of leading consumers to infer things that are not true. Prohibiting such forms of promotion is rationally connected to Parliament's public health and consumer protection purposes. The ban is not overbroad or vague, but rather falls within a range of reasonable alternatives. The expression at stake is of low value.

Section 22.2 permits information and brand-preference advertising in certain media and certain locations, but Section 22.3 bans "advertising that could be construed on reasonable grounds to be appealing to young persons". This limit on free expression is justified.

Section 22.3 requires the prosecution to prove that there are reasonable grounds to believe that the advertisement of a tobacco product at issue could be appealing to young persons, in the sense that it could be particularly attractive and of interest to young persons, as distinguished from the general population. Given the sophistication and subtlety of tobacco advertising practices in the past, Parliament cannot be said to have gone further than necessary in blocking advertising that might influence young persons to start smoking. Moreover, the vulnerability of the young may justify measures that privilege them over adults in matters of free expression.

The ban on "lifestyle advertising" in Section 22.3 also constitutes a justified limit. The phrase "or evokes a positive or negative emotion about or image of, a way of life" is aimed at precluding arguments that to constitute lifestyle advertising, there must be a link, on the face of the advertisement, between the tobacco product and a way of life. This phrase should be interpreted in a way that leaves room for true information and brand-preference advertising.

Furthermore, since sponsorship promotion is essentially lifestyle advertising in disguise, the general ban in Section 24 on that kind of promotion is similarly justified. The specific prohibition on using corporate names in sponsorship promotion and on sports or cultural facilities in Sections 24 and 25 is also justified. The evidence establishes that as restrictions on tobacco advertising tightened, manufacturers increasingly turned to sports and cultural sponsorship as a substitute form of lifestyle promotion. Placing a tobacco manufacturer's name on a facility is one form such sponsorship takes. Even where there is no overt connection between the corporate name and the brand name of a tobacco product, the corporate name may serve to promote the sale of the tobacco product.

The requirement in the Tobacco Products Information Regulations that the government's health warnings occupy at least 50 percent of the principal display surfaces of packages infringes Section 2.b of the Charter, but the infringement is justified under Section 1. The requirement for warning labels, including their size, falls within a range of reasonable alternatives. The reasonableness of the government's requirement is supported, notably, by the fact that many countries require warnings at least as large as Canada's. Finally, the benefits flowing from larger warnings are clear, while the detriments to the manufacturers' expressive interest in creative packaging are small.

Languages:

English, French (translation by the Court).



Croatia Constitutional Court

Important decisions

Identification: CRO-2007-2-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 07.02.2007 / **e)** U-III-3138/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 22/07 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

5.2.2.2 **Fundamental Rights** – Equality – Criteria of distinction – Race.

5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – Ethnic origin.

5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

Education, primary / Education, organisation / Roma, schooling, separate class.

Headnotes:

In principle, separate classes in primary school are only justifiable for those pupils who have yet to master the Croatian language to the extent that they can successfully access the school curriculum. There are no objective and justified reasons not to include within regular primary classes those pupils who have mastered the language and can access the curriculum. The primary education system should be organised in such a way that each pupil receives the same treatment in relatively similar situations. Derogations from this rule may be deemed acceptable, provided they are necessary in a democratic society, and have a reasonable justification and legitimate aim.

The Constitution and the Convention ensure the right of access to educational institutions. They also bestow the right to receive an effective education, and every person has an equal legal opportunity to obtain official recognition of the specific level of education that he or she has successfully completed. The necessary precondition for this recognition is prior completion of the curriculum prescribed for a particular level of education.

Summary:

I. Fifteen applicants from the Roma national minority, who had been primary school pupils in the academic year 2001/2002, filed a suit against the schools in question, Međimurje County and the Ministry of Education and Sports. They alleged that the above parties had acted unlawfully in organising the education of Roma pupils by placing them in separate classes. They argued that this resulted in an inferior level of education, and pointed out that "segregation" even continued in higher grades.

The first instance court found that the criterion for setting up these classes in the defendant primary schools was knowledge of the Croatian language, rather than the pupils' ethnic origins. It invoked various provisions of Article 27/1 of the Primary Education Act, in support of its findings. Under these provisions, teaching in Croatian primary schools is carried out in the Croatian language and Latin script. Without sufficient knowledge of the Croatian language, pupils cannot absorb their course materials. It did not find any unlawful actions by the defendants. Only in exceptional situations children are transferred from class to class. Moreover, the applicants had not supplied any proof of alterations to classes once they were formed. Stability in class formation is important, as it helps to maintain the integrity of a class and a sense of togetherness in the higher grades.

The second instance court, upon appeal by the applicants, upheld the first instance court's findings and confirmed its judgment.

The applicants then launched a constitutional complaint, alleging that they were placed in separate Roma classes solely on the grounds of their racial and ethnic origin and had received a considerably inferior education. They also suggested that the lower courts' findings had breached their rights, by finding that schools were justifying in continuing with separate classes in higher grades, so as not to disrupt the integrity of a class and to foster a sense of togetherness. They argued that these considerations should not have outweighed their constitutional rights and rights to multi-culturalism, equality and national equality. Lastly, they pointed out that the defendants'

conduct had resulted in their being subjected to racial segregation.

The Constitutional Court found that the pupils of Roma nationality were placed in separate classes in order to achieve a legitimate goal, consisting of making necessary adjustments to the primary education system reflecting the applicants' abilities and needs. The decisive factor here was that the applicants had little or no proficiency in the Croatian language in which teaching is carried out. The purpose of forming special classes for children enrolled in the first grade of primary school was not to enforce racial segregation. Rather, it was a measure intended to intensify the work with children, aimed at teaching them the Croatian language and removing the consequences of previous social deprivation.

II. The Constitutional Court referred to Articles 23.1 and 65.1 of the Constitution, which respectively deal with prohibition of any kind of ill treatment and provide for compulsory free education. Each article was to read separately and in conjunction with Article 14 of the Constitution (prohibition of discrimination and equality of all before the law) and Article 3 ECHR, this being the prohibition of torture and degrading treatment. Also relevant here was the first sentence of Article 2 Protocol 1 ECHR (no one shall be denied the right to education), taken alone and in conjunction with Article 14 ECHR.

According to jurisprudence of the European Court of Human Rights, discrimination consists of different treatment, without objective and reasonable justification, for persons in similar situations. The Constitutional Court noted that the separate classes for the applicants were arranged for the purpose of achieving a legitimate goal, namely making necessary adjustments within the primary education system according to the complainants' abilities and needs. The decisive factor here was that the applicants had little or no proficiency in the Croatian language in which teaching is carried out. Therefore, the purpose of the special classes was to concentrate efforts on the children, to bring them up to speed with the Croatian language and to remove the consequences of previous social deprivation. The Constitutional Court pointed out that the applicants themselves had stated in the constitutional complaint that in the academic year 2001/2002, 40.93% of Roma children were placed in regular classes immediately as they enrolled. This strengthens the Constitutional Court's conclusion that there was no reason to doubt the work being done in primary schools. The Court had heard from expert commissions composed of experts in the fields of pedagogy, educational psychology and special educational needs, which were responsible for placing each child into the appropriate class.

The Constitutional Court accepted the applicants' argument that there is no justifiable reason to maintain separate classes in the higher grades, especially when somebody has mastered the Croatian language and successfully absorbed the course material. If such pupils are held against their will in the separate classes, for reasons other than their needs and abilities, this runs counter to the principle of equality before the law, guaranteed in Article 14.2 of the Constitution. This particular constitutional complaint confined itself to a general statement about the running of separate classes in the higher grades. It did not specify whether any or all of the applicants had suffered a violation of his or her right to equality before the law because they found themselves in that situation that year. The Constitutional Court accordingly found no grounds for ruling that the judgments before the lower courts had breached the right to equality of any of the applicants. Furthermore, the Constitutional Court warned that the primary education system should be organised so that each pupil receives the same treatment in relatively similar situations. Measures departing from this rule, if they are necessary in a democratic society, and have a reasonable justification and legitimate aim (in this particular case, the formation of separate classes for pupils who have little or no proficiency in the Croatian language) may be found acceptable.

The Constitutional Court rejected the applicants' argument that there was a reduced curriculum in the classes they attended. There may be objective reasons for differences in teaching plans and programmes for parallel classes, such as a large number of unexplained absences. This does not amount to non-compliance with the requirement that teaching should be carried out by means of the same plans and programmes for all parallel classes. The Constitution and the European Convention guarantee the right to access the educational institutions in the country, as well as the right to receive effective education, and the right to obtain official recognition of the specific level of education that has been successfully completed. The necessary precondition for this recognition is prior completion of the curriculum prescribed for a particular level of education. This applies to all persons having the status of a pupil or a student, including the applicants.

The Constitutional Court stated that the competent courts had found that the placement of the applicants into separate classes, in which teaching was delivered in compliance with the Primary School Curriculum adopted by the Ministry of Education and Sports (i.e. to the same extent as in other, parallel classes), was not motivated by the applicants' racial or ethnic origins. No form of ill-treatment could be

deduced from the defendants' conduct. They were not segregated in order to debase them, and these actions could not be said to affect their personalities in a way which fell foul of Article 23 of the Constitution and Article 3 ECHR.

Languages:

Croatian, English.



Identification: CRO-2007-2-006

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 21.02.2007 / **e)** U-I-1559/2001 and others / **f)** / **g)** *Narodne novine* (Official Gazette), 26/07 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
 3.16 **General Principles** – Proportionality.
 3.18 **General Principles** – General interest.
 4.10.7.1 **Institutions** – Public finances – Taxation – Principles.
 5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
 5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
 5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Property right, restriction / Taxation / Tax, proportional contribution / Tax, punitive.

Headnotes:

A legal provision, introducing a tax for not using real property, and which indirectly obliges property owners to use their properties constitutes a restriction on the right to ownership of real property. It goes beyond constitutionally permitted restrictions on property rights, because the purpose behind its enactment is not the realisation of a legitimate goal prescribed by the Constitution. It is also out of proportion to the nature of the need for the restriction.

Owners of business property, undeveloped building plots and uncultivated cultivable agricultural land must not be forced to act in a certain way (i.e. to use their property) unless it can be defined as a contribution to the general good, for example the protection of national interests and security, nature, the environment and public health.

Such taxes are punitive by nature. They contravene the constitutional principles of equity and equality in the taxation system and the principle according to which everybody has to contribute towards public expenditure, in line with his or her financial position.

Summary:

I. At the request of two natural persons, the Constitutional Court initiated the review of the constitutionality of certain provisions of the Local Self-Government and Administration Units Financing Act (referred to here as "the Act"). The provisions in question were Articles 38.a, 38.b, 38.c, 38.d, 38.e, 38.f, 38.g, 38.h, 38.i, 38.j, 38.k, 38.l, 38.m and 38.n. The Constitutional Court repealed them all.

Article 30.1.6 of the Act gives cities/municipalities the right to introduce three new types of tax. These are Uncultivated Cultivable Agricultural Land Tax (Article 38a-38e), Undeveloped Entrepreneurial Real Property Tax (Article 38f-38k) and Undeveloped Building Land Tax (Article 38l-38n). The disputed provisions of the Act require the owners of the properties to pay these taxes if they do not use their properties.

The first petitioner argued that the provisions of Articles 30.1.6, 38.l, 38.m and 38.n of the Act contravened Articles 3 and 51 of the Constitution, on the basis that a tax on unused and undeveloped building land is contrary to the economic and socio-political principles that should underlie the tax system of the state.

The second petitioner suggested that the provisions of Articles 38.a to 38.n of the Act contravened Articles 3, 48 and 51 of the Constitution. The levying of tax on uncultivated cultivable agricultural land, undeveloped entrepreneurial real property and undeveloped building land does not take into account taxpayers' economic circumstances, or the principles of equality and equity in taxation. The taxes are punitive by nature.

II. The Constitutional Court reviewed the disputed provisions in the context of Articles 16, 48.1, 48.2 and 52 of the Constitution. It observed that under Article 16 of the Constitution, the legislator may restrict freedoms and rights guaranteed by the

Constitution. However, this is only possible in order to achieve legitimate goals, such as the protection of the freedoms and rights of others, protection of the legal system, public health and morality, and must be in proportion to the nature of the necessity for restriction.

Article 48.1 of the Constitution guarantees the right of ownership. Article 48.2 provides that ownership implies obligations, and that owners and users of property should contribute to the general welfare. The Constitutional Court found that owners of undeveloped entrepreneurial real property, undeveloped building land and uncultivated cultivable agricultural land must not be forced to act in a certain way (for example to use their property). This would only be permissible if the tax could be defined as a contribution to the general good, serving to protect national interests and security, nature, the environment, public health and morality.

The Constitutional Court noted that the legislator had given cities/municipalities the authority to levy tax for not using property. These taxes indirectly obliged property owners to use their properties. Such a restriction goes beyond the constitutionally permitted restrictions on the right to ownership. It was not created in order to realise a legitimate goal prescribed by the Constitution, neither is it in proportion to the nature of the need for the restriction. The Constitutional Court took the view that the taxes were punitive by nature. To penalise somebody because he has not made use of his property is not one of the permitted restrictions of the right of ownership in Article 16 of the Constitution in conjunction with Article 48.2 of the Constitution. Neither does it comply with the principle of legitimate expectations of parties as to the legal certainty of the effects of legislation. The Act did not contain a proper definition of owners' activities which would free them from the obligation of paying the stated taxes.

The Constitutional Court found that when the legislator enacted the provisions in point, giving rise to the taxes, the legislator breached the principle under which everybody is required to contribute towards public expenses in accordance with their financial position (see Article 51.1 of the Constitution). These particular taxes arise from the non-use of land; they take no account of taxpayers' economic circumstances. They are out of line with the constitutional principles of equality and equity of the tax system (see Article 51.2 of the Constitution). This is because only those who do not use their property have to pay for them; it does not apply to all property owners. Equality is one of the constitutional cornerstones of the tax system. It does not exist if tax is levied on a punitive basis, with a view to forcing

owners to use their property, when this may not be in accordance with their interests and abilities. The principle of equality of the tax system requires an equal distribution of the tax burden for all taxpayers.

The Constitutional Court also acknowledged that the legislator is entitled to bring in various measures to encourage the cultivation of uncultivated agricultural land, the enhancement of business property and the use of undeveloped building lands. The legislator must, however, act in accordance with fundamental constitutional values and protected goods, and this had not been the case here.

Languages:

Croatian, English.



Identification: CRO-2007-2-007

a) Croatia / b) Constitutional Court / c) / d) 18.04.2007 / e) U-X-1457/2007 / f) / g) *Narodne novine* (Official Gazette), 43/07 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.2.4 **Constitutional Justice** – Types of claim – Initiation *ex officio* by the body of constitutional jurisdiction.

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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

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

5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Pension, survivor / Pension, widow / Pension, entitlement.

Headnotes:

In respect of the entitlement to survivors' pensions, married and common-law widows and widowers of

deceased insured persons shall be treated alike. Common law widows and widowers are to be treated as members of the deceased's family.

Summary:

The Constitutional Court has the authority to observe the realisation of constitutionality and legality and to notify Parliament of any instances of unconstitutionality and illegality, under Article 128/5 of the Constitution and Article 104 of the Constitutional Act on the Constitutional Court of the Republic of Croatia. It therefore informed Parliament that changes were necessary to the Pension Insurance Act (hereinafter referred to as ZOMO). The purpose was to regulate the legal requirements for entitlement to a survivor's pension for common law widows and widowers, as members of the deceased insured person's family.

Under the pension insurance system regulated by ZOMO, a survivor's pension is a long-term monthly income from pension insurance to which certain family members are entitled after the death of the insured person under general and special legal conditions. This pension is recognised on the grounds of contributions paid by the insured person for old age, disability or death, and it is grounded on the obligation of spouses (insured persons) to support one another and their children, and other members of their family, under statutory conditions.

Article 21.1 ZOMO enumerates those who are to be considered family members, in the event of the death of the insured:

- widow/widower;
- divorced spouse entitled to be supported;
- children (born within or out of wedlock, or adopted);
- foster-children supported by the insured person, grandchildren supported by the insured person, provided that they have no parents, or if one or both parents are unable to work through disability;
- parents – father, mother, step-father, step-mother or foster-carer of the insured person who were supported by the insured person;
- children with no parents – brothers, sisters and other children the insured person supported, provided that they have no parents, or if one or both parents is unable to work due to disability.

With regard to the closest family members (widow, widower and children of certain age), ZOMO is grounded on the obligation of spouses to support one another and their children. However, with regard to other family members, such as divorced spouse, foster children, grandchildren, parents and children of

certain age, ZOMO requires that the insured person supported them until his or her death. This fact must always be proven.

Under Article 63 ZOMO, the term widows and widowers, within the meaning of Article 21.1.1 ZOMO only includes those widows and widowers who lived with the deceased insured in a marital union. ZOMO does not recognise common law widows and widowers as members of the deceased's family. This category of widow or widower is not entitled to a survivor's pension, even in cases where the court had granted them the right to maintenance.

The Constitutional Court pointed out that in the Republic of Croatia, the family enjoys special state protection, and is therefore deemed a protected constitutional benefit. On the other hand, the Constitution recognises both marriage and common law marriages, and makes no distinction between the two in family matters. Both unions are regulated by law.

Against this background, and taking account of the legal nature and purpose of survivor's pensions within the pension insurance system, the Constitutional Court held that there should be provision within ZOMO for entitlement to survivors' pensions for common law and married widows alike.

The Constitutional Court went on to examine the problems which might arise from entitlement by common law widows and widowers. It noted the impact of the Family Act and Article 8/2 of the Inheritance Act, which protect the inheritance rights of unmarried spouses.

The Constitutional Court also referred to the Act on the Rights of Croatian Homeland War Defenders and Members of their Families. This Act recognises common law widows and widowers as close family members, who are entitled to survivor's pensions. As pensions for this category of persons are funded from the State Budget, if the relatives of captured or missing Croatian defenders are entitled to pensions, then there is even more reason to recognise the position of common law widows and widowers within the pension insurance system regulated by ZOMO. This system is, after all, financed by contributions paid by insured persons.

The Constitutional Court also noted that, under Article 2.4.1 of the Constitution, the Croatian Parliament is empowered to regulate all issues regarding the rights of common-law spouses to survivors' pensions.

Languages:

Croatian, English.



Identification: CRO-2007-2-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 18.04.2007 / **e)** U-I-1152-2000 and others / **f)** / **g)** *Narodne novine* (Official Gazette), 43/07 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
 3.10 **General Principles** – Certainty of the law.
 5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
 5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.
 5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Discrimination, justification / Pension, insurance scheme / Pension, entitlement.

Headnotes:

Differing pensionable ages to statutory or early pensions or different factors for calculating them based exclusively on difference in sex is in contravention of the constitutional guarantee of equality of the sexes, prohibition of discrimination on the grounds of gender and equality before the law.

The legal arrangements in force must comply with the relevant provisions of the Constitution. The possibility of a different legal solution does not mean that the legal arrangement is in breach of the Constitution, provided that the legislator does not exceed its powers.

Summary:

This case before the Constitutional Court was concerned with the age at which natural persons are entitled to draw pension, and the rights of married

and common law widows and widowers, under the pension insurance system regulated by the Pension Insurance Act (hereinafter referred to as ZOMO).

Five natural persons had submitted different proposals for the Court to review the conformity of certain provisions of ZOMO with the Constitution.

The Constitutional Court initiated proceedings for the constitutional review of Articles 21.2, 30, 31, 66 and 78.2 of the Act. It repealed them all, ordering that Article 21/2 ZOMO would lose its force on 31 December 2007 and the remaining provisions on 31 December 2018. However, the Constitutional Court did not agree to a constitutional review of the provisions of Articles 21.1.1, 178, 179 and 182 ZOMO and Article 40 of the Pension Insurance (Revisions and Amendments) Act (*Narodne novine*, no. 147/02, hereinafter: ZID ZOMO/2002).

The Constitutional Court resolved to report to Parliament about the inherent unconstitutionality in the lack of entitlement of common law widowers and widows to survivors' pensions, under the Pension Insurance Act. It would inform Parliament of the need to amend the Act, to ensure common law spouses could have access to survivors' pensions.

The Constitutional Court also examined various transitional provisions, allowing access to statutory old age, early old age and survivors' pensions at differing ages. It held that this state of affairs was in order, because of the need to bring the pension system into line with changing social conditions.

1. Article 21.2 ZOMO

Under Article 21.2 ZOMO the Croatian Pension Insurance Bureau (hereinafter referred to as HZMO) determines the conditions under which an insured person is considered to support a member of his or her family, together with the conditions under which entitlement to a survivor's pension terminates because of changes in income or financial situation. The first petitioner argued that this contravened Article 14 of the Constitution (prohibition of discrimination on any ground and equality of all before the law).

The Constitutional Court found that the legislator, in Article 21.2 ZOMO, had allowed for direct, independent and unlimited regulation by a legal person with public authorities (HZMO) of the preconditions in substantive law under which a particular legal relationship is deemed to exist or not to exist. The Court held that this legislative activity was not in conformity with the principle of the rule of law, the highest value of the constitutional order, under Article 3 of the Constitution.

2. Articles 30, 31, 66 and 78.2 ZOMO

ZOMO provides for different ages, on the grounds of gender, for identical entitlements in various circumstances. Article 30 allow for different pensionable ages for men and women in respect of their statutory old age pensions. Article 31 provides for different ages for entitlement to an early old-age pension for men and women. Article 66 provides for different ages for entitlement to a survivor's pension for the mother and the father of a deceased insured person. Article 78.2 sets out different ages for the application of the initial factor for calculating an early old-age pension for men and women. The second petitioner contended that Articles 30 and 31 of Zomo resulted in discrimination on the grounds of gender, and accordingly contravened Articles 14.2 and 54 of the Constitution.

The third petitioner pointed out that Articles 30 and 31 ZOMO provide more difficult requirements for the entitlement to a statutory old-age or early old-age pension for men than for women. He emphasised that this right was acquired on the grounds of employment and payment of contributions, regardless of gender. He had the same concerns over Articles 66 and 78.2 ZOMO.

The Constitutional Court held that there was nothing in constitutional law that could justify different pensionable ages or entitlement to statutory or early old age pensions, or survivors' pensions solely on gender grounds under the ZOMO. It ruled that Articles 30, 31, 66 and 78.2 ZOMO were out of line with Articles 3 and 14 of the Constitution.

The Constitutional Court noted that there were complex problems associated with equalising pensionable ages for men and women in the ZOMO pension insurance scheme. It therefore stated that repealed Articles 30, 31, 66 and 78.2 ZOMO would lose their force as of 31 December 2018.

2A. Article 30 ZOMO

The fourth petitioner challenged that part of Article 30 ZOMO imposing a qualifying period of fifteen years for entitlement to a statutory old age pension. She suggested that it might contravene Articles 14.2 and 57.1 of the Constitution, which protect the rights of those who are sick, unemployed or otherwise incapable of work to assistance with their basic needs.

The Constitutional Court observed that there are no limits in the Constitution to the Croatian Parliament's powers to regulate preconditions for entitlement to a statutory old-age pension. Article 2.4.1 of the

Constitution empowers Parliament to regulate economic, legal and political relations in the Republic of Croatia, independently and in compliance with the Constitution and the law. This includes the authority to impose a requirement for a certain number of qualifying years in order to obtain an old-age pension. The Constitutional Court emphasised that whatever legal arrangement is in place must be compliant with the relevant provisions of the Constitution. Although there is a possibility of differing legal solutions, the provisions may still be constitutionally compliant, provided Parliament has not exceeded its powers.

The Constitutional Court did not review the conformity of Article 30 ZOMO with Article 57.1 of the Constitution, since this provision is not relevant to the regulation of the pension insurance scheme.

3. Article 21.1.1 ZOMO

Under Article 21.1.1 ZOMO, in the event of the death of the insured person or of the beneficiary of a statutory or early old age or disability pension, the widow or widower shall be insured. The first and fifth petitioners criticised it.

The first petitioner challenged the state of affairs under the ZOMO, whereby all widows and widowers of deceased insured persons are deemed to have equal rights to survivors' pensions. No account is taken of the length of their marriage, any additional income, the fact that they may now be living with somebody else and whether or not the widow or widower had been making their own pension insurance contributions. She suggested this might be in breach of the Constitution.

The Constitutional Court found no breach of Article 14.2 of the Constitution. The solution outlined above represents a positive social-policy measure for vulnerable groups (such as widows or widowers who might otherwise lose their income) or one designed to improve the material position of the insured (such as widows or widowers who are themselves insured but who are entitled to a survivor's pension).

The Constitutional Court noted that the legislator had opted to bestow entitlement to survivors' pensions upon all widows and widowers, irrespective of other factors such as length of marriage, additional income, or living with somebody else. In terms of reviewing the constitutional compliance of Article 21.1.1 ZOMO, the fact that there are different conditions for entitlement to survivors' pensions does not necessarily mean that the legislation contravenes the Constitution.

The fifth petitioner was a common law spouse and not entitled to a survivor's pension. She suggested that Article 21.1.1 ZOMO was in breach of the Constitution.

The Constitutional Court noted that ZOMO entitles divorced spouses to survivors' pensions if the court has granted them the right to maintenance. However, common law spouses have no such entitlement, even though the court has granted them the right to maintenance.

The Constitutional Court noted that the family is under special state protection, and represents a protected constitutional benefit. Nonetheless, both marriage and common law arrangements enjoy constitutional and legislative recognition. The Constitution makes no distinction between marriage and common law situations in family matters.

If common law widows or widowers of deceased insured persons are not entitled to survivors' pensions, this results in inequality between two constitutionally recognised family unions, and contravenes the principle of equality, a crucial value of the constitutional order. The Constitutional Court took account of Article 61 of the Constitution, which recognises two kinds of family unions, and the legal nature and purpose of a survivor's pension within the pension insurance system, which is based on the obligation of the insured person to support family members. The Constitutional Court held that the ZOMO should provide for survivors' pensions for married and common law widows and widowers alike. The Constitutional Court will invoke its powers under Article 128/5 of the Constitution and Article 104 of the Constitutional Act on the Constitutional Court, and report to the Parliament about this instance of unconstitutionality. It will point out the need for changes to ZOMO so that common law spouses can claim survivors' pensions within the pension insurance scheme regulated by ZOMO.

4. Articles 178, 179 and 182 ZOMO

Articles 178, 179 and 182 of the ZOMO provide for a transition period whereby, with effect from 1999, statutory and early pensionable ages will gradually increase by six months every year. The statutory pension age for men was 60 in 1998, and it will increase to 65 in 2008. Women were able to claim statutory pensions at 55 in 1998; this will increase to 60 in 2008. Early pension age will increase from 55 to 60 for men and from 50 to 55 for women.

The third petitioner contended that the disputed provisions were in breach of Articles 14 and 3 of the Constitution (equality of the sexes). This is one of the

highest values of the constitutional order. The Constitutional Court observed that the measures contained in Articles 178, 179 and 182 ZOMO were necessary in a democratic society, to bring the national pension insurance system into line with changing social conditions. The low statutory and early pension ages were a legacy from the legal system of the former SRFY. They were no longer tenable and had been temporary measures. The Constitutional Court found that there were compelling reasons, acceptable from a constitutional standpoint, justifying the temporary existence of the disputed legal provisions in the legal order of the Republic of Croatia.

5. Article 40 ZID ZOMO 2002

Article 40 ZID ZOMO 2002 provides for a transition period, under which rights to survivors' pensions can be acquired under more favourable conditions than those provided for in ZOMO. However, this only applies to widows, not widowers.

The third petitioner suggested that this breached the requirement for equality between the sexes. The Constitutional Court noted that under Article 62 ZOMO, widows and widowers are equal in their entitlement to survivors' pensions. Article 40 ZID ZOMO/2002 departs from this position.

The Constitutional Court noted that there were constitutionally acceptable reasons behind the inequality on gender grounds, in Article 40 ZID ZOMO/2002. This is an applicable legal measure in the field of social policy, adopted by the legislator to correct existing inequalities in the material position of most widows, by comparison to widowers, after their husbands' deaths. It is aimed at the correction of a socially unacceptable state of affairs and envisaged for a specific legislative period only, making them temporary by nature. The Constitutional Court found that there were constitutionally acceptable reasons in this instance for the temporary survival of the disputed legal provisions within the legal order.

Languages:

Croatian, English.



Identification: CRO-2007-2-009

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 20.06.2007 / **e)** U-III A-4885/2005 / **f)** / **g)** *Narodne novine* (Official Gazette), 67/07 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

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:

Administrative proceedings / Compensation / Delay.

Headnotes:

Non-activity and lack of efficiency on the part of administrative authorities, state bodies and legal persons vested with public power, coupled with a lengthy administrative dispute, may amount to violation of Article 29.1 of the Constitution and Article 6.1 ECHR.

Summary:

I. This case concerned the right to a trial within a reasonable time, regarding a request for compensation for property expropriated during the period of Communist rule. The applicant had not availed herself of any legal remedy for speeding up the administrative proceedings. There had not been any repetition at any stage of the proceedings, neither had there been any obvious repetition of the administrative dispute in which case non-use of such legal remedies would not be relevant for the examination of the length of administrative proceedings. The Court noted that the matter had lasted more than three years. It held that there had been a breach of the right to a decision within a reasonable time span. The applicant was awarded appropriate compensation.

The applicant lodged a constitutional complaint in respect of the length of an administrative dispute and administrative proceedings. These, in turn, arose from her claim for compensation for agricultural land expropriated during Communist rule.

On 23 April 1997, the applicant filed a request for compensation with the first instance administrative body. This request was turned down, by a ruling

dated 30 September 1999. She appealed. The second instance administrative body rejected her appeal on 28 May 2002. The applicant filed a complaint on 28 September 2002 with the Administrative Court of the Republic of Croatia. On 13 July 2006, the Administrative Court rejected her appeal as ill founded. That made the decision concerning the applicant's rights in this administrative matter final.

II. The Constitutional Court has, in the past, turned down those constitutional complaints which refer to the length of proceedings in administrative proceedings preliminary to administrative disputes. This is because administrative proceedings must be completed within statutory time limits. Parties to proceedings have legal remedies at their disposal for speeding up administrative proceedings. These include appeals for failure to respond and actions for failure to respond.

Hitherto, the Constitutional Court has taken the view that legal remedies against failure to respond are a priori effective for speeding up administrative proceedings. It has now decided that this is not always the case.

The Constitutional Court held that henceforth, when deciding upon potential violations of those parts of Article 29.1 of the Constitution and Article 6.1 ECHR referring to a reasonable length for proceedings, courts must also consider the length of administrative action together with the length of the preliminary administrative proceedings in the same administrative matter. Time will start to run from the date when the "dispute" within the meaning of Article 6.1 ECHR began, i.e. the day when a party first claimed a legal remedy in administrative proceedings, or the day when a party first filed a remedy of legal protection for failure to respond. The Constitutional Court noted that where legal remedies against the failure to respond are admissible, it would only examine the length of the "disputed" administrative proceedings in the part that has already become final if the applicant explicitly refers to its unreasonable length. The applicant also needs to prove that he or she availed themselves of legal remedies for failure to respond in these proceedings.

The Court noted that there is a difference between the above situation and one where there has been recurring repetition of administrative proceedings. The Administrative Court quashes administrative decisions and refers (usually for incompletely and wrongly established facts) when in fact it is justified to view the overall duration of administrative and administrative-court proceedings together, and to decide upon any violations of the Constitution and

Convention. This is because remedies designed as protection against failure to respond do not, *per se*, constitute an effective domestic legal remedy for the situations described above.

By changing its legal opinion as stated, the Constitutional Court is bringing its case law into line with that of the European Court of Human Rights in the application of Article 6.1 ECHR, which guarantees the right to a fair trial within a reasonable time.

It pronounced the part of the applicant's constitutional complaint which referred to the length of administrative proceedings to be inadmissible. The applicant failed to use any legally permitted remedy for speeding up administrative proceedings, and there was no repetition of any stage of the administrative proceedings, neither had there been any manifold repetition of the administrative dispute. Had this been the case, it would have been irrelevant whether the remedies were used or not. However, there had been a breach of her right to a decision within a reasonable time span. The case had lasted more than three years. The applicant was adjudicated appropriate compensation.

Languages:

Croatian, English.



Czech Republic

Constitutional Court

Important decisions

Identification: CZE-2007-2-006

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 06.06.2007 / **e)** II. US 265/07 / **f)** / **g)** *Sbírka zákonů* (Official Gazette) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.2.1.6 **Constitutional Justice** – Types of claim – Claim by a public body – Local self-government body.

1.3.2.2 **Constitutional Justice** – Jurisdiction – Type of review – Abstract / concrete review.

1.3.4.4 **Constitutional Justice** – Jurisdiction – Types of litigation – Powers of local authorities.

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

4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.

Keywords of the alphabetical index:

Constitutional Court, municipality, *locus standi* / Municipality, assembly, acting on behalf of its members.

Headnotes:

The assembly of a municipality of a higher regional self-governing unit can file a municipal complaint, on the basis that a statutory intervention by the state breached the guaranteed right of a regional self-governing unit to self-governance. Such an intervention would have to be an individual one. Only the regional authority whose rights were directly affected could claim before the Constitutional Court. A municipal complaint does not have the attributes of an *actio popularis*.

Summary:

I. The Municipal Assembly of “Town XY” filed a municipal complaint, challenging a resolution of the District Prosecutor’s Office rejecting a complaint against its resolution to launch criminal proceedings.

These were based on resolutions by the Unit of the Czech Criminal and Investigation Police Service responsible for the uncovering of corruption and financial crime, and by members of the Assembly and Council of town XY, and at the initiative of the Regional Prosecutor’s Office. The above organisations are referred to here as “the parties to the proceedings”.

The claimant claimed that these decisions and interventions constituted an intervention by the State into Town XY’s right to self-governance, under Articles 8 and 101.4 of the Czech Constitution. In particular, the criminal prosecution of fourteen individuals who had been (and some of whom still were) members of the town’s Assembly, constituted an unlawful intervention into the right to self-governance. The individuals concerned had voted to adopt a resolution under which the Assembly agreed that Town XY could assume costs arising from the representation by legal counsel of the head of the Development and Investment Department, a member of the town’s Assembly and former mayor, and a member of the present Assembly and present mayor. Legal representation was necessary because of criminal charges arising from the grant of a subsidy for the renovation of a sports arena.

The claimant suggested that criminal prosecution of the members of the Assembly and Council of the town was in direct contravention of the constitutionally guaranteed right to self-governance, and that it introduced the dangerous practices of a police state. The claimant was concerned that the introduction of a practice by which the decision-making of an assembly will be subject to the approval of those authorities engaged in criminal prosecutions would effectively eliminate self-governance.

The claimant asked the Constitutional Court to overturn the challenged resolution and to prohibit the Police of the Czech Republic and the Prosecutor’s Office from intervening in the self-governance of town XY, by launching criminal prosecutions against members of its Assembly and Council in connection with a resolution concerning the assuming of the costs of legal counsel.

The parties to the proceedings argued that the assuming of the criminal defence costs of natural persons (i.e. the representatives of a town), could not be considered to fall within the powers and responsibilities of a corporation set up under public law. The powers of the Assembly have to be exercised in the interests of the municipality and its inhabitants. Such interests do not encompass the situation of town representatives, facing criminal prosecution, and requiring legal assistance in the form of costs of criminal defence. The payment of the

costs of defending a citizen of a town from criminal prosecution cannot be included in the costs covered by the municipality's budget. The Constitutional Court could only intervene in the decision-making of authorities engaged in the application of criminal procedure in certain extreme situations.

II. The Constitutional Court held that the conditions for deliberating on the merits of the municipal complaint had not been satisfied. The claimant, the Municipal Assembly of Town XY, and the administrative unit itself – town XY – were not parties to the proceedings in which the challenged decisions were made. They were not directly concerned with the proceedings. They were not entitled to apply for the overturning of the challenged decision or to issue proceedings against the relevant authorities. The directly concerned parties were those subject to criminal prosecution. They could defend themselves against the decisions by filing a constitutional complaint. The Constitutional Court accordingly declined to admit the claimant's application and it did not deal with the factual objections it had raised.

Languages:

Czech.



Identification: CZE-2007-2-007

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 19.06.2007 / **e)** II. US 79/07 / **f)** / **g)** *Sbírka zákonů* (Official Gazette) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

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

5.3.16 **Fundamental Rights** – Civil and political rights – Principle of the application of the more lenient law.

Keywords of the alphabetical index:

Vigilantibus jura scripta sunt, principle / Civil claim, criminal law enforcement / Criminal proceedings, subsidiarity / Subsidiarity, criminal law.

Headnotes:

Private law sanctions should apply to conduct that breaches civil law rights, in line with the principle *vigilantibus iura*. Should these prove to be insufficient, administrative sanctions may be applied, and, as a last resort, criminal law sanctions. If one were to apply criminal sanctions without having first deployed other available legal sanctions, this would be in breach of the principle of the subsidiarity of criminal repression. This requires the state to proceed cautiously when applying criminal law sanctions.

Summary:

I. In her constitutional complaint, the claimant challenged decisions by the District Court in “XY” and the Czech Police. She suggested that there had been a breach of her constitutionally guaranteed rights under Articles 37.1, 40.2, 40.3 and 40.4 of the Charter of Fundamental Rights and Freedoms, and Article 6.2 and 6.3.c ECHR. A breach may also have occurred of her rights under Article 14.2 and 14.3.g of the International Covenant on Civil and Political Rights. The claimant stated that these breaches occurred when a fine was imposed on her, under the provisions of the Criminal Procedures Code, for failure to comply with a request to relinquish a particular item – an automatic washing machine.

The Police of the Czech Republic initiated criminal proceedings concerning the theft of an automatic washing machine, on the basis that her actions constituted the crime of theft, as defined by the Criminal Code. The alleged injured party was the brother of the claimant's ex-husband, and, allegedly, the owner of the washing machine. The crime was said to have been committed when the claimant took the machine from her ex-husband's property, although she would have been aware that it did not form part of the common marital property, which had not been settled at that point, but belonged to the injured party.

The claimant, as the suspect, was asked to relinquish the washing machine. She refused to do so. A fine was duly imposed on her by decision of the Police of the Czech Republic. The claimant challenged this decision by a complaint filed with the District Court. It rejected it.

II. The Constitutional Court upheld the constitutional complaint.

The claimant argued that the police authorities were compelling her, by means of a fine, to engage in an activity, which, in her view could amount to self-incrimination.

The Constitutional Court had already ruled that the constitutionally guaranteed right not to be compelled to incriminate oneself arises primarily from Article 37.1 of the Charter. This sets out the universal right to refuse to give testimony, if one thereby puts oneself or somebody closely related at risk of criminal prosecution. In this case, the Constitutional Court noted that there is no fundamental difference between the right of somebody who has been charged to refuse to give testimony and the right of somebody yet to be prosecuted not to be forced, by sanctions, to release evidence that may cause that person's criminal prosecution. In this case, the police authority was forcing the claimant to present evidence, with the aim of confirming or refuting a suspicion of a crime having been committed.

The Constitutional Court concluded that any steps taken against the claimant, resulting in her having to incriminate herself in criminal proceedings, constituted a breach of the constitutionally guaranteed rights mentioned above.

The Constitutional Court considered an alternative, and constitutionally compliant, approach to achieving the purposes of criminal proceedings, in such a situation. One example might be the subsidiary use of the measure of seizing an item, as prescribed by the Criminal Procedure Code. This would not constitute compelling a person to relinquish tangible evidence against themselves. Rather, it would constitute a constitutionally permissible apprehension of tangible evidence, albeit against the will of the person charged or suspected. In its case law on the principle of prohibiting self-incrimination, the Constitutional Court has made a distinction between the relinquishing of an item (possibly forced), and its seizure.

The Constitutional Court noted that authorities applying criminal procedure must always determine whether the facts of the case meet the definition of a crime, and ascertain whether there is reasonable cause to suspect that a crime has been committed, before proceeding with steps against the suspect, which might interfere with his or her human rights or fundamental freedoms. In the claimant's case, it had been evident from the outset that the dispute was one between former spouses, concerning property, and was of a civil law nature. Criminal law cannot be used to protect the rights and legal interests of an

individual in the sphere of private relations, where it is primarily up to the initiative of the individual to guard his or her rights. Protection exists for these rights, in the shape of judicial power, under the principle *vigilantibus iura scripta sunt*.

The Constitutional Court granted the claimant's claim and overturned the decisions described overleaf.

Languages:

Czech.



Identification: CZE-2007-1-008

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 17.07.2007 / **e)** IV. US 451/05 / **f)** / **g)** *Sbírka zákonů* (Official Gazette) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

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.

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

Keywords of the alphabetical index:

Precedent, judicial, review / Precedent, judicial, deviation, reasoning, obligation.

Headnotes:

The precedential effects of published Supreme Court decisions are weakened in the Czech legal system, to the extent that the judicial opinions contained therein are not formally binding upon the lower courts. This does not mean, however, that Supreme Court jurisprudence is devoid of normative force. A lower court has the right not to respect these judicial

conclusions and, in diverging from them, to bring about changes. However, in order to be constitutionally compliant, any such initiatives must take place within the framework of a fair trial. If the Appeal Court decides to ignore the published judicial opinions of the Supreme Court, it must give a careful explanation in the grounds of its decision as to why it disagrees with the opinion, and why it has deemed it necessary to replace it with a new one. It should also consider whether there are sufficiently strong reasons to justify these measures.

