

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.

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The decisions are presented in the following way:

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

G. Buquicchio

Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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

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There was no relevant constitutional case-law during the reference period 1 May 2008 – 31 August 2008 for the following countries:

Azerbaijan, Denmark, Japan, Luxembourg, Norway.

Précis of important decisions of the reference period 1 May 2008 – 31 August 2008 will be published in the next edition, *Bulletin* 2008/3, for the following country:

Moldova.

Armenia

Constitutional Court

Statistical data

1 May 2008 – 31 August 2008

- 58 applications have been filed, including:
 - 9 applications, filed by the President
 - 49 applications, filed by individuals
- 18 cases have been admitted for review, including:
 - 9 applications, concerning the compliance of obligations stipulated in international treaties with the Constitution
 - 9 individual complaints, concerning the issue of constitutionality of certain provisions of laws
- 5 cases heard and 5 decisions delivered (including decisions on applications filed before the relevant period), including:
 - 2 decisions on individual complaints (of the applications filed before the relevant period)
 - 3 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution
- Examination of 15 cases is pending (on 9 individual complaints)

Important decisions

Identification: ARM-2008-2-006

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 13.05.2008 / **e)** DCC-753 / **f)** On the conformity with the Constitution of Article 53.2 of the Law on Television and Radio / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

- 3.9 General Principles – **Rule of law**.
- 3.10 General Principles – **Certainty of the law**.
- 3.12 General Principles – **Clarity and precision of legal provisions**.
- 3.13 General Principles – **Legality**.
- 4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers**.

Keywords of the alphabetical index:

Media, broadcasting, fee.

Headnotes:

Certainty and clarity are vital components of the rule of law, and must be freely available. Parties to legal proceedings should be able to discern the legal norms that will apply to them. Legal norms cannot be described as “law” if they are insufficiently clear. Clarity can assist legal and natural persons to adjust their behaviour, in line with the law. They should be able to predict the consequences that may flow from their behaviour. The presence and absence of contradictions in various regulations is an essential factor in assessing the predictability of law.

Summary:

The applicant, Radio Haj Limited, expressed concern over provisions of the Law on Television and Radio, which obliged television and radio companies to pay annual over-the-air fees for using broadcasting frequencies. The calculation of the fee was based upon necessary expenses for serving the frequency. In its decision aimed at implementing the above norm, the Government had authorised the Ministry of Transport and Communication to calculate and approve the amount of the over-the-air fee for using broadcasting frequency.

The applicant suggested that the provision lacked clarity, and that it infringed Article 45 of the Constitution in that it did not stipulate an amount for the annual over-the-air fee for using broadcasting frequency, neither had it appointed a specific body to consider the amount of such an annual fee. Article 45 of the Constitution states that everybody must pay taxes, duty and other compulsory fees “in conformity with the procedure prescribed by the law”.

In its deliberations on the above complaint, the Constitutional Court decided to examine the content of the notion “compulsory fee” specified in Article 45 of the Constitution, together with the content of the notion of “over-the-air fee” described in the disputed norm.

The Constitutional Court, having analysed the relevant tax legislation, stated that the compulsory fees described in Article 45 of the Constitution had “public law content”, that is, they were established and paid within the scope of public relations with socio-legal content. It further observed that they are to be paid into the state or community budget.

It went on to describe the “over the air fee” as a goods usage charge to be exacted, which meant that

the fee was an element of civil legal relations. The contract signed by the owner of radio frequencies, namely the state, and the user of radio frequencies constitutes the legal basis for exacting such fee.

As far as television and radio companies are concerned, procedures for establishing and exacting similar fees are regulated in such an indefinite manner that it is impossible to arrive at any accurate conclusion, either on the aims behind exacting such a fee or its content. This gives rise to a situation of uncertainty and unpredictability, in turn raising questions over the legality of exacting the fee, so that certain obligations provided for by the law might not be fulfilled.

Certainty and clarity are vital components of the rule of law, and must be freely available. Parties to legal proceedings should be able to discern the legal norms that will apply to them. Legal norms cannot be described as “law” if they are insufficiently clear. Clarity can assist legal and natural persons in adjusting their behaviour to “law”. They should be able to predict the consequences that may flow from their behaviour. The presence and absence of contradictions in various regulations is an essential factor in assessing the predictability of law.

The Constitutional Court noted the various contradictions in the legal regulation of radio frequency usage, the uncertainty of the provision in dispute, and the implementation of the norm that stemmed from an incorrect interpretation of the norm due to that very uncertainty. It ruled that the norm did not allow economic organisations to deduce the aim of exacting over the air fees, the content of the fee and the legality of the duty to pay it. The norm was therefore incompatible with the requirements of the Constitution.

Languages:

Armenian.



Identification: ARM-2008-2-007

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 27.05.2008 / **e)** DCC-754 / **f)** On the conformity with the Constitution of Article 231.1.4 (Article 233.4) of the Civil Procedure Code of the RA / **g)** *Tegekagir* (Official Gazette) / **h)**

Keywords of the systematic thesaurus:

4.7.2 Institutions – Judicial bodies – **Procedure.**

4.7.3 Institutions – Judicial bodies – **Decisions.**

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

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

Keywords of the alphabetical index:

Appeal procedure / Cassation appeal, imperfection, correction, right / *Res judicata.*

Headnotes:

A person who appeals to the Cassation Court must be entitled to remove the imperfections of the appeal and apply to the Cassation court again within the three-month period proscribed in legislation for the lodging of an appeal. This remains the case if the Cassation Court has not determined a time limit for removing the imperfections of the appeal.

Summary:

The applicant lodged a complaint with the Constitutional Court, challenging certain provisions of the Civil Procedure Code. According to these provisions, if the Cassation Court decision did not allow time to remove the imperfections of the appeal, the applicant would be unable to lodge an appeal again with the Cassation Court. This would remain the case, even where the three-month period stipulated by law for lodging an appeal had not expired.

The Constitutional Court examined the legislative regulations on returning suit, appeals and individual complaints as set out in the Civil Procedure Code, the Administrative Procedure Code and the Law on Constitutional Court. It concluded that, logically, imperfections of suit, appellate appeal or individual complaint should not impede their admission for consideration and prevent the effective implementation of the right of access to court. The above reasoning stemmed from the necessity to guarantee access to court. Under this legal regulation, once an individual has removed the imperfections noted by the Court, he or she can lodge an application again. The opportunity to lodge an application again is independent of the discretion of the competent court. A party to proceedings has an effective remedy against a decision by the Court to return a suit, appellate appeal or individual complaint. There is provision within the legislation to lodge an appeal against such decisions.

With respect to the appeal to the Cassation Court under consideration here, the opportunity to remove its imperfections depended on the discretion of the Cassation Court. There was no effective protection remedy should that discretion be arbitrarily employed. Thus, the implementation of the norm in dispute could give rise to situations where imperfections in the appeal might lead to interference with the exercise of an individual's right to appeal against a court decision and, accordingly, the right of access to courts. This would run counter to the logic at the heart of the above regulations.

The Constitutional Court noted the practical considerations surrounding implementation of the disputed norm, and the lack of "fully-fledged" legal guarantees of legal and non-arbitrary execution of the Cassation Court's power to determine a time period for the removal of imperfections of appeal. Lack of such guarantees meant that there was no effective remedy against a decision by the Cassation Court to return the appeal. The Court therefore ruled that the norm posed a legal obstacle to the exercise of the constitutional right to judicial protection by the Cassation Court.

The Constitutional Court also undertook a constitutional review of the challenged provision, together with Article 68.9 of the Law on the Constitutional Court. Under this provision, the same individual only has the right to lodge an appeal with the Cassation Court against the same judicial decision on one occasion.

The Constitutional Court ruled that the principle "a matter already adjudicated upon cannot be raised again" (*res judicata*), which is well known in international law, had been expressed in the above norm in a distorted fashion, and in a way that was not appropriate to the aim of that principle. The rationale behind the norm was not the prevention of *res judicata*, but it interfered with the fully-fledged and effective exercise of an individual's right to lodge an appeal with the Cassation Court.

Languages:

Armenian.



Belgium Court of Arbitration

Important decisions

Identification: BEL-2008-2-008

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 26.06.2008 / **e)** 95/2008 / **f)** / **g)** *Moniteur belge* (Official Gazette), 13.08.2008 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.

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

5.3.9 Fundamental Rights – Civil and political rights – **Right of residence**.

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

5.3.34 Fundamental Rights – Civil and political rights – **Right to marriage**.

Keywords of the alphabetical index:

Family reunification / Polygamy / Cohabitation, certainty / Marriage, mutual rights and obligations.

Headnotes:

The law does not violate the Constitution by restricting the right to family reunification of spouses united by a form of conjugal union (polygamy) which is contrary not only to Belgian international public policy, but also to the international public policy of the other European Union member states, as is clear from Council Directive no. 2003/86/EC of 22 September 2003 on the right to family reunification.

On the other hand, it is contrary to the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) also to exclude from family reunification with a parent resident in Belgium all the children who are the issue of polygamous unions, since the children concerned are in no manner responsible for their parents' conjugal situation, and since the family reunification,

where they are concerned, is not an effect of their parents' marriage, but an effect of the relationship by descent which links them to their parent settled or authorised to reside in Belgium.

Summary:

Several non-profit-making associations lodged two applications for review the Law of 15 September 2006 amending the Law of 15 December 1980 on aliens' access to Belgian territory, residence, settlement and removal.

They objected *inter alia* to Article 6 of that Law, which superseded Article 10 of the Law of 15 December 1980, known as the "Law on aliens". The new Article 10 granted the right of admission to residence on Belgian territory with a view to family reunification to the foreign spouse or to the alien with whom a registered partnership had been concluded and who came to cohabit in Belgium with an alien admitted or authorised to reside in the Kingdom for an indefinite period, or authorised to settle there. This right of residence was also granted to their common unmarried minor children and to the unmarried minor children of one of the spouses or partners who came to live with them, provided that certain conditions relating to the custody of these children are met.

Article 10.1.2 nevertheless excluded from this family reunification the spouse of a polygamous alien, if another spouse of this person was already resident in the Kingdom, and the children who were the issue of a polygamous marriage between the alien and a spouse other than the one who was already resident in the Kingdom.

The applicants argued that Article 10.1.2 violated both the right to private and family life (Article 22 of the Constitution, Article 8 ECHR) and the principle of equality (Articles 10 and 11 of the Constitution, Article 14 ECHR), as well as Articles 2, 3, 9 and 10 of the Convention on the Rights of the Child, in that the right to family reunification was not granted to children who were the issue of a polygamous marriage.

The Court found that the impugned provision executed Article 4.4 of Council Directive no. 2003/86/EC of 22 September 2003 "on the right to family reunification", the first sub-paragraph of which required Belgian law to deny the right to family reunification to the polygamous spouse of an alien resident in Belgium, when another spouse was already resident on Belgian territory. The second sub-paragraph authorised member states to "limit" the family reunification with the sponsor of the minor children of another spouse.

The Court referred to the case-law of the Court of Justice of the European Communities (CJEC, *European Parliament v. Council of the European Union*, 27 June 2006, C-540-03), in which the Court stated that the directive could not be interpreted as authorising the member states, expressly or impliedly, to adopt implementing provisions that would be contrary to the right to respect for family life (§ 71). *Inter alia*, a limitation of the right to family reunification through the introduction of quotas would be contrary to the Directive (§ 100).

The Court added that the authorisation given to states to impose restrictions on family reunification could not be interpreted as allowing the law to violate the principle of equality (Articles 10 and 11 of the Constitution).

The Court added that the law could limit the family reunification of spouses united by a form of conjugal union which was contrary not only to Belgian international public policy, but also to the international public policy of the other European Union member states, as was clear from the origins of the limitation contained in Article 4.4 of the aforementioned Directive. According to the Court, such a limitation constituted interference (allowed by Article 8 ECHR) by a public authority with the exercise of the right to respect for family life that was necessary in a democratic society in order to defend the policy mentioned in this provision.

However, the question remained in the court's view of whether this ground might also justify a limitation of the right to family life of the minor children who were the issue of a polygamous marriage.

The Court found that the law denied the right to family reunification only to those children who were the issue of a polygamous marriage when a wife other than their mother was already resident on Belgian territory. Thus the law established a difference in treatment between such children and the alien's other minor children, who all benefited from the right to family reunification with their parent, whether they were the issue of a monogamous marriage, a polygamous marriage to the wife present on the territory, a previous dissolved marriage, a relationship between two unmarried persons or an extramarital relationship.

This difference in treatment was based on the criterion of the nature of the conjugal link between their parents. The Court had to verify whether this criterion was relevant in relation to the object and purpose of the law, and whether its use could be justified in relation to the infringement of the right to family life which it occasioned. The Court then

pointed out that its supervision was more rigorous when the fundamental principle of equality of birth was in question.

The Court concluded that the criteria of the circumstances of the child's birth and of the conjugal situation of his or her parents had no relevance to either the object of the provision or the defence of Belgian or European international public policy. The children concerned were in no manner responsible for their parents' conjugal situation, and family reunification, where they were concerned, was not an effect of their parents' marriage, but an effect of the relationship by descent which linked them to their parent settled or authorised to reside in Belgium.

The Court concluded that the difference in treatment concerned was inconsistent with the principle of equality (Articles 10 and 11 of the Constitution), whether or not these articles were read in conjunction with the provisions of the aforementioned Convention on the Rights of the Child.

In its initial Judgment no. 95/2008 of 26 June 2008, the Court therefore declared void Article 10.1.2 of the Law on aliens. Subsequently, the Court made an automatic rectification, in pursuance of Article 117 of the Special Law of 6 January 1989, to limit the voiding to one part of the impugned provision.

Languages:

French, Dutch, German.



Identification: BEL-2008-2-009

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 10.07.2008 / **e)** 101/2008 / **f)** / **g)** *Moniteur belge* (Official Gazette), 06.08.2008 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

5.4.13 Fundamental Rights – Economic, social and cultural rights – **Right to housing**.

Keywords of the alphabetical index:

Housing, social, rental, condition, language / Language, minority, safeguards / Language, public services, employment.

Headnotes:

In the social housing field, regional Flemish law may prescribe, as a condition, that tenants must be willing to learn Dutch to a minimum level. It must in this respect take account of the safeguards from which French speakers benefit in a number of municipalities on the language border and around the Brussels-Capital Region (the municipalities defined as being on the periphery and on the language border), where, on the basis of the legislation on the use of languages in administrative matters, public authorities – such as the companies which rent out social housing – have in certain cases to use French in their dealings with French speakers who so request.

The possibility for the social housing lessor to terminate a lease at any time in the event of a serious or persistent failure by the social tenant, without prior judicial supervision in pursuance of a cancellation clause (*clause résolutoire*) in the lease providing for termination in specified circumstances, is not reasonably justified in relation to the right to decent accommodation guaranteed by Article 23 of the Constitution.

Summary:

The Government of the French Community, the *Liga voor Mensenrechten ASBL* and the *Vlaams Overleg Bewonersbelangen ASBL* lodged applications to annul a number of articles of the Flemish Region's decree of 15 December 2006 amending the decree of 15 July 1997 containing the Flemish Housing Code (*Code flamand du logement*).

The impugned provisions amended the provisions of the Code relating to the rental of housing in the social sector. In general terms, the decree was intended to be an answer to the problems of quality of life and of housing conditions which existed in certain social housing complexes in Flanders, in order to guarantee the right of all residents to accommodation. To this end, the new provisions of the decree defined more clearly than previously the obligations of the tenant and the lessor and made available to the latter instruments which should enable him or her to react rapidly and appropriately *vis-à-vis* tenants who caused a nuisance and damaged the quality of life and of housing conditions in social housing.

The applicants complained *inter alia* of the requirement for social tenants to be willing to learn Dutch to a minimum level (a language which is spoken by the majority of residents in the Flemish Community).

According to the Government of the French Community, the Flemish Region had acted *ultra vires*, given that it was actually, through these provisions, pursuing an objective of integration of persons who did not have a command of Dutch, some of whom were immigrants, whereas policy on the reception and integration of immigrants was within the communities' remit.

The Court replied that the Flemish regional legislature, by virtue of its responsibility for housing, had been able to adopt provisions regulating access to social housing, *inter alia* in order to ensure that tenants and would-be tenants had to demonstrate their willingness to learn Dutch, as a minimum knowledge for all tenants of the language used by the lessor's staff helped to improve communication with the latter, and consequently the quality of housing conditions for all the residents of the housing concerned.

The Government of the French Community also argued that the obligation to show a willingness to learn Dutch contravened Article 16bis of the Special Law of 8 August 1980 on institutional reform, which stated that there could be no rule damaging the "safeguards from which French-speakers benefit" in a number of municipalities on the language border and around the Brussels-Capital Region (the municipalities defined as being on the periphery and on the language border), where, on the basis of the legislation on the use of languages in administrative matters, public authorities had in certain cases to use French in their dealings with French-speakers who so requested.

The Court found that social housing lessors constituted public services within the meaning of the legislation on the use of languages in administrative matters. Although the impugned decree itself provided that it should apply "without prejudice to language facilities", the Court considered whether it had in practice caused prejudice to French speakers' safeguards, and decided that it had not, *inter alia* because the obligation to demonstrate a willingness to learn Dutch did not imply any obligation to use that language.

The Court nevertheless declared void a provision which allowed a cancellation clause (*clause résolutoire*) to be included in the social housing tenancy agreement. This clause gave the social housing company power to terminate the lease at any

time in the event of a serious or persistent failure by the social tenant, without prior judicial supervision. The Court considered that such a clause was not reasonably justified in relation to the right to decent accommodation (Article 23 of the Constitution). It observed, referring in this context to the judgment of the European Court of Human Rights in the case of *McCann v. the United Kingdom*, of 13 May 2008, that this condition might well entail the loss of their home for a category of persons who were already disadvantaged, which had to be regarded as one of the most extreme forms of interference with the right to respect for housing.

The Court also had to consider whether the condition of a willingness to learn Dutch created a difference in treatment contravening the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), *inter alia* between would-be tenants who already knew Dutch and those who did not have the requisite level of knowledge. This difference in treatment was, according to the applicants, not justified, particularly in the light of the right to decent accommodation (Article 23 of the Constitution).

The Court referred to the preparatory work on the impugned provision, which made it clear that the provision was intended to improve security in housing complexes and conviviality in housing areas through better communication. "Willingness to learn Dutch" could not be confused with a capacity to speak Dutch. It was absolutely not the intention in the decree to give any kind of priority in access to social housing to Dutch speakers. The objective was to enable every social housing tenant to achieve a basic level of knowledge.

The Court pointed out *inter alia* that Article 23 of the Constitution guaranteed economic, social and cultural rights, but allowed legislatures to take account of "corresponding obligations". It concluded that the impugned arrangements did not give rise to differences in treatment inconsistent with the constitutional principle of equality (Articles 10 and 11 of the Constitution) or with the right to housing (Article 23 of the Constitution), either taken in isolation or in conjunction with the provisions of the Convention, subject to any penalties for refusal to learn Dutch or to follow the civic integration path being proportionate to the nuisance or damage caused by these refusals and not being used to justify termination of the lease other than after prior judicial supervision.

The Court also dismissed the applicants' complaint that it was unjustified to impose a language condition on the obtaining of social housing in the municipalities on the periphery or on the language border, as well as their complaint that such a condition constituted

interference in private life contrary to Article 22 of the Constitution and Article 8 ECHR. The Court pointed out that the lessors of rented social housing, who constituted public services within the meaning of the legislation on the use of languages in administrative matters, had to comply with these laws, where municipalities with special language facilities were concerned, and that communication between lessor and tenant had to take place in French if the latter so requested. Would-be tenants and tenants who benefited from these facilities were not under an obligation to use Dutch. The Court decided that the impugned arrangements, in order to be in conformity with the Constitution, had to be interpreted as not applying to the would-be tenants and tenants of the social housing covered by the impugned decree, located in municipalities on the periphery and on the language border, who intended to benefit from these language facilities. This interpretation, which is in conformity, is reiterated in the operative words of the judgment.

Languages:

French, Dutch, German.



Identification: BEL-2008-2-010

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 31.07.2008 / **e)** 119/2008 / **f)** / **g)** *Moniteur belge* (Official Gazette), 29.08.2008 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**
 5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship.**
 5.4.1 Fundamental Rights – Economic, social and cultural rights – **Freedom to teach.**
 5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education.**

Keywords of the alphabetical index:

School, choice / School, enrolment, order / Education, parents' freedom of choice, change of school / Education, secondary, enrolment, priority / Education, secondary, enrolment, procedure.

Headnotes:

Parents' freedom of choice in respect of education implies not only that they are free to choose an educational establishment, but also that they may change this choice.

When a parent asserts that he or she can no longer agree with an establishment's educational project for reasons of religious or philosophical belief, Articles 19 and 20 of the Constitution, in conjunction with Article 24.1 of the Constitution, with Article 9 ECHR and with Article 18 of the International Covenant on Civil and Political Rights, require that he or she may, in principle, change his or her choice of school.

Summary:

An application was lodged with the Constitutional Court to annul several articles of a decree of the French Community of 8 March 2007 introducing various measures to regulate school enrolments and changes of school in the compulsory education system, and of a decree of 19 October 2007 amending the decree of 8 March. This application was lodged by a non-profit-making association, the object of which is education, and by some pupils' parents concerned by the new school enrolment system. The Court recognised that they had *locus standi*.

The applicants first complained that the impugned decree restricted the possibilities for changing establishments in the ordinary education system in the course of an academic cycle. They based their argument firstly on freedom of education. The Court pointed in this respect to its case-law relating to parents' freedom of choice, to the right to set up educational establishments and to the right to subsidy, and concluded that this freedom of choice also implied the possibility of changing one's choice. The Court then considered whether the restrictions to this freedom contained in the decree could be justified. It took the view that the objective pursued of "reducing consumerism in school matters" was justifiable. It then allowed that there was no disproportionate infringement of freedom of education insofar as the provision was interpreted as allowing a change of school at the request of a child's parents on the grounds of their religious or philosophical belief. The Court also took account of the fact that the impugned provision included sufficient safeguards, since appeals were possible against the decision by a school head to refuse a change of school. The interpretation guidelines are reiterated in the operative words of the court's judgment.

The applicants also complained that the same provision failed to acknowledge freedom of thought, conscience and religion, and the right to respect for private and family life. The Court found, in this respect, that the right to respect for private and family life (Article 22 of the Constitution and Article 8 ECHR) was not absolute, and required any interference by the authorities to be provided for by a sufficiently precise legislative provision, to correspond to a pressing social need and to be proportionate to the objective pursued. The Court pointed out in this respect that the decree allowed parents to change their child's school in a number of possible circumstances, and that, in other cases, the school head could certainly prevent such a change by refusing to give a favourable opinion, but that such a decision had to comply with the requirements set out by the Court, and was subject to safeguards. When a parent asserted that he or she could no longer agree with an establishment's educational project for reasons of religious or philosophical belief, the provisions of the Constitution which guaranteed freedom of worship and freedom to express one's opinions (Articles 19 and 20 of the Constitution), in conjunction with Article 9 ECHR and with Article 18 of the International Covenant on Civil and Political Rights, required that he or she be able, in principle, to change his or her choice of school. The authorities which had to give an opinion about the change of school had to take account of this fundamental right. This new guideline is also included in the operative words of the judgment.

In a second submission, the applicants complained that the provisions of the decree organising the system of enrolment for secondary education violated the principles of equality and non-discrimination (Articles 10 and 11 of the Constitution). They firstly challenged the priority given to certain categories of persons, brothers and sisters of a pupil, pupils attending boarding schools, pupils benefiting from "total immersion" language learning, pupils from an associated establishment and pupils who had at least one parent working full or part-time at the establishment. The Court found in its judgment that all these priorities could be objectively and reasonably justified.

The applicants then complained that the impugned provisions created inequalities between parents, who were not all able to be present at the time set by the government for the submission of applications for enrolment at a school. The Court considered in this respect that the problem did not derive from the impugned provisions, but from their application, such that consideration of this point was not within the court's jurisdiction.

The applicants then raised an argument based on freedom of education (Article 24 of the Constitution), expressing the view that the impugned decree restricted the freedom of organisation of educational establishments by organising an enrolment procedure according to chronological order.

The Court found that the objective pursued in the decree was to make schools more socially mixed by requiring every application for enrolment to be recorded in a register, indicating the date on which each application had been made. Thus the provision did not restrict parents' freedom of choice, as all parents could submit an application for enrolment, and a place would be offered to them as soon as one was available, in the order in which applications for enrolment had been made. On the other hand, the impugned decree did restrict the freedom of organisation of educational establishments, which had to record every application for enrolment in a register, in the order in which the applications had been received, the government having set the date with effect from which applications could be submitted. The Court nevertheless found that, even before the impugned decree had come into force, an educational establishment which had a free place could not refuse to enrol a pupil, provided that, where the establishment concerned was a subsidised one, the pupils or parents concerned subscribed to the teaching and educational project of the organising authority. The impugned provisions had not created new obligations, but had simply provided for a system which promoted transparency of enrolments, since everybody could see the order in which applications for enrolment had been submitted and in which order the available places were offered. The Court therefore found that there had been no manifestly unreasonable infringement of freedom of education.

Languages:

French, Dutch, German.



Canada

Supreme Court

Important decisions

Identification: CAN-2008-2-002

a) Canada / **b)** Supreme Court / **c)** / **d)** 23.05.2008 / **e)** 32147 / **f)** Canada (Justice) v. Khadr / **g)** *Canada Supreme Court Reports* (Official Digest), [2008] 2 S.C.R. 125 / **h)** Internet: <http://scc.lexum.umontreal.ca/en/index.html>; (2008), 293 *Dominion Law Reports* (4th) 629; 375 *National Reporter* 47; 72 *Administrative Law Reports* (4th) 1; 232 *Canadian Criminal Cases* (3d) 101; 56 *Criminal Reports* (6th) 255; [2008] S.C.J. no. 28 (*Quicklaw*); CODICES (English, French).

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**.

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

5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file**.

Keywords of the alphabetical index:

Criminal procedure, foreign process / Evidence, obtained by participating in proceedings violating international human rights obligations, disclosure / International law, comity of nations, principle.

Headnotes:

When participating in a process that violates its binding international human rights obligations, Canada is bound by the Canadian Charter of Rights and Freedoms, and the comity concerns that would normally justify deference to foreign law do not apply.

The content of Canada's duty of disclosure pursuant to Section 7 of the Charter is defined by the nature of its participation in the violative process.

Summary:

I. K, a Canadian, has been detained by U.S. Forces since 2002 at Guantanamo Bay, Cuba, where he was facing murder and other terrorism-related charges. He was taken prisoner in Afghanistan when he was 15 years old. In 2003, Canadian officials, including agents of the Canadian Security and Intelligence Service, questioned K at Guantanamo Bay with respect to matters connected to the charges he is now facing, and shared the product of these interviews with U.S. authorities. After formal charges were laid against him in Cuba, K sought disclosure in Canada of all documents relevant to these charges in the possession of the Canadian Crown, including the records of the interviews. The Federal Court refused the request, but the Federal Court of Appeal set aside the decision and ordered that unredacted copies of all relevant documents in the possession of the Crown be produced before the Federal Court for review.

In an unanimous decision, the Supreme Court of Canada dismissed the appeal but varied the appellate decision with respect to the scope of disclosure.

II. The principles of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law and which might otherwise preclude application of the Canadian Charter of Rights and Freedoms to Canadian officials acting abroad, do not extend to participation in processes that violate Canada's binding international human rights obligations. The process in place at Guantanamo Bay at the time Canadian officials interviewed K and passed on the fruits of the interviews to U.S. officials has been found by the U.S. Supreme Court, with the benefit of a full factual record, to violate U.S. domestic law and international human rights obligations to which Canada subscribes. The comity concerns that would normally justify deference to foreign law do not apply in this case. Consequently, the Charter applies.

With K's present and future liberty at stake, Canada is bound by the principles of fundamental justice and is under a duty of disclosure pursuant to Section 7 of the Charter. The content of this duty is defined by the nature of Canada's participation in the process that violated its international human rights obligations. In the present circumstances, this duty requires Canada to disclose to K records of the interviews conducted by Canadian officials with him, and information given to U.S. authorities as a direct consequence of conducting the interviews, subject to claims for privilege and public interest immunity. Since unredacted copies of all documents, records and other materials which might be relevant to the charges against K have already been produced to a

judge of the Federal Court, the judge will now review the material, receive submissions from the parties and decide which documents fall within the scope of the disclosure obligation.

Languages:

English, French (translation by the Court).



Identification: CAN-2008-2-003

a) Canada / **b)** Supreme Court / **c)** / **d)** 27.06.2008 / **e)** 31603 / **f)** R. v. Kapp / **g)** *Canada Supreme Court Reports* (Official Digest), [2008] 2 S.C.R. 483 / **h)** Internet: <http://scc.lexum.umontreal.ca/en/index.html>; (2008), 294 *Dominion Law Reports* (4th) 1; 376 *National Reporter* 1; 232 *Canadian Criminal Cases* (3d) 349; [2008] 8 *Western Weekly Reports* 1; [2008] 3 *Canadian Native Law Reporter* 347; [2008] S.C.J. no. 42 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

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

5.2.3 Fundamental Rights – Equality – **Affirmative action**.

5.5.5 Fundamental Rights – Collective rights – **Rights of aboriginal peoples, ancestral rights**.

Keywords of the alphabetical index:

Aboriginal, affirmative action programme / Aboriginal, communal fishing licence.

Headnotes:

Section 15.1 and 15.2 of the Canadian Charter of Rights and Freedoms work together to promote the vision of substantive equality that underlies the Charter. The focus of Section 15.1 of the Charter is on preventing governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of Section 15.2 of the Charter is on enabling governments to pro-actively combat discrimination by developing programmes aimed at helping disadvantaged groups improve their situation.

Summary:

I. The federal government's decision to enhance aboriginal involvement in the commercial fishery led to the Aboriginal Fisheries Strategy. A significant part of the Strategy was the introduction of three pilot sales programmes, one of which resulted in the issuance of a communal fishing licence to three aboriginal bands permitting fishers designated by the bands to fish for salmon in the mouth of the Fraser River for a period of 24 hours and to sell their catch. The appellants, who are all commercial fishers, mainly non-aboriginal excluded from the fishery during this 24-hour period, participated in a protest fishery and were charged with fishing at a prohibited time. At their trial, they argued that the communal fishing licence discriminated against them on the basis of race. The trial judge found that the licence granted to the three bands was a breach of the appellants' equality rights under Section 15.1 of the Charter that was not justified under Section 1. Proceedings on all the charges were stayed. A summary convictions appeal by the Crown was allowed. The stay of proceedings was lifted and convictions were entered against the appellants. Both the Court of Appeal and the Supreme Court of Canada upheld that decision.

II. It is open to the government, when faced with a Section 15 claim, to establish that the impugned programme falls under Section 15.2 of the Charter and is therefore constitutional. If the government fails to do so, the programme must then receive full scrutiny under Section 15.1 of the Charter to determine whether its impact is discriminatory. Here, the communal fishing licence falls under Section 15.2 of the Charter and is therefore constitutional.

A distinction based on an enumerated or analogous ground in a government programme will not constitute discrimination under Section 15 if, under Section 15.2 of the Charter:

1. the programme has an ameliorative or remedial purpose; and
2. the programme targets a disadvantaged group identified by the enumerated or analogous grounds.

Given the language of the provision and its purpose, legislative goal is the paramount consideration in determining whether or not a programme qualifies for Section 15.2 protection. The programme's ameliorative purpose need not be its sole object. The communal fishing licence was issued here pursuant to an enabling statute and regulations and qualifies as a "law, programme or activity" within the meaning of Section 15.2. The programme also "has as its object

the amelioration of conditions of disadvantaged individuals or groups". The Crown describes numerous objectives for the programme, which include negotiating solutions to aboriginal fishing rights claims, providing economic opportunities to native bands and supporting their progress towards self-sufficiency. The means chosen to achieve the purpose (special fishing privileges for aboriginal communities, constituting a benefit) are rationally related to serving that purpose. The Crown has thus established a credible ameliorative purpose for the programme. The programme also targets a disadvantaged group identified by the enumerated or analogous grounds. The bands granted the benefit were disadvantaged in terms of income, education and a host of other measures. The fact that some individual members of the bands may not experience personal disadvantage does not negate the group disadvantage suffered by band members.

With respect to Section 25 of the Charter, it is not clear that the communal fishing licence at issue lies within the provision's compass.

Section 25 provides that "[t]he guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:

- a. any rights or freedoms that have been recognised by the Royal Proclamation of 7 October 1763; and
- b. any rights or freedoms that now exist by way of land claims agreements or may be so acquired."

The wording of Section 25 and the examples given therein suggest that only rights of a constitutional character are likely to benefit from Section 25. A second concern is whether, even if the fishing licence does fall under Section 25, the result would constitute an absolute bar to the appellants' Section 15 claim, as distinguished from an interpretive provision informing the construction of potentially conflicting Charter rights. Prudence suggests that these issues, which raise complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians, are best left for resolution on a case-by-case basis as they arise.

In a concurring opinion, one judge agreed with the restatement of the test for the application of Section 15 of the Charter set out in the main opinion, but held that Section 25 of the Charter operates to bar the appellants' constitutional challenge under Section 15.

He found that there is no need to go through a full Section 15 analysis before considering whether Section 25 applies. It is sufficient to establish the existence of a potential conflict between the pilot sales programme and Section 15. Here, the right to fish given by the pilot sales programme falls under Section 25 and there is a real conflict since the right to equality afforded to every individual under Section 15 is not capable of application consistently with the rights of aboriginal fishers holding licences under the pilot sales programme. Section 25 of the Charter accordingly applies in the present situation and provides a full answer to the claim.

The communal fishing licence issued under the pilot sales programme granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours falls within the ambit of Section 15.2 of the Charter and did not breach the equality rights of the commercial, mainly non-aboriginal fishers who were excluded from the fishery at that time.

Languages:

English, French (translation by the Court).



Croatia

Constitutional Court

Important decisions

Identification: CRO-2008-2-007

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 23.04.2008 / **e)** U-III-1437/2007 / **f)** / **g)** *Narodne novine* (Official Gazette), 55/08 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality.**

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

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

Keywords of the alphabetical index:

Prisoner, treatment / Compensation, for damages.

Headnotes:

Where a person is incarcerated for a lengthy period in a prison that does not meet the standards laid down in Croatian legislation on prisons, because the cell lacks one quarter of the space required by the statutory minimum, the light is poor and they cannot meet their physiological needs at night, these factors are sufficient to cause that person hardship of an intensity exceeding the unavoidable level of suffering inherent to detention. He or she will accordingly have been exposed to conditions amounting to degrading treatment; treatment that breaches legal standards respecting a prisoner's dignity laid down in the Constitution. In such cases, regular courts are obliged to award compensation for violation of human dignity.

Summary:

The applicant lodged a constitutional complaint against the Varaždin County Court decision of 25 February 2007, which dismissed the applicant's appeal and confirmed the Ivanec Municipal Court decision of 28 November 2006. This judgment refused the applicant's claim for payment of

24,000 HrK in respect of non-pecuniary damage from the Republic of Croatia, Ministry of Justice, the Prison System Directorate, Lepoglava State Prison. During the judicial proceedings, it was established that the applicant was for a portion of his imprisonment accommodated in inadequate prison cells. However, the ordinary courts found that this did not damage his health, and that the legal requirements for compensation for damage were not met.

The applicant argued that these judgments infringed his constitutional rights guaranteed under the Constitution in Article 14.2 (equality of all before the law) and Article 25.1. Article 25.1 requires humane treatment and respect for the dignity of all arrested and convicted persons. He pointed out that during his imprisonment in the B wing of Lepoglava State Prison, he and three others were exposed to conditions not satisfying the basic detention criteria. This wing had no sanitary facilities.

The Constitutional Court upheld the constitutional complaint, overturned the second and first instance judgment and returned the case to the first instance court for retrial for the reasons expounded below.

Article 74 of the Act on the Enforcement of Prison Sentence stipulates that accommodation for inmates shall meet the required standards in terms of health, hygiene, space and climate conditions; that inmates' rooms shall be clean, dry and of adequate size; that penitentiaries and prisons shall be equipped with sanitary facilities allowing inmates to meet their physiological needs in clean and adequate conditions whenever they wish to do so.

The Constitutional Court noted from examination of the facts of the case that between 7 February 2001 and 6 April 2003, the applicant was imprisoned in the B wing of Lepoglava State Prison. This wing had not been renovated, and fell some way below the required standards of accommodation and detention set out in the above legislation, as it lacked one quarter of the space required by the statutory minimum. The lighting was poor, and the applicant was unable to meet his physiological needs at night. Moreover, between 7 February and 6 April 2003, he was detained in wing IVB in a common room with three inmates. This wing housed prisoners found guilty of war crimes against civilians. On 6 April 2003, he was transferred to wing 1D, where he remained until 12 December 2003.

The Constitutional Court found that the established factors of inadequate space coupled with a lack of access to the toilet for lengthy periods during the night were in themselves sufficient to cause the applicant hardship of an intensity exceeding the

unavoidable level of suffering inherent in detention. Thus, during the above period, the applicant was exposed to conditions amounting to degrading treatment, i.e. treatment in violation of standards that respect a prisoner's dignity in Article 25.1 of the Constitution.

The Constitutional Court found especially unacceptable the view of the courts that in this case non-pecuniary damage in Article 200 of the Civil Obligations Act (*Narodne novine* nos. 53/91, 73/91, 3/94, 7/96, 91/96, 112/99 and 88/01) could not have been awarded to the applicant, as the case concerned a legally unrecognised form of compensation for damage.

The Constitutional Court emphasised that modern democratic states particularly protect the personal rights of every human being, and non-pecuniary damage includes three forms of damage: biological (bodily injury), moral (mental injury) and existential (injury of all other personal rights, for instance injury to the human spirit).

It also observed that Article 1046 of the new Civil Obligations Act (*Narodne novine* no. 35/05) defines non-pecuniary damage as violation of personal rights, which means that every violation of a personal right is considered non-pecuniary damage. Article 19.2 of the Civil Obligations Act defines personal rights as the right to life, physical and mental health, dignity, reputation, honour, privacy of personal and family life, freedom and others. Therefore, the non-pecuniary damage is not considered simply to be the presence of mental or physical pain or fear (which was the concept of the old Civil Obligations Act) or diminishment of vital activities none of which featured in the instant case, according to the findings of the regular courts), but every violation of personality and dignity under Article 19 of the present Civil Obligations Act.

The Constitutional Court found that the established facts of the case demonstrated a violation of the dignity of the applicant of the constitutional complaint and were grounds for a claim in respect of non-pecuniary damage. The fact that the damage occurred when the old Civil Procedure Act was in force did not pose an obstacle to the acceptance of his claim by the courts, because Article 200.1 made provision for non-pecuniary damage caused by the violation of other "personal rights" (although these rights were not defined by this Act). However, the theoretical concept of personal rights was clear even at that time, and the violation of the right to dignity was certainly considered a violation of a personal right.

Further to the above, the Constitutional Court concluded that in the instant case a human constitutional and personal value was violated because the applicant was imprisoned in conditions that fell below the standards laid down in the Act on the Enforcement of Prison Sentence and those set out in Article 25.1 of the Constitution. The courts were accordingly also obliged to award compensation for this violation of human dignity.

Languages:

Croatian, English.



Identification: CRO-2008-2-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 30.04.2008 / **e)** U-I-402/2003 and U-I-2812/2007 / **f)** / **g)** *Narodne novine* (Official Gazette), 78/08 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.2.2.1 Constitutional Justice – Types of claim – Claim by a private body or individual – **Natural person.**
 1.3.2.2 Constitutional Justice – Jurisdiction – Type of review – **Abstract / concrete review.**
 1.3.5.4 Constitutional Justice – Jurisdiction – The subject of review – **Quasi-constitutional legislation.**
 2.1.1.4.16 Sources – Categories – Written rules – International instruments – **Framework Convention for the Protection of National Minorities of 1995.**
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
 5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law.**
 5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin.**
 5.3.29 Fundamental Rights – Civil and political rights – **Right to participate in public affairs.**

Keywords of the alphabetical index:

Minority, protection / Discrimination, positive, appropriate measures.

Headnotes:

The Constitutional Act on the Rights of National Minorities gives preference in employment to these minorities. This is a special positive measure, implying the intentional according of priority to a specific group or groups (such as ethnic, gender, social, political), in order to remove factual inequality and differentiating between persons according to stated or other characteristics, thereby preventing different forms of open (direct) or hidden (indirect) discrimination, where the legislator has established that such discrimination exists. Preference for employment of members of national minorities is not automatic or unconditional, and only applies where certain stipulated requirements are met. Its application ensures proportionality in representation of members of national minorities in administrative and judicial bodies in a manner that ensures their equal position with other citizens of the Republic of Croatia.

Summary:

The Constitutional Court rejected a petition by two natural persons requesting a review of the conformity with the Constitution of Article 22.2, 22.3 and 22.4 of the Constitutional Act on the Rights of National Minorities (*Narodne novine* no. 155/02).

Under Article 22 of the Constitutional Act, members of national minorities are entitled to representation in the state administration, judicial organisations and local authority departments (local and regional), in compliance with the provisions of special acts, taking due account of their participation in the total population at the level at which the body has been formed as well as their acquired rights. Such preference, under the same conditions, shall be given to the representatives of national minorities.

The petitioners argued that this provision placed members of national minorities in a more favourable position, and that even “positive” discrimination was not allowed as, by definition, it constitutes discrimination.

The Constitutional Court considered various constitutional provisions relevant for the review of constitutionality of the disputed provision of the Constitutional Act. These included Article 3 (equality and respect for human rights and the rule of law as the highest values of the constitutional order); Article 14 (prohibition of discrimination, and equality of all before the law); Article 15.1 (equal rights to all national minorities) and Article 15.2 (equality and protection of national minorities shall be regulated in

the constitutional act). It also took into account the provisions of Articles 1, 4.2, 4.3 and 15 of the Framework Convention for the Protection of National Minorities (Ratification Act, *Narodne novine* – International Agreements, no. 14/97, entered into force on 17 October 1997).

The Constitutional Court observed that the preference under dispute is a separate positive measure that implies intentionally giving priority to a specific group or groups (ethnic, gender, social, political, etc.), with the aim of removing factual inequality and differentiating between persons according to the stated or other characteristics, thereby preventing different forms of open (direct) or concealed (indirect) discrimination, provided that the legislator has established that such discrimination in their respect exists.

However, the prescribed preference in the employment of members of national minorities is not automatic or unconditional, and it is only applied if the stipulated requirements are met. Its application secures proportionality in representation of members of national minorities in administrative and judicial bodies in a manner which ensures their equal position with other citizens of the Republic of Croatia. The stipulated preference in employment should be taken as a separate positive measure in favour of members of national minorities (minority groups) with the aim of securing their rights to effective participation in public affairs through their employment in the state administration and judicial bodies and administrative bodies of the units of local self-government within the meaning of Articles 4.2, 4.3 and 15 of the Framework Convention. This places a duty on the parties to adopt appropriate measures and create conditions in order to promote efficient equality between persons belonging to national minorities and those belonging to the majority population in all areas of economic, social, political and cultural life, and to enable their effective participation in public affairs.

The Constitutional Court took the view that the positive measure used in employing members of national minorities fell within the scope of the legislator’s free assessment. It could be perceived as justified and permissible as long as the reasons for its introduction persist. This is decided by the legislator in the first place; i.e. until the measure begins to compromise the principle of proportionality, prescribed in Article 16 of the Constitution, which is in the first place the subject of constitutional court control. Therefore, as long as the positive measure in Article 22 of the Constitutional Act can be considered justified, permissible and proportionate, it should not be considered as a form of discrimination prohibited by Article 14.1 of the Constitution.

In the light of the above, and from the perspective of the relevant constitutional provisions and those of the relevant international agreements, the Constitutional Court held that the petitioners' contentions as to the unconstitutionality of the provisions of Article 22 of the Constitutional Act were not well founded.

Languages:

Croatian, English.



Identification: CRO-2008-2-009

a) Croatia / b) Constitutional Court / c) / d) 18.06.2008 / e) U-III-195/2006 / f) / g) *Narodne novine* (Official Gazette), 78/08 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Communities.**

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

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

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

Keywords of the alphabetical index:

Property, seizure, adequate compensation / Compensation, damages.

Headnotes:

Owners are entitled to compensation if they are unable to use their property due to acts of the state in the implementation of social measures undertaken in order to remove the consequences of war. However, they are not entitled to compensation equivalent to the market value of the property in respect of property they abandoned which was given to temporary users in compliance with relevant legal provisions. Starting from the legitimate aim of restricting applicant's right of ownership on the property and the principle of

proportionality, the amount of compensation for the property should be "reasonably related to its value".

Summary:

The applicant lodged a constitutional complaint against the Šibenik County Court judgment of 21 November 2005, which had rejected as groundless his appeal against the Knin Municipal Court judgment of 14 September 2004. The first instance court accepted in part the applicant's claim for compensation for the use of two flats in his two-storey house, (namely for one flat between 1 November 2002 and 26 September 2003 and for another flat between 1 November 2002 to 2 April 2003). The compensation awarded was lower than that for which he had claimed. At the same time, the court totally rejected his claim for the period from 5 October 1998 to 31 October 2002, on the basis that there were no grounds in substantive law to award compensation.

Under the Temporary Takeover and Management of Certain Property Act, the Republic of Croatia gained temporary control over and use of privately-owned property which had been abandoned by its owners, in order to protect it. Also, Articles 8 and 10 of the Areas of Special State Concern Act (which came into force on 12 June 1996) allowed settlers in areas of special concern to be accommodated in family houses or flats abandoned and unused by their owners in the sense of the Temporary Takeover and Managing of Certain Property Act.

In the case in point, decisions by national governmental bodies had awarded the applicant's property to temporary users under the legislation then in force and described above. This was in compliance with the general interest, and the measures were taken with a legitimate aim of protecting abandoned property from devastation and deterioration, and to provide accommodation for displaced persons or those whose homes had been destroyed in the war. It is indisputable that the applicant's property was not confiscated, but he was restricted in its use. On 5 October 1998 the applicant filed a claim for return of his property. He took one flat back into possession on 2 April 2003, and the other on 26 September 2003.

The applicant acknowledged that his right of ownership and possession had been restricted in the national interest, as the property was given into the possession of persons that the state had to provide for. The only factor missing was compensation for the applicant at market value. He noted that the first and second instance courts grounded their decisions on the provisions of Article 27.2 and 27.4 of the Areas of Special State Concern Act and on the Decision of the Government of the Republic of Croatia on the Amount

of Compensation of 17 April 2003. However, the applicant had referred to the constitutional guarantee of ownership as the legal grounds for his claim for payment of the market value for restriction of the right of ownership. There was no mention whatsoever in the disputed judgment as to whether this request was well founded. Instead, the courts awarded compensation for the impossibility of using the property after 30 October 2002 under Article 27 of the Areas of Special State Concern Act.

The Constitutional Court noted that the issue of the proceedings prior to the constitutional complaint was whether the State had interfered excessively with the applicant's right of ownership by not allowing him to repossess his property from the day when he filed a suit for its repossession on 5 October 1998.

The Constitutional Court noted various constitutional provisions, including Article 16.2 (principle of proportionality), Article 48.1 (guarantee of ownership), Article 50.1 (restriction or expropriation of property by law in the interest of the State upon payment of compensation equal to its market value) and Article 50.2 (exceptional restriction or expropriation of property for the purposes of protecting the interests and security of the State). It also took note of Article 1 Protocol 1 ECHR (protection of property).

The Constitutional Court found some justification in the applicant's claims that the courts had erred, in the given legal situation, in only applying the provisions of the Areas of Special State Concern Act (*Narodne novine* no. 88/02). It took the view that the provisions of the Areas of Special State Concern (Revisions and Amendments) Act were transitional and concluding provisions, regulating the obligation of the State to compensate owners in cases when the deadlines in the Act have expired. They do not, however, apply to compensation for a case such as the one under scrutiny, i.e. where the property owner is seeking compensation for being unable to use his property during the period covered by the lawsuit, i.e. from the day when he filed a request for repossession with the competent body.

According to the Constitutional Court this does not in itself mean, as the courts held, that there are no grounds in substantive law for "compensating the damage" suffered by the applicant, i.e. compensating him for not being able to use the property in the period covered by the lawsuit – from the day when he filed the request for repossession, which also includes the period before entry into force of the Areas of Special State Concern Act. The applicant's right to compensation for this period will depend on the court's assessment as to whether the length of time for which he could not use his property placed

an excessive burden on him by comparison with the legitimate aim resulting in his dispossession. Courts will need to examine the above circumstances whenever they are adjudicating the merits of an action for compensation for inability to use property.

The Constitutional Court held that in this type of case, owners are entitled to due compensation for being unable to use their property because of acts of state in implementing social measures undertaken with the aim of removing the effects of war. The Constitutional Court also noted that the European Court had confirmed that damages may be payable in such circumstances, in *Radanović v. Croatia* (26 December 2006). Here, the European Court, by deciding on the equitable basis, awarded the applicant just satisfaction for pecuniary damage.

As for the amount of compensation, the Constitutional Court found that there were no grounds for the courts to refer to the Decision of the Government of the Republic of Croatia of 17 April 2003, in which the Government set the amount of compensation to be paid to owners for not keeping to the deadlines prescribed in the Areas of the Special State Concern (Revisions and Amendments) Act. The Constitutional Court stated that the Decision was not a general normative act of binding character, as it was not binding in relation to property owners whose property was not returned to them before the expiry of the deadlines prescribed in Article 27.2 and 27.3 of the Act. Rather, it was an offer made by the Government of the Republic of Croatia as compensation to owners for being unable to use their property because of the acts of the state in implementing social measures taken to remove the effects of war. The Constitutional Court took the same stance in ruling no. U-II-1953/2003 of 18 June 2008. The above did not give the applicant the right to compensation corresponding to market value. Starting from the premise of the legitimate aim for restricting the applicant's right of ownership and the principle of proportionality, the amount of compensation should be "reasonably related to its value" (see European Court judgment in this respect expressed in *Gashi v. Croatia* of 13 December 2007).

The Constitutional Court also observed that the provisions of the Constitution and the Convention should have been used in the applicant's case as a benchmark for a decision as to the merits of his claim, in order to strike a fair balance between the demands of the general public interest and the demands of the protection of the fundamental rights of the individual, which the competent courts failed to do. The Constitutional Court accordingly overturned the first and second instance judgments, and referred the case to the first-instance court for retrial.

Languages:

Croatian, English.



Identification: CRO-2008-2-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 09.07.2008 / **e)** U-I-3226/2006 / **f)** / **g)** *Narodne novine* (Official Gazette), 95/08 / **h)** CODICES (Croatian, English).

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**.

1.3.4.10 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the constitutionality of enactments**.

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**.

4.8.5 Institutions – Federalism, regionalism and local self-government – **Definition of geographical boundaries**.

Keywords of the alphabetical index:

Municipality, boundary, change / Act, provision, unconstitutional / European Charter of Local Self-Government / Local self government.

Headnotes:

The Croatian Constitution and the European Charter of Local Self-Government both require that the opinions of citizens in the area affected and the relevant representative bodies should be sought, when changes to the boundaries are proposed. The fact that neither the European Charter nor the relevant acts explicitly define the manner in which the opinion of the citizens or the unit of local self-government of the territory requesting the change should be expressed does not affect the obligation to

implement the statutory procedure, regardless of the fact that the legislator is not bound by the opinion.

Summary:

The City of Samobor Council requested a review of the conformity with the Constitution of the provisions of Article 4.3 of the Territories of Counties, Towns and Municipalities of the Republic of Croatia Act (*Narodne novine* nos. 86/06, 125/06 and 16/07), referred to here as the Act/06. It repealed the part of the Act that read “*Prekrižje Plešivičko*”, and ordered that the repealed provision should lose its legal force on 31 December 2008.

Article 4.3 of the Act placed Prekrižje Plešivičko settlement within the City of Jastrebarsko. This settlement formed part of the City of Samobor under previous legislation.

The petitioner argued that this change contravened Article 30 of the Territories of Counties, Towns and Municipalities of the Republic of Croatia Act (*Narodne novine* nos. 10/97, 124/97, 50/98, 68/98, 22/99, 42/99, 117/99, 128/99, 44/00, 129/00, 92/01, 79/02, 83/02, 25/03, 107/03 and 175/03), referred to here as the Act/97, which lost its force on 13 June 2006, when the Act/06 entered into force. This was due to failure to consult the opinions of Prekrižje Plešivičko citizens and those of the City of Samobor Council and the Zagreb County Assembly.

The Constitutional Court viewed the question of the constitutionality of the disputed legal provision against the background of Article 133.1 of the Constitution. This stipulates that municipalities and towns are units of local self-government and their territories should be determined in the way prescribed by law. Also of relevance here was the Act on the Ratification of the European Charter of Local Self-Government (*Narodne novine – Međunarodni ugovori*), referred to here as International Agreements no. 14/97), which in Article 5 of the European Charter of Local Self-Government stipulates that changes to local authority boundaries should not be made without prior consultation of the local communities concerned. This could be done by referendum where this is permitted by statute.

The Constitutional Court noted that under Article 133.1 of the Constitution, procedures for altering local authority boundaries are set out in Article 7.2 of the Local and Regional Self-Government Act (*Narodne novine* no. 33/01). This stipulates that any such changes can only be made upon prior consultation of the citizens of the unit concerned. Of relevance here are the provisions of Articles 30 and 31 of the Act/97, under which changes to boundaries can be proposed by the representative body of a unit, or at the request of

one-third of the citizens resident in the territory. If the representative body is seeking changes, it must obtain the opinion of the citizens in the territory requesting the change. If the citizens are seeking changes, they will need to canvas the opinion of the representative body.

The Constitutional Court observed that in the case in point, the legal provision under dispute joined Prekrižje Plešivičko to the City of Jastrebarsko. However, the procedures set out in legislation were not followed; neither the opinion of the citizens of Prekrižje Plešivičko nor of the Zagreb County Assembly were obtained.

The initiative under which Prekrižje Plešivičko settlement was separated from the City of Samobor and joined to the City of Jastrebarsko was started by the Plešivica Local Board in 1994. However, this initiative was not outlined in a formal manner, pursuant to law, which would have clearly and unequivocally expressed the will of the citizens of this settlement, especially in view of the time that had passed between the launch of the initiative and the enactment of Act/06. Both the expert group charged with drafting the Act and the legislator accepted as relevant the initiative of the Plešivica Local Board of 1994, which had repeatedly been forwarded to the competent bodies over a longer period of time. However, the local board is not empowered to propose changes to local authority boundaries.

The Constitutional Court noted that obtaining the opinion of citizens when changing boundaries is required by Article 133 of the Constitution. The European Charter requires the seeking of the opinion of the relevant local unit. The European Charter forms part of the internal legal order of the Republic of Croatia and is, in terms of legal effects, above the law and of direct application. This is stated in Article 140 of the Constitution. In the case in point, opinions were not sought from the citizens or the relevant local unit. The fact that neither the European Charter nor the relevant acts explicitly define the way in which these opinions should be expressed does not affect the obligation to implement the statutory procedure, regardless of the fact that the legislator is not bound by the opinion.

The Constitutional Court found that the disputed legal provision was in breach of Article 5 ECHR and Articles 133.1 and 5.1 of the Constitution (principle of constitutionality).

Languages:

Croatian, English.



Cyprus Supreme Court

Important decisions

Identification: CYP-2008-2-001

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 25.01.2008 / **e)** 243/06 / **f)** Constantinou v. Republic / **g)** to be published in *Cyprus Law Reports* (Official Digest) / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

- 3.9 General Principles – **Rule of law.**
- 3.12 General Principles – **Clarity and precision of legal provisions.**
- 3.14 General Principles – **Nullum crimen, nulla poena sine lege.**
- 5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**
- 5.3.13.25 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the charges.**

Keywords of the alphabetical index:

Criminal proceedings.

Headnotes:

Article 11.2 of the Constitution stipulates no person shall be deprived of his liberty save in the following cases when and as provided by the law.

Article 5.1 ECHR stipulates that everyone has the right of liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.

Summary:

I. The appellant was convicted by the Assize Court of the offences of sexual exploitation of a minor and indecent assault. He challenged his conviction by means of an appeal to the Supreme Court.

II. The Supreme Court allowed the appeal on the ground that the Assize Court had erred in evaluating the evidence.

The Supreme Court noted in its judgment that according to the principles of the rule of law every person should be fully aware of what conduct constitutes a criminal offence and the sentence to be imposed in the event of committing it. He should be fully aware of what acts and omissions will make him criminally liable and the relevant sentences. The Court in its judgment cited cases from the European Court of Human Rights, which emphasised that offences and the relevant penalties must be clearly defined by law.

The appeals were allowed.

Languages:

Greek.



Identification: CYP-2008-2-002

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 21.01.2008 / **e)** 185/2006, 210/2006 / **f)** Theocharous v. Republic / **g)** to be published in *Cyprus Law Reports* (Official Digest) / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

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:

Trial within reasonable time, delay, sentence, mitigation.

Headnotes:

Under the Constitution, in the determination of his or her civil rights and obligations or of any criminal charges, every person is entitled to a fair and public hearing within a reasonable time by an independent, impartial and competent court established by law.

Summary:

I. The Assize Court convicted the appellant of the offences of conspiracy to defraud, obtaining money by false pretences, corruption and abuse of power. The offences were committed in 2000 and the indictment was filed in December 2001. Judgment was delivered in 2006.

Upon appeal against his conviction the appellant challenged the validity of his trial and sought its annulment because his criminal liability was not determined within a reasonable time as provided by Article 30.2 of the Constitution.

II. The Supreme Court noted that although the period that elapsed between the arrest and the time of first appearance before the Court was not unreasonably lengthy, there had been a delay of three and a half years, between the appellant's First Court appearance and the date the hearing commenced. This contravened Article 30.2 of the Constitution and Article 6.1 ECHR. Nonetheless, the Supreme Court held that the Assize Court had considered this delay when imposing sentence on the appellant. The delay was accordingly remedied by mitigation of the sentence imposed.

The appeal was dismissed.

Languages:

Greek.



Czech Republic

Constitutional Court

Statistical data

1 May 2008 – 31 August 2008

- Judgment of the Plenary Court: 7
- Judgment of panels: 59
- Other decisions of the Plenary Court: 8
- Other decisions by chambers: 944
- Other procedural decisions: 32
- Total: 1 050

Important decisions

Identification: CZE-2008-2-006

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 06.05.2008 / **e)** Pl. US-st 25/08 / **f)** Deciding on a constitutional complaint against a detention decision when the plaintiff is no longer being detained / **g)** *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court); <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.5.4.2 Constitutional Justice – Decisions – Types – **Opinion.**

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

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

5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis*.**

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, compensation / Detention, liberation before intervention of constitutional court.

Headnotes:

Actual interference in fundamental rights under the Czech Constitution and the Act on the Constitutional Court is always involved if that interference – and thus any subsequent confirming decision by the Constitutional Court – can manifest itself in the legal sphere of the petitioner. Therefore, protection of the fundamental right to personal freedom, which is enshrined in the Charter of Fundamental Rights and Freedoms and which provides that nobody can be taken into custody except on grounds and for a period provided by statute, and on the basis of a court decision requires that an illegal decision on detention always be annulled. This also applies in cases where the detention has ended by the time the Constitutional Court makes its decision.

Summary:

The plenum of the Constitutional Court adopted the above position on 6 May 2008, after a request from panel II for an assessment of the panel's differing legal opinion. The Constitutional Court's opinion was issued in connection with a constitutional complaint arising from a decision by a general court, refusing a petition to release the plaintiff from custody. In this regard the Constitutional Court pointed to the lack of uniformity in its decision-making on the question of whether, in the case of a constitutional complaint against a decision ordering detention, it is still possible to repeal the decision if the plaintiff has already been released from custody when the Constitutional Court makes its decision. While in several cases a contested decision was annulled on the grounds that it "continued to manifest itself in the petitioner's legal sphere", in most cases the Constitutional Court did give a verdict finding that the petitioner's rights had been violated, but with reference to the impossibility of an immediately and present interference that could affect the petitioner's situation, it denied the constitutional complaint due to obvious lack of justification.

The Constitutional Court concluded that it would be appropriate to unify its procedures so that, where constitutional complaints are upheld, it will repeal the contested decision ordering detention, although the petitioner is no longer in custody. It started from the premise that, on its own, a statement to the effect that a petitioner's constitutional right had been violated would not, if the custody decision was left to stand, create a claim for compensation of damages under the Act on Liability for Damage Caused in the Exercise of Public Authority through a Decision or Incorrect Official Procedure. It also pointed to the possible inequality that would arise where the justification for the constitutional complaint depended

only on whether the Constitutional Court acted sufficiently quickly and made its decision at a time when the petitioner was still in custody. It also took into consideration the opinion of the European Court of Human Rights concerning interpretation of Article 5.5 ECHR. The only reason for granting damages under Article 5.5 ECHR is illegality due to inconsistency with domestic law, or directly due to inconsistency with Article 5 ECHR. In this regard it also accepted the legal conclusions stated in the decision of the European Court of Human Rights on 27 September 2007 in the matter of *Smatana v. the Czech Republic*, under which it was precisely as a result of non-annulment of a detention decision on the part of the Constitutional Court that the petitioner could not seek enforcement of his right under Article 5.5 ECHR.

The judge rapporteur in the matter was Justice Nykodým. None of the judges filed a dissenting opinion.

Languages:

Czech.



Identification: CZE-2008-2-007

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 20.05.2008 / **e)** Pl. US 12/07 / **f)** On judicial review of a decision denying the issue of and revoking a travel document from somebody undergoing criminal prosecution / **g)** *Sbírka zákonů* (Official Gazette), no. 355/2008 Coll.; *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court); <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

5.1.4.3 Fundamental Rights – General questions – Limits and restrictions – **Subsequent review of limitation.**

5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement.**

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:

Passport, withdrawal / Right to travel, restriction.

Headnotes:

Under the Charter of Fundamental Rights and Freedoms, the right to freedom of movement can only be limited if the condition of unavoidability is met. At the same time, there is a guaranteed universal right to judicial review of limitation of that right from the point of view of unavoidability. The Czech legislation then in force on travel documentation limited the rights of somebody holding a travel document to seek protection of his or her rights before a court or other body in a manner that totally precluded this constitutionally guaranteed judicial review of interference. The provision was accordingly held to be inconsistent with the right to judicial review of administrative decisions and the right to freedom of movement under the Charter.