Summary:

I. The City of XY (referred to here as the claimant) filed a constitutional complaint, in which it challenged an Appeal Court judgment, which had upheld the judgment of the adjudicating court. This judgment had denied the City of XY's application for payment of a monetary amount due from unpaid rent. The claimant suggested that there had been a violation of Article 90 of the Constitution, and Article 36.1 of the Charter of Fundamental Rights and Freedoms (referred to here as "the Charter").

The courts of both instances concluded that the rental agreement, upon which the claimant had based its claim, was invalid. The adjudicating court recognised the claimant's claim, based on the statement of facts that the Defendant had failed to pay outstanding rent owing to it, to be a claim for the relinquishment of unjust enrichment. However, the court also noted the objection the defendant had made during the court hearing, that the amount had been set off, and rejected the application.

In its appeal, the Claimant disagreed with the objection concerning set-off, contending that set off was already barred by the statutory limitation period. The Appeal Court adopted the position that the claimant's claim could not have been judged under other norms of substantive law, as the claimant changed the legal nature of its claim during the procedure, but had not altered its statement of fact. The Appeal Court ruled that the adjudicating court had erred in failing to rule on the change of the petition. Nonetheless, the Appeal Court upheld the judgment, as it took note of the claimant's point that the set off was time-barred.

II. The Constitutional Court stated that if an appeal court upholds a judgment by a court of first instance, for a reason other than that for which that court denied the application, it must first inform the parties to the proceedings of its differing judicial opinion, before handing down the judgment. This gives them the chance to present their opinions. To do otherwise would breach the principle of a double-instance

procedure, and would deny the claimant of its right to a fair hearing. No such situation had arisen in the case in point. Counsel for the defence had raised the objection to the Claimant's claim for the relinquishment of unjust enrichment, and the point about the time-bar, in the hearing before the adjudicating court. The Claimant responded to them in the appeal proceedings. Hence, the Claimant was not denied to right to express its views on the counter-claim.

However, the Appeal Court attributed a different degree of relevance to the objection concerning the statutory limitation period than did the adjudicating court. The Constitutional Court examined the question of whether the Appeal Court had acted in conformity with the Constitution, in its interpretation and application of substantive law. In its jurisprudence, the Constitutional Court has construed the conditions under which the improper application of a simple right leads to the breach of fundamental rights and freedoms. These include the arbitrary application of a norm of simple law by an Appeal Court, without reasonable justification, or, more precisely, a connection to any purpose protected by the Constitution. The Constitutional Court proceeded to appraise the impact of the Appeal Court's interpretation and application of procedural norms upon the application of the provisions of substantive law. The constitutional law framework for its review, set out by Article 1 of the Charter, establishing the equality of rights in relation to general courts, includes the right to the provision of the same degree of protection by courts as has been granted in the past, in cases with similar facts. The principle that the steps of a court must be foreseeable, as those of an authority exercising public power, and the implications of the principle in the subsequent interpretation of a norm, plays a significant role in court decision-making, and leaves no room for any licence.

The Appeal Court's decision in the current proceedings was based on the premise that if the Claimant had requested specific performance of a rental agreement that proved to be invalid, it could not have been granted performance on the basis of unjust enrichment, without a change in the application. The case law of the Supreme Court of the Czech Republic states that such a legal assessment is improper, as the issue of the validity of a contract is a legal, not a factual issue; and therefore, if a contract is proved to be legally invalid, this does not change the statement of facts set out in the application. If the court is deciding upon a case concerning a right to performance, based upon a finding of facts that, under the law, enables the subsuming of a claim made under a different substantive norm than that

stated by the Plaintiff, it must evaluate the matter according to the relevant provisions. It must also render a decision on the claim irrespective of the legal reason that the Plaintiff gave when claiming performance. The Appeal Court, however, had adopted a completely different stance from that of the Supreme Court.

The Constitutional Court had already held that unsubstantiated disregard for a Supreme Court decision may constitute judicial arbitrariness. By handing down a judgment that rejected consolidated case law, without justification, the Appeal Court had diverged from the framework of the rules of a due and just process, within the meaning of Article 36.1 of the Charter. It had denied judicial protection to the Claimant to the extent that may have been expected, given the jurisprudence of the Supreme Court of the Czech Republic. The Constitutional Court found that there had been a breach of Articles 1 and 36 of the Charter, granted the constitutional complaint, and overturned the challenged decision.

Languages:

Czech.



Identification: CZE-2007-2-009

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 17.07.2007 / **e)** IV. US 23/05 / **f)** / **g)** *Sbírka zákonů* (Official Gazette) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

5.3.31 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Judge, defamation / Personality, right to protection / Sphere, public, protection.

Headnotes:

The publication of defamatory material about somebody active in public life cannot be considered reasonable or legitimate, unless:

1. it is shown that there were reasonable reasons to rely on the truthfulness of the information, and
2. it is shown that available steps have been taken to verify the veracity of such information, and the extent and degree to which the verification of the information was available and definitive, and
3. the person publishing the defamatory information had reason to believe that the information was true.

Moreover, the publication of such material cannot be deemed legitimate or reasonable if the disseminator of the information has not checked its veracity, by making inquiries of the person concerned, and has failed to publish that person's position, except when this procedure is not possible or is evidently not required. The examination of the motive is important to the assessment of the legitimacy of the publication of the information. Legitimacy cannot be inferred if publication is predominantly motivated by the wish to damage the person to whom the information relates and if the disseminator did not believe the information or provided it negligently, without bothering to check the truth behind it.

The fundamental right to honour applies in the private, social, civil, and professional spheres; the three latter ones can be called the social sphere. In the private sphere, there is a right to the absolute self-determination of information. The social, civil, and professional spheres reflect the social nature of fundamental rights, or, more precisely, reflect the fact that an individual lives in a society and enters into communication with other members of society. In this other sphere, absolute self-determination of information does not apply; interference in that sphere is possible under certain conditions, because there may be situations that can constitute the subject of justified public interest. The authorities may make proportionate interventions within the social spheres, in order to protect the interests of society as a whole.

The so-called public sphere constitutes the outer perimeter of an individual's social sphere. It is that part of a human life that can be seen or observed by anybody. There are practically no limitations on the dissemination of truthful material arising within this sphere. This sphere of human life clearly overlaps with the professional sphere of persons active in public life.

Summary:

I. The claimant, a journalist, filed a constitutional complaint seeking the overturning of a judgment by the High Court, referred to here as the Appeal Court. This had arisen from a dispute over the protection of personality, and in the judgment, the defendant, Czech Television, was ordered to apologise to the plaintiff (Judge S.P.). The claimant argued that this decision constituted a primary breach of her fundamental right to the freedom of speech and the dissemination of information, embodied in Article 17.1 to 17.5 of the Charter of Fundamental Rights and Freedoms.

The claimant produced a report called "The Judge", in which it was suggested that the justice system should get rid of Judge SP, as part of its "cleansing process", as she "rendered decisions contrary to the applicable law". She also claimed, "Judge S.P. was a member of the narrow group of judges designated to carry out political trials."

Judge S.P. filed an application with the court of general jurisdiction (Regional Court) and an appeal with the appeal court. The general court held that the claimant's report encroached unlawfully upon Judge S.P.'s personal rights.

II. At the core of the dispute is the clash between journalistic freedom of speech, under Article 17 of the Charter, and the protection of Judge SP's honour under Article 10 of the Charter. Having assessed the evidence, the Constitutional Court upheld the constitutional complaint, as the material in the report, to the extent contained in the statement of the challenged claim of the High Court, could be considered true. If the High Court has reached the opposite conclusion, it has breached the claimant's fundamental right to free speech under Article 17.1 of the Charter.

The Constitutional Court found that the High Court failed to take into account the fact that this particular dispute concerned the fundamental rights of persons active in public life. The professional honour of journalist and judge fall within the public sphere. There should be a degree of openness of information. The argument about the impossibility of separating personal and professional lives cannot grant judge immunity from the public interest in information about the judge's professional qualifications to perform his or her job. Members of the public are entitled to know whether judges are carrying out their duties properly. The quality of judicial decision-making is also a matter of legitimate public concern. The professional honour of persons active in public life carries less weight in comparison with the exercise of the freedom of speech.

The restriction on the freedom of speech by ordering an apology was not justifiable under Article 10.2 ECHR. This allows restrictions on the freedom of speech in the interest of preserving the authority and impartiality of judicial power. Although this provision affords special protection to judges in connection with the fundamental right to the freedom of speech, there is an expectation that judges should exercise a greater measure of tolerance and generosity than other citizens should. Public criticism of judicial power is an important counterweight to judicial independence. One must, therefore, presume the permissibility of any expression, provided its intensity and content does not exceed the scope of its purpose.

The Constitutional Court took the view that the purpose of the report was to establish, by posing questions, a connection between a judge's professional history and his or her current decision-making. The general courts had not taken into account that an intervention by the authorities, in the field of freedom of speech, should come as a subsidiary measure, in a situation when such an intervention is the only way to undo damage. One defence might have been the use of permissible opportunities for countering controversial opinions. Judge S.P. did not avail herself of it.

A request to publish a comprehensive professional resume of a judge cannot be turned down on the grounds that it would undermine judicial independence. A judge does not enjoy informational autonomy with regard to issues concerning his or her professional history. The Constitutional Court granted the complaint and overturned the challenged decision of the High Court. The dissenting opinion of Justice M.V. was attached to the ruling.

Languages:

Czech.

*Identification: CZE-2007-2-010*

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 16.08.2007 / **e)** IV. US 650/05 / **f)** / **g)** *Sbírka zákonů* (Official Gazette) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.

5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, income, calculation / Interpretation, law, more lenient / Right, interference, minimal.

Headnotes:

In situations where the law allows for two interpretations, it is crucial to bear in mind that, in public law, state authorities may only perform those steps that are explicitly permitted by law. Therefore, public authorities, when assessing and collecting taxes, (i.e. effectively seizing property) must respect fundamental rights and freedoms and, if in doubt, adopt less stringent measures. The substance of the protection of ownership in the context of the assessment and collection of taxes and fees is not simply the formal subsuming of a certain tax under a specific statutory provision. In a democratic state under the rule of law, this protection must apply to the application and interpretation of specific statutory provisions setting out tax or fee obligations. Here, the Supreme Administrative Court had applied and interpreted a legal provision in a manner that was contrary to the Charter. In so doing, it had made certain income subject to tax obligations. This situation would not have arisen under a more lenient interpretation of the law. This resulted in a breach of the claimant's fundamental rights.

Summary:

I. The claimant filed a constitutional complaint seeking the overturning of a Supreme Administrative Court judgment. She contended that it had breached her fundamental rights guaranteed by Articles 4.4 and 11.5 of the Charter of Fundamental Rights and Freedoms (Charter).

The dispute turned upon the issue of whether the income of the claimant from the assignment of a receivable arising from the sale of securities should be taxed as individual income tax. The tax administrator had treated it as such, assessing it as "other income", under Section 10 of the Income Tax Act (ITA).

The claimant objected that the sale of the securities, from which the assigned receivable arose, was exempt from income tax. Therefore, the assignment of a receivable from that sale could not have been subject to taxation, as that receivable clearly came from income exempt from tax. Performance on the basis of the agreement on the assignment of the receivable was performance on the basis of the original legal title, i.e., the sale of securities. She also argued that under Section 10 of the ITA, other income is taxed only if it leads to an increase of assets, which did not occur in her case, as she exchanged property already owned, in the form of a receivable, for cash in the same amount. The tax administrator had accordingly levied tax under Section 10 unjustifiably.

The Supreme Administrative Court held that the legal title of the income of the claimant (assessed as other income under Section 10 of the ITA), was an agreement on the assignment of a receivable, and that the performance under the agreement does not constitute income from the sale of securities, which would be exempt from tax under the ITA. The court could not identify any provision in the ITA to the effect that an increase in assets would be a condition for an income being subsumed under Section 10 of the ITA. It was evident from Section 10.1 that any income not constituting income under Sections 6 to 9 is deemed other income, in which assets are increased.

Hence, the substance of the constitutional complaint was the claimant's objection to the Supreme Administrative Court and the tax administrator's interpretation of the ITA, as a result of which her income from the assignment of the receivable was classified as "other income", under Section 10 ITA, even though, as she claimed, her assets did not increase.

The question was, whether the interpretation and application of the provisions of Section 10.1 of the ITA conformed to the Constitution, or whether the public authorities, in interpreting and applying the claimant's tax obligations, had respected fundamental rights and freedoms under Article 4.4 of the Charter and the claimant's right of ownership under Article 11 of the Charter.

II. The Constitutional Court concluded that the interpretation of Section 10.1 of the ITA by the SAC, and the conclusion adopted on that basis, about an increase of assets not being a condition for the said income being subsumed under other income, does not unambiguously flow from that provision. The Supreme Administrative Court had not observed the principles guaranteed by Article 2.2 of the Charter (under which state power may only be exercised in cases and within the bounds set out by the law, in a

manner prescribed by the law). It had also neglected Article 4.4 of the Charter (respect for the nature and meaning of the claimant's fundamental right to ownership). As a result, it had breached the fundamental right of the claimant guaranteed by Article 11.1 of the Charter (universal right to property ownership with equal legal content and protection of all ownership rights).

The Constitutional Court granted the constitutional complaint and overturned the challenged decision.

Languages:

Czech.



Estonia

Supreme Court

Important decisions

Identification: EST-2007-2-003

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 08.06.2007 / **e)** 3-4-1-4-07 / **f)** Petition of the Tallinn City Council to declare Sections 8.2 and 9.4 of the Protection of War Grave Act invalid due to their unconstitutionality / **g)** *Riigi Teataja III (RTIII)* (Official Bulletin) 2007, 25, 202, www.riigikohus.ee / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources** – Categories – Written rules – International instruments – Geneva Conventions of 1949.

3.16 **General Principles** – Proportionality.

4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.

4.8.8.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Principles and methods.

4.8.8.3 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Supervision.

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

Keywords of the alphabetical index:

War grave, dislocation, decision, competence.

Headnotes:

Issues related to monuments and marks of war graves are national issues for the attention of central government, as they are related to the international obligations of the Republic of Estonia to protect war graves under the Geneva Conventions of 1949. When resolving national issues of this nature, any restrictions upon the constitutional guarantee of local government must be proportionate.

Summary:

The Tallinn City Council claimed in abstract norm review proceedings that Sections 8.2 and 9.4 of the Protection of War Graves Act (PWGA), as a result of which local government bodies have no decision-making powers as to the removal of war graves, are not compatible with the guarantees of local government under Section 154 of the Constitution. The development of public space by means of deciding on planning and construction issues is a local question. The Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949 concerns protection of and respect for the remains and the graves of those who died during hostilities. Under Article 34.4.b of the Additional Protocol, the state has the right to exhume and rebury remains where this is in the public interest. The Additional Protocol also regulates the marking of graves with grave monuments. The removal of a war grave and a grave monument are interrelated issues. Although the state can meet its international obligations in a variety of ways, and can work with local government on a particular issue, this does not make it a "local issue", solely within the remit of local government.

The Chamber considers issues related to monuments and markings of war graves to be a national issue, to be dealt with by central government. The infringement of the power of local government to develop and protect public spaces and the cultural environment is not a severe one. Nonetheless, any infringement of the right to self-determination by local government must be proportionate, to be in conformity with Section 154.1 of the Constitution. The aim of uniform regulation of protection of war graves by the PWGA, and protection, respect for and dignified treatment of those who have died in the course of hostilities, is legitimate. Sections 8.2 and 9.4 of the PWGA provide a suitable means of reburial of the remains, marking of new graves and transformation of the old gravesite in a manner that respects the memory of the dead.

In order to preserve respect for and dignified treatment of the remains of those who have died in the course of hostilities, resolution of the issues of relocation and changes to grave markings should not be subject to the discretion of local government to issue building permits. The PWGA excludes the discretion of local government to issue building permission only in such cases, where a grave monument or grave marking is to be removed from its previous location and installed at a new burial site, it is also proportionate. The Chamber noted that local government authorities are entitled to participate and to be heard in administrative proceedings relating to

the removal of war graves. The Chamber did not consider it possible to declare Sections 8.2 and 9.4 of the PWGA unconstitutional within the abstract norm review proceedings. It accordingly dismissed the petition of the Tallinn City Council.

Languages:

Estonian, English.



France

Constitutional Council

Important decisions

Identification: FRA-2007-2-005

a) France / **b)** Constitutional Council / **c)** / **d)** 09.08.2007 / **e)** 2007-554 DC / **f)** Law reinforcing the action against reoffending among adult and young offenders / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 11.08.2007, 13478 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.1.1.1.2 **Sources** – Categories – Written rules – National rules – Quasi-constitutional enactments.

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

2.3.2 **Sources** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.

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

3.16 **General Principles** – Proportionality.

5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.

Keywords of the alphabetical index:

Constitutional review, restricted / Penalties, personalisation, principle / Care order / Mentally ill / Penalty, necessity, manifest disproportion / Minimum penalty / Minors, protection / Recidivism, minimum penalty / Penalty, necessity, principle / Penalty, mitigation, based on age.

Headnotes:

While the need to penalise offences is a matter for the legislature's discretionary powers, the Constitutional Council must ensure that there is no manifest disproportion between the offence and the penalty incurred. This principle is not violated by the introduction of minimum penalties for serious crimes and offences punishable by a minimum three years' imprisonment that are perpetrated in the context of recidivism, because the court can still impose a lighter

penalty, particularly having regard to the circumstance of the case. Similarly, the introduction of minimum prison sentences which the court must respect unless the offender offers exceptionally solid guarantees on rehabilitation or social reintegration for particularly serious crimes or offences committed a second time in the context of recidivism, does not, in the light of these facts, infringe the principle of the necessity of penalties.

The principle of "penalty personalisation" does not prevent the legislator from establishing rules to ensure the effective suppression of offences and does not need for the penalty to be determined exclusively on the basis of the offender's personality. By providing that for the first instance offence of recidivism (i.e. the second commission of the offence) the court may impose a lighter penalty than the minimum established in the light of the circumstances of the offence, the law did not infringe the principle of penalty personalisation. The law does not reject the principle that the court can, within the limits set by law, impose penalties and define their modalities in accordance with the circumstances of the offence and the offender's personality; the court retains the power, at least partly, to suspend the sentence and impose probation.

Nor does the establishment of minimum penalties violate the special provisions attenuating criminal responsibility on the grounds of psychic or neuropsychic disorders having affected the person's discernment or impeded the control of his/her acts at the time of the offence. These provisions provide that the court must have regard to this circumstance when determining the penalty and the modalities of its enforcement.

The basic principle in French legislation on young offenders is that their criminal responsibility must be mitigated in accordance with their age and that efforts must be made to rehabilitate child offenders with educational and moral measures suited to their age and personality, as ordered by a special court or implemented under appropriate procedures. This principle does not entail prohibiting coercive measures and sanctions in all cases and allowing exclusively educational measures. It does not eliminate the criminal responsibility of minors or exclude the imposition, if need be, of placement, supervision, retention or detention measures, the latter in the case of young people over the age of thirteen.

The legislator has retained the rule that mitigated penalties must be applied to minors over the age of sixteen. While such mitigation is inapplicable to minors over the age of sixteen in a second instance

of recidivism (i.e. third commission of the offence), the court may decide otherwise. Furthermore, the legislator has left intact the current provisions under which the youth court can order protection, assistance, supervision and educational measures and at the same time impose a criminal sanction if it deems the latter necessary. The minimum penalties set out in the legislation are only applicable in the latter case.

The provisions on imposing a care order on persons liable to socio-judicial supervision always require a court decision. This means that they are by no means automatic and respect both the principles of the necessity of penalties and their personalisation and the prerogatives of the judicial authority.

Summary:

The law adopted in July 2007 is geared to stepping up action against recidivism on the part of adult and young offenders, continuing on from the Law of 12 December 2005. It introduces, right from the first instance of recidivism (i.e. the second commission of the offence), minimum prison sentences ("floor sentences") of approximately one-third of the sentence incurred for serious crimes and certain offences; it also reinforces this mechanism for serious crimes and particularly serious offences where the acts constitute a second case of recidivism (i.e. the third commission of the offence).

1. The appellants challenged these measures with reference to the principles of the necessity of penalties, contending that they would lead to penalties of a severity disproportionate to the seriousness of the offences committed.

The Constitutional Council does not consider itself bound to conduct its own appraisal in lieu of that of the legislature, confining itself to restricted supervision; it does, however, ascertain that there is "no manifest disproportion between the offence committed and the penalty incurred".

Where the first instance of recidivism (i.e. the second commission of the offence) is concerned, the Council notes that the law empowers the court, having regard to the particular circumstances of the case, to impose a lighter penalty than the statutory minimum. For a second instance of recidivism the Constitutional Council finds that the provision applies only to particularly serious acts (all serious crimes and some particularly serious offences). In the Council's view, the mere fact of such an offence being committed for the third time constitutes a particularly serious objective circumstance. The complaint is therefore dismissed.

2. The appellants then invoked a violation of the principle of penalty personalisation deriving from Article 8 of the Declaration of the Rights of Man and of the Citizen of 1789.

The Constitutional Council first of all recalls that this principle does not prevent the legislator from establishing rules to ensure effective suppression of offences, and secondly observes that the principle does not entail determining the penalty exclusively on the basis of the personality of the perpetrator of the offence. This means that the Council must ascertain that where legislation reconciles the principle of penalty personalisation with the other aims set out in the Constitution, it refrains from creating any manifest imbalance and, in particular, from making the determination of penalties in any way automatic.

The Council notes that where an offence constitutes a first instance of recidivism, the law empowers the court to take account of the circumstances of the particular case, the offender's personality and his/her guarantees vis-à-vis rehabilitation. This means that the court retains freedom to impose a lighter sentence. In the event of a second instance of recidivism, the court can impose a penalty other than imprisonment or a lighter sentence than the minima, "provided that the accused offers exceptionally solid guarantees on social reintegration or rehabilitation", a formula which the appellants deemed both too restrictive and too vague. The Council rejects these complaints and considers the legal mechanism in question justified by the aim pursued, viz to ensure the effective suppression of particularly serious offences and to prevent recidivism. It observes that while the law endeavours to restrict the court's power to determine penalties, this restriction does not make the determination of the penalty automatic. Lastly, the Council notes that the law leaves the court extensive leeway to decide on the conditions for enforcing the penalty, and in particular allows it to accompany the penalty, at least partially, with a stay of sentence and probation.

3. The question was also raised of combining the new mechanism with Article 122-1 of the Penal Code to the effect that the court should take account of any deterioration of the offender's mental faculties. There is no difficulty here if the acts in question constitute a first instance of recidivism, provided that the psychic or neuropsychic disorder is a component of the offender's personality which the court can take into account to impose a lighter penalty. In the event of a second case of recidivism, however, the court can only impose a penalty lighter than the minimum one if there are "exceptional guarantees on social integration or rehabilitation". However, such conditions would be difficult for individuals suffering

from psychic or neuropsychic disorders to fulfil. In the absence of specific legal provisions the Council points out that the law was not intended to supersede the special provisions of Article 122-1 of the Penal Code. Consequently, if the court deems it necessary and suited to the offender's personality, it can impose a prison sentence shorter than the minimum established or an alternative penalty on the grounds of the offender's impaired mental faculties.

4. The Council went on to consider the conformity of the new provisions with the constitutional requirements specific to judicial treatment of young offenders. On the one hand, the new law makes the minimum penalties applicable to under-age recidivists, halving the penalty in accordance with usual practice. On the other hand, it permits courts to dispense with this mitigation of responsibility, without stating reasons, in cases of offences committed with the aggravating circumstance of violence. Lastly, it eliminates the penalty mitigation principle for minors over the age of sixteen in cases of particularly serious offences committed as a second instance of recidivism (i.e. for the third time), unless otherwise decided by the court, whereby Youth Courts must provide a special statement of reasons for their decision.

The appellants claimed that this mechanism infringed the fundamental principle enshrined in French legislation in the field of judicial treatment of young offenders. The Council recalls the scope of this principle, which provides for mitigating the criminal responsibility of minors and imposes efforts to rehabilitate them with educational and moral measures suited to their age and personality. However, the Council notes that legislation must reconcile this constitutional principle with measures to prevent breaches of public order, particularly violation of the safety of persons and property, which are required for the protection of constitutional rights.

The Council rejects the appellants' arguments on the grounds that the provisions challenged preserve the principle of mitigating sentences for under-age offenders, with exceptions based on the particular circumstances of the case. While attenuation on the grounds of minority does not apply to young people over the age of sixteen in the case of specified offences committed as a second instance of recidivism, the court may nonetheless decide otherwise.

Lastly, it notes from the reports of parliamentary debates that the legislator's intention was not to eliminate the provisions under which the competent court ordering protection, assistance, supervisory and educational measures can also impose a criminal

sanction if it considers the latter necessary. The minimum penalties set out in the new articles of the Penal Code will therefore be applicable only in this latter case (reservation).

5. The last section of the law makes care orders generally applicable. Previously, this supplementary penalty, applicable to offenders liable to socio-judicial supervision (sexual offences) was a mere alternative option. The law provides that the sentenced person is deemed liable to a care order unless otherwise decided by the judge; this measure can also be decided subsequently by the judge responsible for the execution of sentences under a stay of sentence accompanied by probation and judicial supervision.

The appellants complained of the "automatic" nature of this procedure, particularly in connection with the judge responsible for the execution of sentences. This complaint is dismissed by the Council on the grounds that the law expressly retains the judge's freedom not to resort to this measure and that it can only be imposed on the sentenced persons where a medical report has established that they should be provided with medical treatment.

Cross-references:

- Decision no. 2007-553 DC of 03.03.2007, *Bulletin* 2007/1 [FRA-2007-1-004];
- Decision no. 2005-520 DC of 22.07.2005, *Bulletin* 2005/2 [FRA-2005-2-005];
- Decision no. 2002-461 DC of 29.08.2002, *Bulletin* 2002/2 [FRA-2002-2-006];
- Decision no. 86-215 DC of 03.09.1986;
- Decision no. 80-127 DC of 19 and 20.01.1981.

Languages:

French.



Identification: FRA-2007-2-006

a) France / **b)** Constitutional Council / **c)** / **d)** 16.08.2007 / **e)** 2007-555 DC / **f)** Law to promote work, employment and purchasing power / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 22.08.2007, 13959 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

3.16 **General Principles** – Proportionality.

4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.

5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.

Keywords of the alphabetical index:

Constitutional review, manifest disproportion / Tax, non-confiscatory nature, tax shield / Tax, necessity.

Headnotes:

While the equality principle does not prevent the legislator from providing incentives, on general-interest grounds, in the form of tax relief, the relevant legislation must be based on objective and rational criteria vis-à-vis the aims pursued and the tax relief granted must be proportional to the expected incentive effect.

Exemption from income tax and social contributions on overtime is geared to stimulating growth and employment. The general idea is to implement the right to employment on general-interest grounds. Since the Constitutional Court has no general appraisal or decision-making powers such as those held by Parliament, it is not incumbent on it to ascertain whether this objective could be achieved by other means, unless the methods used are manifestly unsuited to the aim pursued.

The tax credit arising out of the construction or purchase of a primary residence after the entry into force of the law is geared to promoting access to house ownership, in line with a general-interest aim.

Provisions extending tax credits intended to promote the purchase of a primary residence to loans already taken out are unconstitutional. By deciding to increase the purchasing power solely of tax-payers having purchased or built their main residence at least five years previous to the new legislation has established differential treatment among tax-payers which is unjustified in the light of the stated objective. This form of tax relief places burdens on the State which are manifestly disproportionate to the expected incentive effect, leading to blatant inequality among tax-payers in sharing the burden of public expenditure.

The requirement flowing from Article 13 of the Declaration of the Rights of Man and of the Citizen of 1789 would be breached if tax were confiscatory in nature or if it placed an excessive burden on a given category of tax-payers in the light of their tax-paying capacities. The principle of placing a ceiling on the proportion of income from a given tax household assigned to the payment of direct taxes is supposed to prevent violation of equality in the taxation field. The percentage of income above which payment of direct tax entitles the tax-payer to a rebate is subject to restricted supervision. The reduction from 60 to 50% of the maximum share of its income which a tax household may have to pay for direct taxation is not deemed to stem from any manifest error of appraisal. Including the general social contribution (*contribution sociale généralisée*) and other social contributions in the total payable under direct taxation is not unsuited to the legislator's specific objective. While the equality principle is, broadly speaking, appraised on a tax-by-tax basis, the "ceiling method" consisting in reimbursing tax-payers the sums paid under direct taxation above the ceiling established by law cannot flow from any overall computation of sums payable.

By introducing mechanisms to reduce the solidarity tax on capital for certain types of investment in small and medium-sized enterprises, the legislator's aim was to provide incentives for productive investment in this sector in view of its major role in the economy. In the light of this general-interest objective and the risks of such investment, the tax relief is not disproportionate and does not blatantly infringe the principle of equality in sharing the burden of public expenditure.

Summary:

In connection with the appeal against the law to promote work, employment and purchasing power, the Constitutional Council considered several key measures in the Government's economic programme.

1. The appellants' main complaint was against the fiscal and social exemption of overtime hours.

The Constitutional Council notes that the law is intended to stimulate growth and therefore to implement the right to employment. It is not incumbent on the Council to ascertain whether this aim could have been attained by other means, unless the methods adopted are manifestly unsuited to the aim pursued.

The equality principle does not prevent the legislator from adopting incentive measures by granting tax relief, provided that they pursue a general-interest aim and are based on objective and rational criteria in

line with the aim pursued. The Council appreciates that the means and the end are sufficiently correlated in this case. Since these conditions are fulfilled in the instant case, there is no cause for censure.

2. A second series of complaints concerned the ceiling placed on direct taxation. The law extends the scope of the “tax shield” by reducing from 60 to 50% the income threshold above which the tax-payer is entitled to a rebate, while at the same time extending the relevant basis of assessment to a variety of social contributions (general social contribution, contribution for the reimbursement of the social debt, social levy on capital income, etc.).

The Constitutional Council has previously held that Article 13 of the Declaration of the Rights of Man and of the Citizen of 1789 would be breached if tax were confiscatory in nature or if it placed an excessive burden on a given category of tax-payers in the light of their tax-paying capacities and that the so-called “tax shield” is designed to prevent any blatant infringement of the principle of equality in sharing the burden of public expenditure.

In the instant case the Council was called upon to pronounce on the extension of the basis of assessment and the fixing of the threshold at 50% of income.

On the former point, it confirms its case-law to the effect that the social contributions in question come under the “taxes of all types” category within the meaning of Article 34 of the Constitution. It concludes that their inclusion in the tax shield was not unsuited to the achievement of the aim pursued by the legislator. On the latter point, it confines itself to restricted supervision of proportionality, deeming that the rule to the effect that no one should pay more than half of his/her earnings in direct taxation did not stem from any manifest error of appraisal.

Lastly, in connection with the equality principle, the Council specifies that in the instant case the appraisal can only be effected in an overall manner and not on a tax-by-tax basis.

3. The appellants also challenged the reduction of the solidarity tax on capital in respect of investment in small and medium-sized enterprises and payments made to local investment funds.

The Constitutional Council ascertains the fulfilment of two conditions: pursuit of a general-interest objective, which here consists in providing incentives for productive investment in view of the role played by small and medium-sized enterprises in the economy; and the existence of objective and rational criteria in

line with the aim pursued. The conditions set out in the law were such that the mechanism was not disproportionate to the aim pursued. This means that the type of tax relief in question did not blatantly infringe the equality of tax-payers in sharing the burden of public expenditure.

4. On the other hand, the Constitutional Council did censure *proprio motu* Article 5 of the Law to the extent that it extended to existing mortgage loans the tax credit introduced to promote access to ownership of the primary residence.

The law established a tax credit on income in respect of interest on loans taken out in order to purchase or building a dwelling to be used as the person's primary residence. This provision had been severely criticised by the opposition as being unconstitutional, but the appellants failed to mention it in their appeal. The Council examined it *proprio motu*.

In the instant case, the introduction, for the future, of a tax credit on income to finance the purchase or construction of a primary residence is deemed to comply with the principle of tax equality: this measure tallies with the general interest of promoting access to house ownership, and the criteria adopted were objective and rational. The sum involved in the measure does not constitute tax relief manifestly disproportionate to the objective pursued by the law.

On the other hand, applying the law to existing loans (in practice loans taken out since September 2002) is deemed to result in a severe infringement of the equality of tax-payers in sharing the burden of public expenditure. The Council finds that the general interest pursued by the measure, as it emerges from the parliamentary records, is to support consumption and the purchasing power of persons taking out loans. However, extending it to other existing loans makes it a means of assisting persons who have purchased property rather than an incentive to purchase. The Constitutional Council concludes from this that the tax relief in question is not based on any rational criterion and establishes unjustified differential treatment among tax-payers *vis-à-vis* the aim pursued. The law benefited a specific category of tax-payers, viz those who have taken out loans since 2002, and this detrimental treatment of other tax-payers is unjustified in the light of the objective of redistributing purchasing power, which concerns all French citizens. This tax relief shifted on to the State a burden which was manifestly disproportionate to the expected incentive effect.

Cross-references:

- Decision no. 2006-535 DC of 30.03.2006, *Bulletin* 2006/1 [FRA-2006-1-004];
- Decision no. 2005-530 DC of 29.12.2005, *Bulletin* 2005/3 [FRA-2005-3-012];
- Decision no. 2003-477 DC of 31.07.2003, *Bulletin* 2003/2 [FRA-2003-2-014];
- Decision no. 2002-464 DC of 27.12.2002, *Bulletin* 2002/3 [FRA-2002-3-009].

Languages:

French.

*Identification:* FRA-2007-2-007

a) France / **b)** Constitutional Council / **c)** / **d)** 16.08.2007 / **e)** 2007-556 DC / **f)** Law on social dialogue and continuity of public service in regular land passenger transport / **g)** *Journal officiel de la République française – Lois et Décrets*, (Official Gazette), 22.08.2007, 13971 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.5.2.4 **Institutions** – Legislative bodies – Powers – Negative incompetence.
 5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.
 5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.
 5.4.10 **Fundamental Rights** – Economic, social and cultural rights – Right to strike.

Keywords of the alphabetical index:

Strike, advance notice, obligation / Collective bargaining / Strike, participation / Public service, continuity / Public service, equality / Trade union, strike, declaration, monopoly.

Headnotes:

According to the seventh paragraph of the 1946 Preamble, “the right to strike shall be exercised within the framework of the laws governing it”. The constitutional writers wished to convey that the right

to strike is a constitutional principle but that it has limits, and they empowered the legislator to establish these limits by ensuring the requisite reconciliation between the defence of professional interests and the protection of the general interest. The right to strike in the public services cannot stand in the way of the legislator's right to establish the necessary limits in order to ensure public service continuity, which also has the status of a constitutional principle.

The legislator may decide that the rules on exercising the right to strike are to be implemented either under a State Council decree or a collective agreement. Article 2 of the Law on social dialogue and continuity of public service in regular land passenger transport provides that in the absence of a framework agreement or a branch agreement at 1 January 2008, a State Council Decree must determine, under the conditions set out in the law, the organisation and implementation of the conflict prevention procedure. The law thus respects the powers conferred under Article 34 of the Constitution.

By increasing the maximum advance notice from five to thirteen days, the law endeavours to facilitate effective negotiation to prevent strikes, followed, as appropriate, by the adoption of a suitable transport plan to guarantee public service continuity. It accordingly places no unjustified restrictions on the conditions for exercising the right to strike.

Having regard to the specific nature of the right to strike, the legislator may confer on representative trade union organisations a number of special rights relating to the calling of strikes. The role entrusted to them in giving advance notice respects the freedom of every employee to decide personally whether or not to take part in the strike.

The parliamentary records show that the main aim of the law was to make mandatory, rather than optional, the pre-conflict prevention procedures, particularly those provided for in the framework agreements signed by the major transport companies. Respecting the substance of these agreements, the law endeavours to reinforce public service continuity while guaranteeing compliance with the principle of equality before the law. It is not unconstitutional in that it does not violate the legally concluded agreements.

The obligation of stating an intention to go on strike 48 hours in advance can only be raised against employees whose presence is directly required for service provision. This obligation does not prevent employees from joining a strike which has already begun, subject to informing their employer at least 48 hours in advance. This arrangement is not disproportionate to the objective of public service continuity.

Disciplinary sanctions, which are exclusively intended to punish any failure to comply with this procedural formality, are as set out in the company's in-house rules. Infringing company rules does not make the exercise of the right to strike illegal.

The mandatory individual declaration is accompanied by safeguards designed to ensure respect for employees' right to private life. Such declarations are covered by professional secrecy and can only be used for the "organisation of the service during the strike". As the texts make no mention of this subject, the Law of 6 January 1978 on computer processing, files and freedoms is applicable *ipso jure* to any processing of personal data which may be conducted in this context.

Summary:

The Law on social dialogue and continuity of public service in regular land passenger transport is designed to organise the prevention of conflicts and the functioning of the service in the event of strike.

Article 2 of the Law requires negotiations to be held in transport companies and their various branches before 1 January 2008 in order to secure the signature of a framework agreement organising a "conflict prevention procedure". Failing this, negotiations can be defined by the social partners at branch level. If no framework or branch agreement has been concluded by 1 January 2008, the law provides for the State Council to issue a Decree in lieu. The transport companies which already have an agreement must bring their situation into line with the new law by 1 January 2008 at the latest.

The appellants contended that the law was vitiated on the grounds of "negative lack of jurisdiction" (*entachée d'incompétence négative*), complaining particularly about the referral to a State Council Decree, infringement of the right to strike and violation of freedom of contract.

Paragraph 7 of the Preamble to the Constitution of 27 October 1946 provides that "the right to strike shall be exercised within the framework of the laws governing it". Consequently to this Preamble and to Article 34 of the Constitution, only the law can govern the right to strike. Nevertheless, the law can refer to both collective agreements and decrees. Since the law at issue strictly defines the powers of both these instruments, it cannot be accused of having overstepped its competence, and the Constitutional Council therefore dismissed the complaint in question.

The appellants also criticised the excessive length of the period of negotiation and the "monopoly" held by

the representative trade unions for submitting advance notice of a strike. However the Council did not deem this period disproportionate in view of its two purposes, namely ensuring effective negotiation and implementing a suitable transport plan. Stressing the specific nature of the right to strike, the Council also considers that the trade union monopoly in initiating strikes does not constitute an excessive obstacle to the exercise of this right.

The new law strives to ensure that the conflict prevention agreements previously concluded are brought into line with the new rules, and makes the conflict prevention procedures mandatory, rather than optional as they had been previously. Accordingly, it does not challenge the overall substance of these agreements but rather is intended to reinforce the continuity of the public service which such enterprises are responsible for ensuring. Any infringement of legally concluded contracts is therefore justified by a sufficiently important general interest.

In the event of a strike, the law requires some categories of employees to declare their intention to take part in the strike 48 hours in advance. The appellants' complaints raised questions about the individual aspect of a conflict deemed to be collective. The 1946 provision on the right to strike is elliptical. Nevertheless, the Court of Cassation posited the individual nature of this right, stating that the employees were the "sole holders of the right to strike".

The Council notes that this new requirement is limited and proportionate to the pursued objective of public service continuity. While dismissing the complaint, the Council advances the principle that the individual declaration requirement cannot be extended to all employees; it is constitutional solely because the presence of the employees subject to this requirement directly determines the provision of services.

Furthermore, the declaration requirement does not prevent employees from joining a strike which is already under way, provided that they inform their employer at least forty-eight hours in advance. Lastly, the disciplinary sanctions laid down for breach of this requirement are intended to penalise only the failure to observe the formality laid down in the law and not any illegal exercise of the right to strike.

Lastly, the Council finds no infringement of the private lives of employees. The information emerging from individual declarations are subject to the rules of existing law, i.e. their use for other purposes is liable to criminal penalties; furthermore, the Law of 6 January 1978 on the processing of personal data is applicable *ipso jure*.

Cross-references:

- Decision no. 87-230 DC of 28.07.1987;
- Decision no. 86-217 DC of 18.09.1986;
- Decision no. 79-105 DC of 25.07.1979.

Languages:

French.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2007-2-009

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 28.02.2007 / **e)** 1 BvL 9/04 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2007, 1735-1741; *Zeitschrift für das gesamte Familienrecht* 2007, 965-973; CODICES (German).

Keywords of the systematic thesaurus:

5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.

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

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

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

Keywords of the alphabetical index:

Child, born out of wedlock, equal treatment with legitimate child / Maintenance claim, duration / Childcare maintenance.

Headnotes:

The legislative has breached Article 6.5 of the Basic Law by granting different durations for a maintenance claim to one parent for the care of his/her child born in wedlock and to the other parent for the care of his/her children born out of wedlock.

Summary:

I. In accordance with § 1570 of the Civil Code (hereinafter: “the Code”), a divorced parent may demand maintenance from his/her former spouse so long and insofar as he/she will not be engaging in gainful employment due to the care or upbringing of a joint child. The case-law agrees in assuming that no obligation to enter into gainful employment exists for the caring parent until the child reaches the age of eight or until the end of primary school attendance. By contrast, the claim of a parent who cares for a

child born out of wedlock and hence does not engage in gainful employment, as set out in § 1615I of the Code, is much weaker. In accordance with § 1615I.2 sentence 3 of the Code, the obligation of the other parent to grant maintenance to the caring parent ends three years after the birth of the child, insofar as this would not be grossly unreasonable, in particular taking account of the best interests of the child.