Summary:

I. The Supreme Administrative Court filed a petition with the Constitutional Court, seeking the repeal of a provision in the Act on Travel Documents and Amending the Act on the Police of the Czech Republic that imposed on the appropriate administrative body the obligation, at the request of a body active in the criminal proceedings, to deny the issue of or to revoke a travel document of a citizen being prosecuted for an intentional crime.

The contested provision was amended by a statute that came into force on 1 January 2005. However, that fact did not establish grounds for suspending proceedings in the matter in question. The general court's petition under Article 95.2 of the Constitution was directed against the contested provision in the wording that was valid and in effect through 31 December 2004, the application of which was to be reviewed by the petitioner in proceedings on a cassation complaint. The reasons for the alleged unconstitutionality were ascribed to the public authorities. Thus, under Article 95.2 of the Constitution, the Constitutional Court was required to review the constitutionality of the contested provision on the merits.

II. The Constitutional Court stated that freedom of movement under Article 14 of the Charter also includes the right to travel freely in and out of the country. Article 14.3 of the Charter allows the public authorities to curtail that freedom, if such a restriction is provided for by statute, has a legitimate purpose, and is unavoidable (necessary) in a democratic society. As regards the contested provision, the first and second conditions were met. The limitation of freedom in

question was provided by statute. The aim was to prevent those being prosecuted for an intentional crime evading or impeding criminal prosecution. The Constitutional Court recognised the purpose of criminal proceedings as a generally legitimate public interest, or as a legitimate aim of the contested legal framework.

With regard to the question of necessity the Constitutional Court pointed to the need for a system of appropriate and adequate guarantees, consisting of the appropriate legal regulations and effective supervision to ensure that they are observed. Article 36.1 of the Charter guarantees everyone the opportunity to assert his rights in the specified procedures before an independent and impartial court, and in specified instances, before a different body. Statutory implementation of that provision, under Article 36.4 of the Charter, may not negate this entitlement, because that would contradict the fundamental right. The Criminal Procedure Code does not provide a defendant any procedural means for obtaining effective review of the appropriateness of the proposed measure, because an application by a body active in criminal proceedings to deny the issue of or to revoke a travel document is decided on in non-criminal proceedings. Furthermore, the provision offered the relevant administrative body no scope for administrative discretion regarding the necessity or appropriateness of the proposed measure. It did not, therefore, satisfy the third condition, because the legislature completely ruled out judicial evaluation of the interference in question from the point of view of unavoidability (necessity) of limitation of freedom of movement, because the administrative body always had to grant the application of the body active in criminal proceedings.

In conclusion, the Constitutional Court added that, under Article 36.2 of the Charter, an administrative decision cannot be exempted from judicial review if it concerns fundamental rights and freedoms guaranteed by the Charter. The contested provision does not rule out judicial review of the administrative body's decision, but the review is limited and does not include review of the procedure (petition) of the body active in criminal proceedings. The Constitutional Court decided that the contested provision was inconsistent both with the principles enshrined in Articles 2.2 and 4.1 of the Charter and the right to effective judicial protection under Article 36.2 of the Charter. This rendered it inconsistent with the right to freedom of movement under Article 14.1 ECHR and Article 2 Protocol 4 ECHR.

The judge rapporteur in the matter was Miloslav Výborný. A dissenting opinion to the reasoning of the judgment was filed by Judges Vlasta Formánková, Pavel Holländer, Dagmar Lastovecká, Jan Musil and Eliška Wagnarová.

Languages:

Czech.



Identification: CZE-2008-2-008

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 17.06.2008 / **e)** II. US 590/08 / **f)** Compensation for unjustified detention / **g)** *Sbirka nálezu a usnesení* (Collection of decisions and judgments of the Constitutional Court); <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.
 5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State**.

Keywords of the alphabetical index:

Detention, psychiatric hospital / Detention, compensation / Medical opinion, expert / Damages, compensation, non-economic loss.

Headnotes:

Where the question of compensation for detention arises, the detention and the actual criminal prosecution cannot be considered completely in isolation. If the criminal prosecution is shown to be unjustified in view of the specific factual circumstances, and, moreover, in the context of prosecution for suspicion of committing a verbal crime, then the detention itself is unjustified as a means leading to the investigation of the alleged criminal activity. The general courts must take this fact into consideration when evaluating the right to compensation under Czech legislation on liability for damage caused in the exercise of state power, otherwise they are acting inconsistently with the principles of a law-based state under Article 1.1 of the Constitution, with the constitutionally guaranteed fundamental right to compensation of damages guaranteed in Article 36.3 of the Charter of Fundamental Rights and Freedoms (the “Charter”) and with Article 5.5 ECHR.

Summary:

I. The petitioner, in a complaint against the Czech Republic, the Ministry of Justice, sought compensation in the form of damages for having been held in detention in criminal proceedings that ended in acquittal. The district court denied the complaint, ruling out any liability on the part of the state, on the basis that the petitioner caused the detention himself, by not collecting official correspondence and not appearing in response to summons. The municipal court upheld the district court's decision. The Supreme Court also observed that the facts of the case gave sufficient grounds for concern that the petitioner would flee or hide. In his constitutional complaint, the petitioner sought the repeal of the decisions of the general courts.

In proceedings before the filing of a complaint for compensation, the petitioner was found guilty of committing the crime of attack on a state body, which he committed by verbal attacks on two judges judging his case. In criminal proceedings, the petitioner was ordered to undergo psychological evaluation. The experts voiced suspicions that the petitioner suffered from a psychological disorder which could cause insanity and possibly rule out criminal responsibility, which they proposed to verify during the petitioner's stay in a closed psychiatric facility. After failure to deliver a resolution ordering observation in a psychiatric clinic to the petitioner, an order to arrest him and take him into custody was issued. The detention continued after the expert evaluation was completed. The expert evaluation did not confirm that the petitioner suffered from a psychological illness. The Supreme Court annulled the court decisions finding the petitioner guilty of committing two crimes against a state body.

II. The Constitutional Court has previously stated that the constitutional law basis for an individual's entitlement to compensation in the form of damages in criminal prosecution that ends in acquittal must be sought not only in Article 36.3 of the Charter, but generally, primarily in Article 1.1 of the Constitution, i.e. in the principles of the rule of law. If a state is really to be considered a based on the rule of law, it must be objectively responsible for the actions of its state bodies, whereby the state bodies or public authorities directly interfere in an individual's fundamental rights.

In the past, the Constitutional Court has applied the above conclusions to applications for compensation of damages for criminal prosecution itself, rather than compensation for having been held in detention in proceedings that ended in acquittal. In the present case the Constitutional Court concluded that for purposes of compensating damages the detention

and the criminal prosecution could not be considered completely in isolation. If the criminal prosecution is shown to be unjustified, then the detention itself is unjustified as a means leading to the investigation of the alleged criminal activity.

In the present case, the petitioner was taken into custody on the basis of a suspicion that he would evade the intended evaluation in a psychiatric institutional and hinder investigation of his alleged criminal activity. The Constitutional Court considered paradoxical the motive leading bodies active in criminal proceedings to order psychiatric evaluation and then impose detention, if the aim was to possibly rule out the petitioner's criminal liability due to insanity. The role of court experts is highly significant here. They prepared the first expert evaluation without having personally examined the petitioner. They then raised very serious (and, as it later transpired) erroneous suspicions about the petitioner's psychological condition.

It was found not to be decisive that the petitioner brought the detention upon himself through his conduct, as the general courts concluded. This was because in the absence of the unjustified criminal prosecution, the petitioner would never have been required to undergo psychiatric evaluation, let alone restriction of his personal liberty in the form of detention.

The Constitutional Court pointed out that, in addition, this was interference in fundamental rights when the public interest lay only in investigation the suspicion of committing a verbal crime. It also considered unacceptable the length of time for which the petitioner was held in custody, because the actual expert evaluation took place only after almost six months of restricting his personal freedom.

Thus, insofar as the general courts, in the contested decisions, concluded that the petitioner is not entitled to compensation of damages, they did not take into consideration the application of principles of the rule of law under Article 1.1 of the Constitution, from which one can draw state liability for illegal actions or procedures limiting an individual's fundamental rights. They also breached Article 36.3 of the Charter. The Constitutional Court also pointed out that in the event of unjustified restriction of personal freedom, entitlement to compensation of material damages and non-material detriment arises directly from Article 5.5 ECHR.

The Constitutional Court granted the petition, and repealed the general courts' decisions for the above reasons. The judge rapporteur in the matter was Eliška Wagnerová. None of the judges filed a dissenting opinion.

Languages:

Czech.

*Identification:* CZE-2008-2-009

a) Czech Republic / b) Constitutional Court / c) Plenary / d) 02.07.2008 / e) Pl. US 12/06 / f) On the impossibility of setting off a bankrupt person's overpayment of tax against his tax debts under § 14.1.i of the Bankruptcy and Settlement Act / g) *Sbírka zákonů* (Official Gazette), no. 342/2008 Sb.; *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court); <http://nalus.usoud.cz> / h) CODICES (Czech).

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

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

5.2 Fundamental Rights – **Equality.**

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

Keywords of the alphabetical index:

Tax, refund, loss in case of bankruptcy / Bankruptcy, creditors, equality.

Headnotes:

The Charter of Fundamental Rights and Freedoms cannot in any way be interpreted to give increased protection to the rights of the state as an owner which would, in cases of bankruptcy, give it an advantage and place it in a privileged position vis-à-vis other creditors.

Summary:

I. The Supreme Administrative Court filed a petition to annul § 64.2 of the Act on Administration of Taxes and Fees, a petition to declare unconstitutional parts of § 37a.1 of Act no. 588/1992 Coll., on Value Added Tax, and a petition to annul § 105.1. third sentence of Act no. 235/2004 Coll., on Value Added Tax.

Under the contested provision of the Act on Administration of Taxes and Fees, a tax may be paid by overpayment of another tax, and an overpayment will be used to cover an amount due for a different tax. Under Act no. 588/1992 Coll., on Value Added Tax, it is possible to refund a refundable overpayment that occurred as a result of an over-assessment of tax,. This is also possible in bankruptcy cases. Act no. 235/2004 Coll., on Value Added Tax even allows for the refund of the over-assessment after a declaration of bankruptcy, if the taxpayer does not have tax debts that arose before or after the declaration of bankruptcy.

The essence of the petition to the court was that it was impossible, as the law then stood, to make a constitutional interpretation of the contested provisions. The statutory framework does not permit the tax administrator, in tax proceedings concurrent to bankruptcy proceedings, when handling a bankrupt person's tax overpayment, to proceed in such a way that the tax overpayment would not be set off against any amounts owed for other taxes, but would instead become part of the bankruptcy estate. Such procedures would violate the principle of equal process for all taxpayers, because it would give an advantage to one group of taxpayers, whose assets had been subject to a bankruptcy filings (bankrupts), vis-à-vis other taxpayers.

II. The Constitutional Court did not find it necessary to consider independently the constitutionality of the contested provisions, § 64.2 of the Act on Administration of Taxes and Fees, and § 37a.1 of Act no. 588/1992, on Value Added Tax. The Court found them to be unconstitutional only in their application to the particular case of bankrupt persons subject to the regime of the Bankruptcy and Settlement Act, which might result in inequality between taxpayers, if the above interpretation of the Constitutional Court were applied. For that reason the Constitutional Court considered the claimed unconstitutionality only in terms of the possibility of a constitutional interpretation of the provisions in question, taken together and read in connection with the provisions of the Bankruptcy and Settlement Act, that is, more simply, whether the application of § 64.2 of the Act on Administration of Taxes and Fees after a declaration of bankruptcy is consistent with the constitutional order. In doing so, it maintained its conclusions in judgment file no. III. US 648/04. Article 11 of the Charter can not be interpreted to give increased protection to the rights of the state as an owner (represented in tax matters by the tax administrator) which would, in cases of bankruptcy, give it an advantage and, de facto, a privileged position vis-à-vis other creditors. The provision of § 14.1.i of the Bankruptcy and Settlement Act rules out the

possibility of setting off not only private law claims but also public law claims. This is a special provision compared to the general framework contained in § 64.2 and other provisions of the Act on the Administration of Taxes and Fees, and creates an obstacle in the procedures followed by the tax administrator.

As regards the claimed violation of the principle of equality under Article 1 of the Charter, the Constitutional Court pointed out that the status of bankrupts differs from that of non-bankrupts. Refunding an overpayment to the benefit of a bankrupt estate is not done for the purpose of giving the bankrupt an advantage over other taxpayers. Rather, its aim is to organise a debtor's assets, with a view to satisfying all of his creditors out of the assets constituting the bankrupt estate. Emphasis is placed on the equal status of all creditors. In bankruptcy proceedings, the state, represented by the tax administrator, is on an equal footing with the other parties to the proceedings. It is subject to the same rules concerning the impermissibility of compensating claims, and cannot avail itself of any of its unique authorities, which serve for the exercise of its function, and which would give it an advantage over other parties.

The plenum of the Constitutional Court, in its judgment in the proceeding on annulment of statutes and other legal regulations, denied the petition of the Supreme Administrative Court seeking the annulment of § 64.2 of the Act on Administration of Taxes and Fees and the petition to declare unconstitutional parts of § 37a.1 of Act no. 588/1992 Coll., on Value Added Tax. The Constitutional Court denied the petition to annul § 105.1 third sentence of Act no. 235/2004 Coll., on Value Added Tax, as being filed by an evidently unauthorised person, because that provision was not applied in the matter being handled by the petitioner.

The judge rapporteur in this matter was Dagmar Lastovecká. None of the judges filed a dissenting opinion.

Languages:

Czech.



Estonia

Supreme Court

Important decisions

Identification: EST-2008-2-006

a) Estonia / **b)** Supreme Court / **c)** Supreme Court *en banc* / **d)** 16.05.2008 / **e)** 3-1-1-86-07 / **f)** Misdemeanour matter concerning punishment of I. Eiche under Article 54⁷.1 of the Public Transport Act / **g)** *Riigi Teataja III* (Official Gazette), 2008, 24, 259, www.riigikohus.ee / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.
3.9 General Principles – **Rule of law**.
4.14 Institutions – **Activities and duties assigned to the State by the Constitution**.
4.15 Institutions – **Exercise of public functions by private bodies**.

Keywords of the alphabetical index:

Transport, public / Separation of powers / Misdemeanour proceedings.

Headnotes:

As there would be potential for severe infringements on fundamental rights if criminal proceedings and the state's penal power over them were delegated to the private sector, any such delegation would not be constitutional. They are core functions of the state. However, the prohibition on the delegation of penal power to a legal person in private law explicitly and directly relates solely to criminal proceedings; it does not extend, for example, to administrative actions of a supervisory nature preceding criminal proceedings.

Summary:

I. In March 2007, a city transport employee of the ticket inspection group of the AS Ühisteenusused imposed a sanction on I. Eiche on the basis of Article 54⁷.1 of the Public Transport Act ("PTA") by a fine of 8 fine units (480 kroons). Eiche had, on 22 February 2007, travelled by public transport vehicle without a document certifying the right to use public transport.

The AS Ühisteenus is a legal person in private law on whom the duties of a body conducting extra-judicial proceedings have been conferred, by means of a contract under public law entered into with the city of Tallinn. The possibility to delegate the conduct of extra-judicial proceedings concerning certain misdemeanours explicitly provided for in the PTA to a legal person in private law is established in Article 54^{11.3} of the PTA. According to the first subsection of the same section all the provisions of the misdemeanour procedure shall apply to such bodies in private law conducting extra-judicial proceedings.

I. Eiche filed an appeal against the decision of the body conducting extra-judicial proceedings, applying for it to be overturned, and for the misdemeanour proceedings to be stopped. He also sought a declaration as to the unlawfulness of stopping public transport vehicles in between stops by the AS Ühisteenus.

The Harju County Court handed down a judgment in June 2007, overturning the decision of the body conducting extra-judicial proceedings as to the punishment imposed on I. Eiche, and replacing it with a fine of 4 fine units (240 kroons). The remaining part of the appeal was dismissed.

I. I Eiche's counsel submitted an appeal in cassation against the judgment of the Harju County Court, seeking the reversal of the county court judgment and termination of the misdemeanour proceedings. The Criminal Chamber of the Supreme Court referred the misdemeanour matter to the General Assembly of the Supreme Court for hearing, on the basis that adjudication of this matter requires the commencement of constitutional review proceedings in order to determine whether Article 54^{11.3} of the PTA was in conformity with the provisions of the preamble and Sections 3, 10, 13 and 14 of the Constitution in their conjunction.

II. The General Assembly of the Supreme Court took the view that the delegation of proceedings of offences and the related penal power of the state to a legal person in private law is in conflict with the provisions of Sections 3, 10, 13 and 14 of the Constitution in their conjunction, and declared Article 54^{11.3} of the PTA and Articles 9.3 and 10.5 of the Code of Misdemeanour Procedure ("CMP") unconstitutional and invalid. Consequently, as the circumstances of subject of proof in misdemeanour procedure can be established solely by a body conducting extra-judicial proceedings, the officials of the AS Ühisteenus did not have jurisdiction to establish the necessary elements of a misdemeanour in the conduct of I. Eiche. The General Assembly

accordingly repealed the judgment of the Harju County Court and terminated misdemeanour proceedings against I. Eiche on the basis of Article 29.1.1 of the CMP, which provide that proceedings are to be terminated if the act in question does not contain the elements of a misdemeanour.

The Supreme Court found, that both criminal procedure and misdemeanour procedure constitute the exercise of one of the sub-categories of state power – penal power. According to the first sentence of Section 3.1 of the Constitution state power, including penal power, must be exercised solely pursuant to the Constitution and laws; this is also one of the expressions of the principle of a state based on the rule of law. So Section 3.1 of the Constitution must be read in conjunction with the principle of a democratic state based on the rule of law expressed in Section 10 of the Constitution.

The requirement that restrictions of fundamental rights be established by law does not necessitate an outright ban on delegation of certain state powers. The Constitution does not permit the delegation of all powers of state; the method of delegation must be in conformity with the Constitution. The title of the contract itself will indicate that it is permissible to delegate by a contract under public law solely and without exception the administrative functions within the sphere of executive power. Penal power – including the entire conduct of criminal proceedings and the attendant judicial procedure – cannot be considered as (ordinary) exercise of administrative functions. That is why, to the extent that the provisions of Articles 9.3 and 10.5 of the CMP and Article 54^{11.3} of the PTA, allow, on the basis of a contract under public law, for the delegation of state penal power to a legal person in private law, they cannot be deemed to be in full conformity with the requirement that restrictions of fundamental rights be established by law.

The delegation of the competence of a body conducting extra-judicial proceedings to the AS Ühisteenus and the delegation of penal power in the broader sense is not only unconstitutional because of the non-observance of the requirement that restrictions of fundamental rights be established by law. The delegation of penal power to a legal person in private law is also in conflict with the requirement, within the first sentence of Section 3.1 and Section 10 of the Constitution, that powers of state must be exercised solely pursuant to the Constitution. This requirement includes the requirement that exercise of powers of state must not be in conflict with the Constitution. Also those functions which, under the Constitution, must be exercised by the state power, and which therefore make up the core functions of the state, cannot be delegated by the state to a legal person in private law.

Penal power, including the conduct of criminal proceedings, must be perceived as one of the core functions of the state, as the conduct of criminal proceedings is a sphere of state activity where extensive infringements of fundamental rights are possible. At the same time the Code of Misdemeanour Procedure does not distinguish the extent of competence of bodies conducting extra-judicial proceedings on the basis of whether the body conducting the proceedings is a public authority or a legal person in private law.

The more extensive the legal possibilities of restricting fundamental rights in certain spheres, the greater the responsibility upon the state to act to protect the individual and to create a situation which precludes unjustified infringements of fundamental rights. A person's ability to defend his interests and to have confidence in the conduct of penal proceedings is dependent upon the public authority establishing rules for the conduct of these proceedings, supervising the training and activities of those who conduct them. Care must also be exercised during each misdemeanour case that fundamental rights are not excessively infringed. In cases where the state does not have direct responsibility over misdemeanour proceedings and does not exercise supervision over the body conducting the proceeding, the fundamental right to procedure and organisation (Sections 13 and 14 of the Constitution) is in jeopardy. Furthermore, the exercise of penal power under the Constitution requires that a penal authority be objective and independent and act solely in the public interest.

Supplementary information:

This judgment attracted considerable public attention, and brought about swift alterations to the *modus operandi* of the ticket inspection group in the public transport system of the city of Tallinn (and other cities), as local government officials with the power to levy fines were recruited, instead of private companies.

Cross-references:

- Judgment of the General Assembly of the Supreme Court of 22.12.2000 no. 3-4-1-10-00, *Bulletin* 2000/3 [EST-2000-3-009], *Riigi Teataja* III (Official Gazette), 2001, 1, 1;
- Judgment of the Constitutional Review Chamber of the Supreme Court of 05.03.2001 no. 3-4-1-2-01, *Bulletin* 2001/1 [EST-2001-1-003], *Riigi Teataja* III (Official Gazette), 2001, 7, 75;
- Judgment of the General Assembly of the Supreme Court of 28.10.2002 no. 3-4-1-5-02, *Bulletin* 2002/3 [EST-2002-3-007], *Riigi Teataja* III (Official Gazette), 2002, 28, 308;

- Judgment of the Constitutional Review Chamber of the Supreme Court of 01.10.2007, no. 3-4-1-14-07, *Bulletin* 2007/3 [EST-2007-3-005], *Riigi Teataja* III (Official Gazette), 2007, 34, 274;
- Judgment of the Constitutional Review Chamber of the Supreme Court of 08.10.2007, no. 3-4-1-15-07, *Riigi Teataja* III, (Official Gazette), 2007, 33, 263;
- Judgment of the Criminal Chamber of the Supreme Court of 10.04.2006, no. 3-1-1-7-06, *Riigi Teataja* III (Official Gazette), 2006, 13, 125.

Languages:

Estonian, English.



Identification: EST-2008-2-007

a) Estonia / **b)** Supreme Court / **c)** General Assembly (*En banc*) / **d)** 16.05.2008 / **e)** 3-1-1-88-07 / **f)** Misdemeanour matter concerning the punishment of S. Mulyar under Section 73.1 of the Customs Act and the confiscation of the assets of AIT under Section 94.4 of the Customs Act / **g)** *Riigi Teataja* III (Official Gazette), 2008, 24, 160, www.riigikohus.ee / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.12 General Principles – **Clarity and precision of legal provisions.**
 4.7.1.3 Institutions – Judicial bodies – Jurisdiction – **Conflicts of jurisdiction.**
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

Keywords of the alphabetical index:

Confiscation, property / *Locus standi*.

Headnotes:

A provision of the Estonian Code of Misdemeanour was pronounced unconstitutional, to the extent that it prevented a third person, who was not party to the misdemeanour proceedings, from lodging an appeal against a decision by an extra-judicial body to confiscate its property.

Summary:

I. In a case before the extra-judicial body of the Tax and Customs Board, cigarettes and diesel fuel were found hidden under the passenger compartment of a motorbus driven by S. Mulyar. The motorbus belonged to Mulyar's employer, a public limited company (AIT). The driver was punished by a fine and the hidden items were confiscated. The motorbus was confiscated, because the extra-judicial body could not rule out the possibility that this specially reconstructed vehicle might still be used to commit breaches of the customs rules. There was no suggestion that Company AIT had committed an offence; it was not embroiled in any misdemeanour proceedings. The company was viewed as a third party not participating in the proceedings.

AIT appealed against the decision by the Tax and Customs Board ordering the confiscation of the motorbus. The County Court overturned the decision, and the vehicle was returned to AIT. The Tax and Customs Board submitted an appeal in cassation against the County Court's judgment, pointing out that AIT was not a party to the proceedings enumerated in Section 16 of the Code of Misdemeanour Procedure (CMP). Thus, under Section 114.1 of the CMP, it had no right to appeal against the decision of the extra-judicial body. By the ruling of the Criminal Chamber of the Supreme Court, the matter was referred to the General Assembly of the Supreme Court for hearing.

II. The General Assembly began its examination of the case by considering whether, under the law currently in force, AIT could challenge the decision of the extra-judicial body on the confiscation of the motorbus, either by way of misdemeanour proceedings or by way of any other court proceedings. The General Assembly then reviewed the constitutionality of the relevant regulation.

The County Court suggested that if the extra-judicial body had decided on confiscation by a ruling under Section 67.4 of the CMP, rather than making a final decision, AIT's right to appeal would have been guaranteed. This exception can only be used if the item in question was the direct object used for commission of the misdemeanour, and the lawful

owner of the object cannot be identified. The Supreme Court dismissed this argument. This exception would not have been possible here. The motorbus was not a direct object of a misdemeanour, but was used as a means to commit an offence. Moreover, the extra-judicial body knew the true owner and lawful possessor of the property.

Neither could AIT file an appeal with the head of an extra-judicial body. This organ would only be competent to adjudicate appeals filed against the activities of the extra-judicial body until the decision is made in the matter, not against the decisions themselves.

The CMP contains a precise definition of those who are parties to proceedings. Only those parties are entitled under this legislation to file an appeal with a county court against decisions by an extra-judicial body. Because this definition does not embrace third parties, there are no grounds for recognising a third party in misdemeanour proceedings as parties to proceedings and for granting them the same rights. Therefore, the Supreme Court concluded that in the present case, there were no effective possibilities for AIT to contest the decision of the extra-judicial body on the confiscation of the motorbus.

As for other court procedures, Section 2 of the CMP mentions norms of criminal procedure applicable in misdemeanour proceedings if the same issue is not regulated by a provision of the CMP. Sections 16 and 17 of the Code of Criminal Procedure (CCP) include third parties as participants to proceedings. However, it was not possible to invoke the above CCP provisions here, because the CMP contains a precise definition of participants to proceedings and their right to appeal, which excludes third parties.

Neither could AIT enlist the assistance of the administrative court here. Under Section 3.2 of the Code of Administrative Court Procedure, a different procedure applies to disputes in public law; they do not fall within the competence of administrative courts. The decisions of extra-judicial bodies are contested in the county court pursuant to the CMP. Thus, a special procedure excludes administrative court procedure. If third parties were allowed access to the administrative court, this would result in a situation where, depending on the procedural status of an appellant, one and the same act of a public authority could be contested in two different courts.

AIT could not protect its right of ownership by way of civil court proceedings. The decision to confiscate the motorbus was a dispute arising from a public law relationship. Under Section 1 of the Code of Civil Procedure, it could not be adjudicated by way of civil court procedure.

The Supreme Court pointed out that none of the possibilities mentioned above would be sufficiently clear to the addressee of the right. In other words, the recognition of the right of appeal through one of the considered interpretations would not meet the principle of legal clarity (Sections 10 and 13.2 of the Constitution). Nonetheless, lack of legal clarity must not be the price of an interpretation that was constitutionally compliant. For the above reasons the General Assembly concluded that the law in force did not afford AIT any possibility of recourse to the court to contest the confiscation of its motorbus.

The confiscation of the motorbus infringed AIT's ownership rights under Section 32 of the Constitution. Under Section 15.1 of the Constitution, all those whose rights and freedoms are violated have the right of recourse to the courts. The Supreme Court stressed the importance of gapless protection of the right of recourse to the courts. It pointed out that Sections 13, 14 and 15 of the Constitution give rise to the right to an effective remedy. This means that somebody whose rights and freedoms have been violated may file an action with a court. Equally, the State is under a duty to provide for a fair and effective judicial procedure for the protection of fundamental rights.

The Supreme Court was concerned to note that a third party to misdemeanour proceedings was deprived of a right to contest a decision by an extra-judicial body that affected its rights (the very rights or constitutional values that the legislator aimed to protect). A restriction of fundamental rights that has no clear aim or which was established to serve an aim not arising from the Constitution is in conflict with the Constitution. The proportionality of such a restriction cannot be controlled. The General Assembly held that because the infringement of Section 15.1 of the Constitution had no apparent aim, Section 114.1.2 of the CMP was unconstitutional to the extent that it prevented someone not a party to the proceedings from filing an appeal with the court against a decision by an extra-judicial body, confiscating its property.

As regards AIT's appeal against the decision of the Tax and Customs Board, the Supreme Court upheld the conclusions of the judgment of the County Court, and substituted the reasoning thereof concerning the grounds for AIT's right to file an appeal with the reasoning set out in its own judgment. The appeal in cassation of the Tax and Customs Board was dismissed. 7 justices out of 19 put forward a dissenting opinion, arguing that there was no ground to declare Section 114.1.2 of the CMP partly unconstitutional and invalid. They contended that the law presently in force afforded sufficient possibilities for somebody not party to misdemeanour proceedings to file an appeal against a decision by an extra-judicial body to confiscate a

motorbus, as the relevant provisions of the Code of Criminal Procedure could have been applied.

Cross-references:

Decisions of the Supreme Court:

- Decision 3-4-1-15-07 of 08.10.2007 of the Constitutional Review Chamber;
- Decision 3-3-1-38-00 of 22.12.2000 of the General Assembly;
- Decision 3-1-3-10-02 of 17.03.2003 of the General Assembly, *Bulletin* 2003/2 [EST-2003-2-003];
- Decision 3-4-1-4-06 of 09.05.2006 of the Constitutional Review Chamber;
- Decision 3-4-1-17-06 of 17.01.2007 of the Constitutional Review Chamber;
- Decision 3-4-1-8-07 of 04.04.2007 of the Constitutional Review Chamber;
- Decision 3-4-1-11-07 of 17.05.2007 of the Constitutional Review Chamber;
- Decision 3-4-1-3-02 of 10.05.2002 of the Constitutional Review Chamber, *Bulletin* 2002/2 [EST-2002-2-004].

Decisions of the European Court of Human Rights:

- *Klass and others v. Germany*, Judgment of 06.09.1978, *Special Bulletin Leading Cases ECHR* [ECH-1978-S-004];
- *Kudla v. Poland*, Judgment of 26.10.2000;
- *Hasan and Chaush v. Bulgaria*, Judgment of 26.10.2000.

Languages:

Estonian, English.



Identification: EST-2008-2-008

a) Estonia / **b)** Supreme Court / **c)** General Assembly (*En banc*) / **d)** 21.05.2008 / **e)** 3-4-1-3-07 / **f)** Petition of the Chancellor of Justice to declare unconstitutional the provisions of the Political Parties Act which do not provide for efficient supervision of the political party funding and to require that the *Riigikogu* set up a monitoring body meeting the minimum requirements / **g)** *Riigi Teataja III* (Official Gazette), 2008, 34, 228, www.riigikohus.ee / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.2.1.8 Constitutional Justice – Types of claim – Claim by a public body – **Ombudsman**.

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

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

3.3.1 General Principles – Democracy – **Representative democracy**.

3.3.2 General Principles – Democracy – **Direct democracy**.

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

3.21 General Principles – **Equality**.

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

4.12.3 Institutions – Ombudsman – **Powers**.

Keywords of the alphabetical index:

Legislative omission / Political party / Political party, funding.

Headnotes:

The competence of state bodies exercising supervision over political party funding is determined by norms which can simultaneously be regarded as norms conferring rights as well as norms prohibiting everything that is not allowed by these norms, thus giving the Chancellor of Justice the right to contest the failure to act of the body that has passed legislation of general application. The controlling authorities of political party funding are independent. They have sufficient competence to supervise political party funding, and transparency of political party funds is ensured.

Summary:

I. Parliament passed the Political Parties Act on 11 May 1994 and has made several amendments to the Act since then, on issues of principle.

Since 2003, the Chancellor of Justice has been pointing out to Parliament, almost on an annual basis, the problems related to the funding of political parties. In May 2006, the Chancellor of Justice submitted to Parliament his proposal to bring the Political Parties Act into conformity with the Constitution of the Republic of Estonia, because he was of the opinion that to the extent that the Political Parties Act did not provide for sufficiently effective supervision over political party funding, the Act was in conflict with the principle of democracy and the fundamental right of political parties as established in the Constitution.

The plenary assembly of the Parliament supported the proposal and in December 2006 Parliament initiated draft legislation amending the Political Parties Act and other Acts. By the time of the public hearing of the case, the draft had been withdrawn from the legislative process, due to expiry of the term of office of the 10th parliament. In February 2007, the Chancellor of Justice submitted a petition to the Supreme Court. He asked the Supreme Court to declare unconstitutional those provisions of the Political Parties Act which did not provide for efficient control of political party funding, and to order Parliament to set up a monitoring body meeting the minimum requirements.

II. A. In his request to have unconstitutionality established, the Chancellor of Justice regarded unconstitutional the legislator's failure to act, which – in his opinion – consisted in the fact that although the legislator had established legal regulation to check the sources of political party funding, it had chosen a mechanism which meant that the actual sources of political party funding could not be discerned. This constituted an unconstitutional omission on the legislator's part.

Although the laws explicitly provided for the competence of the Chancellor of Justice to contest the constitutionality of an existing regulation, they were silent about his right to contest the inactivity of the body which has passed an Act. When legislation of general application required by the Constitution had not been passed at all, this amounted to legislative failure to act.

The activity of the legislator as a result of which a regulation is enacted which excludes the exercise of a right can simultaneously be regarded as an imposition of an unconstitutionally restricting regulation or as a failure to establish a regulation required by the Constitution. In such a situation, contesting a restricting norm may entail contesting the legislator's failure to act, which consists in failure to establish a regulation required by the Constitution.

The Chancellor of Justice therefore had the right to contest the failure to act of the body that had passed legislation of general application using the argument that the existing regulation was unconstitutional because it did not contain what was required by a fundamental right. The competence of state bodies exercising supervision over political party funding is determined by norms which can simultaneously be regarded as norms conferring rights as well as norms prohibiting everything that is not allowed by these norms.

As the Political Parties Act is an Act regulating political parties and their funding, the legislator should have ensured the existence of a control mechanism covering the actual sources of political party funding. If the Political Parties Act establishes that other Acts shall further specify the control of political party funding, the drawbacks of the control mechanism enacted by other Acts are the same drawbacks as those of the Political Parties Act. If the control mechanism provided for in other Acts does not make it possible to discern the actual sources of political party funding, it must be concluded that the Political Parties Act is unconstitutional to the extent that it does not guarantee that the actual sources of political party funding are ascertained.

B. There was no ground to hold that auditors, the parliamentary select committee of the implementation of anti-corruption legislation, and the police, when exercising control of the legality of political party funding, were dependent on the political parties subject to control. The main issue was whether the competence of the bodies exercising control of political party funding allowed, where possible, for the disclosure of the actual sources of political party funding.

The requirements concerning submission of financing reports form the bases for the control of political party funding. The Political Parties Act provides for measures to guarantee the accessibility of sources of political party funding during the election period and in between elections. The principle of accessibility constitutes an important institution, making it possible to determine the actual sources of political party funding.

The competences of the parliamentary select committee of the implementation of the Anti-corruption Act, the auditors, the Tax and Customs Board and the police in their conjunction, and bearing in mind the requirement under the Political Parties Act to maintain a register of donations and submit annual financial reports which are disclosed, the whole control system of political party funding and the competence of control bodies in their conjunction allow for the determination of the actual sources of political party funding. The control bodies of political party funding are independent, they have sufficient competence to supervise political party funding, and the transparency of political party funding is ensured. Even if one conceded that the regulatory provisions concerning the control of political party funding were not perfect, this in itself would not give rise to conflict with the Constitution. Not everything imperfect is unconstitutional.

The Supreme Court *en banc* dismissed the petition of the Chancellor of Justice.

C. Justice Põld (joined by Justices Jerofejev, Kiris, Kivi and Luik) in his dissenting opinion was convinced that the Political Parties Act is unconstitutional to the extent that it does not provide for effective supervision of political party financing. There is a conflict with the equality of political parties (Section 48.1 of the Constitution), and disproportionate interference with active and passive suffrage (Sections 57, 156 and 60.2 of the Constitution). To the extent under discussion the Political Parties Act is in conflict with the principle of democracy (Section 1 of the Constitution), as it does not prevent corruption to a sufficient extent. The insufficient competence of the existing monitoring bodies does not mean that the legislator is obliged to set up a new state authority with a new competence. It is up to the legislator to decide whether to set up such a body or to supplement the competence of the existing monitoring authorities (primarily the parliamentary select committee of the implementation of the Anti-corruption Act and/or the Tax and Customs Board).

Supplementary information:

The above court proceedings attracted media attention on a large scale. The judgment was also followed by a lively discussion in the public arena and resulted in considerable political discussion.

Languages:

Estonian, English.



Identification: EST-2008-2-009

a) Estonia / **b)** Supreme Court / **c)** Supreme Court *en banc* / **d)** 02.06.2008 / **e)** 3-4-1-19-07 / **f)** Petition of the Tartu County Court of 16 November 2007 to declare unconstitutional the absence of provisions in the Penal Code and in the Code of Criminal Procedure to allow for the release of a person from the service of a sentence when the Act providing for the punishment has been amended / **g)** *Riigi Teataja III* (Official Gazette), 2008, 52, 360, www.riigikohus.ee / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

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

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

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

3.16 General Principles – **Proportionality.**

5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Prisoners.**

5.2 Fundamental Rights – **Equality.**

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

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

Keywords of the alphabetical index:

Punishability / Judgment, execution / Legislation, amendment / Convicted person.

Headnotes:

Under the Constitution, a convicted person enjoys the fundamental right that his situation be brought in conformity with more lenient legislation enacted after he or she has committed an offence. However, this right is not unlimited; it is not subject to the requirement that restrictions be imposed solely by Acts. Restrictions of this right could also be justified by other considerations, such as other fundamental rights or constitutional values. Examples might include efficient functioning of the court system, force of law of a decision on punishment, legal certainty and confidence in the legal system. In certain cases, other constitutional rights or values may partially or completely counteract this right. Where this is the case, the legislator may provide that the more lenient law either applies only to a limited extent to those who have already been convicted, or that it does not apply to them at all, thus restricting the fundamental right of certain categories of convicted persons to enjoy the retroactive force of a more lenient law.

Summary:

I. The Tartu Prison and the Lõuna District Prosecutor's Office applied to the judge in charge of execution of court judgments for the adjudication of the matter of release of T. Toompalu from imprisonment. T. Toompalu was serving the third year of a prison sentence of three years and two months. This was imposed as an aggregate punishment by a Tartu County Court judgment in February 2006, of which one year and eight months were punishments imposed under Article 199.2 of the Penal Code ("PC") for the

theft of items with a value of under 1 000 kroons. Under Article 9.21 of the Penal Code and the Related Acts Amendment Act, with effect from 15 March 2007, the thefts for which T. Toompalu had been indicted were punishable only as misdemeanours under Article 218 of the PC. Misdemeanours were not punishable by imprisonment. The law did not provide for the release of persons convicted before 15 March 2007 for the theft of items valued at under 1 000 kroons. The judicial practice concerning the necessity of release of such persons was not uniform.

By the ruling of the Tartu County Court of November 2007 T. Toompalu was released from serving the remainder of the sentence imposed by the judgment of the Tartu County Court of February 2006. The County Court also noted, and considered to be unconstitutional, the absence of provision in the Penal Code and in the Code of Criminal Procedure, to justify excusing a person from serving the remainder of their sentence when amendments had been made to the legislation providing for their punishment. The County Court referred the ruling to the Supreme Court, thus initiating constitutional review proceedings. The Constitutional Review Chamber of the Supreme Court, having heard the petition of the Tartu County Court in a panel of five justices, concluded that the case related to a highly significant issue from a fundamental rights perspective, and that it might prove necessary to alter the earlier judicial practice of the Supreme Court. It accordingly referred the petition to the Supreme Court *en banc* for adjudication.

II. Section 23.2 of the Constitution establishes that no one shall have a more severe punishment imposed on him or her than the one that was applicable at the time the offence was committed. If, subsequent to the commission of an offence, the law provides for a more lenient punishment, the more lenient punishment shall apply. A law providing for a more lenient punishment for the purposes of the second sentence of Section 23.2 of the Constitution is also a law which totally excludes penal consequences for a particular action, or replaces punishment for a criminal offence with punishment for a misdemeanour. The interpretation that the sphere of protection of the second sentence of the Section 23.2 of the Constitution not only includes the suspects and the accused, but also convicted persons serving sentences, is *inter alia* supported by the interpretation of the fundamental right under discussion in conjunction with the principle of equality before the law, arising from the first sentence of Section 12.1 of the Constitution. At the same time the sphere of protection of the second sentence of Section 23.2 of the Constitution does not include those convicted persons who have served their sentences, and whose

criminal record has been expunged from the register, so not giving rise to the right of a convicted person to have a punishment, which has been executed, alleviated; but giving rise only to the right to have a punishment, which is being served, brought into conformity with legislation which was enacted after the entry into force of a court judgment.

In certain cases other constitutional rights or values may partially or completely counteract the right of a convicted person described above. Where this is the case, the legislator is entitled to provide that the more lenient law shall apply to those who have already been convicted only to a limited extent or that it does not apply to them at all, thus restricting the fundamental right of certain categories of convicted persons to enjoy the retrospective force of a more lenient law. In so doing, the legislator has to balance the intensity of the infringement of the fundamental rights of a convicted person and the values justifying this infringement. The evaluation of whether a new Act alleviates the situation of a convicted person may prove complex because of the necessity to ascertain new facts, which did not have legal significance under the penal law in force at the time the judgment was rendered. However, amendments are sometimes made to legislation where it is relatively simple to ascertain the necessary facts to determine the alleviating effect.

The Constitution enables the legislator to restrict the rights of certain convicted persons. The first sentence of Section 3.1 and Section 11 of the Constitution stipulate that restrictions may only be imposed by law. Thus, fundamental rights may only be restricted where there are legal grounds within an Act, providing for the possibility of such a restriction. The aim of the constitutional provisions concerning competence and formal requirements is to guarantee the observance of the basic constitutional principles (e.g. legal clarity, legal certainty, separation and balance of powers) and effective protection of fundamental rights. Restrictions of fundamental rights of certain intensity may be imposed only by laws in the formal sense. From the perspective of substantive law, it is possible not to bring the punishment imposed on a convicted person into conformity with more lenient legislation passed after entry into force of court judgment only when the law provides for a legal basis for this. In the cases when the legislator has not provided for a legal basis for the restriction of the fundamental rights arising from the first sentence of Article 12.1 and the second sentence of Section 23.2 of the Constitution, convicted persons whose punishments have not been executed are entitled to have their punishments brought into conformity with the more lenient law enacted after the entry into force of court judgments.

There was no norm in the legislation then in force to justify the restriction of the rights of persons convicted under the Penal Code to the retrospective application of the more lenient law. According to Article 5.2 of the PC, regulating the temporal applicability of penal law, an Act which states that an action no longer has penal consequences, mitigates a punishment or otherwise alleviates the situation of a person shall have retroactive effect. The Supreme Court *en banc* maintained the opinion that Article 5.2 of the PC did not restrict the right established in the second sentence of Section 23.2 of the Constitution, and that instead it established, in the general part of the Penal Code, the principle of retroactive force of a more lenient penal law, without providing for any exceptions. Article 5.2 of the Penal Code does not distinguish between those who have been convicted and those who have yet to be convicted, thus offering a legal basis for retroactive application of a more lenient law in regard to both groups of persons. This means that like the second sentence of Section 23.2 of the Constitution, Article 5.2 of the PC provides for the retroactive application of a more lenient law both upon imposition of punishment and when somebody has already been convicted and is serving a sentence at the time of entry into force of the new law.

The Supreme Court *en banc* did not concur with the County Court's conclusion that there was no provision in the Penal Code to enable the court to excuse somebody from serving the remainder of their sentence because the law had been amended. Consequently, the petition of the county court concerning the application for declaration of unconstitutionality of the absence of a substantive law basis allowing for the release of convicted persons was dismissed. As the absence of the provision referred to by the Tartu County Court in the Code of Criminal Procedure was not relevant, the Supreme Court had no ground to review the constitutionality of the Code of Criminal Procedure and the petition of the county court was also dismissed in regard to the Code of Criminal Procedure.

Cross-references:

Case-law of the Supreme Court:

- Judgment of the Supreme Court *en banc* of 17.03.2003, no. 3-1-3-10-02, *Bulletin* 2003/2 [EST-2003-2-003], *Riigi Teataja III* (Official Gazette), 2003, 10, 95;
- Ruling of the Supreme Court *en banc* of 28.04.2004, no. 3-3-1-69-03, *Riigi Teataja III* (Official Gazette), 2004, 12, 143;
- Judgment of the Supreme Court *en banc* of 03.12.2007, no. 3-3-1-41-06, *Riigi Teataja III* (Official Gazette), 2007, 44, 350;

- Ruling of the full composition of the Criminal Chamber of the Supreme Court of 07.12.2007, no. 3-1-2-2-07, *Riigi Teataja III* (Official Gazette), 2007, 46, 369.

Languages:

Estonian, English.



Identification: EST-2008-2-010

a) Estonia / **b)** Supreme Court / **c)** General Assembly (*En banc*) / **d)** 12.06.2008 / **e)** 3-1-1-37-07 / **f)** Criminal case of charges against T. Tiiki under Section 424 of the Penal Code / **g)** *Riigi Teataja III* (Official Gazette), 2008, 29, 191, www.riigikohus.ee / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.14 General Principles – **Nullum crimen, nulla poena sine lege.**
 3.18 General Principles – **General interest.**
 4.5.2 Institutions – Legislative bodies – **Powers.**
 5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**
 5.3.14 Fundamental Rights – Civil and political rights – **Ne bis in idem.**
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

Keywords of the alphabetical index:

Confiscation, property / Sanction, nature / Fine, nature / Fine, confiscation.

Headnotes:

An automobile is a means used to commit a criminal offence under the Estonian Penal Code, since a person driving while intoxicated uses the motor vehicle for participating in road traffic and thus for the commission of an offence. The confiscation of a means used to commit an offence under the Penal Code does not require additional legitimacy from the special part of the Penal Code.

Under the Constitution, the State can determine which acts are criminal offences and can provide for punishment for such acts. It proceeds from the Constitution that fines, i.e. punishments consisting in the infringement of ownership right, may be a category of punishments. Although the term “fine” primarily means monetary sanctions, in case of the confiscation the object of the fine is defined through the object being expropriated.

Summary:

I. T. Tiiki was convicted in the County Court under Section 424 of the Penal Code because he had driven under the influence of alcohol at a time when he was still subject to punishment for having committed the same offence. Initially, Tiiki was sentenced to five months in prison, suspended on probation for eighteen months, and his driving privileges were withdrawn for eight months. When he committed the same offence a second time, the County Court sentenced him to nine months in jail, substituted by 540 hours of community service. Supplementary punishments included deprivation of driving privileges for one year, and under Section 83.1 of the Penal Code, confiscation of the automobile used as a means to commit the offence.

Tiiki’s defence counsel appealed against the County Court judgment, seeking the overturning of that part of it imposing supplementary punishment and confiscation. The Circuit Court upheld the County Court judgment and dismissed the appeal. Tiiki’s defence counsel submitted an appeal in cassation against the Circuit Court judgment, seeking the overturning of that part of the judgment ordering confiscation. He argued that the criminal offence provided for in Section 424 of the Penal Code does not establish the possibility of confiscation. Thus, the automobile could not be confiscated under Section 83.1 of the Code. He further contended that this was not a proportional measure and double punishment could not be the aim of confiscation.

The Criminal Chamber referred the criminal case to the General Assembly of the Supreme Court for adjudication. The Chamber raised the issue that Section 83.1 of the Code, by allowing for the confiscation of an object in unrestricted commerce, used as a means to commit an offence, might constitute a disproportional infringement of the fundamental right to property and the right of equality before the law. See Section 12.1 of the Constitution.

II. The General Assembly began its adjudication with an assessment as to whether an automobile constitutes a means used to commit an offence provided for in Section 424 of the Penal Code, or a

direct object of the offence. The Supreme Court then examined the constitutionality of the regulation on infringement of the right to inviolability of property. Finally, it ruled upon the legality of the confiscation of the automobile from Tiiki.

A means used to commit an offence is a thing used to attack the object of offence or in any other way, to facilitate the commission of the offence. The direct object of an offence, on the other hand, is a substance or a thing, the operation or handling of which is the purpose of the offence, and in cases prescribed by law, the possession of which itself may result in the confiscation thereof. The difference is whether an offence is committed with the help of the object, or whether an offence is directed towards the object; irrespective of whether the object is mentioned as one of the necessary elements of an offence.

The Supreme Court agreed that an automobile is a means used to commit a criminal offence as described in Section 424 of the Penal Code, since a person driving while intoxicated uses the motor vehicle for participating in road traffic and thus for the commission of an offence. The confiscation of a means used to commit an offence under Section 83.1 of the Code does not require additional legitimacy from the special part of the Penal Code. The Penal Code accordingly allows for the confiscation of an automobile used to commit an offence under Section 424.

The Supreme Court noted the third sentence of Section 32.2 of the Constitution, which prohibits the use of property contrary to the public interest. When somebody is intoxicated, their ability to control a motor vehicle deteriorates and the risk of traffic accidents increases. Thus, driving while intoxicated endangers the life, health and property of other road users. The State is obliged to react to such use of property contrary to public interest and to take measures to protect those values.

Section 83 of the Penal Code allows the confiscation of a means used to commit an offence only if the act committed comprises the necessary elements of an offence, is unlawful and a person is guilty thereof. As the confiscation is *inter alia* based on the guilt of the person, the General Assembly considered that the deprivation of a person of the object used to commit an offence also expresses condemnation for the act committed. Consequently, the confiscation of a means used to commit an offence constitutes a punishment in the substantive sense. The General Assembly emphasised that where state coercive measures of this nature are deployed, which are not mentioned as punishments in the formal penal law but can be regarded as such in the substantive sense, fundamental rights must be guaranteed.

The General Assembly interpreted Section 32 of the Constitution as not precluding punishments infringing the fundamental right to property. The State must be able to react to use of property contrary to the public interest, by measures that could include expropriation without compensation. Section 23 of the Constitution allows the State to determine the acts that constitute criminal offences and to provide for punishment of such conduct. Under Section 113 of the Constitution, fines, i.e. punishments consisting in the infringement of ownership right, may be a category of punishments. Although the term "fine" primarily means monetary sanctions, in case of confiscation the object of the fine is defined through the object to be expropriated.

The Supreme Court pointed out that the legislator has a wide margin of appreciation in defining punishments corresponding to offences. Driving a motor vehicle while intoxicated is a common cause of serious traffic accidents. Bearing in mind the significant preventive effect of the confiscation of an automobile as a means used to commit an offence, it can be considered as corresponding to the offences. However, confiscation can only be regarded as justified when there is sufficient ground to believe that the person will continue to commit similar offences in the future, and less draconian measures (such as withdrawal of driving privileges) have not dissuaded them from committing new offences of the same kind.

The Supreme Court stressed that in terms of confiscation of a means used to commit an offence, those who own automobiles and those who use them but do not drive them are not comparable. Confiscation is deemed a punishment in the substantive sense and the court deciding its justification must take into account the specific circumstances of each case.

In the current case, the Supreme Court concurred with the justifications of the earlier court decisions, upheld the Circuit Court judgment and dismissed the appeal in cassation of Tiiki's defence counsel.

6 judges out of 19 gave three dissenting opinions. They argued that although driving while intoxicated constitutes a serious problem in modern society, the confiscation of a motor vehicle used by an intoxicated driver is not a suitable, necessary or reasonable solution to the problem. The dissenting judges were not convinced that a motor vehicle used by an intoxicated driver is a means used to commit an offence for the purposes of Section 424 of the PC.

They also emphasised that it is not sufficient to back up the expropriation of an object that is in unrestricted civil commerce and used to commit an offence with Section 32.2 of the Constitution, which prevents the use of property contrary to the public interest.

Section 113 of the Constitution, which expressly refers to fines (monetary punishment), allows for proprietary punishments by way of confiscation, but the confiscation can only be regarded as a “fine” once the legislature has declared such a measure “a fine”. This has not been done.

Cross-references:

- Decision 3-4-1-10-00 of 22.12.2000 of the General Assembly, *Bulletin* 2000/3 [EST-2000-3-009];
- Decision 3-4-1-5-02 of 28.10.2002 of the General Assembly, *Bulletin* 2002/3 [EST-2002-3-007];
- Decision 3-4-1-10-04 of 25.10.2004 of the General Assembly, *Bulletin* 2006/2 [EST-2006-2-004];
- Decision 3-4-1-2-05 of 27.06.2005 of the General Assembly.

Languages:

Estonian, English.



Identification: EST-2008-2-011

a) Estonia / **b)** Supreme Court / **c)** General Assembly (*En banc*) / **d)** 26.06.2008 / **e)** 3-4-1-5-08 / **f)** Review of constitutionality of Article 38.1.4 of the Public Procurement Act in the wording in force from 1 May 2007 to 27 March 2008 / **g)** *Riigi Teataja III* (Official Gazette), 2008, 33, 222, www.riigikohus.ee / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

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

1.3.4.11 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of constitutional revision.**

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

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

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

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

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

4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**

4.7.1.3 Institutions – Judicial bodies – Jurisdiction – **Conflicts of jurisdiction.**

Keywords of the alphabetical index:

Tender, public, conditions / Public procurement / Community law, application by Member States.

Headnotes:

As a rule, the Supreme Court is not competent to review the constitutionality of a provision of an Estonian act of general application relating to EU law, or to declare the provision invalid if the provision is in conformity with the EU law which serves as the basis thereof. In such a situation, the Supreme Court would, in essence, through the provision of an Estonian legal act, review the constitutionality of the EU law serving as the basis of the provision. This would not be in conformity with the principle expressed in the ECJ case-law.

Summary:

I. The Public Limited Company Government Real Estate (GRE) organised an open tendering procedure. By a decision of the GRE management board the Aspen Group OÜ was excluded, among others, from the procurement procedure on the basis of Article 38.1.4 of the Public Procurement Act (PPA).

In the wording in force at the time the decision was made, Article 38.1.4 of the PPA provided as follows: “The contracting authority shall not conclude public contracts with the person and shall at any time exclude from the procurement process the tenderer or candidate [...] who has been in a situation of tax arrears within the last 12 months for more than 30 days in total prior to submission of the relevant certificate to the contracting authority”.

It appeared that the Aspen Group OÜ had had tax arrears within 12 months for 47 days in total. This certificate served as grounds for excluding the company from the public procurement process.

The Aspen Grupp OÜ lodged a protest over the decision on exclusion from the procurement procedure to the contestation committee of the Public Procurement Office. The committee dismissed the protest, finding that the Aspen Grupp OÜ was excluded from the procurement process on a legal basis and that Article 38.1.4 of the PPA complied with Directive no. 2004/18 and therefore the latter was not directly applicable.

The Aspen Grupp OÜ filed an action with the Tallinn Circuit Court, applying for the initiation of constitutional review proceedings, challenging the conformity with the Constitution of Article 38.1.4 of the PPA. The Aspen Grupp OÜ substantiated its action by stating that there was no legal ground to exclude the company from the procurement process, as the relevant provision of Estonian law was in conflict with Article 45.2.e and 45.2.f of Directive no. 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, and therefore the GRE ought to have set aside the Estonian law and directly applied the directive. Secondly, the Aspen Grupp OÜ argued that the decision on its exclusion from the procurement process was disproportionate, because the general norm on the basis of which this had been decided was unconstitutional as it was disproportionate.

The circuit court upheld the action by the Aspen Grupp OÜ, overturned the contestation committee decision, and declared clauses 2 and 5 of the GRE decision, as to the exclusion of the Aspen Grupp OÜ from the procurement process unlawful. The circuit court held that Article 38.1.4 of the PPA was in conflict with the principle of proportionality arising from Sections 31 and 11 of the Constitution in their conjunction. The circuit court declared the referred provision unconstitutional, did not apply it, and referred the judgment to the Supreme Court, thus initiating constitutional review proceedings.

In March 2008, Parliament passed the Public Procurement Act Amendment Act, where the above-mentioned condition was omitted from the wording of Article 38.1.4 of the PPA.

II. A conflict of a provision with EU law does not necessarily mean the provision is in conflict with the Constitution or the Constitutional Amendment Act. Nevertheless, the courts have not been given the competence to initiate constitutional review proceedings for the reason that legislation of general application is in conflict with European Union law. With regard to the necessity of initiating constitutional review proceedings in a situation where a conflict of a provision of the

Estonian law with EU law becomes apparent, the Supreme Court *en banc* has held that there are different possibilities for bringing the national law into conformity with European Union law, and that neither the Constitution nor the European Union law provide for the existence of constitutional review proceedings for this purpose. The national law conflicting with the EU law is only to be set aside in the concrete dispute.

In a situation where, within one and the same case, the conformity of a provision to both the Constitution and the EU law is questioned, the court adjudicating the matter has first to check the conformity of Estonian law with EU law. Should it appear to the court reviewing the conformity of the Estonian law to EU law – if necessary, with the help of a preliminary ruling from the European Court of Justice (ECJ) – that the Estonian law is in conflict with the EU law, and the conflict cannot be overcome through the EU law conforming interpretation, the court must refuse to apply the provision without initiating constitutional review proceedings. If possible, in such a case the EU law, having direct legal effect, must be applied.

The Supreme Court is competent to review the constitutionality of a provision relating to EU law, if formal constitutionality of the provision is contested. It is also competent to review provisions relating to EU law, which also regulate circumstances not covered by EU law (and a constitutional review is petitioned in regard to those situations only). It has competence in a situation where the EU law, including the case-law of the ECJ, gives the Member States the right of discretion upon the transposition and implementation of the EU law, in the exercise of which the Member States are bound by their Constitutions and the principles arising from the Constitutions. The possible existence of the situations enumerated above can be ascertained upon reviewing the conformity of the Estonian law to the EU law.

The Supreme Court cannot adjudicate a petition for the review of constitutionality of a provision of legislation of general application relating to EU law, when the court adjudicating a legal dispute has not reviewed the conformity of the provision to EU law. The hearing of a petition in such a case may result in a situation where, through a provision of Estonian legislation, which is in conformity with the EU law, the Supreme Court reviewed the constitutionality of the EU law, serving as the basis of this provision. As Article 38.1.4 of the PPA is a provision relating to the EU law, the circuit court ought to have first reviewed its conformity with EU law. The circuit court did not do so, neither did it analyse the prerequisites for the constitutional review of the provision. Consequently the petition of the Tallinn Circuit Court was not permissible, and it was rejected without a hearing under Article 11.2 of the Constitutional Review Court Procedure Act.

Supplementary information:

This ruling is highly significant, being at present the only ruling in Estonia to deal comprehensively with the relationship between the constitutional review and the EU law.

Cross-references:

- Opinion of the Supreme Court of 11.05.2006, no. 3-4-1-3-06, *Bulletin* 2006/1 [EST-2006-1-002] *Riigi Teataja III* (Official Gazette), 2006, 19, 176;
- Ruling of the Administrative Law Chamber of the Supreme Court of 07.05.2008 no. 3-3-1-85-07, *Riigi Teataja III* (Official Gazette), 2008, 21, 146.

Languages:

Estonian, English.

*Identification:* EST-2008-2-012

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 01.07.2008 / **e)** 3-4-1-6-08 / **f)** Review of constitutionality of the second sentence of Section 71.2 of the Aviation Act / **g)** *Riigi Teataja III* (Official Gazette), 2008, 24, 160; *Riigi Teataja III* (Official Gazette), 2008, 33, 223, www.riigikohus.ee/ / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

- 4.5.2.4 Institutions – Legislative bodies – Powers – **Negative incompetence.**
- 4.6.2 Institutions – Executive bodies – **Powers.**
- 4.10.1 Institutions – Public finances – **Principles.**
- 4.10.6 Institutions – Public finances – **Auditing bodies.**
- 5.3.13.1.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Non-litigious administrative proceedings.**
- 5.3.13.25 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the charges.**
- 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation.**

Keywords of the alphabetical index:

Air traffic, safety.

Headnotes:

The certification procedure constitutes a single administrative procedure, in the course of which a public law relationship only arises between the Civil Aviation Board and the air operator, not between the air operator and the inspecting organisation.

The relevant provision of the Estonian Aviation Act establishes the obligation to pay the costs of inspection without determining the necessary elements of the obligation. It is accordingly in conflict with the requirement to provide state financial obligations by law and unconstitutional in the formal sense.

Summary:

I. A company named Enimex sought to obtain from the Civil Aviation Board a certificate of inspection of airworthiness and a certificate of airworthiness of aircraft BAe ATP, originally registered in the UK. It also sought a certificate of being an organisation able to guarantee continued airworthiness. After three months, the Civil Aviation Board registered the aircraft BAe ATP in a state register under registration mark ES-NBA, and issued a certificate of registration to that effect. Enimex paid state fees for the determination of the airworthiness of the aircraft, for having the aircraft entered in the operations specification of an air operator's certificate, for the issue of a certificate of being an organisation guaranteeing the continued airworthiness and for the issue of an airworthiness certificate. This cost around 132 euros altogether.

Thereafter, the Civil Aviation Board issued Enimex with an invoice for conducting an audit in co-operation with a Swedish company AviaQ AB, to inspect the airworthiness of the aircraft and to review the conformity of the air carrier's aviation activities with the valid requirements. The invoice included auditing service (+ value added tax), air tickets and accommodation (altogether ca 9 953 euros). Enimex challenged this invoice, and only paid it when the Civil Aviation Board sent a reminder for payment of invoice, pointing out that it would be unable to issue certificates of airworthiness for Enimex until the invoice was settled.

Enimex filed an action with the Administrative Court, arguing that the Civil Aviation Board had illegally required payment for costs of inspection of airworthiness. It also sought a declaration of unlawfulness of delay and compensation for the material damage caused by the delay in issuing the certificates. The

action was dismissed. Enimex filed an appeal with the Circuit Court, contending that the administrative procedure in its regard had been delayed unlawfully, and that the demand to pay the invoice, based on the second sentence of Section 71.2 of the Aviation Act, was unconstitutional.

The Circuit Court upheld Enimex's appeal against the Civil Aviation Board. Declaring the second sentence of Section 71.2 of the Aviation Act unconstitutional, the Court did not apply it and initiated constitutional review proceedings. The claim of compensation for material damage was referred back to the first instance court for a new hearing.

The Circuit Court held that the Civil Aviation Board fulfils public law functions by guaranteeing air safety and organising supervision of safety, inter alia through certification procedures. These procedures must be regarded as a single administrative procedure, as opposed to being divided into technical inspection under private law and public law. No civil law relationship arises within a certification procedure between the person performing the inspection referred to in Section 71 of the Aviation Act and an air operator. Therefore, the obligation imposed on the air operator subject to inspection to pay a charge constitutes a financial obligation in public law in the sense of Section 113 of the Constitution. The second sentence of Section 71.2 of the Aviation Act delegates the right to determine these financial obligations by a person in private law, but does not specify the bases of calculation or the limits of the costs of inspection. Such delegation is not therefore in conformity with Section 113 of the Constitution. In addition, the obligation to pay double payments (state fee and inspection costs) is unreasonably burdensome and disproportionate.

II. The Constitutional Review Chamber determined whether the contested obligation to pay the costs of inspection, provided in the second sentence of Section 71.2 of the Aviation Act, is a financial obligation under public law, falling within the sphere of protection of Section 113 of the Constitution, and whether the relevant provision is constitutional.

The Chamber held that the obligation to pay the costs of inspection is a financial obligation in public law. In substance, the disputed obligation is a fee, which aims to cover part of the expenses relating to the performance of an act by the state, i.e. issue of a certificate. From the air operator's perspective, the certification procedure constitutes a single administrative proceeding, within which a public law relationship is created between the Civil Aviation Board and the air operator. The fact that the Civil Aviation Board is entitled, under Section 71 of the Aviation Act, to perform part of the procedure in co-

operation with a private person, is irrelevant. No legal relationship is created between an air operator and the inspecting organisation; the air operator cannot influence the conditions of the agreement between the Civil Aviation Board and the inspecting organisation.

According to Section 113 of the Constitution, state taxes, duties, fees, fines and compulsory insurance payments shall be provided by law. This includes all financial obligations in public law, irrespective of their title in different acts of legislation. The requirement means that the law must determine the elements of financial obligations in public law. These elements include the basis of establishing the obligation, the subjects under obligation, the extent of the obligation or the conditions of determining the amount thereof, the procedure for payment or collection, and other inherent characteristics of a relevant financial obligation.

The second sentence of Section 71.2 of the Aviation Act establishes the obligation to pay the costs of inspection without determining the necessary elements of this obligation. It is therefore in conflict with the requirement to provide for state financial obligations by law, and not constitutional in the formal sense. The elements of the financial obligation under discussion have not been provided by any legislation of general application. Instead, the amount of this financial obligation is decided by an agreement between the Civil Aviation Board and an inspecting organisation.

Based on the above considerations, the Constitutional Review Chamber declared the second sentence of Section 71.2 of the Aviation Act unconstitutional, because it did not determine the elements of the established financial obligation in public law in conformity with the requirement of Section 113 of the Constitution that state financial obligation must be provided by law.

Cross-references:

- Decision 3-4-1-16-06 of 13.02.2007 of the Constitutional Review Chamber;
- Decision 3-4-1-10-00 of 22.12.2000 of the General Assembly, *Bulletin* 2000/3 [EST-2000-3-009];
- Decision 3-4-1-22-03 of 19.12.2003 of the Constitutional Review Chamber;
- Decision 3-4-1-18-07 of 26.11.2007 of the Constitutional Review Chamber.

Languages:

Estonian, English.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2008-2-008

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 15.01.2002 / **e)** 1 BvR 1783/99 / **f)** Permit for ritual slaughter / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 104, 337-356 / **h)** *Neue Juristische Wochenschrift*, 2002, 663-666; *Sammlung Lebensmittelrechtlicher Entscheidungen*, 42, 343-354; *Gewerbearchiv*, 2002, 286-288; *Natur + Recht*, 2002, 404-407; *Arbeitsrechtliche Praxis*, no.2 relating to Article 4 GG; *Zeitschrift für evangelisches Kirchenrecht*, 48, 207-214; *Jagdrechtliche Entscheidungen VII*, no. 59; *Entscheidungen in Kirchensachen seit 1946*, 40, 1-15 (2002); CODICES (German, English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.
 5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship**.
 5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession**.

Keywords of the alphabetical index:

Religious group, ritual slaughter, animal / Animal protection.

Headnotes:

If a non-German butcher who is a pious Muslim wants to slaughter animals without stunning them (ritual slaughter) in order to facilitate to his customers, in accordance with their religious conviction, the consumption of the meat of animals that were ritually slaughtered, the constitutionality of this activity is to be examined in accordance with Article 2.1 in conjunction with Article 4.1 and 4.2 of the Basic Law.

In the light of these constitutional norms, Article 4a.1 in conjunction with Article 4a.2.2.2 of the *Tierschutzgesetz* (Animal Protection Act) is to be interpreted in such a way that Muslim butchers can be granted an exceptional permission for ritual slaughter. [Official Headnotes].

The practice of a non-German Muslim butcher, who wants to slaughter animals without stunning them first (ritual slaughter) in order to allow his customers to consume the meat of animals slaughtered in accordance with their belief, must be constitutionally examined on the basis of Article 2.1 in conjunction with Article 4.1 and 4.2 of the Basic Law (*Grundgesetz*). [Unofficial Headnotes].

Summary:

I. Pursuant to Article 4a of the Animal Protection Act it is prohibited to slaughter warm-blooded animals without previously stunning them (*Schächten*, ritual slaughter) in Germany. An exceptional permission may be granted to the extent that this “is necessary for meeting the needs of members of specific religious groups in the area of applicability of this law, to whom mandatory provisions of their religious group prescribe ritual slaughter or prohibit the consumption of the meat of animals that were not ritually slaughtered.”

The complainant, a Muslim butcher, requests that such an exceptional permission be granted. From 1988 to 1995, he had been granted such permissions, but none thereafter. In the opinion of the administrative courts, neither the Sunnitic persuasion of the Muslim faith nor the Muslim faith in general prohibit the consumption of the meat of animals that were not ritually slaughtered. The courts held that the beliefs of the religious group as a whole are decisive, not those of individuals, who may have stricter religious convictions, such as the complainant and his customers. In this case, ritual slaughter does not constitute the exercise of his right to practise his religion, rather the practice of an occupation.

After unsuccessful recourse to the courts, the complainant lodged a constitutional complaint with the Federal Constitutional Court. He alleged that these decisions violated his religious freedom and a number of other fundamental rights. He was of the view that the protection of animals did not suffice to justify a ban on ritual slaughter, since – properly performed – ritual slaughter is no more painful for the animal than the conventional methods permitted for the slaughter of animals.

II. The First Panel granted the constitutional complaint and declared that Article 4 of the Animal Protection Act was in conformity with the Basic Law, but that its interpretation and application by the administrative authorities and administrative courts in the contested decisions did not meet the requirements of the Basic Law.

It is true that for a Muslim butcher, ritual slaughter is primarily a matter of the freedom to practise his occupation and not one of religious freedom. However, in performing this occupation, a devout Muslim must observe religious laws. Therefore, the interpretation of provisions regulating the practice of an occupation or profession must be supplemented in scope by the additional protection inherent in the fundamental right of religious freedom. This, however, does not alter the fact that it is possible to restrict the practice of an occupation or profession. Nonetheless, in doing so the principle of proportionality must be observed.

As far as the result is concerned, Article 4a.1 in conjunction with Article 4a.2.2.2 of the Animal Protection Act is in conformity with the Basic Law. The legislature took into account in an acceptable manner the interests of animal protection through its general ban on ritual slaughter and its granting of exceptional permissions in Article 4a.2.2.2 of the Animal Protection Act. Its basic assumption that animals are caused less pain and suffering if they are stunned prior to being slaughtered is at least reasonable. However, the possibility of granting exceptional permissions also means that the fundamental rights of Muslim butchers are sufficiently taken into account and that they are able to practise their occupation in compliance with their religious convictions. They are thus able to supply their Muslim customers with the meat of animals that have been ritually slaughtered and in this way place them in a position to consume meat which is in keeping with their religious convictions.

This only applies, however, if – as has been required since the rendering of a fundamental decision by the Federal Administrative Court (*Bundesverwaltungsgericht*) in 1995 – Article 4a.2.2 of the Animal Protection Act is not interpreted and applied in a way that makes the provision in practice devoid of effect for Muslim butchers. Such a result can be avoided by interpreting the legal elements “religious group” and “mandatory provisions” in conformity with the Basic Law. The term “religious group” must not, as has meanwhile also been accepted in a recent decision by the Federal Administrative Court, be understood as signifying a religious body or group within the meaning of Article 137.5 of the Constitution of the

German Reich (*Weimarer Reichsverfassung*) or Article 7.3 of the Basic Law. Rather it is sufficient for the grant of an exemption from the ban on ritual slaughter that the applicant belong to a group of persons who share a common religious conviction. Therefore, in this context, groups within the Islamic faith whose members have a religious persuasion different to that of other Islamic groups can be considered religious groups. The interpretation of the term “religious group” is in conformity with the Basic Law and takes into consideration in particular Article 4 of the Basic Law. It is also compatible with the wording of the above-mentioned provision for the protection of animals and corresponds to the will of the legislator. It was the legislator’s intention to make the exemption available not only for members of the Jewish faith, but also for members of the Islamic faith and its various different religious convictions.

This also has indirect consequences for the handling of the second element “mandatory provisions”, which prohibits members of the group from consuming the meat of animals that were not ritually slaughtered. It is a matter for the authorities, and in cases of dispute, the courts to decide whether this element has been satisfied. Nonetheless, this question cannot be answered in the case of a religion that – such as Islam – takes different views as regards mandatory ritual slaughter, where the point of reference of such an examination is not necessarily Islam as a whole or the Sunnitic or Shiitic persuasions of this religion. Rather the question of the existence of mandatory provisions is to be answered in view of the specific persuasion and, if necessary, for the specific religious group within an existing persuasion. In this context, it is sufficient for the person who needs the exceptional permission in order to supply the members of a religious group, states, in a substantiated and understandable manner, that the common religious conviction of the religious group mandatorily requires the consumption of the meat of animals that were not stunned before they were slaughtered. If such a statement has been made, the state, which may not fail to consider such a concept that the religious group has of itself, is to refrain from making a value judgment concerning this belief.

The authorities and administrative courts misjudged the necessity and the possibility of such a constitutional interpretation and therefore restricted the above-mentioned fundamental right in a disproportionate manner at the expense of the complainant when applying the exemption regulation concerning the ban on ritual slaughter. Against this legal background the challenged decisions had to be overturned and the matter referred back to the Federal Administrative Court.

Languages:

German; English version (slightly abridged) to be found in Decisions of the *Bundesverfassungsgericht*, Volume 4, 340-354 and on the homepage of the Federal Constitutional Court.

*Identification:* GER-2008-2-009

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 01.04.2008 / **e)** 1 BvR 1620/04 / **f)** Enforced contact / **g)** / **h)** *Neue Juristische Wochenschrift*, 2008, 1287-1292; *Europäische Grundrechte-Zeitschrift*, 2008, 219-230; *Deutsches Verwaltungsblatt*, 2008, 637-641; *Zeitschrift für das gesamte Familienrecht*, 2008, 845-853; *Familie-Partnerschaft-Recht*, 2008, 238-244; CODICES (German).

Keywords of the systematic thesaurus:

- 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**
- 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, parents, contact, duty / Child, parental contact, enforced / Child, best interest, duty of contact, joint consideration.

Headnotes:

The duty to care for and bring up their child which is imposed on parents by sentence 1 of Article 6.2 of the Basic Law is not owed exclusively to the state but also to the child. The child's right to parental care and upbringing in sentence 1 of Article 6.2 of the Basic Law corresponds with this parental duty. It is for the legislator to elaborate the right and duty.

The encroachment on the fundamental right to protection of personality contained in Article 2.1 in conjunction with Article 1.1 of the Basic Law, which is associated with the imposition of an obligation on a parent to have contact with his or her child, is justified by the parent's responsibility for his or her child

imposed by Article 6.2.1 of the Basic Law and the child's right to parental care and upbringing. It is reasonable to oblige a parent to have contact with his or her child if this is in the child's best interests.

Contact with a child which can only be enforced against the parent unwilling to have contact with the aid of coercive measures is not usually in the child's best interests. The encroachment on the parent's fundamental right to protection of his right of personality which results from the threat to apply coercive measures is not justified in this context unless there are sufficient indications in an individual case which suggest that enforced contact will be in the child's best interests.

Summary:

I. The complainant has two children, who are both minors, from his existing marriage. In addition, he has an illegitimate son born in 1999 with whom he does not maintain personal contact. The complainant has, however, recognised his paternity and pays child support.

The child's mother's application for an access arrangement between the son and his father was rejected by the Local Court. The Local Court explained its refusal on the basis that enforced contact would not be in the child's best interests in view of the father's hostile attitude. The Higher Regional Court altered this decision after obtaining a psychological opinion and ordered the complainant to have contact with his child. In its view the child had a right to contact with its father pursuant to Article 1684.1 of the German Civil Code (hereinafter: the Code). Under the same provision, the father was obliged to have contact.

The provisions of Article 1684 of the Code which are relevant here state that:

1. A child has the right to have contact with each of its parents; each parent is obliged and entitled to have contact with his or her child.

3. The Family Court may determine the scope of the right of contact and elaborate the details of how it should be exercised, including in relation to third parties. ...

4. The Family Court may restrict or exclude the right of contact or the enforcement of earlier decisions on the right of contact to the extent the child's best interests make this necessary. It may only issue a decision restricting or excluding the right of contact or its enforcement over an extended period or

permanently if failure to do so on its part would endanger the child's best interests. The Family Court may in particular order that contact may only take place when a third party who is willing to assist with it is present. The third party may also be a youth welfare agency or an association; in this case the agency or association will select the individual to provide the assistance.

The Higher Regional Court threatened to fine the complainant 25,000 euros if he did not comply. This threat was based on Article 33 of the Act on Matters of Non-Contentious Jurisdiction (hereinafter: the Act).

The relevant provisions of this section state:

1. If the Court imposes an obligation on a person to undertake an act the performance of which depends entirely on his volition ..., it may enforce such performance by ordering him to pay a fine unless the law provides otherwise. ...

3. Prior to ordering payment of the fine (subsection 1), the Court must first threaten the party concerned with the imposition of a fine. The fine may not exceed twenty-five thousand euros in a single case. ...

The complainant's constitutional complaint is directed against the order of the Higher Regional Court threatening to impose a fine and indirectly against sentence 1 of § 33.1 and § 33.3 of the Act.

II. The constitutional complaint was successful. The matter was referred to the Higher Regional Court for a new decision.

The decision of the Federal Constitutional Court is based essentially on the following considerations:

The threat of a fine to enforce contact of the complainant, who was unwilling to have contact, encroaches on his fundamental right to protection of his right of personality.

The statutory basis for the threat of a fine is § 33 of the Act. When examining whether the encroachment on fundamental rights resulting from the threat of a fine can be justified, § 684.1 of the Code obliging parents to have contact with their children must be considered.

The legislator pursues a legitimate purpose in providing for the possibility of the threat of an imposition of a fine where a parent is unwilling to have contact with his or her child.

The duty of a parent to have contact with his or her child pursuant to § 684 of the Code is a permissible concretisation of parental responsibility provided by the Basic Law. Article 6.2 of the Basic Law guarantees parents the right to care for and bring up their child, but at the same time makes this task a duty owed to the state and the child. This corresponds with the child's right to parental care and upbringing in Article 6.2 of the Basic Law. It is for the legislator to elaborate the details of the right and duty. Since contact between parents and their child is in principle in the child's best interests, the legislator obliged parents in § 1684 of the Code to have contact with their child.

The encroachment on the fundamental right to protection of personality, which is associated with the imposition of an obligation on a parent to have contact with his or her child, is justified by the responsibility for his or her child imposed on the parent by Article 6.2 of the Basic Law and the child's right to parental care and upbringing. If one weighs the child's interest in beneficial contact with both parents against a parent's interest in not wanting to have personal contact with the child, then one should accord the child's desire considerably more weight than the parent's wishes. This is because contact with its parents is of considerable significance for a child's development and such contact contributes in principle to its well-being. It is thus reasonable to oblige a parent to have contact with his or her child if this is in the child's best interests.

However, as a rule the threat of compulsory enforcement of a parent's duty of contact with his or her child is not suitable for achieving the purpose sought to be achieved. Contact with the child which can only be enforced by applying coercive measures is not usually in the child's best interests. The encroachment on the parent's fundamental right to protection of his right of personality resulting from the threat to apply coercive measures is not justified in this context unless there are sufficient indications in an individual case that suggest that enforced contact will be in the child's best interests.

What counts in deciding whether it would be suitable to use coercive measures against a parent to force him or her to have contact with his or her child is not whether the contact could endanger the child's best interests, but whether such contact is in the child's best interests. The legislator assumed that a child's contact with its parents is of outstanding importance for its development and is in its best interests. This justifies the encroachment on the parents' fundamental right to protection of their rights of personality resulting from the imposition on them of a duty to have contact with their child. Nevertheless, this is only true to the

extent that and for as long as contact with its parent actually serves the child's best interests. If the statutory means do not achieve this purpose, they are not suitable to justify encroachment on the parent's right of personality. This also applies to the possibility offered by the law of enforcing the duty of contact through the threat of coercive measures. The fact that § 684.4 of the Code only permits restrictions on and the exclusion of the right of contact if the child's best interests would otherwise be endangered does not prevent the above. This provision deals with the limits on the parental right of contact and not with the enforcement of the duty of contact.

Nevertheless, one cannot rule out the possibility that there are cases in which there is a realistic chance of a child being able, through its behaviour, to overcome the resistance of the parent who wants to avoid it so that what was initially enforced contact can be in the child's best interests. The older a child is and the more developed its personality is, the more it can be assumed that even the compulsory enforcement of its own express and emphatic wish to have contact with its parent will be in its best interests. In such a case it is reasonable to expect a parent to have contact with his or her child and, if necessary, to force him or her to do so by also using coercive measures.

§ 3 of the Act is thus to be interpreted in accordance with the Constitution as meaning that compulsory enforcement of the duty of contact must be avoided unless there are sufficient indications in a specific case that enforcement would be in the child's best interests.

Languages:

German.



Identification: GER-2008-2-010

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 06.05.2008 / **e)** 2 BvR 337/07 / **f)** / **g)** / **h)** *Beilage zu Fachanwalt Arbeitsrecht*, 2008, 203; *Die Sozialgerichtsbarkeit*, 2008, 408; *Arbeit und Recht*, 2008, 262; CODICES (German).

Keywords of the systematic thesaurus:

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

4.7.4.1.5 Institutions – Judicial bodies – Organisation – Members – **End of office.**

4.7.4.1.6.2 Institutions – Judicial bodies – Organisation – Members – Status – **Discipline.**

5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**

5.4.22 Fundamental Rights – Economic, social and cultural rights – **Artistic freedom.**

Keywords of the alphabetical index:

Judge, lay, Constitution, loyalty / Judge, lay, conduct, acting in a private capacity / Judge, lay, removal from office.

Headnotes:

Lay judges are subject to a duty of loyalty to the Constitution when acting in a private capacity.

Summary:

I. The complainant was a lay judge at a Labour Court. In January 2008 the Higher Labour Court removed him from office. In its reasoning, the Court explained that since 1989 the complainant had been a member of a rock band which from 1988 onwards had appeared in more than 200 concerts at home and abroad with a number of other right-wing extremist skinhead bands. The Higher Labour Court, in considering the lyrics of the songs and the performance of the band, came to the conclusion that these brought to mind the nationalist socialist regime, glorified violence and were evidence of an anti-constitutional ideology. The Court held that the conduct of the complainant constituted a serious breach of his official duties justifying his removal from office.

In his constitutional complaint against the decision of the Higher Labour Court the complainant in essence criticised the violation of his fundamental rights pursuant to sentence 1 of Article 5.1 of the Basic Law (freedom of expression) and sentence 1 of Article 5.3 of the Basic Law (artistic freedom).

II. The constitutional complaint failed. The First Panel of the Second Senate of the Federal Constitutional Court concluded that the complainant's removal from office was constitutionally unobjectionable.

In essence, the decision is based on the following considerations:

The challenged decision does not infringe the complainant's right to artistic freedom, but the removal from office does constitute a violation of this fundamental right. The violation, however, is justified. It serves a constitutionally legitimated purpose and is founded on a sufficiently defined statutory basis. The interpretation and application of the statute, too, are constitutionally unobjectionable in the present individual case.

With regard to the constitutionally legitimated purpose, the Court explained:

Guaranteeing artistic freedom potentially conflicts with all kinds of constitutional provisions. The resulting conflict is to be resolved in each case by considering the circumstances of the particular case. The constitutional principle that civil servants and judges – including lay judges – are to be required to uphold the constitutional order on the basis of which they have been sworn in is also one of the protected interests in respect of which there is a potential conflict.

Professional judges and lay judges are subject to a special duty of loyalty to the Constitution. This follows, notwithstanding the fact that Article 33.5 of the Basic Law only recognises the traditional principles of the permanent civil service and is thus not directly applicable to lay judges, from the fact that lay judges act as organs of state fulfilling tasks on equal terms with professional judges. The Basic Law requires that legislative power be exercised through state courts. A court is not defined as a "state" court merely because it is constituted on the basis of state law and that its object is to fulfil state tasks. Rather, its connection to the state must also be sufficiently assured in terms of personnel. For this reason, the Offices of Justice of the *Länder* are to have strict regard to the fact that only persons who can guarantee that the judicial duties to which they are subject by virtue of the Constitution and which they have confirmed under oath will be fulfilled without reservation at all times, may be nominated for the post of lay judge. The lay judge's duty of loyalty, just as the duty of loyalty of the professional civil servant or judge under the Constitution carries particular weight due to the fact that the Constitution is not neutral in value, but has decided in favour of core fundamental values which it protects and assigns the state the task of securing and guaranteeing. This precludes the state admitting applicants to exercise state authority or permitting citizens to remain in (honorary) positions involving the exercise of state power if they reject and challenge the free democratic legal and social order.

The encroachment on artistic freedom has a sufficiently defined statutory basis, namely sentence 1 of § 27 of the Labour Court Act. In accordance with this provision, a lay judge is to be removed from office if he has seriously breached his official duties. There are no constitutional reservations with regard to this provision.

Finally, the interpretation of the provision by the Higher Labour Court is also unobjectionable as regards the complainant's constitutional rights. The fact that the Higher Labour Court saw a grave misconduct in the complainant's participation in the activities of the band justifying a removal from office, does not constitute a disproportionate encroachment on the right of artistic freedom.

Nor has there been a violation of the fundamental right of freedom of expression. The decision of the Higher Labour Court, which is the subject of the challenge, falls within the boundaries of freedom of opinion as delineated by general laws and does not disproportionately intrude into the complainant's fundamental right.

Languages:

German.



Identification: GER-2008-2-011

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 07.05.2008 / **e)** 2 BvE 01/03 / **f)** / **g)** / **h)** *Deutsches Verwaltungsblatt*, 2008, 770-778; *Europäische Grundrechte-Zeitschrift*, 2008, 312-323; *Neue Juristische Wochenschrift*, 2008, 2018-2025; www.bundesverfassungsgericht.de; CODICES (German, English).

Keywords of the systematic thesaurus:

4.5.2 Institutions – Legislative bodies – **Powers**.
 4.5.7 Institutions – Legislative bodies – **Relations with the executive bodies**.
 4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces**.

Keywords of the alphabetical index:

Army, deployment, abroad, parliament, approval, requirement / Army, deployment, abroad, armed conflict, expectation.

Headnotes:

There is a requirement of parliamentary approval under the provisions of the Basic Law which concern defence if the context of a specific deployment and the individual legal and factual circumstances indicate that there is a concrete expectation that German soldiers will be involved in armed conflicts. This precondition is subject to full judicial review.

Summary:

I. The *Organstreit* proceedings (proceedings on a dispute between supreme federal bodies) relate to whether the deployment of German soldiers in NATO AWACS aircraft to monitor airspace above the sovereign territory of Turkey required the approval of the German *Bundestag*.

On 19 February 2003, the NATO Defence Planning Committee authorised the military authorities of the alliance to station NATO AWACS aircraft and systems in Turkey. Thereupon, four NATO AWACS aircraft were moved to Turkey and from 26 February 2003 or 18 March 2003 until 17 April 2003 they were deployed in Turkish airspace for surveillance purposes. The AWACS aircraft constitute an airborne warning and control system to give early warning of aircraft or other flying objects. The system has control and command functions and serves to direct fighter aircraft, without carrying weapons itself. The crews consist of members of the forces of twelve NATO member states. Approximately one-third of the crew members are soldiers of the *Bundeswehr* (German Federal Armed Forces).

In March 2003, the Chairman of the parliamentary group of the *Freie Demokratische Partei* (FDP) in the *Bundestag* informed the Federal Chancellor that in the opinion of the FDP parliamentary group the Federal Government had an obligation to apply for the approval of the German *Bundestag* of the participation of German soldiers in the AWACS deployments over Turkey. At least, he wrote, the Federal Government must, in the case of armed conflict, be prepared to pass without delay a resolution on such an application and submit it to the German *Bundestag* for votes to be taken. The Federal Government refused to obtain the approval of the German *Bundestag*. As grounds, it stated that the NATO AWACS aircraft over Turkish territory

conducted only routine flights for strictly defensive aerial surveillance. It stated that they gave no support to deployments in or against Iraq.

After the armed conflict commenced in Iraq on 20 March 2003, FDP *Bundestag* members and the FDP parliamentary group submitted a motion in the German *Bundestag*. By this motion, the German *Bundestag* was to call on the Federal Government to fulfil its constitutional duty and apply without delay for the approval of the German *Bundestag*, which is essential, of the participation of German soldiers in the AWACS deployments. The motion did not obtain the necessary majority.

The FDP parliamentary group filed an application with the Federal Constitutional Court for the issue of a temporary injunction to the effect that German participation in the AWACS deployments in Turkey might be maintained only on the basis of a resolution of the *Bundestag*; the Second Panel rejected this application by an order of 25 March 2003.

In its application in the main action, the FDP parliamentary group petitioned the court to find that the Federal Government had violated the rights of the German *Bundestag* by failing to obtain its approval for the deployment of German soldiers in measures of aerial surveillance for the protection of Turkey.

II. The Second Panel of the Federal Constitutional Court held that the application was admissible and well-founded. The Federal Government should have obtained the approval of the German *Bundestag* to the deployment of German soldiers in NATO AWACS aircraft for aerial surveillance above the sovereign territory of Turkey in spring 2003. There is a requirement of parliamentary approval under the provisions of the Basic Law which concern defence for the deployment of armed forces if the context of a specific deployment and the individual legal and factual circumstances indicate that there is a concrete expectation that German soldiers will be involved in armed conflicts. These conditions were fulfilled in the present case. By carrying out aerial surveillance of Turkey in NATO AWACS aircraft, German soldiers took part in a military deployment in which there was tangible actual evidence of imminent involvement in armed operations.

The decision is essentially based on the following considerations:

In its judgment of 12 July 1994, the Federal Constitutional Court considered the totality of provisions of the Basic Law which concern defence, and derived from the Basic Law, against the background of German constitutional tradition, a

general principle that every deployment of armed forces requires the essential prior approval of the German *Bundestag*. Under this principle, the authorisation contained in Article 24.2 of the Basic Law to join a system of mutual collective security is the constitutional basis for the participation of the *Bundeswehr* in deployments outside the federal territory, insofar as these occur within and pursuant to the rules of such a system. Sentence 1 of Article 59.2 of the Basic Law provides that the German *Bundestag* must approve the treaty basis of a system of mutual collective security. In contrast, the concretisation of the treaty and filling out the details of the integration programme contained in it is the duty of the Federal Government.

But the freedom of the Federal Government to structure its alliance policy does not include the decision as to who, on the domestic level, is to determine whether soldiers of the *Bundeswehr* will take part in a specific deployment that is decided in the alliance. By reason of the political dynamics of an alliance system, it is all the more important that the increased responsibility for the deployment of armed forces should lie in the hand of the body that represents the people. The requirement of parliamentary approval under the provisions of the Basic Law which concern defence is therefore an essential corrective to the limits of parliament's assumption of responsibility in the area of foreign security policy. The German *Bundestag* is competent to make the fundamental and essential decision as to the deployment of armed forces; it bears the responsibility for the armed deployment of the *Bundeswehr* abroad. In view of the function and importance of the requirement of parliamentary approval under the provisions of the Basic Law which concern defence, its scope may not be defined restrictively; in case of doubt, it must be interpreted in favour of parliament. If and to the extent that competence of the German *Bundestag* in the form of a right of participating in decisions under the provisions of the Basic Law which concern defence can be derived from the Basic Law, there is necessarily no freedom for the Federal Government to decide on its own authority. The requirement of parliamentary approval is part of the structural principle of the separation of powers, not a mechanism to break down the barriers between them.

If German soldiers are involved in armed operations, this is a deployment of armed forces which under the Basic Law is permissible only on the basis of the essential approval of the German *Bundestag*. It is not relevant for the requirement of parliamentary approval under the provisions of the Basic Law which concern defence whether armed conflicts in the sense of

combat have already taken place, but whether, in view of the specific context of the deployment and the individual legal and factual circumstances, the involvement of German soldiers in armed conflicts is concretely to be expected. The mere possibility that there may be armed conflicts during a deployment is not sufficient for this. Instead, there must firstly be sufficient tangible actual evidence that a deployment, by reason of its purpose, the concrete political and military circumstances and the deployment powers, may lead to the use of force. Secondly, there must be particular proximity to the use of force. An indication for this exists if the soldiers are carrying arms abroad and are authorised to use them.

The question as to whether there is involvement of German soldiers in armed operations is subject to full judicial review. The Federal Government is not granted latitude for assessment or prognosis that cannot be verified, or that can be verified only to a limited extent, by the Federal Constitutional Court.

By this standard, the involvement of German soldiers in the aerial surveillance of Turkey by NATO was a deployment of armed forces which in accordance with the requirement of parliamentary approval under the provisions of the Basic Law which concern defence required the approval of the German *Bundestag*. In this way, German soldiers took part in a military deployment in which there was tangible actual evidence of imminent involvement in armed operations. The AWACS aircraft deployed were part of a system of concrete military protective measures against a feared attack on the NATO area. The monitoring of airspace from the outset had a specific connection to a military conflict with Iraq, which was considered possible by reason of concrete circumstances. There was tangible actual evidence that the involvement of NATO in a military conflict was to be expected.

An involvement of German soldiers in armed operations was also immediately to be expected. At the latest when the rules of engagement that had been extended because of the deterioration of the situation were introduced, the involvement of German soldiers in armed operations depended only on whether and when Iraq would launch an attack on Turkey.

Cross-references:

The proceedings which preceded the main action, for the issue of a temporary injunction, have the file number 2 BvQ 18/03; the decision is printed in the Official Digest, volume 108, pp. 34 *et seq.*

The decision of 12 July 1994, to which reference is made (file number 2 be 3/92, 5/93, 7/93, 8/93) is printed in volume 20, pp. 286 *et seq.*, of the Official Digest.

Languages:

German, English version (slightly abridged) to be found in Decisions of the *Bundesverfassungsgericht*, Volume 4, 340-354 and on the homepage of the Federal Constitutional Court.



Identification: GER-2008-2-012

a) Germany / b) Federal Constitutional Court / c) First Panel / d) 27.05.2008 / e) 1 BvL 10/05 / f) / g) / h) *Europäische Grundrechte-Zeitschrift*, 2008, 428-436; *Deutsches Verwaltungsblatt*, 2008, 1116-1121; CODICES (German).

Keywords of the systematic thesaurus:

- 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**
- 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**
- 5.3.34 Fundamental Rights – Civil and political rights – **Right to marriage.**

Keywords of the alphabetical index:

Transsexuality, marriage / Gender affiliation, determination / Sexual identity, self-determined, recognition / Transsexual, married, sex-change operation, recognition.

Headnotes:

§ 8.1.2 of the Transsexuals Act (*Transsexuellengesetz*) is not compatible with Article 2.1 in conjunction with Articles 1.1 and 6.1 of the Basic Law because it only grants to a married transsexual who has undergone sex-change operations the possibility to receive recognition of his or her new gender affiliation under the law on civil status if his or her marriage is previously dissolved.

Summary:

I. The decision of the Federal Constitutional Court was handed down in proceedings on the constitutionality of a specific statute. It was based on the case of a transsexual who had been married for 56 years. His marriage produced three children. He has felt that he belonged to the female gender for a long time. He has held a female forename since 2001 on the basis of a court ruling in accordance with the Transsexuals Act (hereinafter: the Act). He underwent a sex-change operation in 2002. Following this, he applied for a determination in accordance with the Act that he is to be deemed to belong to the female gender. In accordance with § 8.1.2 of the Act, the determination and legal recognition of the other gender affiliation is contingent on the person concerned not being married. The applicant and his spouse however do not wish to divorce since their relationship is intact.

The Local Court considered itself to be prevented from complying with the application in light of the statutory requirement of being unmarried. Thereupon, it suspended the proceedings and submitted the question to the Federal Constitutional Court in accordance with Article 100.1 of the Basic Law for review as to whether § 8.1.2 of the Act is compatible with the Basic Law.

II. The First Panel of the Federal Constitutional Court reached the conclusion that § 8.1.2 of the Act is unconstitutional. It is unreasonable to expect the legal recognition of the new gender of a married transsexual to be conditional on his or her divorcing his or her spouse with whom he or she is united by law, and with whom he or she wishes to remain together, without being enabled to continue his or her partnership, which is based on marriage, in a different but equally secured form.

The ruling is essentially based on the following considerations:

§ 8 of the Act in principle accommodates the right, ensuing from Article 2.1 in conjunction with Article 1.1 of the Basic Law, to recognition of self-determined sexual identity by facilitating recognition under the law on civil status of the gender of a transsexual that has been changed through gender reassignment surgery. § 8.1.2 of the Act however stipulates as a precondition for the change of civil status that the person concerned is not married. This constitutes a material encroachment on the right to recognition of the self-determined sexual identity. For a married transsexual who only discovered his or her transsexuality or decided to reveal his or her perception of belonging to the other gender during

marriage, and indeed decided to have him or herself adjusted to this gender through surgery, is hereby faced by the following choice: either to uphold his or her marriage, but then despite a physical sex change already having taken place not to receive legal recognition of his or her new sexual identity. Or he or she must divorce in order to receive legal recognition, even if he or she and his or her spouse wish to remain united by marriage.

This impairment which a married transsexual incurs by virtue of the provision in question is disproportionate.

The legitimate interest of the legislator in reserving the legal institution of marriage, particularly protected by Article 6.1 of the Basic Law, exclusively to man and woman, in other words to partners of different genders, as a form of legally secured co-habitation, takes on considerable significance. Legal recognition of the changed gender affiliation of a married transsexual would lead to a situation in which his or her marriage was continued by same-sex partners.

By contrast, however, the impairment also takes on considerable weight which a married transsexual incurs by virtue of § 8.1.2 of the Act. In particular, the existing marriage of the person concerned is considerably impaired. If the state forces spouses to have their marriages dissolved, this not only runs counter to the structural characteristic of marriage as a lasting partnership and community of responsibility. It also denies to existing marriages the protection granted to them by Article 6.1 of the Basic Law. This protection is not removed by virtue of the fact that the transsexual spouse adjusts his or her external sexual characteristics to the perceived gender during marriage by undergoing surgery. The marriage is therefore now kept by same-sex partners, both *de facto* and as to its external appearance. It however continues to be a lasting partnership and a community of responsibility between two spouses. What is more, the spouse of the transsexual also incurs a considerable impairment of the protection of his or her marriage. He or she is also subjected to the conflict of deciding on either upholding the marriage, but thereby preventing his or her spouse obtaining legal recognition of his or her sexual identity, or of divorcing his or her partner against his or her own will, and hence not only accepting separation from him or her, but also losing the legal security that is associated with marriage.

The legislative interest in maintaining the institution of marriage as a union of man and woman must not in principle take a back seat to the interest of a same-sex married couple to uphold their marriage; equally, the legislator cannot unhesitatingly ignore the

interests of a married couple to maintain their existing marriage. However, it must be considered here that the regulation places specific relationships in a situation that is experienced as an existential crisis. By contrast, the principle of different sexuality is only marginally affected in view of the specific circumstances. The instant cases only refer to a small number of transsexuals who did not discover or reveal their transsexuality until marriage, and whose marriages did not break up as a result of this profound change, but are to be continued according to the wishes of both spouses.

The interplay between Article 6.1 of the Basic Law and the right to recognition of self-determined sexual identity, which is also protected by fundamental rights, is particularly decisive for the weighing up. The special burden entailed by § 8.1.2 of the Act lies in the fact that, in order to implement the will of the legislator, it makes the realisation of one fundamental right contingent on renouncing the other. This leads the persons concerned not only to a virtually unsolvable internal conflict, but also to an unacceptable impairment of fundamental rights. § 8.1.2 of the Act is hence unconstitutional because it does not afford to a married transsexual the possibility to obtain legal recognition of his or her new gender affiliation without having to terminate his or her marriage.

The legislator was instructed to remedy the unconstitutional situation by 1 August 2009. The legislator is to decide by what means it will remedy the unconstitutionality. If it does not wish to allow couples to remain in a marriage who are of the same sex under the law on civil status by virtue of the establishment of the changed gender affiliation of the transsexual spouse, it may follow such a course since its interest is in line with Article 6.1 of the Basic Law. It must however then ensure that the previous marriage can at least be continued as a legally secured community of responsibility. Thus, it can transfer it to a registered civil partnership or to a legally secured civil partnership *sui generis*, but must ensure that rights acquired and duties imposed from the marriage remain unreduced.

In view of the small number of married transsexuals concerned, the legislator may however also decide to provide them with the possibility of the legal recognition of their changed gender whilst continuing their marriage, and delete § 8.1.2 of the Act to this end.

In view of the gravity of the encroachment on married transsexuals, § 8.1.2 of the Act (requirement of being single) is inapplicable until such time as a new provision comes into force.

Languages:

German.

*Identification:* GER-2008-2-013

a) Germany / b) Federal Constitutional Court / c) Second Panel / d) 03.07.2008 / e) 2 BvC 1/07, 2 BvC 7/07 / f) / g) / h) *Deutsches Verwaltungsblatt*, 2008, 1045-1051; *Die Öffentliche Verwaltung*, 2008, 726-730; CODICES (German).

Keywords of the systematic thesaurus:

4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**

5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections.**

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

Keywords of the alphabetical index:

Election, voting weight, negative / Parliament, election, accommodation of federative interests / Election, “overhang mandates” / Election, equal contribution towards success / Election, directness.

Headnotes:

Sentence 2 of Article 7.3 in conjunction with Article 6.4 and 6.5 of the Federal Electoral Act (*Bundeswahlgesetz – BWahlG*) violates the principles of the equality and directness of elections insofar as it makes it possible for an increase in the number of second votes to lead to a loss of seats won via the *Land* lists, or for a loss of second votes to lead to an increase in the number of seats won via the *Land* lists.

Summary:

I. One half of the Members of the *Deutscher Bundestag* is directly elected in the constituencies by the majority of first votes (direct mandates), the other half with the second votes in proportional representation via *Land* lists in the *Bundesländer*. These *Land* lists of a party are regarded by the law as

being combined. The total votes cast for them across Germany are added up and then in turn (sub-)distributed among the individual *Land* lists, depending on the second votes received there. If a party has acquired more direct mandates within a *Bundesland* than its entitlement according to the second votes, it is able to retain these as what are known as “overhang mandates”.

This system may lead to the effect of the “negative voting weight”. This is a paradox in the procedure of the allocation of mandates consisting of a gain in the number of second votes of a party potentially leading to a loss of mandates for precisely this party, and vice versa a reduction in the number of second votes potentially leading to extra mandates. The complaints requesting review of an election received by the Federal Constitutional Court relate to the issue of the constitutionality of this effect.

A negative voting weight may occur in *Bundestag* elections when “overhang mandates” are created in accordance with sentence 2 of Article 7.3 in conjunction with Article 6.5 of the Federal Electoral Act (hereinafter: the Act). If the number of a party’s constituency candidates elected in a *Bundesland* compare to only an identical number of or fewer seats (sub-)distributed by second votes on the *Land* list, it may be more favourable for the party to receive fewer second votes in a *Bundesland* if this means that the number of seats in the overall national distribution among the various parties is not influenced. Influence is then exerted by the smaller number of votes solely on the sub-distribution of the seats among the individual *Land* lists of the party in question. In the distribution of the residual votes left over in the sub-distribution, a smaller number of second votes can lead to a situation in which another *Land* list is given predominance. The closer the decimal shares of the unrounded seat claim of two *Länder* are on the basis of which the allocation of the residual votes is assessed, the more likely it is that the “negative voting weight” effect will occur – if “overhang mandates” were won in at least one of these *Länder*. If the party loses a list mandate in the sub-distribution in the *Land* in which it has won an “overhang mandate”, this does not cause it a disadvantage because its list is not given predominance in any case, and it cannot lose the constituency mandates to which it is entitled. Another *Land* list of the party, by contrast, receives one more seat. This means that the lower vote share will give the party in question one extra seat nationally. A party may also lose an “overhang mandate” by gaining more second votes, and hence be in a worse position as to the overall number of its mandates.

II. The Second Senate of the Federal Constitutional Court reached the conclusion that the effect of the “negative voting weight” violates the principle of the equality of elections.

The equal contribution towards success requires the contribution of each vote towards success to be equal. This also means that it must be able to have a positive effect for the party for which it was cast.

An electoral system which in typical constellations permits an increase in the number of votes to lead to a loss of mandates or the electoral proposal of a party to achieve more total mandates if it itself attracts fewer votes, or if a competing proposal attracts more votes, leads to arbitrary results and to a situation in which democratic competition for the approval of the electorate appears to be paradoxical. The effect of the “negative voting weight” however also impairs the equality of chances for success of the votes. Such equality permits – as for instance in the majority voting system – votes not to be measured, but not for a vote having inherent in itself both the chance to contribute to the intended success, and to impair the own goal in voting.

The impairment of the equality of elections by the “negative voting weight” effect cannot be justified by imperative reasons.

The regulations from which the “negative voting weight” effect emerges serve interests of the federal proportional representation election system. Federative interests can in principle be taken into account when drafting electoral law. They do not, however, constitute an imperative reason by means of which the “negative voting weight” effect can be justified. This effect constitutes a major encroachment on the equality of elections. It leads not only to a different weighting of the electorate’s votes in allotting the mandates, but its effect is also that the will of the electorate is turned full-circle. By contrast, the federative element does not assume sufficient weight here, especially since the legislator has in many ways accommodated the federative state structure, and the structure of the parties which follows from it, in electoral law and the corresponding regulations are independent of those regulations from which the “negative voting weight” effect emerges. What is more, as a unitary representation body of the federal people, the federal legislator is not obliged to account for federative aspects in the election to the *Bundestag*.

The “negative voting weight” effect is also not a necessary consequence of a system of proportional representation combined with the personal election of candidates. The effect depends on various factors,

but above all on the model of setting off the first-vote mandates with the second-vote mandates, which do not determine the electoral system as such. The legislator is not constitutionally prevented from ordering a system of proportional representation election combined with the personal election of candidates without the “negative voting weight” effect.

Over and above this, the regulation also violates the constitutionally guaranteed directness of elections. Voters are unable to recognise whether their vote always has a positive impact on the party to be elected and its candidates, or whether they are bringing about the failure of a candidate of their own party by their vote.

§ 7.3 in conjunction with § 6.4 and 6.5 of the Act is hence unconstitutional insofar as it brings about the effect of the “negative voting weight”.

The electoral error is also relevant in terms of mandates. This effect is not a very rare exception, but as a general rule, it has an impact on the result of elections if “overhang mandates” are created in an election to the *Deutscher Bundestag*.

Nonetheless, the electoral error does not lead to the election being declared invalid, and hence to the dissolution of the 16th *Deutscher Bundestag*. The error results from a paradox of the valid Federal Electoral Act which cannot be quite easily understood, and on the whole relates to only a few mandates of the *Deutscher Bundestag*. The dissolution of the *Deutscher Bundestag* without previously affording Parliament the opportunity to amend the Federal Electoral Act would also create a situation in which the *Bundestag* to be elected would have to be elected on an unconstitutional legal basis. In contradistinction to this, the consequences of a decision which approves the present legal situation for a suitable transitional period is constitutionally acceptable.

The legislator was granted a deadline up to 30 June 2011 to remedy the unconstitutionality of the current electoral system. This relates not only to the sub-distribution of seats among list combinations of a party, but also to the entire calculation system of the seat allocation in the *Deutscher Bundestag*. The legislator has several possibilities for a new regulation which each have a substantial impact on the valid regulations. With regard to the fact that the “negative voting weight” effect is indivisibly linked to the “overhang mandates” and to the possibility of list combinations, a new regulation can tackle the emergence of the “overhang mandates” or the setting off of direct mandates with the second-vote mandates, or indeed the possibility of list combinations. Depending on the alternative selected,

there is an impact on the entire electoral system. Taking into account the considerable complexity of the regulatory mandate and of the statutory deadlines to prepare *Bundestag* elections, it appears to be inappropriate to instruct the legislator to amend the electoral law in good time prior to expiry of the present electoral period.

Languages:

German.



Identification: GER-2008-2-014

a) Germany / b) Federal Constitutional Court / c) First Panel / d) 30.07.2008 / e) 1 BvR 3262/07, 1 BvR 402/08, 1 BvR 906/08 / f) Non-smoking laws of the *Länder* / g) / h) *Neue Juristische Wochenschrift*, 2008, 2409-2422; *Deutsches Verwaltungsblatt*, 2008, 1110-1116; www.bundesverfassungsgericht.de; CODICES (German).

Keywords of the systematic thesaurus:

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**

5.2 Fundamental Rights – **Equality.**

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

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

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

Keywords of the alphabetical index:

Non-smoker, protection / Smoking, ban / Smoking, ban, discotheque / Health, protection / Smoking, passive.

Headnotes:

If due to the scope for assessment, evaluation and action accorded to the legislator it decides in favour of a concept to protect non-smokers in eating and drinking establishments which seeks to balance health protection against, in particular, the occupational freedom of establishment operators,

then exceptions to the ban on smoking must be drafted in such a way that they also cover certain groups of eating and drinking establishments – in this case smaller establishments which primarily serve alcoholic beverages – in order to prevent such establishments from being exposed to an especially strong economic burden.

It is a violation of the principle of equality if the law allows smoking rooms in eating and drinking establishments, but excludes discotheques from this privilege.

Summary:

I. In order to protect people, especially children and youths, from the dangers of passive smoking, the Non-Smoking Act of the *Land Baden-Württemberg* has banned smoking in a variety of public buildings, including eating and drinking establishments and discotheques, since 1 August 2007. The establishment operator is permitted to set aside separate rooms in which smoking is allowed. The smoking ban applies without exceptions to discotheques. The Non-Smoking Act of the *Land Berlin*, which entered into force on 1 January 2008, bans the smoking of tobacco in eating and drinking establishments, including clubs and discotheques. The Act provides for an exception in the case of separate rooms which are set aside in eating and drinking establishments as well as in the case of separate rooms which are set aside in discotheques that only admit adults.

Two of the complainants operate small single-room pubs in Baden-Württemberg and Berlin, which are mainly frequented by regular patrons. According to the complainants' submissions, 70 per cent of their patrons are smokers. The third complainant, a limited partnership, directs its complaint against the Non-Smoking Act of the *Land Baden-Württemberg*, which bans it as a discotheque operator from allowing smoking on its premises and, in addition, excludes it from establishing smoking rooms.

II. The constitutional complaints were successful. The First Panel of the Federal Constitutional Court found that the challenged provisions violated the complainants' fundamental right to the free exercise of their occupations (sentence 2 of Article 12.1 of the Basic Law).

The ban on smoking amounts to a serious encroachment on the publicans' free exercise of their occupation. In view of the fact that the percentage of smokers among the adult population in Germany amounts to 33.9%, this can – depending on the type of gastronomy being offered – result in a sharp drop in turnover. This encroachment is not justified in the

shapes that it takes in the provisions to be evaluated here. It is true that the legislator in seeking to protect people from danger to their health through passive smoking pursues a community interest of paramount importance. The challenged provisions are not, however, proportionate. They burden in an unreasonable way the operators of smaller single-room establishments which primarily serve alcoholic beverages.

When weighing the seriousness of the encroachment against the weight of reasons that justify it, one must respect the limits of what is reasonable. In this context, due to the scope for assessment, evaluation and action accorded to the legislator it would not be prevented from giving priority to the protection of the health of the population at large, including that of establishment employees, over the liberty rights which would be consequently impaired, and it would not be prevented from banning smoking in eating and drinking establishments without exceptions. The legislator was entitled to assume on the basis of a multitude of scientific investigations that there are serious health risks associated with passive smoking. Since health and especially human life are among those interests valued particularly highly, it is possible to seek to protect them with means that severely encroach on a person's fundamental right to exercise his or her occupation.

However, the proportionality test leads to a different result where the issue for decision is not a strict ban on smoking, but rather – as is the case here – the reduced vigour with which the goal of health protection is pursued due to the interests of publicans and smokers. In Baden-Württemberg and Berlin exceptions to the ban on smoking which are of considerable significance in practice, such as the establishment of separate smoking rooms, are allowed. It is true that the scope for assessment, evaluation and action accorded to the legislator allows it to select a concept to protect non-smokers which is less stringent about enforcing the health protection of non-smokers when balanced against the liberty rights of establishment operators and smokers. It must then, however, carry through this decision consistently.

For this reason, the specific effects of the ban on smoking for smaller establishments which primarily serve alcoholic beverages acquire greater importance in the course of weighing all of the interests. The ban on smoking results in a considerably higher economic burden for them than it does for the operators of larger premises because of the high percentage of smokers among their patrons. In the case of larger eating and drinking establishments with separate rooms, the ban on smoking is only relative. On the other hand, there is

a complete ban on smoking in the case of smaller eating and drinking establishments if separate rooms are not available. Their operators are expected to strictly comply with the ban on smoking even if it costs them their economic existence although the *Land* legislator wanted to pursue the desired health protection only whilst taking into account the occupational needs of the publicans. The dangers to health caused by passive smoking are thus accorded a different importance when weighed against the occupational freedom of the publicans. The extent of the burden on them is no longer in a reasonable proportion to the advantages for the public sought to be achieved by the *Land* legislator in relaxing the ban on smoking. The smaller establishments which primarily serve alcoholic beverages are not of significance for effective protection of non-smokers since the majority of their patrons are smokers.

In addition, the constitutional complaint of the discotheque operator against the provisions of the Baden-Württemberg Non-Smoking Act is justified. It is incompatible with Article 12.1 of the Basic Law in conjunction with Article 3.1 of the Basic Law (equality principle) not to allow smoking rooms to also be established in discotheques that do not admit youths. The objectives pursued by the legislator cannot justify unequal legal consequences for discotheques and other eating and drinking establishments. It is true that it is not constitutionally objectionable that the *Land* legislator assumed that there is a particularly high concentration of pollutants in discotheques. This fact does not, however, make a general exclusion for discotheques necessary. If smoking is only allowed in separate rooms which are completely set aside, then the argument of the increased dangerousness of passive smoking in discotheques vanishes. Nor does the significance of copycat effects and peer pressure in the case of youths justify treating discotheques differently to other types of eating and drinking establishments. It is sufficient for achieving the protection sought for this group of the population if the ban on establishing smokers' rooms is limited to those discotheques that admit persons under 18 years of age.

The *Land* legislatures have the option in connection with the enactment of the necessary amendment of giving priority to the goal of protecting people's health against the dangers of passive smoking and deciding in favour of a strict concept to protect non-smokers which does not allow any exceptions; alternatively, they may adopt a less strict concept of protection which allows the interests of establishment operators and smokers more leeway and permits exceptions to the ban on smoking. If it is decided that the protection of health will have a lower priority, then the exceptions to the ban on smoking must, however,

take into account the special burdens on individual areas of the eating and drinking sector and be drafted to afford equal treatment. For this reason, the legislator may not lose sight in particular of the interests of smaller establishments which primarily serve alcoholic beverages. Since their space limitations do not usually allow for the establishment of separate smoking areas, only exemption from the ban on smoking can be considered in their case.

Due to the high significance of people's protection against the dangers of passive smoking, the challenged provisions will remain in force until the legislator has amended the law, which it has to do by 31 December 2008. In order to avoid a situation where the operators of smaller eating and drinking establishments would suffer damage to their livelihood, the Federal Constitutional Court extended the application of the exceptions by adding an exception for smaller establishments which primarily serve alcoholic beverages until the amended law takes effect. The prerequisites for such an exception are that the establishment does not offer prepared meals, does not have space for patrons exceeding 75 square metres, does not have a separate room which can be set aside and does not admit persons under 18 years of age. In addition, the establishment must have a sign in its entrance area indicating that it is a smokers' establishment that does not admit persons under 18 years of age. Smokers' rooms – without dance floors – may be established in discotheques which only admit persons over the age of 18.

Six judges concurred on the permissibility of the strict ban on smoking and the disproportionality of the rule for smaller establishments which primarily serve alcoholic beverages, whilst in both cases two judges dissented; otherwise the decisions were unanimous. Two judges have each attached dissenting opinions. One of the two judges is of the opinion that the challenged provisions are matters of legislative prerogative. The second judge is of the opinion that the challenged provisions are based on a statutory concept of an exacting but balanced protection of non-smokers, which is in principle constitutionally sound. On the other hand, in his opinion a ban on smoking in eating and drinking establishments without exceptions would be disproportionate.

Languages:

German.



Hungary Constitutional Court

Statistical data

1 May 2008 – 31 August 2008

Number of decisions:

- Decisions by the Plenary Court published in the Official Gazette: 20
- Decisions in chambers published in the Official Gazette: 7
- Other decisions by the Plenary Court: 39
- Other decisions in chambers: 19
- Number of other procedural orders: 73

Total number of decisions: 158

Important decisions

Identification: HUN-2008-2-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 29.05.2008 / **e)** 75/2008 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2008/80 / **h)**.

Keywords of the systematic thesaurus:

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

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

5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion**.

5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly**.

Keywords of the alphabetical index:

Assembly, freedom / Demonstration, legal, prior authorisation, peaceful conduct.

Headnotes:

The right of assembly is enshrined within the Hungarian Constitution. It includes the right to hold

assemblies organised in advance, and peaceful demonstrations organised for valid reasons at short notice. It also includes the right to hold spontaneous gatherings.

Summary:

I. Several petitioners asked the Constitutional Court to assess the constitutionality of the whole and of certain provisions of Act III of 1989 on the Right of Assembly. Under Article 62.1 of the Constitution, the Republic of Hungary recognises the right to peaceful assembly and shall ensure its free exercise. The petitioners suggested that Article 14.1 of the Act ran counter to the above constitutional provision. It allowed police to disperse an assembly that had been convened without notification, where notification was necessary, or in a manner that differed from the specifications in Article 7.a and 7.b.

Article 6 of the Act requires that police be notified of the organisation of an assembly to be held in a public place three days before the planned date of the assembly. Article 7 requires written notification to include the scheduled starting and finishing times, the location or route of the assembly, and its aims and agenda.

The petitioners referred to the judgment of the European Court of Human Rights in the case of *Bukta and Others v. Hungary*. The European Court of Human Rights held that there had been a breach of Article 11 ECHR in that case, as the police had dispersed the applicants' peaceful assembly.

II. In its Decision no. 55/2001, the Constitutional Court had already reviewed the Act as a whole, together with some of its provisions. However, the petitioners in these particular proceedings had raised different constitutional issues, which had become a hot issue after the delivery of Decision no. 55/2001. Besides, the Court itself decided differently on the constitutionality of dispersing the assemblies in its current judgment. This was due to changes in the case law on the right of assembly and the judgment of the European Court of Human Rights in *Bukta*.

The Constitutional Court in the tenor of the judgment held that the right of assembly guaranteed by Article 62.1 of the Constitution includes the right to hold assemblies arranged in advance, and peaceful demonstrations organised for valid reasons in accordance with relevant legislation at short notice. It also includes the right to hold spontaneous gatherings.

The Court also held that Article 6 should be interpreted in accordance with Article 62.1 of the Constitution, so that the obligation to notify applies only to an organised assembly held in a public place. The police should not prohibit the holding of a peaceful demonstration if the circumstances giving rise to it have made it impossible for the organisers to give the police three days notice.

The Court directed the repeal of Article 14.1 of the Act. Under this clause, police had a duty to break a demonstration up if it took place without notification or if the time, place, aims and agenda differed from those specified in the notification.

In its reasoning, the Court emphasised that the rationale behind the guarantee of the right to peaceful assembly is to ensure free collective expression of ideas and opinions. Occasions where a crowd occupies a public place for an indefinite time, or when the aim of the gathering is not the expression of commonly shared opinions do not count as assemblies.

As a general rule, organisers must give notification when the assembly is to take place on public ground. The statutory obligation of notification limits the right to a peaceful assembly in a constitutional manner. It is clearly impossible to demand notification in the case of spontaneous gatherings. Nonetheless, organisers should give notification in cases of speedily arranged gatherings (*Eilversammlungen*). The police may prevent this kind of gathering from going ahead if the assembly would seriously endanger the undisturbed operation of the organs of popular representation or of the courts, or if it would prove impossible for them to divert the traffic (Article 8.1 of the Act). If the organisers only notify the police shortly before the assembly starts, the police may not be able to maintain an orderly flow of traffic.

The Constitutional Court took into account the danger of an unlawful exercise of the right of assembly. There are several legal remedies for this situation within the Act. It is within the competence of the court to review the way the police applied the legislation. The legal interpretation of the court is binding on the police. Integrating the case law on assemblies could reduce the possibility of legal uncertainty.

It is also an important factor, that the organisers and participants of a given assembly could exercise their right of assembly in an unlawful way. However, the Court stressed that the fundamental right of assembly should not be restricted simply because somebody might exercise their right unlawfully. The Act contains enough legal remedies to deal with unlawful assemblies and with those that violate the rights and

freedoms of others or which have strong potential to do so. Under Article 14 of the Act, the police should disperse assemblies that are in breach of the peace. The Act of Police allows the application of certain means of coercion if a crowd has gathered unlawfully and it is not possible to disperse it by deploying less draconian measures. Besides, if people disregard the Highway Code and occupy a public place without police agreement, this is a traffic violation. The Court saw no need for further limitations on the right of assembly by amendments to the legislation.

Justice András Bragyova attached a dissenting opinion to the decision. Justice László Kiss concurred with the dissenting opinion. Justice Bragyova emphasised that the Court should have declared unconstitutionality manifested in omission. There are several loopholes and gaps in the Act. For example, the Act does not list those public places where it is unlawful to gather, or behaviour that is prohibited during a lawful demonstration. Therefore, the constitutional rights could not be exercised in a proper way.

Justice András Holló also attached a separate opinion to the decision, to which Chief Justice Mihály Bihari joined. According to Justice Holló, the Court should have declared unconstitutionality manifested in omission, but should not have annulled that part of Article 14.1 of the Act under which the police were obliged to disperse a demonstration that was taking place at a different time or place to that specified in the notification, or which had different aims and agendas. Rather than repealing the provision, a better solution to the problem of dispersal of assemblies would have been detailed regulations, clearly explaining the means the police were entitled to use in different situations.

Cross-references:

- Decision 57/2001, *Bulletin* 2001/3 [HUN-2001-3-008].

Languages:

Hungarian.



Identification: HUN-2008-2-005

a) Hungary / b) Constitutional Court / c) / d) 03.07.2008 / e) 95/2008 / f) / g) *Magyar Közlöny* (Official Gazette), 2008/98 / h).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
 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:

Hatred, incitement.

Headnotes:

The legislature may only resort to criminal law to restrict free expression in extreme cases. These are the so-called most dangerous acts that are “capable of whipping up intense emotions in the majority of people”, that endanger fundamental rights with a prominent place among constitutional values, and which pose a clear and present danger of a breach of the peace.

Summary:

I. At its session of 18 February 2004, the Parliament adopted an Act on the Amendment of Act IV of 1978 on the Criminal Code. It brought in a new statutory definition of hate speech. It made hate speech a criminal offence punishable by up to two years in prison.

The new Article 181/A. of the Criminal Code targets the use or circulation of expressions concerning the Hungarian nation, or any other group of people (especially an ethnic, a religious or a racial group), or gestures reminiscent of a totalitarian regime, which could denigrate a member of a given group or damage human dignity. Such behaviour, in front of a large public gathering, constitutes a misdemeanour and attracts a prison sentence of up to two years.

Under Article 181/A.3, somebody committing such a misdemeanour in connection with a political party or political operation of an NGO could not be punished.

The President of the Republic did not sign the Amendment because he had concerns over its

constitutionality. Exercising the power vested in him by Article 26.4 of the Constitution, he initiated a constitutional review of the Amendment.

The President was concerned that the Amendment restricted freedom of expression to an unacceptable degree. He pointed out that the statutory definition of the Amendment was very close to the offence of "disparagement" declared unconstitutional by the Court in its Decision no. 18/2004.

II. The Constitutional Court emphasised that the right to free expression under Article 61 of the Constitution protects opinion irrespective of the value and veracity of its content. The Constitution guarantees free communication and it is not the content to which the right of free expression relates. This is because everyone has an equal right to speak and to express him or herself. Therefore, the right to free expression cannot be restricted in order to protect someone from damaging, denigrating or offensive opinions. The possible consequences of the speech, not its content, may justify certain restrictions on the right to free speech. There is settled case law from the Court on this point, in Decisions nos. 30/1992, 12/1999, 18/2004. The legislature may only resort to criminal law to restrict free expression in extreme cases. These are the so-called most dangerous acts that are "capable of whipping up intense emotions in the majority of people", that endanger fundamental rights with a prominent place among constitutional values, and which pose a clear and present danger of a breach of the peace.

By adopting the Amendment, the legislature significantly extended the scope of the prohibited act beyond the limits set out in the relevant case law of the Constitutional Court.

When adopting the new Article 181/A. of the Criminal Code, the legislature maintained as conduct constituting a misdemeanour the use and circulation of disparaging expressions or the making of gestures reminiscent of a totalitarian regime. However, as the Court mentioned several times, communications below the level of incitement are protected by Article 61.1 of the Constitution. Restriction on freedom of expression is only justified by incitement incorporating a level of danger above a certain limit. The use and circulation of disparaging expressions or the making of gestures reminiscent of a totalitarian regime (such as use of the Nazi salute), do not per se result in the clear and present danger of a forcible act. In many cases, such conduct does not even pose a threat of violation to individual rights.

The Court also stressed that the aggrieved parties of the misdemeanour are not concrete persons, neither are they clearly defined members of a group. The new statutory definition of hate speech is an immaterial offence that does not require the violation of individual rights or even a threat to them. A person could be convicted of an offence even if no one's personal rights were violated. It would be sufficient if the expression used or the gesture in an abstract sense were capable of violating the human dignity of a member of the affected group.

The aim of the Amendment is to punish hate speech even if the injured party cannot be identified, and disparagement is based on belonging to a national, ethnic, racial or religious group. In the Court's view, it is a legitimate aim to protect people who refuse to become a captive audience forced to listen to hate speech. The problem is that the challenged provision would have punished all forms of hate speech, including racist expressions which contain generalisations and for which the public (including the affected group) is not forced to be an audience.