The plaintiff of the initial proceedings is the mother of a child born out of wedlock in April 1997, for whose care she is responsible. She sued the father for maintenance payments from February 2002. This action was rejected by the Local Court since the plaintiff had not submitted any circumstances indicating that rejection of maintenance would be grossly unreasonable on expiry of the three years. The plaintiff submitted an appeal on points of fact and law against this, which she reasoned by claiming the alleged unconstitutionality of the time-limit contained in § 1615I.2 of the Code. The Higher Regional Court thereupon seized of the case suspended the proceedings and submitted the question to the Federal Constitutional Court for a ruling as to whether the provision was incompatible with Article 6.5 of the Basic Law. Article 6.5 of the Basic Law provides that children born out of wedlock are to be granted, by legislation, the same conditions for their physical and emotional development and their status in society as children born in wedlock.

II. The First Panel of the Federal Constitutional Court has ruled that the different regulation of the duration of the maintenance claim of a child-caring parent is incompatible with the Basic Law. It violates Article 6.5 of the Basic Law. The legislature is obliged to create a constitutional arrangement by 31 December 2008. The existing regulations continue to apply until such time as the new regulation enters into force.

The ruling is based in essence on the following considerations:

The legislature has breached of the prohibition of prejudicing children born out of wedlock as against children born in wedlock contained in Article 6.5 of the Basic Law. The provision prohibits the use of a double standard in allocating personal care to children born in wedlock and out of wedlock. How much parental care and attention a child needs does not depend on whether he/she is born in or out of wedlock. The inequality in the length of the maintenance that arises from childcare prejudices to the child born out of wedlock as compared with the child born in wedlock because he/she is deprived of the possibility of being the focus of parental care for as long as a child born in wedlock. This different treatment is not justified.

It is not justified by the difference in social situations of the children. The actual circumstances of children born in wedlock of divorced parents are in principle are not all that different. The caring parent relies, in both cases, on the assurance of receiving maintenance if he/she wishes to take care of the child, and hence not to engage in gainful employment.

Furthermore, the broad range of different lifestyles among unmarried parents, in comparison to married parents, is unable to justify the difference in lengths of the maintenance claims of parents who care for children. Article 6.5 of the Basic Law intends, in particular, to place children whose parents have not assumed any responsibility for one another on an equal footing with those children whose parents care for one another and for their child within a marital community. The nature of the parental relationship is ultimately immaterial to a maintenance claim granted in respect of the care for or upbringing of a child. The party who is obliged to pay maintenance by law is not obliged to do so for the sake of the other parent, but for that of the child, so that he/she can receive this care in person from a parent. Also, the diversity of non-marital relationships does not lead to different parental responsibilities towards the child.

The difference in lengths of maintenance claims is also not justified by the fact that, with divorced spouses, in comparison to unmarried parents, marital solidarity has a continuing impact, and can give rise to claims to which the unmarried are not entitled.

It is possible, to place a divorced parent on a better footing in terms of the law on maintenance than an unmarried parent because of the protection afforded by marital community under Article 6.1 of the Basic Law. This may also have an indirect impact on the circumstances of the children living with these parents. For instance, a divorced parent has a maintenance claim against the other parent, regardless of the age of the child he/she is taking care of, if he/she does not find suitable gainful employment. If however the legislature grants the divorced spouse a maintenance claim solely on the grounds of the personal care of the joint offspring, Article 6.5 of the Basic Law will prevent it from measuring the duration of the necessary care for the child born in wedlock differently from that of a child born out of wedlock. Neither the wording of § 1570 of the Code, nor its origin, gives rise to an orientation of the maintenance claim beyond childcare. There are no indications that childcare maintenance is also justified by the additional protective purpose of post-marital solidarity. The duration of the maintenance claim under § 1570 of the Code, measured exclusively by the age of the child, rather, counters the presumption of such a further reason determining

the duration of the claim. Also, the case-law exclusively links the duration of the maintenance to the age of the child. The age of a child is certainly a suitable indication to determine a child's need for parental care. It is, however, not a suitable standard by which to measure the length a parent should be granted maintenance not because of childcare, but because of his/her trust in the role as a carer for the child assumed during the marriage. Due to the link made exclusively to the age of the child, the different duration of the claim to childcare maintenance stems solely from a different estimation of the need for care of children born out of wedlock and in wedlock. This is, however, prohibited by Article 6.5 of the Basic Law.

§ 1615I.2 sentence 3 of the Code, by contrast, does not violate the parental right protected by Article 6.2 of the Basic Law. The time-limit of the maintenance claim to three years as a rule is not objectionable in the light of Article 6.2 of the Basic Law. It lies within the latitude open to the legislature to determine the length of time for which it considers it necessary, from the point of view of the child's best interests, as well as reasonable for the parent obliged to pay maintenance, to enable one parent to take care of the child by granting a maintenance claim to the latter. It has also granted each child the right to be placed in a kindergarden from the age of three, and has ensured that a child can, as a rule, be given non-domestic care from this age onwards. The legislature has reached a justifiable assessment by not having considered it necessary to release the caring parent from his/her obligation to engage in gainful employment for a longer period, but instead has presumed, in assessing academic studies, that care of the child in kindergarden does not harm it, but in fact enhances important skills.

The legislature has several possibilities at its disposal to remedy the unconstitutional situation. For instance, it may bring about equal treatment by amending § 1615I and § 1570 of the Code, or by creating a new regulation on both situations. In doing so, it must use an equal standard as a basis for the duration of child maintenance for children born out of wedlock and in wedlock.

Languages:

German.



Identification: GER-2007-2-010

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 08.05.2007 / **e)** 2 BvM 1-5/03; 2 BvM 1, 2 /06 / **f)** / **g)** / **h)** *Wertpapiermitteilungen* 2007, 1315-1319; www.bundesverfassungsgericht.de (German and English version); CODICES (German).

Keywords of the systematic thesaurus:

2.1.2.2 **Sources** – Categories – Unwritten rules – General principles of law.

4.18 **Institutions** – State of emergency and emergency powers.

Keywords of the alphabetical index:

Customary international law, general principle / Government bonds, foreign, default / State necessity, economic / State necessity, invocation towards private creditor / State necessity, plea under international law, general legal principle.

Headnotes:

There is no ascertainable general rule of international law that entitles a state to temporarily refuse to meet private-law payment claims that are due to private individuals, by invoking state necessity which it declared because of the inability to pay.

Summary:

I. In the context of the Argentinean financial crisis, the Republic of Argentina made considerable use of the instrument of bonds. Such bonds were also issued on the German capital market and were subscribed to by German creditors. Early in 2002, Argentina declared its inability to pay invoking state necessity. In view of several actions against the Republic of Argentina that had been brought before the Frankfurt Local Court by German investors, the court submitted to the Federal Constitutional Court the question as to whether the state necessity declared by the Republic of Argentina in respect of the inability to pay, entitles the latter by force of a rule of international law to temporarily refuse to meet due payment claims.

II. The Second Panel of the Federal Constitutional Court reached the result that no general rule of international law is ascertainable which entitles a state to temporarily refuse to meet private-law payment claims due to private individuals by invoking state necessity declared because of the inability to pay.

The ruling is based in essence on the following considerations:

The proceedings are admissible. They are submission proceedings under Article 25.2 of the Basic Law. Such proceedings are admissible if the existence or scope of a general rule of international law is called into doubt in a legal dispute. What is more, the court that submits the question to the Federal Constitutional Court must adequately explain why the question is material to the ruling. These prerequisites are met.

A general rule of international law such as had been inquired about in the submission proceedings could, however, not be ascertained.

In documentation concerning the application under customary law, reference cannot be made to the United Nations International Law Commission's draft Convention on state responsibility which, in its Article 25, governs state necessity under international law, as a justification. It is generally recognised that this provision constitutes applicable customary international law. Necessity, as it is regulated therein is, however, a justification in a relationship to which international law applies, not a justification in the relationship between the state and private creditors.

Nor does the relevant case-law of international and national courts permit the positive ascertainment of a general rule of international law in accordance with which a state would be entitled to make an objection of state necessity towards private individuals. There is no uniform state practice that recognises such a justification by force of international law. The practice of international courts does not constitute an adequate basis for such recognition. It is true that several international courts (International Centre for Settlement of Investment Disputes; Permanent International Court of Justice; Mixed Claims Commission France-Venezuela) have already reviewed states' invocation of necessity as a justification. Nonetheless, these cases do not provide any indications of the transferability of a plea of state necessity to private-law relations. In the respective proceedings, the objection of necessity was restricted to the international obligations between the states. The rulings are silent on the question of whether state necessity could be invoked directly towards a private individual. Also, the view of national case-law on the question of state necessity for lack of agreeing practice does not suggest that the recognition of state necessity impacting on private-law relationships is established in customary law.

A member of the Panel has attached a dissenting opinion to the ruling, which argues as follows: The Panel did not decide upon the admissibility of the

submission according to the standards developed in case-law to date. Moreover, the Panel answers a submission question which was put to it in submission orders of the Frankfurt am Main Higher Regional Court, which were rescinded in the meantime, but not by the Frankfurt am Main Local Court, whose submissions were the only ones on which the Panel had to rule. Also, the substantive legal situation is not the one the Panel had established. The plea of state necessity under international law is a general legal principle behind which generally recognised convictions lie that concern the boundaries of the enforceability of claims and the precedence of elementary common-good interests. This is a matter of the state's obligation to maintain its elementary security and public welfare services that take precedence over the claims of private individuals. For instance, those of creditors of speculative bonds. The plea of state necessity, which enforces such precedence, is not restricted in the manner that is assumed by the Panel.

Cross-references:

As regards the subject of Argentine government bonds, see also the following decisions of the Federal Constitutional Court:

- Decision no. 2 BvR 120/03 of 04.05.2006, *Bulletin* 2006/2 [GER-2006-2-009];
- Decision no. 2 BvM 9/03 of 06.12.2006, *Bulletin* 2006/3 [GER-2006-3-017].

Languages:

German.



Identification: GER-2007-2-011

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 13.06.2007 / **e)** 1 BvR 1550/03; 1 BvR 2357/04; 1 BvR 603/05 / **f)** / **g)** / **h)** *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis* 2007, 1356-1367; *Steuern und Bilanzen* 2007, 558; *Praxis Steuerstrafrecht* (Beilage) 2007, 171; *Wertpapiermitteilungen* 2007, 1360-1367; *Deutsches Verwaltungsblatt* 2007, 1023-1030; *Neue Juristische Wochenschrift* 2007, 2464-2473; CODICES (German).

Keywords of the systematic thesaurus:

- 3.10 **General Principles** – Certainty of the law.
 3.12 **General Principles** – Clarity and precision of legal provisions.
 3.16 **General Principles** – Proportionality.
 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
 5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Bank account, data, retrieval, automated.

Headnotes:

§ 93.8 of the Tax Code violates of the principle of the clarity of law because it determines the group of authorities which may file a request to retrieve master account data without sufficiently determining the tasks which such requests are to serve.

§ 24c.3, sentence 1, no. 2 of the Banking Act and § 93.7 of the Tax Code are compatible with the Basic Law.

Summary:

I. The subject-matter of the constitutional complaints, filed amongst others by a domestic bank, a lawyer and notary, a recipient of housing benefit and a recipient of social assistance, is in essence § 24c.3, sentence 1, no. 2 of the Banking Act, as well as § 93.7 and 93.8 of the Tax Code. These provisions entitle the authorities and courts competent to provide international mutual assistance in criminal matters, as well as for criminal proceedings, the tax authorities and the social welfare authorities, to retrieve automatically certain data which the banks must retain. These are the master account data of the bank customers and of other parties with power of disposal, such as surname, date of birth, account numbers and deposit numbers. No account balances or movements can be retrieved by these means. The authorities may only obtain those details on the basis of other empowerment provisions.

II. The constitutional complaints were partially successful. The First Panel of the Federal Constitutional Court stated the following in essence:

§ 93.8 of the Tax Code violates the right to informational self-determination of the two applicants who receive social benefits. § 24c.3, sentence 1, no. 2 of the Banking Act and § 93.7 of the Tax Code, by contrast, are compatible with the Basic Law.

The data retrieval governed by the impugned provisions encroaches on the right to informational self-determination.

Provisions providing an empowerment to such encroachments must determine precisely their reason, purpose and limits. § 93.8 of the Tax Code does not comply with these principles of the clarity of the law and with the principle that the law must be definite. The provision neither determines sufficiently precisely the group of authorities which should be entitled to request retrieval nor the tasks which such requests are to serve.

The area of application of the provision, and hence the possibility to retrieve account data, is opened if the social welfare authority applies a law which is linked to “definitions of the Income Tax Act”. Even if one were to interpret this narrowly, such that a statute only falls under this provision if it specifically relates to terms of income tax law, it is possible to derive neither a concrete delimitation of the area of application nor an area-specific purpose of the respective data collection. Hence, § 93.8 of the Tax Code makes available the tool of the automated retrieval of master account data for an immense multiplicity of statutory purposes. It is not evident that the indefinite wording of the provision is due to particular difficulties in laying down a clear and definite regulation. The provision is intended, in particular, to combat the abuse of social benefits and the non-payment of social charges. For the authorities’ investigations relating thereto, case groups can be created. It would have been straightforward to simply list the statutes for the execution of which retrieval of bank account data was to be permissible.

§ 24c.3, sentence 1, no. 2 of the Banking Act and § 93.7 of the Tax Code, by contrast, satisfy the principle that the law must be definite, since they designate sufficiently precisely the authority empowered to collect the information, the preconditions for the retrieval of bank account data in terms of the elements of potential offences, as well as the nature of the information.

The empowerment to intervene, contained in the provisions, also satisfies the principle of proportionality. The same applies to § 93.8 of the Tax Code if the indefiniteness of this provision, which has been described, is remedied constitutionally.

The provisions serve interests of the common good, which are of considerable significance. § 24c.3, sentence 1, no. 2 of the Banking Act aims at effective criminal prosecution and mutual assistance in criminal matters, § 93.7 of the Tax Code aims to bring

about equal fiscal burdens. Also, the goals contained in § 93.8 of the Tax Code take on considerable weight if the area of application is reduced to prosecuting significant public interests, namely ensuring that social charges are collected and that the abuse of social benefits is countered.

These interests of the common good are not disproportionate to the encroachments on the right to informational self-determination facilitated by the provisions. The information obtained by retrieving bank account data – the master account data pure and simple – if looked at in isolation has no special relevance in terms of personality. The impugned regulations are also not inappropriate insofar as the possibility of a legal appeal is limited as a result of the secret nature of retrieval. If the investigation is kept secret from the person concerned, this increases the intensity of the encroachment on informational self-determination. The authority must, however, take this into account when deciding whether it is possible for master account data to be secretly accessed in an individual case without previously informing the person concerned, or whether one may consider an investigative measure which is less detrimental in terms of fundamental rights. Retrieval of bank account data is hence subject to the principle of necessity. The structure of the encroachment thresholds in the impugned provisions also complies with the principle of proportionality since the retrieval of bank account data is permitted only where there is a specific suspicion.

The data retrieval provided for in the impugned provisions does not violate the right of the bank filing the complaint to informational self-determination. The interest of a bank in the confidentiality of its business relations is only protected by fundamental rights insofar as the impairment can have an impact on its own economic activity. This is, in principle, not the case insofar as the business relationships are taken note of solely in the context of investigations targeting customers.

§ 24c.3, sentence 1, no. 2 of the Banking Act and § 93.7 of the Tax Code do not breach the right of the applicant lawyer and notary to freely choose an occupation. The measures which can be taken on the basis of the impugned provisions do not impair the relationship of trust between the lawyer/notary and his/her clients. A lawyer's client can only develop a constitutionally protected trust in his/her confidentiality insofar as the lawyer has actual possibilities to exert an influence.

The impugned provisions also meet the fundamental right-related requirements of legal protection which is actually effective. Procedural law guarantees, for

those concerned, a fundamental right to information of which they can indeed avail themselves at the latest when the authority in question has evaluated the outcome of retrieval of the bank account data with consequences which are detrimental to him/her. The authorities must comply with the requirements of the guarantee of legal protection when applying the provisions from which the right to information emerges. In particular, insofar as the tax authorities are granted discretion as to information, this is reduced in favour of the person concerned if and to the degree that the provision of information is not opposed by a special interest in confidentiality which takes on overriding significance. The legislature was not obliged to provide for an obligation incumbent on the authority acting in each case to inform the person concerned after each instance of the retrieval of bank account data. If the retrieval of bank account data has no detrimental consequences for the person concerned, his/her interest in establishment and omission is not so grievous that he/she would always have to be actively provided with the knowledge necessary to invoke this in court.

The legislature has until 31 May 2008 to adopt a new constitutional regulation of § 93.8 of the Tax Code. Until then, the provision remains applicable on the condition that, in accordance with this provision, retrieval requests are only allowed for the purpose of examining the entitlement to social benefits named in the application decree of 10 March 2005 issued by the Federal Ministry of Finance.

Languages:

German.



Identification: GER-2007-2-012

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 14.06.2007 / **e)** 2 BvR 2247-2249/06 / **f)** / **g)** / **h)** *Wertpapiermitteilungen* 2007, 1392-1395; CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Class action, foreign, constitutionality / Procedural law, foreign / Hague Convention, judicial and extrajudicial documents, meaning and service / Judicial assistance, civil proceedings / Damages, punitive, constitutionality.

Headnotes:

The service of statements of claim in American class actions through mutual assistance channels does not, as such, constitute a violation of Article 2.1 of the Basic Law (general freedom of action) in conjunction with the rule of law. Such a violation can exist, however, if the objective pursued by the action infringes essential principles of a free state governed by the rule of law.

Summary:

I. The constitutional complaints concern the service of statements of claim in American class actions on the complainant in Germany through mutual assistance channels pursuant to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (hereinafter: "the Convention").

The complainant is an automobile manufacturer the registered office of which is in Germany and it has subsidiaries in the United States of America and Canada. Numerous class actions are pending in the USA against the complainant and other automobile manufacturers and dealers. They are based on the allegation of agreements, made in violation of competition law, preventing the import of motor vehicles from Canada to the United States for the purpose of keeping the price level in the United States automobile market high.

In the case of three of these actions pending in the USA, the Central Authority competent in Germany and upon the plaintiffs' request ordered the service of the statements of claim on the complainant. The complainant did not take receipt of the statements of claim.

The competent Higher Regional Court rejected as unfounded the applications made by the complainant challenging the orders of service.

II. The Federal Constitutional Court has not admitted the constitutional complaints for decision. The reasons for the decision were essentially as follows:

The decisions of German state bodies which serve foreign statements of claim on a domestic level, may violate Article 2.1 of the Basic Law in conjunction with the rule of law principle, if the objective pursued by the statement of claim violates essential principles of a free state governed by the rule of law. However, the class actions in this case do not satisfy this requirement.

The Convention regulates the cooperation between the Contracting States in relation to the service of documents in civil proceedings. If a request for service in a civil or commercial matter within the meaning of the Convention is made, service may only be rejected on the basis of the reservation clause in Article 13.1 of the Convention.

There is no doubt as to the constitutionality of the Convention. It serves important general interests which justify an encroachment on the general freedom of action. The German state does not protect its citizens who engage in international legal transactions from their responsibilities in a foreign legal system. On the contrary, the state supports the enforcement of foreign claims to jurisdiction. Article 13.1 of the Convention takes into account the limits that are imposed by the Constitution in this respect:

"Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security. It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based. The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal."

The narrow circumstances under which service may be refused are justified by the interest in quick and effective judicial assistance in the case of service by the courts and is, in principle, in line with the Constitution.

The reservation clause in Article 13.1 of the Convention is not, however, devoid of content: a limit might be reached where the objective pursued by the action obviously violates essential principles of a free state governed by the rule of law. The Federal Constitutional Court has not yet conclusively

determined whether in such a case the German state body may for constitutional reasons, refuse service of the statement of claim.

This question, however, is not significant for the present decision because there is no violation of essential principles of a free state governed by the rule of law. The added burdens which, from the point of view of the German legal system, a defendant is subject to in an American class-action lawsuit will not alone be sufficient to substantiate an allegation that the plaintiff has breached the law. Instead, the objective and the specific circumstances of the legal action must indicate that there has been an obvious breach of the law – this is missing in the present case.

The following legal institutions can result in added burdens for the defendant:

In class actions, a multitude of parties who may have been injured can be joined into one group without having to be actively involved in the litigation. According to information from the complainant, pre-trial discovery was ordered in some of the class actions. This procedure, which serves the securing of evidence, is so time-consuming and costly in large proceedings that the defendants would often prefer to settle even where there is considerable doubt as to the validity of the claim against them. Apart from the damages calculated as compensation, the plaintiffs also claim punitive damages in their action. Furthermore, the class actions seek to make the defendants jointly and severally liable for the entire amount of damage irrespective of how much they contributed to its cause. In addition, the winning side cannot demand reimbursement of its out-of-court costs from the losing side, and the court costs themselves are relatively low. Where actions are based solely on allegations and the plaintiff hopes to find specific evidence to support them in the course of pre-trial discovery, there is no risk of having to pay all of the costs, which would be a deterrent to his or her bringing an action.

However, the legal institutions described are as such not capable of substantiating the allegation that the actions based on them are incompatible with essential principles of a free state governed by the rule of law.

The Federal Constitutional Court has already decided that an American action for punitive damages does not violate essential principles of a free state governed by the rule of law.

Subjecting an opponent to pre-trial discovery may come close to a “fishing expedition”. However, the mere possibility of doing this in connection with service of a statement of claim is not a violation of the essential principles of the German legal system.

The fact that the complainant will not be reimbursed for its extra-judicial costs, irrespective of the outcome of the proceedings, also does not establish a violation of essential rule of law principles.

Joint and several liability, viewed on its own, also does not violate essential principles of a free state governed by the rule of law. It may well be that it further increases the pressure to settle, but it does not establish liability without the defendant contributing to the cause of the damage.

In addition, the decision to allow class-action lawsuits in the case of a tort involving a multitude of injured parties without requiring the individual members of the group to be actively involved, does not establish a violation of essential principles of a free state governed by the rule of law. This is so provided that unconditionally required rights of defence are guaranteed. Article 13.1 of the Convention expressly prohibits refusing compliance with a request for service only on the grounds that the state addressed would not permit the action upon which the application is based.

The regulation is compatible with the Basic Law. A violation against essential principles of a free state governed by the rule of law, which can oblige German state institutions to reject the request under constitutional law and entitle it to do so under international law, can only exist if in a specific case, the action has an obviously abusive character.

In addition to the fundamental-rights concerns of the defendant in the foreign action, the constitutional objective of avoiding, as far as possible, violations of international law by the Federal Republic of Germany, is taken into account. Compliance with international law limits by German state institutions when interpreting and applying Article 13 of the Convention ensures that the Convention is also adhered to by other Contracting States. Thus, it helps to avoid resorting to other methods of service, which would make the legal position of German defendants considerably more burdensome.

The abusive character of the actions is not obvious from the outset of this case. It cannot be established that there is obviously no basis for the amount of the claim lodged, or that the defendant obviously has nothing to do with the conduct complained of, or that significant pressure has been built up in order to compel the defendant to conclude what is actually an unfair settlement.

Languages:

German.



Identification: GER-2007-2-013

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 03.07.2007 / **e)** 2 BvE 2/07 / **f)** / **g)** / **h)** *Europäische Grundrechtszeitschrift* 2007, 331-340; www.bundesverfassungsgericht.de (German and English version); CODICES (German).

Keywords of the systematic thesaurus:

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

4.5.7 **Institutions** – Legislative bodies – Relations with the executive bodies.

4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.

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

Keywords of the alphabetical index:

Armed forces, reconnaissance aircraft, use, abroad / NATO, out of area operation / Afghanistan, International Security Assistance Force (ISAF), mandate / Armed forces, use, abroad.

Headnotes:

Participation in the expanded ISAF mandate resulting from the resolution of the Bundestag of 9 March 2007 does not infringe the rights of the German Bundestag under sentence 1 of Article 59.2 of the Basic Law.

Summary:

I. The *Organstreit* proceedings (proceedings on a dispute between supreme federal bodies) relate to the participation of armed German forces in the deployment of an International Security Assistance Force in Afghanistan.

After the overthrow of the Taliban regime in Afghanistan, the United Nations Security Council, on 20 December 2001, authorised the establishment of an International Security Assistance Force (ISAF), in order to support the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas.

On 21 December 2001, the German *Bundestag*, upon the Federal Government's application, gave its consent to the participation of German forces in the International Security Assistance Force. The deployment, at first restricted to six months, was later extended on the basis of applications of the Federal Government to this effect, most recently until 13 October 2007. The status and rights of the International Security Assistance Force are governed by the agreements entered into between NATO and the Government of Afghanistan.

In August 2003, NATO took over the leadership of the ISAF deployment, which was extended afterwards to include the whole of Afghanistan. The mission took over the responsibility for the north and west of the country. It later also covered the Southern and Eastern region of Afghanistan. In these parts of the country, only the states participating in Operation Enduring Freedom had previously been deployed. The Operation is a loose coalition of more than 40 states, which has formed with the purpose of fighting international terrorism and which started a military offensive against the Afghan Taliban regime in October 2001. Since its extension, ISAF operates parallel to, and in cooperation with, Operation Enduring Freedom, with the missions remaining institutionally, and as regards their objective, separate.

On 8 February 2007, the Federal Government requested the consent of the German *Bundestag* to expand German participation in the NATO-led International Security Assistance Force in Afghanistan, with capabilities for air reconnaissance and surveillance. To justify this, the application stated, *inter alia*, that the extension of the mandate for the continuation of German participation in ISAF, resolved on 28 September 2006, was done in expectation that the deployment of ISAF would be extended to the whole of Afghanistan. In doing this, the application stated that NATO was taking on new challenges, in particular a tenuous security situation. It was therefore also necessary for NATO to have the capability of air reconnaissance. It intended to use Tornado RECCE reconnaissance aircraft for this task, which had the capacity of daytime and nighttime reconnaissance imaging capability. These reconnaissance aircraft were, however, not to be used for close air support. On 9 March 2007, the German *Bundestag* approved this application by the Federal Government.

In reaction to this, the parliamentary group PDS/*Die Linke* in the *Bundestag* filed an application to institute *Organstreit* proceedings against the Federal Government, asserting that the right of the *Bundestag* to participate, under Article 59.2 of the Basic Law, has been infringed.

II. The Second Panel of the Federal Constitutional Court has found that the Federal Government did not infringe any rights of the German *Bundestag* under sentence 1 of Article 59.2 of the Basic Law in conjunction with Article 24.2 of the Basic Law with the resolution to deploy Tornado reconnaissance aircraft in Afghanistan.

The decision is essentially based on the following considerations:

1. The application is admissible. The applicant has sufficiently justified the position that the rights conferred on the German *Bundestag*, by the Basic Law, may have been infringed by the challenged measures.

Pursuant to sentence 1 of Article 59.2 of the Basic Law, treaties which regulate the political relations of the Federation require the consent or participation, in the form of a federal statute, of the bodies competent for such legislation. In approving a statute that ratifies a treaty under international law, the *Bundestag* and the *Bundesrat* (lower and upper chamber of Parliament) determine the scope of the commitments of the Federal Republic of Germany on the basis of the treaty and have an ongoing political responsibility for this towards the citizen. Material deviations from the treaty basis are therefore no longer covered by the original Consent Act. If the Federal Government pursues the further development of a system of mutual collective security beyond the authorisation that it has been granted, the *Bundestag's* right to participate in sovereign decisions relating to foreign affairs is infringed.

The further development of a treaty that forms the basis of a system of mutual collective security in the meaning of Article 24.2 of the Basic Law is subject to another limit. Pursuant to this provision, "for the maintenance of peace", the Federal Government may "join a system of mutual collective security". From a constitutional point of view, the participation of the Federal Republic of Germany in such a system and the continuing participation in this system are in this way made subject to the maintenance of peace. The transformation of a system that originally satisfied the requirements of Article 24.2 of the Basic Law into a system that no longer serves to maintain peace is also constitutionally prohibited and can therefore not be covered by the content of the Consent Act.

2. The application is unfounded. There has been no infringement of the right of the German *Bundestag* under sentence 1 of Article 59.2 of the Basic Law in conjunction with Article 24.2 of the Basic Law.

The ISAF mission in Afghanistan, under the leadership of NATO, serves the security of the Euro-Atlantic area. It is therefore within the scope of the NATO Treaty integration programme for which the German *Bundestag* is jointly responsible through of the Consent Act to this treaty.

From the outset, the regional connection, as the core element of the NATO Treaty integration programme, has from the outset not meant that NATO's military operations would be restricted to the territory of the member states. As a result of NATO's purpose as a system, by a number of states, for joint defence against outside military attacks, defensive military operations out of area, that is, including those on the territory of an attacking state, were implied from the outset. In this respect, in addition to the military defence against an attack, a complementary crisis response operation on the territory of the attacking state that is related in substance and time is still in line with the regional restriction of the NATO Treaty.

The ISAF mission in Afghanistan cannot be seen as separate from NATO's regional connections. This mission is clearly directed not only at the security of Afghanistan from future as well as present attacks but also at the security of the Euro-Atlantic area. From the beginning, the ISAF mission had the aim of enabling and securing the rebuilding of civil society in Afghanistan, in order to prevent the Taliban, al-Qaeda and other groups from endangering the peace. The security interests of the Euro-Atlantic Alliance were intended to be safeguarded because aggressive politics which disturb the peace are not expected in the future of a stable Afghan state, whether as a result of active steps taken on the part of this state or as a result of passive tolerance taken with regard to terrorist activities on its territory. Those responsible in connection with NATO were and are entitled to assume that the securing of the rebuilding of Afghanistan's civil society also contributes directly to the Euro-Atlantic area's own security.

Nor does the ISAF mission in Afghanistan provide any indication that NATO has structurally departed from its task of maintaining the peace (Article 24.2 of the Basic Law). The character of the NATO Treaty has clearly not been changed by the ISAF mission in Afghanistan and the cooperation with Operation Enduring Freedom. ISAF and Operation Enduring Freedom are guided by separate objectives, different legal bases and clearly delimited spheres of responsibility. Whereas Operation Enduring Freedom is primarily aimed at direct counterterrorism, ISAF serves the maintenance of security in Afghanistan in order to create a basis for the rebuilding of civil society in the state. The cooperation between the

operations, has not removed these delimitations, which exist in fact and law. It is already apparent from the resolution of the Federal Government on the deployment of the reconnaissance aircraft that there can be no question of integrated combat missions. This resolution provides that the Tornado aircraft are to carry out reconnaissance work and are to be armed for purposes of self-protection and self-defence only. With regard to passing on reconnaissance results to the Operation Enduring Freedom, according to the above-named resolution, this is only to occur on the basis of the ISAF operational plan of NATO if this is required for the necessary implementation of the ISAF operation or for the security of the ISAF forces.

Languages:

German.



Identification: GER-2007-2-014

a) Germany / **b)** Federal Constitutional Court / **c)** / **d)** 04.07.2007 / **e)** 2 BvE 1-4/06 / **f)** / **g)** / **h)** *Neue Zeitschrift für Verwaltungsrecht* 2007, 916-937; *Europäische Grundrechte Zeitschrift* 2007, 295-331; CODICES (German).

Keywords of the systematic thesaurus:

1.5.1.3.2 **Constitutional Justice** – Decisions – Deliberation – Procedure – Vote.
4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.

Keywords of the alphabetical index:

Parliament, member, additional occupations / Parliament, member, additional income, disclosure / Parliament, member, freedom to exercise office (lower chamber of Parliament).

Headnotes:

The obligation of Members of the *Bundestag* to disclose their additional income does not constitute a violation of their constitutional status under sentence 2 of Article 38.1 and Article 48.2 of the Basic Law.

The “centre of attention arrangement” contained in § 44a.1.1 of the Members of the *Bundestag* Act is compatible with the Basic Law. The duties to report and the publication of information relating to activities in addition to the exercise of an office as well as the sanctioning of violations, are in line with the Constitution.

Summary:

I. The applicants are Members of the German *Bundestag* and work as lawyers, industrial engineers, medium-sized entrepreneurs and as self-employed commercial sales representatives. The legal dispute relates to the question of whether the new regulations which entered into force on 18 October 2005 on:

- the exercise of the office of a Member of the *Bundestag* (§ 44a.1 of the Members of the *Bundestag* Act, hereinafter: “the Act”), the so-called “centre of attention arrangement”;
- the notification and publication of activities carried out in addition to the office and the income earned therefrom (§§ 44a.4.1 and 44b of the Act in conjunction with §§ 1 and 3 of the Code of Conduct);
- including the implementing provisions issued by the Speaker of the *Bundestag* on 30 December 2005 (nos. 3 and 8) and the sanctions that are provided in case of non-compliance (§§ 44a.4 sentences 2 to 5 and 44b no. 5 of the Act in conjunction with § 8 of the Code of Conduct)

are compatible with the constitutional status of a Member of the *Bundestag* under sentence 2 of Article 38.1 and sentence 1 of Article 48.2 of the Basic Law.

II. The Second Panel of the Federal Constitutional Court has rejected the applications. The ruling is based in essence on the following considerations:

The “centre of attention arrangement” (§ 44a.1 of the Act) states that the exercise of the office forms the focus of the activities of a Member of the *Bundestag*. Regardless of this, activities of a professional or other nature are permissible in principle.

This arrangement is unobjectionable in the view of four Panel members.

The duties connected with the freedom to exercise the office of a Member of the *Bundestag* (Article 38.1 of the Basic Law) include participating in the parliamentary tasks such that their performance is guaranteed. Parliamentary democracy requires the entire attention of a person, who at best may try to

pursue his/her profession in addition to his/her activity as a Member of the *Bundestag*. A Member of the *Bundestag* is encumbered to such a degree that as a rule, it is impossible to also make a living elsewhere. This justifies financing his/her full livelihood from tax funds.

The presumption that a Member of the *Bundestag*, who carries out a freelance or entrepreneurial activity, corresponds in a particular manner to the constitutional model of an independent Member of the *Bundestag* has no foundation. Sentence 1 of Article 48.3 of the Basic Law already presumes that the independence of a Member of the *Bundestag* is adequately ensured by the remuneration to which he/she is entitled. Above all, however, the constitutional provision contained in sentence 2 of Article 38.1 of the Basic Law, by appointing a Member of the *Bundestag* as a representative of the people and declaring him/her not to be bound by instructions in this capacity and only subject to his/her conscience, also aims to achieve the independence from interest groups. The maintenance of the independence of a Member of the *Bundestag* in this respect is particularly significant. This is a matter of independence from influences which do not emanate from decisions made by the electorate. The liberal professions offer many different possibilities to use political influence profitably by means of a seat in the *Bundestag* for a professional activity carried out outside this context. This is a danger for the independence of the exercise of the office.

In the view of the four other Panel members, the “centre of attention arrangement” is only compatible with the Basic Law if interpreted in conformity with the Constitution. In accordance with sentence 2 of Article 38.1 of the Basic Law, a Member of the *Bundestag* represents the people together with all the Members of Parliament. The necessity of being rooted in society also includes the freedom to exercise a professional activity during the time in office. It is in fact this which gives a Member of the *Bundestag* the *de facto* freedom to exercise his/her office subject to his or her conscience without having to consider any of the expectations of his/her party, other influential interest groups, or indeed the media, in order to increase the opportunity of his/her re-election and the safeguarding of an income. Sentence 1 of Article 48.2 of the Basic Law, in accordance with which no one may be prevented from accepting and exercising the office of a Member of the *Bundestag*, also aims to provide the opportunity to combine the office with a profession.

In the interest of a well-functioning Parliament, a Member of the *Bundestag* must deal responsibly with the freedom to exercise the office. It would however

be incompatible with this freedom to interpret the “centre of attention arrangement” so that a Member of the *Bundestag* owed a certain number of working hours, must document them and faces possible consequence of sanctions if he/she does not comply. If interpreted in conformity with the Constitution, the “centre of attention arrangement” is not a basis for controlling any “proper” exercise of the office and for a time-limit on additional occupations.

The applications are unfounded in the view of the four Panel members supporting the ruling regarding the applicants objection to duties to report and to the publication of information on activities in addition to their office and to the sanctioning of violations.

The transparency rules are to serve to elucidate for the electorate, any professional and other obligations of Members of the *Bundestag* in addition to their office, and the income earned from such obligations. Knowledge of this is important for the decisions made at the ballot box, and also ensures the ability of the German *Bundestag* to represent the people, independently of the hidden influence of paying interested parties. The people have a right to know from whom – and on what scale – their representatives obtain money or benefits in kind. The interest of a Member of the *Bundestag* in obtaining information on the professional activity, although dealt with confidentially, is in principle secondary to finding a possible conflict of interest.

There are no constitutional objections to the legislature having established an across the board duty to report activities carried out and income outside the office without it being a matter of determining whether there is a conflict of interest. The possibility of a danger to the detriment of the independence of the office is sufficient. The duties to report are also suitable and appropriate.

The publication of the activities which are subject to reporting, as stipulated by the law, as well as of income according to specific income grades, does not violate the applicants’ rights either. It is justified in that the electorate is entitled to form an opinion on the exercise of the office by a Member of the *Bundestag*, and that the information relevant to this must therefore be made available.

The provisions on the sanctioning of breaches of duties to report are also compatible with sentence 2 of Article 38.1 of the Basic Law. Such obligations must be legally constituted and implementable where necessary. Parliament’s functioning would be impaired and the principle of the strict equal treatment of all Members of the *Bundestag* would be breached, were it not possible to enforce disclosure obligations

for lack of effective sanctions. What is more, Parliament would appear powerless in the eyes of the public to implement its own rules, which would lead to a loss of faith.

The other four Panel members, are of the view that the applications targeting the transparency regulations should be successful. Their view is as follows:

Insofar as income earned in this respect will be disclosed to the public without sufficient protection of the rule of law, it is incompatible with sentence 2 of Article 38.1 of the Basic Law. The obligation imposed on Members of the *Bundestag* to disclose activities additional to the exercise of their office, and to specify all income earned, encroaches on the freedom to exercise their office. It may not be disregarded here that individuals may be pilloried by the media as a result of the disclosure of facts such as gross income in particular. Without further declarations, the mere information on flows of funds could lead to false conclusions being reached.

Within the impugned rules on the disclosure of activities additional to the exercise of the office and the income earned therefrom, there is no constitutional balance reached between the legislative interest in transparency and the freedom to exercise an office enriched by fundamental rights aspects.

Just as a Member of the *Bundestag* cannot defend himself/herself private against transparency requirements by invoking the protection of his/her sphere, the legislature is also not permitted to completely deny this interest in protection of a Member of the *Bundestag* by invoking transparency goals. This means that disclosure is only justified where the information reveals a potential of a conflict of interest arising.

Since the provisions on the duty to report are not compatible with the Basic Law, no sanctions may be incurred by violating these duties to report.

The applications as to the obligations to report and publish were unsuccessful, since a violation of the Basic Law cannot be established where there is a parity of votes (§ 15.3 of the Federal Constitutional Court Act).

Languages:

German.



Israel Supreme Court

Important decisions

Identification: ISR-2007-2-001

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** / **d)** 12.12.2005 / **e)** 366/03 / **f)** / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 5.1.3 **Fundamental Rights** – General questions – Positive obligation of the state.
- 5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.
- 5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Fundamental right, essence / Social right, minimum standard / Social security system / Subsistence, minimum, right.

Headnotes:

It is the duty of the state, under the Basic Law, to maintain a system that ensured a safety net for those of limited means, to make sure they do not fall below subsistence level.

In the light of the difficulty inherent in determining who should establish the minimum amount necessary to live in dignity and how to decide upon that amount, extensive factual documentation is necessary, to back up an allegation of violation of dignity.

Summary:

I. In 2003, Parliament passed legislation which reduced the amount of income supplement benefit paid to individuals and families, and which cancelled various subsidies they had also been receiving. The cash benefits were reduced by between eight and twenty-three percent depending on a variety of factors. The cancelled subsidies included reduced bus fares and an exemption from television license fees.

The petitioners argued that the decision brought income supplement benefits below the lowest level of subsistence, resulting in an infringement of the recipients' right to a dignified existence. They also pointed out that it was not enough for the State simply to guarantee a minimum level of subsistence; the State should guarantee a tolerable standard of living for individuals.

The petitioners pointed out that it was necessary to evaluate the reduction in income supplement benefits in the light of all the other services the state provides. In their view, a reduction of any one component of the overall social assistance system could not constitute a violation of dignity. Furthermore, this type of «broader assistance» ensured a minimum level of human subsistence.

II. The Basic Law: Human dignity and liberty entail two obligations for government. There is a negative duty, not to violate the dignity of the individual, and a positive duty to protect it. The petitioner's claim relates to the latter duty. The Court stated that the right to human dignity is given substantive content, through consideration of the circumstances of time and place, the basic values of society and its way of life, social and political consensus, and normative reality.

The Court noted that the right to human dignity is part of a group of rights, which need protection to ensure the existence of dignity. Without these rights, an individual cannot be described as a free entity, as he or she will be bereft of power to develop body and spirit of his or her own free will. These rights are likely to be included within the framework of civil and social rights. Amongst the social rights, the Court recognised the right to a guarantee of a minimum of material means, to allow an individual to subsist in the society in which he lives. The Court concluded that the duty of the state, under the Basic Law, was to maintain a system that ensured a safety net for those of limited means, to make sure they did not fall below subsistence level.