Therefore, the Court held that the Amendment does not reach the level of culpability defined by the Court's well-established case-law. The violation of specific individual fundamental rights and disturbing the public peace are not preconditions of the misdemeanour. The Amendment was therefore considered an unnecessary and disproportionate restriction to the freedom of expression granted by Article 61.1 of the Constitution.

Justice Péter Kovács attached a concurring opinion to the judgment. He emphasised that even the jurisprudence of the Constitutional Court does not preclude the punishment of expressions that do not reach the level set by the Court in its Decision no. 30/1992. He mentioned Decision no. 14/2000 on the use of totalitarian symbols. Besides, Justice Péter Kovács emphasised that international instruments allow for the punishment of hate speech in a broader sense than that accepted by the Court. However, he agreed with the court in holding the Amendment unconstitutional, since it did not meet with the requirement of legal certainty.

Justice Miklós Lévy wrote a concurring opinion to the decision. He disagreed with the Court's statement that the right to free expression was protected regardless of its content. According to him, when the Court kept in line with the US Supreme Court, it did not take into account the fact that some speech is not even protected under the US First Amendment. In some cases, the Constitutional Court upheld content-based legal regulations (e.g. the statutory definition sanctioning the use of symbols of despotism in

Decision no. 14/2000). However, he also held that the challenged Amendment did not comply with the requirement of legal certainty.

Justice László Kiss attached a dissenting opinion to the judgment. He argued that the Court should not simply have assumed that in a free and democratic society the expression of extreme opinion does not endanger the foundations and operations of society. In expressing such views, the discriminator confines him or herself to the periphery. The fact remains that neither the case-law of the judiciary nor of the Constitutional Court is capable of protecting human dignity against the almost unlimited protection of free expression.

Cross-references:

See previous “hate speech” cases of the Court:

- Decision no. 30/1992, *Special Bulletin Leading Cases 2*, [HUN-1992-S-002];
- Decision no. 12/1999, *Bulletin 1999/3* [HUN-1999-3-003];
- Decision no. 18/2004, *Bulletin 2004/1* [HUN-2004-1-004].

Languages:

Hungarian.



Identification: HUN-2008-2-006

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 03.07.2008 / **e)** 96/2008 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2008/98 / **h)**.

Keywords of the systematic thesaurus:

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

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.**

5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**

Keywords of the alphabetical index:

Hatred, incitement / Defamation, racial.

Headnotes:

Only natural persons are entitled to protection of their dignity by legislation. Such protection does not extend to broader communities or groups. However, the Court did not preclude the possibility of legal protection for the dignity of the individual, in view of their relationship with a particular community.

Summary:

I. On 29 October 2007 Parliament amended the Civil Code. The new clause broadened the scope of people offended by purveyors of hate speech to take legal action. It enabled individuals to bring a civil action against a speaker, despite the fact that the hate speech was not directly aimed at the plaintiff, but at the ethnic or social group to which he or she belonged. The Amendment also enabled civil liberties groups to take legal action.

The President of the Republic referred the Amendment to the Constitutional Court. In his petition, the President expressed concerns that the Amendment restricted the fundamental right of freedom of expression disproportionately. It made no allowance, either for the intensity of the relationship between the group and its members, or the extensive and non-circumscribable nature of a community that was viewed as a group. It did not exclude the duty of compensation either. The President also pointed out that the minority situation of a community within a society could not substantiate its privileged nature based on the Amendment. Thus, the Amendment violated the requirement of equal treatment.

II. The Constitutional Court held the Amendment unconstitutional. It emphasised that the restriction of free expression is determined by the intensity of the relationship between the unlawful conduct and the resulting violation of subjective rights. The Court also stated that only natural persons are entitled to legislative protection of their human dignity. This cannot be applied to broader communities or groups. However, the Court did not exclude the possibility of legally protecting the “dignity” of the individual, in view of their relationship with a particular community. The Court pointed out that the amendment did not recognise the collective body of individuals as plaintiff; it did not bestow a “collective right”. Instead, it created the possibility of protection for an individual claiming to be a member of the community, where that community faces a violation. Under the Act, the legal violation of

the community is mirrored by the individual. The legislature wanted to guarantee the means of individual legal protection for the protection of communities.

In assessing the constitutionality of the Amendment, the Constitutional Court gave major importance to the fact that a chosen identity has uncertain boundaries. Several identities can exist, and their manifestations may vary to the outside world. Exercising a right is based on stating identity and belonging to the community, that is, on the individual's right to self-determination, against which the law may set only one criterion, that of good will. Any other duty to justify, doubt or check against this stated identity or the relation between the individual and the community or its intensity is impossible to interpret. Considering the great number of personal traits that are suitable for determining personality and forming a group, such a regulation does nothing to reduce the possibility of restriction of the freedom of expression to a minimum. It is possible to evaluate and sanction the same unlawful conduct as often as an individual in the community finds a particular disparaging opinion derogatory. Moreover, the possibility of civil liberties groups to take legal actions is impossible to interpret, since the Amendment guarantees individual legal remedies.

The Constitutional Court also stated that there was no well-founded reason for assigning personal traits to a group with the aim of only allowing the individuals of a minority access to this category. The Amendment ran the risk of leaving certain communities with particular traits without protection, due to their law.

Justices László Kiss and Péter Kovács made a concurring opinion to the decision. They felt that the Constitutional Court should have reviewed the existing practice of restricting freedom of expression.

Justice László Trócsányi also made a concurring opinion to the decision. In his view, the jurisprudence of the ordinary courts did not give protection against collective defamation; it did not accord recognition to community concerns. The aim behind the Amendment was to put the plaintiff's right to bring a civil action in case of collective defamation beyond dispute. According to Justice Trócsányi, judicial practice could have created an adequate test for legal protection. However, he agreed that in its present state the Amendment did not fulfil the requirement of equal treatment, and violated the right to self-determination.

Languages:

Hungarian.



Identification: HUN-2008-2-007

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 03.07.2008 / **e)** 99/2008 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2008/98 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.12 Constitutional Justice – Jurisdiction – Types of litigation – **Conflict of laws.**
 2.1.1.4 Sources – Categories – Written rules – **International instruments.**
 3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**
 5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education.**

Keywords of the alphabetical index:

Education, school, religious, state funding.

Headnotes:

This case dealt with the state support of churches in comparison with that of local government, and the entitlement of church institutions to such support.

Summary:

I. Three members of the Hungarian Parliament asked the Constitutional Court to review the constitutionality and the conformity of some provisions of Act LXXIX of 1993 on Public Education with the agreement between the Republic of Hungary and the Holy See, signed on 20 June 1997. This agreement, which deals with the finance of public services and religious activities of the Catholic Church of Hungary, is referred to as “the Vatican Treaty”.

The petitioners had concerns over Article 118.4 of the Act. In their view, it violated the principle of sector neutral finance. Moreover, the deadline for lodging an appeal for normative budgetary support was a term of preclusion. Article 118.4 stated that the normative budgetary contributions given out to non-state and non-local government maintainers of institutions could not be less than the normative support given out to local governments on the same basis.

II. The Constitutional Court pointed out that under Article 2 of the Vatican Treaty, institutions of public education maintained by the Church are entitled to the same budgetary support as state and local government education institutions. However, Article 118.4 of the Act states that the normative budgetary and other (that is, non-normative) support of churches together must be the same as the normative budgetary support of local governments. As a result, church institutions are entitled to far less state support than those of local government. This brings Article 118.4 of the Act into conflict with the Vatican Treaty. The Constitutional Court struck the term “other supports” from Article 118.4, in order to give church institutions the same normative budgetary support entitlement as those of local government.

However, the Constitutional Court did not share the constitutional concerns over the strict deadlines for the lodging of appeals over budgetary support. It observed that strict deadlines are necessary for the continued operation of the budget. This also serves the requirement of legal certainty.

András Holló made a dissenting opinion to the decision, which Miklós Lévay joined. They contended that the Vatican Treaty requires the state to give the same amount of financial support to church, state and local government schools. This, however, does not necessarily mean that the normative budgetary support has to be the same for church and local governments. All of the legal resolutions concerning the finance of church education institutions must be considered, in order to determine whether the given financial support conflicts with the Vatican Treaty. In Holló’s opinion the legal situation that is in breach of the Vatican Treaty arose because the current legal regulations do not contain the procedural provisions that would give adequate guarantees to the church authorities maintaining these institutions that they will gain access to state support undertaken in the Vatican Treaty. Holló’s view was that the Constitutional Court should have found unconstitutionality manifested in omission.

András Bragyova also attached a dissenting opinion to the judgment. He stated that the Constitutional Court paid insufficient attention to the fact that in this case it did not conduct a posterior review of legal norms, but a review of conformity with Treaties. In Bragyova’s opinion, the measure of control in this procedure is the interpretation of the international legal instruments in line with international law. In constitutional proceedings, an international treaty cannot be interpreted in a way that is contrary to international law. If there is a question over the meaning of the international treaty, the Constitutional

Court must await the outcome of the international legal debate about the treaty. It cannot find violation of the international treaty, if the debated Hungarian legal provision fits any of the possible meanings of the international treaty. However, the interpretation of Article 2 of the Vatican Treaty, which was the basis for the Constitutional Court’s annulment, has long been debated by the Hungarian State and the Holy See. For this reason, the petition requested an interpretation of the Vatican Treaty, which, however, falls outside the competence of the Court. Thus, the petition had to be rejected.

Agreeing with András Holló’s dissenting opinion András Bragyova was also of the opinion that Article 118.4 could not be annulled even if the Constitutional Court undertook the interpretation of the international treaty. Bragyova would also have preferred the Court to have found unconstitutionality manifested in omission. He pointed out that based on the Vatican Treaty itself, Article 118.4 could not have been annulled, because it referred not only to Catholic, but all non-state, non-local governmental institutions.

Cross-references:

- Decision 22/1997, *Bulletin* 1997/2 [HUN-1997-2-005].

Languages:

Hungarian.



Ireland

Supreme Court

Important decisions

Identification: IRL-2008-2-004

a) Ireland / **b)** High Court / **c)** / **d)** 01.05.2008 / **e)** SC 489/06 / **f)** Oguekwe & Others v. The Minister for Justice, Equality and Law Reform & Others / **g)** [2008] IESC 25 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**

5.3.9 Fundamental Rights – Civil and political rights – **Right of residence.**

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:

Citizenship, law / Residence, child, foreign, birth in country of residence.

Headnotes:

The Minister for Justice, when making a deportation order, is required to consider the rights of the applicants under the Constitution of Ireland and the European Convention on Human Rights. This includes express consideration of the rights of a child who is an Irish citizen.

Summary:

I. The first and second named applicants were Nigerian nationals who are the father and mother of the third named applicant, a child born in Ireland. The father had applied for residency under the Irish Born Child (IBC) Scheme of 2005, an administrative scheme applied to parents of children born in Ireland to parents

who are not Irish citizens (the scheme was designed to deal with those persons affected by the restriction of the right to *jus soli* by constitutional amendment in 2004 and regulated by the Irish Nationality and Citizenship Act 2004). The IBC Scheme requires evidence of continuous residence in the State from the child's birth. The child's mother had been resident in Ireland from his birth on 9 June 2003 and was granted residency under the Scheme. However, the father's application for residency was refused as he had not entered Ireland until 3 February 2005. As he did not meet the criteria of the IBC Scheme, the Minister for Justice issued an order for his deportation under the Immigration Act 1999.

The applicants challenged the validity of the deportation order in the High Court on two principal grounds: that the Minister's decision to deport the first named applicant (the father) was:

- i. in breach of his son's rights under Article 40.3 of the Constitution (personal rights) and under Article 41 of the Constitution (The Family); and
- ii. in breach of the Minister's obligations under the European Convention on Human Rights Act 2003 (the statute which incorporated the Convention into Irish law) as it was not compatible with the State's obligations under Article 8 ECHR (right to respect for private and family life).

Regarding the first ground, the High Court held that that there was no adequate consideration by the Minister for Justice of "the facts and factors affecting the citizen child and his family in relation to his personal rights" and that the " cursory analysis" conducted did not constitute the type of consideration required under previous Irish case law. The Court therefore concluded that the unsatisfactory consideration of such rights prior to the decision to deport the first named applicant (the father) breached the rights of the third named applicant (the child) under Article 40.3 of the Constitution.

On the second ground, the Court noted that the European Convention imposed "similar but not identical" obligations on the Minister for Justice in relation to the determination of deportation orders. The Court referred to case law of the Irish courts, of United Kingdom courts and of the European Court of Human Rights and on the basis of this analysis set out a (non-exhaustive) number of questions that the Minister was required to consider prior to any decision to make a deportation order affecting the rights of a citizen child. The Court held that in the instant case the Minister had failed to engage in any substantive consideration of the questions, although the Minister was obliged under Section 3 ECHR Act

2003 to consider these questions if his decision was to be justified under Article 8.2 ECHR. As he had not done so in the instant case, the decision was held to be in breach of citizen child's right to respect for his private and family life under Article 8 and in breach of the Minister's obligations under Section 3 ECHR Act 2003. The High Court issued an order quashing the deportation order. The Minister for Justice appealed this decision to the Supreme Court.

II. The Supreme Court affirmed the decision of the High Court, stating that "The Minister is required in this process to consider the Constitutional and Convention rights of the applicants. This includes express consideration of, and a reasoned decision on, the rights of the Irish citizen child. This was not done." However, the Court offered a partly different non-exhaustive set of questions which must be considered by the Minister for Justice when making a decision as to deportation under Section 3 of the Act of 1999 of a parent of an Irish born citizen child. These are:

1. The Minister should consider the circumstances of each case by due inquiry in a fair and proper manner as to the facts and factors affecting the family.

2. Save for exceptional cases, the Minister is not required to inquire into matters other than those which have been sent to him by and on behalf of applicants and which are on the file of the Department of Justice. The Minister is not required to inquire outside the documents furnished by and on behalf of the applicant, except in exceptional circumstances.

3. In a case such as this, where the father of an Irish born citizen child, the mother (who has been given residency), and the Irish born citizen child are applicants, the relevant factual matrix includes the facts relating to the personal rights of the Irish born citizen child, and of the family unit.

4. The facts to be considered include those expressly referred to in the relevant statutory scheme, which in this case is the Act of 1999, being:

- a. the age of the person(s);
- b. the duration of residence in the State of the person(s);
- c. the family and domestic circumstances of the person(s);
- d. the nature of the person's/persons' connection with the State if any;
- e. the employment (including self-employment) record of the person(s);
- f. the employment (including self-employment) prospects of the person(s);

- g. the character and conduct of the person/persons both within and (where relevant and ascertainable) outside the State (including any criminal convictions);
- h. humanitarian considerations;
- i. any representations duly made by or on behalf of the person(s);
- j. the common good; and
- k. considerations of national security and public policy;

so far as they appear or are known to the Minister.

5. The Minister should consider the potential interference with rights of the applicants. This will include consideration of the nature and history of the family unit.

6. The Minister should consider expressly the Constitutional rights, including the personal rights, of the Irish born child. These rights include the right of the Irish born child to:

- a. reside in the State;
- b. be reared and educated with due regard to his welfare;
- c. the society, care and company of his parents; and
- d. protection of the family, pursuant to Article 41.

The Minister should deal expressly with the rights of the child in any decision. Specific reference to the position of an Irish born child of a foreign national parent is required in decisions and documents relating to any decision to deport such foreign national parent.

7. The Minister should also consider the Convention rights of the applicants, including those of the Irish born child. These rights overlap to some extent and may be considered together with the Constitutional rights.

8. Neither Constitutional nor Convention rights of the applicants are absolute. They require to be considered in the context of the factual matrix of the case.

9. The Minister is not obliged to respect the choice of residence of a married couple.

10. The State's rights require also to be considered. The State has the right to control the entry, presence, and exit of foreign nationals, subject to the Constitution and international agreements. Thus the State may consider issues of national security, public policy, the integrity of the Immigration Scheme, its consistency and fairness to persons and to the State.

Fundamentally, also, the Minister should consider the common good, embracing both statutory and Constitutional principles, and the principles of the Convention in the European context.

11. The Minister should weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision. While the Irish born child has the right to reside in the State, there may be a substantial reason, associated with the common good, for the Minister to make an order to deport a foreign national who is a parent of an Irish born child, even though the necessary consequence is that in order to remain a family unit the Irish born child must leave the State. However, the decision should not be disproportionate to the ends sought to be achieved.

12. The Minister should consider whether in all the circumstances of the case there is a substantial reason associated with the common good which requires the deportation of the foreign national parent.

In such circumstances the Minister should take into consideration the personal circumstances of the Irish born child and the foreign national parents, including, in this case, whether it would be reasonable to expect family members to follow the first named applicant to Nigeria.

13. The Minister should be satisfied that there is a substantial reason for deporting a foreign national parent, that the deportation is not disproportionate to the ends sought to be achieved, and that the order of deportation is a necessary measure for the purpose of achieving the common good.

14. The Minister should also take into account the common good and policy considerations which would lead to similar decisions in other cases.

15. There should be a substantial reason given for making an order of deportation of a parent of an Irish born child.

16. On judicial review of a decision of the Minister to make an order of deportation, the Court does not exercise and substitute its own discretion. The Court reviews the decision of the Minister to determine whether it is permitted by law, the Constitution, and the Convention.

Languages:

English.



Identification: IRL-2008-2-005

a) Ireland / **b)** High Court / **c)** / **d)** 08.05.2008 / **e)** HC 150/08 / **f)** Ahern v. His Honour Judge Alan Mahon & Others / **g)** [2008] IESC 119 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.6.10.1.1 Institutions – Executive bodies – Liability – Legal liability – **Immunity**.

5.3.13.1.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Non-litigious administrative proceedings**.

5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file**.

Keywords of the alphabetical index:

Inquiry, file, access / Parliament, member, immunity / Privilege, material, right / Lawyer, privilege, legal, professional.

Headnotes:

The principle of parliamentary privilege in the common law world is one with a long pedigree. In Ireland it is guaranteed by Article 15.13 of the Constitution, which states that “The members of each House of the *Oireachtas* [national parliament] ... shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself.” The principle extends to tribunals of inquiry as well as courts. The principle precludes a tribunal, when conducting an inquiry, from drawing a member of parliament’s attention to statements made by him/her in parliament that are inconsistent with statements made outside parliament to suggest that such utterances were untrue or misleading or inspired by improper motivation. However, the reproduction of such utterances in a report of a tribunal of inquiry, without commentary, is permissible.

In addition, an established ingredient of the right to a fair hearing is legal professional privilege, which may be sub-divided into litigation privilege and legal advice privilege. A person whose conduct is under examination by a tribunal of inquiry is in a position analogous to a party to litigation rather than a witness and as a result enjoys certain fundamental constitutional rights.

Therefore, litigation privilege extends to such a person in respect of communications with third parties concerning their dealings with a tribunal of inquiry.

Summary:

I. The applicant, a member of *Dáil Éireann* (the house of deputies) who was until 6 May 2008 the *Taoiseach* (Prime Minister of Ireland), was under examination by the Tribunal of Inquiry into Certain Planning Matters and Payments, established by *Dáil Éireann* in 1997 to investigate allegations of corrupt payments to politicians regarding political decisions (it has mostly investigated planning permissions and land rezoning matters in the 1990s in the Dublin County Council area).

A Divisional High Court (comprising the President of the High Court and two Judges of the Court – the High Court normally sits with one judge only) was required to consider two issues:

- i. the Tribunal's entitlement to question the applicant in respect of statements made by him in the national parliament; and
- ii. the applicant's entitlement to claim legal professional privilege in respect of communications between his legal advisors and an expert he had retained for the purpose of the Tribunal's proceedings.

1. Parliamentary Privilege:

The Tribunal was enquiring into the nature and sources of certain lodgements made by the applicant or persons with whom he is associated to bank accounts held by him or persons with whom he is associated. As part of the private phase of the Tribunal's enquiries it sought information concerning loans provided by specific persons to the applicant in 1993 and 1994. However, through unauthorised disclosure by unknown persons the loans became the subject of newspaper publicity in September 2006, to which the applicant responded by making statements to the media and to *Dáil Éireann*. Four statements made to *Dáil Éireann* in September and October 2006 were of interest to the Tribunal.

Correspondence between the Tribunal and the applicant had revealed a difference between the parties as to the Tribunal's entitlement to question the applicant regarding the statements made in the *Dáil*. The Tribunal maintained that it was permissible to draw the applicant's attention to matters which it believed to be "factually erroneous" in the context of public statements made in the *Dáil* or elsewhere. The applicant contended that the Tribunal sought to interrogate him about the statements made in the *Dáil*

in breach of Article 15.13 of the Constitution which guarantees the principle of parliamentary privilege.

II. The High Court examined the principle contained in Article 15.13 of the Constitution of Ireland in the context of its origins in Article 9 of the Bill of Rights 1689 and the position of the common law, which supports an even wider principle. The Court affirmed the statement in a previous High Court case that "a member of [the national parliament] cannot be forced either directly or indirectly to give evidence to any tribunal in relation to any utterance made by him in either House [of parliament]..." and the statement by the Supreme Court in the same case that the principle of parliamentary privilege in Irish constitutional law is "an absolute privilege" which "constitutes a significant restriction on the important public right associated with the administration of justice of the maximum availability of all relevant evidence...".

The High Court further noted the statement by the Privy Council of the United Kingdom that in cases such as this there are three issues at play:

- i. the need to ensure that the legislature can exercise its powers freely on behalf of its electors;
- ii. the need to protect freedom of speech generally; and
- iii. the interests of justice in ensuring that all relevant evidence is available to the courts. Lord Browne Wilkinson in that case had noted that "of these three interests, the first must prevail."

Accordingly, the High Court held that the principle of parliamentary privilege precluded the Tribunal from drawing the applicant's attention to statements made by him in the *Dáil* that were inconsistent with statements made outside parliament to suggest that such utterances were untrue or misleading or inspired by improper motivation. However, the reproduction of such utterances in a report of a tribunal of inquiry, without commentary, was deemed permissible. The Court stated that "It will be for the reader [of the report] to draw his own conclusions" as to whether the applicant was or was not "factually erroneous" in the statements which he made to the *Dáil* i.e. the applicant "may be judged by the court of public opinion in respect of his parliamentary utterances but not by the Tribunal."

2. Legal Professional Privilege:

Legal professional privilege is a privilege claimed by a party to litigation to protect certain documents from disclosure. It contains two sub-classes: litigation privilege and legal advice privilege. In the instant case

the applicant's lawyers had retained the services of an expert for the purposes of providing expert advice and assistance in respect of the banking and financial aspects of the Tribunal's enquiry. The Tribunal made an Order requiring the applicant to disclose all documents in his power, possession or control relating to his retaining of the expert in connection with his dealings with the Tribunal. The applicant claimed litigation privilege regarding these documents (150 in all). The Tribunal contended that the applicant could not claim litigation privilege as he was a witness before the Tribunal and not a party to litigation. The Tribunal also contended that, even if the applicant was entitled to litigation privilege, he had by his actions waived such entitlement.

The High Court first considered whether litigation privilege would attach to the 150 documents were the applicant a party to litigation. The Court answered this question in the affirmative. The Court then considered whether the applicant's status precluded him from claiming litigation privilege. The Tribunal had been established pursuant to the Tribunals of Enquiry (Evidence) Act 1921, which provides that "A witness before any [tribunal of enquiry] shall be entitled to the same immunities and privileges as if he were a witness before the High Court or the Court of Session." An amending Act of 1997 further provided that "A person who produces or sends a document to any [tribunal of enquiry] shall be entitled to the same immunities and privileges as if he were a witness before the High Court."

The Tribunal argued that a tribunal of enquiry involved an entirely different process than a legal action, because it is inquisitorial rather than adversarial in nature and is not involved in the administration of justice. The Tribunal contended that there was no basis for extending legal professional privilege to a person who was a witness before it. The Court disagreed, referring to a previous ruling by a different tribunal of enquiry that: "...a person who produces documents to a [tribunal of enquiry] whether under the compulsion of an order of the Tribunal, or voluntarily, does so on the same footing, and with the self same immunities and privileges as a party disclosing documentation in the course of High Court proceedings." The Court also held that, as the applicant was a person whose conduct was under examination by the Tribunal, his position was more accurately analogous to a party to litigation rather than a witness. It was quite possible that the Tribunal's report would include reference to its findings regarding the applicant's conduct. While it was accepted that the Tribunal was not involved in the administration of justice based on established case law it nonetheless had an adjudicatory function and its findings could affect the applicant's right to a good name. In such a

situation, the applicant was entitled to minimum protection by the State and certain fundamental constitutional rights regarding his dealings with the Tribunal, and by extension, entitled to claim litigation privilege regarding the 150 documents.

While the Court based its decision primarily on the applicant's constitutional rights, it also found support in a number of English decisions which emphasised that, whether proceedings were of an adversarial or inquisitorial nature, the central consideration was fairness, an established ingredient of which in English law was the entitlement to legal professional privilege. The Court therefore held that the applicant was entitled to claim legal professional privilege in respect of documents detailing communications between his legal advisors and the expert he had retained for the purpose of the Tribunal's proceedings.

It is established law that litigation privilege regarding privileged material (and any associated material) is waived where it is deployed in court in an interlocutory application. In the instant case the Tribunal argued that, even if the applicant was entitled to claim litigation privilege, he had waived entitlement to claim privilege to at least some of the 150 documents by deploying some of these documents by referring to them and to the retained expert in a prepared statement made before the Tribunal. The Court referred to a case in which deployment had occurred, where a substantial portion of a letter over which one party to proceedings claimed litigation privilege was contained in an affidavit which formed part of the proceedings. In that case, it was held that the claim to litigation privilege had been waived by the party's use of the letter in the affidavit. By contrast, the Court held the applicant's statement before the Tribunal did not amount to such deployment as his references to the expert and documents prepared by the expert were general in nature and far removed from the situation in the case referred to. The Court therefore held that the applicant had not waived his entitlement to claim litigation privilege in respect of any of the 150 documents.

The question of legal advice privilege (the second type of legal professional privilege), which the applicant claimed in respect of 11 of the 150 documents, was not considered by the Court as these documents were deemed to be already protected by litigation privilege.

Languages:

English.



Italy

Constitutional Court

Important decisions

Identification: ITA-2008-2-002

a) Italy / b) Constitutional Court / c) / d) 29.07.2008 / e) 306/2008 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 06.08.2008 / h) CODICES (Italian).

Keywords of the systematic thesaurus:

2.1.1.3 Sources – Categories – Written rules – **Community law.**

2.1.1.4 Sources – Categories – Written rules – **International instruments.**

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

3.20 General Principles – **Reasonableness.**

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

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**

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

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

Keywords of the alphabetical index:

Residence permit / Income, condition.

Headnotes:

A law prohibiting the payment of a care allowance to nationals of states not members of the European Union who do not have sufficient income to be granted a residence card or permit is unconstitutional.

Summary:

An Albanian national, who had been living lawfully in Italy for six years and was married with two children, had applied to the INPS (National Social Security Institute) so as to be granted the care allowance for disabled persons unable to work, since she was totally unfit for work following a car accident which

had left her in a coma. The institute had refused her application on the ground that she was not in possession of a residence card, although she fulfilled all the other conditions required by law. She could not be issued with this card as she did not have sufficient income to maintain herself and her family, which was a condition for granting a residence card. The Albanian national had brought her case before a court, which had referred to the Constitutional Court the question of the constitutionality of the legislation prohibiting her from being awarded the care allowance because she lacked the income necessary to obtain a residence card.

The Court maintained that the law was incompatible with Article 2 of the Constitution (recognition and protection of inviolable rights) and Article 3 of the Constitution (principle of equality), interpreted in conjunction with Article 32 of the Constitution (protection of health as a fundamental right) and Article 38 of the Constitution (right to social assistance). It also maintained that the law was incompatible with Article 10 of the Constitution (providing that the Italian legal system must comply with generally recognised rules of international law), Article 11 of the Constitution (on Italy's membership of international organisations aimed at guaranteeing peace and justice between nations), Article 35 of the Constitution (whereby Italy must foster and promote international agreements and international organisations aimed at asserting and regulating labour rights), as well as with Article 117.1 of the Constitution (requiring the legislature to observe the obligations ensuing from Community law and from international commitments), interpreted in conjunction with ILO Conventions no. 97 of 1949 and no. 143 of 1975.

The Court noted that the question of constitutionality submitted to it was “*rilevante*” (relevant), meaning that, since the challenged law was binding on the lower Court (Court *a quo*), a decision by the Court was necessary. It observed, following the referral order of the Court *a quo*, that new legislation had been substituted for the challenged law, so as to replace the “residence card” with a “residence permit”, but that issuance of the latter remained subject to an income condition which the Albanian woman failed to meet. There was accordingly no need to send back the question for a new examination of its “*rilevanza*”. Community law, with its direct applicability, which would have made a decision by the Court unnecessary (Judgment no. 170 of 1984), was not to be taken into account as, in the case under consideration, the situation did not involve a number of member states, as required under Article 1 of Council Regulation (EC) no. 859/2003. There could be no question of the

direct applicability of provisions of the European Convention on Human Rights, as the Constitutional Court had ruled out this possibility in its Judgments nos. 348 and 349 of 2007. Nor could the direct applicability of the ILO Conventions be invoked, in so far as this required that the foreign national should have the status of a worker, which was precluded in the case under consideration.

The Court first examined the nature of the care allowance. It was payable to disabled persons who could not walk unaided or carry out acts of daily living, without taking their earnings into account in any way. It accordingly constituted a “social security and assistance” measure – in accordance with the terminology adopted by the European Court of Human Rights – the beneficiaries of which could be limited in number on account of a scarcity of financial resources, but had been determined on the basis of decisions taken so as to comply with the principle of reasonableness. Parliament could lay down different rules but they must be justified and non arbitrary.

The Court deemed it arbitrary that the award of a social benefit, such as the care allowance, should be made subject to receipt of an income and to the applicant's being granted a legal document allowing her to continue to live in Italy. The challenged law was accordingly unreasonable and, hence, contrary to Article 3 of the Constitution. It infringed the right to health, which was a fundamental right, and accordingly breached Articles 2, 32 and 38 of the Constitution. Article 10.1 of the Constitution was also violated since generally recognised rules of international law must be taken to include those guaranteeing the individual's fundamental rights, regardless of the state of which he or she is a national, and those banning all forms of discrimination towards foreigners living lawfully in Italy.

The Court accordingly declared unconstitutional the law prohibiting payment of the care allowance to nationals of states not members of the European Union who did not have sufficient income to be issued with a “residence card” or with the “residence permit” that had subsequently replaced it.

Languages:

Italian.



Latvia Constitutional Court

Important decisions

Identification: LAT-2008-2-001

a) Latvia / b) Constitutional Court / c) / d) 29.11.2007 / e) 2007-10-0102 / f) On Compliance of the Law “On Authorisation to the Cabinet of Ministers to Sign the Draft Agreement between the Republic of Latvia and the Russian Federation on the State Border between Latvia and Russia Initialled on 7 August 1997” and the Words “Observing the Principle of Inviolability of Borders Adopted by the Organisation of Security and Cooperation in Europe” of Article 1 of the Law “On the Republic of Latvia and the Russian Federation Treaty on the State Border of Latvia and Russia” with the Preamble and Article 9 of the Declaration of 4 May 1990 of The Supreme Council of the Republic of Latvia “On Restoration of Independence of the Republic of Latvia” and Compliance of the Treaty of 27 March 2007 of the Republic of Latvia and the Russian Federation of the State Border of Latvia and Russia with Article 3 of the *Satversme* (Constitution) of the Republic of Latvia / g) *Latvijas Vestnesis* (Official Gazette), no. 193(3769), 30.11.2007 / h) CODICES (Latvian, English).

Keywords of the systematic thesaurus:

1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties.**
 2.1.1.4.1 Sources – Categories – Written rules – International instruments – **United Nations Charter of 1945.**
 2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**
 2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**
 2.1.1.4.10 Sources – Categories – Written rules – International instruments – **Vienna Convention on the Law of Treaties of 1969.**
 2.3.6 Sources – Techniques of review – **Historical interpretation.**
 3.1 General Principles – **Sovereignty.**
 3.8.1 General Principles – Territorial principles – **Indivisibility of the territory.**
 3.9 General Principles – **Rule of law.**

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

Keywords of the alphabetical index:

Aggression, duty to protect / Annexation / Statehood / Independence, restoration, statehood continuation / Occupation, belligerent.

Headnotes:

The USSR carried out an unlawful occupation of the State of Latvia following unlawful aggression.

The Latvian people are the only subject of sovereign power. The restored Republic of Latvia identifies itself with pre-war Latvia. Now that independence is restored, Latvia continues its statehood (*integratio ad integrum*).

Changing the territorial status in favour of the aggressor State after aggression and intervention in national affairs is wrong from an international perspective, irrespective of the form and procedure that the aggressor State has chosen.

Summary:

The Constitutional Court assessed the historical facts in the framework of the case. These include events related to the establishment of an independent State of Latvia and restoration thereof, the signing of the 1920 Peace Treaty and continuity of the State of Latvia. The judgment includes legal qualification of the events of 1940. The Court concluded that in 1940 the USSR committed aggression towards the State of Latvia and interfered with its internal affairs. This was followed by an unlawful and, according to the legal norms of that time, non-compliant occupation and annexation of Latvia. The Court concluded that the USSR carried out an unlawful alienation of part of the territory of Latvia in favour of Russia in 1940.

The Court established that the USSR has recognised, by means of the resolution of the Congress of People's Deputies of the USSR, that in 1940 it violated the treaties concluded between the USSR and the Baltic States in relation to the latter. The judgment further indicates that the Russian Federation has also recognised the violation of international law and the 5 October 1939 Mutual Assistance Pact between Latvia and the Union of Soviet Socialist Republics.

The Court indicated that, as the Latvian-Russian Border Treaty takes effect, Latvia will lose and Russia

will gain *de jure* rights to the Abrene area. However, having assessed the compliance of the Border Treaty with the Constitution and with the 4 May 1990 Declaration of Independence, the Court concluded that the Abrene area was not considered as an integral part of the territory of Latvia at the moment of coming into force of the Constitution; it was rather regarded as a newly-acquired territory that Latvia included within its territory after the Peace Treaty came into force. Consequently the Border Treaty does not violate the inseparability of the territory of Latvia that consists of four provinces. It is also in line with Article 3 of the Constitution. The Court stressed that it was not within its competence to assess the legal expediency of the signing of the Border Treaty, since this is the responsibility of the Parliament and the executive power.

The Court held that the loss of the Abrene area does not affect the continuity of the State of Latvia. The State continuity is affected by the will of the state itself and by recognition of others. Consequently, after 1990 Latvia took the stance that it is the successor of Latvia occupied in 1940. Most of the other states of the world have supported it. The Court concluded that there had been no breach of the Preamble and Article 9 of the Declaration of Independence.

However, the Court indicated that the reference to the OSCE principle of inviolability of borders included in the Treaty, by which the Border Treaty was ratified, does not comply with Article 68 of the Constitution. The reference to the principle of inviolability of borders narrows the Preamble of the Border Treaty, which refers to the UN and OSCE principles. This viewpoint does not duplicate the position of the other state included in the ratification act and is not coordinated with the text of the Border Treaty. It may have a considerable impact on the implementation of liabilities undertaken by means of the particular Treaty and the legal opinion of the other party. Moreover, the contested words included in Section 1 of the Ratification Law may have a profound impact in future on the interpretation of the content and the scope of the Border Treaty.

The dissenting opinion of one of the Constitutional Court justices, Kristine Kruma, is annexed to the case. She concurred with several of the arguments evinced and conclusions reached in the Judgment in relation to Article 9 of the Declaration of Independence. She maintained that the reference of Article 9 of the Declaration to the 1920 Peace Treaty is not simply restricted by the fact that Russia recognises the independence of Latvia. This is predicated on three arguments. Firstly, the interpretation of Article 9 of the Declaration of

Independence by the Court does not comply with the principle of state continuity. Secondly, the Court's interpretation is out of line with the consistent practice that Latvia was observing before conclusion of the Border Treaty in relation to the domestic law, as well as international relations. Thirdly, this interpretation does not comply with the former practice and statements of Latvia regarding the Border Treaty.

Consequently, the mandate included in Article 9 of the Declaration of Independence, which includes the entire Peace Treaty and confirms continuity, means that Latvia may change the borders established by the Peace Treaty without affecting its continuity. Latvia, when passing a territory to Russia, must be confident that the other party (namely Russia) will assess this legal situation in an identical manner, (i.e. that under the Border Treaty Latvia passes and Russia accepts the Abrene area, or both parties will explicitly indicate their different positions in the context of the continuity of Latvia).

Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2006-05-01 of 16.10.2006;
- Judgment no. 2005-08-01 of 11.11.2005;
- Judgment no. 2004-18-0106 of 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];
- Judgment no. 2004-15-0106 of 07.03.2005, *Bulletin* 2005/1 [LAT-2005-1-004];
- Judgment no. 2004-01-06 of 07.07.2004, *Bulletin* 2004/2 [LAT-2004-2-006];
- Judgment no. 2002-12-01 of 25.03.2003, *Bulletin* 2003/1 [LAT-2003-1-004].

European Court of Human Rights:

- *Kolk and Kislyiy v. Estonia*, decision of 17.01.2006;
- *Penart v. Estonia*, decision of 24.01.2006;
- *Ždanoka v. Latvia* [GC], judgment of 16.03.2006, para. 12.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2008-2-002

a) Latvia / b) Constitutional Court / c) / d) 17.01.2008 / e) 2007-11-03 / f) On Compliance of the Part of Riga Land Use Plan 2006 – 2018 Covering the Territory of the Freeport of Riga with Article 115 of the *Satversme* (Constitution) of the Republic of Latvia / g) *Latvijas Vestnesis* (Official Gazette), no. 12(3796), 23.01.2008 / h) CODICES (Latvian, English).

Keywords of the systematic thesaurus:

- 1.2.2.2 Constitutional Justice – Types of claim – Claim by a private body or individual – **Non-profit-making corporate body.**
- 1.3.5.8 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by federal or regional entities.**
- 1.4.4 Constitutional Justice – Procedure – **Exhaustion of remedies.**
- 2.1.1.3 Sources – Categories – Written rules – **Community law.**
- 3.9 General Principles – **Rule of law.**
- 3.10 General Principles – **Certainty of the law.**
- 3.17 General Principles – **Weighing of interests.**
- 3.19 General Principles – **Margin of appreciation.**
- 4.14 Institutions – **Activities and duties assigned to the State by the Constitution.**
- 5.1.1.5.2 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Public law.**
- 5.5.1 Fundamental Rights – Collective rights – **Right to the environment.**

Keywords of the alphabetical index:

Land-use plan / Protected territory / Environment, protection / Environmental impact, assessment / Precaution, principle.

Headnotes:

The right to live in a benevolent environment is of direct application. An individual has the right to apply to the court about action (or lack of it) on the part of the public law subject, which has infringed his or her rights and legitimate interests. These individual rights derive from the specific nature of environmental law.

The rights to a benevolent environment include three procedural elements – first, the right of access to information on the environment, second, the right to participate in environmental decision-making, and third, the right of access to the courts in environmental matters. These procedural elements form part of the obligations of the State to ensure a benevolent environment for future generations.

The objectives and tasks faced by modern society may be achieved only by close collaboration between the State, local government, non-governmental organisations and the private sector. Therefore, the term “the State” should be construed here to include local authorities and other derived public persons, whose duty, together with that of the public administration institutions, is to protect the universal right to live in a benevolent environment.

Legal persons under private law, and not only private law persons, clearly have rights regarding the environment.

Local government has extensive discretionary power over land use planning, under the legislation. However, this power is not unlimited. The principles of land use planning and general principles shall serve as guiding lines for freedom of action in the sector of land use planning. The objective of a land use plan is to ensure economic development and implementation of social and cultural interests, and protection of the environment. The contents of a land use plan should be determined by acknowledging limits of discretion of local government and the objective of the land use plan to ensure a coordinated implementation of economic, environmental, social and cultural interests.

Although in specific cases the Constitutional Court may or even must go beyond the strict formulation of a claim in order to ensure effective protection of individual rights and judgment enforcement, the assessment of the constitutional compliance of such acts, which are not subject to review in the respective case, would be contrary to the procedural principles of the Constitutional Court.

According to the precautionary principle, environmental protection is not limited to protection of the environment to prevent impairment and damage occurring. It is often impossible to return a site to its previous state after an adverse event. The objective of the precautionary principle is to minimise possible negative future effects. This requires assessment and elimination of potential risks at an early stage of activities or decision-making. This makes sound economic sense, as it is usually far more expensive to remedy environmental damage after the event. Reference to the precautionary principle ensures prevention of potential risks at an early stage.

The principle of rule of law, a fundamental principle of a democratic state under the rule of law, provides that laws should be predictable and clear as well as sufficiently stable and constant. Therefore, legal regulation should be sufficiently stable to enable individuals to make long-term plans as well as short-term decisions.

Upon ratification of the Treaty on Accession of Latvia to the European Union, the European Union law became an integral part of the Latvian legal system. Therefore, legal acts of the European Union and interpretation provided by case-law of the European Court of Justice should be taken into account when applying national law.

Summary:

I. The association “Coalition for Nature and Cultural Heritage Protection” submitted a constitutional complaint maintaining that part of the land use plan regarding the territory of the Freeport of Riga is in conflict with Article 115 of the Constitution.

The complainant argued that implementation of the plan had already given rise to several breaches of procedural and substantive law. Were it to remain in force, irreversible harm might be inflicted on the environment. Activities were already taking place in the Freeport of Riga that were unlawful until the strategic assessment required by legislation had been carried out.

II. The Constitutional Court ruled that a strategic assessment is indispensable to the process of adoption of planning documentation. The strategic assessment of the plan was vitiated by a manifest procedural defect. The Court accordingly held that that part of the Riga City Land Use Plan 2006-2018 relating to the territory of the Freeport of Riga was in breach of Article 115 of the Constitution of the Republic of Latvia. It was void from the date of coming into force.

Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2000-03-01 of 30.08.2000; *Bulletin* 2000/3 [LAT-2000-3-004];
- Judgment no. 2000-07-0409 of 03.04.2001, *Bulletin* 2001/1 [LAT-2001-1-002];
- Judgment no. 2001-07-0103 of 05.12.2001;
- Judgment no. 2001-12-01 of 19.03.2002, *Bulletin* 2002/1 [LAT-2002-1-004];
- Judgment no. 2002-04-03 of 22.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008];
- Judgment no. 2002-14-04 of 14.02.2003; *Bulletin* 2003/1 [LAT-2003-1-002];
- Judgment no. 2003-16-05 of 09.03.2004; *Bulletin* 2004/1 [LAT-2004-1-003];
- Judgment no. 2004-18-0106 of 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];
- Judgment no. 2005-10-03 of 14.12.2005;

- Judgment no. 2005-12-0103 of 16.12.2005;
- Judgment no. 2006-09-03 of 08.02.2007;
- Judgment no. 2006-38-03 of 26.04.2007;
- Judgment no. 2007-12-03 of 21.12.2007;
- Judgment no. 2007-13-03 of 19.12.2007.

European Court of Human Rights:

- *Hatton and Others v. the United Kingdom*, 02.10.2001, para 97.

Court of Justice of the European Communities:

- C-44/95 *Regina v. Secretary of State for the Environment* [1996] ECR I-03805;
- C-3/96 *Commission v. the Netherlands* [1998] ECR I-3031;
- C-180/96 *United Kingdom v. Commission* [1998] ECR I-2265;
- C-371/98 *The Queen v. Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd.* [2000] ECR I-9235;
- C-67/99 *Commission v. Ireland* [2001] ECR I-5757;
- C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-7405;
- C-6/04 *Commission v. United Kingdom* [2005] ECR I-9017.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2008-2-003

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 09.05.2008 / **e)** 2007-24-01 / **f)** On Compliance of the Second Sentence of the Second Part of Section 50 of the Latvian Penalty Execution Code with Article 92 of the *Satversme* (Constitution) of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), no. 73(3857), 13.05.2008 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

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

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

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

5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Prisoners.**

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**

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

5.3.13.27.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel – **Right to paid legal assistance.**

5.3.37 Fundamental Rights – Civil and political rights – **Right of petition.**

Keywords of the alphabetical index:

Convicted person, access to court / Legal aid, absence / Legal aid, right.

Headnotes:

In a democratic state governed by the rule of law, the ability to appeal against a court judgment cannot simply depend on somebody's financial status.

The state is under a duty to adopt measures for reducing the expenses of parties to legal proceedings and, in some instances, to exonerate them from this burden altogether. This stems from the right to a fair trial.

The State has other positive duties connected with right of access to court. For instance, it has to cover a prisoner's expenses in corresponding with his or her legal representative, or in posting complaints. The State must defray the expenses of prisoners' correspondence related to access to court in the case if they have no means at their disposal to cover these expenses.

Summary:

I. Section 50 of the Latvian Penalty Execution Code regulates the rights of persons sentenced to imprisonment to submit proposals, applications and claims to State authorities, public organisations and officials. It also provides an order for the submission of the above. Under the second sentence of the

second part of Section 50 of the Latvian Penalty Execution Code, the State is only obliged to defray the expenses of prisoners' correspondence with UN institutions, the Parliamentary Human Rights and Public Affairs Committee, the Bureau of the Ombudsman Bureau, the prosecutor's office and the court. Foreign citizens convicted of offences are also entitled to coverage of the costs of their correspondence with the diplomatic or consular representation of his or her state, which is authorised to represent his or her interests.

The Administrative Procedure Law requires observance of the procedure of prior out-of-court examination of a case. Thus, a convicted person, before appealing to the administrative court, must submit an application to the higher authority. A convicted person without the wherewithal to pay for correspondence is denied the possibility of addressing the administrative court.

The applicant in the constitutional complaint argued that the contested provision restricts the right to fair trial established in Article 92 of the Constitution in two ways – it restricts the access to court and the rights to receive state-guaranteed legal assistance.

II. The Constitutional Court reiterated that the right to fair trial includes access to court. This includes the duty of the State to ensure, in certain cases, legal aid for persons unable to afford legal representation themselves.

The Constitutional Court pointed out that the State must not only refrain from actions that would restrict a person's right to a fair trial, but it must also take positive steps to protect those rights. Referring to international case law and international documents binding on the State, the Constitutional Court established that the State must also defray expenses for correspondence of prisoners with their legal team or for posting complaints or applications. If someone is guaranteed the possibility of addressing a court by law, but in practice it proves impossible to implement the pre-conditions for submission of an application, it cannot be said that the State has ensured practical implementation of the rights to access to court.

The judgment established that if someone cannot submit an application challenging an administrative act, he or she is prohibited from access to an administrative court. In view of the above, the Constitutional Court found it necessary, in determining whether prisoners' rights to access to court are being restricted, the Constitutional Court found that it is necessary to assess whether prisoners have the possibility of submitting an application to challenge an administrative act. The Constitutional Court concluded that a prisoner can only submit an

application if he or she is challenging an administrative act issued by the administration of the institution where he or she is in custody, since under the law, the application should be submitted to the same institution. If a prisoner wants to appeal against administrative acts issued by other institutions, the application must be posted. That means that the rights of convicted persons to access to court and the rights to legal aid depend on the fact of whether they can pay for posting an application.

The Constitutional Court concluded that the contested provision does not ensure the rights to access to court for those persons who have no financial resources at their disposal and who need to post an application regarding the disputing of an administrative act or a request for legal assistance. Consequently, the State has not fulfilled its positive duty, which follows from the rights to a fair court.

The Constitutional Court held that the contested provision does not comply with Article 92 of the Constitution insofar as it does not provide for payment of the cost of posting applications challenging an administrative act or requests for legal assistance for those prisoners with no financial resources at their disposal.

Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2000-03-01 of 30.08.2000; *Bulletin* 2000/3 [LAT-2000-3-004];
- Judgment no. 2001-08-01 of 17.01.2002; *Bulletin* 2002/1 [LAT-2002-1-001];
- Judgment no. 2001-10-01 of 05.03.2002;
- Judgment no. 2003-04-01 of 27.06.2003; *Bulletin* 2003/2 [LAT-2003-2-009];
- Judgment no. 2003-08-01 of 06.10.2003; *Bulletin* 2003/3 [LAT-2003-3-010];
- Judgment no. 2003-10-01 of 06.11.2003; *Bulletin* 2003/3 [LAT-2003-3-012];
- Judgment no. 2004-14-01 of 06.12.2004; *Bulletin* 2004/3 [LAT-2004-3-009];
- Judgment no. 2004-16-01 of 04.01.2005;
- Judgment no. 2004-18-0106 of 13.05.2005; *Bulletin* 2005/2 [LAT-2005-2-005];
- Judgment no. 2005-07-01 of 17.10.2005;
- Judgment no. 2005-17-01 of 06.02.2006; *Bulletin* 2006/1 [LAT-2006-1-001];
- Judgment no. 2005-18-01 of 14.03.2006;
- Judgment no. 2006-28-01 of 11.04.2007;
- Judgment no. 2007-03-01 of 18.10.2007.

European Court of Human Rights:

- *Airey v. Ireland*, Judgment of 09.10.1979, para. 26; *Special Bulletin Leading Cases ECHR* [ECH-1979-S-003];
- *Hornsby v. Greece*, Judgment of 19.03.1997, para. 40; *Bulletin* 1997/1 [ECH-1997-1-008] no. 107/1995/613/701];
- *A.B. v. the Netherlands*, Judgment of 29.01.2002, paras. 90-9;
- *Prodan v. Moldova*, Judgment of 18.05.2004, para. 52;
- *Steel and Morris v. the United Kingdom*, Judgment of 15.02.2005, para. 60;
- *Laskowska v. Poland*, Judgment of 13.03.2007, para. 51.

Languages:

Latvian, English (translation by the Court).



Liechtenstein

State Council

Important decisions

Identification: LIE-2008-2-001

a) Liechtenstein / **b)** State Council / **c)** / **d)** 26.05.2008 / **e)** StGH 2006/73 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

3.26.1 General Principles – Principles of Community law – **Fundamental principles of the Common Market.**

5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality.**

Keywords of the alphabetical index:

Foreigner, employment / Freedom of movement of services / Treaty, reservation, temporary / Employment, foreigner, equality.

Headnotes:

Treaty law does not *a priori* prohibit treating nationals of EEA Member States differently from those of third States (in this case Swiss nationals). On the basis of reservations relating to the right of establishment, the Vaduz Convention leaves some leeway for differential treatment, e.g. where the administration of auditing firms is concerned. However, the degrees of freedom of movement which have been negotiated with EFTA Member States and which allow more derogations than the conventions concluded with the EEA States, must be compatible with the equality principle and the prohibition of arbitrariness.

There is no justification for entitling natural persons holding the nationality of an EFTA State to exercise the profession of chartered accountant in Liechtenstein, to set up and operate an individual enterprise and to employ staff, while at the same time, unlike Liechtenstein nationals and the nationals of all EEA States, prohibiting them from doing so in the form of a legal entity or from managing a legal entity. No cogent argument has been advanced in

support of imposing, for administrative reasons, a nationality criterion on chartered accountants holding Swiss nationality but not on chartered accountants holding the nationality of an EEA State. This is a distinction which lacks any substantive foundation in the situations to be regulated and for which there is no discernable general interest. Furthermore, the reservations to the Vaduz Convention were not designed to last. Consequently, the refusal to admit the appellant to the post of manager of an auditing firm is unjustified and contravenes Article 31 of the Constitution.

Summary:

The constitutional appeal was lodged against an Administrative Court decision concerning a refusal to permit the appointment of a national of an EEA non-Member State as manager of a Liechtenstein auditing firm.

The State Council consequently quashed the disputed judgment and also revoked, for breach of the principle of legal equality and of the prohibition of arbitrariness, Article 1.2.c WRPG concerning the nationality criterion for granting authorisation to exercise the profession of chartered accountant.

Languages:

German.



Identification: LIE-2008-2-002

a) Liechtenstein / **b)** State Council / **c)** / **d)** 30.06.2008 / **e)** StGH 2007/118 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
3.20 General Principles – **Reasonableness**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Dog, dangerous, permit / Trust, principle / Provision, transitional, proportionality / Security, public, danger.

Headnotes:

In principle, the legal regulations set out in Article II.1 of the transitional provisions published in LGBl 2006, no. 277, which make potentially dangerous dogs subject to a special permit where they are already in their owners' possession, constitute a more serious interference with rights than the obligation to apply for a permit on first acquiring a potentially dangerous dog. Given that the transitional provision does not allow the owner to produce evidence that the dog is harmless and permits the fact of any previous convictions, a criminal record, and therefore a bad reputation on the owner's part to be used as grounds for withholding the permit, in some cases the legal provision in question exceeds what might reasonably be expected in terms of risk prevention. It therefore undermines the principle of legitimate expectations which the legislator must also respect, in the case of dog owners who have legally acquired their dogs and have never received any complaints about them. The transitional provisions should, in specific cases, authorise persons who already own dogs to keep them if they are safe, which it does not. The provision is therefore in breach of the principle of proportionality.

Summary:

Under proceedings to verify the constitutionality of rules in accordance with Article 18.1.a of the Law on the State Council, the Administrative Court requested the revocation of Article 6.2.d of the Law on Dogs and Article II.1 of the transitional provisions published in LGBl 2006, no. 277. Whereas the Constitutional Court deemed defensible the provisions of Article 6.2.d for a fresh acquisition of a dog, it subsequently revoked, for breach of the principle of proportionality in the transition between the old and new provisions of the Law on dogs, the aforementioned transitional provisions, the main thrust of which was to extend the same conditions to permits for dogs which had already been lawfully acquired.

Languages:

German.



Identification: LIE-2008-2-003

a) Liechtenstein / b) State Council / c) / d) 30.06.2008 / e) StGH 2007/130 / f) / g) / h) CODICES (German).

Keywords of the systematic thesaurus:

4.7.15.1.4 Institutions – Judicial bodies – Legal assistance and representation of parties – The Bar – **Status of members of the Bar.**

5.3.13.23 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to remain silent.**

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

Keywords of the alphabetical index:

Lawyer, professional secrecy / Lawyer, refusal of testimony, right / Lawyer, privilege, legal, professional / Secrecy, professional, lawyer / Testimony, lawyer / Personality, protection / Lawyer, client, disclosure of identity.

Headnotes:

A client's identity falls within the ambit of professional secrecy and as such must be covered by § 107.1.3 of the Code of Criminal Procedure. The lawyer's right to refuse to testify overlaps with his/her professional obligation of discretion, and covers all information which (s)he receives in the context of his/her brief. Like banking secrecy, the priority function of legal secrecy is to protect the client's personality rights. Preservation of secrecy therefore applies to all data and information on the client which the latter wishes to be kept secret. As a general rule, for legal clients just as for bank customers, the client's desire for discretion, particularly as regards his/her identity, is taken for granted. To require a lawyer acting as a witness to reveal his/her client's identity in order to substantiate the power of attorney would be an unlawful circumvention of the right to invoke professional secrecy.

Summary:

During a set of criminal proceedings, a lawyer who was called to the witness-box relied on his right to refuse to testify in order to avoid disclosing his client's name. The Court imposed a coercive fine on him, which was confirmed by the higher Court. The Constitutional Court upheld the constitutional appeal lodged against the decision of the higher Court for breach of the prohibition of arbitrariness, on the grounds that the higher Court's interpretation to the

effect that the lawyer's right to invoke professional secrecy did not apply to the client's identity could not be objectively justified, was contrary to the law and would have led to an unacceptable restriction of legal professional secrecy.

Languages:

German.



Lithuania

Constitutional Court

Important decisions

Identification: LTU-2008-2-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 20.05.2008 / **e)** 05/07 / **f)** On granting to public institutions land lots not to be privatised / **g)** *Valstybės Žinios* (Official Gazette), 58-2182, 22.05.2008 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

- 1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**
- 1.3.2.1 Constitutional Justice – Jurisdiction – Type of review – **Preliminary / ex post facto review.**
- 1.3.2.2 Constitutional Justice – Jurisdiction – Type of review – **Abstract / concrete review.**
- 1.3.5.10 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by the executive.**
- 3.10 General Principles – **Certainty of the law.**
- 3.18 General Principles – **General interest.**
- 4.6.2 Institutions – Executive bodies – **Powers.**
- 5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**
- 5.3.39.2 Fundamental Rights – Civil and political rights – Right to property – **Nationalisation.**
- 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

Keywords of the alphabetical index:

Expropriation, restitution / Expropriation, compensation / Legitimate expectation.

Headnotes:

In terms of the recovery of the right to property, it is important to strike a balance between the interests of those seeking restoration, and those of society as a whole. Such a balance would be impossible if those seeking restoration were given an absolute right of restoration in kind. The Constitutional Court also ruled that, where expedient for the needs of society, property may be left unreturned in kind that once belonged to an owner through property rights in force prior to illegal nationalisation or other expropriation.

Summary:

The District Court of Kaunas filed a petition with the Constitutional Court, seeking a review of certain parts of the List of Not-Privatised Agricultural Enterprises and Organisations approved by Resolution no. 540 of 9 December 1991 (edited on 27 February 1992 and 14 May 1999). In addition, it sought a review of provisions of Government Resolution no.266 of 8 March 2001 on not-privatised agricultural land assigned to the Lithuanian Veterinary Academy. Also under scrutiny were provisions of Government Resolution 579 of 14 May 1999 by the Government regarding state land assignment to the Weaponry Fund. The District Court suggested that these provisions might be in conflict with the Constitution and legislation regulating the recovery of rights to property.

The Kaunas District Court expressed concern over the assignation of non-privatised land to the Lithuanian Veterinary Academy and the Weaponry Fund, which the heirs of the former landowner now wished to reclaim. The District Court suggested that this might contravene Article 23.1 and 23.3 of the Constitution, the principle of a democratic state under the rule of law, and legislation on priority of the right to recovery of land in kind.

The Constitutional Court noted that the Lithuanian State had attempted a partial restoration of justice in its handling of the issue of the recovery of violated rights to property. It had opted for a limited restitution, rather than *restitutio in integrum*. This would restore a certain degree of justice to the owner, enabling him to receive compensation for property that could not be returned in kind. It is important in these circumstances to strike a balance between the interests of those seeking restoration of their property, and those of society as a whole. Such a balance would not be possible if those seeking restoration had the absolute right to receive their property in kind.

The Constitutional Court has ruled several times that where it is impossible to return the property in kind, fair compensation will satisfy the restoration of the rights to property. Legislation providing an alternative to recovery of rights to property in kind does not contravene the goals of restitution, neither does it contravene the constitutional protection of rights to property. Moreover, a reasonable and lawful redemption of the property objects by recovery of the rights to property will also satisfy the requirement of the constitutional protection of just expectations. The Constitutional Court has previously held that property that was the subject of illegal nationalisation or expropriation can be left unreturned in kind where this is expedient in terms of the needs of society. Such property is redeemed by the state.

An example is the provision of land for scientific and academic institutions, under consideration by the Constitutional Court here. Scientific and academic institutions would not be able to perform their socially significant functions without possessing realty in the form of land and buildings. In terms of the official constitutional doctrine of restitution (recovery of citizens rights over property), it must be stressed that the status of state redeemable land can only be granted to land assigned to academic and scientific institutions that is of vital importance to the achievement of their aims and the performance of their functions. In other words, the property is needed for society as a whole. Municipal officials and academic and scientific institutions must make sure that the land assigned to them is used to serve the purposes of society.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2008-2-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 28.05.2008 / **e)** 39/06 / **f)** On court authorisation to collect evidence / **g)** *Valstybės Žinios* (Official Gazette), 62-2353, 31.05.2008 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

1.3.2.1 Constitutional Justice – Jurisdiction – Type of review – **Preliminary / ex post facto review.**

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

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

4.7.2 Institutions – Judicial bodies – **Procedure.**

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

5.3.13.14 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.**

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

Keywords of the alphabetical index:

Court, independence / Evidence, compilation by judge, impartiality, safeguard.

Headnotes:

In some cases, the execution of justice cannot depend simply on material provided to the Court, and the judge will need to carry out certain actions, such as compiling missing evidence, in order to investigate the circumstances of the case in a thorough and objective fashion, and to establish the truth. In carrying out such activities, the Court must act in a way that gives no cause for accusations of partiality or influence.

Summary:

The Regional Court of the Rokiškis Region asked the Constitutional Court to assess the compliance with the Constitution of Article 256.3 of the Code of Administrative Law Violations (or CALV). The petitioner suggested that the Code might contravene Article 31.2 of the Constitution (right to a public and fair hearing by an independent and impartial court) and Article 109.2 of the Constitution (while administering justice, the judge and courts shall be independent). The petitioner expressed concerns over that part of the Code under which, during cases examining breaches of administrative law, evidence may be collected. The regional courts (or their judges) will appoint experts or specialists where necessary.

The petitioner argued that once the Court has embarked on the process of executing justice, in administrative law cases, it should not participate in investigations, control them or support the charges. In executing justice, the Court should hear the case that has already been prepared. Significant data should already have been collected, to facilitate the establishment of the truth. However, due to Article 256.3 of the CALV, the Court has an unlimited role in the establishment of the circumstances of the case.

The petitioner pointed out that where a court corrects errors in an investigation made by an institution that has drafted the minutes regarding an administrative

law violation and collects the missing evidence, the Court performs the role of accuser. Elements not due to execution of justice then occur in the actions of the Court, and the principles of separation of power and judicial independence are breached. The petitioner also noted that the Code of Administrative Law Violations provision under dispute could lead to the Court joining the banner of one of the parties, and to collude with it in compiling evidence to the disadvantage of the other party. The Court then becomes partial, which might prevent it from establishing the truth of the case. The right to a fair, impartial and independent hearing is denied, along with the principle of competition arising from this right.

The Constitutional Court noted that the legal regulation established in Article 256.3 CALV does not provide for any deviation from the requirements established in Articles 31.2 and 109.2 of the Constitution. When hearing cases of administrative law violation, courts (judges) must objectively and impartially investigate, examine, and assess the data (evidence) and arrive at a fair conclusion as to the culpability of the person charged with committing the violation. In certain instances, circumstances may already have been revealed that are of significance in reaching the decision, but the person drafting the minutes has failed to record them. Sometimes, there is insufficient material before the Court to enable it to make a fair decision. Where this is the case, the Court (judge) is authorised to conduct the necessary action, because otherwise they cannot fulfil their duty of objective and impartial investigation, and establishment of the truth. The Constitutional Court also has stressed that in so doing, the Court must not give any cause for accusations of partiality or influence.

The fact that the Court (judge) is authorised under Article 256.3 of the CALV to compile evidence while hearing a case of administrative law violation does not, in any way, exonerate the person drafting the minutes regarding the violation from the responsibility of compiling evidence. He or she must not provide the Court or official considering the case with materials that are incomplete, incomprehensible, or are otherwise improperly drafted.

The Constitutional Court noted that problems sometimes arise with legal regulation when both officials charged with executive authority and courts are given authority to execute justice. Nonetheless, this is not a ground to establish that the provision in point contravenes the Constitution, and the Constitutional Court accordingly held that Article 256.3 was in line with the Constitution in this respect.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2008-2-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 30.06.2008 / **e)** 38/06 / **f)** On state debt recovery / **g)** *Valstybės Žinios* (Official Gazette), 75-2965, 03.07.2008 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

1.3.2.1 Constitutional Justice – Jurisdiction – Type of review – **Preliminary / ex post facto review.**

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

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

3.18 General Principles – **General interest.**

3.21 General Principles – **Equality.**

4.6.2 Institutions – Executive bodies – **Powers.**

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

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

Keywords of the alphabetical index:

State aid / Debt, enforcement.

Headnotes:

The state is free to select various means of supporting economic efforts and initiatives that are useful to the public. An example is the state loan. Measures will be needed to ensure adherence to the obligations under the loan. Under the Constitution, it is for the state to establish such regulations. Any execution proceedings would be carried out not only by the courts, but also by the other institutions or officials described in the law. The legislator will set out the procedure for recovery of state loans (and other associated costs that may fall

on the state). However, nobody can be denied the right to appeal to a court of law to defend rights that he or she deem to be breached.

Summary:

The Vilnius District Court asked the Constitutional Court to assess the constitutionality of provisions set out in Article 9.2 of the Law on State Debt (edited on 18 December 2003). These consisted mainly of decisions by the Lithuanian Ministry of Finance on debt recovery from the debtor which is transferred to court bailiffs for execution in accordance with the Code of Civil Procedure. The District Court expressed concern that these were in conflict with Article 29.1 of the Constitution (equality of persons before the law, state institutions), Article 30.1 of the Constitution (the right to apply to court), and Article 46.3 of the Constitution (the duty of the state to regulate economic activity so that it serves the general welfare).

Under the Constitution, the state is free to select various means of supporting economic efforts and initiatives that are useful to the public. One example is the state loan.

Legislation must be in place to support the receipt of state support by economic entities. It must cover points such as the state institutions that have the right to make decisions on such support, and the practicalities of giving the support. In regulating state support afforded to economic efforts and initiatives that are useful to the public, including state loans, the legislator must respect constitutional values such as responsible management, transparency, legitimacy, equality, and fair competition. The legislation must not contain any provisions that would constitute a mechanism that would either endow economic entities with privileges or limit their initiative.

The Constitutional Court noted that there must be freedom of contract between the state and the person (economic entity) regarding the loan. This is considered as a guarantee at constitutional level. Somebody availing themselves of state support (which may be in the form of a loan) must adhere to the conditions and must respect the law. They will be subject to control as to the proper application of the support, which will include timely repayments. Measures must be in place to cover the situation where somebody in receipt of state support reneges on their obligations. One such measure might be provision in legislation for execution by an appropriate institution, to recoup the loan and any other expenses that might fall on the state. Such measures must be clearly set out in law.

The type of legislation provided above does not present a problem from a constitutional perspective. Execution proceedings would not only be initiated by court decisions, but also by decision of other state institutions or officials, as set out in the law. The rationale behind the legislation establishing execution proceedings is to ensure that it happens in a smooth and efficient manner, without scope for delay or abuse of the law. The right to seek redress for rights that may have been breached cannot be excluded in this connection. The right of recourse to court is absolute, as is the constitutional mission of the Court to execute justice. Effective judicial control is necessary, over the execution process. This control could take several forms. Its principal aim would be to ensure that execution was carried out lawfully and in an efficient manner, and to ensure that the person on the receiving end of the procedure were respected.

In these proceedings, the Constitutional Court was assessing the constitutionality of decisions by the Ministry of Finance transferring responsibility for execution of loans to court bailiffs. It held that these provisions were in line with the Constitution as the person on the receiving end of execution proceedings still had the right to apply to the Court for assistance if his or her rights were infringed by the decisions. The legislation did not, therefore, limit the rights of the person or economic entity in receipt of a state loan to apply to court. The provisions of the Law on State Debt were in line with the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Netherlands

Council of State

Important decisions

Identification: NED-2008-2-005

a) Netherlands / b) Council of State / c) Third Chamber / d) 21.05.2008 / e) 200706809/1 / f) Stichting Triumphant Faith Chapel v. college van burgemeester en wethouders Ouder-Amstel / g) *Jurisprudentie Bestuursrecht* (JB) 2008, 145 / h) CODICES (Dutch).

Keywords of the systematic thesaurus:

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

3.18 General Principles – **General interest.**

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

5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship.**

Keywords of the alphabetical index:

Land-use plan / Land, industrial, use for worship.

Headnotes:

Planning regulations resulting in a restriction of the right to freedom of religion were justified on the grounds of the protection of public order and the protection of the rights and freedoms of others.

Summary:

I. The Foundation 'Triumphant Faith Chapel' held church services for the benefit of young people or asylum seekers on industrial premises in the town of Duivendrecht. The municipality decided that this use of land was contrary to the planning regulations in force which restricted the use of this piece of land to business and industry. It therefore issued an administrative order. The foundation objected to the decision but the local authority dismissed the objections. The District Court upheld the decision. On appeal to the Administrative Jurisdiction Division of the Council of State, the foundation argued that

prohibition of the use of the land for religious services was inapplicable, since it was in breach of Article 9 ECHR.

II. The Administrative Jurisdiction Division of the Council of State held that the Court of First Instance, which referred to the Council of State's judgment of 6 April 2005, was right in ruling that the mere fact that a fundamental right was at stake did not automatically mean that the planning regulations concerned ought to be set aside. In this respect, it was significant that the purpose of the planning regulations was not to define religion or to dictate the way in which it should be practiced. The limitations on the freedom of religion were prescribed by law and in this case the restrictions were necessary in a democratic society in the interests of public order and the protection of the rights and freedoms of others. Importance was also attached to the fact that the planning regulations in force in the municipality did allow other premises to be designated for the church services and other activities organised by the foundation. In the meantime the foundation had been able to hold its church services at different locations, so that the planning regulations concerned did not render it impossible for the foundation to hold church services. The fact that another local authority had allegedly carried out a balancing of interests with a different outcome in similar cases, was held to lack significance in the present case, as the municipal Board of Ouder-Amstel exercised a discretionary power of its own, for the practice of which it carried a responsibility of its own.

Cross-references:

- ABRvS 06.04.2005, no. 200406278/1, *Bulletin* 2006/3 [NED-2006-3-001] (*Stichting 'Vaders huis is moeders toevlucht' v. college van burgemeester en wethouders Valkenswaard*).

Languages:

Dutch.



Identification: NED-2008-2-006

a) Netherlands / b) Council of State / c) Third Chamber / d) 04.06.2008 / e) 200703206/1 / f) S. v. Minister of Transport, Public Works and Water Management / g) *Administratiefrechtelijke Beslissingen* (AB) 2008, 229; *Jurisprudentie Bestuursrecht* (JB) 2008, 146 / h) CODICES (Dutch).

Keywords of the systematic thesaurus:

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

2.3 Sources – **Techniques of review.**

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

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

5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**

Keywords of the alphabetical index:

Damages, immaterial / Interpretation, in the light of the Convention.

Headnotes:

In case of breach of the 'reasonable time'-criterion in Article 6 ECHR by an administrative court, material and immaterial damages can be obtained in administrative court proceedings

Summary:

I. The Minister of Transport, Public Works and Water Management rejected the applicant's application for damages under the Betuwe Freight Railway (Compensation) Regulations. The applicant objected to the decision but the Minister dismissed his objections. The District Court upheld the decision. On appeal to the Administrative Jurisdiction Division of the Council of State, the applicant, *inter alia*, complained about the length of the proceedings. He stated that the protracted proceedings had imposed an emotional burden on him and his family.

II. The Administrative Jurisdiction Division of the Council of State supplemented the legal basis of this ground of appeal on its own initiative treating the complaint as claiming that the right to a fair hearing within a reasonable time laid down in Article 6.1 ECHR had been breached. The complaint was

treated as an application for compensation for damages caused by this alleged breach (emotional distress).

The question whether the 'reasonable time'-criterion in Article 6.1 ECHR had been breached, was considered in the light of the circumstances of the case, taking into account the case-law of the European Court of Human Rights. The proceedings had taken five years and eight months, the court starting immediately after the reception of the notion of objections by the Minister. It had taken the District Court more than three years and five months to pronounce judgment. Therefore, the Administrative Jurisdiction Division of the Council of State deemed it arguable that the Court of First Instance had acted in breach of Article 6.1 ECHR. In this view of Article 13 ECHR the Administrative Jurisdiction Division of the Council of State decided to re-open the examination of the case to deal with the issue of damages, thereby interpreting provisions of national law concerning administrative procedure in the light of Article 13 ECHR.

Supplementary information:

This is the first case in the Netherlands where it has been held that compensation of (immaterial) damages for breach of the 'reasonable time'-criterion in Article 6.1 ECHR by a court can be obtained in administrative court proceedings.

Cross-references:

European Court of Human Rights:

- *Frydlender v. France*, no. 30979/96, 27.06.2000, *Reports of Judgments and Decisions* 2000-VII; *Bulletin* 2000/2 [ECH-2000-2-007];
- *Pizzati v. Italy*, no. 622361/00, 29.03.2006.

Languages:

Dutch.



Identification: NED-2008-2-007

a) Netherlands / b) Council of State / c) Third Chamber / d) 18.06.2008 / e) 200706166/1 / f) Stichting Parnassia Bavo v. Stichting Koppeling / g) / h) CODICES (Dutch).

Keywords of the systematic thesaurus:

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

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**

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

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

Keywords of the alphabetical index:

Medical assistance, free, right / Foreigner, health, treatment, costs.

Headnotes:

The costs of essential medical assistance in life-threatening situations for the benefit of foreigners residing illegally in the Netherlands ought to be compensated to care providers in the light of the State's obligation to subject no one to inhuman and degrading treatment.

Summary:

1. The Benefit Entitlement Foundation ("*Stichting Koppeling*") took the decision to, *inter alia*, compensate the Parnassia Bavo Foundation, an institution specialising in mental healthcare, only to a limited extent for costs made for the treatment of non-insured foreigners residing illegally in the Netherlands in the year 2002. Parnassia Bavo objected to the decision but the Benefit Entitlement Foundation dismissed the objections. The District Court upheld the decision. On appeal to the Administrative Jurisdiction Division of the Council of State, Parnassia Bavo argued, *inter alia*, that the Benefit Entitlement Foundation ought to have compensated the costs of essential medical assistance for the benefit of foreigners residing illegally in the Netherlands.

2. Under the Benefit Entitlement (Residence Status) Act, foreign nationals residing illegally in the Netherlands are not entitled to social security benefits

and other social services. However, all foreigners, with or without legal residence status, do have the right to certain services such as essential medical assistance. The Explanatory Memorandum to the Benefit Entitlement (Residence Status) Bill states that, as health institutions could not neglect their duties to provide medical care in life-threatening situations, the government would provide cover for some of the foreseeable financial risks these institutions face, though without being obliged to do so. For this purpose a Benefit Entitlement Fund was set up, administered by the Benefit Entitlement Foundation.

3. A preliminary question was whether the Benefit Entitlement Foundation's decision qualified as a subsidy in the sense of the General Administrative Law Act. 'Subsidy' means the entitlement to financial resources provided by an administrative authority for the purpose of certain activities of the applicant, other than as payment for goods or services supplied to the administrative authority. The Administrative Jurisdiction Division of the Council of State gave an affirmative answer, holding that, by contrast to what had been said in the Explanatory Memorandum to the Benefit Entitlement (Residence Status) Bill, the State was obliged to provide for financial means in order to facilitate necessary medical assistance to foreigners without legal residence status.

Firstly, most foreigners were mainly taken into care by Parnassia Bavo after a court order, an order for remand in custody or detention under a hospital order, so that the State had assumed responsibility for their treatment and, in principle, for the costs involved. Secondly, after consideration of the European Court of Human Rights case-law on Article 3 ECHR, the Administrative Jurisdiction Division of the Council of State held that Article 3 ECHR imposed on the State an obligation to prevent foreigners without legal residence status from being subjected to inhuman and degrading treatment in life-threatening situations. This obligation was particularly pertinent if care providers were, given the nature and duration of the medical assistance granted to foreigners without legal residence status and with no financial support from the State, not capable of fulfilling their duty of care under national law.

The Administrative Jurisdiction Division of the Council of State held that Parnassia Bavo had been right in arguing that the Benefit Entitlement Foundation ought to have compensated the costs of essential medical assistance for the benefit of foreigners residing illegally in the Netherlands. In the light of the obligations resting with the State and given the fact that the costs for providing necessary medical assistance for the benefit of foreigners residing illegally in the Netherlands were unknown at the time,

the State was obliged to find budgetary means, if necessary in the year to come, to pay the costs. Further, expenses for expensive and chronic care could not be restricted to a six month period. Such conditions were held to be at odds with the obligation imposed on the State on the basis of Article 3 ECHR, because, given the amount of cases in which their duty of care applied and the nature and the duration of care provided in such cases, care providers were not capable of complying with this obligation.

Cross-references:

European Court of Human Rights:

- *D. v. United Kingdom*, no. 30240/96, 02.05.1997, Reports 1997-III;
- *Lind v. Russia*, no. 25664/05, 06.12.2007;
- *N. v. United Kingdom*, no. 26565/05, 27.05.2008.

Languages:

Dutch.



Identification: NED-2008-2-008

a) Netherlands / **b)** Council of State / **c)** Third Chamber / **d)** 23.07.2008 / **e)** 200707561/1 / **f)** Calvijn College v. college van gedeputeerde staten van Zeeland / **g)** / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion**.
5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship**.

Keywords of the alphabetical index:

Education, denominational school, subsidy, equality.

Headnotes:

Turning down an application by a denominational school for a rebound facility was not in breach of either the principle of equality or the freedom of education as protected by the Constitution.

Summary:

I. The Calvijn College (hereafter: the denominational school) is a denominational school for secondary education. The school had applied for a subsidy for a so-called 'rebound facility' to the Board of the Province of Zeeland. A 'rebound facility' is a short-term educational crisis relief for pupils at risk. The Board rejected the application on the ground that, first, it had already granted a subsidy for a rebound facility jointly applied for by three regional educational institutions. Secondly, its policy rules favoured cooperation between as many parties as possible. The District Court upheld the decision. On appeal to the Administrative Jurisdiction Division of the Council of State, the denominational school argued, *inter alia*, that the rejection was in breach of the freedom of education as protected by the Constitution.

II. The Administrative Jurisdiction Division of the Council of State upheld the District Court's judgment that the Board's policy was not unreasonable, despite the fact that it did not take into account the circumstance that the applicant was a denominational school, for the application concerned a provincial subsidy based on provincial policy in the field of general social care. The requirement for cooperation was, for reasons of general accessibility and efficiency, not unreasonable either.

The Administrative Jurisdiction Division of the Council of State also upheld the District Court's judgment that the Board had not acted in breach of the principle of equality by having granted subsidies to the three regional educational cooperations separately, as these subsidies were all designated for one and the same rebound facility, albeit with three sites in the entire province.

Finally, the Administrative Jurisdiction Division of the Council of State dismissed the denominational school's claim based on the Constitution. Article 23 of the Constitution places public and private (or: denominational) schools on an equal financial footing. It stipulates, *inter alia*, that private primary schools that satisfy the conditions laid down by Act of Parliament shall be financed from public funds according to the same standards as public-authority schools and that the conditions under which private secondary education and pre-university education shall receive contributions from public funds shall be laid down by Act of Parliament. The denominational school argued that the District Court had failed to recognise that the equality of publicly-run and privately-run education also applied to secondary education and that it could not facilitate educational crisis relief for pupils at risk without the subsidy it had applied for. The Administrative Jurisdiction Division of

the Council of State held that, even if the rebound facility was a type of education in the sense of Article 23 of the Constitution, it did not follow that the funding applied for ought to be granted, since the school was not obliged by the Education Act or any education law to provide for a rebound facility. On the same ground the argument based upon Article 2 Protocol 2 ECHR was rejected. There was no positive obligation under the provision for the State to provide financial support for a facility of the type under discussion.

Languages:

Dutch.



Poland

Constitutional Tribunal

Statistical data

1 May 2008 – 31 August 2008

Number of decisions taken:

Judgments (decisions on the merits): 29

- Rulings:
 - in 18 judgments the Tribunal found some or all challenged provisions to be contrary to the Constitution (or other act of higher rank)
 - in 11 judgments the Tribunal did not find the challenged provisions to be contrary to the Constitution (or other act of higher rank)

- Initiators of proceedings:
 - 10 judgments were issued upon the request of courts – the question of legal procedure
 - 10 judgments were issued upon request of private individuals (physical or natural persons) – the constitutional complaint procedure
 - 4 judgments were issued upon the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
 - 2 judgments were issued upon the request of a group of Deputies (members of the *Sejm*, i.e. first chamber of Parliament)
 - 1 judgment was issued upon the request of trade union
 - 1 judgment was issued upon the request of employers' organisation
 - 1 judgment was issued upon the request of an occupational (professional) organisation

- Other:
 - 3 judgments were issued with dissenting opinions



Portugal

Constitutional Court

Statistical data

1 May 2008 – 31 August 2008

Total: 169 judgments, of which:

- Prior review: 3 judgments
- Abstract *ex post facto* review: 3 judgments
- Appeals: 116 judgments
- Complaints: 37 judgments
- Declarations of inheritance and income: 2 judgments
- Political parties' accounts: 8 judgments

Important decisions

Identification: POR-2008-2-005

a) Portugal / b) Constitutional Court / c) Third Chamber / d) 29.05.2008 / e) 292/08 / f) / g) *Diário da República* (Official Gazette), 141 (Series II), 23.07.2008, 32727 / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 3.17 General Principles – **Weighing of interests.**
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
 5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press.**
 5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation.**

Keywords of the alphabetical index:

Media, journalist, rules of conduct / Media, journalist, liability.

Headnotes:

The right to one's honour and reputation is enshrined in the Constitution and has a very broad scope, restricting other rights such as freedom of expression, information and the press.

Natural and legal persons are entitled to their honour and are wronged if their honour is insulted or tarnished by illicit, unlawful, offensive, defamatory or other acts which in some way undermine their position in society.

The right of legal entities to their honour, even if they are bodies "in the public eye", and freedom of expression, information and the press do not always co-exist harmoniously. In certain specific circumstances, they can conflict with one another.

Legal conflicts cannot be settled through abstract choices, based simply on the idea that there is a hierarchical system of constitutional values, as it is difficult to establish an order of precedence of values protected by the Constitution on a theoretical basis alone. In most cases, this kind of hierarchy can be identified only by taking account of the actual circumstances of a case. The Constitution protects different values and interests and there can be no justification for favouring one of them to the detriment of others. Instead, the interests at stake must be weighed up empirically and this can yield results that vary according to the circumstances. Conflicts between legal rules must therefore be resolved through a process based on the principle of harmonisation and practical concordance.

However, the application of this principle must never undermine the essential content of any of the rights at issue and will not necessarily mean that it is always the most practical solution that is adopted.

Summary:

The case related to the constitutionality or otherwise of a rule derived from a combination of the articles of the Civil Code relating to civil liability for unlawful acts (particularly in relation to affronts to the reputation or honour of natural or legal persons) and journalists' professional rules, under which unthinking or aberrant misconduct on the part of journalists in the exercise of their right to inform constituted sufficient reason for legal persons to be compensated for an affront to their honour.

In the case in question, an article published in a national newspaper with a wide readership alleged that a well-known legal entity had failed to fulfil its tax obligations. This article was said to have undermined this entity's right to its honour and reputation and attributed legally and criminally reprehensible acts to it.

In view of the fact that the Portuguese Constitution did not provide for a system of appeals whereby individuals could assert their rights and the constitutionality of rules could be reviewed at the same time, or a constitutional

complaints system, but a system based on the review of the constitutionality of legislation, the Constitutional Court did not have the authority to determine the constitutionality or otherwise of judicial decisions in themselves according to whether they constituted infringements of constitutionally protected fundamental rights. It was not therefore appropriate to consider whether, in the decision of the Supreme Court of Justice that was disputed in the case in question, all the conditions needed for the party's civil liability to be incurred had been met.

The Court against which the complaint had been made had reached the following four findings:

1. publication of the information at issue in the newspaper had been unlawful;
2. there had been no justification for the applicants' action;
3. the applicant journalists had acted in an ethically and legally questionable manner;
4. the applicant had been entitled to demand compensation from the defendant for non-pecuniary damage.

From a constitutional viewpoint, the question was whether, in cases where freedom of expression, information and the press were concerned, it was possible to interpret the relevant articles of the Civil Code and the journalists' professional rules to mean that compensation for an affront to a legal entity's good name could be demanded where the impugned conduct had merely been unthinking.

International human rights law did not afford unlimited, absolute protection to freedom of the press. The European Convention on Human Rights and the International Covenant on Civil and Political Rights – which were international instruments that were binding on the Portuguese state under the Constitution – allowed restrictions on freedom of expression and freedom of the press.

The constitutional question in this case was whether, in cases where the right to inform was at issue, the term “negligence” used in the Civil Code could be considered to cover unthinking misconduct and hence imply that anyone acting in this manner who announced or spread word of a fact capable of undermining the honour or reputation of a natural or legal person could be ordered to pay compensation. In the case in question, such information had been disseminated by the applicants.

The conflict between a legal entity's right to its honour and reputation and the journalists' right to inform had to be resolved by a system of weighting based on the principle of practical concordance, in which it was

assumed that the burden of the conflict would be shared proportionately.

The fact that the legal entity in this case was a body “in the public eye” could not radically reduce its right to honour if, when this right was weighed against the right to information, only the latter was taken into consideration.

The question that was raised was whether, bearing in mind the interpretation of the law that had been at issue in this case and in view of the relevant articles of the Constitution, the infringement of the right to honour by the press stemmed from the fact that the perpetrator, through lack of foresight or negligence, had not anticipated the possibility that an illegal act would be committed. The point was, however, that, when limiting the freedom of the press, the right to honour had to be upheld irrespective of the type of negligent act committed, in other words regardless of whether the perpetrator had failed take the necessary care to avoid the prejudicial result (conscious wrongdoing) or had not even anticipated that an unlawful act was possible (negligence).

While the case-law of the European Court of Human Rights allowed extensive restrictions on this right where freedom of expression and the press were at issue, it had to be borne in mind that the context of the Constitutional Court was quite different.

The essential content of the freedoms of expression, information and the press should not be undermined, any more than the essential content of the right to honour. Consequently, it needed to be established whether these freedoms were irremediably undermined in the case of an infringement of a legal entity's right to its honour, where simple negligence was considered a reason for the perpetrator's non-contractual civil liability to be incurred. It could be argued that holding journalists civilly (and financially) liable for negligence in publishing information under cover of the right to journalistic investigation would undermine the essential content of freedom of information and the press, because journalists would then refrain from publishing information and investigating unless they were absolutely certain of the truth of the facts reported, or at least disproportionately restrict their freedom. Basically, it was argued that holding journalists civilly liable for simple (and, in this case, unknowing) negligence could constitute a mechanism of self-censorship that would be detrimental to democracy.

The Constitutional Court did not share this view. In this particular case, there was evidence that the journalists had broken some of the rules of conduct they were expected to comply with, with regard to both professional standards and legal requirements.

Even if the interpretation given in this case restricted the right to inform, it did not therefore affect its essential content or restrict it disproportionately. Journalists preserved their right to inform provided that they complied with professional standards and the law in the course of their investigations.

According to the Constitutional Court, to allow the contrary would be tantamount to disavowing journalists' professional obligations. It did not consider the impugned legal rule to be unconstitutional.

Supplementary information:

One judge voted against the judgment because he considered that freedom of expression and information was not just a right that protected people from wrongful interference by the state, as was the case with all other individual rights, freedoms and guarantees, but also had an objective, institutional dimension because the legal interest or value protected by the Constitution included the formation of the type of stable public opinion without which democracy was impossible. In view of the objective nature of the right concerned (freedom of expression) and hence the extent of the constitutional protection afforded to this right, the requirement was, according to the dissenting judge, that journalists show good faith and reasonable diligence, and not that they carry out exhaustive checks as to the truth of the facts they described. According to the dissenting judge, a requirement to do so went beyond the scope of the protection afforded by the constitutional rule, precisely because of the inhibitive effect that it would have on the exercise of the right to inform.

Languages:

Portuguese.



Identification: POR-2008-2-006

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 30.05.2008 / **e)** 311/08 / **f)** / **g)** *Diário da República* (Official Gazette), 148 (Series II), 01.08.2008, 34401 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

4.7.14 Institutions – Judicial bodies – **Arbitration.**

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:

Arbitration, agreement, implementation, financial difficulties / Arbitration, access to courts, exclusion / Access to courts, exclusion by arbitration agreement.

Headnotes:

Official recognition of courts of arbitration makes it possible, where there are enforceable rights, for the parties to a conflict to choose to make use of them in accordance with the provisions of an arbitration agreement. Proceedings of this type are similar to legal and procedural cases.

The drawback to assigning authority to a court of arbitration through an arbitration agreement is that this prevents a judicial settlement of a dispute.

Arbitration is an example of the constitutional principle of self-determination in that it ensures that private freedom of action can be properly exercised, contributing to its implementation in the specific field of legal relations.

Yet implementation of this principle cannot be entirely separated from legal aspects relating to the constitutional protection of other rights and values, which would also seem, on the face of it, to apply to the situation in question and are liable to conflict with the results of an arbitration procedure.

In the face of conflicting demands, it is possible to arrive at an arrangement in line with the Constitution only by weighing up the interests at stake in a manner in keeping with the actual circumstances of the case.

Summary:

The Court was asked to rule on the constitutionality of an interpretation of the Code of Civil Procedure whereby the breach of an arbitration agreement was considered to render a claim before a court of law inadmissible, even though the party attempting to institute judicial proceedings had insufficient resources (and therefore required legal aid) and the dispute was over certain acts which may have been the cause of this situation. This had prevented the

Court from ruling on the case and had meant that no judgment had been handed down.

A language training centre had brought proceedings in a court of first instance against another centre of the same type and a consultancy and marketing firm. It had lodged two claims: firstly, it had applied for the first defendant to be ordered to pay it the sum owed as the result of the illegal termination of the franchise agreement and unpaid rent under a leasing agreement signed between the applicant party and certain third parties (for the purposes of establishing the training centre to which the franchise agreement related); secondly, it had requested that both defendants be ordered to pay it the sums owed in connection with work and refurbishments carried out on the premises which had been sublet (in which the applicant had set up the centre to which the franchise agreement related).

It had been found in this case that it had been impossible for the applicant to pay legal costs as it did not have sufficient resources. To exercise its right of access to the courts and hence to defend its rights and interests, it had been entitled to legal aid, which it had actually been granted in full in the context of proceedings it had brought before a court of law. However, the applicant, which had actually become the defendant in these proceedings, had challenged the authority of the Court on the ground that an arbitration clause had already been negotiated, and demanded that it be fully implemented.

Given that no provision was made for legal aid to be granted in the courts of arbitration, the strict application of this agreement would have made it impossible for the applicant to appoint a legal representative. The conflict derived precisely from the fact that it was impossible simultaneously to uphold both of these constitutionally protected rights, namely freedom of negotiation, reflecting the principle of self-determination, whose binding effects must be observed without fail, and the principle of effective judicial protection.

There were two possible solutions to this conflict of rights, which were mutually exclusive. Either the arbitration agreement was applied, in which case justice would be denied to one of the parties because of its financial difficulties, or it could be considered that in order for this party to be given proper legal protection, the jurisdiction of the Court of law had to be recognised. The latter solution, however, meant denying the effectiveness of what had been freely agreed to under the arbitration agreement. In cases of this type, account could be taken of the interest that had been sacrificed only by pinpointing the circumstances of each case and attributing "compelling reasons" to the protected interest.

All the factors to be weighed in the balance in this case tipped the scales in favour of the second solution described above. When an arbitration agreement was negotiated, it was not some abstract aspect of self-determination that was at stake but the very practical matter of the way of implementing this principle, and this implementation was linked to the fact that the agreement assigned authority to a court which did not form part of the judicial system. This specific means of putting freedom of negotiation into practice could not be said to have anything to do with the personal fulfilment of individuals. It did not therefore fall within the sphere of self-determination, for which "maximum protection" had to be provided.

The judgment went on to state that the court of arbitration's decision-making power, although based on the parties' desires, did also have a clear institutional dimension and was subject to conditions and restrictions deriving from national law. The freedom to negotiate an arbitration agreement, which was reflected by the granting of authority to a court of arbitration, did not come about all on its own. For it to work properly, the way in which the latter court administered justice had to be entirely consistent with the way in which a court of law operated, otherwise it could not offer equivalent safeguards. It was for this reason that, during proceedings before courts of arbitration, it was essential to abide by fundamental procedural principles, whose infringement constituted grounds for invalidating any decision taken by the Court. This also meant that clauses in arbitration agreements establishing arbitration procedures which failed to secure legally prescribed procedural guarantees had to be completely prohibited.

Consequently, the Constitutional Court found that the way in which the rule in question had been interpreted was unconstitutional.

Languages:

Portuguese.



Identification: POR-2008-2-007

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 11.06.2008 / **e)** 313/08 / **f)** / **g)** *Diário da República* (Official Gazette), 126 (Series I), 02.07.2008, 4112 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Civil servant, cohabitation, pension, equality.

Headnotes:

The question posed is the compatibility with the constitutional principle of equality before the law of the difference in the rules governing determination of the date of commencement of entitlement to a survivors' pension, granted to the person who cohabited with a deceased beneficiary, depending on whether the beneficiary was affiliated to the general social security scheme or the specific civil service scheme. The fact that in both situations entitlement to a survivors' pension is acquired as a result of legal recognition of a *de facto* union with a deceased beneficiary or affiliate is an element that tends to confirm that the two situations are the same. Although it does not reflect a situation in which the circumstances are absolutely identical, since a comparison is being drawn between pensions payable under the general scheme and pensions payable under the scheme applicable to civil servants and public officials, this element nonetheless makes it possible to consider the situations as fundamentally the same in view of the very many common factors. Indeed, under both schemes the analysis of the "legal social security relationship", based on the same criteria, is substantially the same.

The lack of a relevant ground for this difference in treatment infringes the constitutional principle of equality.

Summary:

The Public Prosecution Service's representative to the Constitutional Court had petitioned the Court for an abstract review finding of unconstitutionality of the rule of the *Estatuto das Pensões de Sobrevivência* (Survivors' Pensions Code, 1973) providing that a survivors' pension was due from the first day of the month following that in which it was claimed. The application was lodged after the Constitutional Court had, in the context of a concrete review of its constitutionality, found this rule unconstitutional for breach of the principle of equality (on account of the

difference in treatment apparent from a comparison of this rule with that applicable to beneficiaries of the social security scheme, under which the pension was due from the beginning of the month following the former beneficiary's death where it was claimed within six months of the judgment recognising entitlement).

In the context of cohabiting couples, persons granted entitlement to a survivors' pension in the event of the death of their *de facto* spouse were treated differently depending on whether the pension was awarded following the death of a civil servant (or a public official) or of a beneficiary affiliated to the general social security scheme.

In the first case, entitlement to a pension was determined by a judicial decision and, according to the rule under consideration here, the pension was due from the first day of the month following that in which it was claimed. In the second, if claimed within six months of the judicial decision recognising entitlement, the pension awarded under the general scheme was due "from the beginning of the month following the beneficiary's death". Since the dates of first payment differed in these two cases (beneficiaries of a pension payable under the general scheme received it earlier) the question arose of respect for the constitutional principle of equality in the case of persons not covered by the general scheme who had acted within the above time-limit.

This position had often been adopted in the Constitutional Court's decisions and, consequently, since the legal conditions were met, the Court declared the challenged rule unconstitutional with absolute binding effect.

Supplementary information:

One judge filed a written opinion, since he considered that, despite having voted in favour of the decision taken in the judgment, he had done so in disagreement with its grounds, given that, in his contention, regardless of the problem of equal treatment under the law, in view of the nature of the pension in question, the legal solution could never be enforced since it was unfit for purpose.

Languages:

Portuguese.



Identification: POR-2008-2-008

a) Portugal / b) Constitutional Court / c) Plenary / d) 12.08.2008 / e) 428/08 / f) / g) *Diário da República* (Official Gazette), 189 (Series II), 30.09.2008, 40756 / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 3.19 General Principles – **Margin of appreciation**.
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
 5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file**.
 5.3.13.20 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Adversarial principle**.
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

Keywords of the alphabetical index:

Criminal procedure, investigation, confidentiality / Investigation, confidentiality.

Headnotes:

The constitutional guarantee of the confidentiality of inquiries and investigations results in a restriction of the ordinary legislature's margin of *manœuvre*, since it can no longer do away with this confidentiality requirement and is obliged to give it a minimum degree of effectiveness. In addition, potential conflicts between the confidentiality of inquiries and investigations and other constitutionally protected interests will have to be resolved in the general context of conflicts of constitutional rights, through their weighting and their possible practical harmonisation.

The confidentiality of inquiries and investigations is not a right per se. It rather serves a functional purpose: that of safeguarding the inquiry and certain personal interests deemed worthy of protection. A procedural rule guaranteeing defendants' right of access to the case-file but failing to protect the inquiry, to the point where it can be called into question, is contrary to constitutional requirements.

Summary:

In the case under consideration the Constitutional Court gave a ruling of unconstitutionality in respect of the interpretation of Article 89-6 of the Criminal Code

whereby, before the closing of an inquiry to which the principle of confidentiality of inquiries and investigations had been applied, defendants had, and could not be refused, unrestricted access to all the elements in the case-file, including information concerning other persons' private lives, such as bank and tax data covered by a professional confidentiality obligation, these elements having been examined without any assessment of their relevance and their evidential value.

What was at issue here was the constitutional principle that the confidentiality of inquiries and investigations should be guaranteed from both an internal and an external standpoint. The former concerned participants directly involved in the procedure. The second concerned all third parties having nothing to do with the procedure.

Until the entry into force of the criminal procedure reforms in 2007 the rule was that "under an adversarial model governed by the principle of investigation" the need to harmonise the system's various aims justified different solutions according to the stage reached in the procedure. However, at no point in the procedure did the prevailing principle, whether confidentiality or publicity, have an absolute value. Even if at the trial stage the principle that the proceedings should be public was justified on the ground that during this stage the presumption of innocence co-existed with the accusation and the bringing of charges, the necessary restrictions were also applied to that principle through the normal functioning of the courts, with a view to safeguarding certain human rights and guaranteeing that justice was done and the truth discovered.

It had been decided that, as a general rule, the pre-trial investigation stage would be subject to the principle of confidentiality (weakened by the revision of the Code of Criminal Procedure in 1998), but that a public procedure was permissible where the accused alone had requested that an investigation be carried out without the request mentioning any objection to its being public.

With regard to the inquiry stage, it had always been held that, at this stage, provision must be made for departures from the principle of publicity since the inquiry included all the steps aimed at verifying that an offence had been committed, identifying the perpetrators and determining their liability, and finding and gathering evidence.

The reform of 2007 had made a public procedure the rule, even at the inquiry stage. Confidentiality had become an exception, and the public prosecutor could depart from the publicity rule only with the investigating judge's consent.

It must nonetheless be borne in mind that, following the constitutional reform of 1997, the constitution contained a direct obligation to safeguard the confidentiality of inquiries and investigations.

As could be seen from the parliamentary debate preceding this revision, the fundamental aim of making protection of the confidentiality of inquiries and investigations a freestanding principle was not to reduce this protection to the defence of citizens' rights. It had been underlined that protection was also justified by the need to guarantee the effectiveness of the criminal investigation and the prosecution, in the context of the state's essential role of guaranteeing fundamental freedoms and rights and respect for the principles of the rule of law, attention being drawn to the fact that the confidentiality of inquiries and investigations was also of importance for the public prosecution service and the courts.

In this judgment the Constitutional Court was asked to review the constitutionality of the normative criterion applied in the challenged decision.

In the light of the public interest inherent in a criminal investigation, the relevant article of the Code of Criminal Procedure must not allow automatic access to reports whenever an inquiry could be seriously called into question, where their disclosure was not conducive to discovery of the truth or endangered the life, physical/mental integrity or liberty of parties to the proceedings and victims of the offence.

It was only where these conditions had been fulfilled that it could be asserted that the constitutional requirement that "the law shall provide for and guarantee adequate protection of the confidentiality of inquiries and investigations" was respected. In the case under consideration the challenged decision had adopted not the "interpretation consistent with the Constitution", but the normative criterion that, once the maximum time-limits for the inquiry and the extensions provided for had expired, the defendant could have unrestricted access to all the elements of the inquiry regardless of their nature.

It was a matter of verifying whether this normative criterion satisfied the constitutional requirement of adequacy of protection of the confidentiality of inquiries and investigations, bearing in mind that, in the case under consideration, as the question of constitutionality had been formulated, solely the protection of the rights of persons other than the party requesting access to the reports was at issue.

The judgment answered this question in the negative.

Although it was true that the concern to protect defendants (and other participants in proceedings) against excessive delays in closing inquiries was linked to the rules deriving from the Code of Criminal Procedure, at the same time it was equally true that, frequently, above all in connection with economic crime, the rapid closing of the inquiry did not depend solely on the diligence of the authority responsible for conducting it – the public prosecution service – on account of the reliance on measures implemented by third parties (expert reports, requests for judicial assistance by other countries, and so on).

Furthermore, in the case under consideration it was a question not of the defendants' access to elements of the case-file considered necessary to an appropriate defence of their rights, but of the possibility of having knowledge of the inquiry as a whole. The normative criterion applied in the challenged decision was therefore held to be constitutionally inappropriate regard being had to the possible adverse effects on the protection of other constitutionally recognised interests covered by other forms of confidentiality (in particular protection of the private lives of third parties, since the definitive sacrifice of this interest was neither necessary nor proportionate for the purpose of protecting the interests of the party requesting access).

One judge voted against since he thought the decision, based on a different assessment of proportionality, had censured the legislature's assessment of proportionality. It was for the Constitutional Court to determine not which rule was better, but solely whether the rule established, as it had been laid down, was or was not in conformity with the Constitution.

Through this vote, with the professed aim of giving a minimum substance to the confidentiality of inquiries and investigations, the majority had in the end granted maximum protection to the principle of criminal investigation, at the inquiry stage, to the detriment of the effectiveness and efficiency of the constitutional guarantee that criminal procedure must offer defendants all the necessary guarantees for their defence.

Languages:

Portuguese.



Romania

Constitutional Court

Important decisions

Identification: ROM-2008-2-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 30.01.2008 / **e)** 38/2008 / **f)** Decision on the constitutionality or otherwise of Articles 13 and 18.1 of the Law approving Government Ordinance no. 28/2007 amending Government Ordinance no. 19/2002 on the composition and use of the stock of rented protocol dwellings (service accommodation) which are public property of the state and on the sale of certain immovable property which is private property of the state and is managed by the RA-APPS, the Autonomous Authority for the Administration of State Protocol Property (*Regie Autonomia – Administratia Patrimoniului Protocolului de Stat*) / **g)** *Monitorul Oficial al României* (Official Gazette), 122/15.02.2008 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Immovable property, acquisition / Property, public, sale, equality.

Headnotes:

The sale by direct negotiation of certain immovable property which is private property of the state and is managed by the Autonomous Authority for the Administration of State Protocol Property, gives rise to privileges for the private natural or legal persons who are expected to use such property.

Regulations of this type introduce a discriminatory measure against the other persons authorised to purchase the said property at public auctions.

Direct negotiation impedes the estimating and obtaining of a better price when certain state-owned property is sold.

Summary:

A group of 70 members of parliament applied to the Constitutional Court, alleging that Article 18.1 of the Law approving Government Ordinance no. 28/2007 was unconstitutional. Under this Law, the private natural or legal persons expected, under a rental contract, an accommodation agreement or any other legal instrument, to use immovable property belonging to the stock of rented protocol dwellings are entitled to purchase them through direct negotiation based on a reference price.

The applicants submitted that the provision in question infringed Article 16.1 of the Constitution on the equality of citizens.

On examining the application, the Court found that the law was unconstitutional on the following grounds:

1. The constitutional principle of the equality of citizens before the law, confirmed by Article 14 ECHR, did not imply uniform regulations, provided that there was no discrimination or privilege. Equal situations had to be dealt with equally in law. In differing situations the applicable legal treatment had to differ, as long as such different treatment could be objectively and reasonably justified. This position was in keeping with the constant case-law of the Constitutional Court and the European Court of Human Rights.

The Court, guided by the principles arising from the judicial practice of a large number of democratic countries, found that the rule of equal treatment was infringed if different treatment had no objective or reasoned justification. Accordingly, Article 14 could be considered to have been violated if it was clearly established that there was no reasonably proportionate relationship between the means used and the aim pursued.

2. There was a need to establish whether the natural and legal persons authorised to purchase immovable property through direct negotiation were in an equal position to other persons who were entitled to take part in public auctions in accordance with ordinary law. For this purpose, the Court considered it necessary to examine Romanian legislation where it related to the sale of housing built by the state.

The Romanian parliament had enacted legislation on the sale of housing built using state funds and its purchase by social housing tenants. The beneficiaries of this legislation had been those renting accommodation with the standard surface area, based on the figure of 10 square metres per family member.

The legislation had introduced separate legal rules on housing which is public property of the state ("protocol dwellings") and housing which is private property of the state. Article 18.1 of the impugned Law set out the regulations on the sale of housing which is private property of the state. Protocol dwellings were also part of the state's private property if their public property status had been changed by government decree to that of private property.

Consequently, former or current public holders of high public rank or civil servants could purchase such property. However, the difference in the legal status of the two categories of housing meant that purchasers also had two different legal statuses, because account had been taken of the different conditions under which the rental agreements had been entered into.

Thus the former tenants, who had bought housing built using state funds, had done so in accordance with the law. Occupants of protocol dwellings had acquired the status of tenants either because they had been appointed to a high public rank or assigned to a public post or because it had been stipulated in a legal instrument that their use of the accommodation concerned was unauthorised. If fixed-term rental agreements had been negotiated in contravention of mandatory legal provisions, these would automatically become invalid 60 days after the end of the term in a high public rank or as a civil servant.

The possibility of purchasing such housing through direct negotiation created an unjustified privilege in favour of the occupants, as all other persons authorised to purchase were excluded from the public auction.

As to the argument that the price of immovable property which is private property of the state was determined in an unconstitutional manner, it was found that the state had a duty to obtain the highest price, achievable only by means of a public auction. This view was based on Article 135.2 of the Constitution on the state's duty to protect fair competition, create a favourable climate stimulating all factors of production and protect national interests in the area of economic and financial activity. This was all the more justified by the fact that some of those who benefited from the impugned legislation were private persons expected to comply with the rules relating specifically to the market economy.

The Court found that the impugned Law clearly created privileges by allowing the sale of immovable property to its present occupants as, in so doing, it also infringed the principle of social equity enshrined in Article 1.3 of the Constitution.

Supplementary information:

The application was based on Article I.6 of the Law approving Government Ordinance no. 28/2007 amending Government Ordinance no. 19/2002 on the establishment and use of the stock of rented protocol dwellings which are public property of the state, and on the sale of certain immovable property which is private property of the state and is managed by the RA-APPS, which provides as follows: "In Article I, after paragraph 10, a new paragraph shall be added, namely paragraph 10.1, which shall read as follows:

1. "At the instigation of the RA-APPS, immovable property may be added to the list for which Article 15.2 provides.
2. Following the inclusion on the list by the RA-APPS of an immovable property used on a legal basis by a private natural or legal person expected to live in the accommodation described in Article 11, and who, on 30 September 2007, had paid in full all taxes relating to the use of the property, the RA-APPS shall ask the natural or legal person concerned to state in writing, within 15 days, whether purchase of the immovable property through direct negotiation is wished for, using the price set in accordance with Article 14 as a basis.
3. Use "on a legal basis" shall mean the use of the immovable property in question in accordance with the terms of a rental contract, an accommodation agreement or any other legal instrument entered into between a private natural or legal person and the RA-APPS.
4. Within 15 days of receipt of the request sent by the RA-APPS, the private natural or legal person expected to use one of the dwellings to which Article 11 refers shall reply, specifying the decision taken.
5. If the person referred to in paragraph 4 above has decided to purchase the property through direct negotiation, the procedure shall end within 10 days of the submission of the decision.
6. If the person referred to in paragraph 4 above fails to reply by the stipulated deadline, or decides not to purchase through direct negotiation, the RA-APPS shall proceed with the sale of the property through an open public auction, in accordance with the legislation in force.

Languages:

Romanian.



Russia

Constitutional Court

Important decisions

Identification: RUS-2008-2-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 20.11.2007 / **e)** 13 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 28.11.2007 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

5.1.1.4.2 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated.**

5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability.**

5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing.**

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

5.3.14 Fundamental Rights – Civil and political rights – **Ne bis in idem.**

Keywords of the alphabetical index:

Mental disorder, direct examination by the judge / Mental disorder, criminal proceedings, status / Mental disorder, degree.

Headnotes:

The constitutional right to judicial protection of rights and liberties provides for the possibility of direct personal participation by individuals in their hearings and the principle of ensuring one's own defence. This is a basic human right applicable throughout proceedings, from the investigation to the trial phase.

Persons suffering from mental disorders who are subject to an order *vis-à-vis* the forced administration, continuation, modification or discontinuation of medical treatment must not be deprived of this right.

Summary:

A group of applicants challenged certain articles of the Code of Criminal Procedure governing the application of security measures, comprising compulsory psychiatric treatment and placement in a healthcare institution, *vis-à-vis* persons having committed various criminal offences in a state of dementia.

The applicants stated that as soon as the psychiatric expert report is added to the case-file, their state of dementia is notified to the representative or defence counsel. These persons thus forfeit *de facto* their procedural capacities without ever having been interviewed, or even seen, by the judge, and without a hearing to ascertain whether they really are incapable of defending their rights in person.

The applicants contend that the aforementioned provisions violate the constitutional rights set out in Articles 45 and 46 of the Constitution (right to judicial protection).

The Court decided that the provisions challenged did indeed place certain restrictions on the procedural status of persons in respect of whom a procedure has been instigated involving the forced administration of medical treatment.

The Court established that in practice, the derogation from criminal procedure in the case of persons suffering from dementia is interpreted as a derogation from their procedural status, which precludes their individual participation in proceedings.

The Court has previously held that in order to guarantee the procedural rights of the persons concerned regard must be had to the specific circumstances of the proceedings.

The Court stresses that international law requires courts to undertake to verify the validity of the expert reports in question, thus ensuring that incapacity is established on the basis of both the evidence included in the case-file and the facts emerging during proceedings.

The constitutional right to judicial protection as interpreted by the Constitutional Court provides that the power to apply to this Court for the protection of one's rights and liberties is universal in nature and permeates the whole legal system. Persons who are subject to an order *vis-à-vis* the forced administration, continuation, modification or discontinuation of medical treatment must not be deprived of this right.

In its Judgment *Romanov v. Russia*, the European Court of Human Rights acknowledged that the presence of the person in question at the hearing is a precondition for the judge personally to ascertain his/her psychological state and to hand down a fair judgment.

No hearings may be held in the applicant's absence (against his or her wishes) except in very specific circumstances (aggressive conduct or a physical and mental state such as to preclude a personal appearance in court).

The fact that Russian legislation draws no distinction between the rights of defendants who retain full capacity despite their mental disorders and those of defendants who are unable to exercise their rights properly is incompatible with both Russia's international obligations and the Constitution of the Russian Federation.

The inability of individuals to implement their procedural rights where they are subject to security measures embracing compulsory psychiatric treatment and placement in a healthcare institution constitutes a restriction and violation of their constitutional rights, unless their condition prevents them from fully exercising these rights.

Taken in their entirety, the provisions prohibiting individuals who are subject to an order *vis-à-vis* the forced administration of medical treatment from having access to the evidence in their case-file, taking part in their hearing, submitting complaints, requesting changes to or the termination of measures implemented and appealing against decisions affecting them are contrary to the Constitution.

The Constitutional Court asked the legislator to devise different regulations on the rights of the aforementioned persons in order to take account of their mental state and their capacity for personally participating in proceedings.

Languages:

Russian.



Identification: RUS-2008-2-002

a) Russia / b) Constitutional Court / c) / d) 28.02.2008 / e) 3 / f) / g) *Rossiyskaya Gazeta* (Official Gazette), 14.03.2008 / h) CODICES (Russian).

Keywords of the systematic thesaurus:

4.7.4.1.6.2 Institutions – Judicial bodies – Organisation – Members – Status – **Discipline.**

4.7.4.1.6.3 Institutions – Judicial bodies – Organisation – Members – Status – **Irremovability.**

4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**

4.7.16.2 Institutions – Judicial bodies – Liability – **Liability of judges.**

Keywords of the alphabetical index:

Judge, disciplinary measure / Judge, dismissal / Judge, appointments board, competences / Judge, appointments board, procedure.

Headnotes:

Disciplinary proceedings against judges and prosecutors, including their dismissal, are not contrary to the Constitution. However, the sanctions must be proportionate to the seriousness of the offence and applied in accordance with established legal procedure.

Summary:

The case was considered on the basis of a complaint lodged by a group of citizens (former judges) challenging the provisions of the Law “on the Status of Magistrates of the Russian Federation”, which, among other things, empower the appointments board to bring disciplinary proceedings against judges in the form of a dismissal.

The applicants adduced the uncertainty of the contested provisions in relation to the establishment of the factual ingredients of the misconduct and to the disciplinary sanction itself. In practice, the judges were punished not under the procedure and for the reasons established by law but by the appointments board, for having levelled criticism within the judicial community, expressed opinions in the context of the administration of justice and adopted various legal decisions in this context.

The Court noted that the law provided for two types of disciplinary sanction against judges, viz reprimand and dismissal.

The lack of legal criteria does not mean that the appointments board can dismiss judges without reason. It must appraise the seriousness and degree of the misconduct and the judge's personality, and reach a corresponding decision exclusively grounded on misconduct incompatible with the person's status as a judge.

Non-implementation of professional rules is not a valid reason for dismissing a judge if such non-implementation is not contrary to law. Disciplinary proceedings against a judge for criticising judicial decisions and the conduct of his/her colleagues, whether within the judicial community or in public, lead to a restriction of civil rights and liberties, which is not based on law.

In principle, none of the foregoing precludes dismissing judges or prosecutors for conduct incompatible with their status. International law provides that judges may be suspended or relieved of their duties only in the event of an inability to fulfil their judicial functions, conduct incompatible with their status, criminal offences or serious violations of disciplinary rules.

According to the constitutional rules and Federal laws defining the status of judges and prosecutors (magistrates), disciplinary proceedings in the form of dismissal cannot be initiated on the basis of any violation of the law or ethical standards, but only those violations which, depending on their nature, are manifestly incompatible with judicial status and with the public mandate assigned to the judiciary.

The judge cannot be the subject of disciplinary proceedings in the form of a dismissal for judicial error in cases where the irregularity of the judicial act does not stem from conduct incompatible with judicial status.

The Court also referred to its position, which is based on international standards, to the effect that the verification of the legitimacy and validity of judicial decisions must be conducted by the higher courts in accordance with the special procedures established by law. No other procedures for reviewing judicial decisions are admissible, on principle.

In practice, appointments boards base their decisions on the irregularity of judicial decisions and on serious violations of procedural rules, drawing on verifications whose results are appended to the application from the President of the court. The appointments board thus exercises a judicial function contrary to the requirements of the Constitution and the Law “on the judicial system”.

The Court stresses that the Higher Appointments Board had no right to supersede the law and prohibit secret voting during the disciplinary examination by the appointments boards of the judges' misconduct.

Furthermore, the Court recalled that only the Supreme Court of the Russian Federation had jurisdiction to rule on appeals submitted by judges against decisions taken by the appointments board.

Consequently, the Court acknowledged that the contested provisions were in conformity with the Constitution. At the same time, it proposed that the legislator amend the law in order to introduce secret voting by the members of the appointments board and study the possibility of using the jurisdiction of special disciplinary courts, impeachment and other procedures, in accordance with international practice.

Languages:

Russian.



Identification: RUS-2008-2-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 11.03.2008 / **e)** 4 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 14.03.2008 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.3.1 General Principles – Democracy – **Representative democracy.**

3.16 General Principles – **Proportionality.**

4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members.**

4.9.7.1 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Electoral rolls.**

4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates.**

5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections.**

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

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

Keywords of the alphabetical index:

Election, regional list / Election, list of candidates, minimum number of signatures / Election, electoral association, registration, cancellation.

Headnotes:

The provision of the Federal electoral law to the effect that a party list may be rejected if the number of groups of regional candidates is lower than that established by law is not contrary to the Constitution.

The Court declared unconstitutional the provision of the regional electoral law permitting a refusal to register a list of candidates where the number of regional groups falls below that established by law.

Regional legislation does not allow for a reasonable reduction in the number of regional groups or a reduction in the number of candidates in the group.

Summary:

The Court received an application from the association “Union of Right Forces” challenging the provision of the electoral law establishing, *inter alia*, a minimum number of regional groups for a party included in the list of candidates.

The applicant association contests the provisions of the regional law enabling the authorities to refuse to register a party for election where the fact of striking off candidates has reduced the number of groups of regional candidates on the party's list to below that provided for by law. Other similar provisions of the Federal law were also contested.

The Court established that the division of the list of candidates into 17 regional groups under the Vologda regional law is a precondition for standing for election.

However, the number of candidates included on the list required by the law is insufficient to constitute all the groups. The fact of striking off all the candidates belonging to one of these groups justifies a refusal to register the list of regional candidates. The law does not provide for reducing the number of regional groups.

The Court then referred to its case-law on the transition to the proportional electoral system. It acknowledged the frontline role played by political parties in the electoral process and defined the specific modes of functioning of the multiparty system.

The Court pointed out that participation in free elections is the cornerstone of the citizen's right to elect and be elected.

The principle of free elections is a direct expression of the people's power. Active and passive electoral rights are the most important component of the citizen's legal status within a democratic society, and the state is required to ensure equal electoral rights throughout its territory.

The state is obliged under the Constitution and in international law to organise free elections on a secret ballot at reasonably frequent intervals, and to guarantee the conditions for citizens to express their wishes freely.

Citizens' electoral rights are by definition individual rights. At the same time, political parties, as the main players in the electoral process, play a vital role in ensuring the expression of the popular will. They can draw up lists of candidates with a considerable number of regional groups.

The legislator is entitled to allow the registration of a list of candidates to be refused where the fact of striking candidates off the list has reduced the number of groups of regional candidates on a party's list below that stipulated by law.

Nevertheless, the conditions for the participation of legally established political parties should not lead to violation of the citizens' constitutional rights.

Regional legislation can stipulate additional guarantees for the electoral rights of citizens. However, it cannot reduce the level of the Federal guarantees on electoral rights, and in particular cannot establish procedures and conditions affecting the actual substance of the right to free elections.

It follows that the Court recognised the Law "on the main guarantees of electoral rights of citizens" as being in conformity with the Constitution.

Where a party's list of candidates comprises a considerable number of regional groups, the Law allows the number of candidates in the group or the number of groups to be reduced.

The Law allows the authorities to refuse to register a party list only where the fact of striking off a large number of candidates would reduce the number of regional groups below that provided for by law.

The Vologda regional law is unconstitutional because it does not provide for reasonably reducing the number of regional groups and/or the number of candidates in individual groups. It requires the authorities to refuse to register lists of candidates where the number of regional groups on such lists is below that provided for by law because candidates have been struck off, even in insignificant numbers.

Languages:

Russian.



Slovakia

Constitutional Court

Statistical data

1 May 2008 – 31 August 2008

Total number of judgments: 10 515

Number of decisions made:

- Decisions on the merits by the plenum of the Court: 14
- Decisions on the merits by the Court panels: 133
- Number of other decisions by the plenum: 4
- Number of other decisions by the panels: 284

Important decisions

Identification: SVK-2008-2-001

a) Slovakia / **b)** Constitutional Court / **c)** Senate / **d)** 26.06.2008 / **e)** II. ÚS 111/08 / **f)** / **g)** *Zbierka náleзов a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

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

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

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

2.2.1.5 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and non-constitutional domestic legal instruments.**

2.2.2.2 Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law.**

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

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**

5.1.4.1 Fundamental Rights – General questions – Limits and restrictions – **Non-derogable rights.**

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

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

Keywords of the alphabetical index:

Extradition, torture / Extradition, information about receiving state / Extradition, competence / Obligation, international, state / Treaty, on human rights, direct applicability.

Headnotes:

Under Slovak extradition legislation, there are two stages to decision-making on extradition. The first is done by ordinary (criminal) courts, and the second by the Minister of Justice. The ordinary legislation in literal terms and in literal interpretation only allows the Minister to take account of important human rights. In practice, however, the ordinary courts must also take human rights into account and carry out the “substantial grounds for believing” test. This duty derives from the principle that the courts are in the first place protectors of human rights; also from the direct applicability of the Constitution and human rights-treaties; and from the fact that decision-making by the Minister cannot be considered as an effective legal remedy.

Summary:

I. The Constitutional Court was considering a complaint by an Algerian citizen who was detained in Slovakia for the purpose of extradition to Algeria, where he had been sentenced *in absentia* to life imprisonment for criminal acts related to terrorism and for the criminal act of falsification and use of false documents. The ordinary courts (regional court, Supreme Court) allowed his extradition, but because of the wording (and literal interpretation) of the code of criminal procedure, the Supreme Court refused to take human rights into account. The complainant stated that if extradited he would be exposed to the risk of ill-treatment. In his view, this matter should have been evaluated by ordinary courts. The complainant submitted this complaint after the decisions of the courts, but before the case could be referred to the Minister of Justice. The complainant claimed the violation of his fundamental right not to be subjected to torture or to cruel, inhuman or degrading treatment (as guaranteed by Article 16.2 of the Constitution and by Article 3 ECHR), which was allegedly caused by the procedure and decision of the Supreme Court. The Constitutional Court deferred the execution of the challenged decision using an interim measure.

II. In its decisions on merits, the Constitutional Court stressed that all courts are under a duty to protect human rights and fundamental freedoms of individuals against the intervention of public power.

III-treatment is prohibited in absolute terms by Article 16.2 of the Constitution, and by Article 3 ECHR. Neither the Constitution nor the ECHR contains a limitation clause on these rights. The Constitutional Court has repeatedly emphasised the categorical nature of the prohibition of ill-treatment in its findings III. ÚS 7/01, I. ÚS 4/02, III. ÚS 86/05, III. ÚS 194/06, and II. ÚS 271/07. The Constitutional Court has also pointed out the binding force of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture"), and the International Convention on Civil and Political Rights ("ICCPR").

The Constitutional Court stated that it is within the jurisdiction of the Slovak Republic to extradite the requested individual (the extradition is assumed by the European Court of Human Rights itself), and because the matter deals with extradition to Algeria, it is also necessary to take into consideration the bilateral agreement between the Slovak Republic and the Republic of Algeria.

The fundamental human rights of any extradited person may be breached by a foreign public power. The extraditing state must therefore consider the human rights aspect of the extradition in a robust albeit sensitive manner. From that perspective, the type of act which the person subject to extradition may have committed is irrelevant, as is the particular criminal act for which he has been sentenced when the issue is about extradition for the purpose of serving that sentence.

Article 3 of the Convention against Torture, which is binding on the Slovak Republic, provides that "no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture". The *Soering* judgment of 1989 is part of European heritage and standard in the protection of human rights. In the *Soering* case, the European Court of Human Rights stated that the requested state is also responsible for potential violations of Article 3 ECHR outside its territory. The opposite would be contrary to the principle that provisions of the Convention should be interpreted and applied so as to make its safeguards practical and effective. The Constitutional Court stated that Article 3 of the Convention against Torture thus becomes part of the Article 3 ECHR. Similarly according to Ordinary Comment no.20 of the Committee concerning prohibition of torture and cruel treatment or punishment (Article 7 ICCPR), state

parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. The Constitutional Court stated that Article 16.2 of the Constitution also includes a prohibition on extradition where there are substantial grounds for believing that the person concerned would risk being subjected to ill-treatment. This prohibition is therefore valid within the Slovak Republic under Article 16.2 of the Constitution, Article 3 of the Convention against Torture, Article 3 ECHR and Article 7 ICCPR. The Constitutional Court also referred to the recent European Court of Human Rights Judgment *Saadi v. Italy*. The Constitutional Court maintained that it is absolutely necessary for the Slovak Republic to responsibly perform the "substantial grounds for believing" test, and specified the state authorities of the Slovak Republic that have this duty.

The Supreme Court stated in its reviewed decision that the consideration of human rights does not fall within its extradition competence. According to the Constitutional Court, in the Slovak Republic, with its mixed model of extradition procedural law, decision-making on extradition is divided between the ordinary courts and the Minister of Justice. The regional court and the Supreme Court form two instances in decision making on the permissibility of extradition. If the courts decide that extradition is permissible, the Minister of Justice either allows it, or he may refuse it if human rights are endangered. Considering the tradition of international public law, as well as the practical requirements, the internal bodies for extradition as part of international relations are the executive power bodies – in this case, the Minister of Justice.

The Constitutional Court examined the question of whether ordinary courts were under a duty to evaluate the permissibility of extradition from a human rights perspective. The Constitutional Court stated that the traditional permissibility conditions of extradition (substantive extradition law), which courts are required to evaluate according to the Code of Criminal Procedure, are enlarged by the human rights perspective by the direct application (*lacunae legis* in the ordinary law) of the Constitution and human rights treaties. In a state governed by the rule of law, courts are in the first place protectors of human rights because of their independence and because they are bound only by law.

The Constitutional Court expressed the opinion that the basic element of the *ordre public* in the Slovak Republic is the respect for human rights in line with European standards. From the *ordre public* and its systematic incorporation into the Criminal Procedure Code, it is clear that this is not only binding on the Minister of Justice, but also on the ordinary courts.

The Constitutional Court took the stance that a decision by the Minister of Justice cannot be considered an effective legal remedy after decisions of the ordinary courts according to Article 3 in connection with Article 13 ECHR. Under the Code of Criminal Procedure, the Minister alone may consider human rights, his or her decision may be political, there is no access to the Minister for complainants, and there is no procedure for the Minister's decision-making. Neither is there any need to divulge the reasons behind the decision. Only a court decision could constitute such a remedy (*Chahal v. United Kingdom*). Thus, both ordinary courts and the Minister are obliged to take human rights into account.

The expressed legal opinions are supported by foreign case-law, for example by the Constitutional Court of the Czech Republic (I. ÚS 752/02 [CZE-2004-3-013], III. ÚS 534/06), and the Spanish Constitutional Court.