The Court observed that the State employs a number of means to perform its duties, including income supplement benefits and subsidies. There is no one manner in which it has to discharge its duty, provided that it continues to protect the right to human dignity by ensuring a minimum level of subsistence. Recipients are not entitled to benefits and subsidies per se, but rather to the social security system as a whole. The Court stated that the petitions contained no factual basis to support a conclusion that the reductions violated the petitioners' human dignity, and ruled that such a violation had not been proved.

III. There was a dissenting opinion to the effect that the reductions violated the recipients' right to human dignity. The opinion distinguished between guaranteeing a minimum level of subsistence and ensuring human dignity. It cited examples of recipients who would have to cut down on their purchasing of essential items, due to their reduced income. It noted that transport and television subsidies allowed recipients to participate more fully in society by protecting their freedom of movement and right to information. According to the person who expressed the dissenting opinion, the reduced payments might guarantee subsistence, but they did not allow for a dignified existence. Turning to proportionality analysis, the opinion found that some aspects of the reduction were not rationally related to their purpose and that the government's failure to present adequate statistical evidence left the minority without the ability to assess the relationship between the remaining part of the law and its aims. There was also no evidence that the government had considered less harmful alternatives, and again, the lack of statistical evidence meant that the minority could not definitively determine the question. Because the government had failed to satisfy its burden of proof, the minority held that the reductions were not proportionate.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2007-2-002

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** / **d)** 19.01.2006 / **e)** 9135/03 / **f)** / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
 3.20 **General Principles** – Reasonableness.
 5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.
 5.3.25 **Fundamental Rights** – Civil and political rights – Right to administrative transparency.

Keywords of the alphabetical index:

Transparency, of decision-making process / Transparency, administrative / Information, disclosure.

Headnotes:

There is no justification for a refusal by public authorities to disclose information based solely on the general public interest in maintaining open and effective discussions. When considering a refusal to provide information, a public authority must take into account; *inter alia*, the applicant's interest in the information and the public interest in disclosure for reasons of public health or safety or the environment. The nature and characteristics of the public authority have significant weight amongst these considerations. The Court described this as a flexible balancing formula, to be implemented while taking account of the individual circumstances of each case.

Summary:

I. Two separate organisations submitted requests to the Council for Higher Education to disclose internal documents and minutes of its meetings under the Freedom of Information Law. The Council for Higher Education is responsible for matters of higher education in Israel. When the Council refused to disclose the information, citing a provision allowing, but not requiring, it to withhold information about internal discussions, the organisations launched proceedings to force disclosure.

The Council argued that a forced disclosure of the minutes of its meetings would deter members from expressing their opinions in an honest and open manner. This 'chilling effect' harms the public interest and lies at the heart of the statutory exemption.

The respondents argued that, although the statute grants the Council discretion over whether to disclose internal discussions, the potential chilling effect provides insufficient justification for doing so and the Council must provide real reasons for its refusal. Furthermore, the law recognises the public's right to receive information from public authorities and as such has already considered potential institutional harms arising from disclosure.

II. The Court began by reviewing the Freedom of Information Law. This legislation stems from, and is imbued with the spirit of, the basic right of a free society, that of the right to receive information concerning public authorities. The right may be

limited by legitimate concerns, such as privacy, state security and the proper functioning of government. The government was entitled to withhold information regarding internal discussions, having taken into account all relevant considerations.

Specifically, the Court found the Council's refusals to be unreasonable. The Council's mistaken belief as to the extent of their discretion not to disclose meant it did not consider all of the elements it was required to consider by law. It did not take into account its prominent status in education, its budgetary power and the public importance of the discussions at issue. The possibility that public officials may be subjected to public scrutiny is something that is unavoidable and required by the public nature of the Council.

The Court concluded that disclosure of information is the rule, whereas non-disclosure is the exception, available only when one of the statutory exemptions is satisfied and only after a reasonable exercise of its discretion in light of the relevant considerations.

Languages:

Hebrew, English (translation by the Court).

*Identification: ISR-2007-2-003*

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** / **d)** 01.02.2006 / **e)** 11225/03 / **f)** / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

3.24 **General Principles** – Loyalty to the State.

4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.

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

5.3.29.1 **Fundamental Rights** – Civil and political rights – Right to participate in public affairs – Right to participate in political activity.

Keywords of the alphabetical index:

Parliament, member, immunity / Parliament, member, privileges and immunities / Parliament, member, freedom of expression.

Headnotes:

The 'margin of natural risk' test was developed to balance the competing interests of legislative independence and political freedom with the principle of equality before the law. Under the test, immunity is given to any unlawful act that can be regarded as an improper way of carrying out a lawful act within the scope of one's role as a member of the Knesset. In other words, the act is part of the role and forms part of the natural risk to which every member of the Knesset is exposed.

Summary:

I. In 2000 and 2001, while the petitioner was a Member of the Fifteenth Knesset, he made two speeches expressing support and approval for the Hezbollah organisation, which Israel has declared a terrorist organisation, and was indicted for the offence of supporting a terrorist organisation.

The petitioner argued that the statements expressed an opinion on political issues and were made in the course of carrying out his duties and for the purpose of carrying out his duties as a member of the Knesset. They were therefore protected by the substantive immunity given to Knesset members, which cannot be lifted.

The respondent countered that his statements supported a terrorist organisation. They fell outside the scope of substantive immunity because they were not made in the course of carrying out his duties and for the purpose of carrying out his duties as a member of the Knesset. In the respondent's opinion, a democratic state should not have to permit activity which has a subversive impact on its ongoing struggle against terrorism, to benefit from substantive immunity.

Substantive immunity applies to members of the Knesset when they act in the course of performing their duties and for the purpose of carrying out their duties as members of the Knesset. Substantive immunity does not apply, *inter alia*, to support for an armed struggle of a hostile state or for acts of terrorism against the State of Israel.

II. The Court drew a distinction between support for a terrorist organisation and support for an armed struggle of a terrorist organisation. Both may be crimes but it is the latter which falls within the ambit of substantive immunity. This distinction is implied by the purpose of the legislation, and reflects the Knesset's attempt to balance the competing desires to protect the foundations of the state and basic political freedoms including freedom of parliamentary expression. The Court held that since the petitioner's statements were in support of a terrorist organisation, this constituted an 'ordinary' offence, which does not fall within the legislative exception to substantive immunity. It should accordingly be analysed with the judicial tests concerning the scope of substantive immunity.

The Court found that the statements fell within the margin of natural risk for three reasons. Firstly, they were minor parts of longer, political speeches. Secondly, given the pivotal importance of speeches in fulfilling the duties of a member of the Knesset, special care must be taken when applying the test to offences relating to freedom of expression. Finally, the Court was concerned that there could be a chilling effect on freedom of parliamentary expression and related political freedoms if members of the Knesset were exposed to criminal indictments for offences concerned with the freedom of expression.

III. There was a dissenting opinion, to the effect that the «margin of natural risk test» was not meant to immunise prohibited activities that were planned in advance; it was only meant to provide a safety net in case legitimate activities overstepped their mark. Likewise, there was an argument within the dissenting opinion for the establishment of 'red lines' that a member of Knesset may not cross and yet retain substantive immunity. Such acts included those that endanger democracy or seek to undermine Israel's foundations as a Jewish and democratic state. According to the dissenting opinion, the petitioner's statements crossed a red line and should not have been granted substantive immunity.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2007-2-004

a) Israel / b) High Court of Justice (Supreme Court) / c) / d) 27.02.2006 / e) 11163/03 / f) / g) / h) CODICES (English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.

3.13 **General Principles** – Legality.

3.16 **General Principles** – Proportionality.

5.2.2.2 **Fundamental Rights** – Equality – Criteria of distinction – Race.

5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

Education, access / Equality, principle, test / Parliament, powers, nature.

Headnotes:

The values of the State of Israel not only do not condone racial discrimination, but themselves prohibit discrimination and require equality between religions and races. Furthermore, each member of the minorities that live in Israel enjoys complete equality of rights. A violation of the principle of equality, serious in its own right, becomes even more so when it affects another basic human right, the right to education.

The disproportionate impact of a norm or administrative act violates the principle of equality. The Court stated that prohibited discrimination may occur without any discriminatory intention or motive; discriminatory outcome is sufficient. The test for the existence of discrimination is an objective one, concentrating on the outcome of the norm in question.

Ideally, only the legislature establishes “primary arrangements” – arrangements that determine the way of life in the state – and the executive only enacts secondary arrangements. Sometimes, however, the complexity of modern life necessitates that the Knesset expressly delegates such power to the government. Although the executive is authorised by statute to act in a residual capacity in the absence of express and specific authorisation by statute, this authority is limited by external restrictions which prevent the government’s enactment of primary arrangements. The Court acknowledged the difficulty of distinguishing perfectly between primary and secondary arrangements, but through analysis of the substance and scope of the arrangement, its social

ramifications and the extent to which it encroaches on the liberty of the individual, an answer can be reached. The underlying goal of the external restrictions is to maintain the separation of powers.

Summary:

I. In 1998, the Government of Israel adopted a decision designating national priority areas A and B. National priority areas were chosen with respect to the government’s goals of encouraging settlement and assisting residents in areas remote from the centre of the country or of strategic importance. In national priority area A, the maximum benefits are given to all fields including industry, agriculture, tourism, education, and housing, whereas in national priority area B lesser benefits are given. This petition only concerned education benefits and for this purpose, although 535 towns and villages were designated national priority area A, only four Arab hamlets were included.

The petitioners, a coalition of various Arab rights organisations, argued that benefits in the field of education should be granted on the basis of the principles of distributive justice that required the consideration and implementation of socio-economic criteria for the entire population in an equal manner. In addition, given the lack of clear written criteria for determining classification, the government’s actions were unreasonable and discriminatory. Concurrently, the petitioners claimed the government had no power to adopt a norm of such significant scope without parliamentary authorisation.

The respondents argued that the designations were made according to purely geographical considerations, so that those areas furthest from the centre received more assistance than others. Since there are few Arab towns in these areas they were under-represented in the final designations, but there was no basis for the argument that the line was drawn in a manner that was intended to discriminate between the Jewish and Arab sectors. The respondents also contended that this decision went no further than the executive decisions the government makes routinely.

II. The Court based its analysis of the discrimination claim on the primacy of the principle of equality.

In its analysis of the designations of national priority areas, the Court assumed that the government had based its decisions on geographic considerations alone, although it noted this assumption was not self-evident in the circumstances of the case. In fact, the government gave no explanation as to why it set the boundaries where it did.

Against this background, the Court determined that the great disparity between the number of Jewish towns with national priority area designation in the field of education and Arab towns with a similar status constituted *de facto* discrimination and was impermissible. The Court then went on to pursue proportionality analysis, and examined whether the violation satisfied the limitations clause of the Basic Law, namely whether the decision befitted the values of the State of Israel, whether it was intended for a proper purpose and whether the violation of equality was not excessive. Because the State provided no explanation for the geographical setting of the boundaries, the Court found no basis upon which to conclude that the decision satisfied the limitations clause. It accordingly deemed it unlawful.

The Court also reviewed the petitioners' claims that the designation was made *ultra vires*. Examining the elements of the decision establishing national priority areas the Court concluded that it was a primary arrangement. The Court based its conclusion on the fact that the decision directly and significantly affects large portions of the country and indirectly affects the rest. Moreover, previous attempts to pass similar legislation indicated the Knesset's belief that the government's decision concerned a primary arrangement.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2007-2-005

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** / **d)** 30.03.2006 / **e)** 4542/02 / **f)** / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
 5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.
 5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

5.4.17 **Fundamental Rights** – Economic, social and cultural rights – Right to just and decent working conditions.

Keywords of the alphabetical index:

Contractual relation, freedom of arranging / Foreigner, residence, permit / Fundamental right, essence, regulation / Immigration, residence, permit.

Headnotes:

A policy allowing foreign workers to come and work in Israel, but tying their residence permits to their continued employment with one employer, violates the workers' basic employment rights and the principles of justice because it compromises the workers' autonomy of will and further reduces their bargaining power.

Summary:

I. The Government of Israel adopted a policy allowing foreign workers to come and work in Israel. The residence permits given to the foreign workers were conditional on their working for a specific employer. Consequently, if the worker left that employer, he would be an illegal alien and subject to arrest and deportation. In response to the initial complaint, the government developed a narrow and complicated mechanism whereby a worker could apply to change employers.

The petitioners, a coalition of human rights organisations, argued that the restrictive employment arrangement violated workers' rights to freedom of occupation and freedom of will in their most basic sense, by making them the property of their employers. According to the petitioners, linking the legality of the workers' residence to a specific employer made the workers absolutely dependent on that employer, depriving them of what little bargaining power they had. This resulted in significant abuses and ill treatment of foreign workers.

The respondents contended that in the light of the social costs of illegal immigration the policy was a reasonable response to the acute need to supervise foreign workers and ensure that they left Israel upon the termination of their permits. Moreover, they argued that the amended procedure undermined the claim that foreign workers were prevented from changing employers, and thus their rights were not violated.

II. The Court concluded that the restrictive employment arrangement clearly constituted a grave

threat to the autonomy and bargaining power of foreign workers. This was particularly so in light of the money and effort these workers invested in order to receive a work permit and to get to Israel. It left them with no real choice between being compelled to work for an employer who seriously violated their rights and resignation, which would render their residency permits void.

The situation violated the essence of employment law and basic principles of justice. By associating resignation with a serious resulting harm, the policy effectively denied the workers the possibility of choosing with whom to enter into an employment contract and compelled them to work for another against their will. It also deprived the workers of their ability to negotiate for their pay and other terms of employment. The Court held that the restrictive employment arrangement violated the workers' rights to dignity and liberty.

The Court held that the new employment procedure did not make the employment arrangements any less restrictive. It did nothing to reduce the excessive power held by employers. Neither did it rectify the basic flaw in the employment arrangements – that employers were entitled to hold onto their workers, whereas employees could only be released from their contracts in certain circumstances. This procedure turned basic human rights into an administrative matter.

The Court also examined the restrictive employment arrangement in the context of the principle of proportionality. The Court found no logical connection between the arrangement and the need to supervise the residence and employment of foreign workers in Israel, and noted that it caused more harm to the worker than necessary. The violation was not proportionate to the benefit arising from it.

The Court held that the government should formulate a new arrangement whereby workers were not tied to one employer, and the act of resignation did not attract penalties.

Cross-references:

- See also: Israeli Supreme Court decision HCJ 10843/04 (19.09.2007, Hebrew).

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2007-2-006

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** / **d)** 04.05.2006 / **e)** CrimA 5121/98 / **f)** / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 2.1.1.1.2 **Sources** – Categories – Written rules – National rules – Quasi-constitutional enactments.
- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
- 5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.
- 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:

Evidence, obtained illegally / Evidence, exclusionary rule / Criminal procedure, evidence, admissibility.

Headnotes:

Evidence may be deemed inadmissible in criminal cases due to the manner in which it has been obtained if two conditions are met simultaneously. The evidence must have been obtained illegally and admitting it in the trial must have a significant negative impact on the accused's rights to a fair trial. Illegally obtained evidence can be excluded if admitting it in the trial would violate the fairness of the proceedings in a substantial way, for an improper purpose and to an excessive degree.

This balancing formula is to be applied at the discretion of the court, in each individual case, taking into account three main points. The first point is the nature and severity of the illegality involved in obtaining the evidence. The second is the influence of the illegality on the evidence, i.e. whether it makes the evidence less credible, and whether the evidence exists independently from the illegality. Finally, courts should consider the social benefit or harm that would result from exclusion. Here the primary concerns are the usefulness of the

evidence and the seriousness of the crime of which the defendant stands accused.

Summary:

I. In 1996, while being admitted into prison for being absent from the army without leave, the petitioner was found to have marijuana in his possession. Before the interrogation on this matter, the interrogator advised the Petitioner of his right to remain silent, but deliberately failed to advise him of his right to consult a lawyer. During the interrogation, the Petitioner confessed to having used marijuana three times during his time as a soldier.

The petitioner presented two main arguments against the confession's admissibility. Firstly, Section 12 of the Evidence Ordinance, which bars the admission of confessions not given "freely and willingly," should be read so that if a confession is obtained without providing notice of the right to consult a lawyer, this will automatically be a violation. Secondly, although Israel had no statutory or case law precedent for the exclusion of evidence based on its having been obtained illegally, the petitioner urged the Court to adopt such a doctrine in the spirit of the Basic Law: Human Dignity and Liberty, enacted in 1992.

The respondents argued that the violation was not severe enough to render such crucial evidence inadmissible under Section 12 and that the Court should not adopt an interpretation whereby failing to give such notice automatically renders a confession inadmissible. The respondents also suggested that the Court should defer to the Knesset instead of pursuing radical changes to the law of evidence. They warned that limiting the admissibility of relevant evidence might hamper law enforcement.

II. The Court reviewed its prior case law from the new perspective of the recently enacted Basic Law: Human Dignity and Liberty. This law elevated concerns over human dignity and liberty to super-legislative constitutional status. Although it did not determine whether the right to consult a lawyer was such a right, the Court held that the right has been strengthened to the point where a violation may lead to the resulting evidence being ruled inadmissible.

Previously under Section 12, the Court would have investigated whether the government's action violated the accused's humanity or deprived him of free will. The former was automatically inadmissible as a matter of principle whereas the latter was inadmissible due to concerns regarding the truth of its content, but the violation of rights was not independently significant. In light of the Basic Law, the Court emphasised the action's effect on individual

rights so that a significant and serious violation of the suspect's autonomy of will and freedom of choice will lead to the inadmissibility of the confession under Section 12. The Basic Law elevated the protection of rights of those undergoing interrogation from an ancillary goal of Section 12 to a main and independent purpose. Whilst the petitioner's rights had been violated, the interrogator had informed him of the right to remain silent. This preserved enough of his autonomy and free will for the Court not to find a violation of Section 12.

Turning to the petitioner's argument for the adoption of an exclusionary rule against illegally obtained evidence: previously – except for special statutory provisions that empowered the Court to exclude evidence that was obtained illegally in certain specific circumstances – the dominant outlook in case law was that relevant and credible evidence was admissible regardless of how it was acquired. The use of illegal means only affected the weight given to the evidence. The Basic Law changed this situation, and the Court sought to strike a new balance between the interests of law enforcement and public safety and the interests of preserving the integrity and fairness of criminal proceedings and protecting the dignity and liberty of the accused. The new framework recognised that there are circumstances in which admitting illegally obtained evidence undermines the fairness of the proceedings and the administration of justice in its broader sense.

As such, the Court adopted a doctrine of relative inadmissibility set out in the headnotes.

In the present case, it was conceded that the evidence was obtained illegally. The Court therefore concentrated on whether the failure to inform the defendant of his right to consult a lawyer significantly infringed his right to a fair criminal trial. Because the omission to notify him of his right to consult a lawyer was deliberate, when it would have been quite easy to procure a confession lawfully, and because the petitioner's offence was a relatively minor one, the Court held that the confession should have been excluded and the conviction overturned.

Languages:

Hebrew, English (translation by the Court).



Liechtenstein

State Council

Important decisions

Identification: LIE-2007-2-002

a) Liechtenstein / **b)** State Council / **c)** / **d)** 04.12.2006 / **e)** StGH 2006/44 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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

3.18 **General Principles** – General interest.

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

5.4.6 **Fundamental Rights** – Economic, social and cultural rights - Commercial and industrial freedom.

Keywords of the alphabetical index:

Authorisation, refusal, stipulation of rule / Health, hospital, establishment, authorisation.

Headnotes:

If the legislator deems it necessary to lay down an authorisation procedure governing activities relating to the field protected by the freedom of trade and industry, (s)he must sufficiently clearly determine the criteria for securing authorisation and specify the possible grounds for refusing the latter. This applies in particular to prohibitions subject to exceptions. The general reference to an overriding public interest without any further specification in the Law is clearly devoid of any specific restrictive effect, it cannot be deduced sufficiently clearly by interpretation, and it therefore makes any exceptions completely, and wrongfully, subject to the appraisal of the executive.

In view of the requirement of an overriding public interest for the establishment and operation of healthcare institutions as set out in Article 52.1.d GesG, it is a case not of a police authorisation but of a prohibition of principle which is subject to exceptions, whereby no sufficiently clear description is provided of the criteria for obtaining an exception. This infringes the principle of freedom of trade and industry set out in Article 36 of the Constitution

because it involves a serious infringement devoid of any sufficiently specific formal legal basis.

Summary:

In the context of a constitutionality review procedure under the terms of Article 18.1.a StGHG, the Administrative Court called for the repeal of Article 52.1.d of the Health Act (GesG). Article 52.1.d GesG requires the existence of an overriding public interest for issuing an authorisation to run a healthcare institution (e.g. a hospital).

Consequently, the State Council repealed Article 52.1.d GesG on the grounds that it violated the principle of freedom of trade and industry as set out in Article 36 of the Constitution.

Languages:

German.



Lithuania

Constitutional Court

Important decisions

Identification: LTU-2007-2-007

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 05.05.2007 / **e)** 18/06 / **f)** On minimum qualification requirements for scientists / **g)** *Valstybės Žinios* (Official Gazette), 52-2025, 12.05.2007 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 4.6.2 **Institutions** – Executive bodies – Powers.
- 4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.
- 5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Civil servant, scientific, qualification requirement / Profession, access, conditions.

Headnotes:

In the absence of alternative requirements, merely formal indicators contained in legislation regarding scientific qualifications do not always reflect a scientist's true qualities, and the value and significance of his scientific work. Making access to certain posts dependent only on these criteria infringes the rule of law.

Summary:

I. The President of the Republic of Lithuania asked the Constitutional Court to review various provisions. They were set out in Item 2.3.1 of Government Resolution no. 899 of 11 July 2001, as set out in Government Resolution no. 906 of 18 August 2005, as well as Items 2.2, 2.5, 3.1.2, 3.1.3 and 3.1.4 of the Inventory Schedule of Minimum Qualification Requirements for scientific workers, researchers and teaching staff at state institutions in the field of humanitarian and social sciences. Questions had also

arisen over Item 3.1 of the Habilitation Procedure approved by Government Resolution no. 962 "On Approving the Habilitation Procedure" of 18 July 2003, (referred to here as Government Resolution no. 962 of 18 July 2003). The President observed that the provisions stipulated that a minimum of two scientific articles had to be published in one of the publications included in the databases of the Institute for Scientific Information. He suggested that this might bring them into conflict with Article 14 of the Constitution and with the constitutional principle of a state under the rule of law.

Item 2.3 of Government Resolution no. 899 of 11 July 2001, and Items 2 and 3 of the Inventory Schedule stated that scientific works were to be published in publications which were assessed in international databases. The petitioner suggested that these provisions, and the Inventory Schedule, were out of line with the principle of a state under the rule of law for the following reasons.

Government Resolution no. 899 of 11 July 2001, and the Inventory Schedule, impose basic requirements for the positions of scientific and teaching staff at institutions of science and studies using indeterminate criteria. This may give rise to legal uncertainty. It is not clear for scientists, teachers, and those aspiring to those positions, in which state and in which published language a serial publication of works of social and humanitarian science will appear, or whether it featured in an international database. The petitioner questioned whether a Government Resolution could regulate the area of the right to choose one's occupation. The petitioner also drew attention to a potential conflict between Government Resolution no. 899 and the Inventory Schedule and Article 14 of the Constitution, under which Lithuanian is to be the state language.

II. The Constitutional Court held that the Constitution does not rule out the possibility of enactment by the state of rules establishing certain minimum requirements for scientists seeking work in state higher education establishments, scientific institutions within state universities and state scientific institutions and establishments. One such requirement could be that one has to have a certain amount of scientific work published in publications recognised in international databases. It was also noted that the requirements that those scientists aspiring to become professors or chief scientific officers must satisfy, must allow for assessment as to whether the candidate is ready to hold these positions.

The Constitutional Court also observed that there is no requirement for identical minimum qualification levels for all scientific study areas. In fact, a degree of

differentiation is essential. This does mean that possibilities for inclusion in recognised publications are more limited. It was also noted that requirements to have a certain number of scientific works published in publications that are reviewed in the international databases might not be made absolute. As well as inclusion in recognised scientific publications, scientific works should also be assessed according to their originality and potential influence over the development of new areas of scientific research.

The Constitutional Court examined Item 3.1 of the Habilitation Procedure. This stipulates that only scientists with at least two articles (or, in certain cases, one) published in publications featuring in international databases, may apply for habilitation. It is not apparent whether scientists who have published a certain established amount of significant scientific articles in publications featuring in other international databases may seek for habilitation. Neither is it clear whether scientists, who have published significant scientific works in respected and recognised scientific publications which do not feature in international databases, or who have published their work in other ways recognised by the scientific community, may seek habilitation. The Court ruled that Item 3.1 of the Habilitation Procedure was out of line with the constitutional principle of a state under the rule of law.

The Constitutional Court explained that the problem with the provisions lay with the requirement of having a certain amount of scientific articles published in the databases for the Institute of Scientific Information, or in other scientific publications recognised in other international databases. These requirements were too absolute in nature. No alternative requirements were established, which bore any relation to the significance of the scientific works, upon fulfillment of which scientists could aspire to appropriate positions.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2007-2-008

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 15.05.2007 / **e)** 7/04-8/04 / **f)** On the provisions of the Law on State Secrets and Official Secrets and the Law on the Proceedings of Administrative Cases / **g)** *Valstybės Žinios* (Official Gazette), 54-2097, 17.05.2007 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.

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.

5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Secrecy, state secret, definition / Secrecy, state secret, access by court / Information, classified, protection.

Headnotes:

A state secret is a constitutional institution, and can be defined as information not subject to publishing or dissemination, the disclosure of which could be damaging to the state, as the common good of society as a whole, the purpose of which is the safeguarding of the public interest and human rights and freedoms.

Under the Constitution, freedom of information is not absolute. The Constitution does not allow for the enactment of regulations which might implement freedom of information but which could result in the violation of other constitutional values. The Constitution charges the state with the protection of the secrecy of information which constitutes a “state secret”, as well as with the protection of certain other information. This would prevent somebody arbitrarily seeking to find out or to impart information, the disclosure of which might be damaging to rights and freedoms, to the legitimate interests of the person and to other constitutional values. However, a legal situation cannot be allowed, whereby a court could not acquaint itself with case material containing information within the category of state secret (or other classified information).

Summary:

I. The Vilnius Regional Administrative Court had been investigating two administrative cases. It asked the Constitutional Court to assess whether Article 57.3 of

the Law on the Proceedings of Administrative Cases (referred to here as “LPAC”) was in conflict with Article 29 of the Constitution. It requested a review of the compliance of Article 10.4 of the Law on State Secrets and Official Secrets (referred to here as “the LSSOS”) with Articles 30.1 and 109.1 of the Constitution. It also asked the Court to assess whether Articles 11.1 and 11.2 of the LSSOS complied with the constitutional principles of justice and a state under the rule of law and with Article 29 of the Constitution. Questions also arose as to the constitutional compliance of Articles 51.1, 5.2 and 53.1 of the LPAC.

The Vilnius Regional Administrative Court made the following observations in its petitions. Under Article 57.3 of the LPAC, as a rule, factual data that constitutes a state or official secret cannot be adduced as evidence in an administrative case, until the data has been declassified in a manner prescribed by law. This places limitations on the rights to parties to the proceedings, and that of the court to invoke evidence which constitutes a state or official secret. The petitioner suggested that this provision was out of line with Article 29 of the Constitution, under which all persons are equal before the law, the court, and other state institutions and officials.

Article 10.4 of the LSSOS provides for the possibility of an appeal against a decision annulling a work permit or a permit to familiarise oneself with information constituting a state secret. The Commission for Secrets Protection Co-ordination of the Republic of Lithuania (referred to here as “the Commission”) will decide upon the appeal. No other institution (not even a court) may assess the reasonableness of such a decision.

Article 11 of the LSSOS elaborates upon the right to familiarise oneself with classified information and the applicable security levels. Documents in the “top secret”, “secret” and “confidential” categories are only available to persons holding a permit to work, or to familiarise themselves with such information. He or she will only be entitled to information related to the performance of his or her duties (paragraph 1). The right to familiarise oneself with classified information is bestowed by the head of the institution which has access to such information. Such a person will have a “target order” issued by the head of the institution where he or she works. This order will certify that the person concerned has a permit to work with the corresponding security level of classified information. It will also specify the type of information to which he needs access, and why he needs it (paragraph 2).

These provisions, without exception, prevent somebody without a permit to work or to familiarise him or herself with classified information, from acquainting themselves with such information, even where they are involved in an administrative case, and the information constituting an official or state secret is recognised and assessed as evidence. Somebody in this position is accordingly in a situation where there is no equality of rights, by comparison to another party to the proceedings, who is privy to the secret information. The Vilnius Administrative Court suggested that the provisions contravened Article 29 of the Constitution and the constitutional principles of justice and a state under the rule of law.

II. The Constitutional Court observed that the right to familiarise oneself with a state secret is linked to the issue of trust. Certain characteristics and previous activities could give rise to distrust, such as violations of the law and personal ties. Only those whose activities, character and personal ties do not pose a threat to state sovereignty, territorial integrity, the constitutional order, defence and society, all important values protected by the Constitution, should have access to the information. Someone who has lost the trust of the state should no longer be entitled to work with information constituting a state secret or to familiarise himself with it.

The Constitutional Court drew attention to Article 109.1 of the Constitution whereby justice in Lithuania is only to be administered by courts. This implies a duty upon courts to consider cases fairly and objectively, and to adopt reasoned and substantiated decisions. Therefore, no legal situation could arise, where a court could not familiarise itself with case material containing information constituting a state secret (or other classified information). Whenever a request is made for secret or classified information to be put forward as evidence, the court has to assess whether this request is justified and whether granting it might be detrimental to the public interest and the freedoms and rights of others, as protected by the Constitution and the international obligations of the Republic of Lithuania. The fact that a party to proceedings is entitled to request that information does not mean that the court has to grant the request. Neither should the fact that secret or classified information could end up as evidence in a corresponding case sway the court’s decision. There are a number of factors to be considered by the Court.

It is not possible to enumerate *a priori* every situation where classified or secret information cannot be put forward as evidence. This means that parties to the proceedings will not necessarily be able to acquaint themselves with the material. However, it is also clear

that where there is material evidence which is not secret or classified, the court may nonetheless withhold its disclosure, in order to protect the public interest and administer justice, and parties to proceedings will not be able to familiarise themselves with it.

The Constitutional Court held that the disputed provisions of the Law on Procedure in Administrative Cases and of the Law on State Secrets and Official Secrets were not contrary to the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2007-2-009

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 23.05.2007 / **e)** 70/06 / **f)** On the privatisation of the JSC "Alita" / **g)** *Valstybės Žinios* (Official Gazette), 58-2246, 26.05.2007 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
 3.13 **General Principles** – Legality.
 4.6.2 **Institutions** – Executive bodies – Powers.
 4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.
 5.3.39.4 **Fundamental Rights** – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Privatisation, procedure, observance by government / Privatisation, tender, best bidder, negotiation / Government, law, application, obligation.

Headnotes:

Under the Constitution, procedures relating to the possession, use, and disposal of state-owned property must be set out in legislation. Such legislation needs to designate clearly the state institutions that have the power to adopt decisions to transfer property belonging to the state and the powers of these institutions. This also applies to the

Government, which does not have discretion to decide on "non-application" of provisions of a particular law, unless such non-application is *expressis verbis* provided for in legislation. Other legislative institutions do not have this type of discretion either (including those with competence in the field of the privatisation of state property).

Summary:

I. On 23 November 2006, the Lithuanian Parliament (*Seimas*), adopted Resolution no. X-922 "On the Conclusions of the Seimas Provisional Investigation Commission for the Inquiry into the Privatisation of the Joint-stock Company 'Alita'". Article 2 and Annex 2 of this document contained a petition, requesting an assessment by the Constitutional Court of Government Resolution no. 1698 "On the Consent to the Draft Agreement on the Purchase and Sale of the Shares of the Joint-Stock Company 'Alita' which Belong to the State by Right of Ownership" of 24 December 2003 (hereinafter – the disputed Resolution). The Parliament suggested that this might contravene the constitutional principle of a state under the rule of law and Articles 3 and 16 of the Law on the Privatisation of State-owned and Municipal Property (described here as "the Law").

The Parliament submitted the following arguments to back up the petition. On 3 February 2003, the Government approved the programme of privatisation of shares in the joint stock company Alita, which belonged to the state by right of ownership and which were to be privatised by public tender. Four participants were registered in the 7 May 2003 public privatisation tender of Alita. L. Bosca submitted the best tender bid, proposing LTL 90,700,000 for the Alita share portfolio. By Order no. IV-266, P. Milašauskas, Director General of the state enterprise State Property Fund, overturned the results of the Commission for the Public Tender for Privatisation of the Joint-stock Companies "Stumbras", "Vilniaus degtinė", "Alita" and "Anykščių vynas". Instead, he asked this commission to negotiate the sale of the Alita" share portfolio with the submitter of the tender who took second place. On 10th October 2006, the Supreme Court of Lithuania pronounced this decision unlawful.

On 22 October 2003, the SE State Property Fund invited the Consortium of V. Junevičius, V. Pečiūra, A. J. Stankevičius and D. Vėželis, which submitted the LTL 57,500,000 bid in the tender, to negotiate regarding the sale of the JSC "Alita" share portfolio. The difference between the bid submitted by the Consortium of V. Junevičius *et al*, and the best bid of the tender was LTL 33,150,000, i.e. almost 37 %. This was more than double the amount allowed by

law. On 10 November 2003, a draft agreement for the purchase and sale of the JSC “Alita” share portfolio was drawn up. Then, on 27 November 2003, the Privatisation Commission approved the draft agreement. On 24 December 2003, the Government, whilst taking note of the Privatisation Committee’s decision, adopted the disputed Resolution in which it approved the draft agreement of purchase and sale of the “Alita” share portfolio, which belonged to the state by right of ownership. The SE State Property Fund and the Consortium of V. Junevičius *et al* signed this agreement on 6 January 2004.

Article 16.1 of the Law allows for negotiations with a view to improving bids, with the potential buyer or buyers who have submitted the highest bids and whose bids do not differ from each other by more than 15 %. The Regulations for Privatisation of State and Municipal Property by Way of Public Tender (described here as “the Regulations”) were approved by Lithuanian Government Resolution no. 1502 “On Approving the Regulations for Privatisation of State and Municipal Property by Way of Public Tender” of 31 December 1997. Item 35 of the Regulations confirms that the difference in these circumstances must be no more than 15%, in accordance with the procedure specified in Item 34 of the Regulations. The petitioner argued that the disputed Resolution approved a transaction which had been concluded in disregard of the requirements of the Law and the Regulations. As a result, it violated the constitutional principle of a state under the rule of law.

II. The Constitutional Court noted the provision in the Law to the effect that the State Property Fund had to overturn the results of the public tender, if the winner of the tender did not turn up in time to prepare or sign an agreement for purchase and sale, or did not pay for the item acquired during the public tender. The Fund could then charge the commission for the public tender to negotiate for the sale of the object of privatisation with the participant of the public tender who took the second place. There must not be a difference of more than fifteen percent between their tender bid and that of the submitter of the best tender bid. If no such participant existed, the public tender had to be regarded as not having taken place. This is the only interpretation of the provisions within the Regulations which is in line with Article 16.1 of the Law. This states that during the privatisation of state property by way of public tender, negotiations are not possible with all those participating in the public tender, but only with the potential buyer or buyers who have submitted the highest bids and whose bids do not differ from the best tender bid by more than 15 %.

The Constitutional Court held that the Government was not, under the circumstances, permitted to approve the draft agreement for the purchase and sale of the shares of the “Alita” concluded between the SE State Property Fund and the Consortium of V. Junevičius *et al*. The draft agreement contravened the rule in Article 16.1 of the Law, that negotiations could only be undertaken with potential buyer or buyers who had submitted the highest bids and whose bids do not differ from each other by more than 15 %. The Constitutional Court also pronounced the disputed provisions of the disputed Resolution to be in conflict with the Constitution and certain provisions of the Law on Privatisation of State-owned and Municipal Property.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2007-2-010

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 07.06.2007 / **e)** 12/05-14/05-18/05-20/05-21/05-22/05-25/05-01/06-03/06-06/06-07/06-08/06-15/06-17/06-21/06-24/06-25/06-28/06-40/06-41/06-47/06-48/06-53/06-55/06-63/06-02/07-07/07-09/07-13/07-15/07-19/07-20/07-21/07-22/07 / **f)** On the support of children / **g)** *Valstybės Žinios* (Official Gazette), 65-2529, 12.06.2007 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
5.3.44 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Child, rights / Child, adult, support, obligation / Child-raising, time.

Headnotes:

The provision within the Lithuanian Constitution whereby parents are obliged to support their children until they come of age is designed to regulate

relationships between parents and their underage children. It does not regulate relationships between parents and children once the children have come of age. However, it does not rule out the possibility of the enactment of future legislation obliging parents to support children of full legal age, where such support is necessary, if there is a basis for this type of obligation in the Constitution.

Summary:

I. Several courts of general jurisdiction submitted thirty-five petitions in total, in which they requested a constitutional review of Article 3.194.3 of the Civil Code (wording of 11 November 2004). This provided that courts may order support to be given, where a child is studying at day time institutions of secondary, higher and vocational schools, and the child is under twenty-four years of age. The petitioners suggested that the provision was in breach of the Constitution, as the Constitution provides that parents must support their children until they come of age. It does not say that they must support them once they have reached full legal age.

II. The Constitutional Court assessed the above provision against the background of Article 38.6 of the Constitution (under which parents must support their children until they come of age) and that of the constitutional principle of a democratic state under the rule of law.

The rationale behind Article 38.6 of the Constitution is to protect the interests of under-age children. It is not designed to regulate relationships between parents and children when the children come of age. The Constitutional Court therefore concluded that the wording (of November 2004) of Article 3.194.3 of the Civil Code did not contravene Article 38.6 of the Constitution.

Nonetheless, the Constitutional Court stressed that the provision under dispute was couched in an “imperative” manner, placing a duty on the court to adjudge the support specified in the provision in all cases under the conditions specified in that provision. The Constitutional Court pointed out that the courts interpreted the provision as being “imperative”. It could give rise to difficulties for courts in the administration of justice and indeed might make it impossible for them to do so at all. This in turn could result in a violation of human rights and freedoms, and other constitutional values too. The provision establishes that courts must in all cases order (thereby implying that they have no powers to decide otherwise) support from parents of children who are of full legal age but not yet twenty-four, who still need support because they are in full-time education. To

that extent, it is out of line with the constitutional principle of a state under the rule of law, as well as Article 109.1 of the Constitution and with. This provides that justice shall be administered only by courts.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2007-2-011

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 27.06.2007 / **e)** 14/06-22/06-27/06-29/06-34/06-35/06-42/06-46/06-52/06-54/06-03/07-11/07 / **f)** On publishing legal acts / **g)** *Valstybės Žinios* (Official Gazette), 72-2865, 30.06.2007 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.15 **General Principles** – Publication of laws.

Keywords of the alphabetical index:

Law, publication, graphic content.

Headnotes:

The Lithuanian Constitution provides that only published laws are valid. That, together with the constitutional principle of a state under the rule of law, does not simply allow but requires the implementation of a general procedure for the official publication of legal acts, together with differentiated legal regulation, to cover the situation of a particularly lengthy piece of legislation, or one with a complex structure. Provision may, for instance, be necessary for separate publication of the text of the legislation and the graphic contents. This would deviate from the usual procedure and is to be considered as an exception rather than the rule. Moreover, such exceptions must be expressly provided for in the law.

Summary:

I. A group of members of the Lithuanian Parliament, the Klaipėda Regional Administrative Court, the Klaipėda City Local Court and the Klaipėda Regional Court presented twelve petitions to the Constitutional Court. They sought a constitutional review of Government Resolution no. 1269 “On the Planning Scheme (General Plan) of the Curonian Spit National Park” of 19 December 1994 (described here as the Government Resolution). They suggested that this might contravene Article 7.2 of the Constitution as well as certain norms of the Law of the Procedure of the Publication and Coming into Force of Laws and Other Legal Acts of the Republic of Lithuania” (wording of 6 April 1993). There was also a potential conflict between the Resolution and the wording of 7 July 2005 of the above Law.

The petitioners relied upon Article 7.2 of the Constitution, under which only published laws are valid. They also relied on the constitutional principle that, in a democratic state under the rule of law, there cannot be any unpublished law. They contended that a narrow interpretation should not be given to the term “law” within Article 7.2. Rather, it should be construed as including legal acts, which have the power of the law, and other provisions that form part of a normative legal act together with its annexes. These are to be treated as constituting a single whole, as being inseparably interrelated and with equal legal force. It is not possible to separate annexes from a legal act, because this would result in alterations to the legal act as a whole.

The petitioners also argued that the Planning Scheme (General Plan) of Curonian Spit National Park (described here as “the Scheme”), which was approved by Government Resolution no. 1269 “On the Planning Scheme (General Plan) of Curonian Spit National Park” of 19 December 1994, is an inseparable part of this Government resolution. However, it was not published in the Official Gazette (the official source of publication of legal acts) either with the Government Resolution or at a later stage. According to the petitioners, this violated constitutional requirements and the procedure for the publication of legal acts, which was already established by law when the Government Resolution was published and which remains in force now.

II. The Constitutional Court emphasised that the Constitution does not expressly set out the sources for official publication of legal acts; neither does it enumerate all the possible methods of publication. The legislator must undertake this task, and, in so doing, he may introduce a differentiated legal procedure, allowing for publication in different

sources or by a different method. This could, for example, cover the situation where a piece of legislation is very long, has a complex structure, or gives rise to technical publishing problems due to graphic content.

The Constitutional Court stated that when the disputed Government Resolution was enacted, the Law “On the Procedure of Publication and Coming into Force of Laws and Other Legal Acts of the Republic of Lithuania” (wording of 6 April 1993) stipulated that the Official Gazette was the only official forum for the publication of government acts. There was nothing in this law to cover lengthy pieces of legislation or ones with a complex structure, with graphic content such as drawings, tables, graphs, schemes and map. Publishing such documents could give rise to major technical difficulties, and a better solution would be for an announcement to appear in the Official Gazette, and for them to be published in a special edition. This would, of course, be a smaller publication with a more limited readership. Nonetheless, the Law made no provision for lengthy and complex legislation. This was in breach of Article 7.2 of the Constitution and the constitutional principle of a democratic state under the rule of law.

The Court also held that, by not enacting differentiated regulation, Parliament had breached the Constitution. Failure to do so was at odds with Article 7.2 of the Constitution, which deals with the official publication of legal acts, and the constitutional principle of a state under the rule of law.

Languages:

Lithuanian, English (translation by the Court).



Moldova

Constitutional Court

Important decisions

Identification: MDA-2007-2-004

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 29.05.2007 / **e)** 13 / **f)** Constitutional review of points 2 and 3 of the “Regulations on the use of cash transactions recording and control apparatus (cash registers) for cash accounting purposes”, approved by Government Decree no. 474 of 28 April 1998 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

- 3.13 **General Principles** – Legality.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
- 4.10.7 **Institutions** – Public finances – Taxation.

Keywords of the alphabetical index:

Tax, authority, powers / Tax, regulation, competence.

Headnotes:

In accordance with Article 96.1 of the Constitution the government implements the state's domestic and foreign policy and exercises general supervision over public authorities. Under Articles 126.2, 130.1 and 132.1 of the Constitution it is for the state to regulate economic activity, administer public property belonging to it by law and protect national interests in the economic, financial and monetary spheres. The formation, administration, use and control of the financial resources of the state, administrative and territorial units and public institutions are governed by law, and taxes and duties and all other revenues of the state budget and the state social security budget and the budgets of the districts, towns and villages shall be determined, under the law, by the respective representative agencies.

Summary:

I. A member of parliament asked the Constitutional Court to review the constitutionality of points 2 and 3 of the “Regulations on the use of cash transactions recording and control apparatus (cash registers) for cash accounting purposes”, approved by Government Decree no. 474 of 28 April 1998.

The applicant argued that the concept of “economic agent” was used in the regulations in a broader sense than that laid down in the Tax Code and the Law on Consumer Protection. Contrary to the terms of the above-mentioned laws, which defined an economic agent as anyone carrying on an entrepreneurial activity, a natural or legal person authorised to perform an entrepreneurial activity with a view to making and/or selling goods or services, point 3 of the regulations defined an “economic agent” as any natural or legal person authorised by law to carry on an entrepreneurial activity or a similar professional activity.

The applicant requested a review of the constitutionality of the term “professional activity” used in point 3 of the regulations concerned, maintaining that it included members of the legal professions, thereby contravening Articles 6, 16 and 102.2 of the Constitution.

The regulations on the use of cash transactions recording and control apparatus (cash registers) had been approved by virtue of Article 8.2.c of the Tax Code and Sections 8.f and 9.f of the Law on Consumer Protection. Point 2 of the regulations applied to natural and legal persons, regardless of their legal situation, carrying on an entrepreneurial activity or a similar professional activity where they kept cash accounts.

II. Pursuant to Article 6 of the Constitutional Jurisdiction Code, the Court deemed that it must rule on the constitutionality of the terms “professional activity” in point 2 and “or other similar activities” in points 2 and 3 of the regulations.

Article 8.2 of the Tax Code requires the taxpayer to keep cash accounts by using cash transactions recording and control apparatus with a tax memory function under the forms prescribed by the government. The provision concerned draws no distinction between taxpayers according to the services they provide, whether this consists of entrepreneurial activity, a professional activity or other similar activities.

The terms and provisions used in Articles 1.3 and 5 of the Tax Code apply solely within the limits of tax relations for taxation purposes. Consequently, the general terms of the Tax Code – “person”, “taxpayer”, “individual entrepreneur”, “economic agent”, “entrepreneurial activity”, “services”, “professional services”, “professional activity or other similar activities” – are employed strictly in that context.

The Court noted a contradiction between points 2 and 3 of the regulations and point 1 of Government Decree no. 474. The impugned decree solely concerned economic agents keeping cash accounts, whereas point 2 of the regulations covered natural and legal persons, regardless of their legal situation, carrying on an entrepreneurial activity or a similar professional activity, who had been qualified as economic agents.

The Court pointed out that classification of taxpayers according to their type of activity, the particularity of which was that it required or allowed the keeping of cash accounts with or without using cash transactions recording and control apparatus, must be done in strict compliance with law. It noted that the provisions of Article 8.2 of the Tax Code did not mean that the government was entitled to introduce tax provisions, since subsequent implementing legislation could not amend or supplement the law pursuant to which it had been passed.

By distinguishing between taxpayers in the regulations according to whether they performed an entrepreneurial activity or a similar professional activity, the government had infringed the general principles of consistency, correlation and subsidiarity of legislation and of succession and equilibrium of regulations. Furthermore, by adopting points 2 and 3 of the regulations, the government had disregarded legal requirements for a standardised classification.

In view of these considerations, the Court held that, by using the term “similar professional activity” in points 2 and 3 of the regulations, the government had exceeded the limits set in Article 8.2 of the Tax Code and the laws relied on, thereby contravening Articles 6, 102.2 and 130.1 of the Constitution.

Languages:

Romanian, Russian.



Identification: MDA-2007-2-005

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 12.06.2007 / **e)** 16 / **f)** Constitutional review of Section II.2 of Law no. 186-XVI of 29 June 2006 amending Law no. 1225-XII of 8 December 1992 on rehabilitation of the victims of political repression / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

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

2.2.2.2 **Sources** – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.

5.2.2.13 **Fundamental Rights** – Equality – Criteria of distinction – Differentiation *ratione temporis*.

5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

5.3.39.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Confiscation, property, communist regime, restitution / Expropriation, restitution / Damage, compensation / Property, seizure, compensation, adequate.

Headnotes:

The principle that constitutional provisions take precedence over ordinary property law, in accordance with Article 7 of the Constitution, cannot interfere with the constitutional principle of non-retrospective effect of laws. The principle of constitutional supremacy cannot be relied on in the case of a law passed before the Constitution of 1994 entered into force.

The obligation to restore property and to pay compensation to the victims of political repression arises only where the state considers itself capable of honouring it.

The principles of equality and non-discrimination are breached where similar cases are treated in different ways without objective, reasonable grounds for doing so, or where the means used are disproportionate to the aim pursued.

Summary:

I. A member of parliament asked the Constitutional Court to review the constitutionality of Section II.2 of Law no. 186-XVI of 29 June 2006 amending Law no. 1225-XII of 8 December 1992 on rehabilitation of the victims of political repression and of Section 12.8 of Law no. 1225-XII.

Under Section 12.8 of Law no. 1225-XII where the value of property does not exceed 200,000 lei payment of compensation may be spread over a period of not more than three years, increased to 5 years at most where the sum exceeds 200,000 lei.

Section II.2 of Law no. 186-XVI provides that the law in question does not concern victims of political repression who were later rehabilitated and who received compensation before its entry into force.

The applicant contended that the provisions cited were in breach of Articles 16.2, 46 and 54.2 of the Constitution and Article 17 of the Universal Declaration of Human Rights.

Article 46 of the Constitution proclaims the right to private property and guarantees its protection. Under that article all natural or legal persons are entitled to respect for their property. Nobody's property may be expropriated except for reasons dictated by public necessity, established in accordance with law, and in exchange for fair compensation made in advance. Lawfully acquired wealth may not be confiscated.

Under Article 53.1 of the Constitution, anyone whose rights have been infringed by a public authority is entitled to obtain recognition of the right being asserted, annulment of the decision and compensation for damage.

Article 54 of the Constitution provides that the exercise of rights and freedoms may be restricted only as provided for by law.

Under the terms of the Law on Rehabilitation of Victims of Political Repression, the restoration of property and compensation for its value shall take the form of payment of compensation to persons who suffered political repression.

II. Upon examining this case the Court observed that the principle that constitutional provisions took precedence over ordinary property law, enshrined in Article 7 of the Constitution, could not interfere with the constitutional principle of non-retrospective effect of laws. The principle of constitutional supremacy could not be relied on in the case of a law passed

before the Constitution of 1994 entered into force. Law no. 1225-XII of 8 December 1992 did therefore not violate the rules laid down in the Constitution, since it was not in force at the time of its adoption.

It followed that the constitutional principles concerning protection of property, expropriation under conditions established by law and compensation for damage caused by a public authority, set out in Articles 46, 53.1 and 54.2 of the Constitution, could not be applied to situations linked to the confiscation, nationalisation or expropriation of property during the campaigns of political repression.

The obligation to restore property and pay compensation to the victims of political repression arose only where the state considered itself capable of honouring it. The Republic of Moldova had proposed mitigating the consequences of political repression by restoring victims' rights and making reparation for the damage caused.

The passing, on 8 December 1992, of Law no. 1225-XII on rehabilitation of the victims of political repression reflected a political and moral resolve on the part of the parliament. The legislation translated into practice the fundamental principle that it was impermissible to expropriate people's property except for reasons dictated by public necessity and under conditions established by law and the general principles of international law.

In view of the financial resources available to the State, and the fact that the value of the property could not be repaid in kind, spreading of the payment of compensation over a period of three or five years constituted a guarantee for victims of political repression that their ownership rights would be restored and they would be compensated, in accordance with Article 53.1 of the Constitution. It followed that the contested provisions were compatible with Articles 46 and 54 of the Constitution.

The Court emphasised that the principle of equality was not to be confused with the principle of uniformity, requiring equal legal treatment in all circumstances. The principles of equality and non-discrimination were breached where similar cases were treated in different ways without objective, reasonable grounds for doing so or where the means used were disproportionate to the aim pursued.

The Constitutional Court accordingly rejected the argument that the principle of equality should benefit victims of political repression who had received compensation in accordance with earlier legislation, whereas the others were to be compensated under the terms of Law no. 186-XVI. The Court held that the

provisions of Section II.2 of Law no. 186-XVI did not infringe the constitutional principle of equality of all citizens before the law and the public authorities.

Languages:

Romanian, Russian.



Identification: MDA-2007-2-006

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 19.06.2007 / **e)** 17 / **f)** Constitutional review of Government Decree no. 683 of 18 June 2004 approving the regulations governing transfer of the natural gas networks to the gas enterprises of the joint stock company "Moldovagaz" for technical assistance purposes / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

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*.

4.10.8 **Institutions** – Public finances – State assets.

Keywords of the alphabetical index:

Economy, state regulation / Energy, national security / Energy, security control.

Headnotes:

Given that the main pipelines and natural gas are objectives of strategic importance to the country and their unskilled exploitation is potentially hazardous, the government's decision to award a technical assistance contract to the joint stock company "Moldovagaz", in its capacity as legal person managing the gas transport and distribution processes in the Republic of Moldova, complies with the Constitution and does not constitute a legal transfer of ownership, since the Civil Code exhaustively enumerates the cases in which ownership is acquired. Nor does this award infringe the municipalities' autonomy.

Summary:

I. A member of parliament asked the Constitutional Court to review the constitutionality of Government Decree no. 683.

The regulations approved under this decree had been drawn up with a view to implementing the gas supply programme in the Republic of Moldova up to 2005, the Law on Gas Distribution via the Main Pipelines, the Law on Safety of Hazardous Industrial Plant and the Law on Gas.

The applicant argued that the provisions of the above decree exceeded the limits of the government's jurisdiction; entailed a violation of the principles of free economic initiative and fair competition, constituting the key characteristics of the economy enshrined in Articles 9.3 and 126 of the Constitution; interfered with the general principles of local public administration, set out in Articles 109, 112 and 113 of the Constitution; contravened Articles 3 and 4 of the European Charter of Local Self-Government; infringed local public authorities' right to property, as laid down in Article 127 of the Constitution, and were in breach of the provisions of the Law on Local Public Administration, the Law on the Government, the Law on Energy and the Law on Gas.

Under Article 96 of the Constitution, the government implements the state's domestic and foreign policy and exercises general supervision over public authorities.

In accordance with Article 102 of the Constitution the government issues decrees, orders and other instruments. Decrees are issued to organise the execution of laws.

Section 10.4 of the Law on the Government, no. 64-XII of 31 May 1990, provides that implementing programmes for the republic's economic and social development shall be a government competence. Section 12.8 entrusts the government with the organisation, formulation and implementation of national programmes, concepts and strategies.

II. The Constitutional Court observed that, under Articles 1.3, 24.1, 37.1 and 46 of the Constitution, there is a universal guarantee by the state of the right to life and to health protection, the right to a non-hazardous environment and the right to private property.

Given that the main pipelines and natural gas constituted objectives of strategic importance to the country and their unskilled exploitation was potentially

hazardous, the government had awarded a technical assistance contract concerning them to the joint stock company "Moldovagaz" in its capacity as legal person managing the gas transport and distribution processes in the Republic of Moldova.

Point 4 of the regulations provided that technical assistance regarding the gas networks could be provided by other firms holding a technical licence from the body responsible for industrial safety, in accordance with the principles of free economic initiative and fair competition. Article 3 of the European Charter of Local Self-Government provided "Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population. This right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them."

Under Article 109 of the Constitution, public administration in the administrative and territorial units is based on the principles of local self-government, decentralisation of public services, election of local public administrative authorities and consultation of the citizens on local issues of special interest. Self-government concerned both the organisation and functioning of the local public administration and management of the communities it represented.

Articles 112 and 113 of the Constitution determined the public administrative authorities through which local self-government was implemented in the villages and towns.

The purpose of the technical assistance contract was the performance of work concerning the operation of the gas networks, as regulated by legislation. The contract did not constitute a legal transfer of ownership, since the Civil Code exhaustively enumerated the cases in which ownership was acquired.

Exercising its jurisdiction in constitutional matters, the Constitutional Court held that Government Decree no. 683 of 18 June 2004 approving the regulations governing transfer of the natural gas networks to the gas enterprises of the joint stock company "Moldovagaz" for technical assistance purposes was constitutional.

Languages:

Romanian, Russian.



Identification: MDA-2007-2-007

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 28.06.2007 / **e)** 19 / **f)** Constitutional review of Section I point 4.3 and Section II point 1.2 of Law no. 448-XVI of 28 December 2006 amending certain legislative instruments / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
4.10.7 **Institutions** – Public finances – Taxation.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Property real, value, taxation, equality / Tax, authority, powers / Equity, taxation, principle.

Headnotes:

The principle of equality, proclaimed in Article 16 of the Constitution, entails the equality of all citizens before the law and the public authorities, not equality between citizens. Tax contributions constitute an obligation of citizens, not a right.

Summary:

I. A member of parliament asked the Constitutional Court to review the constitutionality of Section I point 4.3 and Section II point 1.2 of Law no. 448-XVI of 28 December 2006 amending certain legislative instruments.

The applicant argued that the contested provisions infringed Article 16.2 of the Constitution concerning equality of rights and Article 58.2 of the Constitution concerning fair distribution of tax burdens.

II. Under Article 130.1 of the Constitution the formation, administration, use and control of the financial resources of the state, administrative and territorial units and public institutions are governed by law.

Article 132 provides that taxes and duties and all other revenues of the state budget and the state social security budget and the budgets of the districts, towns and villages shall be determined, under the law, by the respective representative agencies.

In accordance with Article 58.2 of the Constitution the legal system of taxation must ensure fair distribution of tax burdens.

The amount of tax payable results from the rate of taxation, which is based on the value of the property.

Article 6 of the Tax Code requires taxation to conform to the principle of equity in tax matters, whereby all natural or legal persons performing their activities under similar conditions are treated in the same manner with a view to paying an equal tax contribution.

The provisions of Article 280.3 of the Tax Code do not infringe the principle of equality, proclaimed in Article 16 of the Constitution, since this principle entails the equality of citizens before the law and the public authorities not equality between citizens.

In this connection, the Constitutional Court stressed that tax contributions constituted an obligation of citizens, not a right.

The object of Law no. 448-XVI of 28 December 2006 was to improve the tax system by instituting the taxation of property according to its market value.

The Court held that the amendments to the Tax Code and to Law no. 1056-XIV complied with Articles 16.2 and 58.2 of the Constitution by introducing balanced taxation and equity in tax matters between all taxpayers.

Languages:

Romanian, Russian.



Montenegro Constitutional Court

Important decisions

Identification: MNE-2007-2-002

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 28.02.2006 / **e)** U 21/05/g / **f)** Constitutionality of the Law on the High Council of Justice / **g)** Official Gazette of the Republic of Montenegro, 24/06 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Court, fee, prior payment, obligation.

Headnotes:

Making court proceedings conditional on prior payment of court fees contradicts Article 17 of the Constitution, which sets out that everyone is entitled to equal protection of their freedoms and rights in a procedure before the law and that everyone has the right of access to the courts.

Summary:

The Constitution of the Republic of Montenegro stipulates that the law shall regulate the manner in which freedoms and rights are exercised in conformity with the Constitution, if that is required for their implementation (Article 12.1 of the Constitution); that citizens are free and equal, irrespective of any special quality or personal characteristics they may have and that they are all equal before the law (Article 15 of the Constitution); that everyone is entitled to equal protection of their freedoms and rights in a procedure before the law and that everyone has the right to file a complaint or to other legal means against decisions relating to their right or interest based on law (Article 17 of the Constitution); that everyone is bound to pay taxes and fees (Article 49 of the Constitution) and that the

law shall be in conformity with the Constitution, and other regulations and general acts in line with the Constitution and the law (Article 107 of the Constitution).

Article 6 ECHR established, *inter alia*, that everyone is entitled to a fair and public hearing, when their civil rights and obligations are being decided on or in a penal indictment against them, within a reasonable time by an independent and impartial court, established by law. Article 13 ECHR stipulates that everyone whose rights and freedoms granted by this Convention have been violated is entitled to an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity.

From the above-mentioned provisions of the Constitution, it follows that everyone is entitled to equal protection of their freedoms and rights in the procedure stipulated by law and that everyone is granted the right to lodge a complaint. The Constitution also prescribed a duty for everyone to pay taxes and other charges established by law, defining only taxes, as a type of fiscal charge, whereas the definition of other charges, including fees, have been left for the legislator.

Based on the above-mentioned provisions, the Republic adopted a law that introduced court fees, setting out the elements of public revenue and the amount of the fee, which is an integral part of this law. The legislator respected various situations connected with the fee payer (such as their property rights, social condition, etc.), thus by using certain methods, the legislator adjusted the amount of the court fee to be paid to fit the financial capacity of the fee payer (e.g. exemptions). Since courts, as the authorities of state power, obtain financial means for carrying out their activities from the state budget, and according to Article 7 of the Law on Courts, the revenues from court fees are the revenues of the budget of the Republic. The purpose of introducing court fees, *inter alia*, is to have the parties partially finance the costs of their court proceedings.

It is indisputable that in view of regulating the system of court fees, which follows from the constitutional obligation of paying taxes and charges, the legislator is authorised to penalise the failure to pay, or the delay in paying court fees. However, the legal regulation of mentioned relations, which implies the obligation of paying the court fee, according to the assessment of the Court, must be in line with both the Constitution and the established principles of the protection of civil freedoms and rights. This means that the obligation for citizens set forth in the

Constitution may not derogate court protection of these rights and freedoms.

It follows, from the above-mentioned provisions of the Constitution, that the Republic is authorised to regulate only the manner in which these freedoms and rights are implemented, if that is required for their implementation, but not to limit by law the rights granted by the Constitution. Namely, under the above-mentioned provisions of the Law, a condition was prescribed to implement these rights making the payment of this fee conditional for court proceedings to take place. The Constitutional Court found that providing for such a condition violated Article 17 of the Constitution, which stipulates that everyone is entitled to equal protection of their rights and freedoms in the proceedings provided for by law and that everyone has the right to file a complaint if these rights and/or freedoms have been breached. Therefore, the challenged provisions are not in conformity with the Constitution of the Republic of Montenegro.

Supplementary information:

Legal norms referred to:

- Articles 113.1.1, 115, 116.3 of the Constitution;
- Articles 51.2 and 56.1 of the Law on the Constitutional Court.

Languages:

Macedonian, English.



Netherlands

Council of State

Important decisions

Identification: NED-2007-2-004

a) Netherlands / b) Council of State / c) Third Chamber / d) 06.06.2007 / e) 200608642/1 / f) / g) / h) CODICES (Dutch).

Keywords of the systematic thesaurus:

1.1.2.6 **Constitutional Justice** – Constitutional jurisdiction – Composition, recruitment and structure – Functions of the President / Vice-President.

1.1.4.1 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Head of State.

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

2.3.3 **Sources** – Techniques of review – Intention of the author of the enactment under review.

4.4.1.3 **Institutions** – Head of State – Powers – Relations with judicial bodies.

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:

Document, disclosure / Court, president.

Headnotes:

The Queen's presidency over the Council of State does not affect the court's impartiality. Besides, neither the Queen's Office, nor the Queen herself is an administrative authority in the sense of the General Administrative Law Act or the Regulations governing public access to government information.

Summary:

I. The Minister of General Affairs (hereafter: the minister) had turned down an application made by the Dutch Broadcasting Foundation (referred to here as "the Foundation") for disclosure of documents. The minister had also refused to forward the Foundation's request to the Queen's Office. The Foundation had contested the decision, but the minister dismissed its objections. The Foundation then launched proceedings in an administrative law court. The District Court upheld the minister's decision in part, but overturned that part of the decision relating to his initial refusal to forward the application to the Queen's Office. The Administrative Jurisdiction Division of the Council of State overturned this part of the District Court's judgment.

The Foundation appealed to the Administrative Jurisdiction Division of the Council of State, beginning by challenging the jurisdiction of the court, as the case concerned the position of both the Queen's Office and the Queen, who is President of the Council of State.

II. The Administrative Jurisdiction Division of the Council of State held it did have jurisdiction to hear the present appeal, notwithstanding the Queen's presidency of the Council of State, for there was no connection between the presidency and the administration of justice. Therefore, the Foundation could not reasonably doubt the independence and impartiality of the Administrative Jurisdiction Division of the Council of State.

The Administrative Jurisdiction Division of the Council of State further observed that the Queen's Office was neither an administrative authority in the sense of the General Administrative Law Act (referred to here as the GALA) nor in the sense of the regulations governing public access to government information. Therefore, the minister was not obliged to forward the Foundation's application to the Queen's Office. The minister had refused to forward it on the ground that the Queen's Office was not an administrative authority in the sense of the Regulations governing public access to government information (an Act of Parliament, hereafter: the Regulations).

Under Article 42.2 of the Constitution, Ministers, rather than the King, are responsible for acts of government. The General Administrative Law Act defines 'administrative authority' as:

- a. an organ of a legal entity established under public law, or
- b. another person or body that is vested with public authority (Section 1:1.1).

The Regulations apply to the following administrative authorities:

- a. ministers;
- b. the administrative authorities of provinces, municipalities, water boards and regulatory industrial organisations;
- c. administrative authorities whose activities are subject to the responsibility of the authorities referred to in Subsection 1.a and 1.b;
- d. other administrative authorities not excluded by order in council (Section 1a.1).

The Regulations also provide that anyone may apply to an administrative authority or to an agency, service or company carrying out work for which it is accountable to an administrative authority for information contained in documents concerning an administrative matter (Section 3.1). If the application concerns documents held by an administrative authority other than that to which the application has been submitted, the applicant shall, if necessary, be referred to that authority. If the application was made in writing, it shall be forwarded and the applicant shall be notified accordingly (Section 4). The Queen's Office provides support to the Queen in the performance of her constitutional duties under Section 1 of the Royal Decree of 18 December 2003 (Queen's Office Decree) read in conjunction with Section 1 of the Act of 22 June 1891 (Act in connection with the devolvement of the Crown to a Queen).

The District Court had held that the Queen's Office, in terms of its duties, was an organ of the State and therefore an administrative authority (in the sense of the Section 1:1.1 opening words and under a, of the GALA). Moreover, the Queen's inviolability did not preclude the Queen's Office being considered an administrative authority with regard to the applicability of the Regulations. On appeal to the Administrative Jurisdiction Division of the Council of State, the minister argued that the District Court had failed to recognise the effect the Queen's inviolability had upon the status of the Queen's Office as an administrative authority, whether in the sense of the GALA or of the Regulations governing public access to government information. The Administrative Jurisdiction Division of the Council of State interpreted Section 1 of the Queen's Office Decree as meaning that the Office afforded exclusive support to the Queen in the performance of her constitutional duties. The Office had not been assigned duties of its own; it lacked independent authority. Therefore, the Queen's Office was neither an administrative authority in the sense of the opening words of Section 1:1.1 and "a" of the GALA or a body invested with any public authority in the sense of Section 1:1.1 opening words and under b, of the GALA.

Finally, the Administrative Jurisdiction Division of the Council of State took the view that the minister was not obliged to forward the Foundation's application to the Queen, since the Queen herself was not to be considered as an administrative authority. The Queen fitted the description of an 'administrative authority' within the opening lines of Section 1:1.1 and under a, of the GALA. The Queen was not among the authorities, persons and bodies which were not deemed administrative authorities under Section 1:1.2 of the GALA. However, parliamentary history demonstrated that an administrative authority (in the sense of the GALA) could only act as such, if it was accountable. The preamble to and parliamentary history of the Regulations governing public access to government information made it clear that the Regulations served effective and democratic administration. Article 42 of the Constitution precluded the Queen from taking responsibility or accounting for her acts, and, therefore, from being an 'administrative authority'.

Languages:

Dutch.



Poland

Constitutional Tribunal

Statistical data

1 May 2007 – 31 August 2007

Number of decisions taken:

Judgments (decisions on the merits): 43

- Rulings:
 - in 11 judgments the Tribunal found some or all of the provisions under dispute to have contravened the Constitution (or other act of higher rank)
 - in 6 judgments the Tribunal found all challenged provisions to conform to the Constitution (or other act of higher rank)
- Proceedings:
 - 6 judgments were issued at the request of private individuals (physical or natural persons) – the constitutional complaint procedure
 - 5 judgments were issued at the request of courts – the question of legal procedure
 - 2 judgments were issued at the request of the Commissioner for Citizens' Rights (i.e. the Ombudsman)
 - 2 judgments were issued at the request of professional organisations
 - 1 judgment were issued at the request of a group of Deputies (members of the *Sejm*, i.e. first chamber of Parliament)
 - 1 judgment were issued at the request of the National Council of the Judiciary
- Other:
 - 1 judgment was issued by the Tribunal in plenary session
 - 2 judgments were issued with dissenting opinions

Important decisions

Identification: POL-2007-2-003

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 30.10.2006 / **e)** P 10/06 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2006, no. 202, item 1492; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 9A, item 128 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 3.18 **General Principles** – General interest.
 5.1.1.4 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons.
 5.1.1.5 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons.
 5.1.2 **Fundamental Rights** – General questions – Horizontal effects.
 5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
 5.1.4.1 **Fundamental Rights** – General questions – Limits and restrictions – Non-derogable rights.
 5.1.5 **Fundamental Rights** – General questions – Emergency situations.
 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
 5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of opinion.
 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
 5.3.22 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
 5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
 5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.
 5.3.31 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Defamation, criminal, sanction, proportionality / Defamation, through media, penalty, more severe / Public debate, chilling effect / Media, journalist, role.

Headnotes:

The constitutional guarantee of the freedom of expression (Article 54.1 of the Constitution, read in conjunction with Article 14 of the Constitution) is a basic tenet of a democratic society, a condition for the

development of such a society and for individual self-fulfilment. Such freedom may not be limited to information and views that are favourably received, or perceived as harmless or neutral. The role of journalists is to disseminate information and ideas about matters of public interest and significance.

Article 54.1 of the Constitution stipulates that everyone is vested with the freedom to express opinions, to acquire and to disseminate information. This provision concerns the expression of opinion in every form and under any circumstances. In principle, it is limited to natural persons, since only natural persons may have their own opinions, and acquire and disseminate information. Freedom of expression is one of the so-called personal freedoms, i.e. it is limited to people and does not apply to other entities (note also Articles 38 to 42 of the Constitution inclusive, and Articles 48, 52, 55 and 56 of the Constitution). There are exceptions: certain aspects of the above freedoms and rights may be applicable to entities that are not natural persons. These include the rights expressed in Article 45.1 of the Constitution (fair trial), Article 50 of the Constitution (inviolability of the home) and Article 51.1, 51.3 and 51.4 of the Constitution (so-called informational autonomy of individuals).

Freedom of the press and other means of social communication, under Article 14 of the Constitution, an element of the freedom of expression, is a fundamental principle of the Polish constitutional system. Its position there stems from its relationship with the principle of a democratic State under the rule of law (see Article 2 of the Constitution). It is not a coincidence that Article 14 of the Constitution is located in the proximity of provisions concerning the freedom of political parties (Article 11 of the Constitution), the freedom to create other associations (Article 12 of the Constitution) and the principle of the decentralisation of public power (Articles 15 and 16 of the Constitution). These principles can be contrasted with features of states that are not democratic. Furthermore, Article 14 of the Constitution forms the basis for those duties of the State that do not stem from freedom of expression, such as the media anti-concentration law. It is, accordingly, important to note that the freedom of means of social communication imposes upon the State the duty to respect that autonomous sphere of social life. It is more difficult to identify, within the disputed provision, a subjective right for individuals. The freedom in question may not constitute per se a reason to limit other constitutional rights and freedoms (i.e. a reason not covered by the general principle of proportionality (see Article 31.3 of the Constitution). Neither does it imply unrestricted freedom for editors and journalists.

The introduction of limitations upon rights and freedoms that could result in the infringement of human dignity cannot be allowed. Article 30 of the Constitution protects human dignity. Within the content of each right and freedom, one may identify a “core”, the violation of which is impermissible since it constitutes the *conditio sine qua non* of the principle of dignity. The closer the relationship between a particular right or freedom with the essence of the human dignity, the better it should be protected by public authorities. Simultaneously, the principles of the State’s constitutional system should be realised in such a way to avoid the violation of human dignity. The protection of dignity may be realised both through short-term intervention by the executive power and through the creation of a legislative system of legal guarantees.

With human dignity comes the expectation of respect on the part of others. Defamation is an example of violation of human dignity, within the above definition. Consequently, public authorities are obliged to protect individuals from the violation of their dignity, resulting from the activities of public entities.

It cannot be assumed that freedom of expression (under Article 54.1 of the Constitution), enjoys a higher level of protection than that afforded to other rights and freedoms, such as the right to protection of one’s home and family life, and to the protection of one’s good name (see Article 47 of the Constitution). The preferences of the constitutional legislator in that respect are evident. The values enumerated in Article 47 of the Constitution are, in contrast to freedom of expression – protected by so-called “non-derogable” rights. Such rights can never be limited, even in times of martial law and states of emergency. See Article 233.1 of the Constitution. This is because of the close relationship between honour and reputation and human dignity. Thus, those rights and freedoms deriving from human dignity, including honour, good reputation and privacy, enjoy supremacy over freedom of expression, and, indeed, may justify the limitation of the freedom of expression. Furthermore, in the light of international treaties binding upon the Republic of Poland, honour and good reputation may justify the limitation of the freedom of expression. See also Article 10.2 ECHR; Articles 17.1, 17.2 and 19.3.a of the International Covenant on Civil and Political Rights, and Article 12 of the Universal Declaration of Human Rights.

Under the principle of proportionality, as set out in Article 31.3 of the Constitution, a legislator introducing limitations upon rights and freedoms should choose measures that are the least burdensome for individuals. A legal provision introducing limitations is inconsistent with the

aforementioned principle in situations where the same effects may be achieved by deploying measures which would imply a lesser limitation upon rights and freedoms.

It is unfounded to assert that the level of the protection of honour and good reputation is equal both on the grounds of civil law (protection of personal interests – see Articles 23 and 24 of the Civil Code 1964) and on the grounds of criminal law (criminalisation of defamation – see Articles 212 and 213 of the 1997 Criminal Code). Bringing the violation of honour and good reputation into the criminal law field can be justified due to the close relationship between these values and human dignity. The latter value is fundamental to the legal order and closely connected to the concept of “common good” (Article 1 of the Constitution). Articles 1 and 30 of the Constitution (common good and human dignity) may not be interpreted separately, since they define the axiological fundamentals of State and social order. Any interference in the sphere of human dignity constitutes a significant violation of that order, and, for that reason, it is not simply an “individual” matter, between the persons in question. The criminalisation of defamation implies that, in general, the legislator considers such activity to be “socially harmful” and in breach of the common good, not just the rights of individuals. The application of criminal sanctions to defamation is justified by the intention to stress the dim view that State and society take of activities that breach honour and good reputation. The situation would be different, if these activities only attracted civil law sanctions.

The risk of conviction for defamation or even the risk of being accused of it, may constitute a “chilling effect” for public debate. It could influence access by the public to information, which would be undesirable in a democratic State. However, under Article 212.4 of the Criminal Code, defamation is an offence to be prosecuted upon initiative by a private party. This, together with the practice of applying the challenged regulation, show that the legal provisions in question do not constitute an instrument of excessive or politically-motivated repression and do not lead to disproportionate interference in the freedom of expression.

The press plays a vital role in a democratic state, but that does not mean that everybody who commits defamation through mass media should enjoy broader protection. On the contrary, this is a particularly harmful type of defamation. A more severe penalty for defamation “through mass media” is, therefore, justified.

Summary:

The Constitutional Tribunal examined the provisions of the 1997 Criminal Code on the offence of defamation. According to Article 212.1 of the Criminal Code, this offence consists of “imputing to another person, group of persons, institution, legal person or organisational unit lacking legal personality such conduct or characteristics that may discredit them in the face of public opinion or result in a loss of confidence necessary for a given position, occupation or type of activity”. Article 212.2 of the Code imposes a more severe penalty for defamation “through mass media”. Under Article 213.1, defamation is not committed if an allegation is not made in public and is true. As regards allegations made in public, the “evidence of truth” is not sufficient, since – pursuant to Article 213.2 of the Criminal Code – it should be also proven that such a true allegation was raised “in defence of a justifiable public interest”.

The proceedings in the present case were initiated by a question of law (see Article 193 of the Constitution) referred by a District Court. The Court alleged that Articles 212 and 213 of the Criminal Code are inconsistent with Articles 14, 31.3 and 54.1 of the Constitution (freedom of press, proportionality, freedom of expression). In the referring Court’s opinion, counteracting the abuse of the freedom of press and the freedom of expression through the mechanism of the criminal law was not necessary in a democratic State and was therefore disproportionate. The referring Court argued that the same effects could have been achieved through the application of the press law (i.e. rectifications and responses) or civil law (i.e. protection of personal interests).

The Constitutional Tribunal ruled that Article 212.1 and 212.2 of the Criminal Code (“regular” defamation and defamation “through mass media”) conform to Articles 14, 31.3 and 54.1 of the Constitution (freedom of press, proportionality and freedom of expression).

Three judges of the Tribunal expressed dissenting opinions.

Cross-references:

Judgments of the Constitutional Tribunal of the Republic of Poland:

- Judgment SK 8/00 of 09.10.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 7, item 211;

- Judgment K 10/04 of 22.02.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 2A, item 17;
- Judgment K 4/06 of 23.03.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 3A, item 32; *Bulletin* 2006/1 [POL-2006-1-006];
- Judgment P 3/06 of 11.10.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 9A, item 121;

Judgments of the European Court of Human Rights:

- Judgment no. 5493/72 of 07.12.1976 (*Handyside v. United Kingdom*), Series A, no. 24; *Special Bulletin Leading Cases – ECHR*.

Languages:

Polish, English, German (summary).



Identification: POL-2007-2-004

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 07.03.2007 / **e)** K 28/05 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2007, no. 47, item 319; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2007, no. 3A, item 24 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.
- 5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
- 5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Civil proceedings.

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

Keywords of the alphabetical index:

Disability, discrimination / Personality, right / Incapacitated, legally, challenge, right.

Headnotes:

Constitutional notions are of an autonomous nature. They may not be interpreted solely on the basis of sub-constitutional acts.

“Legal incapacitation” is a constitutional notion (see Article 62.2 of the Constitution). It influences certain constitutional political rights of persons who have been legally incapacitated. Such persons are deprived of the right to vote (Article 62.2 of the Constitution), the right of access to public services (Article 60 of the Constitution), the right to participate in “popular” legislative initiatives (Article 118.2 of the Constitution), and the right to stand as a candidate in presidential elections (Article 127.3 of the Constitution). This could be justified on the basis that persons who are incapable of managing their own conduct (due to mental illness, handicap or other mental disorder) should not have influence over decisions concerning public interest.

Legally incapacitated persons should be treated as “disabled persons”, within the meaning of Article 69 of the Constitution. This obliges public authorities to provide them with assistance, to ensure their subsistence, adaptation to work and social communication. The protection of disabled people is a particular feature of the “obligation of solidarity with others” (see the Preamble to the Constitution) and the protection of human dignity (see Article 30 of the Constitution).

The right to lodge a motion for revoking or changing legal incapacity is a component of the right to court (see Article 45.1 of the Constitution). It may also be described as “right of access to court” or “right to initiate court proceedings.”

Human dignity, under Article 30 of the Constitution, is the only constitutional right that may not be subject to any limitations. Constitutional conditions on limiting rights and freedoms (see Article 31.3 of the Constitution) do not apply to human dignity.

Human dignity may be perceived from two perspectives: firstly, as an inherent and inalienable value; secondly, as the “right of personality”,

encompassing the values of the psychological life of each human being and all the values determining the position of the individual in society, which comprise, in general opinion, the respect due to each person. From the “right of personality” derives the existence of a certain minimum substance that would guarantee individuals the possibility to function in society and to develop their personalities fully within their social and cultural environment.

The principle of protecting individual liberty (Article 31.1 and 31.2 of the Constitution), on the one hand, complements constitutional provisions defining particular freedoms and, on the other hand, constitutes the basis for an independent subjective right to liberty, consisting of the freedom to express one’s will and to make one’s own choices. In its positive aspect, individual liberty implies the freedom to shape one’s own behaviour; in its negative aspect, individual liberty implies a universal duty to prevent interference within the sphere reserved for an individual.

The idea behind the challenged provision was that it was necessary to relieve courts of the duty to adjudicate upon evidently groundless motions lodged by legally incapacitated persons. However, this was not justified, in the light of conditions for the permissibility of limiting constitutional rights and freedoms (Article 31.3 of the Constitution). Enhancing the effectiveness of the administration of justice is not a value which would be of more significance than the right of legally incapacitated persons to liberty.

Summary:

In Polish civil procedure, cases concerning legal incapacitation are subject to the procedure on non-contentious matters. The spouse of a person who is to be legally incapacitated, his or her relatives in direct line, siblings or a legal representative may lodge motions instituting proceedings for legal incapacitation. See Article 545.1 of the Civil Procedure Code 1964. According to Article 559 of the Civil Procedure Code:

“1. Legal incapacitation shall be revoked by a court, where the reasons for the declaration thereof cease to exist; revocation may be also decided *ex officio*.

2. Should the mental condition of a legally incapacitated person improve, the court may alter total legal incapacitation to partial incapacitation; should their mental condition get worse, the court may change partial legal incapacitation to total incapacitation”.

Under customary judicial practice, the circle of persons entitled to lodge the motion to revoke or change legal incapacitation based on Article 559 of the Civil Procedure Code has been the same as the circle of persons entitled to lodge a motion to declare legal incapacitation, as enumerated in Article 545.1 of the same Code. This signified that a person legally incapacitated had been deprived of the right to initiate proceedings for revoking or changing the legal incapacitation. He or she had only been entitled to file appeals against decisions issued within the procedure for incapacitation (See also Article 560 of the Civil Procedure Code).

The constitutional review in the present case was initiated by the application lodged by the Ombudsman (Commissioner for Citizens’ Rights) who alleged that depriving a legally incapacitated person of the possibility of launching proceedings to revoke or change the incapacitation raised doubts as to its conformity with the principle of human dignity (Article 30 of the Constitution). The Ombudsman also suggested that the challenged provision restricts the individual liberty of legally incapacitated persons (Article 31.1 and 31.2 of the Constitution) in a way that was at odds with the principle of proportionality (Article 31.3 of the Constitution).

The Constitutional Tribunal held that Article 559, read in conjunction with Article 545.1 and 545.2 of the Civil Procedure Code, did not allow legally incapacitated persons the right to file motions to institute proceedings for revoking or changing their legal incapacitation. It therefore ran counter to Articles 30 and 31 of the Constitution, i.e. human dignity, individual liberty and the principle of proportionality.