The Constitutional Court finally stated that the Supreme Court, by failing to perform the "substantial grounds for believing" test, by criticising the procedure of the Regional Court (which partially evaluated the human rights context of extradition), and by ignoring the possibility of infringement of the complainant's human rights violated the procedural component of Article 16.2 of the Constitution and Article 3 ECHR. The Constitutional Court maintained that ordinary courts must review the case, evaluate the relevant information, perform the "substantial grounds for believing" test, take into account the documents submitted by the complainant, and, possibly at their own initiative obtain other documents. These could have been obtained from the U.N. High Commissioner for Refugees, the Slovak Helsinki Committee, the Slovak National Center for Human Rights, Amnesty International, Human Rights Watch, reports of the United States Department of State, as well as the comments by the U.N. Committee against Torture relating to Algeria.

The Constitutional Court examined the bilateral agreement between Algeria and the Czechoslovak Socialist Republic as to legal assistance in civil, family and criminal cases. The Constitutional Court stated under the wording of the agreement, extradition is not permissible if the legal order of either party forbids it. If ordinary courts establish that a complainant may face the threat of ill-treatment, then extradition is not permissible because the Slovak legal order does not allow it.

The Constitutional Court noted how sensitive the issue of the value (public good) of the Slovak Republic's citizens' security was. The purpose of extradition is to prevent perpetrators from fleeing

justice. According to the Code of Criminal Procedure, if a decision was made in extradition proceedings that the extradition was not permissible and the Minister had not allowed the extradition, the Ministry of Justice would have submitted the case, in accordance with the legal order for criminal prosecution, to the Attorney Ordinary's Office of the Slovak Republic.

Supplementary information:

It must be emphasised that the Constitutional Court did not decide whether the complainant should be extradited. It simply decided that criminal courts must carry out the "substantial grounds for believing" test. The Supreme Court subsequently decided that the complainant could not be extradited.

Cross-references:

- See also *Bulletin* 2004/3 [CZE-2004-3-013].

Languages:

Slovak.



Slovenia

Constitutional Court

Statistical data

1 May 2008– 31 August 2008

The Constitutional Court held 22 sessions during the above period. 7 were plenary and 8 were in Chambers. Of these, 3 were in civil chambers, 2 in penal chambers and 3 in administrative chambers. There were 356 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 1 119 unresolved cases in the field of human rights protection (denoted Up- in the Constitutional Court Register) from the previous year at the start of the period 1 May 2008. The Constitutional Court accepted 96 new U- and 1 030 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court resolved:

- 121 (U-) cases in the field of the protection and legality, in which the Plenary Court made:
 - 9 decisions and
 - 112 rulings;
- 5 cases (U-) cases joined to the above-mentioned cases for common treatment and adjudication.

Accordingly the total number of U- cases resolved was 126.

In the same period, the Constitutional Court resolved 690 (Up-) cases in the field of the protection of human rights and fundamental freedoms (14 decisions issued by the Plenary Court, 676 decisions issued by a Chamber of three judges).

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas the rulings of the Constitutional Court are not generally published in an official bulletin, but are handed over to the participants in the proceedings.

However, the decisions and rulings are published and submitted to users:

- In an official annual collection (Slovenian full text versions, including dissenting/concurring opinions, and English abstracts);

- In the *Pravna Praksa* (Legal Practice Journal) (Slovenian abstracts, with the full-text version of the dissenting/concurring opinions);
- Since August 1995 on the Internet, full text in Slovenian as well as in English <http://www.us-rs.si>;
- Since 2000 in the JUS-INFO legal information system on the Internet, full text in Slovenian, available through <http://www.ius-software.si>;
- Since 1991 bilingual (Slovenian, English) version in the CODICES database of the Venice Commission.

Important decisions

Identification: SLO-2008-2-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 15.05.2008 / **e)** Up-309/05-25 / **f)** / **g)** *Uradni list RS* (Official Gazette), 59/08 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian).

Keywords of the systematic thesaurus:

- 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
- 4.7.15 Institutions – Judicial bodies – **Legal assistance and representation of parties**.
- 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

Keywords of the alphabetical index:

Contempt of court / Freedom of expression, lawyer / Defence, right.

Headnotes:

If a constitutional complaint clearly does not allege a violation of human rights or fundamental freedoms, the Constitutional Court will not accept it for consideration.

A lawyer acting in his capacity as defence counsel during criminal proceedings is exercising his right to freedom of expression under the Constitution, although exercising such right serves the purpose of ensuring the defendant's right to a defence.

The right to a defence under the Constitution is essential for a defendant to have an effective defence. The Court may not infringe this right by penalising the defendant's defence counsel. Contemptuous criticism which entails the personal disqualification of the expert witnesses as experts exceeds the reasonable argumentation by which defence counsel could justify a motion to call fresh expert witnesses.

Such criticism means that the defendant does not have an effective defence.

The Court may interfere with a defence counsel's right to freedom of expression by penalising him if, in so doing, it is pursuing a constitutionally admissible aim. Examples could include the protection of confidence in the judiciary and the protection of the good reputation and authority of the judiciary. Because expert witnesses are also assistants to the courts in the exercise of their function, their authority must be protected within the framework of the protection of the authority of the judiciary.

There is a certain "tolerance threshold" when considering justification for infringement of a defence counsel's freedom of expression. This may be higher when he is representing somebody charged with a grave criminal offence. However, it is not unlimited. The punishment of a defence counsel by means of a fine for insults that entailed contempt towards expert witnesses in their capacity as expert assistants to the Court was not an excessive interference of his freedom of expression.

The possibility of independent criminal protection by means of private prosecution is not an appropriate substitute for the ability to penalise insulting submissions by defence counsels in order to ensure the good reputation and authority of the judiciary. Therefore, it cannot serve as one of the criteria on the basis of which the proportionality of the interference with the right to the freedom of expression of a defence counsel must be reviewed.

Summary:

The complainant alleged that his right to freedom of expression had been violated because he was penalised for insulting expert witnesses. At the time, he was carrying out his duties as defence counsel in criminal proceedings.

In Decision no. U-I-145/03 of 23 June 2005 (Official Gazette RS, no. 69/05 and OdlUS XIV, 62), the Constitutional Court reviewed the constitutionality of Article 109 of the Civil Procedure Act (Official Gazette RS, no. 26/99 ff. – hereinafter referred to as CivPA).

This legislation sets out sanctions for insulting behaviour in civil procedure. The Constitutional Court held that the regulation in question, which was designed to protect confidence in the judiciary, was in line with the Constitution. It stressed that the exercise of freedom of expression (in terms of oral statements and written submissions) by a party or his or her legal representative as a party to court proceedings serves the purpose of the effective exercise of constitutional procedural guarantees.

The Constitutional Court then reviewed the allegation that the above regulation was inconsistent with Article 39.1 of the Constitution, against the background of a further review of the compliance of the provision with Article 22. It took the view that, with regard to statements made by a defence counsel when representing a party before the Court in an individual case, this prohibition entails the manner of exercising the right determined in Article 22 of the Constitution, rather than a limitation (see Article 15.2). However, the Constitutional Court also stated that in deciding whether to apply the provision on penalties for insulting behaviour, a careful assessment is always necessary, as to whether critical and possibly sharp statements fall within the permissible scope of the right to be heard in proceedings. If a court does not pay sufficient attention to these points, there is a danger that they might limit the right to be heard.

"Consequently, one must, on the one hand, consider that the fact that this concerns the making of statements in the defence of rights before the Court speaks in favour of greater tolerance. On the other hand, one must also consider the special significance of confidence in the judiciary and respect for the authority of courts in the performance of its duties by the judicial branch of power" (see Paragraph 13 of the reasoning of the decision cited above).

Following the decision on the constitutionality of Article 109 of the CivPA, there was a further decision, namely Decision no. Up-150/03, dated 12 October 2005 (Official Gazette RS, no. 101/05 and OdlUS XIV, 100). Here, the Constitutional Court was concerned with a court order on the penalising of a defence counsel who insulted the Court in appeal proceedings. The Court referred to the stance it took in Decision no. U-I-145/03 and reviewed the alleged interference with the complainant's right to freedom of expression determined in Article 39.1 of the Constitution within the framework of the right determined in Article 22 of the Constitution. The Court in question had considered the starting points set out in the cited decision and had made an appropriate assessment of the necessity of the complainant's statements from the perspective of the effective protection of rights before the Court. The right to a

defence had accordingly been properly exercised. The Constitutional Court ruled that the decision as to the inadmissible nature of insulting statements did not excessively interfere with the complainant's right within the meaning of Article 39.1 of the Constitution.

The present complaint, as was the case in Decision no. Up-150/03, concerns the application of the statutory regulation allowing for the penalising of lawyers for making insulting submissions. It must be borne in mind that the freedom of expression of a lawyer in his capacity as defence counsel in criminal proceedings serves the purpose of the defendant's right to a defence. In criminal proceedings, the right to be heard within the meaning of Article 22 of the Constitution is particularly guaranteed as a special human right under Article 29 of the Constitution, which regulates legal guarantees in criminal proceedings. The latter human rights are enjoyed by parties to proceedings rather than their defence counsels. As a result, only parties to proceedings (and not their defence counsels) could complain of the violation of these human rights. Defence counsels could not do so in their name.

The complainant in this case is a lawyer who is not challenging a breach as a result of court decisions of his client's rights, but rather, a breach of his own rights, which he was exercising as a defence counsel. Such a right could only be a defence counsel's right to freedom of expression within the meaning of Article 39.1 of the Constitution, which is exercised in a special manner within the framework of judicial proceedings. The peculiarity of the position demands that the performance of his role as defence counsel, when exercising the right of his client under Articles 22 and 29, cannot result in the consequence that his right to freedom of expression can only be violated in cases in which the violation of Articles 22 and 29 of the Constitution can be established beforehand.

The Constitutional Court accordingly decided to deviate from its stance in Decision no. Up-150/03, under which possible violations of a defence counsel's right to freedom of expression can only be reviewed within the framework of respecting the rights determined in Articles 22 and 29 of the Constitution. The fact that a defence counsel in judicial proceedings exercises his right to freedom of expression because and only because he represents a client is of primary importance for the review of the admissibility of the interference with the right of a defence counsel determined in Article 39.1 of the Constitution. However, this cannot mean that the Constitutional Court would not then assess whether the courts' decision to penalise him violated his right to freedom of expression.

The courts' assessment that the complainant expressed contemptuous criticism towards the expert witnesses is supported by reasons and is not unsound. The complainant did not merely express sharp criticism of the expert opinions, but his insulting remarks entailed personal disparagement of the expert witnesses as experts. The expressed contemptuous criticism is beyond the reasonable argumentation by which the defence counsel could justify his motion that new expert witnesses be called. Therefore, it cannot be accepted that such criticism could be justified for the purpose of exercising the defendant's right to a defence as determined in Article 29 of the Constitution. Contemptuous criticism of an expert witness as a person who has been called to provide an expert opinion could even threaten a fair trial in criminal proceeding.

The Constitutional Court stressed in Decision no. U-I-145/03 that parties to proceedings must understand that insulting sharp speech in court does not constitute quality representation. Moreover, quality defence is not based upon criticism that shows contempt for expert witnesses. Instead, the defence counsel must be directed towards a criticism of opinions provided in the individual proceedings, supported by arguments and reasons. Courts should not be expected to tolerate insults that, upon reasonable assessment, show contempt for the expert witnesses in their capacity as expert assistants to the Court. Thus, the fact that the Court has imposed a fine on defence counsel for this insulting behaviour is not a disproportionate interference with his right to freedom of expression.

Supplementary information:

When the Constitutional Court reviewed Article 109 of the CivPA, it stated that a civil court shall impose a penalty on a person who, in his submission insults the Court, a party to proceedings, or other participant in proceedings in accordance with Article 11.3 to 11.7 of this Act. In the decision cited above, the Constitutional Court repealed Article 11.5 to 11.7 of the CivPA and part of the third paragraph of the above article. It held, however, that Article 109 of the CivPA did not contravene the Constitution.

Under Article 78 of the CPA, the Court may impose a fine on defence counsel, lawyers, legal representatives, private prosecutors or injured parties conducting their own litigation if, during their submissions or speeches, they insult the Court or any party to the proceedings. The fine shall amount to a minimum of one fifth of the last officially announced average net monthly salary in the Republic of Slovenia, and to a maximum of three times the

amount of that salary. The ruling on the fine shall be made by the investigating judge or the panel before which the insulting statement was made. If the insult is contained in the submission, the ruling on the fine shall be rendered by the Court deciding on the submission. Appeals against these rulings are permissible. An insult made by the public prosecutor or somebody deputising for him shall be reported to the competent public prosecutor. The imposition of a fine on a lawyer or an articulated clerk shall be reported to the Bar Association.

The penalty referred to in the above paragraph will not affect the prosecution and the imposition of criminal sanctions for criminal offences committed by insult.

In *Nikula v. Finland* the circumstances were different. Here, the defence counsel's criticism was inappropriate, but she limited it to the behaviour of the prosecution counsel towards her client during the case, and did not extend it to his general professional or other qualities. The European Court of Human Rights found this factor decisive, along with the fact that she had had to endure very considerable criticism by the applicant in her capacity as defence counsel (see paragraph 51 of the judgment).

If an expert witness is subjected to insults, he could be open to accusations about his impartiality, as he might then favour the defence counsel's client with a view to avoiding further insults. If, however, he responded to them in a way that was unfavourable to the defence counsel's client, he would not be acting impartially and his conduct would also have a harmful effect on the defendant's right to a defence.

Dissenting and concurring opinions of the constitutional judges.

- Article 39 of the Constitution [URS];
- Article 59.1 of the Constitutional Court Act [ZUstS].

Languages:

Slovenian, English (translation by the Court).



South Africa Constitutional Court

Important decisions

Identification: RSA-2008-2-005

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 22.05.2008 / **e)** CCT 38/07; [2008] ZACC 6 / **f)** Independent Newspapers (Pty) Ltd v. Minister for Intelligence Services and Freedom of Expression Institute In re: Billy Lesedi Masetlha v. President of the Republic South Africa and Manala Elias Manzini / **g)** <http://www.constitutionalcourt.org.za/Archimages/12349.PDF> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.11.3 Institutions – Armed forces, police forces and secret services – **Secret services.**

5.3.13.26 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to have adequate time and facilities for the preparation of the case.**

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

Keywords of the alphabetical index:

File, disclosure / Disclosure, order / Information, access / Information, classified, access / Information, confidential / National security, information / National security, protection / Secret / Secret service, records / Justice, interest.

Headnotes:

The right to open justice is not absolute, and a court must decide in all the circumstances of a particular case whether its limitation is in the interests of justice. When weighing the right to open justice against the government's obligation to pursue national security, even where a document is labelled classified, the court retains its discretion to decide whether or not it should be protected from disclosure to the media and the public.

Summary:

In a claim premised on the right to open justice, a newspaper group, Independent Newspapers (Pty) Ltd, sought an order compelling public disclosure of discrete portions of a record of proceedings of a matter determined by the Constitutional Court (*Masetlha v. President of the Republic of South Africa and Others*). Mr Masetlha had been head and Director-General of the National Intelligence Agency until his suspension and ultimate dismissal by the President in 2006. The case in question dealt with various challenges to the lawfulness of the suspension and dismissal.

Independent Newspapers had attempted to join the *Masetlha* proceedings as an intervening party in order to gain access to the written argument lodged by the parties in that case as well as to certain documents in the record of proceedings which had been removed from the Constitutional Court's website by the Registrar on the instruction of the Justices. The State, represented by the Minister of Intelligence, also joined the proceedings and objected to the disclosure of certain of the documents sought on grounds of national security. In particular, the release of specified paragraphs of an "*in camera affidavit*" deposed to by Mr Masetlha and certain annexures to it, including a report compiled by the Inspector General of Intelligence on the legality of a certain surveillance operation conducted by agents of the National Intelligence Agency, was opposed.

Independent Newspapers requested to have copies to the restricted documents for the limited purpose of preparing its case. This request was accompanied by an assurance that access to the documents would be limited to its counsel, attorneys and senior editors. The Minister declined the request, and Independent Newspapers brought an interlocutory application for an order that it should be entitled to access the documents in question.

The application was refused by a majority of the Constitutional Court for the following reasons. Independent Newspapers did not attack the constitutional validity of the decision to render the documents classified, and was not severely prejudiced by its lack of access to the documents for the purposes of their argument. The Court also found that disclosure of the documents to Independent Newspapers might have dissipated the attempts to keep the information confidential.

On the main issue concerning public access to the withheld portions of the record, Moseneke DCJ, writing for the majority, considered the cluster of rights that establish the right to open justice. He observed that the right to open justice is not absolute,

and that a court must decide in all the circumstances of a particular case whether its limitation is in the interests of justice. In this case, it was recognised that the interests of justice must be considered in light of two competing constitutional claims: the principle of open justice, and the government's obligation to pursue national security. In considering the Minister's argument that the mere fact that documents are classified renders them immune to disclosure, he held that a security classification alone does not oust the jurisdiction of a court to decide whether they should be protected from disclosure to the media and public. Moseneke DCJ then considered each of the documents separately. He ruled that the whole of the *in camera affidavit* made by Mr Masetlha should be made available to the public but that the three disputed annexures to the affidavit should not.

Yacoob J dissented. He held that all the documents should be released to the public mainly because the information they contained is in the public interest. The national security interest, he reasoned, may be adequately protected by further redaction of the documents. His judgment emphasised that the public version of the Inspector General's report by the government was both misleading and deceptive and he took the view that the Court should not be used as an instrument for concealment in the circumstances. Yacoob J further held, in relation to the interlocutory application, that it would have been in the interests of justice for the documents to be made available to the legal representatives of Independent Newspapers and some of their senior personnel to help Independent Newspapers prepare their case.

Sachs J in his judgment, which aligns itself with the outcome proposed by Yacoob J, placed reliance on the constitutional principle of openness to justify the disclosure of the relevant material. In contrast to the hegemonic and secretive agencies of the past, he reasoned, the South African intelligence services are required at all times to act within the limits defined by the Constitution, and in line with the spirit and purport of the Constitution. Sachs J concluded that more damage would be done to the national interest in general, and to the vitality of the intelligence service in particular, by withholding stale and routine information about the workings of the agency, than by allowing the normal rules governing public access to all court documents to apply.

In a dissenting judgment, Van der Westhuizen J agreed with the majority judgment that the interlocutory application should be dismissed. On the main application he expressed the view that the factors mentioned in Section 36 of the Constitution, applied when a court tests whether the limitation of a right is reasonable and justifiable in an open and

democratic society, could be useful in the balancing of the competing rights in this matter. He agreed with Yacoob J that the in this case disclosure of all the disputes information was required, save the names of the any operatives not already revealed by the media.

Supplementary information:

Legal norms referred to:

- Sections 1.d, 16.1.a and 16.1.b, 32, 34, 35.3.c, 173, 198, 199.5 and 199.8 and 210 of the Constitution of the Republic of South Africa, 1996;
- Section 153.1 of the Criminal Procedure Act 51 of 1977;
- Section 5.2 of the Magistrates' Courts Act 32 of 1944; and
- Sections 12 and 41.1 of the Promotion of Access to Information Act 2 of 2000.

Cross-references:

- *Azanian Peoples Organisation (AZAPO) and Others v. President of the Republic of South Africa and Others*, *Bulletin* 1996/2 [RSA-1996-2-014];
- *Crown Cork & Seal Co Inc and Another v. Rheem South Africa (Pty) Ltd and Others* 1980 (3) *South African Law Reports* 1093 (W);
- *Gory v. Kolver NO and Others (Starke and Others Intervening)*, *Bulletin* 2006/3 [RSA-2006-3-014];
- *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)*, *Bulletin* 2001/1 [RSA-2001-1-006];
- *Moise v. Greater Germiston Transitional Local Council (Minister of Justice and Constitutional Development Intervening) (Women's Legal Centre as Amicus Curiae)*, *Bulletin* 2001/2 [RSA-2001-2-009];
- *NM and Others v. Smith and Others (Freedom of Expression Institute as Amicus Curiae)*, *Bulletin* 2007/1 [RSA-2007-1-004];
- *Shinga v. The State (Society of Advocates, Pietermaritzburg Bar as Amicus Curiae)*;
- *O'Connell and Others v. The State*, *Bulletin* 2007/1 [RSA-2007-1-002];
- *South African Broadcasting Corporation Ltd v. National Director of Public Prosecutions and Others*, *Bulletin* 2006/2 [RSA-2006-2-011];
- *South African National Defence Union v. Minister of Defence and Another*, *Bulletin* 1999/2 [RSA-1999-2-006].

Languages:

English.



Identification: RSA-2008-2-006

a) South Africa / b) Constitutional Court / c) / d) 29.05.2008 / e) CCT 86/06; [2008] ZACC 7 / f) Schabir Shaik and Others v. The State / g) <http://www.constitutionalcourt.org.za/Archimages/12400.PDF> / h) S v. Shaik and Others 2008 (2) *South African Criminal Law Reports* 165 (CC); CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Confiscation, asset, penalty / Confiscation, prevent / Crime, prevention, individual and general / Crime, organised, fight / Crime, organised, special measure / Fine, determination of the amount / Interpretation, contextual / Penalty, fine, excessive / Penalty, proportionality / Sentencing, discretion.

Headnotes:

The purpose of the South African Prevention of Organised Crime Act is to deprive criminals of their illegal proceeds, and in doing so both to deter others from becoming criminals and prevent crime by financially incapacitating career criminals. Punishment is not a goal of this Act, which distinguishes it from similar United Kingdom legislation. However, the mechanisms of the Act are deliberately broad and robust to prevent criminals escaping through technicalities. For this reason, it is appropriate that the "proceeds of unlawful activities" claimed under Chapter 5 of the Act be interpreted to mean gross and not net proceeds.

Summary:

I. The applicant was convicted on charges of corruption, on the grounds that he had bribed a senior official of the South African government to provide the applicant's companies with political support. Consequent to this conviction, the State obtained an order from the High Court allowing the State to confiscate approximately R34 million from the applicant. This amount of money was held by the High Court to be the amount that the applicant had gained from his crimes. The applicant appealed to the Supreme Court of Appeal, which upheld only a small portion of his claims. The applicant then appealed to the Constitutional Court.

The legislation under which the confiscation orders were made is the Prevention of Organised Crime Act.

II. O'Regan J, writing for a unanimous Court, outlined the aims of the Act. It seeks to create fair but effective powers of confiscation in order to stop criminals from benefitting from their crimes – and in particular to deal with organised crime, which is adept at concealing its proceeds. As such, the aims of the Act are primarily deterrence and prevention of crime.

This distinguishes it from similar legislation in the United Kingdom, which was relied upon for the State to argue that punishment is also a goal of the Act. O'Regan J analysed the Preamble to the Act and also compared the constitutional context in which the Act must be interpreted. Her conclusion was that, although confiscation may inevitably have a punitive effect, punishment is not one of the purposes of the Act.

Despite this, the Act remains a robust mechanism. The applicant argued, first, that the Act only permitted the confiscation of net profits and not gross proceeds. However, O'Regan J held that the provisions of the Act clearly referred to a much broader definition than that suggested by the applicant, and thus that confiscation of gross proceeds was entirely permissible under the Act.

The applicant then argued that the confiscation orders were disturbingly severe and inappropriate, and for this reason should be set aside by the Court. O'Regan J first had to determine the nature of the discretion to impose confiscation orders, as this would influence her ultimate conclusion. She agreed with the European Court of Human Rights that the discretion was similar to that involved in sentencing an accused. Accordingly, the discretion was informed by an extensive knowledge of the facts of each case and should not lightly be interfered with by an appellate court. O'Regan J set out three

considerations relevant to the exercise of this discretion. First, a court must have regard to all the circumstances of the criminal activity. Second, a court must have regard to the degree to which proceeds are the direct result of criminal activity. The less direct the connection between the crime and the reward, the less reason there is for a Court to include the reward within the ambit of its confiscation order. Third, the nature of the crime is relevant. The Act is set up to deal with specific kinds of crimes, namely those that might broadly be described as "organised crime". Organised criminal activity is often set up specifically to prevent the confiscation of its proceeds, and a court should be aware of this and not hesitate to use the full force of the Act to seize unlawful gains from criminals.

The crime in this case was corruption. O'Regan J relied on the UN Convention Against Corruption and the AU Convention on Preventing and Combating Corruption in concluding that corruption should be deemed to be an "organised crime". It was therefore appropriate to use the provisions of the Act against the applicant, convicted as he was of corruption. For these reasons, O'Regan J held that the confiscation orders made by the High Court were not disturbingly inappropriate.

The applicant also raised three factual arguments, but O'Regan J dismissed them all on various grounds. The appeal was dismissed.

Supplementary information:

Legal norms referred to:

- Section 1.1.a of the Corruption Act 94 of 1992;
- Preamble and Sections 1, 12, 18, 19 and 26 of the Prevention of Organised Crime Act 21 of 1998;
- United Nations Convention Against Corruption;
- African Union Convention on Preventing and Combating Corruption;
- Sections 34, 35.3 and 39.2 of the Constitution of the Republic of South Africa Act 108 of 1996.

Cross-references:

- *National Director of Public Prosecutions v. Rebuszi* [2001] ZASCA 127; 2002 (2) *South African Law Reports* 1 (SCA);
- *S v. Basson*, *Bulletin* 2005/2 [RSA-2005-2-008];
- *Giddey NO v. JC Barnard and Partners*, *Bulletin* 2006/2 [RSA-2006-2-009];
- *South African Association of Personal Injury Lawyers v. Heath and Others*, *Bulletin* 2000/3 [RSA-2000-3-017];

- *R v. Rezvi* [2002] 1 *All English Reports* 801 (HL);
- *R v. Smith (David)* [2002] 1 *All English Reports* 366 (HL);
- *Phillips v. The United Kingdom*, Case no. 41087/98, European Court of Human Rights, final judgment (12.12.2001).

Languages:

English.



Identification: RSA-2008-2-007

a) South Africa / b) Constitutional Court / c) / d) 02.06.2008 / e) CCT19/07; [2008] ZACC 8 / f) Nyathi v. Member of the Executive Council for the Department of Health Gauteng and another (Centre for Constitutional Rights as *Amicus Curiae*) / g) <http://www.constitutionalcourt.org.za/Archimages/1234.PDF> / h) CODICES (English).

Keywords of the systematic thesaurus:

4.6.10.1 Institutions – Executive bodies – Liability – **Legal liability.**

4.10.1 Institutions – Public finances – **Principles.**

4.10.8 Institutions – Public finances – **State assets.**

5.2 Fundamental Rights – **Equality.**

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

5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**

Keywords of the alphabetical index:

Budget, state / Debt, enforcement / Liability, state basis / State asset, execution / State, order against, failure to comply, execution / Court, judgment, binding nature.

Headnotes:

Legislation preventing a judgment creditor of the state from attaching state assets as satisfaction of a judgment debt is a violation of the right of access to courts, the right to equality, the constitutional requirement that an order of court binds all person to

whom and organs of state to which it applies and the constitutional principle that the public administration must be accountable. The execution of state assets is therefore an appropriate remedy in circumstances where the state fails to comply with court orders against it.

Summary:

I. The applicant suffered 30 percent second and third degree burn wounds after a paraffin stove was thrown at him. He was subsequently admitted to the Pretoria Academic Hospital for treatment where a central venous line was incorrectly inserted into his right Carotis Communis artery. He was later transferred to Kalafong Hospital in Pretoria where the medical personnel failed to diagnose the incorrect insertion of the central venous line.

The applicant instituted an action in the High Court against the first respondent claiming damages in the sum of ZAR 1 496 000 for the stroke and disability suffered as a result of the negligent and improper care administered to him. When the applicant's health deteriorated rapidly his attorneys requested an interim payment of ZAR 317 700 to provide for the applicant's treatment and medication. The first respondent refused to pay the interim payment and offered a full and final settlement of ZAR 500 000 which the applicant rejected. The first respondent failed to comply with the court order.

The High Court found that Sections 34, 165.5 and 195.1.f of the Constitution were violated and that Section 3 of the State Liability Act placed the government above the law insofar as the binding nature of court orders were concerned. The High Court declared Section 3 of the State Liability Act to be inconsistent with the Constitution and the matter was referred to the Constitutional Court for confirmation.

II. The majority judgment, written by Madala J, held that Section 3 makes an unjustifiable differentiation between a judgment creditor who obtains judgment against the state and the judgment creditor who obtains a judgment against a private litigant. The effect of the differentiation is that Section 3 does not allow a judgment creditor who obtains judgment against the state the same protection and benefits that a judgment creditor who obtains judgment against a private litigant enjoys.

The majority held that the effect of Sections 8, 34 and 165.5 is that the court order issued by the court is binding on all persons to whom and organs of state to which it applies. The provisions of the Constitution do not treat state litigants differently from the private

litigants. It was stated that the deliberate non-compliance with court orders by the state detracts from the dignity, accessibility and the effectiveness of the courts. It was contended that the limitation imposed by Section 3 with regard to the attachment of state assets was neither reasonable nor justifiable.

Accordingly, the majority confirmed the order of constitutional invalidity made by the High Court and declared Section 3 to be inconsistent with the Constitution to the extent that it disallows the execution and attachment against the state and that it does not provide an express procedure for the satisfaction of judgment debts.

In a dissenting judgment, Nkabinde J held that the impugned portion of Section 3 of the State Liability Act is not inconsistent with the Constitution because the unlawful conduct of the state officials concerned cannot form a basis for attacking the validity of the section. She stated that Section 3 is designed to prevent disruptions in the social fabric which may occur as a result of attachments and executions against the state, and that the prohibition serves a legitimate government purpose. A *mandamus* is one of the legal remedies that may constitute effective alternatives to compulsory execution by way of attachment against public assets.

Supplementary information:

Legal norms referred to:

- Sections 1, 7.2, 8, 9.1, 10, 36.1, 165.5, 172.1.b, 172.2.a, 172.2.d, 173, 195.1.f and 213.2 of the Constitution of the Republic of South Africa, 1996;
- Sections 76.1.h and 85.1 of the Public Finance Management Act 1 of 1999;
- Sections 2 and 3 of the State Liability Act 20 of 1957.

Cross-references:

- *East London Local Transitional Council v. Member of the Executive Council for Health, Eastern Cape, and Others* – 2001 (3) *South African Law Reports* 1133 (Ck); [2000] 4 *All South African Law Reports* 443 (Ck);
- *Fose v. Minister of Safety and Security* – *Bulletin* 1997/2 [RSA-1997-2-005];
- *Kate v. MEC for the Department of Welfare, Eastern Cape* – 2005 (1) *South African Law Reports* 141 (SE); [2005] 1 *All South African Law Reports* 745 (SE);
- *Magidimisi NO v. Premier of the Eastern Cape and Others* – [2006] ZAECHC 20 (25.04.2006);

- *Mjeni v. Minister of Health and Welfare, Eastern Cape* – 2000 (4) *South African Law Reports* 446 (Tk).

Languages:

English.



Identification: RSA-2008-2-008

a) South Africa / b) Constitutional Court / c) / d) 04.06.2008 / e) CCT 03/07; [2008] ZACC 9 / f) Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana and Others v. Sidwell Nwamitwa (Commission for Gender Equality and Others as *Amici Curiae*) / g) <http://www.constitutionalcourt.org.za/Archimages/12529.PDF> / h) CODICES (English).

Keywords of the systematic thesaurus:

2.1.2 Sources – Categories – **Unwritten rules.**
 2.2.2.1 Sources – Hierarchy – Hierarchy as between national sources – **Hierarchy emerging from the Constitution.**
 3.10 General Principles – **Certainty of the law.**
 3.11 General Principles – **Vested and/or acquired rights.**
 4.8.8 Institutions – Federalism, regionalism and local self-government – **Distribution of powers.**
 5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender.**
 5.4.20 Fundamental Rights – Economic, social and cultural rights – **Right to culture.**
 5.5.5 Fundamental Rights – Collective rights – **Rights of aboriginal peoples, ancestral rights.**

Keywords of the alphabetical index:

Constitution, values / Court, law-making task / Customary law, respect / Group, ethnic, law, development / Customary law, amendment / Law, indigenous, recognition / Law, accessibility / Law, social context, change / Law-making rule / Law-making, constitutional rule / Living law, concept / Succession, male primogeniture, principle / Succession, right / Succession, rules / Discrimination, protection of culture as justification.

Headnotes:

The right of a customary community to function according to customary law in terms of Section 211.2 of the Constitution includes the right to develop that law to bring it in line with the constitutional commitment to gender equality. Insofar as the institutions of a customary community do not have the power to develop the law in this way in terms of existing customary law, the Constitution requires that the customary law be developed to grant them this power. The appointment by customary institutions of a female chief, contrary to tradition, is therefore lawful.

Summary:

I. The first applicant and the respondent were members of the royal family of the Valoyi traditional community. In 1968, the first applicant's father, then Hosi (Chief) of the Valoyi, died. Because succession among the Valoyi was governed by the rule of male primogeniture, the first applicant, a woman, did not succeed him. Instead, her brother Richard, the respondent's father, became Hosi. After the adoption of the new Constitution in 1996, the customary community's authorities, including the royal family and Hosi Richard, resolved that the first applicant would succeed Richard in accordance with the new constitutional commitment to gender equality.

After Hosi Richard's death in 2001, the validity of this decision was challenged by the respondent. He claimed that, as the eldest son of the previous Hosi, he had a right to succeed him. He also claimed that chieftainship is a matter of birth and the community authorities had no power to appoint the first applicant. The High Court and the Supreme Court of Appeal upheld these arguments. The applicant appealed to the Constitutional Court.

II. Justice Van der Westhuizen, writing for an unanimous court, held that customary law must be respected as a body of law by which many South Africans regulate their lives. A court called upon to determine the legal position in terms of customary law has to consider three facts. The first is the traditions of the customary community concerned. The second is the current practices of that community. This was important because Section 211.2 of the Constitution includes the right of customary communities to develop their own law. Customary law is "living law" and a court must consider whether changes to the law as practised by the community have occurred. Third, a court must balance this flexibility with the need for legal certainty and respect for vested rights. A community should have the right to amend its laws, but the law must also be sufficiently clear that it is capable of being followed and applied.

In applying these three factors and determining a legal position under customary law, a court should also bear in mind its duty under Section 39.2 of the Constitution to develop customary law in line with the Constitution.

Turning to the facts, the Court held that the respondent's claim was based wholly on the past practice of the community. Because the possibility of contemporary development by the community of its law had to be considered, this past practice could not be decisive. The contemporary practice of the community showed that the community's authorities had indeed purported to develop its law to appoint the first applicant, a woman, as Chief. The question was then whether they had the power to do so.

It was not clear, on the evidence, that the community's authorities did have this power traditionally. But even if this were so, the Court held, it must be the case that the authorities had the power to act as they did. The Constitution requires that customary communities have the power to develop their own laws in line with the Constitution and its values. Were this not the case, a customary community would have to approach a court in order to develop its own laws. This was contrary to the constitutional status of customary communities as empowered to amend their own laws. So even if customary law traditionally did not provide for such a power, the Court was obliged under Section 39.2 of the Constitution, to develop the customary law such that communities were empowered to do so.

The recognition of the legal change was not outweighed in this case by the need to uphold legal certainty, since the change was confined to a succession of leadership of the community and did not give rise to problematic uncertainties. It also did not affect vested rights. The respondent did not have a right to be Hosi, but merely an expectation. The Court therefore held that the legal development by the community should be recognised and that the respondent's claim had to fail. The first applicant was lawfully the Chief of the Valoyi.

Cross-references:

- *Alexkor Ltd and Another v. Richtersveld Community and Others*, *Bulletin* 2003/3 [RSA-2003-3-008];
- *Bhe v. Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v. Sithole and Others; South African Human Rights Commission and Another v. President of the Republic of South Africa and Another*, *Bulletin* 2004/3 [RSA-2004-3-011].

Legal norms referred to:

- Sections 9, 39.2 and 211.2 of the Constitution of the Republic of South Africa, 1996.

Languages:

English.

*Identification:* RSA-2008-2-009

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 13.06.2008 / **e)** CCT 41/07; [2007] ZACC 10 / **f)** Merafong Demarcation Forum and Others v. President of the Republic of South Africa and Others / **g)** <http://www.constitutionalcourt.org.za/Archimages/12595.PDF> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.4 Constitutional Justice – Jurisdiction – Types of litigation – **Powers of local authorities.**
 1.3.5.4 Constitutional Justice – Jurisdiction – The subject of review – **Quasi-constitutional legislation.**
 3.3 General Principles – **Democracy.**
 3.4 General Principles – **Separation of powers.**
 3.9 General Principles – **Rule of law.**
 3.20 General Principles – **Reasonableness.**
 4.8.2 Institutions – Federalism, regionalism and local self-government – **Regions and provinces.**
 4.8.5 Institutions – Federalism, regionalism and local self-government – **Definition of geographical boundaries.**
 4.8.8 Institutions – Federalism, regionalism and local self-government – **Distribution of powers.**
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
 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:

Constitution, amendment, quality / Efficiency, economic / Government, duty to consult and accommodate / Law-making process, participation, constitutional rules / Government act, legitimate purpose.

Headnotes:

The constitutional duty to facilitate public participation requires that the public be afforded a reasonable opportunity to make submissions. It does not require a legislature to re-engage with the public if it initially supports the majority view expressed by the public but ultimately departs from it. All public power must be exercised rationally, but the contentious political nature of a decision is irrelevant to the rationality enquiry. If a public body changes its mind, its decision is not irrational where the change is based on legitimate considerations and a correct appreciation of its powers and obligations.

Summary:

I. The applicants challenged the validity of part of the Constitutional Twelfth Amendment Act of 2005 (amending legislation). The challenged amendment purported to change provincial boundaries, the dispute in this matter concerning a change in the provincial boundary between Gauteng and the North West province. As a result of the amendment, one part of Merafong City Local Municipality (Merafong) was relocated from Gauteng into the North West Province, where the other part of the same municipality was located before the passing of the Twelfth Amendment. At a public hearing held by the two legislatures of the provinces before the passage of the Act, the majority view was that Merafong should instead be located in Gauteng and not the North West province.

Provincial legislatures were required to vote on the Amendment in the National Council of Provinces (NCOP). In the NCOP, each provincial legislature has to confer written mandates on its delegate. A negotiating mandate is conferred prior to deliberations in the NCOP, after which a final voting mandate is conferred. The Gauteng Provincial Legislature (Gauteng) in its negotiating mandate indicated its intention to support the amending legislation conditional on it being amended so that Merafong would fall within Gauteng. However, during the deliberations in the NCOP it was indicated to Gauteng that the Constitution did not permit provinces to make amendments in the NCOP, but only vote against or in favour. Following this, Gauteng altered its position in the final voting mandate to one of unconditional support.

The applicants, members and representatives of the Merafong community, sought a declaration that the Gauteng Legislature (legislature) had failed to comply with its constitutional obligation to facilitate public involvement in its processes leading up to the approval of the amending legislation by the National Council of Provinces (NCOP), and that the legislature had acted irrationally when it supported the amending legislation.

II. Van der Westhuizen J wrote for the majority. On the issue of public participation, he held that the duty to facilitate public involvement is in line with the mutually supportive ideas of participatory and representative democracy contemplated in the Constitution. Public involvement also enhances responsible citizenship and legitimate government. The obligation to facilitate public involvement may be fulfilled in different ways and legislatures have discretion to determine how to fulfill the obligation. The method and degree of public participation that is reasonable in a given case depends on a number of factors, including the nature and importance of the legislation and the intensity of its impact on the public. In the process of considering and approving a proposed constitutional amendment regarding the alteration of provincial boundaries, a provincial legislature must at least provide the people who might be affected a reasonable opportunity to submit oral and written comments and representations.

The applicants alleged that the process of public involvement was not meaningful, because the ruling African National Congress had already decided that Merafong would go to the North West province. They also alleged that the Portfolio Committee's change of position between the negotiating mandate and the final voting mandate, without further consultation with the community, was unreasonable.

The majority, rejecting these arguments, held that it was clear on the facts that there had been a reasonable opportunity for the community to express its views and a willingness to take those views into account. This satisfied the requirements of the Constitution.

Sachs J disagreed. He held that, given the importance of provincial boundary changes and the fact that an expectation had been created by the initial adoption of a position in line with majority's views, there had been a failure to engage in any dialogue.

On the second, rationality issue, Van der Westhuizen, for the majority, held that the Constitution requires that there be a rational link between the means adopted by the legislature and the end sought to be achieved. Provided a legitimate government purpose is served, the political merits or demerits of disputed legislation or any preferences the court might have are irrelevant.

Applicants argued, first, that the abandoning of its mandate by the Gauteng delegation to the NCOP was irrational, for no proper reason was shown for this change of position. The majority disagreed. The court could indeed review the legislature's decision,

although it is difficult to examine the reasons why a legislative body, made up of many representatives, supports a particular proposition. But assuming this could properly be done, the reasons given in the final mandate for the change in position were not based on a material misunderstanding of the voting powers of the province in the NCOP.

Second, applicants argued that the decision to locate Merafong in the North West Province was also irrational, because service delivery in North West was much poorer. The majority held it was not appropriate for the Court to engage with the socio-economic merits of the decision and that the legislature's decision was rational.

The majority therefore dismissed the application.

Ngcobo J wrote a separate concurring judgment, holding that the court could scrutinise the reasons given by the legislature in its mandates and that these were rational. Skweyiya J also wrote a concurrence, emphasising that the decisions challenged in this case were chiefly political choices in which the Court should play a limited role.

Moseneke (Deputy Chief Justice), writing for the minority, dissented on the rationality question. He held that while ordinarily it may be inappropriate for a court to investigate why a deliberative body adopted a particular position on a legislative measure, in this case, the Court had the power to investigate the reason for the legislature's change in attitude. The unexplained reversal pointed to arbitrary or irrational conduct. On the facts, he held that the new position of the legislature was not adopted to pursue a legitimate government purpose, but to prevent consequences which were, at best, imaginary. The minority therefore held that the amending legislation was invalid. Madala J wrote a short concurring judgment.

Cross-references:

- *Doctors for Life International v. Speaker of the National Assembly and Others*, Bulletin 2006/2 [RSA-2006-2-008];
- *Matatiele Municipality and Others v. President of the RSA and Others*, Bulletin 2006/3 [RSA-2006-3-010];
- *Bel Porto School Governing Body and Others v. Premier, Western Cape and Another*, Bulletin 2002/1 [RSA-2002-1-002];
- *Pharmaceutical Manufacturers of SA and Another: In Re Ex Parte President of the RSA and Others*, Bulletin 2000/1 [RSA-2000-1-003].

Legal norms referred to:

- Sections 1, 3, 21.3, 42, 59, 72, 74, 103.2, 118 and 167.4.d of the Constitution of the Republic of South Africa, 1996;
- Section 21.1 of the Local Government: Municipal Demarcation Act 27 of 1998;
- Section 12.1 of the Local Government: Municipal Structures Act 117 of 1998.

Languages:

English.

**Identification: RSA-2008-2-010**

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 31.07.2008 / **e)** CCT 89/07 & CCT 91/07; [2008] ZACC 13 / **f)** Thint (Pty) Ltd v. National Director of Public Prosecutions and Others; Jacob Gedleyihlekisa Zuma and Michael Hulley v. National Director of Public Prosecutions and Others / **g)** <http://www.constitutionalcourt.org.za/Archimages/12696.PDF> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 3.17 General Principles – **Weighing of interests.**
 5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence.**
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**
 5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home.**
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

Keywords of the alphabetical index:

Accused, right / Confiscation, property / Crime, organised, fight / Criminal proceedings, prosecution stage / Evidence, unlawfully obtained / Search, house / Information, privacy, right / Investigation, criminal / Investigator, powers / Privacy, invasion / Privilege, material, right / Search and seizure / Search, warrant / Search, lawyer's office / Prosecution, discretionary powers / Warrant, legislative provisions authorising issue / Lawyer, professional privilege / Warrant, need, establishment.

Headnotes:

An application by the state for a search and seizure warrant which authorises the search of premises of suspects of serious, organised crime, in order to obtain information connected to the investigation of such crimes, must disclose material facts and demonstrate a need for the warrant to the issuing judge. Where there is an appreciable risk that the state would not be able to obtain the information sought by other means, it is reasonable in the circumstances for warrants to be obtained. The warrants are required to be intelligible so that they are reasonably capable of being understood by the reasonably well-informed person, and they need not specifically mention the right to claim legal professional privilege.

Summary:

On 18 August and 8 September 2005, various premises of the applicants – two of whom were suspects in an investigation into serious, organised crime and the third of whom was the attorney of one of the suspects – were subject to search and seizure operations carried out by an investigative unit of the National Prosecuting Authority (the state) subsequent to the issue, on application by the state, by a High Court judge of warrants which authorised the operations in terms of the National Prosecuting Authority Act (the Act). The purpose of the operations was to obtain evidence in relation to the investigation. Approximately 93 000 documents were seized.

The applicants in case CCT 91/07 successfully challenged the warrants and their execution in the Durban High Court, which held the warrants and the searches pursuant to them unlawful. A similar challenge by the applicant in case CCT 89/07 failed in the Pretoria High Court. Both cases were appealed to the Supreme Court of Appeal, which held by a majority that the application to obtain the warrants, their contents and their execution were all lawful.

On appeal to the Constitutional Court, the applicants claimed that, in violation of the duty of utmost good faith required of an ex parte applicant, the state failed to disclose material facts to the issuing judge, and that a need for the warrants in terms of the Act had not been established. They alleged further that the warrants were vague and overbroad and thus authorised an unbounded search of the premises in violation of the applicants' rights to privacy and to property, and that the warrants did not sufficiently protect legal professional privilege, thus threatening the right to a fair trial.

The majority judgment, written by Chief Justice Langa, acknowledged that the Court must strike a balance between, on the one hand, protecting privacy and property interests and, on the other, not interfering with the state's constitutionally mandated task of prosecuting crime. The application for the warrants had, it was held, complied with the duty to disclose material facts, bearing in mind that, in complex cases such as these, it is difficult to draw a crystal-clear distinction between material and immaterial facts. The state had also demonstrated a need, as required by the Act, for the warrants. The test for need was held to be whether a search and seizure warrant is reasonable in the circumstances, this test being satisfied if there is an objective, appreciable risk that the state will be unable to obtain by alternative means the evidence it seeks. In these cases, this risk was present; an alternative method might have resulted in the destruction of the evidence.

The warrants were held to be neither overbroad nor unduly vague and were intelligible as the law requires. A warrant was held to be intelligible if its terms are reasonably capable of being understood by the reasonably well-informed person who understands the relevant empowering legislation and the nature of the offences under investigation. This test was satisfied in these cases.

A paragraph in the warrants that purported to authorise the seizure of any item that "might have a bearing" on the investigation was held, in the context of the warrant issued at the attorney's offices only, to pose too great a danger that privileged documents would be seen. As the paragraph in that warrant was not executed, and it was clearly separate to the rest of the warrant, it could be severed from the warrant.

The argument that the warrants' terms or their execution provided insufficient protection for the applicants' legal professional privilege was rejected. There was no statutory or constitutional requirement for the warrants to refer expressly to the Section of the Act that provides a mechanism for the speedy resolution of claims of privilege made during a search. None of the applicants had made any claim of privilege in respect of any specified item during or subsequent to the searches and there was an absence of any evidence of actual prejudice to any of them.

Accordingly the majority refused the appeal.

A dissenting judgment was written by Ngcobo J, in which he held that the state had breached the duty of utmost good faith by failing to disclose material facts to the issuing judge, and that the state had not

demonstrated a need for search and seizure warrants in terms of the Act. While he agreed that the basic test for need is whether search and seizure is reasonable in the circumstances, he held that the state was obliged to show that other less drastic measures would not have been successful, and that it had not done so in these cases.

Cross-references:

- Investigating Directorate: *Serious Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd and Others: in re Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others*, *Bulletin* 2000/2 [RSA-2000-2-011];
- *Powell NO and Others v. Van der Merwe NO and Others* – 2005 (5) *South African Law Reports* 62 (SCA); 2005 (1) *All South Africa Law Reports* 149 (SCA).

Legal norms referred to:

- Sections 10, 14, 25, 35.3, 35.5, 39.2 of the Constitution of the Republic of South Africa, 1996;
- Sections 28, 29 of the National Prosecuting Authority Act 32 of 1998.

Languages:

English.



Spain

Constitutional Court

Important decisions

Identification: ESP-2008-2-007

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 14.05.2008 / **e)** 59/2008 / **f)** Occasional domestic violence / **g)** *Boletín oficial del Estado* (Official Gazette), no. 135, 04.05.2008 / **h)**

Keywords of the systematic thesaurus:

1.3.1.1 Constitutional Justice – Jurisdiction – Scope of review – **Extension.**

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

3.20 General Principles – **Reasonableness.**

3.21 General Principles – **Equality.**

Keywords of the alphabetical index:

Violence, against women / Offence, criminal / Guilt, constitutional principle / Criminal law, less severe.

Headnotes:

The law which stipulates that a man who commits an occasional offence of domestic violence is liable to one of a range of alternative penalties, including a prison sentence of between six months and one year, while a woman committing similar acts of violence is liable to a prison sentence of between three months and one year, does not infringe the constitutional principles of equality under the law or those relating to culpability.

Criminal law policy is an exclusive matter for the democratic legislator, who has wide discretionary powers within the limits set out in the Constitution.

The provision in question requires analysis, not from the angle of the prohibition of discrimination on the grounds of sex, but rather from the general principle of equality.

The general principle of equality (Article 14 of the Constitution) requires different treatment of cases concerning the same facts to be objectively and reasonably justified; this should not entail consequences disproportionate to the aim pursued.

It is quite legitimate for the law to pursue the aim of protecting women from gender-based violence, *inter alia* by means of criminal-law measures. The provision in question is appropriate for this aim because it is deemed legitimate for the law to consider that aggression involves serious harm to the victim where the attacker acts in a given cultural context, viz the inequality existing within a couple's relationship, which involves serious injury to the victims.

The wording of the provision in question in no way suggests that the perpetrator of the offence is necessarily a man, since it is also possible for women to perpetrate the offence in question; this does not prevent the Constitutional Court from determining the question of unconstitutionality on the basis of the Criminal Court's interpretation of the principle.

Summary:

The judgment concerns a question of unconstitutionality raised by a Criminal Court in trying a man accused of violent acts against his wife. If the Criminal Court declared him guilty, it had to establish its sentence on the basis of the provision introduced into the Penal Code by the Organic Law on protection against gender-based violence, which was approved in 2004. The question is based on the fact that the law stipulates severer penalties if the attacker is a man rather than a woman; this allegedly indicates a case of discrimination based on sex, given that different penalties are imposed for the same conduct.

The judgment, which was adopted, with three votes against, stated that criminal law in no way infringed the right to equality before the law. This is partly due to the fact that the principle in question must be analysed on the basis of the general equality principle set out in the first sentence of Article 14 of the Constitution, not on the subsequent prohibition of sex discrimination. The reason for this is as follows: the sex of the perpetrators and victims is not an exclusive or decisive factor in determining different criminal sanctions, given the type of conduct described in the provision considered by the court (Article 153.1 of the Penal Code), or the grounds mentioned by the legislator. These grounds are based on a major abnormality in the conduct described in Article 153.2, which is applicable to men and women in matters of attacks committed outside the context of the couple, i.e. the Article provides for prison sentences of between three months and one year.

This provision has a legitimate aim, namely to reinforce protective measures to guarantee the physical, psychological and moral integrity of women in a specific environment, that of the couple, where

the legislator sets forth grounds for considering that women are sufficiently protected and combating inequality within this same environment. The distinction drawn in the provision is a reasonable one, and does not involve disproportionate consequences in the light of the limits on the penalties (minimum of six months rather than three) and their flexibility (the law provides for alternatives to imprisonment and certain factors varying the length of detention). This is even more apparent when we consider that the law protects vulnerable persons cohabiting with violent offenders.

Lastly, the provision in no way infringes the constitutional principle of guilt: it is naturally and perfectly legitimate, although it does not assume that men's conduct is more aberrant because they are men or women are more vulnerable because they are women. Nor does the provision penalise the guilty parties for violence perpetrated by other male spouses, but only for their own base acts.

The judgment sets out a number of preliminary considerations. One of them, to the effect that although male responsibility for the offence is one of the possible interpretations of the provision, it should not be overlooked that women too can perpetrate this offence, and that the inclusion of "particularly vulnerable persons cohabiting with the perpetrator" as alternative victims broadens the definition of "victim" by ensuring that it is not confined to women. However, the Court challenges the constitutionality of the provision as interpreted by the Criminal Court which raised the question, presuming that the perpetrator is a man and the victim a woman.

The judgment recalls that, as a general rule, the framing of criminal policy is an exclusive matter for the democratic legislator. Selecting a given act for consideration as an offence and attaching a specific penalty to it is the result of a complex assessment of expediency which does not only involve the enforcement or application of the Constitution. This determines the limitations on the jurisdiction of the Court, which is not responsible for analysing the efficacy or justification of criminal provisions: it must solely assess whether the external limits imposed by the Constitution on the criminal legislator, who enjoys wide discretionary powers, have been respected.

Supplementary information:

Article 153.1 of the Penal Code (approved by Organic Law no. 10/1995 of 23 November 1995), pursuant to the wording of Article 37 of Organic Law no. 1/2004 of 28 December 2004 on comprehensive protection against gender-based violence (BOE, 29 December 2004, no. 313), reads as follows: "Anyone inflicting on

another person, by any means or procedure, any type of psychological harm or injury not defined as an offence by the present Code or striking or inflicting physical ill-treatment on another person without causing lesions, the victim being the perpetrator's wife or a person having had an affective relationship with the perpetrator, even in the absence of cohabitation ... will be punished with a prison sentence of between six months and one year."

The judgment, which sparked a heated political debate, was the first in a long list of judicial decisions on one hundred or so cases submitted by various criminal courts relating to the Law on gender-based violence.

Languages:

Spanish.



Identification: ESP-2008-2-008

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 26.05.2008 / **e)** 62/2008 / **f)** Eugenio Díaz Zarza / **g)** *Boletín oficial del Estado* (Official Gazette), no. 154, 26.06.2008 / **h)**

Keywords of the systematic thesaurus:

5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment.**

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

5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability.**

Keywords of the alphabetical index:

Discrimination, prohibited grounds, list / Worker, illness, dismissal / Dismissal, illness.

Headnotes:

A worker's illness may constitute a discriminatory factor as prohibited under Article 14 of the Constitution, where this involves segregating or stigmatising the worker as an ill person, in a manner unconnected with his/her aptitude for developing his/her professional relationship.

The company dismissed the worker because it considered that his illness rendered him incapable of performing his work, a decision which was not discriminatory in itself. The illness/disease, considered from the strictly functional angle of its disabling effect *vis-à-vis* work, does not constitute discrimination based on personal circumstances, although it might have done under different circumstances.

Summary:

A bricklayer was dismissed for infringing contractual good faith by concealing the fact, on his recruitment by the company, that he suffered from a disease of the cervical vertebrae which had been the cause of several periods of sick leave when he worked for other building firms, as his illness involved certain functional limitations. The courts declared the dismissal decision inadmissible, although they did not deem it void since the illness did not constitute a discriminatory factor prohibited under Article 14 of the Constitution. Judgment no. 62/2008 rejected the implementation of protective measures.

This was the first ever judgment to address the question whether a worker's illness/disease could in itself constitute discrimination as prohibited by the Constitution. The judgment broadly stressed the fact that in order to establish whether a criterion for differential treatment, which is not expressly included in Article 14, should be considered as being covered by the general clause prohibiting discrimination, viz "any other personal or social condition or circumstance", it is necessary to consider whether this criterion can be deemed reasonable.

The essence of the prohibition of discrimination *vis-à-vis* the general equality principle resides in the particularly offensive nature of the differentiation criterion applied, which turns a personal feature or inborn condition or faculty expressing the most basic freedoms into a segregative, indeed persecutory factor, such conduct being completely contrary to human dignity and the inherent inviolable rights (Article 10 of the Constitution).

Where illness is envisaged from the strictly functional angle of its disabling effect on work, it does not constitute a prohibited discriminatory factor. In the present case, the firm dismissed the worker on the grounds that his illness rendered him incapable of performing his work, a decision which could be considered admissible or inadmissible depending on whether the cause invoked is justified and whether it is really disabling, but not directly discriminatory.

Languages:

Spanish.



Identification: ESP-2008-2-009

a) Spain / b) Constitutional Court / c) Plenary / d) 24.06.2008 / e) 101/2008 / f) Election by the Senate of judges to the Constitutional Court / g) *Boletín oficial del Estado* (Official Gazette), no. 200, 19.09.2008 / h).

Keywords of the systematic thesaurus:

1.1.2.3 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointing authority.**
 1.1.2.4 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointment of members.**
 2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**
 2.3.8 Sources – Techniques of review – **Systematic interpretation.**
 4.5.2 Institutions – Legislative bodies – **Powers.**
 4.5.4 Institutions – Legislative bodies – **Organisation.**
 4.5.4.1 Institutions – Legislative bodies – Organisation – **Rules of procedure.**
 4.8.2 Institutions – Federalism, regionalism and local self-government – **Regions and provinces.**

Keywords of the alphabetical index:

Constitutional Court, judge, appointment / Constitutional Court, interpretation, binding effect / Constitutional Court, jurisdiction.

Headnotes:

The Rules of Procedure of the Senate confer on this Chamber the power to supervise the election of candidates to posts of judges of the Constitutional Court, which candidates are nominated by the Parliaments of the 17 Autonomous Communities, in accordance with the requirements imposed by Article 159 of the Constitution.

The right of the Assemblies of the Autonomous Communities to put forward candidates as judges of the Constitutional Court in no way prevents the Senate from fulfilling its functions or its constitutional obligation to nominate judges to the said posts (Article 159 of the Constitution), which is an exclusive duty of the Senate.

The procedural provision to the effect that the Senate Nominations Board must submit a list of candidates to the plenary Senate in no way forces the Plenary to adopt this list, given that such adoption requires a three-fifths majority of the plenary Senate.

The plenary assembly of the Senate has a specific will overriding that of the other Senate bodies, which express their views by means of secret, individual voting by their members.

The Constitutional Court is in no way bound by any interpretation emerging from parliamentary debate, especially where this interpretation would lead to an understanding of the provision that was incompatible with the Constitution, comprehensively and systematically.

The interpretation of the principle set out in the Rules of Procedure to the effect that it is compatible with the Constitution guarantees that the Senate can elect potential candidates from its own membership, in the event of not all the posts of judges of the Constitutional Court being filled by candidates put forward by the Assemblies of the Autonomous Communities.

Summary:

The judgment complements STC no. 49/2008. It analyses an unconstitutionality appeal submitted by over fifty Senators from the main opposition party against the amendment to the Rules of Procedure of the Senate governing the method and procedure for the election of the four judges of the Constitutional Court from among the candidates nominated by the Parliaments of the Autonomous Communities, which reform was ratified by the Organic Law on the Court adopted in 2007. The judgment states that the Rules of Procedure are not unconstitutional if they are interpreted in the manner indicated in its legal foundations. It was adopted with three votes against.

The judgment deals with three separate questions. The first concerns nominations by the Parliaments of the Autonomous Communities. The fact that the Rules of Procedure provide that such nominations are a matter for the said Parliaments does not prevent the Senate from discharging the duty exclusively assigned to it by the Constitution, namely to submit to

the Crown its nominations of four recognised "jurists" with over fifteen years' experience as members of the national legal service. The Assemblies of the Autonomous Communities are required to prove that the two candidates they put forward fulfil the constitutional criteria for exercising the duties in question. The Bureau of the Senate may decide that the candidatures submitted are inadmissible if they do not comply with the requisite criteria; in this case the Parliaments of the Autonomous Communities can nominate fresh candidates. Furthermore, the admissibility of the formalities for nominating the candidates during this first phase does not guarantee election in the second phase, which is an exclusive matter for a final vote taken by the plenary assembly of the Senate.

The second question concerns the presentation of the candidatures in the Senate. There is nothing in the contested provision to prevent the Appointments Board from submitting to the plenary Senate a list comprising the same number of candidates as of posts to be filled (i.e. four). However, the plenary does not necessarily have to accept the Board's proposal as it is free to express its own opinion by voting on the candidates nominated by the Nominations Board.

The third question considered in the judgment is the Senate Appointments Board's power to put forward candidates other than those originally nominated by the Parliaments of the Autonomous Communities. In practical terms, where one or more of the candidates nominated fails to secure the qualified majority required for appointment, the Senate itself has discretionary powers to exercise its constitutional function, in respect of which it cannot decline jurisdiction. In principle, as stipulated in its Rules of Procedures, the Upper Chamber must confine itself to electing one or more of the candidates previously nominated by the Assemblies of the Autonomous Communities. However, an interpretation of the principle established in the Rules of Procedure in line with the Constitution suggests that the Chamber can elect other possible candidates, from among its own members, should it prove impossible to fill all the judges' posts in the Constitutional Court or if the candidates nominated by the Assemblies of the Autonomous Communities fail to obtain the three-fifths majority required under Article 159.1 of the Constitution.

Supplementary information:

The judgment is directly linked to an earlier judgment (STC no. 49/2008), which confirmed the constitutionality of Article 16.1 LOTC as drafted under Organic Law no. 6/2007 of 24 May 2007; this

judgment stipulates that the Parliaments of the Autonomous Communities must participate in the election by the Senate of the four judges of the Constitutional Court.

The renewal of the judges was scheduled for December 2007.

Languages:

Spanish.



Identification: ESP-2008-2-010

a) Spain / b) Constitutional Court / c) Plenary / d) 21.07.2008 / e) 92/2008 / f) María Jesús Pérez Ledo / g) *Boletín oficial del Estado* (Official Gazette), no. 200, 19.08.2008 / h).

Keywords of the systematic thesaurus:

2.1.1.3 Sources – Categories – Written rules – **Community law.**

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

5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment.**

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

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

Keywords of the alphabetical index:

European Community, directive, discretion of the Member States / Worker, protection / Dismissal, unjustified / Dismissal, invalidity / Pregnancy, worker, protection.

Headnotes:

A Spanish law declaring invalid the dismissal of pregnant workers as from the starting date of the pregnancy guarantees effective protection *vis-à-vis* the right to non-discrimination on the grounds of sex, as laid down in Article 14 of the Constitution.

The Spanish legislator introduced this instance of invalidity of dismissal without making it subject to such requirements as prior notification of the worker's pregnancy to the employer or the latter's *de facto* prior knowledge of such pregnancy.

The national law, as transposed into Spanish legislation, thus provides a more extensive guarantee than that required under the EU Directives.