Cross-references:

- Judgment K 28/97 of 09.06.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 4, item 50; *Bulletin* 1998/2 [POL-1998-2-013];
- Judgment K 4/99 of 20.12.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 7, item 165; *Bulletin* 2000/1 [POL-2000-1-003];
- Judgment P 5/99 of 14.03.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 2, item 60; *Bulletin* 2000/1 [POL-2000-1-009];
- Judgment K 21/99 of 10.05.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 4, item 109; *Bulletin* 2000/2 [POL-2000-2-013];

- Judgment K 27/00 of 07.02.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 2, item 29; *Bulletin* 2001/1 [POL-2001-1-007];
- Judgment K 11/00 of 04.04.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 3, item 54;
- Judgment P 6/01 of 08.11.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 8, item 248; *Bulletin* 2002/1 [POL-2002-1-006];
- Judgment SK 6/02 of 15.10.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 5A, item 65; *Bulletin* 2003/1 [POL-2003-1-003];
- Judgment K 7/01 of 05.03.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 3A, item 19; *Bulletin* 2003/2 [POL-2003-2-017];
- Judgment SK 42/01 of 14.07.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 6A, item 63;
- Judgment K 20/02 of 23.09.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 7A, item 76; *Bulletin* 2003/3 [POL-2003-3-031];
- Judgment P 21/02 of 18.02.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 2A, item 9; *Bulletin* 2004/2 [POL-2004-2-012]; *Special Bulletin Human Rights Limitations* [POL-2004-H-001].

Languages:

Polish, English, German (summary).



Portugal Constitutional Court

Statistical data

1 May 2007 – 31 August 2007

Total: 177 judgments, of which:

- Prior review: 2 judgments
- Appeals: 136 judgments
- Complaints: 32 judgments
- Electoral disputes: 2 judgments
- Political parties and coalitions: 2 judgments
- Political parties' accounts: 1 judgment
- Inappropriate activity by holders of political office: 2 judgments

Important decisions

Identification: POR-2007-2-006

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 02.05.2007 / **e)** 278/07 / **f)** / **g)** *Diário da República* (Official Gazette), 117 (Series II), 20.06.2007, 17291-17296 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

5.3.35 **Fundamental Rights** – Civil and political rights – Inviolability of the home.

Keywords of the alphabetical index:

Search, necessity, threat, imminent / Search, warrant, absence, judicial review / Offence, threat, imminent, search without warrant.

Headnotes:

Home searches require prior court permission or a court order. However, in some cases, a home search performed by the police without prior judicial permission is constitutionally permissible, notably in

cases of violent crime, when there is strong evidence that an offence is imminent which poses a serious threat to someone's life or physical safety.

Where a police service carries out a home search without prior judicial permission, the constitutional system would appear to require an unofficial judicial review after the event.

Summary:

I. During a criminal investigation that led to charges against five people of personal involvement in a kidnapping, an intentional homicide, profanation (concealment) of a dead body and illegal possession of a weapon, the courts initially dismissed an objection that the results of a search were invalid. The home of one of the accused had been searched because of strong evidence that the victim of a kidnapping and/or assault was in the flat in question, but the courts had not been immediately informed of the search and had not assessed the matter or given permission for the operation.

II. Two constitutional questions arose: the first to do with the statutory requirement to notify the courts of the police search in good time, the second to do with tacit judicial approval of the search deriving from the decision validating an accused's detention and placing the accused in custody.

Under the Constitutional Court's case law, sanctity of the home under Article 34 of the Constitution reflects, in one very specific area, the general guarantee in Article 26.1 of the Constitution of the right to personal and family privacy. Consequently, the former guarantee is not confined to protecting the home in the civil-law sense of the place of usual residence, but is wider in scope, seeking to protect dwellings as being enclosed spaces with which strangers are not allowed to interfere in so far as a range of behaviour specific to private and family life takes place there and occurs discreetly and freely.

Given the importance of the value at issue and the seriousness of the constitutionally permitted interference, the legitimacy of such interference must be subject to judicial verification in order to safeguard other constitutionally protected values or interests. A 48-hour lapse of time is not excessive, notably in comparison with the time limit for bringing before a court accused persons not detained under a court order. Subsequent judicial review as required by the Constitution can be regarded as having taken place if performed within that period.

In addition, although an independent and explicit judicial decision approving the search may be thought

preferable, implicit approval, provided it is clear, adequately meets the constitutional objectives – that is, it confirms that the conditions on which the authorities are allowed to carry out a search without prior judicial permission were met.

In conclusion, the Court did not regard it as unconstitutional to interpret the code of criminal procedure to mean that, in the case of violent crime, and where one could presume the imminent commission of an offence posing a serious threat to life or physical safety, notice of a police search without prior judicial permission must be given to the investigating judge within 48 hours. The judicial decision approving it can be treated as implicit in the decision approving the accused's detention.

Supplementary information:

This approach taken by the Constitutional Court is confirmed by Judgment nos. 274/07 and 285/07, dealing with the same issues of constitutionally protected sanctity of the home and searches of the home.

Languages:

Portuguese.



Identification: POR-2007-2-007

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 14.08.2007 / **e)** 442/07 / **f)** / **g)** *Diário da República* (Official Gazette), 175 (Series I), 11.09.2007, 6451-6471 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.22 **General Principles** – Prohibition of arbitrariness.
 4.10.7 **Institutions** – Public finances – Taxation.
 5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
 5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.

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

5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, authority, powers / Taxpayer, guarantee / Personal data, electronic treatment / Civil servant, taxation, information of superior / Income tax, calculation / Privacy, protection / Banking secrecy / Fundamental right, protection, effectiveness.

Headnotes:

There are sufficient concrete reasons for the requirement that the finance director notify the superior of a public servant (or of any public-service employee) of any decision to assess the latter's taxable income (by indirect methods) in tax situations where the taxpayer, though showing external signs of wealth, has not submitted an income-tax return. To distinguish the situation of such a public servant or public service employee from that of other taxpayers is neither arbitrary nor unreasonably discriminatory. Therefore, the statutory requirement does not conflict with the equality principle.

The basis of banking confidentiality was reinforced by recognition of personality rights and by treating banking confidentiality in terms of protection of privacy and not just as a contractual matter between bank and client. The right to confidentiality is strengthened in that, although the basic right to respect for privacy (Article 26.1 of the Constitution) includes the right to confidentiality of one's personal banking data, the special rules governing rights, freedoms and guarantees become applicable. Three types of right are encompassed by the right to respect for personal and family privacy – the right to be left alone, the right to anonymity and the right to self-determination in information matters. The third one (the right not to make public facts or conduct indicative of one's personality or lifestyle) is the most significant and carries the most weight when the constitutionality of banking confidentiality comes under challenge.

Nonetheless, bringing a bank's financial data on the individual client within the scope of the right to privacy raises issues in that the right to privacy might be thought to encompass only the circumstances of private life, thus excluding, in principle, financial assets. However, in the specific case of data and documents held by banks, and above all as regards debit transactions on accounts, it is neither solely nor

particularly the knowledge as such of the financial situation which is a possible invasion of privacy. At a time when bank-account activity, notably by means of credit cards, has grown hugely in volume and become commonplace, such knowledge allows a full and accurate picture to be gained of the account holder's lifestyle.

Thus it is mainly as a guarantee protecting non-financial personal information (which otherwise would be indirectly revealed) that banking confidentiality must be given constitutional protection and brought under the right to respect for privacy established in Article 26.1 of the Constitution. Such inclusion raises problems only with regard to legal persons, mainly commercial companies.

The scope of protection of a fundamental right differs from that of the protection afforded in actual practice. The latter results from weighing interests and values connected with privacy against other interests likewise protected by the Constitution but conflicting with them. Banking confidentiality is a matter that falls within community life, in principle lying outside the strictly private sphere, and even if it is understood as a protected area it is only marginally so. Thus not only is banking confidentiality an aspect of confidentiality open to restriction, breach of it at the behest of the tax authorities is only a slight interference with the protected sphere.

In addition, the principle of fair apportionment of the tax burden entitles the authorities to make tax investigations, the extent of which can on no account be limited by banking confidentiality. Even in a system which (like the Portuguese one) is heavily based on guarantees, there are no constitutional grounds for making data which is, in principle, covered by confidentiality a "safe haven" from the tax authorities. Access to such data is a restriction on a fundamental right. In some circumstances, it is legitimised by the public authorities' obligation to preserve other constitutionally protected rights. The important task for the legislature is to establish mechanisms whereby – to the degree compatible with the main objectives of waiving banking confidentiality – protection continues to be given to those interests that are regarded as coming under the constitutional protection accorded to privacy.

Summary:

The President of the Republic had sought precautionary review of the constitutionality of provisions in Articles 2 and 3 of the parliamentary decree amending the Tax Act, the code of tax procedure and the general rules governing tax offences.

The first constitutionality issue stemmed from the first rule, last section. This provided that final decisions on taxable income were to be communicated not only to the public prosecutor but also, in cases involving public servants or public-service employees, to the supervising authority, for purposes of investigation within its field of responsibility. The issue arose in the context of situations where a taxpayer showed external signs of wealth but had not submitted a tax return. It was then for the taxpayer to show that income declared corresponded to actual earnings and that, because the external signs of wealth derived from another source, no income tax was payable in respect of them. The question here was whether the tax legislation laid down a set of rules for public servants and public-service employees in their capacity as taxpayers that differed from the rules applying to private citizens in general. The Constitutional Court held that, as far as the actual tax relationship was concerned, there was absolute equality of treatment between such persons and other taxpayers. It could thus be concluded that public servants and public-sector employees had the same rights and the same obligations with regard to the methods of determining income. It was therefore after the tax relationship – once the process of assessing taxable income by indirect methods had been concluded and a final decision, whether administrative or judicial, had been taken on the matter – that the rules now introduced a special feature: in the case of private citizens generally the decision was to be communicated only to the public prosecutor, whereas in the case of a public servant or public-service employee it was also to be communicated to the supervising authority. In the Constitutional Court's view no discrimination against the persons concerned arose from this provision, which did not contravene the equality principle in so far as that principle prohibited arbitrariness and unjustified differentials. Consequently the provision was not unconstitutional.

The second constitutional issue had to do with the rule whereby banking confidentiality could be lifted in the event of an administrative or judicial appeal from the taxpayer, provided there was good reason for it. The request from the President of the Republic was based on the following constitutional principles: the right to respect for privacy (Article 26.1 of the Constitution), the right to a court (one aspect of Article 20 of the Constitution when viewed as a corollary of the rule of law as established in Article 2 of the Constitution), the right of petition (Article 52 of the Constitution), the right of members of the public to appeal against any administrative decision detrimental to them (Article 268.4 of the Constitution), the proportionality principle (Articles 2 and 18 of the Constitution) and the principle of administrative good faith (Article 266 of the Constitution).

The Constitutional Court held that, quite apart from the vagueness of the overall defence safeguards which it offered, the provision in question allowed the administrative authorities a further waiver of banking confidentiality on grounds which were unduly wide and subject to few conditions.

In addition to interfering with the right to privacy, as was inevitable when confidentiality was lifted without the data subject's consent, this undermined the right of administrative or judicial appeal, and the legislator had not provided for any precautionary or attenuating measure which could be applied without sacrificing the desired objective. In other words, precisely when solid and effective guarantees for the taxpayer were most needed, the necessary measures had been most neglected.

By infringing the principle of a fair hearing, the rules at issue on the lifting of banking confidentiality substantially affected the taxpayer's guarantees of being able to challenge decisions by the tax authorities. Although the right of administrative or judicial challenge was not restricted directly or head on, the inequitable lifting of confidentiality, together with the underlying factors, to a large extent deprived those rights of effect.

The Constitutional Court accordingly held that Article 2 of the Constitution and its corollaries (Articles 20.1, 20.4 and 268.4 of the Constitution) had been contravened.

In addition, weighing up the various interests led to the conclusion that the lack of a requirement to obtain the taxpayer's explicit consent constituted an especially disproportionate and unjustifiable interference with the interest legally protected by the right to privacy: although the lifting of banking confidentiality could not be said to be an inevitable consequence of appeal (since the authority could always find the appeal to be ill-founded), the fact was that, by his own action, the taxpayer immediately and in one fell swoop forfeited what, ultimately, the right was intended to give him, namely control over disclosure of his personal data. Even if the authority decided not to lift confidentiality, the taxpayer lost all power of decision since the mere fact of his submitting an appeal transferred it entirely to the authority. The view must therefore be taken that there was undue and arbitrary interference with the taxpayer's self-determination regarding information.

The greatest interference with the rules deriving from the proportionality principle as broadly construed arose with regard to proportionality in the strict sense. The arrangements for exercising the power to lift confidentiality were unduly detrimental to the guarantee of a proper hearing and the right to respect

for privacy in that they were not confined to what was “necessary to safeguard other rights or interests protected by the Constitution”, contrary to Article 18.2 of the Constitution and were disproportionate.

Thus the approach adopted provided neither procedural fairness nor a fair hearing with regard to the lifting of banking confidentiality. That alone would justify a finding of unconstitutionality. But this defect, which was reflected in disregard of the right to detailed and appropriate procedural rules, had even more serious effects in the event of an administrative or judicial appeal, basically because it confronted the taxpayer with a constitutionally unacceptable dilemma: either he risked losing his privacy or he lost an important means of protecting his rights and interests. Instead of striking a harmonious balance between the two alternatives so as to retain the main advantages of both, the amendments “compelled” the taxpayer to choose between the two.

On this second issue the Constitutional Court thus found to be unconstitutional the provisions of the code of tax procedure as amended by the parliamentary decree, on the grounds of infringement of Articles 2, 18.2, 20.1, 20.4, 26.1 and 268.4 of the Constitution.

Languages:

Portuguese.



Romania Constitutional Court

Important decisions

Identification: ROM-2007-2-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 20.06.2007 / **e)** 610/2007 / **f)** Decision on a preliminary objection of unconstitutionality concerning Section III.2 and III.3 of Law no. 356/2006 amending and supplementing the Code of Criminal Procedure and amending other laws / **g)** *Monitorul Oficial al României* (Official Gazette), 474/16.07.2007 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

4.7.11 **Institutions** – Judicial bodies – Military courts.

5.2 **Fundamental Rights** – Equality.

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

Keywords of the alphabetical index:

Court martial, jurisdiction / Court martial, civilian, trial.

Headnotes:

Constitutional standards and principles do not rule out the existence and functioning of military prosecutor's offices.

The provisions governing the composition of courts martial, which are to be made up of independent judges solely obedient to the law, and the rules of procedure followed by such courts entail no infringement of the right to a fair trial.

For reasons of good administration of justice and in view of the tendency to limit the jurisdiction of courts martial solely to offences committed by military personnel, a tendency similarly shown by the European Court of Human Rights, it is justifiable to establish the civil courts' jurisdiction to try cases in

which persons without military status are accused of offences perpetrated with military accomplices.

Giving the military prosecutor's offices and the courts martial jurisdiction over cases pending at the time of the law's entry into force constitutes discrimination under Article 16.1 of the Constitution by reason of the civilian status of one of the defendants.

Summary:

I. In a preliminary decision of 7 December 2006 the Military Appeal Court referred to the Constitutional Court an objection of unconstitutionality concerning Section III.2 and III.3 of Law no. 356/2006 amending and supplementing the Code of Criminal Procedure and amending other laws. It argued that the impugned provisions – which continued to allow courts martial to try offences perpetrated by civilians – contravened Articles 15.2, 16.1, 21.3, 124.2, 124.3 and 126.5 of the Constitution and were incompatible with Article 6 ECHR.

II. Having examined these arguments of unconstitutionality, the Court held that, in accordance with Article 35.1 and 35.2 of the Code of Criminal Procedure, as amended by Section I.17 of Law no. 356/2006, if in joined or related proceedings more than one court by law had jurisdiction in respect of the various defendants or the various charges and, among those courts, one was civil and the other military, jurisdiction should be vested in the civil court. The law previously provided that, in the same situation of joined or related proceedings, jurisdiction should be vested in the military court, as a result of which persons without military status were tried by courts martial. In the light of Article 126.2 of the Constitution, concerning the jurisdiction of the courts and trial procedure, the Court found that both the current and the earlier legislation were consistent with the Constitution and, accordingly, the existence and functioning of the military prosecutor's offices and the courts martial entailed no breach of constitutional standards or principles.

The Court found that the trial of civilians by courts martial for offences perpetrated with military accomplices did not infringe the civilians' rights to an impartial, independent court and to a fair hearing. By reason of the status of the judges composing them and the procedure they followed courts martial were impartial, and military judges were independent and solely obeyed the law.

Section 301 of Law no. 303/2004 provided that the appointment, promotion and career development of military judges and prosecutors would be governed

by the same conditions as were applicable to the members of other courts and prosecutor's offices.

The only additional requirement was that they should have the status of active military officials within the Ministry of Defence. This did not mean, however, that they performed their duties under instructions or orders. Military judges and prosecutors accordingly had all the rights and obligations conferred by law on judges and prosecutors in general.

The change in the law was made so as to guarantee good administration of justice and follow the trend, shown by other democratic judicial systems, to limit the jurisdiction of military courts solely to criminal offences committed by military personnel. The case-law of the European Court of Human Rights (*Maszni v. Romania*, 2006) was also in favour of giving civil prosecutor's offices and the civil courts jurisdiction to deal with cases which involved military personnel and civilians to the same degree.

In addition, the Court found that, through Section III.2 and III.3 of Law no. 356/2006, Parliament had unjustifiably maintained the jurisdiction of the courts martial and the military prosecutor's offices to deal with cases pending at the time of the law's entry into force. This meant that the military bodies retained their jurisdiction over cases pending which involved civilians.

This derogation was clearly discriminatory in the light of the criterion applied by Parliament when amending Article 35.1 and 35.2 of the Code of Criminal Procedure, namely the lack of military status of one of the defendants. On that basis the Court found that the provisions breached Article 16.1 of the Constitution in so far as they instituted different rules governing jurisdiction to prosecute and try individuals with the same status and in the same judicial situation, that of being charged with a criminal offence.

The Court consequently allowed the objection and held Section III.2 and III.3 of Law no. 356/2006 to be unconstitutional.

Languages:

Romanian.



Slovakia

Constitutional Court

Important decisions

Identification: SVK-2007-2-002

a) Slovakia / **b)** Constitutional Court / **c)** Senate / **d)** 29.03.2007 / **e)** III. ÚS 381/06 / **f)** / **g)** *Zbierka náleзов a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

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

1.6.5.4 **Constitutional Justice** – Effects – Temporal effect – *Ex nunc* effect.

1.6.9.1 **Constitutional Justice** – Effects – Consequences for other cases – Ongoing cases.

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

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

Keywords of the alphabetical index:

Constitutionality, principle / Law, unconstitutional, application to ongoing cases.

Headnotes:

The substantive legal effects of a judgment to the effect that a legal provision is in conflict with the Constitution of the Slovak Republic are binding *ex tunc* for all parties to proceedings in individual cases which have not been finally adjudicated by the time of publication of the judgment on the conflict. To decide otherwise would be against the principle of the observance of constitutionality. It would also be an unacceptable interpretation of the principle of legal certainty.

Summary:

I. If a health insurance company in Slovakia delays paying healthcare facilities (e. g. pharmacy), it will be obliged *ex lege* to pay a fine to those facilities for the delay. Before 1 June 2003, the amount of this fine was set at 0,1 % of the principal per day. Changes to Act no. 138/2003 Coll. which came into effect from 1 June 2003, reduced the level of the fine to 0,01 %

per day. In finding PL. ÚS 38/03, published in the Collection of Laws on 15 July 2004, the Constitutional Court held that the above reduction in payment for delay was in breach of the Constitution.

Under Section 41a.3 of the Law on the Constitutional Court, if certain legislation loses validity or effect as a result of a Constitutional Court finding, that does not lead to restoration of the legislation which was previously repealed by it. Where, however, the legal enactments in question are amendments, the “pre-amendment” wording of the legislation will be valid.

Under Section 41.2 of the Law on the Constitutional Court, a finding of the non-conformity of a legal enactment with another legal enactment having higher legal force or with an international treaty is to be published in the same way as laws are published. A finding is generally binding from the day of its publication in the Collection of Laws.

After the Constitutional Court finding, many proceedings were pending at ordinary court level, where plaintiffs were claiming against health insurance companies for payments of fines for delay. The period forming the basis for calculation of the sum representing the fine for delay included the period before as well as after 15 July 2004. In the period after 1 June 2003, the plaintiffs sought payment of an amount of 0,1 % per day because, they argued, Section 38.4 (the original provision) had been restored. The courts, however, between 1 June 2003 and 15 July 2004 adjudicated a fine in the amount of only 0,01 % per day. After 15 July 2004 they set the amount at 0,1 % per day, on the basis that abstract review findings of the Constitutional Court Plenum and restoration of enactments operate *ex nunc*.

The plaintiffs filed a constitutional complaint, alleging breaches of the rights to own property and to judicial protection.

II. One of the Constitutional Court's senates first rejected their complaint as patently ill founded, because it agreed with the ordinary courts' interpretation, but not all the senates shared this view. Acting upon Section 6 of the Law on the Constitutional Court, the Constitutional Court Plenum unified the divergent legal opinions. Thereafter, the 3rd Senate, for example, issued the following finding in line with the unifying decision of the Plenum:

The complainant (pharmacy) in this matter (III. ÚS 381/06) claimed that there had been a breach of its right to judicial protection, as the ordinary court had imposed a duty to pay a fine for the delay on the health insurance company and awarded the

money to the pharmacy at the 0,1 % (higher) rate only after 15 July 2004. The Constitutional Court ruled that the regional (appellate) court should not have applied the invalid provision to the period after 1 June 2003. It should, instead, have applied the restored provision, under which the fine for delay was made at the 0,1 % rate.

The Constitutional Court based its decision upon the general principle of a democratic state governed by the rule of law, which comprises both the principle of constitutionality and that of legal certainty, enshrined in the Law on the Constitutional Court. The latter appears in the presumption of constitutionality of legal enactments. It is also significant that decisions which became final and no longer subject to appeal before 15 July 2004 (before the publication of the Constitutional Court abstract review judgment) might not be reopened, regardless of the fact that they were issued under regulations later pronounced unconstitutional by the Court. The principle of legal certainty is embodied by legislation in Sections 41b and 41.2 of the Law on the Constitutional Court.

The principle of constitutionality manifests itself in decision-making on the basis of laws (enactments) which are in conformity with the Constitution. In the Constitutional Court's view, Section 41a.3 of the Law on the Constitutional Court ensures the implementation of the principle of constitutionality in proceedings not yet finally adjudicated. To comply with the principle of constitutionality, the restoration of the prior legal enactment must be interpreted retrospectively *ex tunc* and not *ex nunc* in future in ongoing cases.

The Constitutional Court held that the regional court rendered its decision in the case in point under a regulation already devoid of force and validity. It thereby violated the complainant's right to judicial protection. The Constitutional Court overturned the regional court's decision, and referred the case back to the regional court for further proceedings.

Languages:

Slovak.



Slovenia Constitutional Court

Statistical data

1 May 2007 – 31 August 2007

The Constitutional Court held 19 sessions during the above period. 8 were plenary and 11 were in Chambers. Of these, 3 were in civil chambers, 4 in penal chambers and 5 in administrative chambers. There were 390 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 3 797 unresolved cases in the field of human rights protection (denoted Up- in the Constitutional Court Register) from the previous year as at 1 May 2007. The Constitutional Court accepted 97 new U- and 1 239 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court decided on:

- 54 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court made:
 - 14 decisions and
 - 40 rulings
- 13 (U-) cases, joined to the above-mentioned for joint hearing and adjudication.

67 cases were resolved in total.

The Constitutional Court also resolved 254 (Up-) cases in the field of the protection of human rights and fundamental freedoms (20 decisions issued by the Plenary Court and 234 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 parties to the proceedings.

However, the decisions and rulings are published and submitted to users:

- in an official annual collection (Slovenian fulltext versions, including dissenting and concurring opinions, and English abstracts);
- in the Slovenian Legal Practice Journal (Slovenian abstracts, with the fulltext version of the dissenting and concurring opinions);
- since 1 January 1987 via the on-line STAIRS database (Slovenian and English fulltext versions);
- since June 1999 on CD-ROM (complete Slovenian fulltext 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, at <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-2007-2-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 29.03.2007 / **e)** U-I-57/06 / **f)** / **g)** *Uradni list RS* (Official Gazette), 33/07 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

- 3.4 **General Principles** – Separation of powers.
- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.16 **General Principles** – Proportionality.
- 4.5.2 **Institutions** – Legislative bodies – Powers.

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

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

Keywords of the alphabetical index:

Corruption, prevention / Official, salary, data, collection.

Headnotes:

The statutory regulation according to which a commission comprising only deputies from the National Assembly may supervise the property situation of officials for the purpose of the prevention of corruption came under scrutiny. The incompatibility of performing a public office along with certain other offices and activities was also examined, with regard to officials who are ensured an independent and autonomous position by the Constitution (e.g. Constitutional Court judges, the human rights ombudsman, members of the Court of Audit). This was held to be inconsistent with the principle of the separation of powers, under Article 3.2 of the Constitution.

One of the provisions in the Incompatibility of the Exercise of Public Office with Profit-Making Activities Act allows three deputies, who are members of the commission, to request the judicial review of administrative acts against a Commission decision reached to the detriment of an individual's rights or obligations, in order to protect the minority opinion of members of the commission. This was ruled to be inconsistent with the principle of a state governed by rule of law determined in Article 2 of the Constitution, as it places the individual concerned in an uncertain legal position. It also shifts decision-making on issues over which the commission has authority to the court. To that extent, it is out of line with the principle of separation of powers determined in Article 3.2 of the Constitution.

The regulation enabling the commission to ask officials questions on matters within its powers is not inconsistent with the principle of legal certainty determined in Article 2 of the Constitution. The official will be aware of his or her legal position and in a position to defend his or her rights and privileges in such proceedings. As the documents that the commission gathers in such a manner cannot be evidentiary materials that could be used in other procedures, especially in criminal ones, the challenged regulation is not inconsistent with the procedural guarantees that are ensured for the defendant in criminal procedure by the Constitution and the European Convention on Human Rights.

Data on the office or offices and positions an official may hold, together with data on profitable activities that he performed before he took office, and data on his or her salary are personal data. Nonetheless, in terms of their contents, such data does not enjoy the protection of personal data in accordance with Article 38 of the Constitution. Such protection is only afforded to personal data which relates to the property of an official. Public access to this data interferes with their rights. When enacting the relevant regulations, Parliament did have a constitutionally admissible goal – the transparency of performing public offices. However, the interference was excessive and as such inconsistent with Article 38 of the Constitution, in that it covered data on the property situation and income of an official during a period of time that was not connected with the performance of public office. Furthermore, the publication of data on the permanent residence of an official is constitutionally inadmissible since it is unnecessary to ensure an insight in the objective and impartial performance of the office. In addition, it constitutes an excessive interference with the human rights of members of the official's family and with the right to his or her personal safety determined in Article 34 of the Constitution. The regulation under which there is no time restriction for informing the public about final decisions on violations as determined by the Incompatibility of the Exercise of Public Office with Profit-Making Activities Act, evidently excessively interferes with the right determined in Article 38 of the Constitution.

According to one statutory provision, archives and records that are kept by the existing Corruption Prevention Commission are transferred to a commission that is composed of National Assembly deputies. Another states that the powers of the commission in relation to judges are assumed by the Judicial Council (which does not have access to this data). There is a contradiction between these two provisions which does not enable the implementation of the law. Therefore, the regulation is inconsistent with Article 2 of the Constitution.

Supplementary information:

Legal norms referred to:

- Articles 2, 3, 34, 38 and 87 of the Constitution (URS);
- Articles 21, 25, 40.2, 43 and 48 of the Constitutional Court Act (ZUstS).

Languages:

Slovenian, English (translation by the Court).



South Africa Constitutional Court

Important decisions

Identification: RSA-2007-2-006

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 10.05.2007 / **e)** CCT 54/06; [2007] ZACC 9 / **f)** Fanuel Sitakeni Masiya v. Director of Public Prosecutions (Pretoria) and Another (Centre for Applied Legal Studies; Tshwaranang Legal Advocacy Centre as *Amici Curiae*) / **g)** <http://www.constitutionalcourt.org.za/Archimages/9889.PDF> / **h)** 2007 (5) *South African Law Reports* 30 (CC); 2007 (8) *Butterworths Constitutional Law Reports* 827 (CC); CODICES (English).

Keywords of the systematic thesaurus:

1.6.5.3 **Constitutional Justice** – Effects – Temporal effect – Limitation on retrospective effect.

3.4 **General Principles** – Separation of powers.

4.5.8 **Institutions** – Legislative bodies – Relations with judicial bodies.

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

Keywords of the alphabetical index:

Child, sexual abuse / Common law, development / Rape, definition, development / Rape, definition, discrimination / Sexual offence.

Headnotes:

The spirit, purport and objects of the Bill of Rights require development of the common law definition of rape so as to include the sexual penetration of the anus of a female. The principle of legality in the Constitution did not permit the retrospective application of this finding.

Summary:

I. The applicant in this matter was an adult male accused of anally raping a nine-year-old girl, the complainant. The respondent is the Director of Public Prosecutions and the Minister of Justice and

Constitutional Development was joined in the proceedings. The Centre for Applied Legal Studies and the Tshwaranang Legal Advocacy Centre were admitted, respectively as *amici curiae*. An application to this Court had been made by the applicant seeking leave to appeal against his conviction of rape in the Pretoria High Court (the High Court). Essentially the case before the Constitutional Court was about the validity of the common law definition of rape to the extent that it excludes anal penetration.

The applicant had appeared in the Regional Magistrates' Court on a charge of rape of the complainant. Evidence adduced at the trial established that the complainant had been penetrated anally by the applicant, therefore necessitating conviction on the offence of indecent assault, a competent verdict to rape as the definition of rape did not extend to anal penetration. The Magistrate, of his own accord, developed the common law definition of rape to include non-consensual sexual penetration of the penis into the anus of a male or female. He held that the distinction between non-consensual penile penetration of the anus of a female or male and of the vagina to be irrational, archaic and discriminatory. Having developed the common law, the Magistrate convicted the applicant of rape and referred the matter to the High Court for confirmation of the conviction and for sentencing. The High Court agreed with the Magistrate's reasons for developing the definition of rape. It confirmed the conviction. As a result, certain provisions of the Criminal Procedure Act 51 of 1977 and the Criminal Law Amendment Act 105 of 1997 were amended so as to be gender-neutral and consistent with the developed definition.

In the Constitutional Court the applicant opposed the extension of the definition of rape on various grounds. He also argued that, if applied to him, the extended application would infringe his fair trial right in Section 35.3.l of the Constitution not to be convicted of an act or omission that was not an offence under either national or international law at the time it was committed. He also appealed his conviction on the merits. The Minister opposed the development on the basis that the trial court should have decided the guilt or otherwise of Mr Masiya on the facts of the case. She also contended that the Legislature was taking steps to address the law on sexual offences in the Criminal Law (Sexual Offences) Amendment Bill 2003 which provides, among other things, for the extension of the common-law definition. The Bill was not yet law. The *amici curiae* supported the judgment of the High Court.

II. The majority judgment written by Nkabinde J acknowledged the patriarchal origins of rape in the Roman-Dutch, English, South African and African

customary laws, emphasising however that with the advent of the South African constitutional dispensation, the foundation of this historical perspective could not survive. She also acknowledged that the current understanding of the crime of rape is one of power and domination. She held that the crime of rape, even in so far as it is gender-specific, criminalises conduct which is clearly morally and socially unacceptable. For this reason she declined to hold that the current definition of rape was unconstitutional but concluded that it was necessary that the definition be developed, as it fell short of the spirit, purport and objects of the Bill of Rights. She therefore extended it to include non-consensual sexual intercourse or penetration of a penis into the anus of a female person. She held that such an extended definition would protect the dignity of female survivors. Acknowledging that non-consensual anal penetration of male persons is no less humiliating, degrading, or traumatic in nature, she emphasised that focusing on non-consensual anal penetration of female persons should not be seen as being disrespectful to male persons. She held that the power to develop common law must be exercised in an incremental fashion as the facts of each case require, in this case being the anal penetration of a young girl. She specifically recognised that the legislature and not the courts have the major responsibility for law reform in the South African constitutional democracy, and thus the extension of the common-law definition of rape to include male rape would, in this case, encroach on the legislative domain.

She also found it not in the interests of justice, in the circumstances of this case, to delay, defer or refuse to deal with the development of the definition, on the basis that the Sexual Offences Bill was before Parliament.

She declined to deal with the merits of the appeal but, on the basis of the principle of legality enshrined in the Constitution, she found that the extended definition could not be applied retrospectively to the applicant. She accepted that in appropriate and rare circumstances, the principle of legality in the Constitution would prescribe that the common law be developed with prospective effect only. She thus held that the developed definition would only apply to those cases which arise after judgment in this matter had been handed down.

In conclusion, Nkabinde J ordered that the conviction of the applicant of rape be set aside and replaced with that of indecent assault. Further, that the case be remitted to the Regional Magistrate's Court for sentencing.

The minority judgment written by Langa CJ, with whom Sachs J concurred, dissented on one point. Langa CJ found that the definition of rape should also be extended to include non-consensual anal penetration of male persons. He argued that, once it was accepted that rape was about the infringement of dignity and that anal rape was as severe an infringement of a victim's dignity as vaginal rape, it made no sense to distinguish between male and female persons. He stated that to limit the definition of rape to female victims would in no way increase the protection afforded to women, but would rather reinforce dangerous, gendered stereotypes.

Supplementary information:

Legal norms referred to:

- Sections 8.3, 9.1, 10, 12, 28.1.d, 35.3.n, 39.2, 170, 172.1, 172.2.a, 173 of the Constitution, 1996;
- Section 261.1.e, 261.1.f and 261.2.c of the Criminal Procedure Act 51 of 1977;
- Section 52 of the Criminal Law Amendment Act 105 of 1997;
- Section 110 of Magistrates' Court Act 1944.

Cross-references:

- *Carmichele v. Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*, *Bulletin* 2001/2 [RSA-2001-2-010];
- *Minister of Home Affairs and Another v. Fourie and Another (Doctors for Life International and Others as Amici Curiae)*;
- *Lesbian and Gay Equality Project and Others v. Minister of Home Affairs and Others*, *Bulletin* 2005/3 [RSA-2005-3-014];
- *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, *Bulletin* 1998/3 [RSA-1998-3-009];
- *S v. Chapman* 1997 (3) *South African Law Reports* 341 (A); 1997 (2) *South African Criminal Law Reports* 3 (A);
- *S v. Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)*, *Bulletin* 2002/3 [RSA-2002-3-018];
- *S v. Ncanywa* 1992 (2) *South African Law Reports* 182 (Ck) (1992 (1) *South African Criminal Law Reports* 209 (Ck);
- *Veldman v. Director of Public Prosecutions, Witwatersrand Local Division*, *Bulletin* 2005/3 [RSA-2005-3-015].

Languages:

English.



Identification: RSA-2007-2-007

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 30.05.2007 / **e)** CCT 65/06; [2007] ZACC 10 / **f)** South African National Defence Union v. The Minister of Defence and Others / **g)** <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT65-06> / **h)** 2007 (8) *Butterworths Constitutional Law Reports* 863 (CC); CODICES (English).

Keywords of the systematic thesaurus:

4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.

5.1.1.4.4 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Military personnel.

5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.

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

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

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

5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

5.4.17 **Fundamental Rights** – Economic, social and cultural rights – Right to just and decent working conditions.

Keywords of the alphabetical index:

Collective bargaining, arbitration / Collective bargaining, representative organisation, working conditions / Freedom of association, scope / Fundamental right, implementation by statute / Impartiality, objective / Independence, powers, representative bodies / Labour relations / Army, discipline, freedom of trade unions / Trade union, in armed forces, constitutionality / Trade union, negotiation, obligatory.

Headnotes:

Section 23.5 of the Constitution provides that every trade union, employers' organisation and employer has the right to engage in collective bargaining and

that national legislation may be enacted to regulate collective bargaining. Where legislation has been enacted to give effect to a constitutional right, a litigant is not entitled to bypass that legislation and to rely directly on the constitutional right. Union activities are justifiably limited in instances when such activities may interfere with the military's ability to carry out its constitutional obligation to protect the Republic. The South African National Defence Force has a legitimate interest in preserving the appearance of political neutrality of the military by prohibiting association with other trade unions.

Summary:

I. A series of disputes connected to collective bargaining arose between the South African National Defence Union (SANDU) (the applicant) and the South African National Defence Force (SANDF) (the respondent, cited as the Minister of Defence and Others), and resulted in three separate High Court judgments. The first (SANDU I) held that the SANDF was not obliged to bargain collectively with the applicant, and that the SANDF's withdrawal from negotiations with the applicant was reasonable. The second of these judgments (SANDU II) also concerned the duty to bargain, as well as an attack on specific regulations passed pursuant to national legislation relating to labour relations in the military. This judgment held that the regulations violated the union members' rights to participate in union activities as well as their rights to freedom of expression and association. It held that, contrary to the earlier judgment, the SANDF had a duty to bargain with the applicant. In the third judgment (SANDU III), the court made an order preventing the respondent from implementing a restructuring programme without first consulting with the applicant.

The decisions in these three cases were appealed to the Supreme Court of Appeal. A single, consolidated hearing was held, resulting in two unanimous judgments. The first judgment held that the respondent is not obliged by the provisions of the Constitution or any other law to bargain collectively with the applicant. The second judgment dismissed all the challenges to the regulations, save one. The applicant sought leave to appeal to the Constitutional Court against the large part of the judgments and orders made by the Supreme Court of Appeal.

In the Constitutional Court, the applicant sought an order declaring that the SANDF was not entitled to withdraw unilaterally from the Military Bargaining Council and to impose preconditions on the applicant for return to negotiations; that the SANDF was obliged to bargain with the applicant on the content of

the regulations and on all matters of mutual interest; and declaring certain regulations promulgated in Chapter XX of the regulations unconstitutional. All the issues related to the broader question as to whether the SANDF bears a duty to bargain with the applicant arising from the provisions of Section 23.5 of the Constitution, the regulations, and/or the constitution of the Military Bargaining Council.

II. In a unanimous judgment, O'Regan J dealt with the history of the relationship between SANDU and the SANDF. She held that where legislation has been enacted to give effect to a constitutional right, a litigant is not entitled to bypass that legislation and to rely directly on the constitutional right. As regulations have been enacted to give effect to Section 23 of the Constitution and regulate the bargaining relationship between the applicant and the SANDF, the application for leave to appeal must be determined in the light of those regulations. O'Regan J did not find it necessary, accordingly, to determine whether Section 23.5 of the Constitution confers a justiciable duty to bargain collectively on employers and trade unions.

O'Regan J concluded that the regulations establish a bargaining forum, the Military Bargaining Council, where matters of mutual interest to the applicant and the SANDF are to be negotiated. If disputes arise in respect of such matters, those disputes may be referred to arbitration by the Military Arbitration Board (the body tasked with settling union disputes). It was held that on a proper construction of the regulations, the SANDF may not impose pre-conditions for bargaining or withdraw unilaterally from the Military Bargaining Council. The Court also found that the regulations do not permit the SANDF unilaterally to implement a transformation policy that is the subject of a dispute at the Military Bargaining Council and that has been referred to the Military Arbitration Board. Finally, the O'Regan J held that the applicant is not entitled in terms of the regulations to demand that the SANDF bargain over the content of the regulations.

In considering the challenges to the individual regulations, O'Regan J dismissed the applicant's challenge to the regulation that prohibits union members from participating in union activities while undergoing training or participating in military exercises. The SANDF can justifiably limit union activities in instances when such activities may interfere with the military's ability to carry out its constitutional obligation to protect the Republic. In the same vein, the SANDF has a legitimate interest in preserving the appearance of political neutrality of the military by prohibiting association with other trade unions.

However, O'Regan J held that several of the regulations were unconstitutional. She found that the Minister of Defence, as head of SANDF, cannot appoint the members of the Military Arbitration Board, because appointment by an interested party (the Minister being the employer) undermines the impartiality and independence of the Board. Furthermore, regulations that prohibit union members from being represented by union members or officials in grievance or disciplinary proceedings offend the right to fair labour practices, because representing its members is one of a union's central tasks. Finally, to the extent that good order and discipline of the military is not jeopardised, the SANDF cannot forbid non-uniformed soldiers from assembling to petition or picket as private citizens.

Supplementary information:

Legal norms referred to:

- Sections 16.1, 18, 23, 33.1, 34, 35.3, 36, 39.2, 199.7 of the Constitution, 1996;
- Defence Act 44 of 1957, repealed and the Defence Act 42 of 2002;
- Regulations of Chapter XX of the General Regulations of the South African National Defence Force and the Reserve R998, published in the Government Gazette 20376 of 20 August 1999;
- Article 5 of the Freedom of Association and Protection of the Right to Organise Convention (ILO no. 87), 68 U.N.T.S. 17 of 1948.

Cross-references:

- *Minister of Health and Another NO v. New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*, *Bulletin* 2005/3 [RSA-2005-3-009];
- *NAPTOSA and Others v. Minister of Education, Western Cape, and Others* 2001 (2) *South African Law Reports* 112 (C); 2001 (4) *Butterworths Constitutional Law Reports* 388 (C);
- *South African National Defence Union v. Minister of Defence and Another*, *Bulletin* 1999/2 [RSA-1999-2-006].

Languages:

English.



Identification: RSA-2007-2-008

a) South Africa / b) Constitutional Court / c) / d) 06.06.2007 / e) CCT 69/06; [2007] ZACC 12 / f) Department of Land Affairs and Others v. Goedgelegen Tropical Fruit (Pty) Ltd / g) <http://www.constitutional.court.org.za/uhtbin/hyperion-image/J-CCT69-06> / h) 2007 (10) *Butterworths Constitutional Law Reports* 1027 (CC); CODICES (English).