The right of pregnant workers to protection from discrimination on the grounds of sex does not strictly necessitate a protective system such as that provided for by the law; however, once such a protective system has been introduced, no restrictive interpretation can be used to hamper the applicability of the fundamental right.

Summary:

A pregnant woman was dismissed by the company for which she worked. The social affairs tribunals rejected the application for dismissal even though it was not apparent that she had notified her condition as such before her dismissal or that her employer had had prior knowledge of her condition.

The Law on the status of workers was amended in 1999 when Community Directive no. 92/85/EEC was transposed into national law, declaring void dismissals of pregnant workers as from the starting date of the pregnancy.

The Constitutional Court grants a safeguard by recognising the fundamental right to concrete judicial protection *vis-à-vis* the right to non-discrimination on the grounds of sex (Articles 24.1 and 14 of the Constitution), and declares null and void dismissals "in accordance with the implicit legal effects". There is nothing in Article 55.5.b of the Workers' Statute to suggest that the legislator laid down as a criterion for declaring a dismissal invalid prior knowledge on the part of the employer of the worker's pregnancy, never mind the requirement of prior notification of the latter. All the criteria facilitating the interpretation, apart from the higher criterion of an interpretation compatible with the Constitution, suggest that the invalidity of the dismissal is purely automatic in nature, exclusively associated with documenting the worker's pregnancy, rather than the fact that the dismissal could have reasons other than those connected with the state of pregnancy.

When transposing the EU Directive into Spanish law, the legislator went far beyond the minimum guarantees of the Directive by enshrining a new case of invalidity of dismissal, without laying down any specific requirement such as prior notification of the

pregnancy to the employer or prior knowledge of this condition on his/her part, by any other means.

The judgment explains that the safeguard on the fundamental right not to suffer discrimination on the grounds of sex does not necessarily involve an objective protective system such as that established by the Spanish legislator: other systems to protect rights in line with the substance of Article 14 of the Constitution are also possible. Case-law formerly required the employer to have been informed of the pregnancy before deciding on the dismissal as a precondition for any finding of discrimination. However, since this system was incorporated into legislation, the courts have been unable to adopt a restrictive interpretation depriving the legal principle of the guarantees added by the legislator, because such an interpretation would hamper the applicability of the fundamental right.

Languages:

Spanish.



Identification: ESP-2008-2-011

a) Spain / b) Constitutional Court / c) First Chamber / d) 21.07.2008 / e) O-188/2008 / f) Eric Roger Maurice Langevin / g) *Boletín oficial del Estado* (Official Gazette), no. 200, 19.08.2008 / h).

Keywords of the systematic thesaurus:

1.2 Constitutional Justice – **Types of claim.**

1.2.2.1 Constitutional Justice – Types of claim – Claim by a private body or individual – **Natural person.**

1.4.5 Constitutional Justice – Procedure – **Originating document.**

Keywords of the alphabetical index:

Admissibility, condition / Constitutional appeal, admissibility / Constitutional appeal, nature / Constitutional appeal, content.

Headnotes:

Appeals geared to protecting public freedoms and fundamental rights cannot be admitted unless the application expressly justifies the special

constitutional nature of the appeal, as required by the reform effected under the Organic Law of the Constitutional Court dating from 2007.

The duty to justify the constitutional nature of the appeal geared to protecting public freedoms and fundamental rights is essential and non-rectifiable.

Summary:

The order proposes an initial interpretation of the new Article 50 of the Organic Law of the Constitutional Court, in accordance with Organic Law no. 6/2007 of 24 May 2007, which effected an in-depth reform of the requirements laid down in terms of admissibility of appeals geared to protecting public freedoms and fundamental rights. This Law denies the admissibility of the appeal in breach of public freedoms and fundamental rights because the request does not expressly document the special constitutional nature of the appeal. The said appeal challenged the decisions of the *Audiencia Nacional* involving the imprisonment of an individual in order to guarantee his or her handover to the French authorities under a European arrest warrant issued with a view to trying him for fraud.

Former Article 50 set out a number of grounds on which the Court could reject an appeal geared to protecting public freedoms and fundamental rights. On the other hand, the 2007 reform allows the Court to admit appeals of this kind which comply with the procedural requirements and also have a content which “justifies a substantive decision from the Constitutional Court owing to its special constitutional nature, which must be appraised in terms of its importance to the interpretation of the Constitution, its general application or efficacy, and for the determination of the content and scope of the fundamental rights” (new Article 50.1 of the Organic Law of the Constitutional Court). Moreover, the Law states that “in any case, the request must demonstrate the purely constitutional nature of the appeal” (new wording of Article 49.1).

The decision contends that this duty to demonstrate the special constitutional nature of the appeal geared to protecting public freedoms and fundamental rights differs from the duty to demonstrate the existence of a violation of a fundamental right. The persons lodging the said appeal, defended by their lawyer (Article 81 of the Organic Law of the Constitutional Court), must provide evidence that the disputed decision infringes a fundamental right. However, since the Law of 24 May 2007 came into force on 24 May 2007, appellants have also been required to document the special constitutional nature of their appeal.

It is not for the Constitutional Court to reconstruct the request *ex officio* where this evidence requirement is flouted. The significance and the function of this new requirement make it a substantive formality that cannot undergo any rectification. Rectifying defects in any judicial action may concern formal requirements, such as the production of documents or deposit of certain data; however, such rectification cannot be extended to the content of arguments in support of the primary contention, because these constitute the material foundation, not to mention that the fact of complementing the application would affect the general principle of the action and the guarantees linked to certainty of the law.

The decision concludes that the request submitted via a solicitor and lawyer responsible for representing the prisoner does not provide the explicit line of reasoning complying with the requirements set out in the Law, and repeated non-compliance with this clause leads to the inadmissibility of the appeal geared to protecting public freedoms and fundamental rights.

Supplementary information:

The Second Chamber recently published Order no. 289/2008 of 22 September 2008, which takes the same line, with one vote against.

Languages:

Spanish.



Switzerland Federal Court

Important decisions

Identification: SUI-2008-2-004

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 31.03.2008 / **e)** 1C_158/2007 / **f)** Thommen and Verein Referendum BWIS v. Zurich cantonal government / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 134 I 125 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.6.3 General Principles – Structure of the State – **Federal State.**

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

5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**

Keywords of the alphabetical index:

Regulatory jurisdiction / Federal law, supremacy / Football, violence, preventive measure / Sports event, violence / Internal security, protection, preventive measure.

Headnotes:

Article 30.1 of the Federal Constitution (right to a court established by law) and Article 49.1 of the Federal Constitution (supremacy of federal law), Article 38 of the Constitution of the Canton of Zurich (legislative principles) and Article 73 of the Constitution of the Canton of Zurich (jurisdiction of the courts). Cantonal rules issued pursuant to the Federal Act on Internal Security Measures (FAISM).

The jurisdiction conferred on the cantonal police force and the municipal police forces of Zurich and Winterthur to impose the measures introduced by the FAISM is in conformity with federal law (recital 2).

Regarding judicial oversight of the measures provided for in the FAISM, the cantonal government is not empowered to issue, through a mere order, rules of

jurisdiction departing from the ordinary organisation of the courts (recital 3).

The rules on jurisdiction existing under the cantonal administrative procedure are in conformity with the FAISM; however, this law necessitates additional regulations in matters of police custody (recitals 4 and 5).

Summary:

I. On 24 March 2006 a new chapter providing for measures to counter violence during sports events was added to the Federal Act on Internal Security Measures (LMSI). The amendment's aim was to improve security at sports events in general and in particular during the EURO 08 football championship, taking place in Switzerland and Austria. The changes introduced provided *inter alia* for area bans (Article 24b), an obligation to report to a police station (Article 24d) and police custody (Article 24e) and determined the conditions thereof. The Zurich cantonal government issued an order implementing these federal provisions. This order gave the municipal police forces of Zurich and Winterthur and the cantonal police force jurisdiction for implementing the measures introduced by the Federal Act (paragraph 1). It also regulated judicial oversight of these measures, stipulating that an appeal would lie to the detentions judge of the Zurich district court, but did not provide for any remedy at cantonal level (paragraph 2).

Lodging a public law appeal, a citizen asked the Federal Court to set aside the cantonal government's implementing order. He relied on the principle of supremacy of federal law laid down in Article 49.1 of the Constitution and also argued that the judicial procedural guarantees of Article 30.1 of the Constitution were breached.

II. The Federal Court allowed the appeal in part, and set aside paragraph 2 of the order.

The principle of supremacy of federal law barred the adoption of cantonal rules which evaded requirements of federal law or ran counter to the meaning or spirit thereof, notably through their aim or the means implemented, or which encroached upon fields that had been fully regulated by the federal parliament. This principle had clearly not been breached by the cantonal government. The federal parliament prescribed no specific organisation for implementing the measures instituted by the Federal Act. By referring to the "cantonal authority" competent to order the various measures, the federal parliament wished not to rule out that several authorities, both cantonal and municipal, could be made responsible for implementing the Federal Act.

Under Article 30.1 of the Federal Constitution, anyone whose case is to be heard in judicial proceedings has the right to have that case brought before a court that has been established by law, has jurisdiction and is independent and impartial. This provision requires that the organisation of the courts should be governed by a law in the formal sense; only questions of secondary importance to the implementation of judicial organisation can be delegated to the executive. Since the questions relating to the judge exercising judicial oversight, the procedural rules and the lack of a remedy at cantonal level were settled by an order of the executive, the contested order issued by the cantonal government failed to comply with constitutional requirements. Similarly, the cantonal constitution required that the courts' organisation and jurisdiction be determined by a law in the formal sense. In the light of the above, the contested order failed to fulfil these requirements. On this ground, the Federal Court set aside the impugned provisions on judicial organisation contained in the cantonal government's order.

The consequences of the partial annulment of the contested order remained to be examined. The measures provided for in the Federal Act, namely the area ban, the obligation to report to a police station and police custody, were of an administrative nature and did not come within the sphere of criminal procedure. This therefore meant that the provisions of ordinary administrative procedure were applicable. These stipulated that measures ordered by the police on the basis of the Federal Act could be challenged before an administrative body and could subsequently be taken before the Cantonal Administrative Court. These rules, applicable to the area ban and the obligation to report to a police station, were compatible with the federal legislation. No change to procedural law was therefore necessary. The situation was however different for police custody. Federal law provided that, at the request of the person concerned, a judge must verify whether the deprivation of liberty was in accordance with law. This provision must be interpreted to mean that the person concerned by the measure must be able to appeal directly to a judge, without first applying to an administrative authority. A remedy of this kind was lacking in the cantonal legislation. It followed that the cantonal legislature must make good this deficiency.

Languages:

German.



Identification: SUI-2008-2-005

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 09.05.2008 / **e)** 6C_1/2008 / **f)** X. and Others v. Grand Council (cantonal parliament) of the Canton of Geneva / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 134 I 214 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
 3.16 General Principles – **Proportionality**.
 3.18 General Principles – **General interest**.
 5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty**.
 5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession**.

Keywords of the alphabetical index:

Child, protection / Begging, ban / Public order, protection / Public safety, protection.

Headnotes:

Article 10.2 of the Federal Constitution (right to personal liberty), Article 12 of the Federal Constitution (right to assistance when in distress), Article 27 of the Federal Constitution (economic freedom) and Article 36 of the Federal Constitution (limitation of fundamental rights). Ban on begging.

Begging does not constitute an activity protected by Article 27 of the Constitution (recital 3).

Begging, as a form of the right to approach others with a view to obtaining assistance, is an elementary freedom, constituting part of the personal liberty guaranteed by Article 10.2 of the Constitution (recital 5.3).

As it is laid down by a law in the formal sense, the ban on begging ensuing from the previously cited provision of cantonal law has a sufficient basis in law (recital 5.5). Regulation of this activity can be justified on account of the public interest to control the risks it may pose for public order, safety and tranquillity and with the aim of protecting children, in particular, and combating the exploitation of human beings (recital 5.6). In the case under consideration the ban on begging complies with the principle of proportionality (recital 5.7).

Summary:

I. On 30 November 2007 the Grand Council of the Canton of Geneva passed a law, subtitled “begging”, amending the Geneva criminal law of 17 November 2006. It *inter alia* added a new Article 11A.1 of which provided that “begging shall be punishable with a fine”. The law thus passed was published in the official gazette and promulgated by the cantonal government.

An association and two citizens lodged a public law appeal with the Federal Court against this law. Alleging violations of a number of articles of the Federal Constitution and the European Convention on Human Rights, the appellants asked the Federal Court to set aside Article 11A.1 of the law.

II. The Federal Court dismissed the appeal to the extent that it was admissible.

Economic freedom, as guaranteed by Article 27 of the Constitution, includes in particular freedom to choose one's occupation and free access to and free exercise of private economic activities of a profit-making nature. Begging did not constitute an activity protected under these provisions. It consisted in seeking assistance for no consideration in return and involved no economic exchange. In so far as it penalised begging, the contested legal instrument accordingly did not infringe economic freedom.

The right to personal liberty is a broad guarantee, encompassing all the elementary freedoms necessary to human well-being. Begging, as a form of the right to approach others with a view to obtaining assistance, must be regarded as an elementary freedom, constituting part of personal liberty.

With the contested law, the ban on begging had a sufficient basis in law in the formal sense. It remained to be determined whether the ban served a public interest. From this standpoint it could not be denied that begging could lead to excessive behaviour, resulting in complaints by members of the public who had been pestered and by trades people. Beggars were often insistent, or even harassed passers-by. Many people perceived the behaviour of beggars as a form of duress, or at least a pressure. In addition people who begged, whether adults or children, were in reality frequently exploited by gangs who utilised them solely for their own financial gain. It therefore followed that the ban on begging served a public interest aimed at the preservation of public order and safety. From the standpoint of proportionality it could be noted that a restriction on begging was unquestionably appropriate to attain the aim of the public interest concerned.

In addition, it was not clear in what way less stringent measures would make it possible effectively to achieve the desired public interest aim. A potential geographical restriction on begging would merely displace the problem. The number of persons begging would scarcely be reduced and the result would be to concentrate them in areas where begging was tolerated, with the effect of enhancing its negative repercussions. Temporal limits on begging would also clearly be inadequate to preserve public order. The possibility of making begging subject to an authorisation would be likely to create inequalities between those wishing to engage in the activity.

Article 12 of the Constitution guaranteed persons in distress the right to assistance. In the Canton of Geneva this principle had been given tangible form in the law on individual social assistance, which granted everyone the right to social support or financial benefits. It followed that the ban on begging would not deprive the persons concerned of the necessary minimum means of subsistence.

The contested ban on begging was accordingly compatible with the constitutional guarantee of personal liberty.

Languages:

French.



"The former Yugoslav Republic of Macedonia" Constitutional Court

Important decisions

Identification: MKD-2008-2-004

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 23.04.2008 / e) U.br.28/2008 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 64/2008, 22.05.2008 / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

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

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

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

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

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**

5.3.5.1.4 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Conditional release.**

Keywords of the alphabetical index:

Life imprisonment / Prisoner, release, application / Offender, rehabilitation.

Headnotes:

The principle of respect for human dignity is a fundamental value of the individual that enjoys universal protection. Thus, the legislature must provide for mechanisms enabling those sentenced to life imprisonment eventually to regain their freedom.

Under the Criminal Code of the Republic of Macedonia, a life sentence does not necessarily entail a life restriction on liberty. Someone who has been sentenced to life imprisonment and who has

already served fifteen years in jail may request release on parole. This means that a person sentenced to life imprisonment may at some point be released from prison.

Summary:

I. The petitioner asked the Court to assess the constitutionality of several provisions of the Criminal Code relating to life imprisonment (see Official Gazette of the Republic of Macedonia, nos. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006 and 7/2008).

He argued that a sentence of life imprisonment deprived the perpetrator of a criminal offence of his liberty until the end of his life. He conceded that the Constitution allowed certain restrictions of human freedoms, but pointed out that such restrictions had to be temporary and the same for everybody. The determination that freedom is restricted for life would result in different offenders having different lengths of restriction of freedom, in cases of sentences of life imprisonment. He argued that freedom was inviolable, and could not be excluded until the end of somebody's life. Because a life sentence excluded the possibility for the individual to regain his or her freedom, it was in breach of the Constitution.

II. The Court took account of the provisions of Articles 8.1.1, 3, 10, 11, 12.1 and 14.1 of the Constitution, together with relevant provisions of the Criminal Code and the Law on the Execution of Sanctions (see Official Gazette of the Republic of Macedonia, no. 2/2006). The Court also took note of the relevant provisions of international law, the jurisprudence of the European Court of Human Rights and some national jurisdictions.

In its reasoning, the Constitutional Court began by observing that human dignity is one of the subjective rights guaranteed by Article 11 of the Constitution, and a fundamental value of a democratic society. As such, it enjoys universal protection. Respect for the moral integrity and dignity of the citizen is part of the role of the state and particularly significant when these values are under threat. The Court noted that this role of the state is especially important in the field of criminal justice and in the system of execution of prison sentences. The state imprisons citizens on the one hand, but on the other hand is obliged to bring the perpetrators of crimes back into society, by appropriate treatment.

The Law on the Execution of Sanctions contains provisions that help to guarantee the respect of the values described above. This legislation proclaims humane treatment for those serving prison sen-

tences, and respect for their personality and dignity. It does not draw a distinction between those sentenced to a prison term and those sentenced to life imprisonment in terms of enjoyment of rights and privileges.

The Constitutional Court observed that, when assessing the constitutionality of life sentences, one should start from the premise that, under the Macedonian Criminal Code, these are not unrestricted. There is, in fact, no life restriction of liberty, as the petitioner suggested. The Criminal Code contains specific provisions under which somebody serving a life sentence may ask for release on parole, once he or she has served fifteen years in prison. It follows that someone sentenced to life imprisonment is not deprived altogether of the possibility of future release. The long-term continued loss of liberty is an extraordinary physical and psychological burden that may result in significant disturbance to the personality of the person undergoing the sentence. This is one of the reasons behind the possibility of release on parole. A life sentence cannot be described as "humane" if the person sentenced never has the chance of securing his liberty at a future date. Statements in the petition link life sentences with incarceration for the term of a prisoner's natural life. This would result in negation of one of the aims of punishment – preparing the offender for reintegration into society by correction and preparation for socially acceptable conduct when set free.

The Court accordingly held that there were no grounds to challenge the conformity of the provisions in the Criminal Code relating to life sentences with the provisions of the Constitution.

Cross-references:

Judgments of the European Court of Human Rights:

- *Leger v. France*, Judgment of 11.04.2006;
- *Kafkaris v. Cyprus*, Judgment of the Grand Court Chamber of 12.02.2008.

Languages:

Macedonian.



Identification: MKD-2008-2-005

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 11.06.2008 / e) U.br.241/2007 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 74/2008, 18.06.2008 / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 3.9 General Principles – **Rule of law.**
 4.5.7 Institutions – Legislative bodies – **Relations with the executive bodies.**
 4.6.2 Institutions – Executive bodies – **Powers.**

Keywords of the alphabetical index:

Government, decision, *ultra vires* / Public health, institution.

Headnotes:

By adopting a decision that repealed the existence of the public health institution originally founded by the Assembly of the Republic of Macedonia, the Government violated the constitutional principles of the rule of law and the separation of powers. This constituted interference by the executive in legislative power.

Summary:

I. Several citizens asked the Court to assess the constitutionality of the Government Decision on the division of the Public Health Institution University Clinical Centre – Skopje, no. 19-3888/1 of 26 June 2007 (see the Official Gazette of the Republic of Macedonia, no. 102/2007).

They alleged that the Decision of the Assembly of the Republic of Macedonia setting up the University Clinical Centre in 1996 could not be repealed by the disputed decision of the Government. There were no legal grounds for such a decision. Moreover, the Government, as an executive body, may not derogate the acts of the Assembly of the Republic of Macedonia.

The government decision under dispute divided the Public Health Institution University Clinical Centre of Skopje into thirty public health institutions. In the final provisions, the decision stipulates that on the date of its entry into force, the Decision on the Foundation of the Clinical Centre – Skopje (Official Gazette of the Republic of Macedonia, no. 20/1996) made by the Assembly of the Republic of Macedonia, shall cease to be valid.

II. The Court took note of Article 8.1.3.4 of the Constitution, which proclaims the rule of law and the separation of powers into legislative, executive and judicial branches to be fundamental values of the constitutional order of the Republic of Macedonia. It also took note of the Law on the Health Care, which, until 2004, stipulated that a public health organisation might be founded by the Assembly of the Republic of Macedonia. In 2004, the Law on Changing and Supplementing the Law on Health Care (Official Gazette of the Republic of Macedonia, 10/2004) instead bestowed this right on the Government, by simply replacing the word “Assembly” with the word “Government”.

The Court held that, following the entry into force of the Law, this amendment allowed the Macedonian Government to found a public health institution. Although the amendments to the Law apply to future relations, they do not regulate the transitional regime. Neither do they govern the legal status of existing public health institutions previously founded by the Assembly.

The Court therefore held that the Government had adopted the Decision in contradiction with constitutionally defined principles. It had repealed the existence of the original public health institution, which it had not in fact set up, and decided to be the founder of new public health institutions on its material base. It had carried out these steps by means of a by-law. There was no legal or transitional regime in place to regulate the state of affairs already in existence. The Government’s Decision was an act that was not made by the founder of the institution. It did not possess any concrete empowerment by the Assembly as the founder of the institution.

In making this Decision, the Government, as holder of the executive power, decided on rights and obligations that related to the Assembly of the Republic of Macedonia and which were directly linked to the repeal of the public health institution founded by the Assembly. It had derogated, that is, removed from the legal order the Decision of the Assembly of the Republic of Macedonia. It had thereby directly violated the constitutional principles of the rule of law and the division of powers. Its actions constituted executive interference with legislative power, and were contrary to Article 8.1.3.4 of the Constitution.

Languages:

Macedonian.



Turkey

Constitutional Court

Important decisions

Identification: TUR-2008-2-004

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 29.01.2008 / **e)** E.2002/1 (SPL), K.2008/1 / **f)** Dissolution of a Political Party / **g)** *Resmi Gazete* (Official Gazette), 01.07.2008, 26923 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.8.1 General Principles – Territorial principles – **Indivisibility of the territory.**

4.5.10.4 Institutions – Legislative bodies – Political parties – **Prohibition.**

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

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

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

5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**

Keywords of the alphabetical index:

Political party, programme / Political party, dissolution / Minority, language.

Headnotes:

The fact that a political party refers to the “Kurdish problem”, proposes some solutions to it, and advocates more autonomy for local governments on the basis of principles of pluralism and participation in the statute and programme of a political party does not make that political party unconstitutional. Such a proposition should not, therefore, be regarded as justification for the dissolution of a political party.

Summary:

I. The Chief Public Prosecutor at the Court of Cassation launched a court action seeking the dissolution of the Rights and Freedoms Party (*Hak ve Özgürlükler Partisi HAK-PAR*) under various

provisions of the Law on Political Parties and of the Constitution.

Article 3 of the party’s statute described one of the party’s aims as the restructuring of Turkey in its administrative, political, social and economic aspects in a decentralised model according to the universal democratic legal norms and pluralist political system of the EU and the world. It went on to promise that the party would solve the Kurdish problem by social consensus based on equality of rights.

In its Party Programme, the Rights and Freedoms Party suggested that this problem might be resolved if Turkish governments put forward the same arguments for Kurds living in Turkey as they demand for minority groups living in countries such as Cyprus, Bulgaria, Greece and Kosovo. It also stated, “Regulation of local governments will depend on the universal principles of participation and pluralism. Local governments will be provided with an autonomous structure.”

The Chief Public Prosecutor claimed that the statute and programme of the Party described the “Kurdish problem” as “the main problem of Turkey”. He pointed out that such an approach, drawing a distinction between Turks and Kurds and accepting the existence of a separate Kurdish nation, entailed the rejection of the concept of nationhood, which depends on conscience of citizenship. As a result, the statute and programme of the party were in conflict with Articles 78 and 101 of the Law on Political Parties, which protect the “indivisible integrity of the state with its nation and territory”. The Chief Prosecutor also contended that the statute and programme of the party contravened Article 81.a-b of the Law on Political Parties. This provision prevents political parties from asserting that there are minorities based upon national, religious and linguistic differences. He also pointed out that the section of the party programme dealing with the restructuring of the state aimed to create administrative regions and sovereign autonomous regions. This ran counter to the concept of the unity of the state and contravened Articles 78.b and 80 of the Law on Political Parties. The Chief Public Prosecutor accordingly asked the Constitutional Court to dissolve the Party.

II. The Constitutional Court observed that Article 69.5 of the Constitution allowed the dissolution of a political party where it can be proved that the party’s statute and programme violate the provisions of Article 68.4 of the Constitution. The Court stated that the statute and the programme of the Rights and Freedoms Party aim to establish a decentralised government model. The party advocates the solution of the Kurdish problem, which it considers one of the fundamental problems of

Turkey, on the basis of equality of rights. The Court reiterated that political parties are indispensable elements of democratic political life. They are free to determine policies and to suggest different solutions to society's social, economic and political problems. They can only be banned if their policies and activities pose a clear and present danger to the democratic regime. The Rights and Freedoms Party was only established a short time ago, and there is no evidence of its having committed unconstitutional acts since its establishment. It is therefore safe to say that the party does not pose a serious threat to the democratic regime. The aims mentioned above should be considered within the scope of freedom of expression. The Chief Prosecutor's request for the dissolution of the party was therefore rejected. Vice President Osman Alifeyyaz Paksüt and Justices Ahmet Akyalçın, Mehmet Erten, A. Necmi Özler, Serdar Özgüldür and Şevket Apalak delivered dissenting opinions.

Languages:

Turkish.



Identification: TUR-2008-2-005

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 20.03.2008 / **e)** E.2006/167, K.2008/86 / **f)** Annulment of the Law no. 5429 (Statistics Law of Turkey) / **g)** *Resmi Gazete* (Official Gazette), 25.06.2008, 26917 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Privacy, personal, right / Personal data, processing.

Headnotes:

Imposing on individuals a duty to submit information or data, regardless of their personal or public nature, to the Turkish Statistical Institute, and subjecting those who fail to submit the data requested to

administrative fines constitutes a violation of the constitutional right to privacy.

Summary:

I. Article 8 of Law no. 5429 (Statistics Law of Turkey) requires statistical units to submit to the Presidency of the Turkish Statistical Institute all information or data completely, accurately and free of charge in the form, period and standards specified by the Presidency. Under Article 54.2 of Law no. 5429, those who fail to submit the information requested by the Presidency or other institutions and organisations in the specified form and time, or who submit incomplete or incorrect information, are first given a warning to submit information requested or cover gaps or correct mistakes within one week. If, despite this warning, no information is submitted or no correction/supplement is made, the parties concerned will receive administrative fines.

The Seferihisar Criminal Court of Magistrates asked the Constitutional Court to rule upon the conformity of the above provisions with the Constitution. The applicant Court suggested that Article 8 of Law no. 5429 obliges all individuals and legal persons to submit all types of information regardless of whether it has personal character or whether it constitutes disclosure of personal beliefs or opinions. Article 54.2 of the Law also provides certain administrative sanctions for those who fail to or abstain from performing the duties set out in Article 8. The applicant Court argued that when these two provisions are considered together, they constitute a violation of constitutional rights of persons and are accordingly in breach of the Constitution. It asked the Constitutional Court to annul these provisions.

II. The Constitutional Court observed that the provisions in question do not clarify the type of information the Institute may require. This means that in practice the Institute can request any kind of information including personal data. The legislation makes no exception for information connected with private life, personal privacy or personal convictions or beliefs. An individual's right to privacy and right not to be compelled to reveal his or her thoughts and opinions for any reason or purpose are guaranteed by Articles 20 and 25 of the Constitution. If individuals are compelled to submit information related to their private lives or personal convictions, to administrative authorities, this is in breach of their constitutional rights. Therefore, Articles 8 and 54.2 of Law no. 5429 are in conflict with Articles 20 and 25 of the Constitution. The Constitutional Court consequently annulled the contested provisions of Law no. 5429. Chief Justice H. Kilic put forward a dissenting opinion.

Languages:

Turkish.

*Identification:* TUR-2008-2-006

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 29.05.2008 / **e)** E.2008/33, K.2008/113 / **f)** Annulment of Law no. 5749 / **g)** *Resmi Gazete* (Official Gazette), 05.07.2008, 26927 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

4.9.3.1 Institutions – Elections and instruments of direct democracy – Electoral system – **Method of voting.**

4.9.9.6 Institutions – Elections and instruments of direct democracy – Voting procedures – **Casting of votes.**

5.3.41.3 Fundamental Rights – Civil and political rights – Electoral rights – **Freedom of voting.**

5.3.41.4 Fundamental Rights – Civil and political rights – Electoral rights – **Secret ballot.**

Keywords of the alphabetical index:

Election, free / Election, ballot, secret / Election, voting, right, persons abroad / Election, postal voting.

Headnotes:

Postal voting cannot guarantee a secret ballot, as it leaves voters unprotected against unwanted influence from family members and social environment. It runs counter to the principle of free elections.

Summary:

I. Article 10 of Law no. 5749 amended the Law on the General Principles of Elections and Electoral Register (Law no. 298) and added some new articles. The Article 94.A regulates voting procedures for Turkish citizens living abroad. Under this regulation, Turkish citizens living abroad may vote in parliamentary and presidential Elections and constitutional referenda. They may cast their votes by one of four alternative voting methods, namely voting at the customs, voting at polling stations, postal voting and electronic voting.

The High Electoral Commission shall decide, after consultation with the Ministry of Foreign Affairs, which voting method shall apply in each country. The amended Article 94.B regulates postal voting. Under this article, a new Abroad County Election Commission will be set up in Ankara. Should the High Electoral Commission decide to apply postal voting for Turkish citizens living in a particular country, the Abroad County Election Commission shall send a postal package to registered voters seventy-five days prior to polling day. Registered voters will cast their vote on a special ballot paper, place it in the envelope provided, place that envelope inside another envelope bearing the address of the Abroad County Election Commission and put it in the post.

The main opposition party parliamentary group asked the Constitutional Court to assess the compliance of the phrase “postal voting” in Article 94.A and Article 94.B of Law no. 298 with the Constitution. The applicant party parliamentary group argued that postal voting leaves individual voters vulnerable to the influence of family members and social groups such as religious or ethnic communities. It also pointed out that postal voting is very open to electoral fraud, and as a result, the above provisions were in conflict with Articles 2, 11, 67 and 79 of the Constitution. It asked the Constitutional Court to annul these provisions.

II. The Constitutional Court stated that the right to vote is a constitutional right that should be respected, whether a citizen lives in his or her homeland or overseas. That right should, however, be exercised in accordance with constitutional principles such as free, equal, secret, and direct and universal suffrage, and public counting of votes. All these are contained in Article 67.2 of the Constitution. The Court ruled that postal voting regulated by the provisions in dispute was very far from guaranteeing secret and free voting in elections, and was in conflict with Article 67 of the Constitution. It annulled the phrase “postal voting” in Article 94.A and Article 94.B of Law no. 298.

Chief Justice H. Kilic and Justices Sacit Adalı, Fulya Kantarcıoğlu and Serruh Kaleli put forward concurring opinions.

Languages:

Turkish.



Ukraine

Constitutional Court

Important decisions

Identification: UKR-2008-2-011

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 22.05.2008 / **e)** 10-rp/2008 / **f)** On compliance with the Constitution (constitutionality) of individual provisions of Article 65 Section I, sub-paragraphs 61, 62, 63 and 66 Section II, sub-paragraph 3 Section III of the Law “On the State Budget for financial year 2008 and on Amending Some Legislative Acts ” and on compliance with the Constitution (constitutionality) of provisions of Article 67 Section I, sub-paragraphs 1-4, 6-22, 24-100 Section II of the Law “On State Budget for FY 2008 and on Amending Some Legislative Acts” (case on the subject and contents of the law on the State Budget) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 38/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status.**

4.10.2 Institutions – Public finances – **Budget.**

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

Keywords of the alphabetical index:

Budget, rider / Amendment, legislative / Budget, law, nature / Judge, remuneration, reduction / Judge, independence, remuneration.

Headnotes:

The law on the state budget can not amend other laws, terminate their implementation or cancel them. For objective reasons, such actions lead to inconsistencies in legislation and consequently impede and curtail human and civil rights and freedoms. If it is necessary to terminate the implementation of laws, to add to or alter them, or to recognise them as invalid, this should be done by separate legislation.

Summary:

The case concerned the compliance with the Constitution of certain provisions of Ukrainian legislation dealing with the 2008 state budget and various amendments to legislative acts.

Under Articles 85.1.4 and 96.1 of the Constitution, approval of the state budget falls within the scope of powers and authorities of the Parliament (*Verkhovna Rada*) and is only executed in the form of a law (see also Articles 92.2.1 and 95.2 of the Constitution). The Constitution does not contain a specific procedure for the consideration, approval and enactment of legislation pertaining to the state budget. However, it does set out certain requirements as to the consideration, approval and enactment of the budget. The structure and contents of the law on the State Budget are provided for in Article 38.2 of the Budget Code (hereinafter referred to as “the Code”).

During the process of adoption of the Law dated 28 December 2007 on the State Budget for financial year 2008 (which also introduced some amendments to various legislative acts), the legislature went against the legal position of the Constitutional Court and transgressed the legal regulations surrounding the budget. It repealed individual legislative provisions (Article 67 Section I) and added to and altered a number of legislative acts, some of which were recognised null and void (Section II).

The Constitutional Court concluded that the law on the state budget could not amend other laws, terminate their implementation or cancel them. Such actions for objective reasons lead to inconsistencies in legislation and consequently impede and curtail human and civil rights and freedoms.

If it is necessary to terminate the implementation of laws, to add to or alter them, or to recognise them as invalid, this should be done by separate legislation.

The provisions of sub-paragraph 19 Section II of the Law on the 2008 State Budget do not terminate implementation, alter or repeal any norms of specific legislative acts or legal acts as a whole. They are also relevant to the process of implementation of the State Budget for financial year 2008 in its income part. They are accordingly in compliance with Articles 95 to 98 of the Constitution and Article 38 of the Code.

However, Article 19.7 of this section of the Law suspends benefits on import customs duty and VAT for all subjects of entrepreneurial activities that import excisable goods and goods falling within Groups 1 to 24 of the Ukrainian Classification of Goods in Foreign Economic Activities through the territories of special

(free) economic zones and priority development territories. The above provision therefore runs contrary to Constitutional Court Decision no. 6-rp/2007 of 9 July 2007 (a case on social guarantees for citizens), *Bulletin* 2007/2 [UKR-2007-2-006]. It also breaches the constitutional requirements surrounding the regulation of the law on the State Budget and is thus unconstitutional.

Under Article 126.1 of the Constitution, the Constitution and laws guarantee independence and immunity for judges. The law on the State Budget has immediate implications for the rights and freedoms of judges and staff of the courts' secretariats.

Because the law recognises certain legal acts as null and void, terminates their implementation and makes changes and additions that have an impact on human and civil rights and freedoms, the Constitutional Court took the view that this effectively impedes and curtails those rights and freedoms.

Under Article 92.1.14 of the Constitution, the status of judges is determined exclusively by laws. In the case in point, the rationale behind the Law on the Status of Judges was protection and practical application of judicial independence. This legislation introduced special procedure for paying the salaries of court presidents and judges in order to avoid significant differences between the salaries prescribed for their respective positions. Thus, a judge's salary must be no lower than 80 % of that of a president of the court where a judge works (see Article 44.2). Legislators were seeking to avoid large discrepancies between the salaries of judges and court presidents, and to ensure that the judge in fact received the salary prescribed for his position.

The disputed provision of the Law deprived judges of this right in 2008 and, therefore, of one of the guarantees of their independence.

Moreover, the norm introduced a procedure under sub-paragraph 61 Section II of the Law, whereby salary rates would be established by the Cabinet of Ministers. This contravened Article 92.1.14 of the Constitution, under which the status of judges is determined exclusively by laws. The Cabinet of Ministers is the highest body in the system of executive power (Article 113.1 of the Constitution) and within the scope of its competence is entitled to issue resolutions and orders (Article 117.1 of the Constitution).

The Constitutional Court took the view that the procedure for calculating a monthly increment for length of service introduced in the analyzed part of the Law resulted in a decrease of its amount, as a

"position salary" is only part of a judge's monthly earnings. Such a decrease results in a diminution of a judge's overall salary and is a restriction on the existing guarantees of judicial independence.

Sub-paragraph "c" of paragraph 61.2 Section II of the Law introduces new wording for Article 44.7.1 of the Law on the Status of Judges. It envisages some changes to the procedure of allocation of housing for judges of the Constitutional Court, the Supreme Court, higher specialised courts, appellate and local courts. Judges of the Constitutional Court, Supreme Court and higher specialised courts always used to receive housing from the Cabinet of Ministers. Judges from other courts received housing from their local state executive authorities. The Law swept away these allowances, giving grounds to recognise sub-paragraph "c" of paragraph 61.2 Section II of the Law unconstitutional.

Sub-paragraph 61.1 of Section II of the Law envisaged the elimination of the words "without limitation of the threshold amount of monthly financial allowance" from Article 43.4.1 of the Law on the Status of Judges, and the establishment of such financial allowance – ten thousand hryvnias. These provisions were adopted by the Parliament contrary to the requirements of Article 22.3 of the Constitution on the inadmissibility of narrowing the contents and scope of the existing rights and freedoms when adopting new laws or amending those already in force.

Before the introduction of amendments to Article 123.2 of the Law on the Judiciary in the Ukraine, the provisions of sub-paragraph 62 of Section II of the Law allowed court employees such as the staff of court secretariats and state court administrations in their capacity as civil servants rights to the same pay, welfare provision and social protection as respective categories of staff of the secretariats of the legislative and executive branch. Their pay was equivalent to that of relevant categories of employees of secretariats of the top central or local executive bodies. The above amendments deprived the court employees of these rights and guarantees.

The annulment by the 2008 Law of paragraph 3 Clause 1 of the Resolution of the Parliament on the procedure for the enactment of the Law on the Status of Judges and a statement regarding the amount of monthly financial allowance for retired judges brought about a narrowing of the scope and content a judges' rights and a limitation to their independence. Therefore, that part of the provision of sub-paragraph 63 Section II of the Law contravened Articles 22 and 126.1 of the Constitution.

Judges V. Kampo, V. Shyshkin, P. Tkachuk attached dissenting opinions.

Languages:

Ukrainian.



Identification: UKR-2008-2-012

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 27.05.2008 / **e)** 11-rp/2008 / **f)** On compliance with the Constitution (constitutionality) of individual provisions of laws in the wording of the Law on amending some Laws on the Status of Deputies of the Supreme Council of the Autonomous Republic of Crimea and Local Councils” / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 40/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.

4.8.6.1.1 Institutions – Federalism, regionalism and local self-government – Institutional aspects – Deliberative assembly – **Status of members**.

Keywords of the alphabetical index:

Imperative mandate / Parliament, member, mandate, termination by political party.

Headnotes:

Provisions giving the top governing body of a political party the right to independently determine the grounds for recalling a deputy (in addition to the grounds of “secession”, “non-affiliation” and “change of factions”) violate the Constitution.

Summary:

The case concerned legislation on the status of deputies of the Supreme Council of Crimea and Local Councils, and in particular, a provision that entitled the top governing body of a political party to terminate the mandate of a deputy.

Under Article 5.2 of the Constitution, the only bearer of sovereignty and source of power in Ukraine is the people. The people exercise power directly and through bodies of state power and bodies of local self-government. Electoral systems set up by law form a vital part of the mechanism for the exercise of power by the people. The contents of such systems are important for determining the nature of a respective representative mandate and specific characteristics of functioning of the institution of constitutional responsibility in the system of representative bodies.

The Fundamental Law provides for the basic principles of local self-government in Ukraine (Chapter XI). On this basis, under Article 8.2 of the Constitution, laws are adopted to directly regulate issues of local self-governance and procedures for the formation, activities and responsibilities of local self-government bodies (see Article 146 of the Constitution). Local self-government issues not directly regulated by the Constitution are also subject to legislative regulation.

Powers and authorities, the procedure of formation and activities of the Supreme Council of the Autonomous Republic of Crimea are determined by the Constitution and Laws, and normative legal acts of the Supreme Council of the Autonomous Republic of Crimea on issues falling within its terms of reference (Article 136.4 of the Constitution). Respective provisions are provided for in Article 24.5 of the Constitution of the Autonomous Republic of Crimea.

A systematic analysis of provisions of Articles 19.2, 92.1.15, 92.1.20, 136.4, 140.3, 146 of the Constitution and other provisions, including Articles 5.2, 36.2, 38.1, 71.2 of the Constitution, would indicate that the organisation and activities of the Supreme Council of the Autonomous Republic of Crimea, the legal status of local councils, and safeguards such as the grounds and procedure for recalling deputies of these councils are not provided for in the Constitution. Under Article 92.1 of the Constitution, principles of local self-government (sub-paragraph 15), organisation and procedure for conducting election and referenda (sub-paragraph 20) are determined exclusively by law.

The system and guarantees of local self-government in Ukraine, principles of organisation and activities, legal status and responsibilities of local self-government bodies and officers are set forth in the Law “On Local Self-Government in Ukraine”. According to Article 49.11 of this Law, “powers and authorities of deputies’ activities are determined in the Constitution, in this Law, the law on the status of a

deputy and other laws". Powers and authorities, procedure for organisation and activities of the Supreme Council of the Autonomous Republic of Crimea, local councils, legal status, guarantees of activities and procedure for recalling deputies of such councils are set forth, respectively, in the Law on the Supreme Council of the Autonomous Republic of Crimea on the Status of Deputies of local Councils.

Amendments to the above legislation introduce additional grounds for recalling a deputy of the Supreme Council of the Autonomous Republic of Crimea and a local council deputy as a result of a decision by the top governing body of a political party (election bloc of parties), on the electoral list of which he or she was elected a deputy of the council concerned. Grounds include non-affiliation by a deputy (unless he or she represents a village or settlement council) to a deputy faction of a respective local organisation of the political party (election bloc of political parties). Another ground could be his or her secession from a deputy faction as a result of submission of a personal application or entry to another deputy faction.

Amendments to legislation on the Supreme Council of the Autonomous Republic of Crimea and on the Status of Deputies of Local Councils" add further grounds besides "secession", "non-affiliation" and "change of factions". They allow the top governing body of the political party (election bloc of political parties) on whose election list he or she was elected to take a decision to recall a deputy of a respective council on "other grounds established by the top governing body of a political party". When enacting this provision, the legislator gave the top governing body of a political party the right to independently determine the grounds for recalling a deputy.

The legal status, responsibility, procedure and conditions for termination of the authorities of deputies of the Supreme Council of the Autonomous Republic of Crimea and local councils are to be determined by law. The grant of such a right to the top governing body of a political party contravenes Articles 92.1.15, 92.1.20, 136.4, 140.3 and 146 of the Constitution.

Under the Constitution, laws and other normative legal acts do not have retroactive force, except in cases where they mitigate or annul the responsibility of a person (Article 58.1).

Under Article 94.1 of the Constitution, a law enters into force within ten days from the day of its official promulgation, unless otherwise envisaged by the law itself, but not prior to the day of its publication. Sub-paragraph 1 Section II "Final Provisions" of the Law "On amending Some Laws on the Status of Deputies of the Supreme Council of the Autonomous Republic

of Crimea and Local Councils" dd. 12 January 2007 (hereinafter referred to as Law no. 602-V) envisages that the law "enters into force on the day of its publication ...". The time of enactment specified in Law no. 602-V "on the day of its publication" therefore meets the requirements of the Constitution.

An analysis of Articles 58 and 94 of the Constitution and the jurisprudence of the Constitutional Court demonstrates that the application of Law no. 602-V to deputies of the Supreme Council of the Autonomous Republic of Crimea and local councils elected in 26 March 2006 does not violate the Constitution. Law no. 602-V applies only to those legal relations that emerged after its publication or entry into force.

Languages:

Ukrainian.



Identification: UKR-2008-2-013

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 25.06.2008 / **e)** 12-rp/2008 / **f)** On compliance with the Constitution of Article 13.5 and 13.6 of the Law "On the Status of a National Deputy", Article 61.4 of the Rules of Procedure of the Parliament (*Verkhovna Rada*) and official interpretation of provisions of Articles 81.2.6, 81.6, 83.6 of the Constitution, Article 13.4 of the Law "On the Status of a National Deputy" (case on stay of a national deputy in a deputy faction) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 52/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
 4.5.3.4.1 Institutions – Legislative bodies – Composition – Term of office of members – **Characteristics.**
 4.5.10.3 Institutions – Legislative bodies – Political parties – **Role.**
 4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies.**

Keywords of the alphabetical index:

Parliament, member, mandate, termination / Political party, parliamentary.

Headnotes:

The non-affiliation of a national deputy elected on an election list of a political party (election bloc of political parties) with a deputy faction of this political party (election bloc of political parties) should be interpreted as meaning the refusal of a national deputy in accordance with the established procedure to join a deputy faction formed by national deputies elected on an election list of a political party or election bloc.

The “exit” of a national deputy from a deputy faction of a political party or election bloc means termination by a national deputy of his or her membership of a deputy faction of a political party or bloc on whose election list he or she was elected a national deputy.

The provisions of the Ukrainian legislation on the status of national deputies regarding a national deputy’s right to be a member of only one faction should be understood as obliging a national deputy to be a member of a deputy faction of the political party (election bloc of political parties) on whose election list he or she was elected a national deputy.

Summary:

Fifty national deputies asked the Constitutional Court to recognise the provisions of Article 13.5 and 13.6 of the Law on the Status of a National Deputy and Article 61.4 of the Rules of Procedure of the Parliament (*Verkhovna Rada*) as non-compliant with Article 83 of the Constitution.

The creation of deputy factions is an important characteristic of modern parliaments. The rationale behind the unification of deputies in factions is to ensure that the goals and objectives set out in party manifestos are actually achieved. It also objectively requires respect for faction discipline from deputies.

At the root of the constitutional basis for the structure and *modus operandi* of the Ukrainian parliament as the sole body of legislative power in Ukraine is the principle of a democratic state based on the rule of law. Deputy factions play a pivotal role, in establishing coalitions with other factions, in helping to appoint the Prime Minister and in the formation of the Cabinet of Ministers (see Article 83.6, 83.7 and 83.8 of the Constitution). They also have a part to play in the event of termination of the mandate of a national deputy since this is intrinsically linked to the deputy’s affiliation to one of the factions (Article 81.2.6). Deputy factions may also be involved in the early termination of Parliament’s powers and authorities by the President in the event that the

Parliament fails to form a coalition of deputy factions within one month (Article 90.2.1). The numerical strength of a deputy faction will determine its real impact in the process of creation of coalitions, election of the Chairs and Deputy Chairs of the Parliament, the establishment of parliamentary committees and temporary special and investigation commissions.

Under Article 13.5 of the Law, a national deputy is entitled to leave a faction or group without hindrance. Under Article 13.6 of the Law, they do not have to be affiliated to any registered deputy faction. These prescriptions are in line with Article 13.1 of the Law, under which deputy groups in parliament are created to guarantee a right of national deputies to form deputy factions and groups.

According to the Constitution, the faction structure of the Parliament and the formation of a deputy coalition constitute mandatory preconditions for its legitimacy. Article 83.6 of the Constitution provides for the creation of a deputy coalition in the Parliament based on the results of elections and reconciliation of political positions. The coalition consists of the majority of national deputies that form constitutional membership of the Parliament. Under Article 90.2.1 of the Constitution, if within a month the Parliament fails to form a coalition of deputy factions as provided for by the Constitution, the President has a right to terminate the powers and authorities of the parliament.

The Constitution links the validity of a representative mandate of a national deputy to his or her membership of a deputy faction of a political party on whose election list he or she was elected. The provisions of Article 13.5 and 13.6 of the Law under which a national deputy can leave a deputy faction without hindrance and which do not require him or her to belong to any registered deputy faction do not comply with Articles 81.2.6, 83.6 of the Constitution.

The Constitutional Court stated its position on individual membership of national deputies in a deputy coalition (Article 13.4 of the Law) in its justification of unconstitutionality of provisions of Article 13.5 and 13.6 of the Law, and its interpretation of Article 81.2.6 of the Constitution. The Court has repeatedly emphasised that issues pertaining to legislative regulation are beyond its jurisdiction. The adoption of and the making of amendments to legislation is the exclusive prerogative of the Parliament (Articles 75, 85 of the Constitution). This constitutes grounds for termination of the constitutional review proceedings relating to this part of the case. See in this context Article 45.3 of the Law on the Constitutional Court.

Until the provisions of Article 81.2.6 and 81.6 of the Constitution (regarding the early termination of a national deputy's mandate, and the role played by the supreme leadership body of a political party) are regulated by law, these points are to be governed by the provisions of Article 8.3 of the Constitution (direct effect of constitutional norms) and relevant provisions of effective legislation. A mandatory element for the termination of a national deputy's authority is the availability of at least one reason set out in Article 81.6 of the Constitution and a decision of the supreme leadership body of a respective political party. Judge V. Kampo attached a dissenting opinion.

Languages:

Ukrainian.



Identification: UKR-2008-2-014

a) Ukraine / b) Constitutional Court / c) / d) 25.06.2008 / e) 13-rp/2008 / f) On conformity with the Constitution (constitutionality) of provision of Item 3.1, Chapter IV of the Law On the Constitutional Court (the case on the authority of the Constitutional Court) / g) *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 52/2008 / h) CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

1.3.4.11 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of constitutional revision.**

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

Keywords of the alphabetical index:

Law, amendment / Constitutional Court, jurisdiction / Constitution, amendment.

Headnotes:

1. To recognise as non-compliant with the Constitution the provisions of item 3.1, Chapter IV of the Law on the Constitutional Court of 16 October 1996, no. 422/96-VR (in the edition of the Law as of 4 August 2006, no. 79-V). Under this provision, the

jurisdiction of the Constitutional Court does not extend to decisions as to the constitutionality of legislation already in force introducing amendments to the Constitution.

2. Constitutional proceedings as to the conformity of the Law on introducing amendments to Chapter IV “Final and Transitional Provisions” of the Law on the Constitutional Court as of 4 August 2006, no. 79-V, with Article 126 of the Constitution, are to be terminated.

3. Provision of Item 3.1 of Chapter IV of the Law on the Constitutional Court as of 16 October 1996, no. 422/96-VR (in the edition of the Law as of 4 August 2006, no. 79-V) was deemed unconstitutional and would lose its legal force immediately the Constitutional Court adopts this decision.

Summary:

Forty seven people's deputies asked the Constitutional Court to consider the conformity with the Constitution of the Law introducing amendments to Chapter IV “Final and Transitional Provisions” of the Law on the Constitutional Court.

The Law introduced an amendment to Item 3.1 of Chapter IV “Final and Transitional Provisions” of the Law on the Constitutional Court. This removed from the Constitutional Court's jurisdiction the possibility of deciding on issues of the constitutionality of legislation introducing amendments to the Constitution which had entered into force.

Under Article 6.2 of the Constitution, bodies of legislative, executive and judicial power exercise their authority within the limits established by this Constitution and in accordance with the law.

Under Article 147 of the Constitution, the Constitutional Court is the sole body of constitutional jurisdiction in Ukraine. It decides on issues on conformity of laws and other legal acts with the Constitution, and gives an official interpretation of the Constitution.

The extent of and limitations on the Constitutional Court's authority are determined by the provisions of Article 150 of the Constitution, factually reproduced by Article 13 of the Law on the Constitutional Court. The procedure for the organisation and operation of the Constitutional Court, and the procedure for its review of cases, are determined by law (Article 153 of the Constitution).

In its decisions, the Constitutional Court has formed legal positions regarding the specific authorities of state bodies as follows:

- redistribution of constitutional authority is only possible by introducing amendments to the Constitution in accordance with Chapter XIII of the Constitution (decision of 23 December 1997, no. 7-zp, in the case on the Chamber of Accounting);
- exceptions from the constitutional norms are established by the Constitution itself and not by other normative acts (decision of 30 October 1997, no. 5-zp, in *Ustymenko* case);
- the Constitutional Court's jurisdiction includes decision-making on all issues stipulated by Article 150 of the Constitution. These include conformity with the Constitution of laws and other legal acts of the Parliament, acts of the President and the Cabinet of Ministers, legal acts of the Parliament of the Autonomous Republic of Crimea, and the official interpretation of the Constitution and laws. Other articles of the Constitution are relevant here, including Article 159, which deals with the compliance of draft legislation on the introduction of amendments to the Constitution with the requirements of Articles 157 and 158 of the Constitution. In the first case, what is known as "subsequent control" by the Constitutional Court takes place: the Court examines the constitutionality of legal acts in force. In the second instance, it applies preceding (preventative) constitutional control. See decision of 9 June 1998, no. 8-rp/98, in the case on introducing amendments to the Constitution.

The Constitutional Court took the view that the Parliament (*Verkhovna Rada*), in its legislative role, may regulate issues regarding a sole body of constitutional jurisdiction in Ukraine only within the limits of its constitutional authority as envisaged by Article 153 of the Constitution. Thus, it can determine the procedure and organisation of the Constitutional Court and procedure for its review of cases.

Changes to Constitutional Court authorities determined by the Constitution may only be made by introducing amendments to the Constitution.

A draft law on introducing amendments to the Constitution is considered by the Parliament upon the availability of an opinion of the Constitutional Court on the conformity of the draft law with the requirements of Articles 157 and 158 of this Constitution (Article 159).

Article 150 of the Constitution does not rule out the possibility of the Constitutional Court exercising subsequent constitutional control of the law on introducing amendments to the Constitution after it has been adopted by the Parliament. The jurisdiction of the courts extends to all legal relations that arise in the state (Article 124 of the Constitution). The Constitutional Court considers that it is the Court which is to exercise subsequent constitutional control of the law on introducing amendments to the Constitution. The absence of judicial control of the procedure for its review and adoption determined in Chapter XIII of the Constitution may result in restriction or abolition of human and civil rights and freedoms, termination of independence, violation of territorial indivisibility and changes to the constitutional order in the way that was not envisaged by the Fundamental Law.

In view of the above, the Constitutional Court concluded that the law the Parliament adopted infringed the provisions of Articles 147 and 150 of the Constitution.

Judges P. Tkachuk and M. Markush submitted dissenting opinions.

Languages:

Ukrainian.



Identification: UKR-2008-2-015

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 08.07.2008 / **e)** 14-rp/2008 / **f)** On compliance with the Constitution (constitutionality) of the provisions of Article 11.1.1, 11.1.2, 11.2.1 and 11.2.2 of the Law on Natural Monopolies (case on national commissions regulating natural monopolies) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 52/2008 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.1.2 Institutions – Head of State – Powers – **Relations with the executive powers.**
4.6.4.1 Institutions – Executive bodies – Composition – **Appointment of members.**

Keywords of the alphabetical index:

Head of State / President, competence / Commission, establishment / Monopoly.

Headnotes:

The case concerned the compliance with the Constitution of certain provisions of the Ukrainian Law on Natural Monopolies and the role of the Head of State in regulating commissions on natural monopolies and their membership.

Summary:

Sixty national deputies requested a constitutional review of Article 11.1.1, 11.1.2, 11.2.1 and 11.2.2 of the Law on Natural Monopolies.

The disputed provisions of the Law provide for the following:

- national commissions regulating natural monopolies (hereinafter referred to as the commission) are central executive bodies with a special status that are created and terminated by the President (Article 11.1.1);
- the commissions act on the grounds of provisions approved by the President (Article 11.1.2);
- the commissions consist of the Commission Chair and at least two commission members appointed and dismissed by the President upon nomination by the Prime Minister (Article 11.2).

The Constitutional Court considered the issues raised by the deputies in the light of the following. Under Article 106.1.31 of the Constitution, the powers and authorities of the President are determined exclusively by the Fundamental Law. The Constitutional Court repeatedly referred to this fact in its documents.

In decision no. 7-rp/2003 of 10 April 2003 (case on guarantees of activities of a national deputy), *Bulletin* 2003/1 [UKR-2003-1-007] it is stated that "powers and authorities of the President are provided for in the Constitution, which makes it impossible to adopt laws that would provide for other powers and authorities (rights and obligations)". The Constitutional Court took the same stance in its decisions no. 9-rp/2004 of 7 April 2004 (case on the Co-ordination Committee), *Bulletin* 2004/1 [UKR-2004-1-010] and no. 1-rp/2007 of 16 May 2007 (case on dismissal of a judge from administrative office), *Bulletin* 2007/2 [UKR-2007-2-001].

When approving the Law in 2000 and providing for the powers and authorities of the President mentioned in Article 11.1.1, 11.1.2, 11.2.1 and 11.2.2 of the Law, the Parliament acted in accordance with the scope of constitutional competence of the head of state provided for in Article 106 of the Constitution, (namely the power to form central executive bodies and regulate their activities).

However, Law no. 2222-IV changed the wording of Article 106 of the Constitution. There was no provision in the new wording of the Article for the head of state's powers to create central executive bodies and regulate their activities through presidential decrees. The President may only take action in respect of those bodies which he or she is constitutionally authorised to create and regulate.

Judges D.D. Lylak and V. Kampo attached a dissenting opinion.

Languages:

Ukrainian.



United Kingdom

House of Lords

Important decisions

Identification: GBR-2008-2-003

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 05.06.2008 / **e)** / **f)** Chikwamba v. Secretary of State for the Home Department / **g)** [2008] UKHL 40 / **h)** [2008] 1 *Weekly Law Reports* 1420; CODICES (English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

Keywords of the alphabetical index:

Asylum, refusal, appeal, in-country / Asylum, seeker, removal from territory / Asylum, seeker, entry clearance, from abroad.

Headnotes:

It was a disproportionate interference with the Article 8 ECHR right to require an asylum-seeker who was both married to another asylum-seeker who had been granted asylum and who had a young child within the marriage to return to her state of origin in order to apply there for entry clearance to return to the UK. While the policy of requiring asylum-seekers to return to their state of origin in order to apply for entry clearance had a legitimate aim i.e., the maintenance and enforcement of immigration control, to routinely apply it and dismiss applications to remain based on Article 8 ECHR was disproportionate and not justified by reference to the aim of seeking to effectively enforce immigration control.

Summary:

I. The claimant was a Zimbabwean national. She arrived in the UK in 2002 and sought asylum. She was refused asylum in June 2002. Because conditions had deteriorated in Zimbabwe the order for removal was suspended until November 2004. In

September 2002 she married another Zimbabwean national who had been granted asylum in June 2002. In February 2003 the Secretary of State refused the claimant's claim that to remove her from the UK would breach her Article 8 ECHR right. In April 2004 the claimant and her husband had a baby girl.

II. Lord Brown gave the lead judgment, with whom Lord Bingham, Hope, Scott and Baroness Hale agreed. He noted that the issue before the court was whether in determining an appeal under Section 65 of the Immigration and Asylum Act 1999 (or as now Sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002) from a refusal of leave to remain (where leave to remain was sought on the basis that to remove the appellant from the UK would interfere disproportionately with his or her Article 8 ECHR right) when, if ever, it is appropriate to dismiss that appeal on the ground that the appellant should be required to leave the UK and seek leave to enter from an entry clearance officer abroad.

The appellant advanced two arguments. First, that there was an unqualified in-country right of appeal in all human rights cases per Section 65 of the 1999 Act. That right of appeal can only be denied where the Secretary of State, under Section 72.2.a of the 1999 Act, certifies the human rights claim advanced by the appellant as 'manifestly unfounded.' The right of appeal cannot be refused on the basis that the appellant can properly seek entry clearance abroad. Secondly, it was submitted that even if the first submission was rejected by the court, the present case was not a case where it could be concluded that the appellant could properly seek entry clearance abroad. It could not because the interference with her Article 8 ECHR right that would arise from requiring her deportation and in order to apply for entry clearance abroad was disproportionate.

The Respondent took the following points. First, it was wrong to suggest that the approach taken by the Secretary of State deprived the appellant of her in-country appeal. She had had her in-country appeal. It was simply determined so as to require her to leave the UK and seek entry clearance abroad. There was nothing in Section 65 of the 1999 Act that precluded such a determination being made. Secondly, it was submitted that any interference with the appellant's Article 8 ECHR right was not disproportionate.

Lord Brown accepted the Respondent's argument on the first point. Dismissing an appeal under Section 65 of the 1999 Act on the ground that the appellant ought to apply for entry clearance abroad was to determine that appeal and not to deny an in-country appeal.

On the second point Lord Brown noted that there was no question as to the genuineness of the appellant's marriage nor to the nature of the obstacle that her husband faced in returning to Zimbabwe if she were required to seek entry clearance there. Equally, there was no dispute that if entry clearance was to be conducted in Zimbabwe it would take three months. The question was whether the immigration policy that required this temporary interference with family life served a legitimate aim and was proportionate. Lord Brown suggested that notwithstanding the stated policy aim behind the policy the real rationale behind it was one which sought to deter individuals from coming to the UK without having obtained entry clearance abroad. This was noted as not being necessarily objectionable. In Article 8 ECHR case however careful attention had to be given to the prospective length and degree of family disruption that requiring an individual to leave the UK to seek entry clearance abroad might give rise to. It might however be a good reason to require an appellant to do this when the officer abroad would be in a better position to assess the genuineness of a marriage or the relationship between family members. It would however tell against requiring an appellant to do this if any second appeal under Section 65 of the 1999 Act would need to take place in the UK with the appellant then abroad. He went on to hold that only comparatively rarely in a case involving children would it be proportionate to require an appellant to leave the UK and seek entry clearance abroad. That issue should, in such cases, be determined in the UK.

In her concurring judgment, Baroness Hale held that even were it not too disproportionate to expect a husband to endure a few months' separation from his wife it must be disproportionate to expect a four year old girl to either be separated from her mother for a few months or to have to travel to conditions that were accepted to be 'harsh and unpalatable' in Zimbabwe in order to apply for UK entry clearance.

Languages:

English.



Identification: GBR-2008-2-004

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 30.07.2008 / **e)** / **f)** Chief Constable of the Hertfordshire Police v. Van Colle (administrator of the estate of GC (deceased)) & Another / **g)** [2008] UKHL 50 / **h)** [2008] 3 *Weekly Law Reports* 593; CODICES (English).

Keywords of the systematic thesaurus:

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**

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

Keywords of the alphabetical index:

Violence, threat, police, duty to protect / Life, risk, duty to protect / Life, duty to protect / Police, duty to protect.

Headnotes:

In order to establish that a positive obligation imposed under Article 2 ECHR had been violated a claimant had to show that a public authority:

- i. either had or ought to have known at the relevant time of a real and immediate risk to an identified individual's life from;
- ii. criminal acts of a third party; and
- iii. the public authority failed to take measures that were within its power to take, which reasonably judged, might have avoided the risk. This test was a constant one. It did not differ where, for instance, the risk to life arose from a decision by a public authority to require an individual to give evidence in a criminal trial.