Keywords of the systematic thesaurus:

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

5.2.2.2 **Fundamental Rights** – Equality – Criteria of distinction – Race.

5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Apartheid, property right, restitution / Community right, principles / Property, real, restitution / Tenancy, right, discrimination.

Headnotes:

In deciding on the restitution of land rights to labour tenants who were dispossessed of their labour tenancy rights by discriminatory laws and practices during apartheid, a generous construction must be preferred over a legalistic interpretation in order to afford the applicants the fullest protection.

Summary:

I. This case concerns the restitution of land rights to labour tenants who were dispossessed of their labour tenancy rights by discriminatory laws and practices during apartheid. The main issue herein is whether such dispossession entitles the dispossessed labour tenants to redress in terms of the Restitution of Land Rights Act 22 of 1994.

Section 2 of the Act provides for entitlement to restitution of rights in land where persons or communities were dispossessed of their rights as a result of past racially discriminatory laws or practices. A group of persons identifying themselves as the Popela Community, alternatively nine individuals, made a claim in terms of Section 2 of the Act for restitution of their labour tenancy rights. The claim was supported by the Department of Land Affairs. The affected land is rural land now consolidated into the farm Goedgelegen in Limpopo Province. The system

of labour tenancy required the applicants to work on the land, in return for a portion of land for residence, farming, and burial of deceased family members.

In 1970, the Minister published a notice in the Government Gazette prohibiting further labour tenants' contracts in particular areas, including that in which the farm was situated. However, approximately one year before, the Altenroxel family, who had been farming the land as lessees at the time, had phased out the labour tenant system on their farm.

The claim came before the Land Claims Court and it found that the dispossession was not one of a community but of individual labour tenants. The Court found further that, whilst the individual claimants may have been dispossessed of rights held as labour tenants, the dispossession was not the result of past racially discriminatory laws or practices as required by Section 2 of the Act. Accordingly, the claim by the individual claimants also failed. An appeal was made to the Supreme Court of Appeal.

The Supreme Court of Appeal dismissed the appeal on the ground that the dispossession was not the result of a past racially discriminatory law or practice.

II. In deciding whether the applicants constituted a community for the purposes of the Act Moseneke DCJ, writing for a unanimous Court, decided that although the applicants had retained much of their identity as part of the erstwhile Popela community in 1969, the acid test was whether the members of the Popela community derived their possession from shared rules. Because each of the families had been compelled to have their own separate relationship with the Altenroxel family, he concluded that in 1969 no rights vested in the labour tenants as a community.

In relation to the individual claims, Moseneke DCJ held that Section 2.1 of the Act must be interpreted in the light of the values of the Constitution. A generous construction must be preferred over a legalistic interpretation in order to afford the applicants the fullest protection. In interpreting Section 2.1 of the Act generously, the term "as a result of" should be interpreted to mean no more than "as a consequence of" and not "solely as a consequence of".

In line with this finding, Moseneke DCJ held that the dispossession was facilitated by a grid of repressive state laws and practices that allowed the labour tenancy system to be abolished without demur. In reaching this conclusion, the subjective motives of the farmer who terminated the labour tenancy were irrelevant. What mattered was whether labour tenants had been deprived of their interest in land as a consequence of racially discriminatory laws and practices.

In relation to remedy, Moseneke DCJ found it inappropriate to venture beyond a declaratory order and costs on the basis that the Court had heard no argument or evidence on appropriate remedies. He declared that the individual applicants were dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws and practices and that accordingly they are entitled to restitution of their labour tenancy rights in terms of the Act.

Supplementary information:

Legal norms referred to:

- Sections 25.5, 25.7, 38 of the Constitution, 1996;
- Section 121.2 of the interim Constitution, 1993.

Cross-references:

- *Alexkor Ltd and Another v. Richtersveld Community and Others*, *Bulletin* 2003/3 [RSA-2003-3-008];
- *In Re Kranspoort Community* 2000 (2) *South African Law Reports* 124 (LCC);
- *Prinsloo and Another v. Ndebele-Ndzundza Community and Others* 2005 (6) *South African Law Reports* 144 (SCA); [2005] 3 *All South African Law Reports* 528 (SCA);
- *National Education Health and Allied Workers Union v. University of Cape Town and Others*, *Bulletin* 2002/3 [RSA-2002-3-019];
- *De Jager v. Sisana* 1930 AD 71.

Languages:

English.



Identification: RSA-2007-2-009

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 07.06.2007 / **e)** CCT 67/06; [2007] ZACC 13 / **f)** Fuel Retailers Association of Southern Africa v. Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others / **g)** <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT67-06> / **h)** 2007 (10) *Butterworths Constitutional Law Reports* 1059 (CC); CODICES (English).

Keywords of the systematic thesaurus:

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

5.5.1 **Fundamental Rights** – Collective rights – Right to the environment.

5.5.2 **Fundamental Rights** – Collective rights – Right to development.

Keywords of the alphabetical index:

Environment, conservation / Environment, impact, assessment / Environment, protection, powers, distribution / Environmental impact assessment / Sustainable development.

Headnotes:

The Constitution recognises the interrelationship between the protection of the environment and socio-economic development. It contemplates the integration of environmental protection and socio-economic development and envisages that the two will be balanced through the ideal of sustainable development. He held that sustainable development provides a framework for reconciling socio-economic development and environmental protection and thus acts as a mediating principle in reconciling environmental and developmental considerations.

Summary:

I. The case concerns the nature and scope of the obligations of environmental authorities when they make decisions that may affect the environment, and in particular the interaction between socio-economic development and the protection of the environment. The environmental legislation requires environmental authorities, when deciding whether to authorise the construction of petrol filling stations, not only to consider need and desirability; they also have a wider obligation to take into consideration sustainable development and the impact of granting authorisation on the environment.

Inama Trust applied to the Mpumalanga environmental authorities for authorisation to construct a petrol filling station in White River, Mpumalanga. Fuel Retailers Association of Southern Africa, an organisation which represents the interests of fuel retailers, the applicant in the proceedings in the Constitutional Court, lodged with the authorities an objection to the construction of the filling station on various grounds, including that the construction of the filling station would have an adverse impact on the environment. The applicant insisted that the environmental authorities should consider whether the proposed filling station would be socially, environmentally, and economically

sustainable as required by the laws governing the protection of the environment. Despite this objection, the environmental authorities authorised the construction of the filling station by Inama Trust. An internal appeal by Fuel Retailers Association was unsuccessful.

The applicant thereafter approached the Pretoria High Court seeking an order setting aside the authorisation to construct the filling station. It alleged that the environmental authorities did not consider whether the proposed development would be socially, environmentally and economically sustainable. It further alleged, that the evaluation conducted by the Town Planning Authorities some seven years earlier, when an application for rezoning for the purposes of constructing the filling station was considered, did not satisfy the requirements of the environmental legislation. The environmental authorities and Inama Trust opposed the application, alleging that the socio-economic aspects of the construction of a filling station had been duly taken into account by the local authority when it considered the rezoning of the property.

The Pretoria High Court dismissed the application. The appeal of Fuel Retailers Association to the Supreme Court of Appeal was equally unsuccessful.

II. In a majority judgment, Ngcobo J held that the obligation of the environmental authorities to consider socio-economic factors includes the obligation to consider the impact of the proliferation of filling stations and of proposed filling station on existing ones. This obligation is wider than the requirement to assess need and desirability in terms of the Ordinance. It also comprehends the obligation to assess the cumulative impact on the environment by the proposed development.

He reasoned that unsustainable developments are in themselves detrimental to the environment. The proliferation of filling stations poses a potential threat to the environment, which arises from the limited end-use of filling stations upon their closure. However, he stressed that the objective of considering the impact of a proposed development on existing ones is not to stamp out competition; rather it is to ensure the economic, social and environmental sustainability of all developments. The filling station infrastructure that lies in the ground may have an adverse impact on the environment.

He held that the authorities misconstrued the nature of their obligations and as a consequence failed to comply with a compulsory and material condition prescribed by the law for granting authorisation to establish a filling station.

Ngcobo J accordingly granted the application for leave to appeal and upheld the appeal. He set aside the decision of the environmental authorities which authorised the construction of the proposed filling station and ordered the environmental authorities to reconsider the application by Inama Trust in the light of the judgment.

In a separate judgment, Sachs J associated himself in with the judgment of Ngcobo J save for the materiality of the failure by the environmental decision-makers. In his view, this failure was innocuous as far as the environment was concerned, and had formal rather than substantive significance. Holding that the purpose of environmental law was to protect the environment and not the profits of incumbent petrol stations, he would support the findings of the High Court and the Supreme Court of Appeal, and dismiss the appeal.

Supplementary information:

Legal norms referred to:

- Section 24 of the Constitution, 1996;
- Sections 21, 22 and 36 of the Environment Conservation Act 73 of 1989;
- Sections 2, 23 and 24 of the National Environmental Management Act 107 of 1998;
- Section 6 of the Promotion of Administrative Justice Act 3 of 2000.

Cross-references:

- *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Others*, *Bulletin* 2004/1 [RSA-2004-1-004];
- *BP Southern Africa (Pty) Ltd v. MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) *South African Law Reports* 124 (W);
- *MEC for Agriculture, Conservation, Environment and Land Affairs v. Sasol Oil (Pty) Ltd and Another* 2006 (5) *South African Law Reports* 483 (SCA);
- *Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report)*, Chapter 1 at paragraph 42, http://www.un.org/esa/sustdev/documents/docs_key_conferences.htm, accessed on 04.06.2007;
- *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* 37 *International Legal Materials* 162 (1998);
- *United Nations Department of Economic and Social Affairs – Division for Sustainable Development Johannesburg Declaration on Sustainable Development* 2002, accessed on 04.06.2007, http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm;

- *United Nations Environment Programme – Division of Policy Development and Law, The Johannesburg Principles on the Role of Law and Sustainable Development, adopted at the Global Judges Symposium held in Johannesburg, South Africa, 18-20.08.2002, <http://www.unep.org/dpdl/symposium/Principles.htm>, accessed on 04.06.2007.*

Languages:

English.



Switzerland Federal Court

Important decisions

Identification: SUI-2007-2-006

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 22.06.2007 / **e)** 1B_87/2007 / **f)** X. v. Canton of Zurich Public Prosecutor's Office III and detentions judge of the Zurich district court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 133 I 234 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.4.14.3 **Constitutional Justice** – Procedure – Costs – Party costs.

3.13 **General Principles** – Legality.

5.3.5.1.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Arrest.

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

Keywords of the alphabetical index:

Detention, lawfulness / Public international law, general principles / International law, respect / Expulsion, foreigner / Expulsion, offender / Extradition / Sovereignty, respect.

Headnotes:

Preventive detention; removal contrary to public international law? Article 5.1 ECHR.

Case of a person charged with professional fraud after hiding in the Dominican Republic, from which he was deported by the Dominican authorities and handed over to the Swiss authorities. His removal was not contrary to public international law and so there was nothing to prevent his being detained, the Swiss authorities having respected Dominican sovereignty and not used force, threat or deception to lay hands on him (recital 2).

Duty on the canton (despite its winning its case) to compensate the appellant (despite his losing his case) for the proceedings before the Federal Court: the issues in the case had not been dealt with by the cantonal detentions judge in the manner required by the Constitution, and this had provided the ground of appeal (recital 3).

Summary:

I. The Canton of Zurich Prosecutor's Office had instituted criminal proceedings against X., a German national. He was suspected of having, with others, committed a number of offences of large-scale professional financial fraud in Switzerland and abroad in 2002. The amounts misappropriated had amounted to at least 18.5 million euros. Some of the others involved had been given lengthy prison sentences.

In August 2002 X. had gone on the run and escaped detention. Despite national and international arrest warrants, he had eluded arrest.

On 9 August 2006 he had been arrested at Santo Domingo, in the Dominican Republic. Three officers from the canton of Zurich police had gone to San Domingo on 18 August 2006, had taken charge of X. and had flown back to Zurich with him. There he had immediately been remanded in custody. The remand had been extended several times.

Upon application from X. the prosecutor had requested a legal opinion from Professor Wolfgang Wohlers, University of Zurich, on the lawfulness of the arrest and handover to the Swiss authorities. X. had proceeded on the basis of that legal opinion.

The detentions judge had rejected an application for release. In his criminal-law appeal, X. asked the Federal Court to set aside the decision of the detentions judge and order his release. He alleged that his arrest in Santo Domingo and transfer to Switzerland had been illegal, rendering his detention contrary to Article 5.1 ECHR.

The Federal Court dismissed the appeal.

II. The Federal Court based its decision on the following facts: after receiving information that X. was living at Santo Domingo, the Justice Office of the Federal Justice and Police Department had contacted the Dominican authorities and sent them an arrest warrant, the intention being that in the event of X.'s arrest his extradition would be requested and Swiss police officers would take him back to Switzerland. Interpol (Santo Domingo) had subsequently informed the Justice Office of X.'s arrest on 9 August 2006 and

that he had lodged a habeas corpus action which might lead to his release. It was thus advisable to send a Swiss delegation to take charge of X. On 19 August 2006 Interpol (Santo Domingo) had taken X. from prison to the airport, where he had been handed over to the Swiss police, then flown to Zurich, where he had been remanded.

The principles of public international law required that states respect other states' sovereignty. In principle, action by one state on another's territory was prohibited. A wanted person could be handed over to another state only by the state in which he was located. Action prohibited particularly included any use of force, threat or deception. The principle of good faith, which applied in both national and international law, similarly prohibited any underhand dealings.

The Federal Court here referred to Swiss case-law and the case-law of the European Court of Human Rights. Having considered the facts, the Federal Court found that the Swiss authorities, acting in liaison with the Dominican authorities, had not engaged in any activities contrary to the sovereignty of the Dominican Republic. They had not resorted to force, threat or deception. Nor had they broken the rules of good faith towards the Dominican Republic. They had originally planned to use extradition procedure, but that was rendered devoid of purpose when the Dominican authorities decided that X., who did not have valid papers to remain in the country, should be expelled immediately. The appellant had not alleged any contravention of Dominican law. The mere fact of Swiss police officers' travelling to the Dominican Republic and taking charge of X. had not been illegal and his transfer to Switzerland did not infringe national or international rules. The maxim *ex iniuria ius non oritur* did not apply. The remand challenged before the Federal Court was therefore not illegal. The appeal was consequently ill-founded and must be dismissed.

The proceedings in the Federal Court were an indication that the case raised tricky and difficult issues. The cantonal detentions judge had not dealt with them appropriately and the appellant had had to turn to the Federal Court. The canton of Zurich accordingly had to compensate him for the Federal Court proceedings.

Languages:

German.



“The former Yugoslav Republic of Macedonia” Constitutional Court

Important decisions

Identification: MKD-2007-2-005

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 02.05.2007 / e) U.br.23/2007 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 60/2007, 16.05.2007 / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 3.15 **General Principles** – Publication of laws.
- 3.20 **General Principles** – Reasonableness.
- 4.4.1.4 **Institutions** – Head of State – Powers – Promulgation of laws.
- 4.5.4.4 **Institutions** – Legislative bodies – Organisation – Committees.
- 4.5.10.1 **Institutions** – Legislative bodies – Political parties – Creation.
- 5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
- 5.3.29.1 **Fundamental Rights** – Civil and political rights – Right to participate in public affairs – Right to participate in political activity.

Keywords of the alphabetical index:

Political party, registration / Political party, dissolution / Signature, authentication / Law, inconsistencies, content / Law, unclear wording / *Vacatio legis*, principle.

Headnotes:

When the Parliamentary Legislative Committee makes alterations to legislation which result in the text of the legal norm being replaced and its disposition changed, this is over and above rectification. It is out of line with the principle of the rule of law, as well as constitutional provisions governing parliamentary powers and the constitutional position of the President of the Republic. It also contravenes the

principle of *vacatio legis*, since the amendments are not made in fresh parliamentary proceedings and the President of the Republic does not promulgate the changes to the legal norms. It breaches the constitutionally defined time limit for entry into force of such amendments after publication.

Checks on the reliability of the signatures of citizens who have set up a political party before the Ministry of Justice, which is part of the executive power, violates the freedom of political association guaranteed in Article 20 of the Constitution.

It was found that the forty-five day time limit for the re-registration of a political party was unreasonable and too short. The aim had been to ensure a sufficient number of “citizen-founders”. However, the minimum number of members who may set up a political party has been increased from five hundred to one thousand. The time limit could also result in the demise of a political party, something that is inadmissible in a democratic society.

Summary:

A few of the smaller political parties requested the Court to review Articles 1.3, 2.2 and 12.3 of the Law on Changing and Supplementing the Law on Political Parties (“Official Gazette of the Republic of Macedonia”, no. 5/2007). They suggested that these provisions breached the constitutional principle of freedom of association.

1. Article 1.3 requires a political party to submit to the Basic Court individual signatures, certified by a notary. There must be the requisite number of signatures for the setting up of the party, and this has to be done every four years since the date of registration.

The law was published on 16 January 2007, and entered into force on 24 January 2007.

On 24 January 2007, an amendment made to this law by the Legislative Committee of the Assembly of the Republic of Macedonia was published in the “Official Gazette of the Republic of Macedonia”, no. 8/2007.

The correction stated that an examination of the original text had revealed certain mistakes within the text of the Law on Changing and Supplementing the Law on Political Parties. Article 1.3 should accordingly read as follows: “A political party is required to submit to the Basic Court individual signatures before an official of the Ministry of Justice, based on the place of residence of the party member.

There must be the requisite number of signatures to found a political party, in line with this article. This must be done every two years from the date of registration."

The Court noted that the Legislative Committee had the power to amend the published text of laws and other acts, on the basis of the original text of the adopted law or other act of the Assembly. This derived from the Decision to set up permanent working bodies of the Assembly of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia", no. 85/2002). However, the Committee did not have authority to replace the text of the legal norm with a correction resulting in a change in its disposition. The attempt to correct the inconsistency in the published text of the law with a correction by the Legislative Committee, and to have this correction replace the published text and enter into force on the date of publication, contravenes the constitutional setup of the Assembly and its competence. It means that the Legislative Committee appears in the role of a legislator. It is not then apparent, either to the legislator or to the citizens, which norm is law in the concrete case. This runs contrary to the principle of the rule of law and legal certainty, which require clarity and precision of the legal norms. The Court observed that in the case in point, it was difficult to determine the real disposition of Article 1.3.

2. Article 2.2 of the law required the signatures needed to set up a political party to be given before officials of the Ministry of Justice, based on the place of residence of the founder of the political party. The Court pointed out that this requirement resulted in citizens having to declare their party affiliation to institutions of the executive power. This might dissuade citizens from publicly supporting certain political parties. The Court accepted that the legislator had to be able to check up on the reliability of data submitted by citizens setting up political parties. However, this could be achieved through the medium of a body independent of the legislative and executive powers.

3. The Court found that the transitional and final provision of the law, under which political parties had to re-register within a time limit of forty-five days, was out of line with the Constitution. There would not be enough time to organise a propaganda campaign, which would engage the interest of citizens in the ideas of various political parties to ensure a sufficient level of membership to put them into action.

In the opinion of the Court, the aim of any law on political parties in a democratic society is always to create conditions for the exercise of the freedom of political association and activity, not to limit it. Hence,

the aim of this law must be creation of conditions for reorganisation of the existing political parties. Bringing into force unrealistic conditions, in terms of the time limit for re-registration, could result in the demise of some of the parties, which is inadmissible in a democratic society.

Languages:

Macedonian, English.



Identification: MKD-2007-2-006

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 20.06.2007 / **e)** U.br.151/2006 / **f)** / **g)** *Slumber venal a Republican Macedonia* (Official Gazette), 83/2007, 03.07.2007 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Pension, survivor, minimum time of marriage.

Headnotes:

Making the right to survivor's pension for widows and widowers conditional upon the duration of the marriage violates the constitutional principle of equality.

Summary:

Upon petition by an individual the Court reviewed the constitutionality of Articles 6 and 7 of the Law on Changing and Supplementing the Law on Pension and Disability Insurance ("Official Gazette of the Republic of Macedonia", no. 70/2006). These articles introduced an additional condition in order to acquire the right to a survivor's pension for a widow or widower; the marriage had to have lasted for at least five years.

Under Article 9 of the Constitution, citizens of the Republic of Macedonia are equal in their freedoms and rights, irrespective of their sex, race, colour of skin, national and social origin, political and religious beliefs, property and social status.

The right to equality, as described overleaf, is a highly significant right and a fundamental value of the constitutional order of the Republic. By its nature, it rules out discrimination, privileges, and special treatment of any type and on any grounds. The state must ensure that this is reflected in its legislation.

Article 34 of the Constitution bestows upon citizens the right to social security and social insurance, as determined by law and collective agreement.

In enacting the Law on Pension and Disability Insurance, the legislator regulates the issue of the family pension (or survivor’s pension) and determines the conditions under which members of the family acquire this right. This is done in accordance with the constitutional requirement that the Republic safeguards the social welfare and social security of citizens pursuant to the principles of social justice. Under Articles 72 and 73 of the law, widows and widowers respectively acquire the right to a family pension in case of demise of the spouse. Other factors include minimum age, inability to work and the existence of one or more children for whom the widow or widower exercises parental duties.

The Court considered that the legislator had exceeded its powers, in that provisions such as those under dispute introduced different treatment, that is, between those insured and their spouses.

The Constitution guarantees equality for citizens irrespective of the length of time they have been married. Therefore, in the Court’s view, the special condition within the contested legal provisions violates the principle of equality, one of the fundamental civil and political freedoms and rights. When planning for and enacting both the general and the special conditions for acquiring a right to a family pension, the legislator is obliged, under the Constitution, to have the same conditions applying equally to all citizens finding themselves in such a situation. In the case in point, the legislator had exceeded its authority, by inserting the condition in the provisions under dispute, making the right to acquire a family pension conditional upon the length of the time the spouses had been married.

The Court accordingly held that the provisions of Articles 6 and 7 of the Law on Changing and Supplementing the Law on Pension and Disability Insurance contravened Article 9 of the Constitution.

Languages:

Macedonian, English.



Identification: MKD-2007-2-007

a) “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 20.06.2007 / **e)** U.br.227/2006 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 88/2007, 13.07.2007 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

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

5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – Ethnic origin.

5.2.2.9 **Fundamental Rights** – Equality – Criteria of distinction – Political opinions or affiliation.

5.3.29.1 **Fundamental Rights** – Civil and political rights – Right to participate in public affairs – Right to participate in political activity.

Keywords of the alphabetical index:

Employment, termination, discrimination / Political party, membership, ground for dismissal.

Headnotes:

The existence of “informal information” or some knowledge the director and the members of the Board of Directors of a firm could have had regarding the political and party affiliation of the petitioners does not mean that they had objective knowledge of these matters, or that this had influenced them when cutting jobs. The termination of the petitioners’ employment could not, therefore, be regarded as a case of discrimination on the grounds of national and political affiliation.

Summary:

I. Four members of the Albanian community in Macedonia, who also belonged to the political party Democratic Union of Integration (hereinafter: “DUI”), filed a request with the Constitutional Court regarding

the protection of those freedoms and rights which rule out discrimination on the grounds of national or political belonging. They claimed that their employment with the Public Enterprise for Airport Services came to an end because of their ethnic origin and political affiliation, as members of DUI.

II. After public hearings and consultations with the petitioners, the Court found that:

In this particular case, the question of whether there had been discrimination on the grounds of national or party affiliation hung upon whether national and party affiliation had been a ground for changing the Rulebook on public sector employment; resulting in the axing of their jobs, as suggested in their petition.

When assessing alleged discrimination on the grounds of national affiliation, the Court noted that the petitioners, who belonged to the Albanian community in Macedonia, were not the only people to have been given notice. The same fate had befallen five Macedonians and one member of the Vlachs community. Therefore, when changes were made to the Rulebook, resulting in the loss of jobs, it could not be argued that national affiliation was a criterion.

As for the alleged discrimination on grounds of political affiliation, the key question put before the Court was whether the competent bodies of the Public Enterprise for Airport Services knew, or could have known, when they adopted the decision, of the petitioners' political and party affiliation and whether this knowledge influenced them in making their decision. The petitioners did not present the Court with any evidence that their political and party affiliation was made public within the enterprise, so as to prove that the director and the board had been aware of it. They only mentioned their assumption that there was informal information which might have been available to the director. However, they had had no personal contact or any other contact with him in order to familiarise him with these circumstances. In this context, the Court noted the statement given by a representative of the public enterprise, in the public hearing before the Court, to the effect that the organisation kept records on employees based on their age, education and specialist training. From 2002, records were also maintained of their ethnic origins. However, there were not and never had been records based on party or political affiliation.

As there was no proof that the director and board members were in a position to know the political and party affiliation of the petitioners, the Court observed that it was difficult to argue that the termination of their employment was due to these factors. Moreover,

the decision altering the Rulebook cut jobs across all sectors of the enterprise. It did not contain names or other data about the employees whose jobs were being cut.

At the public hearing, the petitioners confirmed in an answer to a question by the Court that other members of the political party DUI were working within the enterprise but that their jobs had not been cut. The Court considered this another point in favour of the argument that these jobs were under threat for business reasons, not political ones.

The petitioners had also pointed out that the notification of job losses resulted in a decrease in the percentage representation of Albanians within the enterprise and that this did not correspond with the provisions for a fair and appropriate representation of the various communities in accordance with the Ohrid Framework Agreement. However, the Court held that this did not constitute *per se* an argument about the breach of an individual right in the sphere of industrial relations. If their assertion as to the effect of the structural reforms in the enterprise was correct, then it might be appropriate for those in positions of power in the enterprise and in government bodies to take the necessary steps to ensure the appropriate and equitable representation of citizens from all communities. However, the protection of the freedoms and rights of the individual and citizen defined in Article 110 line 3 of the Constitution, may only be requested before the Constitutional Court in cases of violation by an individual act or deed.

The Court held that the termination of the employment of the petitioners could not be regarded as a case of discrimination on the grounds of national and political affiliation.

Languages:

Macedonian, English.



Identification: MKD-2007-2-008

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 04.07.2007 / e) U.br.40/2007 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 88/2007, 13.07.2007 / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.

5.3.29 **Fundamental Rights** – Civil and political rights – Right to participate in public affairs.

Keywords of the alphabetical index:

Health care, public office / Public office, holder, citizenship / Public official, appointment / Foreigner, employment / Statutory health insurance fund, director, citizenship.

Headnotes:

The Health Insurance Fund is a public institution established for the implementation of compulsory health insurance. It carries out its duties with public funds. Accordingly, the position of Director of the Health Insurance Fund is a public office which, in view of its character and significance, is only entrusted to Macedonian nationals.

Summary:

An individual requested the Court to review the constitutionality of part of Article 57.2 of the Law on Health Insurance (“Official Gazette of the Republic of Macedonia”, nos. 25/2000, 34/2000, 96/2000, 50/2001, 11/2002, 31/2003, 84/2005, 37/2006 and 18/2007). This article determined the conditions for appointment as Director of the Health Insurance Fund, opening up the possibility for a foreigner to be appointed to this post.

Under Article 2.1 of the Constitution, sovereignty in the Republic of Macedonia derives from citizens and belongs to citizens. Under Article 23 of the Constitution, each citizen has the right to participate in the carrying out of public mandates. Under Article 29 of the Constitution, foreigners in the Republic of Macedonia enjoy freedoms and rights guaranteed by the Constitution, under conditions defined by law and international agreements.

Analysis of the above constitutional provisions shows that foreigners in Macedonia have freedoms and

rights as defined by the Constitution, except for those which, under the Constitution, belong only to Macedonian nationals. The conditions for their exercise are to be defined by law and international agreements. This means, however, that there is no obligation on the legislator to prescribe equal conditions for the exercise of certain freedoms and rights for the citizens/nationals of the Republic of Macedonia and for foreigners and, in that respect, to place them on an equal footing.

Under the Constitution, because the exercise of public office relates to the carrying out of tasks connected with the legislative, judicial and executive functions of the state, it is reserved for Macedonian nationals and foreigners are not to be placed on an equal footing with them.

Under the Law on Health Insurance, the Health Insurance Fund of Macedonia administers compulsory health insurance. This fund is set up for the realisation of rights and obligations under compulsory health insurance. The Fund carries out an activity of public interest and performs public mandates defined by this law. It has the capacity of a legal entity, and is independent in its work.

Article 55 of this law stipulates that the Fund is managed by a Board of Directors. The Board is composed of seven members who are appointed by the Government of the Republic of Macedonia for a term of four years.

Under Article 58, the Director of the Fund oversees the work of the Fund, represents the Fund; proposes general activity; ensures the implementation of the Board’s decisions and the observance of its regulations, and performs other tasks defined by the regulations and statutes of the Fund.

Under Article 62 of the law, the wherewithal for the work of the Fund comes from compulsory health insurance contributions and other sources as set out in Article 37 of this law.

In summary, the Law on Health Insurance establishes a Health Insurance Fund for Macedonia, with a view to implementing compulsory health insurance for citizens. The Fund performs an activity of public interest and carries out public mandates defined by this law. It is funded chiefly from compulsory health insurance contributions from citizens, or from the national budget. This means it is subject to public liability for the management of these funds. In terms of protecting the public interest, the legislator stipulated that the Macedonian government appoints and dismisses the Board of Directors of the Fund and the Director.

For these reasons, the Court held that the function of Director of the Health Insurance Fund is one which, by its nature and significance, is a function only to be carried out by a Macedonian national, not by a foreign person. The fact that a foreign person cannot occupy this post does not interfere with his or her right to work. They may do so, under conditions defined by law and international agreement, but not as holders of public office.

Languages:

Macedonian, English.



Ukraine Constitutional Court

Important decisions

Identification: UKR-2007-2-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 16.05.2007 / **e)** 1-rp/2007 / **f)** Official interpretation of Article 20.1 of the Law “On the Judiciary” (case on dismissal of a judge from administrative position) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 40/2007 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.1.3 **Institutions** – Head of State – Powers – Relations with judicial bodies.

4.7.4.1.2 **Institutions** – Judicial bodies – Organisation – Members – Appointment.

4.7.4.1.5 **Institutions** – Judicial bodies – Organisation – Members – End of office.

4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.

Keywords of the alphabetical index:

Judge, dismissal.

Headnotes:

The provision of Article 20.5 of the Law vesting the President with authority to appoint a judge to a position of court chairman or court deputy chairman, and to dismiss him or her from this position, conflicts with Article 106 of the Constitution because under Article 106.31 of the Constitution, the authority of the President derives solely from the Fundamental Law.

Summary:

The Constitutional Court was asked for an official interpretation of the provisions of Article 20.5 of the Law on the Judiciary. These allowed for the dismissal of judges from administrative positions (except administrative positions at the Supreme Court), at the initiative of the High Court of Justice. The article also set out the requisite procedure.

The Constitutional Court found several constitutional difficulties with Article 20.5, particularly the President's power to appoint and dismiss court chairmen and deputy chairmen.

Under the Constitution, the President has authority over the organisation and operation of judicial power. The President may appoint and dismiss one third of the composition of the Constitutional Court. He or she may also set up courts, and put a professional judge in position for a term of five years and dismiss him or her from this position, according to the procedure set by the law. However, the Constitution does not give the President the authority to appoint a judge for the position of court chairman, deputy chairman and to dismiss him or her from this position.

The Constitutional Court took the view that the appointment and dismissal of court chairmen and deputy chairmen should be regulated by legislation, with the exception of administrative positions at the Supreme Court. This was because of the close relationship between Article 20.5 (dismissal of judges from administrative positions) and Article 20. The Court had previously ruled the latter to be in breach of the Constitution. In the circumstances, there was no need for an official interpretation of the provision of Article 20.5 of the Law, which was the subject of the constitutional petition.

Judges V. Bryntsev, D. Lylak and V. Shyshkin expressed dissenting opinions.

Languages:

Ukrainian.



Identification: UKR-2007-2-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 12.06.2007 / **e)** 2-rp/2007 / **f)** On conformity with the Constitution (constitutionality) of provisions of Articles 10.1, 11.2.3, 11.5, 11.6, 15, 17.1, 24 and Chapter VI.3 “ Final Provisions” of the Law “On political parties” (case on establishing political parties) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 54/2007 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.5.10.1 **Institutions** – Legislative bodies – Political parties – Creation.

4.5.10.2 **Institutions** – Legislative bodies – Political parties – Financing.

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

5.3.29.1 **Fundamental Rights** – Civil and political rights – Right to participate in public affairs – Right to participate in political activity.

Keywords of the alphabetical index:

Political party, registration / Political party, contributions, mandate.

Headnotes:

The legislator has the right, based on the Constitution and international legal acts which the Ukraine has ratified, to regulate the legal status of political parties. This can take the form of provisions for their establishment, state registration and state control over their activities. Such norms must not hamper the constitutional right to freedom of association in political parties or invalidate the universal right to participate in political activity.

Article 10.1 of the Law on Political Parties, insofar as it distinguishes the Autonomous Republic of Crimea from the other subjects within the system, violates the constitutional principle of equality of all citizens depending on the place of their residence.

Summary:

The case was concerned with the compliance with the Constitution of certain provisions of the Law on Political Parties, and the situation of political parties in the Autonomous Republic of Crimea.

Seventy People's Deputies submitted a petition to the Court, regarding various provisions of Articles 10.1, 11.2.3, 11.5, 11.6, 15, 17.1, 24 and Chapter VI.3 “Final Provisions” of Law no. 2365-III “On political parties” of 5 April 2001.

Under Article 11.5, the Cabinet of Ministers determines the registration fee. Article 15 prohibits the financing of political parties by state institutions and local authority bodies, state and municipal enterprises, establishments and organisations, and enterprises, establishments and organisations, whose property includes state or municipally owned shares, or which belong to non-residents. It also rules out backing from foreign states and their citizens,

charitable and religious associations and organisations, anonymous persons or those using pseudonyms, and those political parties not included in the “electoral block” of political parties. Banks will notify the Ministry of Justice of funds received by political parties from prohibited organisations. The political parties will then have to transfer these funds to the state.

Article 17.1 (wording of 5 April 2001) requires political parties to publish each year in the national mass media a financial report on profits and expenses, as well as their property interests.

Under Article 24, if, within three years of the date of registration, it transpires that a political party has submitted incorrect information in its registration documents, there can be no nominations of its candidates to presidential elections and elections of People’s Deputies for ten years. The institution that registered the party would need to appeal to the Supreme Court in order to rectify the position. There are no other grounds for annulment of a registration certificate.

If the Supreme Court decides to annul a political party’s registration certificate, this results in the termination of the party’s activity and the dissolution of its organisation at local and national level.

Chapter VI (“Final Provisions”) stipulate that political parties will need to take steps to implement this Law, to make any necessary changes to documentation and to submit them to the Ministry of Justice. This must be done no later than one year after the next parliamentary elections following the entry into force of this Law.

Under Article 36.1 of the Constitution, citizens have the right to freedom of association in political parties, as well as the realisation and protection of their rights and freedoms and satisfaction of their political, economic, social, cultural and other interests.

Under Article 3.2 of the Law on Political Parties, political parties are established and operate only with “all-Ukrainian status”, in conformity with constitutional norms guaranteeing freedom of political activities, provided these are not forbidden by the Constitution and laws (see Article 15.4). Article 21 deals with the inalienability and inviolability of human rights and freedoms. Article 23 establishes the right to freedom of personality, provided that this does not result in a breach of the rights and freedoms of others.

Article 10.1 of the Law on Political Parties stipulates that the signatures of at least ten thousand citizens are needed for the establishment of a political party. The Constitutional Court considered this an important

guarantee of a constitutional basis for a public association. It also ensured a truly national status for a political movement as well as a “level playing field” for all political parties.

Article 15 of the Law introduces certain limitations. It rules out the financing of political parties by state institutions and local government authorities (unless there is provision for this in other legislation), state and municipal enterprises, anonymous persons and other subjects. The aim is primarily to set equal pre-conditions for the activity of all political parties, and to ensure the protection of the rights and freedoms of those who do not belong to these particular political parties.

Under Article 133 of the Constitution, the system of administrative-territorial structure consists of the Autonomous Republic of Crimea, twenty-four regions and the cities of Kiev and Sevastopol. The Constitution, in giving special status to the Autonomous Republic of Crimea, simultaneously proclaims it as an “inalienable part” (see Article 134). It does not bestow any preferential treatment as regards the formation or activities of political parties with regard to other subjects of the administrative-territorial system. See Articles 137 and 138.

Article 10.1 of the Law on Political Parties, insofar as it distinguishes the Autonomous Republic of Crimea from the other subjects within the system, violates the constitutional principle of equality of all citizens depending on the place of their residence.

This position is in accordance with Decision no. 2-rp/98 of the Constitutional Court, 3 March 1998 (regarding the association of citizens in the Autonomous Republic Crimea). In that decision, the Court emphasised that the Autonomous Republic of Crimea did not have the power to regulate the establishment and activity of political parties. It also pointed out that the establishment of political parties with All-Crimean status only for residents of the Autonomous Republic of Crimea does not conform with the constitutional principles under which the citizens have equal constitutional rights and freedoms with no privileges or limitations, depending on the place of their residence.

Languages:

Ukrainian.



Identification: UKR-2007-2-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 14.06.2007 / **e)** 3-rp/2007 / **f)** On conformity with the Constitution (constitutionality) of the first sentence of Chapter II.2 “Final Provisions” of the Law “On introducing amendments to Article 43 of the Law “On pension provision of servicemen, persons of commanding and junior composition of bodies of internal affairs and some other persons” and on the official interpretation of provisions of Articles 43.3, 51, 55, 63.3 of the Law “On the pension providing of persons, dismissed from military service and some other persons” (case on the re-calculation of pensions of servicemen) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 48/2007 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Pension, adjustment / Military, pension.

Headnotes:

Narrowing the content of rights and freedoms means a decrease in the possibilities available to a person, represented by their respective rights and freedoms (i.e. the “qualitative nature of a right). Narrowing the volume of rights and freedoms results in a smaller circle of subjects, size of territory, time, size or amount of benefits or any other measurable indications of the use of the rights and freedoms, (i.e. their “quantitative nature”).

Summary:

The case was concerned with pension provision and calculation for service personnel and those working for internal affairs.

A number of People’s Deputies asked the Constitutional Court to review the first sentence of Chapter II.2 “Final Provisions” of Law no. 1769-IV “On pension provision for servicemen, persons of commanding rank, junior members of organs of internal affairs and some other persons” as of 15 June 2004, hereinafter referred to as Law no. 1769-IV. The Court was also asked for an official interpretation of the provisions of Articles 43.3, 51, 55 and 63.3 of Law no. 2262-XII “On pension provision for those dismissed from military service and various others” of 9 April 1992, hereinafter referred to as Law no. 2262-XII. A constitutional

appeal was also lodged with regard to the provisions of Articles 43.3, 51, 55, 63.3 of the Law no. 2262-XII. This appeal was made by the Committee on the Protection of rights of servicemen and employees of the Ministry of Internal Affairs and Security Service “For justice”, the Party of Development, the Party of Legal Protection (regarding the legal protection of non-state organisations), the Ukrainian Union of veterans of Afghanistan, and citizens S. Tokar and P. Iordanov.

Under the first sentence of Chapter II.2 “Final provisions” of the Law no. 1769-IV persons who were earlier granted pensions are entitled to a re-calculation, taking into account the provisions of this law. They are entitled to payment of fifty percent of the re-calculated pension from 1 January 2005, and one hundred percent of it from 1 January 2006.

Article 22 of the Constitution is to be found in Chapter II, in which citizens’ fundamental rights and freedoms are secured. The right to pension provision forms part of the right to social protection, as provided in the Constitution. The procedures for the realisation of pension rights for service personnel and certain other categories of person are to be found in Law no. 2262-XII.

In its Decision no. 8-rp/2005, of 11 October 2005, on pension levels and monthly allowances, the Constitutional Court stated that: “The content of human rights and freedoms is the conditions and means, that determine material and spiritual possibilities of an individual, necessary to satisfy the necessities of his/her existence and development. The volume of human rights is the quantitative indicator of the respective possibilities, which characterise its (volume's) multiplicity, scope, intensity and a degree of its manifestation, and which are shown in certain units of measurement”.

Analysis of the first sentence of Chapter II.2 “Final provisions” of the Law no. 1769-IV reveals that the content of the right to social protection enjoyed by those whose pensions were assigned under Law no. 2262-XII remained unchanged. Law no. 1769-IV did not change existing acquired rights on the day of its adoption. Parliament simply sought to establish, in accordance with Articles 85.1.3, 85.1.5, 92.1.1 and 92.1.6 of the Constitution, the order of payment of re-calculated pensions for those whose pensions were assigned under Law no. 2262-XII and who were entitled to a re-calculation, taking into account the provisions of Law no. 1769-IV. This envisages staged payments to service personnel and certain other categories of person, of the magnitude of fifty percent of the re-calculated pension from 1 January 2005, and one hundred percent from 1 January

2006. Accordingly, the legislator, when introducing an order for payment of re-calculated pensions, did not contravene Article 22 of the Constitution.

There is a reservation within Chapter II.2 “Final provisions” of Law no. 1769-IV. It states that if the re-calculation resulted in a smaller pension entitlement for the period 1 January 2005 to 1 January 2006, the earlier established amount will be paid. This means that there is no possibility of a reduced pension, and thus the measure complies with Article 22.3 of the Constitution.

Languages:

Ukrainian.



Identification: UKR-2007-2-004

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 18.06.2007 / **e)** 4-rp/2007 / **f)** As to the conformity with the Constitution (constitutionality) of separate provisions of Articles 36.20, 36.33, 36.49, 36.50, 71, 97, 98, 104, 105 of the Law “On the 2007 State Budget” (case on guarantees of independence of judges) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 54/2007 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.7.4.1.6 **Institutions** – Judicial bodies – Organisation – Members – Status.

5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Judge, independence, remuneration / Judge, retirement allowance.

Headnotes:

One of the safeguards of judicial independence, which is contained in Article 126.1 of the Constitution, is that judges are accorded financial and social protection by the state, by means of salary, pension and monthly allowances, as well as the future

expectation of the status of a retired judge. Their right to pension security constitutes an important safeguard for the independence of acting judges.

Constitutional rights and freedoms are guaranteed, and the state must not adopt any legislation that would result in existing rights and freedoms being abolished or reduced in content and volume.

Summary:

This case concerned pensions and monthly allowances for judges, the provision of which by the State is a crucial safeguard of judicial independence. The state must not enact any legislation which might reduce or abolish these rights.

The Supreme Court of the Ukraine asked the Constitutional Court to consider the conformity with the Constitution of the following provisions of Articles 29, 36, 69.13, 69.20, 69.30, 69.33, 69.49, 69.50, 71, 97, 98, 104, 105, 106 and 111 of the Law on the 2007 State Budget.

Under Article 126.1 of the Basic Law, the Constitution and legislation safeguards judicial independence and inviolability. An important component of these guarantees is the duty of the State to provide finance and an infrastructure for the work of judges and courts. There is to be specific provision within the state budget for these matters. See Article 130.1 of the Constitution, which is provided for in the Law on the State Budget.

The Supreme Court also asked the Constitutional Court to examine certain provisions of Law no. 489-V “On the 2007 State Budget”, 19 December 2006. One of them was Article 36, which grants various privileges to certain employees of public institutions, service personnel and persons both of commanding rank and less senior rank. For instance, they are entitled to discounts on their rent, public utility payments, and telephone expenses, as well as free travel on public transport in the cities (but not taxis), public motor transport in rural areas and rail and water transport in suburban areas. The amount of the concession in monetary terms should not exceed the size of profit, which might give rise to a tax on social privilege. This affected judges.

Article 71.20 terminated for the year 2007 the effect of Article 37.2 and 37.5 of the Law on the Civil Service (regarding the size of pension), part of which concerns the judicial profession.

Article 71.33 terminated for the year 2007 the effect of Article 43.4.1 of the Law on the Status of Judges,

which determines the size of permanent monthly allowances for judges. Article 71.49 terminated for the year 2007 the effect of Item 1.3 of the Parliamentary Decree on the procedure for bringing into force the Law on the Status of Judges. This provision dealt with those bodies which paid permanent monthly allowances to retired judges.

Article 71.50 terminated for the year 2007 the effect of Articles 123.2 and 130.2 of the Law on Judicial System. These dealt with the wages of court employees and employees of the state judicial administration service, and equating the terms of payment, and these provisions have an impact on them.

Article 97 sets out the situation which will apply with effect from 1 January 2007. The maximum size of pension or monthly permanent allowance as calculated for 2006-2007 must not exceed the twelve minimum sizes of pension on age, as set out in Article 28.1.1 of the Law on obligatory state pension insurance. For other categories of pension, the size of pension or monthly permanent allowance (again, taking into account rises and extra pensions bestowed by Ukraine under the legislation), as re-calculated in 2007, may not exceed 10 000 hryvnias per month. Part of these provisions affects the judicial profession.

Article 98 refers to the pension paid in advance to the category of "working pensioners", who come within the ambit of the Law on Obligatory State Pension Insurance and the Law on Civil Service. This affects judges and those working in the court system.

Under Article 104, with effect from 2007, the Pension Fund will set and pay permanent monthly allowances to retired judges. The Executive Board of the Pension Fund will carry out this function, with the approval of a specially-authorized executive body in the field of labour and social policy.

The Constitutional Court was also asked to review the conformity with the Constitution of provisions of Article 105 of the Law "On the 2007 State Budget", 19 December 2006, on the basis of Article 45.2 of the Law "On Constitutional Court". The petitioners suggested that this was at odds with both the Constitution and the Law on the Constitutional Court.

Article 11.3 of the Law on the Status of Judges guarantees judges' independence and provides for their legal protection and their financial and public welfare. These measures cannot be abolished or reduced by other normative acts. This position conforms to Article 22.3 of the Constitution.

In its Decision no. 20-rp/2004 of 1 December 2004, the Constitutional Court stated that norms relating to financial and "household" provision for judges, as set out in Article 44 of the Law on the Status of Judges, may not be abolished or reduced without appropriate compensation. Granting the judges the privileges, recompense and safeguards envisaged by this legislation cannot be dependent on the profits of judges and thus may not reduce guarantees of their independence. See Item 7.2 of the "motivation" section.

One of the safeguards of judicial independence, which is contained in Article 126.1 of the Constitution, is that judges are accorded financial and social protection by the state, by means of salary, pension and monthly allowances, as well as the future expectation of the status of a retired judge. Their right to pension security constitutes an important safeguard for the independence of acting judges. The established permanent monthly allowance is supposed to provide an appropriate standard of living. The conditions and the order of the payment of this allowance can be found in the Law on the Status of Judges. This is the position expressed by the Constitutional Court, in its Decision no. 8-rp/2005 of Constitutional Court, 11 October 2005. This case dealt with the level of pensions and monthly allowances.

As to the content of provisions of Article 22.2 and 22.3 of the Basic Law, constitutional rights and freedoms are guaranteed, and the state must not adopt any legislation that would result in existing rights and freedoms being abolished or reduced in content and volume. Article 24.1 of the Constitution sets out the principle according to which citizens have equal constitutional rights and freedoms and are equal before the law.

Languages:

Ukrainian.



Identification: UKR-2007-2-005

a) Ukraine / b) Constitutional Court / c) / d) 20.06.2007 / e) 5-rp/2007 / f) As to the official interpretation of provisions of Article 5.8 of the Law on the Renewal of a Debtor's Capacity to Pay or recognition of his Bankruptcy" (case on creditors of enterprises of municipal ownership) / g) *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 48/2007 / h) CODICES (Ukrainian).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

3.16 **General Principles** – Proportionality.

4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.

4.8.7 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects.

Keywords of the alphabetical index:

Bankruptcy, enterprise, municipal / Municipality, property right.

Headnotes:

Local government authorities may, in exceptional cases at plenary sessions take decisions as to the non-applicability of the Law to municipal unitary enterprises in the ownership of the local municipal community, both before bankruptcy proceedings and at any stage of the bankruptcy.

The law envisages that bankruptcy proceedings against municipal enterprises are subject to termination, irrespective of whether the local authority has arrived at a decision that the provisions of the law should not apply, or upon the initiative of a court of general jurisdiction.

Under the principle of proportionality, the limitation of the rights of creditors of economic entities in bankruptcy in the municipal sector should correspond to the legitimate purpose necessary for the society.

Summary:

The case concerned the Ukrainian law on the Renewal of a Debtor's Capacity to pay, or Recognition of his Bankruptcy. It was held that the term "legal entity – enterprises which are objects of

right of municipal ownership" would only apply to municipal unitary enterprises.

Article 214.4 of the Economic Code states that in certain cases, determined in legislation, bankruptcy proceedings do not apply to communal enterprises. Article 5.8 of the Law on the Renewal of a Debtor's Capacity to Pay states that the provisions of the law do not apply to certain legal entities – enterprises owned by a municipality – if a decision is taken to this effect at a plenary session of the relevant local authority.

Articles 140 to 145 of the Constitution set out the foundations for local government, including its institutions and its financial arrangements. Other issues of local government are covered in Article 146.

Law no. 280/97-VP "On local self-government", 21 May 1997, together with various supplements and amendments, covers various other issues of local government. Reference is also made to the Economic Code, which entered into force as of 1 January 2004 and other legislation.

The Law on Local Self-Government safeguards the principles of legal, organisational and financial independence, within the limits of competence. Article 16.5 of the Law no. 280 states that municipal property interests are catered for by the relevant local councils. Further particulars on the rights of ownership are contained in Article 60.

Under Article 140 of the Constitution and Article 2 of Law no. 280, matters of local significance are regulated within the communities, either by the community itself, on an independent basis, or by local government officials. Article 1 of the Law no. 280 defines the term "right of communal ownership" – the right of a community to own and to dispose of its property, in an efficient, economical and expedient way, at its own discretion and in its own interest, both directly and through institutions of local government.

Institutions of local government are not economic entities and they are not allowed to carry out entrepreneurial activities. The correct choice of the organisational and legal form of economic entity is highly significant. Article 24.1 and 24.3 of the Economic Code deal with the management of economic activity in the communal sector of the economy and stipulate that this be carried out by local authority bodies. The form the economic entity takes, depends on the documentation under which they were set up.

If the main task of the economic entity in the municipal sector is the production of vital goods or services for the inhabitants of the community (for example water supply, heating or waste disposal), its organisational and legal form should be a municipal unitary enterprise. These are economic entities which provide the population with necessary services, acting in the interests of the community.

By contrast, the realisation of corporate rights by local authority institutions is geared towards the expedient, economic and effective use of municipal property, rather than the satisfaction of basic needs. Article 24 of the Economic Code accordingly classifies them differently.

Under the principle of proportionality, the limitation of the rights of creditors of economic entities in bankruptcy in the municipal sector should correspond to the legitimate purpose necessary for the society. The Constitutional Court considered that this limitation was proportionate. It was also necessary for the inhabitants of communities who were only able to obtain proper municipal services from such entities.

Whether or not bankruptcy proceedings are available in the case of municipal enterprises should not influence councils in their decision-making as to the applicability of the disputed legislation to the enterprise. Local authorities are not, therefore, obliged to consult creditors of these organisations and other interested parties when making such a decision. Neither are they obliged to suggest measures on prevention of bankruptcy.

The list of grounds for termination of proceedings in a bankruptcy case, set out in Article 40 of the Law, is not complete. This norm does not envisage termination of proceedings in bankruptcy cases, where the circumstances are the same as those in Article 5.8 of the Law. The Constitutional Court took the view that the legislator had a positive duty to fill in the gaps in Article 40 of the Law, so that the courts could apply the provisions properly.

Languages:

Ukrainian.



Identification: UKR-2007-2-006

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 09.07.2007 / **e)** 6-rp/2007 / **f)** As to the conformity with the Constitution (constitutionality) of provisions of Articles 29, 36, 56.2, 62.2, 66.1, 71.7, 71.9, 71.12, 71.13, 71.14, 71.23, 71.29, 71.30, 71.39, 71.41, 71.43, 71.44, 71.45, 71.46, 98, 101, 103, 111 of the Law “On the 2007 State Budget” (case on social guarantees of citizens) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 52/2007 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.10.2 **Institutions** – Public finances – Budget.
 5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
 5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.
 5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Budget, law / Social security, termination.

Headnotes:

When adopting legislation on the state budget, Parliament does not have the power to include provisions that terminate the effects of other legislation or in any other way to alter the legal regulation of public relations, as set out in other legislation.

Summary:

This case concerned provisions of the Ukrainian Law on the State Budget for 2007, which brought to an end privileges and guarantees contained within other legislation and altered or established new conditions for the granting of such privileges. This posed a restriction on fundamental rights and freedoms. It was held that Parliament did not have the authority to pass legislation with this type of impact.

Forty six People’s Deputies asked the Constitutional Court to examine the conformity with the Constitution of some articles of the Law on the 2007 State Budget, dated 19 December 2006, no. 489-V, and its subsequent amendments.

They contended that the following articles of this Law did not comply with the Constitution:

- Articles 29, 36, 56.2.3 and 66.1 which terminated for the year 2007 the effect of legislative provisions and norms on health protection, culture and education;
- Article 71.7 which terminated for the year 2007 the effect of Articles 41 and 43 of the Law on mandatory state social insurance in relation to loss of ability to work and birth and funeral expenses;
- Article 71.9 which terminated for the year 2007 the effect of Article 43.2 of the Law on Secondary Education;
- Article 71.12 which terminated for the year 2007 the effect of Article 6 of the Law on the Social Protection of "War Children" with reference to Article 111 of this Law;
- Article 71.13 which terminated for the year 2007 the effect of Articles 12.5, 13.5, 14.5 and 15.5 of the Law on the status of war veterans and guarantees of their social protection, along with Article 6.3 of the Law on the victims of Nazi Persecution;
- Article 71.14 which terminated for the year 2007 the effect of Articles 12, 15.1 and Chapter VIII.3 "Final Provisions" of the Law on state aid to families with children;
- Article 71.23, which terminated for the year 2007 the effect of Article 1.5 of the Law on minimum subsistence level;
- Article 71.29, which terminated for the year 2007 the effect of Article 27 of the Law on the Rehabilitation of Invalids;
- Article 71.30 which terminated for the year 2007 the effect of a number of articles of the Law on the Status and Social Protection of Citizens who suffered after Chernobyl catastrophe;
- Article 71.39, which terminated for the year 2007 the effect of Article 21 of the Law on the basis of social protection for labour veterans and other aged citizens;
- Article 71.41 which terminated for the year 2007 the effect of Article 24.3 and 24.27 of the Law on scientific and scientific and technical activity;
- Article 71.43 which terminated for the year 2007 the effect of Article 37.2 of the Law on the Central Election Commission;
- Article 71.44 which terminated for the year 2007 the effect of Article 27.2 of the Law on the Anti-Monopoly Committee;
- Article 71.45 which terminated for the year 2007 the effect of Article 30 of the Law on the Secret Service;
- Article 71.46 which terminated for the year 2007 the effect of Article 44.4, 2nd sentence, and Article 47.4 of the Law on local state administration.

The People's Deputies also wished to emphasise to the Parliament, the President and the Cabinet of Ministers the importance of observing the provisions of Articles 1, 3, 6, 8, 19, 22, 95 and 96 of the Constitution and Articles 4, 27 and 38.2 of the Budget Code, when drafting, adopting and bringing into effect the Law on State Budget.

The decision of the Constitutional Court has implications for courts of general jurisdiction when considering applications arising from the Law on State Budget that were declared unconstitutional.

Under the Constitution, Ukraine is a democratic and social state, under the rule of law. Human beings are recognised as having the highest social value. Their rights and freedoms determine the content and orientation of state activity, and the state's main task is to protect them. Human rights and freedoms are inalienable and inviolable. Any new legislation must not restrict or encroach upon them.

Analysis of parliamentary legislative activity reveals that when the Law on the State Budget was adopted, this resulted in the abrogation of provisions of other legislation dealing with the granting of privileges and guarantees. These privileges are an important ingredient of the rights to social security and an appropriate standard of living (see Articles 46 and 48 of the Constitution). The abrogation of these provisions resulted in a restriction on these rights. Such a restriction is only possible, under the Constitution, in certain instances.

The principle of the social state is also embodied in international treaties that the Ukraine has ratified. These include the International Covenant on Economic, Social and Cultural Rights of 1966, the European Social Charter (adopted in 1961 and revised in 1966), the European Convention on Human Rights of 1950, and various judgments of the European Court of Human Rights.

Parliament alone determines the State budget and the budget system. See Article 92.2.1 of the Constitution. It approves the state budget each year for the period from 1 January to 31 December. Under certain circumstances, it can do so for another period (see Article 96.1 of the Constitution) by the adoption of appropriate legislation.

The Constitutional Court held that the termination by the Law on the State Budget of 2007 of certain other legislation granting privileges, guarantees and compensation did not comply with Articles 1, 3, 6.2, 8.2, 19.2, 21, 22, 92.2.1, 95.1, 95.2 and 95.3 of the Constitution. When adopting legislation on state budgets, Parliament does not have the power to

include provisions that terminate the effects of other legislation or in any other way to alter the legal regulation of public relations, as set out in other legislation. Those articles of the Law on the 2007 State Budget that were declared unconstitutional would lose their force with effect from the day this decision was made.

Languages:

Ukrainian.



United States of America Supreme Court

Important decisions

Identification: USA-2007-2-002

a) United States of America / **b)** Supreme Court / **c)** / **d)** 25.06.2007 / **e)** 06-157 / **f)** Hein v. Freedom From Religion Foundation, Inc. / **g)** 127 *Supreme Court Reporter* 2553 (2007) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
- 3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
- 4.6.2 **Institutions** – Executive bodies – Powers.
- 4.10.2 **Institutions** – Public finances – Budget.
- 4.10.7 **Institutions** – Public finances – Taxation.
- 5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Budget, appropriation, extraordinary / Religion, establishment / Taxpayer, standing to sue.

Headnotes:

The Constitution limits the jurisdiction of the federal courts to actual cases or controversies.

A plaintiff raising only a generally available grievance about governmental action, and seeking relief that benefits her or him no more than it does the public at large, does not state a case or controversy under the Constitution.

To establish standing to sue in the federal courts, a plaintiff must allege a personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

The payment of taxes generally is not enough to establish standing to challenge a government action, since the alleged injury sustained by a taxpayer is not

distinct from that suffered in general by other taxpayers or citizens.

Generally, the interest of a federal taxpayer in seeing that public funds are spent in accordance with the Constitution does not give rise to the kind of redressable personal injury required for standing under the Constitution.

A narrow exception to the general prohibition against taxpayer standing exists for plaintiffs challenging a legislative act authorising the use of funds in a manner that allegedly violates the constitutional proscription against establishment of religion.

To have standing to challenge an allegedly unconstitutional governmental expenditure, a taxpayer must establish a logical link between that status and the type of legislative enactment attacked and also establish a nexus between that status and the precise nature of the constitutional infringement alleged.

Summary:

I. The Freedom From Religion Foundation (“FFRF”), a non-profit organisation opposed to governmental endorsement of religion, and three of its members brought suit against certain federal government officials affiliated with the Office of Faith-Based and Community Initiatives (the “Office”). Established within the administration of the President of the United States, the Office’s functions include distribution to religious organisations of funds for a variety of community programs. The funds are general purpose funds appropriated by the U.S. Congress to the executive branch. The FFRF and its members claimed that the officials violated the Establishment Clause of the First Amendment to the U.S. Constitution by organising conferences that were designed to promote, and had the effect of promoting, religious groups over secular ones. The Establishment Clause proscribes laws “respecting an establishment of religion”.

The federal District Court dismissed the lawsuit on the grounds that the claimants lacked standing to sue. Standing is a controlling factor in the determination of whether a “case” or “controversy” has been presented to a federal court as required under Article III of the U.S. Constitution, which establishes the jurisdictional reach of the federal courts. Under the U.S. Supreme Court’s jurisprudence, a plaintiff will satisfy the standing requirement by alleging a “personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” In the instant case, the plaintiffs’ only asserted basis for standing was that the individuals are federal

taxpayers who oppose the executive branch’s use of congressional funds for the Office’s conferences. This assertion relied on the U.S. Supreme Court’s 1968 decision in *Flast v. Cohen*, in which the Court relaxed its standing requirements for plaintiffs presenting Establishment Clause challenges to the constitutionality of congressional spending programs. The District Court rejected application of the *Flast v. Cohen* exception in the instant case, however, because it did not view the government officials as administrators of a congressional program. The U.S. Court of Appeals for the Seventh Circuit reversed the District Court’s decision, interpreting *Flast v. Cohen* as granting federal taxpayers standing to challenge executive branch programs on Establishment Clause grounds, so long as the activities in questions are financed by general congressional appropriations.

II. In a five to four decision, the U.S. Supreme Court reversed the Seventh Circuit Court of Appeals, ruling that the plaintiffs lacked standing. The five Justices voting to reject the challengers’ lawsuit as presenting a non-justiciable abstract claim further subdivided into two groups. A three-Justice plurality concluded that the Court of Appeals had misapplied *Flast v. Cohen* by extending its scope to include taxpayer challenges where specific congressional action was absent. Thus, the plurality upheld *Flast v. Cohen* as a narrow exception to the general constitutional prohibition against standing for taxpayers to challenge governmental expenditures. In a separate concurring opinion, the other two Justices rejecting the taxpayers’ lawsuit argued that *Flast v. Cohen* was incorrectly decided and should be disregarded as precedent.

The plurality opinion set forth a two-part test for determining whether a federal taxpayer has standing to challenge an allegedly unconstitutional expenditure. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will have standing to allege the unconstitutionality only of exercises of congressional power. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory legislative act. Second, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress. The establishment Clause, the plurality stated, is such a specific constitutional limitation on the exercise of congressional taxing and spending powers.

Supplementary information:

Four of the Court's nine Justices dissented from the Court's decision. The dissenting Justices disagreed with the plurality's distinction between general appropriations immune from taxpayer challenges and specific congressional acts for which the *Flast v. Cohen* is available. The dissenting opinion warned that Establishment Clause protections will become meaningless if the executive branch is allowed to accomplish through the exercise of discretion what the Congress cannot do through legislative action.

Cross-references:

- *Flast v. Cohen*, 392 *United States Reports* 83, 88 *Supreme Court Reporter* 1942, 20 *Lawyer's Edition Second* 947 (1968).

Languages:

English.

*Identification: USA-2007-2-003*

a) United States of America / b) Supreme Court / c) / d) 28.06.2007 / e) 06-6407 / f) *Panetti v. Quarterman* / g) 127 *Supreme Court Reporter* 2842 (2007) / h) CODICES (English).

Keywords of the systematic thesaurus:

5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

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:

Death penalty, competency / Death penalty, insanity / Death penalty, mental illness.

Headnotes:

The constitutional prohibition of cruel and unusual punishments bars the execution of a condemned person who is insane.

The constitutional prohibition against execution of an insane person applies even though the person was earlier deemed competent to be held responsible for committing a crime and to stand trial for it.

A condemned person who makes a preliminary showing that his or her current mental state would bar execution is entitled under constitutional due process guarantees to an adjudication, conducted in accord with fundamental fairness, for a conclusive determination on the question.

The basic due process requirements for a proceeding to determine a condemned person's mental health competency to be subject to execution include an opportunity to submit evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the state's own psychiatric examination.

The substantive standard for mental illness incompetency to be subject to execution may not exclude proven delusional beliefs as irrelevant even though the condemned person is aware of the impending execution and the factual basis for it.

Summary:

I. In its 1986 Decision in *Ford v. Wainwright*, the U.S. Supreme Court determined that the Eighth Amendment to the U.S. Constitution, which bars the infliction of cruel and unusual punishments, prohibits the execution of a condemned prisoner who is insane. This prohibition applies even though a prisoner was earlier deemed competent to be held responsible for committing a crime and to stand trial for it. Even after sentencing, a prisoner who makes a preliminary showing that his or her current mental state would bar execution is entitled under constitutional due process guarantees to an adjudication, conducted in accord with fundamental fairness, for a conclusive determination on this question. These basic due process requirements include an opportunity to submit evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the state's own psychiatric examination.

In 1995, a jury in the state of Texas found Scott Louis Panetti guilty of murder and sentenced him to death. During the proceeding, he did not argue that mental illness rendered him incompetent to be executed. Once the state court scheduled an execution date, however, Mr Panetti filed a motion that claimed, for the first time, that he was incompetent to be executed because of mental illness. On the basis of a report submitted by court-appointed mental health experts, the court found Mr Panetti competent and denied his motion. The court had not held a competency hearing at which Mr Panetti would have had full opportunity to submit evidence of his condition and to attempt to rebut the submission of the court-appointed experts.

Subsequently, a Federal District Court, ruling on Mr Panetti's petition for *habeas corpus* review of the state court decision, concluded that the competency determination proceeding had been constitutionally inadequate under the *Ford v. Wainwright* procedural requirements and that therefore the state court's finding of Mr Panetti's competency was not entitled to any deference. Nevertheless, the Federal District Court concluded that Mr Panetti had not satisfied the standard for incompetency established by the case-law of the U.S. Court of Appeals for the Fifth Circuit. Under that precedent, a prisoner is competent to be executed if she or he knows the fact of the impending execution and the factual basis for it. On appeal, the Fifth Circuit Court of Appeals affirmed the District Court's determination.

II. In a five-four decision, the U.S. Supreme Court reversed the decision of the Court of Appeals. The Supreme Court agreed with the federal courts that the state court's competency proceeding did not meet the *Ford v. Wainwright* procedural requirements and therefore was not entitled to deference. However, the Supreme Court also concluded that the incompetency standard of the Fifth Circuit Court of Appeals was too restrictive of Eighth Amendment protections. In the U.S. District Court proceeding, Mr Panetti's expert witnesses testified that although Mr Panetti claimed to understand that the State of Texas was going to execute him for murder, in his delusional state he thought this reason was a sham, and that the State actually sought to execute him for preaching about his religious beliefs. Applying its incompetency standard, the Court of Appeals ruled that such delusions were not relevant so long as Mr Panetti was aware that the State had identified the link between his crime and the punishment to be inflicted. According to the Supreme Court, that ruling ignored the possibility that gross delusions stemming from a severe mental disorder may put that the prisoner's awareness in a context so far removed from reality that the punishment can serve no proper purpose. In sum, the Court stated that a prisoner's "awareness" of

the State's rationale for execution is not the same under the Eighth Amendment as a "rational understanding" of it. The Court therefore reversed the decision of the Court of Appeals.

While it rejected the incompetency standard of the Fifth Circuit Court of Appeals, the Supreme Court at the same time concluded that, because the evidentiary record was incomplete, it could not fashion a precise rule that prospectively would govern all competency determinations. It therefore remanded the case to the Court of Appeals for supervision of the further development of the record and resolution of Mr Panetti's claim.

Supplementary information:

Four of the Court's nine Justices dissented from the Court's decision. In their dissenting opinion, the four Justices criticised the decision on a number of grounds, including the Court's determination that jurisdiction to adjudicate Mr Panetti's claims was proper under the applicable federal *Habeas Corpus* legislation, its determination that the state incompetency proceeding had been constitutionally inadequate, and its alleged failure to adhere to established Eighth Amendment analysis.

The Eighth Amendment is applicable to the States under the Fourteenth Amendment to the U.S. Constitution, which prohibits the States from depriving any person of liberty "without due process of law."

Cross-references:

- *Ford v. Wainwright*, 477 United States Reports 399, 106 Supreme Court Reporter 2595, 91 Lawyer's Edition Second 335 (1986).

Languages:

English.



European Court of Human Rights

Important decisions

Identification: ECH-2007-2-004

a) Council of Europe / b) European Court of Human Rights / c) Chamber / d) 07.06.2007 / e) 75251/01 / f) Case of Parti nationaliste basque – Organisation régionale d'Iparralde v. France / g) *Reports of Judgments and Decisions of the Court* / h).

Keywords of the systematic thesaurus:

4.5.10.2 **Institutions** – Legislative bodies – Political parties – Financing.

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

Keywords of the alphabetical index:

Political party, funding, foreign source, prohibition / Venice Commission, political parties, financing, report.

Headnotes:

The prohibition for national political parties to obtain funds from foreign parties or states constitutes an interference with the freedom of association. Such a prohibition is not as such incompatible with the freedom of association.

Insofar as it does not challenge the legality of the party concerned, nor legally prevents it from participating in political life, nor censors any arguments which it intends to develop in the political arena, such a prohibition may be deemed necessary in a democratic society.

Summary:

I. The applicant party is the French “branch” of the Spanish Basque Nationalist Party. In order to be able to receive funds, in particular financial contributions from the Spanish party, the applicant party formed a funding association in accordance with the 1988 Political Life (Financial Transparency) Act. However, authorisation of the association, a prerequisite for its operation, was refused on the ground that most of the applicant party’s resources derived from the support it

received from the Spanish party. The 1988 Act prohibits the funding of a political party by any foreign legal entity; accordingly, political parties’ funding associations may not receive financial contributions from a foreign political party. Subsequent appeals by the applicant party were dismissed.

In its application to the Court, the applicant complained of the adverse effects of the law on its funds and on its ability to pursue its political activities, particularly in the electoral sphere. It relied primarily on Article 11 ECHR and Article 10 ECHR taken together.

II. The Court examined the case under Article 11 ECHR. In view of the impact of the circumstances in issue on the applicant party’s financial capacity to engage fully in its political activities, there had been “interference”, which had been “prescribed by law”. The government had submitted that the prohibition on the funding of French political parties by foreign parties or governments had been intended to avoid creating a relationship of dependency which would be detrimental to the expression of national sovereignty; the aim pursued thus related, in their view, to the protection of the “institutional order”. The Court accepted that the concept of “order” (“*ordre*”) within the meaning of the French version of Articles 10 and 11 ECHR also encompassed the “institutional order”.

As to whether the interference had been necessary in a democratic society, the fact that political parties were not permitted to receive funds from foreign parties was not in itself incompatible with Article 11 ECHR. Furthermore, the choice of the French legislature not to exempt political parties established in other European Union member States from this prohibition was an eminently political decision, which accordingly fell within its residual margin of appreciation.

It remained to be determined what impact the prohibition had on the applicant party’s ability to engage in political activities. The measure complained of did not call into question the applicant party’s legality or amount to a legal impediment to its participation in political life or to censorship of the views it sought to expound in the political arena. Although the applicant party had to forgo financial assistance from the Spanish Basque Nationalist Party, it would still be able to fund its political activities through its members’ contributions and donations from individuals, including non-French nationals.

There was nothing in law to prevent it either from receiving funds from other French political parties or

from taking advantage of the French system of State funding of election campaigns. It was true that those sources of funding appeared hypothetical in the applicant party's particular case: in view of its political aims, it was unlikely to gain the support of another French party, while in view of its geographical sphere of activity, it was likely to take part in local rather than parliamentary elections, so that it scarcely appeared to be in a position to benefit from the State funding system (which was based on results in parliamentary elections). Its election candidates would nevertheless enjoy all the same benefits as those from other parties in terms of the funding of their election campaign. In conclusion, although the prohibition on receiving contributions from the Spanish Basque Nationalist Party had an impact on the applicant party's finances, the situation in which it found itself as a result was no different from that of any small political party faced with a shortage of funds. There had therefore been no violation of Article 11 ECHR, taken alone or in conjunction with Article 10 ECHR.

In application of Rule A1.2 of the Rules of Court, the First Chamber of the Court requested the Venice Commission to introduce its Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources (CDL-AD(2006)014, Venice, 17-18 March 2006).

Cross-references:

- *United Communist Party of Turkey and others v. Turkey*, Judgment of 30.01.1998, *Reports of Judgments and Decisions* 1998-I;
- *Socialist Party of Turkey (STP) and others v. Turkey*, Judgment of 25.05.1998, *Reports of Judgments and Decisions* 1998-III;
- *Sidiropoulos and others v. Greece*, Judgment of 10.07.1998, *Reports of Judgments and Decisions* 1998-IV;
- *Refah Partisi (Prosperity Party) and others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, *Reports of Judgments and Decisions* 2003-II;
- *United Macedonian Organisation Ilinden and others v. Bulgaria*, no. 59491/01, 19.01.2006.

Languages:

English, French.



Identification: ECH-2007-2-005

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 29.06.2007 / e) 15809/02 and 25624/02 / f) O'Halloran and Francis v. the United Kingdom / g) *Reports of Judgments and Decisions of the Court* / h) CODICES (English, French).

Keywords of the systematic thesaurus:

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

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:

Right to remain silent / Car, driver, identity, revelation, obligatory / Road traffic, offence.

Headnotes:

The obligation imposed on the owner of a motor vehicle to provide information leading to the identification of the person who was driving the vehicle at the time of commission of a road traffic offence, on pain of a fine, does not violate the right to remain silent and the right not to incriminate oneself.

Summary:

I. Under Section 172 of the Road Traffic Act 1988 the registered keeper of a vehicle can be required to provide information as to the identity of the driver where certain road-traffic offences are alleged to have been committed. It is an offence not to supply the information unless the keeper is able to show that he did not know and could not with reasonable diligence have ascertained the driver's identity. In separate incidents the applicants' vehicles were caught on speed cameras driving in excess of the speed limit. They were subsequently asked to identify the driver or risk prosecution. The first applicant admitted to being the driver in his case and was convicted of speeding after making an unsuccessful attempt to have his confession excluded as evidence. He was fined and his licence was endorsed. The second applicant invoked his right to silence and privilege against self-incrimination. He was convicted under Section 172. He received a fine and his licence was endorsed.

In their application to the Court, the applicants complained that the obligation imposed on the owner of a motor vehicle to provide information leading to the identification of the driver violates the right not to incriminate oneself. They relied on Article 6 ECHR.

II. The Court did not accept the applicants' argument that the right to remain silent and the right not to incriminate oneself were absolute rights. In order to determine whether the essence of those rights was infringed, it focused on the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained was put.

a. Nature and degree of the compulsion: While the compulsion was of a direct nature anyone who chose to own or drive a car knew that they were subjecting themselves to a regulatory regime, imposed because the possession and use of cars was recognised to have the potential to cause grave injury. Those who chose to keep and drive cars could be taken to have accepted certain responsibilities and obligations including the obligation, in the event of the suspected commission of a road traffic offence, to inform the authorities of the identity of the driver on that occasion. Lastly, the nature of the inquiry the police were authorised to undertake was limited. Section 172 applied only where the driver was alleged to have committed a relevant offence and it authorised the police to require information only as to the identity of the driver.

b. Safeguards: No offence was committed if the keeper of the vehicle showed that he did not know and could not with reasonable diligence have known who the driver of the vehicle was. The offence was therefore not one of strict liability and the risk of unreliable admissions was negligible.

c. Use to which the statements were put: Although the first applicant's statement that he was the driver of his car was ruled admissible as evidence of that fact after his unsuccessful attempt to exclude it, the prosecution were nevertheless still required to prove the offence beyond reasonable doubt and the first applicant had been entitled to give evidence and call witnesses if he so wished. The identity of the driver was only one element in the offence of speeding, and there was no question of a conviction arising in the underlying proceedings in respect solely of the information obtained as a result of Section 172. In the second applicant's case the underlying proceedings were never pursued as he had refused to make a statement. Accordingly, the question of the use of his statement in criminal proceedings did not arise, as his

refusal to make a statement was not used as evidence: it constituted the offence itself.

Having regard to all the circumstances of the case, including the special nature of the regulatory regime and the limited nature of the information sought by a notice under Section 172, the essence of the applicants' right to remain silent and their privilege against self-incrimination had not been violated. There had therefore been no violation of Article 6.1 ECHR and no separate issue arose under Article 6.2 ECHR.

Cross-references:

- *P., R. and H. v. Austria*, nos. 15135/89, 15136/89 and 15137/89, Commission decision of 05.09.1989, *Decisions and Reports* 62;
- *Funke v. France*, Judgment of 25.02.1993, Series A, no. 256-A;
- *John Murray v. the United Kingdom*, Judgment of 08.02.1996, *Reports of Judgments and Decisions* 1996-I;
- *Saunders v. the United Kingdom*, Judgment of 17.12.1996, *Reports of Judgments and Decisions* 1996-VI;
- *Serves v. France*, Judgment of 20.10.1997, *Reports of Judgments and Decisions* 1997-VI;
- *Heaney and McGuinness v. Ireland*, no. 34720/97, *Reports of Judgments and Decisions* 2000-XII;
- *J.B. v. Switzerland*, no. 31827/96, *Reports of Judgments and Decisions* 2001-III;
- *Allen v. the United Kingdom* (dec.), no. 76574/01, *Reports of Judgments and Decisions* 2002-VIII;
- *Weh v. Austria*, no. 38544/97, 08.04.2004;
- *Shannon v. the United Kingdom*, no. 6563/03, 04.10.2005;
- *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006.

Languages:

English, French.



Systematic thesaurus (V18) *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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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 For example, Rules of procedure.

⁴ For example, age, education, experience, seniority, moral character, citizenship.

⁵ Including the conditions and manner of such appointment (election, nomination, etc.).

⁶ Including the conditions and manner of such appointment (election, nomination, etc.).

⁷ Vice-presidents, presidents of chambers or of sections, etc.

⁸ For example, State Counsel, prosecutors, etc.

⁹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹⁰ For example, assessors, office members.

¹¹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

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¹² Including questions on the interim exercise of the functions of the Head of State.

¹³ Referrals of preliminary questions in particular.

¹⁴ Enactment required by law to be reviewed by the Court.

¹⁵ Review *ultra petita*.

¹⁶ Horizontal distribution of powers.

¹⁷ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁸ Decentralised authorities (municipalities, provinces, etc.).

¹⁹ This keyword concerns questions of jurisdiction relating to the procedure and results of referenda and other consultations. For questions other than jurisdiction, see 4.9.2.1.

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²⁰ This keyword concerns decisions preceding the referendum including its admissibility.

²¹ 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.

²² As understood in private international law.

²³ Including constitutional laws.

²⁴ For example, organic laws.

²⁵ Local authorities, municipalities, provinces, departments, etc.

²⁶ Or: functional decentralisation (public bodies exercising delegated powers).

²⁷ Political questions.

²⁸ Unconstitutionality by omission.

²⁹ Including language issues relating to procedure, deliberations, decisions, etc.

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³¹ Pleadings, final submissions, notes, etc.

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³⁸ Including its Protocols.

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³⁹ Presumption of constitutionality, double construction rule.

⁴⁰ Including the principle of a multi-party system.

⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

⁴⁴ Including maintaining confidence and legitimate expectations.

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⁴⁵ Principle according to which sub-statutory acts must be based on and in conformity with the law.

⁴⁶ Prohibition of punishment without proper legal base.

⁴⁷ Including compelling public interest.

⁴⁸ Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

⁴⁹ Including questions of treason/high crimes.

⁵⁰ Including prohibition on monopolies.

⁵¹ For the principle of primacy of Community law, see 2.2.1.6.

⁵² Including the body responsible for revising or amending the Constitution.

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⁵³ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵⁴ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁵ For example, the granting of pardons.

⁵⁶ For regional and local authorities, see chapter 4.8.

⁵⁷ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁸ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁹ In particular commissions of enquiry.

⁶⁰ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁶¹ Obligation on the legislative body to use the full scope of its powers.

⁶² Representative/imperative mandates.

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⁶³ Presidency, bureau, sections, committees, etc.

⁶⁴ Including the convening, duration, publicity and agenda of sessions.

⁶⁵ Including their creation, composition and terms of reference.

⁶⁶ State budgetary contribution, other sources, etc.

⁶⁷ For the publication of laws, see 3.15.

⁶⁸ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁹ For local authorities, see 4.8.

⁷⁰ Derived directly from the constitution.

⁷¹ See also 4.8.

⁷² 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.

⁷³ Civil servants, administrators, etc.

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⁷⁴ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

⁷⁵ Other than the body delivering the decision summarised here.

⁷⁶ Positive and negative conflicts.

⁷⁷ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁸ For example, Judicial Service Commission, *Conseil supérieur de la magistrature*.

⁷⁹ Comprises the Court of Auditors in so far as it exercises judicial power.

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⁸¹ And other units of local self-government.

⁸² See also keywords 5.3.41 and 5.2.1.4.

⁸³ Organs of control and supervision.

⁸⁴ For questions of jurisdiction, see keyword 1.3.4.6.

⁸⁵ Proportional, majority, preferential, single-member constituencies, etc.

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⁸⁶ For aspects related to fundamental rights, see 5.3.41.2.

⁸⁷ For the creation of political parties, see 4.5.10.1.

⁸⁸ For example, names of parties, order of presentation, logo, emblem or question in a referendum.

⁸⁹ Tracts, letters, press, radio and television, posters, nominations, etc.

⁹⁰ Impartiality of electoral authorities, incidents, disturbances.

⁹¹ For example, signatures on electoral rolls, stamps, crossing out of names on list.

⁹² For example, in person, proxy vote, postal vote, electronic vote.

⁹³ For example, *Panachage*, voting for whole list or part of list, blank votes.

⁹⁴ For example, Auditor-General.

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⁹⁶ For example, Court of Auditors.

⁹⁷ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

⁹⁸ *Staatszielbestimmungen*.

⁹⁹ Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

¹⁰⁰ Including state of war, martial law, declared natural disasters, etc; for human rights aspects, see also keyword 5.1.4.1.

¹⁰¹ Positive and negative aspects.

¹⁰² For rights of the child, see 5.3.44.

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¹⁰⁴ Includes questions of the suspension of rights. See also 4.18.

¹⁰⁵ Taxes and other duties towards the state.

¹⁰⁶ According to the European Convention on Nationality of 1997, ETS no. 166, "'nationality' means the legal bond between a person and a state and does not indicate the person's ethnic origin" (Article 2) and "... with regard to the effects of the Convention, the terms 'nationality' and 'citizenship' are synonymous" (paragraph 23, Explanatory Memorandum).

¹⁰⁷ For example, discrimination between married and single persons.

¹⁰⁸ This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

¹⁰⁹ Detention by police.

¹¹⁰ Including questions related to the granting of passports or other travel documents.

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¹¹¹ May include questions of expulsion and extradition.

¹¹² 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.

¹¹³ This keyword covers the right of appeal to a court.

¹¹⁴ Including the right to be present at hearing.

¹¹⁵ Including challenging of a judge.

¹¹⁶ Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

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¹¹⁷ This keyword also includes the right to freely communicate information.

¹¹⁸ Militia, conscientious objection, etc.

¹¹⁹ Aspects of the use of names are included either here or under "Right to private life".

¹²⁰ Including compensation issues.

¹²¹ For institutional aspects, see 4.9.5.

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This keyword also covers "Freedom of work".

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Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

Keywords of the alphabetical index *

* The précis presented in this *Bulletin* are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

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