Summary:

I. The House of Lords heard two joined appeals. Both appeals raised the same issue: how and in what circumstances would the police, having been informed of a threat to kill or injure an individual and having taken no steps to prevent the threat from materialising, be liable to the individual's relatives when the threat did materialise. The first claim arose as a consequence of the Giles Van Colle's murder at the hands of a man against whom he was to give evidence in a criminal trial. The second case arose as a consequence of an injury inflicted on the claimant by his former partner. The first claim arose under

Articles 2 and 8 ECHR. The second claim was brought under the common law only.

II. Lord Bingham gave the lead judgment on the first claim. He first noted that the scope of the Article 2 ECHR obligation had been determined authoritatively by the Strasbourg Court in *Osman v. the United Kingdom* (1998) 29 *European Human Rights Reports* 245. In that judgment the Court noted that Article 2 ECHR required States to refrain from intentionally and unlawfully taking life. This required the State to do two things. First, it required the State to enact an effective criminal law and law enforcement. Secondly, in certain well-defined circumstances it placed a positive obligation to take preventative measures to protect individuals whose lives were at risk from other's criminal acts. The ambit of the second requirement was the focus of the present appeal.

Lord Bingham noted that the Strasbourg Court, in *Osman* at [116], that the relevant authorities "knew or ought to have known at the time of the existence of a real and immediate threat to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers, which judged reasonably, might have been expected to avoid the risk." This was a test, as Lord Hope noted, that required no further explanation. It simply needed applying to the facts in each case.

It had been argued however by the claimants (Giles Van Colle's estate) that the test was modified because the police authority had involved Mr Van Colle in the prosecution of the individual who would cause his death. It was said that this placed him in a special category of individual to whom a lower threshold applied than that set out in *Osman*. That submission was rejected. The proper interpretation of the *Osman* test was that set out by Lord Carswell in *In re Office L* [2007] UKHL 36; [2007] 1 *Weekly Law Reports* 2135 at [20]. In that judgment it was held that the test was constant and did not differ depending on the circumstances. What differed were the facts and circumstances of each case, the test however did not change depending on those facts and circumstances.

Languages:

English.



United States of America Supreme Court

Important decisions

Identification: USA-2008-2-003

a) United States of America / b) Supreme Court / c) / d) 12.06.2008 / e) 06-1195, 06-1196 / f) *Boumediene v. Bush* / g) 128 *Supreme Court Reporter* 2229 (2008) / h) CODICES (English).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
4.7.1 Institutions – Judicial bodies – **Jurisdiction**.
5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.
5.3.13.3.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – **Habeas corpus**.

Keywords of the alphabetical index:

Enemy combatant / Extraterritoriality / *Habeas Corpus*, writ / Sovereignty, *de jure*.

Headnotes:

A detainee's status as an alien is not in itself a basis for denial of the writ of *habeas corpus*.

A detainee's location outside the territory of the *de jure* sovereignty of the United States is not in itself a basis for denial of the writ of *habeas corpus*.

To determine if constitutional *habeas corpus* protection extends to a location outside the territory of the *de jure* sovereignty of the United States, a court must apply a pragmatic approach comprised of at least three factors:

1. the citizenship and status of the detainee and the adequacy of the process through which that status determination was made;

2. the nature of the sites where apprehension and then detention took place; and
3. the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

The Constitution limits the powers of the legislative and executive branches, even when acting extraterritorially, to decide when and where its terms apply.

The legislature may replace the *habeas corpus* remedy with another procedure, but the Constitution requires that it must be an adequate substitute that at least:

1. provides detainees with a meaningful opportunity to demonstrate that they are being held pursuant to an erroneous application or interpretation of relevant law; and
2. grants the *habeas* court the power to order the conditional release of individuals unlawfully detained.

The constitutional requirement that a *habeas* court or its substitute must have the power to correct errors related to an individual's detention includes some judicial authority to assess the sufficiency of the evidence against the detainee.

The Constitution requires that a detainee in a *habeas* proceeding must have an opportunity to present relevant exculpatory evidence.

Summary:

I. Lakhdar Boumediene and Fawzi Khalid Abdullah Fahad Al Odah (the petitioners) are aliens who were captured outside the United States and subsequently detained at the U.S. Naval Station at Guantanamo Bay, Cuba. In proceedings before Combatant Status Review Panels (CRSTs) established by the U.S. Department of Defense, they were determined to be "enemy combatants".

In two separate proceedings, Boumediene and Al Odah filed petitions in the U.S. courts for writs of *habeas corpus* to challenge the legality of their detention, including the legality of their designation as enemy combatants. The writ of *habeas corpus* is a means for judicial review of the legality of an individual's detention by the executive branch. It has its origins in common law, but also is addressed in the "Suspension Clause" in Article I.9.2 of the Constitution, which provides that:

"[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The petitioners' cases were consolidated for appeal. While the appeal was pending, the U.S. Congress enacted two statutes:

1. the Detainee Treatment Act of 2005 (DTA), which among other provisions gave the U.S. Court of Appeals for the District of Columbia Circuit exclusive jurisdiction to review CRST decisions; and
2. the Military Commissions Act of 2006 (MCA), which in its Section 7 stripped the federal courts of jurisdiction to consider *habeas corpus* petitions filed by Guantanamo detainees who had been determined to be enemy combatants. On the basis of MCA Section 7, the U.S. Court of Appeals for the District of Columbia Circuit dismissed the petitions for lack of jurisdiction. As a result, the Court of Appeals ruled, the detainees were not entitled to the privilege of the writ of *habeas corpus* or the protections of the Suspension Clause.

II. In reviewing the decision of the Court of Appeals, the U.S. Supreme Court first determined that neither the petitioners' status as aliens nor the extraterritorial location of the Guantanamo Naval Station were grounds to deny eligibility for the writ. In particular, the Court rejected the U.S. government's argument that the constitutional protections of the Suspension Clause extend only to territory over which the United States maintains *de jure* sovereignty. In doing so, the Court distinguished its 1950 decision in *Johnson v. Eisentrager*, relied on by the government for its *de jure* sovereignty argument, in which the Court stressed practical difficulties for its denial of the writ of *habeas corpus* to prisoners detained in a prison in Germany. In addition, the Court stated, the sovereignty-based test raises troubling separation of powers concerns, because the Constitution limits the powers of the legislative and executive branches, even when acting extraterritorially, to decide when and where its terms apply. Therefore, rather than employ a categorical rule, the Court applied a pragmatic approach to the question of extraterritoriality. This approach is comprised of at least three factors:

1. the citizenship and status of the detainee and the adequacy of the process through which that status determination was made;
2. the nature of the sites where apprehension and then detention took place; and
3. the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

Applying these factors, the Court concluded that the petitioners were entitled to the writ.

Under the Court's precedents, the mandate in the Suspension Clause to make available the *habeas corpus* remedy may be avoided if Congress has provided adequate substitute procedures for *habeas corpus*. The Court therefore examined the adequacy of the DTA as a substitute. While the Court stated that it would not offer a comprehensive summary of the requirements of an adequate substitute, it said that they include at least:

1. the availability of a meaningful opportunity for detainees to demonstrate that they are being held pursuant to an erroneous application or interpretation of relevant law; and
2. the power of the habeas court to order the conditional release of individuals unlawfully detained.

Due to a number of perceived insufficiencies in the DTA, including the constraints placed on detainees' ability to rebut the government's factual basis for asserting that they are enemy combatants, the Court determined that the DTA did not satisfy these requirements.

Therefore, the Court concluded that MCA Section 7 brought about an unconstitutional suspension of the writ of *habeas corpus*. As a result, a jurisdictional bar did not exist to the examination of the petitioners' claims in the federal courts.

Justice Souter filed a concurring opinion. Four of the Court's nine Justices dissented from the Court's decision. Their views were set forth in dissenting opinions filed by Chief Justice Roberts and Justice Scalia.

Cross-references:

- *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct. 936, 94 L. Ed. 1255 (1950).

Languages:

English.



Identification: USA-2008-2-004

a) United States of America / **b)** Supreme Court / **c)** / **d)** 25.06.2008 / **e)** 07-343 / **f)** Kennedy v. Louisiana / **g)** 128 *Supreme Court Reporter* 1521 (2008) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.3.2 Fundamental Rights – Civil and political rights – **Right to life**.
 5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.

Keywords of the alphabetical index:

Death penalty, proportionality / Punishment, capital, proportionality / Rape, child, death penalty / Secrecy, evolving standards.

Headnotes:

The death penalty in itself does not violate the constitutional prohibition of cruel and unusual punishments.

The constitutional prohibition of cruel and unusual punishments proscribes all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.

The constitutional prohibition of excessive or cruel and unusual punishments flows from the basic precept of justice that punishment for a crime should be graduated and proportional to the offense; in addition, respect for the dignity of the person requires that capital punishment must be limited to a narrow category of the most serious crimes in circumstances where an offender's extreme culpability makes him or her the most deserving of execution.

Whether the constitutional requirements concerning punishments have been fulfilled in a concrete case will be determined by norms that currently prevail, and their meaning is based on the evolving standards of decency that mark the progress of a maturing society.

In addition to the objective indicators of society's standards, as expressed in legislative enactments and state practice with respect to executions, the question of whether the death penalty is disproportionate to the crime committed will depend upon the standards elaborated by controlling precedents and the Supreme Court's own understanding and interpretation of the Constitution's text, history, meaning, and purpose.

Based both on national consensus and the Court's own independent judgment, the imposition of capital punishment on a person who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional.

Summary:

I. Patrick Kennedy was tried in a jury trial in a State of Louisiana Court for the crime of aggravated rape. He was charged in connection with the rape of his 8 year old step-daughter. He was found guilty and sentenced to death under a state statute authorising capital punishment for the rape of a child under 12.

The Louisiana Supreme Court affirmed the sentence. In so doing, the Court rejected Kennedy's reliance on the 1977 Supreme Court decision in *Coker v. Georgia*, which upheld capital punishment as constitutionally permissible when the crime was the rape of an adult woman, but left open the question of whether other non-homicide crimes can be punished by death consistent with the Eighth Amendment to the U.S. Constitution. The Eighth Amendment, which is applicable to the States through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, states in full that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Louisiana Supreme Court reasoned that children are a class in need of special protection and that child rape is unique in terms of the harm that it inflicts upon the victim and society. Therefore, the Court concluded that, except for first-degree murder, no crime is more deserving of the death penalty. The Court acknowledged that Kennedy would be the first person executed since the state law was amended to authorise the death penalty for child rape in 1995, and that Louisiana is in the minority of jurisdictions authorising death for that crime. However, the Court emphasised that four other States also had made child rape a capital crime since 1995, and that at least eight other States had authorised death for other non-homicide crimes. Therefore, citing the U.S. Supreme Court decisions in *Roper v. Simmons* and *Atkins v. Virginia* which held that it is the direction of change, rather than the numerical count, that is significant in regard to the Eighth Amendment, the Court held Kennedy's death sentence to be constitutional.

II. The U.S. Supreme Court, reviewing the decision of the Louisiana Supreme Court, held that the Eighth Amendment bars imposition of capital punishment for the rape of a child where the crime did not result, and was not intended to result, in the victim's death. In arriving at this conclusion, the Court pronounced that the Eighth Amendment's protections flow from the

proposition that punishment for a crime should be graduated and proportional to the offense. In regard to the proportionality requirement, the Court stated that the Eighth Amendment prohibits "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." In addition, according to the Court, respect for the dignity of the person requires that capital punishment must be limited to a narrow category of the most serious crimes in circumstances where the offender's extreme culpability makes him or her "the most deserving of execution." Whether these Eighth Amendment requirements have been fulfilled in a concrete case, the Court stated, will be determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that currently prevail. The Eighth Amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society. Thus, in the *Atkins* and *Roper* decisions, the Court ruled that the execution of mentally retarded persons and persons who were minors at the time of the crime, respectively, violated the Eighth Amendment because the offenders had diminished personal responsibility for the crime. Also, in the *Coker* decision, the Court found the death penalty disproportionate to the crime itself where the crime did not result, or was not intended to result, in the victim's death.

Meanwhile, however, while guided in part by the objective indicators of society's standards, the Court stated that it also views the proportionality question from the perspectives of standards set forth in controlling precedents and its own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose.

Applying this multi-faceted approach, the Court conducted a review of the authorities informed by contemporary norms, including the history of the death penalty for child rape and other non-homicide crimes, current state statutes, and state practice in regard to executions since the last execution for child rape in 1964. The Court concluded that this review demonstrated a national consensus against capital punishment for the crime of child rape. In addition, based on its own precedents and its understanding of the Constitution, the Court concluded, in its independent judgment, that the death penalty is not a proportional punishment for the crime of child rape. The Court therefore reversed the decision of the Louisiana Supreme Court.

Four of the Court's nine Justices dissented from the Court's decision. Their views were set forth in a dissenting opinion authored by Justice Alito.

Cross-references:

- *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L. Ed. 2d 982 (1977);
- *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L. Ed. 2d 1 (2005);
- *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L. Ed. 2d 335 (2002).

Languages:

English.

*Identification:* USA-2008-2-005

a) United States of America / **b)** Supreme Court / **c)** / **d)** 26.06.2008 / **e)** 07-290 / **f)** District of Columbia v. Heller / **g)** 128 *Supreme Court Reporter* 2783 (2008) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty.**

Keywords of the alphabetical index:

Arm, right to bear, limitation / Self-defense, right.

Headnotes:

The constitutionally-protected right to bear arms is an individual right, and not only a collective right.

Not all weapons fall within the scope of the constitutionally-protected right to bear arms; instead, the exercise of the right is limited to firearms in common use at the time.

The constitutional right to bear arms is not absolute, and may be made subject to certain limitations.

The inherent right of self-defense is a core protection within the right to bear arms; therefore, a regulation that encroaches too far on the right of self-defense, particularly its exercise within the home where the need for self-defense is most acute, will be constitutionally suspect.

Handguns are a class of firearms that people in the United States overwhelmingly choose for the lawful purpose of self-defense; therefore, they are within the scope of the constitutionally-protected right to bear arms and a prohibition on their possession, particularly in the home, may be constitutionally suspect.

Summary:

Dick Heller is a resident of the District of Columbia. A security guard at a governmental office building in the District, he was authorised to carry a handgun while on duty. He applied for a registration certificate for a handgun that he wished to keep in his home, but the District denied his application on the basis of a District law making it a crime to carry an unregistered firearm and prohibiting the registration of handguns. The District law also provides that no person may carry an unlicensed handgun, but authorises the police chief to issue one-year licenses, and requires residents to keep lawfully owned firearms unloaded and disassembled or bound by a trigger lock or similar device.

Heller filed a lawsuit seeking, on grounds of the Second Amendment to the U.S. Constitution, to enjoin the city from enforcing the prohibition of handgun registration, the licensing requirement to the extent that it prohibited carrying an unlicensed firearm in the home, and the trigger-lock requirement to the extent that it prohibited the use of functional firearms in the home. The Second Amendment states in full: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The Court of First Instance dismissed the lawsuit, but the U.S. Court of Appeals for the District of Columbia Circuit reversed that decision. The Court of Appeals ruled that that the Second Amendment protects an individual's right to possess firearms and that the District's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right.

The U.S. Supreme Court affirmed the decision of the Court of Appeals. In so doing, the Court concluded that the Second Amendment right to bear arms is an individual right, and not only a collective right connected with service in a "well regulated militia". This conclusion was based on analysis of the text of the Second Amendment, as well as its historical background. In addition, according to the Court, nothing in its case law, including its 1939 decision in *United States v. Miller*, foreclosed this interpretation. Contrary to the dissenting Justices' citation of *Miller* as supportive of the collective right interpretation, the Court stated that it stood simply for the proposition

that the Second Amendment's protections extend only to firearms "typically possessed by law-abiding citizens for lawful purposes" and therefore not to other types of weapons, such as short-barreled shotguns.

The Court stated also that the Second Amendment right is not unlimited, stating that it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." For example, the Court stated, concealed weapons prohibitions have been found constitutionally valid. Therefore, the Court explained that its decision in the instant case should not be viewed as casting doubt on prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. In addition, the Court recognised, in keeping with its *Miller* decision, that the scope of Second Amendment protection is limited to the types of weapons "in common use at the time." According to the Court, that limitation is supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons."

In the instant case, however, the Court concluded that the District's total ban on handgun possession in the home amounted to a prohibition on an entire class of firearms that people in the United States overwhelmingly choose for the lawful purpose of self-defense. According to the Court, the "inherent right of self-defense has been central to the Second Amendment right." In addition, the Court noted, the prohibition extended to the home, "where the need for defense of self, family, and property is most acute." Therefore, the District's absolute prohibition, as well as the trigger-lock requirement that any lawful firearm in the home be kept inoperable for the purpose of immediate self-defense, made the District's law unconstitutional. Because of these conclusions, the Court said it was not necessary to address the District's licensing requirement. Thus, assuming that Heller was not disqualified from exercising Second Amendment rights, the District was required to permit him to register his handgun and to issue him a license to carry it in his home.

Four of the Court's nine Justices dissented from the Court's decision. Their views were set forth in dissenting opinions filed by Justice Stevens and Justice Breyer.

Cross-references:

- *United States v. Miller*, 307 U.S. 174, 59 S.Ct. 816, 83 L. Ed. 1206 (1939).

Languages:

English.



Inter-American Court of Human Rights

Important decisions

Identification: IAC-2008-2-005

a) Organisation of American States / b) Inter-American Court of Human Rights / c) / d) 02.05.2008 / e) Series C 177 / f) Kimel v. Argentina / g) Secretariat of the Court / h) CODICES (English, Spanish).

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

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

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

5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**

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

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.**

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

Keywords of the alphabetical index:

Defamation, criminal proceedings, censorship, effect / Censorship, prior.

Headnotes:

Freedom of thought and expression encompasses not only the right to seek, receive, and disseminate ideas and information of any kind, but also to receive information and be informed about the ideas and information disseminated by others. However, it is not an absolute right, and States may restrict it by

imposing subsequent liability for its abuse. These restrictions should in no way limit, beyond what is strictly necessary, the full exercise of freedom of thought and expression or become either a direct or indirect mechanism of prior censorship.

The protection of the right to have one's honor respected and one's dignity recognised, as well as other rights which might be affected by the abusive exercise of freedom of thought and expression, justifies limitations to this latter right in accordance with strict proportionality criteria.

Protecting a person's honor and reputation may be grounds for establishing subsequent liability in the exercise of the freedom of thought and expression. Criminal proceedings are suitable when, by threatening to impose sanctions, they serve the purpose of preserving the legal right whose protection is sought. Restrictions or limitations on freedom of thought and expression of a criminal nature should take into account the seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception. At all stages the burden of proof must fall on the party who brings the criminal proceedings.

Any limitation or restriction on freedom of information must be both formally and materially provided for by law. Restrictions or limitations of a criminal nature must strictly meet the requirements of the criminal definition in order to adhere to the *nullum crimen nulla poena sine lege praevia* principle. Thus, they must be formulated previously, in an express, accurate, and restrictive manner.

Summary:

I. On 28 October 1991, a judge who had been criticised for his handling of a murder case in journalist Eduardo Kimel's book, *La Masacre de San Patricio (The San Patricio Massacre)*, started criminal proceedings against him for defamation. The court of first instance acquitted Kimel of that charge, but found him guilty of "false imputation of a publicly actionable crime" and sentenced him to one-year suspended imprisonment and the payment of \$ 20,000.0 (twenty thousand Argentine pesos) in damages, plus costs. This sentence was reversed by an appellate court, but the Supreme Court later overturned that judgment and sent the case to the Appeals Chamber for Criminal and Correctional Matters so that a new decision could be delivered. The Appeals Chamber reinstated the penalties imposed in the first instance, but convicted Kimel for defamation, instead of the

charge of “false imputation of a publicly actionable crime.” Subsequent motions for review were denied on 14 September 2000, rendering that judgment final.

On 19 April 2007, the Inter-American Commission on Human Rights (hereinafter, the Commission) filed an application against the State of Argentina to determine the international responsibility of the State for the violation of Article 8 ACHR (right to a fair trial) and Article 13 ACHR (Freedom of thought and expression), in relation to Article 1.1 ACHR (obligation to respect rights) and Article 2 ACHR (domestic legal effects) of the same instrument, to the detriment of Eduardo Kimel.

II. In its judgment of 2 May 2008, the Court first accepted the State’s acknowledgment of international responsibility for the violation of Kimel’s right to freedom of thought and expression recognised in Article 13.1 and 13.2 ACHR, in relation to the general obligations set forth in Articles 1.1 and 2 ACHR, and found, in addition, a violation of the right to be free from *ex post facto* laws established in Article 9 ACHR. The Court held that though the protection of a person’s honor and reputation is a legitimate end, and that criminal proceedings are suitable means to protect that honor, the State’s criminal legislation punishing defamation was insufficiently precise. Such a broad definition was contrary to the principle of *ultima ratio* intervention of criminal law. Additionally, the penalties imposed by this legislation on Kimel were disproportionate to the advantages obtained by the adoption of that legislation, given their limiting effect on the dissemination of ideas related to issues of public concern.

Second, the Court accepted the State’s acknowledgment of international responsibility for the violation of Kimel’s right to a hearing within a reasonable time, established in Article 8.1 ACHR, in relation to Article 1.1 ACHR, since his criminal proceedings lasted nine years, beyond what is reasonable considering the complexity of the case, and the State did not provide justification for such a delay.

Last, the Court accepted the waiver of rights made by the representatives regarding the right to a hearing by an impartial and independent court, as established in Article 8.1 ACHR, the right to appeal the judgment to a higher court, as established in Article 8.2.h ACHR, and the right to judicial protection, as established in Article 25 ACHR.

Consequently, the Court ordered the State to annul the criminal judgment and sentence imposed on Kimel, acknowledge its international responsibility by

organising a public act, publish the judgment in the State’s Official Gazette and another newspaper of national circulation, and bring its domestic laws in line with the Convention in order to prevent criminal prosecution for criticism of the actions of public officials in the performance of their duties. Finally, the Court ordered, *inter alia*, that the State pay pecuniary and non-pecuniary damages and the reimbursement of costs and expenses.

Judges García-Sayán and García-Ramírez wrote separate opinions.

Languages:

Spanish.



Identification: IAC-2008-2-006

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c) / d)** 06.05.2008 / **e)** Series C 179 / **f)** Salvador Chiriboga v. Ecuador / **g)** Secretariat of the Court / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

1.6.6.1 Constitutional Justice – Effects – Execution – **Body responsible for supervising execution.**
 3.16 General Principles – **Proportionality.**
 3.17 General Principles – **Weighing of interests.**
 3.18 General Principles – **General interest.**
 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.**
 5.3.39.1 Fundamental Rights – Civil and political rights – Right to property – **Expropriation.**

Keywords of the alphabetical index:

Compensation, claim, time-limit / Effective remedy, right, scope / Expropriation, compensation, amount, calculation, market value.

Headnotes:

The right to property is not an absolute right. For the deprivation of a person's property to be in keeping with the right to property, such deprivation must be based on reasons of public utility or social interest, subject to the payment of a fair compensation and restricted to the cases and forms established by law.

The reasons of public utility and social interest to which the Convention refers comprise all those legally protected goods whose use allows the development of a democratic society.

In the case of a condemnation, in order for the State to fairly balance a social interest and an individual's interest, it must use the means that least infringe upon the right to property of the individual.

In cases of expropriation, a just compensation must be received promptly, adequately, and by means of effective proceedings. In order for compensation to be adequate, the trade value of the property prior to the declaration of public utility must be taken into account, as well as the fair balance between the general interest and the individual interest.

Summary:

I. In May 1991, the Municipal Council of Quito declared the property of Salvador Chiriboga and her brother, now deceased, to be of public utility for the creation of a metropolitan park. To counter this decision, the Salvador Chiriboga siblings filed a number of legal proceedings, three of which were still pending resolution as of the date of the Court's judgment. In addition, between 7 July and 10 July 1997, the State took possession of the property without a court order determining the final value of the property or ordering the payment of compensation. Though the State deposited 225.990.625 *suces* for the alleged victim at a bank, no agreement had been reached regarding the amount of compensation. The State initiated a condemnation proceeding, in accordance with domestic law, to determine said amount of compensation. The condemnation proceeding was still pending as of the date of the Court's judgment.

On 12 December 2006, the Inter-American Commission on Human Rights (hereinafter, the Commission) filed an application against the State of Ecuador to determine the international responsibility of the State for the violation of Article 8 ACHR (right to a fair trial), Article 21 ACHR (right to private property) and Article 25 ACHR (right to judicial protection), in relation to Article 1.1 ACHR (obligation

to respect rights) and Article 2 ACHR (domestic legal effects), to the detriment of María Salvador Chiriboga. Additionally, the alleged victim's representatives claimed violations of Article 24 ACHR (right to equal protection) and Article 29 ACHR (restrictions regarding interpretation), and the State raised the preliminary objection of non-exhaustion of domestic remedies.

II. In its judgment of 6 May 2008, the Court first denied the State's preliminary objection, agreeing with the Inter-American Commission that domestic remedies had been exhausted and that pending domestic proceedings were not resolved due to serious problems affecting the administration of justice in Ecuador. The Court found violations of Articles 21, 8 and 25 ACHR, in relation to Article 1.1 ACHR, to the detriment of Salvador Chiriboga. It determined that though the creation of a park is a legitimate public use that furthers recreational and ecological ends, the State did not carry out the expropriation in the forms established by law or pay adequate compensation for the land.

With respect to the right to a fair trial and judicial protection, first, as of the date of the Court's judgment, the State had not resolved two domestic proceedings, initiated fourteen and eleven years ago, respectively, objecting to the lawfulness of the State's declaration of the alleged victim's land for public use. Thus, the State had exceeded what could be considered a reasonable time in processing these claims. Second, the condemnation proceeding initiated by the State, in accordance with domestic law, to determine the amount of the alleged victim's compensation was simple, yet did not constitute an effective remedy, since it had not produced results in more than ten years.

With respect to the right to property, because the State did not comply with the procedural terms set out in its domestic legislation, the condemnation proceedings that deprived the alleged victim of her property without the determination of a just compensation were arbitrary. The State violated Article 21 ACHR as it did not fairly balance the interests of the individual with that of society, nor pay her a just compensation, and therefore did not comply with the requirements necessary to restrict the right to property in accordance with the American Convention on Human Rights.

The Court found no violation of Article 2 ACHR, since the delay in the proceedings and the ineffectiveness of the remedies were not the direct result of the existence of rules incompatible with the the American Convention on Human Rights or due to a lack of rules preventing this situation.

The Court found no violation of Article 24 ACHR (right to equal protection) and Article 29 ACHR (Restrictions regarding Interpretation), citing a lack of evidence with respect to both.

Consequently, the Court ordered the determination of the amount and payment of a just compensation for the expropriation of the victim's property, as well as any other measure intended to repair the violations declared in the Judgment, to be made by common consent between the State and the representatives within six months. It also reserved the authority to verify whether the agreement made by the parties is in accord with the American Convention on Human Rights, and to determine the appropriate reparations, costs, and expenses to be paid by the State if no agreement is reached.

Judge Quiroga Medina and *ad hoc* Judge Rodríguez Pinzón wrote partially dissenting opinions and Judge Ventura Robles wrote a concurring opinion.

Languages:

Spanish.



Identification: IAC-2008-2-007

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 06.05.2008 / **e)** Series C 180 / **f)** Yvon Neptune v. Haiti / **g)** Secretariat of the Court / **h)** CODICES (English, French, Spanish).

Keywords of the systematic thesaurus:

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

4.6.10.1.3 Institutions – Executive bodies – Liability – Legal liability – **Criminal liability.**

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

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**

5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest.**

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

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

5.3.13.24 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the reasons of detention.**

Keywords of the alphabetical index:

Detention, judicial review / Detention, lawfulness / Judicial protection, right, essence, endangered.

Headnotes:

A criminal suspect, if prosecuted, has the right to be brought promptly before a competent organ of justice or investigation in order to substantiate the charges against him and to achieve the purposes of the administration of justice, particularly the determination of the truth, so as not to prolong indefinitely the effects of a criminal prosecution.

Any domestic law or measure that imposes costs, or in any other way obstructs an individual's access to the courts, and that is not warranted by what is reasonably needed for the administration of justice, should be considered contrary to Article 8.1 ACHR. Any person who is committed to trial must have the effective possibility of obtaining a final ruling without undue delays resulting from the lack of diligence and care that the courts of justice must guarantee.

Any requirement established by the national laws that is not complied with when depriving a person of his liberty will render this deprivation unlawful and contrary to the American Convention on Human Rights.

To ensure that a deprivation of liberty is not arbitrary, the measures that deprive or restrict liberty must be appropriate, proportionate, and necessary to further a legitimate end. When a criminal proceeding is invalid *ab initio*, subsequent actions in the context of those proceedings are also invalid, and detention for any period of time is unlawful and arbitrary.

In order to adequately inform a person of the reasons for his detention, that person must understand that he or she is being detained, and the agent carrying out the detention must inform him of the essential facts and legal grounds for his detention in simple language, free of technicalities.

While immediate judicial control is a measure intended to avoid arbitrary or unlawful detention, if a person does not receive adequate information on the reasons for his detention, he does not know what charges he must defend himself against, and consequently, judicial control becomes meaningless.

The principle of legality (freedom from *ex post facto* laws) obliges states to define criminal acts or omissions as clearly and precisely as possible.

Detention conditions that do not meet minimum standards constitute inhuman treatment.

The separation of accused persons from convicted persons requires not only keeping them in different cells, but also that these cells be located in different sections within a detention center, or in different institutions, if possible. The State must demonstrate the existence and functioning of a classification system for prisoners in penitentiary centers, as well as the existence of exceptional circumstances if it does not separate accused persons from convicted persons.

Summary:

I. In March 2004, after Yvon Neptune's mandate as Prime Minister of Haiti had ended, the transitional government then in power accused him of having ordered and participated in a massacre and in the arson of houses and cars in St. Marc. An arrest warrant was issued that same month, and Neptune was detained in June 2004. In September 2005, a court of first instance declared that there was enough evidence to try him as an accomplice in the commission of killings, rape, arson, and other crimes. Neptune was put in prison, where he endured unsanitary conditions and was placed in a cell near those of convicted prisoners. He was released on humanitarian grounds in July 2006. In April 2007, a court of appeals held that it did not have jurisdiction to try him, since the Haitian Constitution provided for a political trial before the Senate for acts committed while Prime Minister.

On 14 December 2006, the Inter-American Commission on Human Rights (hereinafter, the Commission) filed an application against the State of Haiti to determine the international responsibility of the State for the violation of Article 5.1, 5.2 and 5.4 ACHR (right to humane treatment), Article 7.4, 7.5 and 7.6 ACHR (right to personal liberty), Article 8.1, 8.2.b and 8.2.c ACHR (right to a fair trial), Article 9 ACHR (freedom from *ex post facto* laws), and Article 25.1 ACHR (right to judicial Protection), all in connection with Article 1.1 ACHR (obligation to respect rights), to the detriment of Yvon Neptune.

II. In its judgment of 6 May 2008, the Court held that the State violated Neptune's right to have access to a competent court in the substantiation of the accusations against him and the right to an effective recourse established in Articles 8.1 and 25 ACHR, in relation to Article 1.1 ACHR, since he was subjected to criminal proceedings before a court that was not competent to hear the allegations against him. This was aggravated by the fact that the appellate court's decision was not duly notified, prolonging Neptune's state of juridical uncertainty.

Second, the Court held that the State violated the right to personal liberty established in Article 7.1, 7.2 and 7.3 ACHR, in relation to Article 1.1 ACHR, since it detained Neptune for over two years by order of a court that lacked jurisdiction to try him. Because his detention did not meet all the requirements established by national law, it was invalid *ab initio*. The Court also found that the State violated Article 7.4 and 7.5 ACHR, in relation to Article 1.1 ACHR, because the charges against Neptune were drawn up fourteen months after his arrest, making it impossible to defend himself or obtain prompt judicial review. The Court found no violation of Article 7.6 ACHR, since it had no evidence that Neptune attempted to use domestic remedies specifically to assess the lawfulness of his detention.

Third, the Court found no violation of Article 9 ACHR, since Neptune was not tried or convicted of being accomplice to a "massacre", a crime not defined under the penal code.

Finally, the Court held that the State violated the right to humane treatment established in Article 5.1 and 5.2 ACHR, in relation to Article 1.1 ACHR, because Neptune endured unsanitary conditions, a climate of insecurity, and a lack of effective measures to protect his physical integrity while in prison. In addition, the State violated Article 5.4 ACHR, in relation to Article 1.1 ACHR, because it did not implement a system for classifying prisoners that separated the accused from the convicted within Neptune's prison, nor prove the existence of exceptional circumstances to excuse this deficiency.

Consequently, the Court ordered the State to ensure that Neptune's juridical situation be defined in relation to the criminal proceedings filed against him, and that if further proceedings are opened, these should satisfy the requirements of due process and respect the right to defense of the accused. It also ordered the State to institute procedures regulating the political trial before the Senate required by the Constitution, and to substantially improve the conditions of the Haitian prisons, adapting them to international human rights norms. Finally, the Court ordered, *inter alia*, that parts of its judgment be

published in the State's Official Gazette and another national newspaper, and that the State pay pecuniary and non-pecuniary damages and the reimbursement of costs and expenses.

Languages:

Spanish.



Court of Justice of the European Communities and Court of First Instance

Important decisions

Identification: ECJ-2008-2-006

a) European Union / b) Court of First Instance / c) Third Chamber / d) 17.03.2005 / e) T-187/03 / f) Isabella Scippacercola v. Commission / g) *European Court Reports* II-1029 / h) CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.25.1 Fundamental Rights – Civil and political rights – Right to administrative transparency – **Right of access to administrative documents.**

Keywords of the alphabetical index:

European Communities, institutions, right of public access to documents / Document, right of access, limitations / Document, originating from a Member State, non disclosure without prior agreement of that State / Document, originating from a Member State, concept.

Headnotes:

It follows from Article 4.5 of Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents that, among third parties, the Member States are subject to special treatment. That provision confers on a Member State the power to request an institution not to disclose documents originating from that State without its prior agreement. That power conferred on Member States by Article 4.5 is explained by the fact that it is neither the object nor the effect of that regulation to amend national legislation on access to documents.

A cost-benefit analysis report received by the Commission in connection with an application for financing from the Cohesion Fund submitted by the only beneficiary Member State, which necessarily

forms part of the information such an application must contain, must be regarded as a document originating from that State, regardless of the fact that it was created by a third party on behalf of that State (see paragraphs 34, 36-39).

Summary:

By letter, Ms I. Scippacercola had applied to the Commission for access to, *inter alia*, a cost-benefit analysis relating to the project for the new Athens International Airport at Spata. That project had been co-financed under the Cohesion Fund (judgment, paragraph 10).

The Directorate-General (DG) for Regional Policy of the Commission had, however, refused to grant the applicant access, stating that the national authorities had informed it by fax that access to that document should not be permitted. The ground for refusal related to protection of intellectual property rights. The document was a study drafted by private consultants on behalf of a bank which had assisted the Greek State during preparation of the project file, under a confidentiality clause (judgment, paragraph 11).

Although Ms I. Scippacercola had repeated her request, the Secretary-General of the Commission had confirmed the refusal to grant access to the document requested (judgment, paragraphs 13-14).

It was the action brought by Ms I. Scippacercola against the latter decision that was at the origin of the present case.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-2-007

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 26.04.2005 / **e)** C-376/02 / **f)** Stichting "Goed Wonen" v. Staatssecretaris van Financiën / **g)** *European Court Reports* I-5425 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

3.18 General Principles – **General interest.**

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

Keywords of the alphabetical index:

Community law, non-retroactivity, exception, condition / Retroactivity, required by purpose in the public interest.

Headnotes:

Although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those interested are duly respected.

The same principle must be observed by the national legislature when it adopts legislation within the sphere of Community law (see paragraphs 33-34).

Summary:

The present case had as its subject-matter a reference for a preliminary ruling from the *Hoge Raad der Nederlanden* (Netherlands) concerning the interpretation of Articles 17 and 20 of Sixth Council Directive no. 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment and the principles of protection of legitimate expectations and legal certainty (judgment, paragraph 1).

That reference had been made in proceedings between the Stichting "Goed Wonen", a Netherlands foundation, and the *Staatssecretaris van Financiën* (State Secretary for Finance) regarding an additional assessment issued by the Inspector of Taxes concerning the value added tax declared by that foundation in respect of the period from 1 April to 30 June 1995 (judgment, paragraph 2).

By its question, the national court asked, essentially, whether Articles 17 and 20 of the Sixth Directive or the principles of protection of legitimate expectations and legal certainty precluded revocation of an adjustment of VAT made on account of the exercise, when immovable property was used for a taxable transaction, of a right to deduct VAT paid in respect of the supply of that immovable property, as a result of

the adoption, after that adjustment, of a law abolishing the taxable nature of the transaction and which, in accordance with the decision of the national legislature, came into effect prior to the use of the immovable property for the taxable transaction and the coming into existence of the right to deduct (judgment, paragraph 24).

The Court ruled that the principles of the protection of legitimate expectations and legal certainty do not preclude a Member State, on an exceptional basis and in order to avoid the large-scale use, during the legislative process, of contrived financial arrangements intended to minimise the burden of VAT that an amending law is specifically designed to combat, from giving that law retroactive effect when, in circumstances such as those in the main proceedings, economic operators carrying out economic transactions such as those referred to by the law were warned of the impending adoption of that law and of the retroactive effect envisaged in a way that enabled them to understand the consequences of the legislative amendment planned for the transactions which they carry out. The Court further ruled that when that law exempts an economic transaction in respect of immovable property previously subject to VAT, it may have the effect of revoking a VAT adjustment made on account of the exercise, when immovable property was used for a transaction regarded at that time as taxable, of a right to deduct VAT paid in respect of the supply of that immovable property (judgment, paragraph 45 and operative part).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-2-008

a) European Union / **b)** Court of First Instance / **c)** Second Chamber / **d)** 26.04.2005 / **e)** T-110/03, T-150/03 and T-405/03 / **f)** Jose Maria Sison v. European Council / **g)** *European Court Reports* II-1429 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

3.18 General Principles – **General interest.**

5.3.25.1 Fundamental Rights – Civil and political rights – Right to administrative transparency – **Right of access to administrative documents.**

Keywords of the alphabetical index:

European Communities, institutions, right of public access to documents / Document, right of access, exception / Judicial review, scope, limits / Terrorism, fight, access to documents.

Headnotes:

In areas covered by the mandatory exceptions to public access to documents, provided for in Article 4.1.a of Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents, the institutions enjoy a wide discretion. Consequently, the Court's review of the legality of decisions of the institutions refusing access to documents on the basis of the exceptions relating to the public interest provided for in that provision must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers (see paragraphs 46-47).

Summary:

On 28 October 2002, the Council of the European Union had adopted Decision no. 2002/848/EC implementing Article 2.3 of Regulation (EC) no. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision no. 2002/460/EC. That decision had included the applicant in the list of persons whose funds and financial assets were to be frozen pursuant to that regulation. That list had been updated, *inter alia*, by Council Decision no. 2002/974/EC of 12 December 2002 and Council Decision 2003/480/EC of 27 June 2003, repealing the previous decisions and establishing a new list. The applicant's name had been retained on that list on each occasion (judgment, paragraph 2).

Under Regulation no. 1049/2001, the applicant had requested, by confirmatory application, access to the documents which had led the Council to adopt Decision no. 2002/848 and disclosure of the identity

of the States which had provided certain documents in that connection. By confirmatory application, the applicant had further requested access to all the new documents which had led the Council to adopt Decision no. 2002/974 maintaining him on the list at issue and disclosure of the identity of the States which had provided certain documents in that connection. Last, by confirmatory application the applicant had also specifically requested access to the report of the proceedings of the Permanent Representatives Committee (Coreper) 11 311/03 EXT 1 CRS/CRP concerning Decision no. 2003/480, and to all the documents submitted to the Council prior to the adoption of Decision no. 2003/480, which formed the basis of his inclusion and maintenance on the list at issue (judgment, paragraph 3).

The Council had, however, by confirmatory decisions of 21 January, 27 February and 2 October 2003, refused even partial access (judgment, paragraph 4).

The present joined cases arose from the action which the applicant brought against each of those decisions refusing access.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-2-009

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 03.05.2005 / **e)** C-387/02, C-391/02 and C-403/02 / **f)** Criminal proceedings v. Silvio Berlusconi (C-387/02), Sergio Adelchi (C-391/02) and Marcello Dell'Utri e.a. (C-403/02) / **g)** *European Court Reports* I-3565 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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:

Penalty, more lenient, retroactive application, general principle of Community law / Law, national, implementing community law, compliance by national courts.

Headnotes:

The principle of the retroactive application of the more lenient penalty forms part of the general principles of Community law which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law (see paragraph 69).

Summary:

These references for preliminary rulings were made in criminal proceedings in which a number of natural persons, including Mr Silvio Berlusconi, had been prosecuted before the Italian courts, the *Tribunale di Milano* and the *Corte d'Appello di Lecce* respectively, for false accounting committed before 2002, the date on which new criminal provisions for offences of that type came into force in Italy (Press Release no. 38/05).

In the three sets of criminal proceedings in the main cases, the offences which the accused were alleged to have committed had been carried out while the former Article 2621 of the Italian Civil Code had been in force, and thus before the entry into force of Legislative Decree no. 61/2002 and the new Articles 2621 and 2622 of that code (judgment, paragraph 26).

Following the entry into force of Legislative Decree no. 61/2002, the accused parties in those three sets of proceedings had argued that the new Articles 2621 and 2622 ought to be applied to them (judgment, paragraph 30).

The *Tribunale di Milano* and the *Corte d'Appello di Lecce* had, however, pointed out that the effect of applying those new provisions would be that a criminal prosecution in respect of the acts, initially charged as constituting the indictable offences referred to in the former Article 2621 of the Italian Civil Code, could no longer be brought for the following reasons (judgment, paragraph 31): a substantially shorter limitation period (a maximum of four and a half years instead of seven and a half

years); the requirement for a complaint from a member or a creditor who regarded himself as having been adversely affected by the false documentation for the bringing of proceedings; and the exclusion of a penalty for false accounting which had no significant effect and was of minimal importance, not exceeding certain thresholds (Press Release no. 38/05).

In the light of those considerations, the *Tribunale di Milano* and the *Corte d'Appello di Lecce* had, however, in the same way as the public prosecuting authorities, taken the view that the proceedings in the present cases raised questions as to whether or not the penalties provided for under the new Articles 2621 and 2622 of the Italian Civil Code were appropriate when considered in the light of, either, Article 6 of the First Companies Directive, as interpreted by the Court in, *inter alia*, Case C-97/96 *Daihatsu Deutschland* [1997] ECR I-6843, or Article 5 of the Treaty, from which, according to case-law which had been well established since Case 68/88 *Commission v. Greece* [1989] ECR 2965, paragraphs 23 and 24, it follows that penalties for infringements of provisions of Community law must be effective, proportionate and dissuasive (judgment, paragraph 36). The national courts had thus decided to stay proceedings and to refer a number of questions to the Court for a preliminary ruling.

By the questions which they had referred, the national courts which had made the references were essentially seeking to ascertain whether, by reason of certain of their provisions, the new Articles 2621 and 2622 of the Italian Civil Code were compatible with the requirement imposed by Community law that penalties for infringement of Community law provisions must be appropriate (judgment, paragraph 52).

After observing, in particular, that the principle of the retroactive application of the less severe penalty forms part of the general principles of Community law which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law, the Court ruled that, in a situation such as that at issue in the main proceedings, the First Companies Directive cannot be relied on as such against accused persons by the authorities of a Member State within the context of criminal proceedings, in view of the fact that a directive cannot, of itself and independently of national legislation adopted by a Member State for its implementation, have the effect of determining or increasing the criminal liability of those accused persons (judgment, paragraph 78).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-2-010

a) European Union / **b)** Court of First Instance / **c)** Fourth Chamber / **d)** 04.05.2005 / **e)** T-398/03 / **f)** Jean-Pierre Castets v. European Commission / **g)** not published / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Legitimate expectations, protection, conditions.

Headnotes:

The right to rely on legitimate expectations depends on three conditions being fulfilled. First, the applicant must have been given precise, unconditional and consistent assurances, coming from authorised and reliable sources, by the Community administration. Second, these assurances must have been such as to give rise to reasonable expectations in the mind of the person to whom they were given. Third, the assurances must have been consistent with the applicable rules (see paragraph 34).

Summary:

This case concerned the mode of calculating the invalidity pension of a former official of the Commission (judgment, paragraph 2).

The person concerned, Mr Jean-Pierre Castets, had been retired and granted an invalidity pension. At the time of leaving the service, he was classified in grade B3, step 6 (judgment, paragraph 3).

The "Pensions" unit of the Office for administration and payment of individual entitlements had fixed Mr Castets' pension entitlement. It follows from the decision of the pensions unit that the basic salary taken into consideration for the purpose of calculating his pension was that corresponding to grade B3, step 6 (judgment, paragraph 4).

Mr Castets had lodged a complaint against that decision, arguing that, under Article 78.4 of the Staff Regulations, the amount of his invalidity pension ought to be calculated by reference to the basic salary that he would have received had he been able to remain in service until the age of 65 years, that is to say, the salary of an official in grade B3, step 8, and not on the basis of the salary relating to his grade and step at the time of being admitted to the invalidity pension, that is to say, grade B3, step 6. He thus requested that the amount of his pension be recalculated accordingly (judgment, paragraph 5).

The appointing authority adopted a decision expressly rejecting that complaint (judgment, paragraph 6).

It was on the action brought against that decision that the Court of First Instance adjudicated in the present case. The application was dismissed. The Court rejected, in particular, the applicant's argument that there had been a breach of the principle of legitimate expectations occasioned by various indications in the vade-mecum associated with the pensions regime, the Commission's intranet and conclusion no. 143/86 of the Heads of Administration (judgment, paragraph 26). The Court recalled on this occasion the three conditions governing the right to claim protection of legitimate expectations.

Languages:

French.



Identification: ECJ-2008-2-011

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 24.05.2005 / **e)** C-244/03 / **f)** France v. Parliament and Council / **g)** *European Court Reports* I-4021 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.5 Constitutional Justice – Jurisdiction – **The subject of review.**

1.6 Constitutional Justice – **Effects.**

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

Keywords of the alphabetical index:

Action for annulment, subject-matter, partial annulment, condition / Partial annulment, severability of the contested provisions, objective criterion.

Headnotes:

Partial annulment of a Community act is possible only if the elements the annulment of which is sought may be severed from the remainder of the act. That requirement of severability is not satisfied in the case where the partial annulment of an act would have the effect of altering its substance. The question whether partial annulment may have such an effect is an objective criterion, and not a subjective criterion linked to the political intention of the authority which adopted the act at issue.

It is for that reason necessary to treat as inadmissible an action brought by a Member State seeking annulment of Article 1.2 of Directive no. 2003/15 amending Directive no. 76/768 on the approximation of the laws of the Member States relating to cosmetic products in so far as that provision introduces into Directive no. 76/768 an Article 4a, the purpose of which is, *inter alia*, to set out the conditions governing the prohibition of marketing cosmetic products containing ingredients or combinations of ingredients that have been tested on animals, while Article 1.1 of Directive no. 2003/15, which provides for the deletion of Article 4.1.i of Directive no. 76/768, which has similar subject-matter and which Article 4a, as inserted, is intended to replace, as is clear from recital 18 in the preamble to Directive no. 2003/15, remains in force, inasmuch as the Member State did not request annulment of Article 1.1, even by way of alternative submission.

As Article 1.1 and 1.2 of Directive no. 2003/15 are inseparable provisions, the partial annulment requested by the Member State would objectively alter the very substance of the provisions adopted by the Community legislature in regard to testing on animals for the purpose of developing cosmetic products (see paragraphs 12-16, 20, 21).

Summary:

In the present case, France sought annulment of Article 1.2 of Directive 2003/15, in so far as it introduced a new Article 4a into Directive no. 76/768 on the approximation of the laws of the Member States relating to cosmetic products. That article provides, in particular, that Member States are to prohibit progressively the marketing of cosmetic products where they or their ingredients have been the subject of animal testing and the performance on their territory of animal testing of such products or ingredients. France claimed that that article would breach the principle of legal certainty. The Parliament and the Council contended that the request for annulment was inadmissible, in so far as it would amount to legislating by judicial means.

The Court declared the action inadmissible, after recalling that partial annulment of a Community act is possible only if the elements the annulment of which is sought may be severed from the remainder of the act and that that is so where partial annulment of an act does not have does not have the effect of altering its substance.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

**Identification:** ECJ-2008-2-012

a) European Union / **b)** Court of Justice of the European Communities / **c)** Third Chamber / **d)** 31.05.2005 / **e)** C-53/03 / **f)** Syfait e.a / **g)** *European Court Reports* I-4609 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

Keywords of the alphabetical index:

Preliminary ruling, national court or tribunal, quality / National court or tribunal, conditions.

Headnotes:

In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. In addition, a body may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

The *Epitropi Antagonismou* (Greek Competition Commission) does not satisfy those criteria. First of all, it is subject to the supervision of the Minister for Development, which implies that that minister is empowered, within certain limits, to review the lawfulness of its decisions. Next, even though its members enjoy personal and operational independence, there are no particular safeguards in respect of their dismissal or the termination of their appointment, which does not appear to constitute an effective safeguard against undue intervention or pressure from the executive on those members. In addition, its President is responsible for the coordination and general policy of its secretariat and is the supervisor of the personnel of that secretariat, with the result that, by virtue of the operational link between the *Epitropi Antagonismou*, a decision-making body, and its secretariat, a fact-finding body on the basis of whose proposal it adopts decisions, the *Epitropi Antagonismou* is not a clearly distinct third party in relation to the State body which, by virtue of its role, may be akin to a party in the course of competition proceedings. Finally, a competition authority such as the *Epitropi Antagonismou* is required to work in close cooperation with the Commission and may, pursuant to Article 11.6 of Regulation no. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 EC, be relieved of its competence by a decision of the Commission, with the consequence that the proceedings initiated before it will not lead to a decision of a judicial nature (see paragraphs 29-37).

Summary:

In the course of this case, a request for a preliminary ruling was made in proceedings brought by the complainants, Syfait and others and PSF, Interfarm and others and Marinopoulos and others, against the United Kingdom company GSK plc and its subsidiary incorporated under Greek law, GSK AEVE, concerning the latter two companies' refusal to meet orders for certain pharmaceutical products on the Greek market.

On 3 August 2001, the *Epitropi Antagonismou* (the Greek Competition Commission) had adopted interim measures requiring GSK AEVE, pending adoption of the decision in the main proceedings, to meet the orders for three medicinal products from the complainants.

GSK AEVE had applied to the *Diikritiko Efetio Athinon* (Administrative Appeal Court, Athens) for an order suspending that decision; however, that court had confirmed the decision on 10 January 2002.

On 5 December 2001, GSK AEVE had applied to the *Epitropi Antagonismou* for negative clearance in respect of its refusal to cover more than 125% of Greek demand. At the same time, the complainants had submitted a complaint to the *Epitropi Antagonismou* against GSK AEVE and GSK plc. Faced with this application and these complaints, the *Epitropi Antagonismou* asked the Court to what extent the refusal by the latter two companies to meet in full the orders placed by the complainants constituted an abuse of a dominant position within the meaning of Article 82 EC.

As a preliminary point, the Court sought to determine whether the *Epitropi Antagonismou* was a court or tribunal within the meaning of Article 234 EC. It found that this was not the case because, amongst other reasons, it was subject to the supervision of the Ministry of Development and that the proceedings initiated before that authority did not lead to a decision of a judicial nature.

Cross-references:

- Judgment of the Court of Justice (Fourth Chamber) of 27.01.2005, *Denuit and Cordenier* (C-125/04, Reports I-923);
- Judgment of the Court of Justice (Fifth Chamber) of 30.06.2005, *Liingst* (C-165/03, Reports I-5637).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

*Identification: ECJ-2008-2-013*

a) European Union / b) Court of Justice of the European Communities / c) First Chamber / d) 02.06.2005 / e) C-266/03 / f) Commission v. Luxembourg / g) *European Court Reports* I-4805 / h) CODICES (English, French).

Keywords of the systematic thesaurus:

3.26.3 General Principles – Principles of Community law – **Genuine co-operation between the institutions and the member states.**

4.17.2 Institutions – European Union – **Distribution of powers between Community and member states.**

Keywords of the alphabetical index:

International agreement / European Community, competence / European Communities, creation of exclusive external competence by reason of the exercise of its internal competence, conditions / Transport, waterway.

Headnotes:

The Community acquires exclusive external competence by reason of the exercise of its internal competence where the international commitments fall within the scope of the common rules, or in any event within an area which is already largely covered by such rules, even if there is no contradiction between those rules and the commitments.

Thus, whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those acts.

The same applies, even in the absence of any express provision authorising its institutions to negotiate with non-member countries, where the Community has achieved complete harmonisation in a given area, because the common rules thus adopted could be affected if the Member States retained freedom to negotiate with non-member countries.

As regards the determination of the conditions for access by non-Community carriers to the national transport of goods or passengers by inland waterway, the Community has not acquired exclusive external competence. Regulation no. 3921/91 laying down the conditions under which non-resident carriers may transport goods or passengers by inland waterway within a Member State does not govern the situation of those carriers since it covers only transporters established in a Member State and the harmonisation achieved by that regulation is not complete (see paragraphs 40-45, 48; 50-51).

Summary:

In this case, the Commission sought a declaration from the Court to the effect that, by individually negotiating, concluding, ratifying and bringing into force, and by refusing to terminate the agreement between the Government of the Grand Duchy of Luxembourg and the Government of the Czech and Slovak Federative Republic on inland waterway transport, signed in Luxembourg on 30 December 1992 (*Memorial A* 1994, p. 579), the agreement between the Government of the Grand Duchy of Luxembourg and the Government of Romania on inland waterway transport, signed in Bucharest on 10 November 1993 (*Memorial A* 1995, p. 13), and the agreement between the Government of the Grand Duchy of Luxembourg and the Government of the Republic of Poland on inland waterway transport, signed in Luxembourg on 9 March 1994 (*Memorial A* 1995, p. 1570), the Grand Duchy of Luxembourg had failed to fulfil its obligations under Article 10 EC and Council Regulation (EEC) no. 3921/91 of 16 December 1991 laying down the conditions under which non-resident carriers may transport goods or passengers by inland waterway within a member state (OJ 1991 L 373, p. 1) and Council Regulation (EC) no. 1356/96 of 8 July 1996 on common rules applicable to the transport of goods or passengers by inland waterway between member states with a view to establishing freedom to provide such transport services (OJ 1996 L 175, p. 7). (Judgment, paragraph 1).

The Commission had, in point of fact, submitted a recommendation for a decision to the Council on the opening of negotiations for the conclusion of a multilateral agreement between the Community and

third countries in the field of transport of passengers and goods by inland waterway.

The Council had authorised the Commission to negotiate a multilateral agreement on the rules applicable to the transport of passengers and goods by inland waterway between the European Economic Community and Poland and the Contracting States of the Danube Convention (Hungary, Czechoslovakia, Romania, Bulgaria, the ex-USSR, ex-Yugoslavia and Austria).

Following the Council's decision, the Commission had, by letter, called on several member states, including the Grand Duchy of Luxembourg, to abstain from any initiative likely to compromise the proper conduct of the negotiations initiated at Community level and, in particular, to abandon ratification of agreements already initialled or signed, and to forgo the opening of further negotiations with the countries of Central and Eastern Europe relating to inland waterway transport.

The Council had decided that priority was to be given to the conduct of negotiations with the Czech Republic, the Republic of Hungary, the Republic of Poland and the Slovak Republic.

Taking the view that, by continuing negotiations and initiating the procedure for parliamentary approval of the contested bilateral agreements, the Luxembourg Government had infringed the provisions of Article 5 of the EC Treaty (now Article 10 EC), the Commission had, in a further letter, repeated its request and urged the Luxembourg Government not to exchange the instruments of ratification.

The multilateral negotiations conducted by the Commission had led to the initialling of a draft multilateral agreement on the basis of which the Commission had presented to the Council a proposal for a decision on the conclusion of the agreement laying down the conditions governing the transport by inland waterway of goods and passengers between the European Community and the Czech Republic, the Republic of Poland and the Slovak Republic.

However, no multilateral agreement has been concluded by the European Community with the countries concerned.

Having become aware that the bilateral agreements had come into force, the Commission had initiated proceedings under Article 226 EC for failure to fulfil obligations. After giving the Grand Duchy of Luxembourg formal notice to submit its observations it had sent a reasoned opinion calling on that member state to take the necessary measures in order to

comply with that opinion within two months of the date of its notification.

Taking the view, however, that the situation remained unsatisfactory, the Commission had decided to bring this action.

The Commission had raised three complaints in support of its action. First, it had alleged that the Grand Duchy of Luxembourg had infringed the exclusive external competence of the Community within the meaning of the judgment of 31 March 1971, *Commission v. Council* ('ERTA') (22/70, ECR 263). Second, it had relied on an infringement of Article 10 EC. Third, it had submitted that the contested bilateral agreements were incompatible with Regulation no. 1356/96 (Judgment, paragraphs 16-25).

The Court found only the second complaint to be well-founded, dismissing the remainder of the action.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-2-014

a) European Union / **b)** Court of Justice of the European Communities / **c)** First Chamber / **d)** 02.06.2005 / **e)** C-394/02 / **f)** Commission v. Greece / **g)** *European Court Reports* II-4713 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.2.1.10 Constitutional Justice – Types of claim – Claim by a public body – **Institutions of the European Union.**

1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest.**

3.18 General Principles – **General interest.**

Keywords of the alphabetical index:

European Commission, right to bring proceedings, specific interest.

Headnotes:

When exercising its powers under Article 226 EC, the Commission does not have to show that there is a specific interest in bringing an action. The Commission's function is to ensure, in the general interest, that the Member States give effect to Community law and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end. Article 226 EC is not therefore intended to protect that institution's own rights. It is for the Commission alone to decide whether or not it is appropriate to bring proceedings against a Member State for a declaration that it has failed to fulfil its obligations, and, depending on the circumstances, because of what conduct or omission those proceedings should be brought (see paragraphs 14-16).

Summary:

In October 1997, the Greek public electricity company, DEI, submitted to the Ministry of Environment, Planning and Public Works, a project concerning the installation of a system for the de-sulphuration, stabilisation, transport and deposit of solid waste from the Megalopolis thermal-electricity generation plant. By decisions of 29 October 1998 and 30 December 1999, the Ministry had given its approval for that project, subject to DEI lodging a request for final authorisation for the elimination of the waste produced by that plant and to the installation, by December 2000, of a conveyor-belt system for the transport of the ash between that plant and the mine of Thoknia. In view of the deadlines laid down, DEI had decided to carry out a negotiated award procedure without publication of a notice and had invited the Koch/Metka consortium and the Dosco company to submit their offers. As Dosco had stated that it did not wish to take part in that procedure, the contract had been awarded to the Koch/Metka consortium.

After giving the Hellenic Republic formal notice to submit its observations, issuing a reasoned opinion, and calling on Greece to adopt the measures necessary to comply with the reasoned opinion within a period of 2 months, the Commission had decided to refer the matter to the Court of Justice under Article 226 EC, holding that the award by DEI of a contract for the construction of a conveyor-belt system for the thermal-electricity generation plant at Megalopolis by means of a negotiated procedure without prior publication of a contract notice had been an infringement of Community law, in particular Council Directive no. 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84),

as amended by Directive no. 98/4/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 1).

Greece had considered that this action was inadmissible insofar as the Commission had no legitimate interest in opening the procedure for failure to fulfil obligations since the alleged infringement of Community law had, when the period for compliance with the reasoned opinion expired, been fully or at least in large measure completed.

The Court of Justice dismissed this argument, holding that, when exercising its powers under Article 226 EC, the Commission did not have to show that there was a specific interest in bringing an action and that, consequently, it was for the Commission alone to decide whether or not it was appropriate to bring proceedings against a member state for a declaration that it had failed to fulfil its obligations.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-2-015

a) European Union / **b)** Court of Justice of the European Communities / **c)** Fourth Chamber / **d)** 03.06.2005 / **e)** C-396/03 P / **f)** Killinger v. Germany e.a. / **g)** *European Court Reports* I-04967 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.2.2 Constitutional Justice – Types of claim – **Claim by a private body or individual.**

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

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

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

Keywords of the alphabetical index:

Effective remedy, right, Community law, principle.

Headnotes:

In the system of legal remedies provided for by the Treaty, an infringement of Community law by the national authorities, including an infringement of Article 234.3 EC may be brought before the Community Courts by the Commission or by another Member State, or may be brought before the competent national courts by any natural or legal person. In the latter case, it is for the national courts to ensure that rules of Community law are protected and thus that the effectiveness of judicial protection is not undermined in any way (see paragraph 28).

Summary:

In this case, the appellant, Mr Killinger, sought the annulment of the order of the Court of First Instance of the European Communities of 8 July 2003, by which it had dismissed as inadmissible his action for annulment of a decision of the Minister for Justice and European Affairs of the Land Thuringia as well as a series of decisions of German courts, for the Federal Republic of Germany to be ordered to allow him the freedom to pursue, at Community level, the professional and economic activities of a lawyer on the same terms as those which applied to qualified lawyers of other member states, and lastly for a declaration that the Federal Republic of Germany, the Council of the European Union and the Commission of the European Communities had failed to act, in that they had omitted to adopt the legislation and the measures within their executive powers required to allow qualified German lawyers to practise their profession at Community level without discrimination.

The Court of First Instance had ruled that the appeal was inadmissible on two grounds. First, the appeal had been submitted by a natural person against a member state. Second, it had not been directed against an institution or body of the European Communities.

In his appeal, the appellant argued that it was essential for the safeguarding of the right to effective judicial protection, as provided for in Article 13 ECHR, that the Court of First Instance regard itself as having jurisdiction over a dispute, including one against a member state, notwithstanding the fact that the Treaty made no provision for any specific jurisdiction in that respect, where it was claimed that Article 234.2 and 234.3 EC had been infringed.

The Court dismissed the appeal on the ground that the effectiveness of judicial protection had not been undermined.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-2-016

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 16.06.2005 / **e)** C-105/03 / **f)** Pupino / **g)** *European Court Reports* I-5285 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**
 1.3.5 Constitutional Justice – Jurisdiction – **The subject of review.**
 1.3.5.2 Constitutional Justice – Jurisdiction – The subject of review – **Community law.**

Keywords of the alphabetical index:

Preliminary ruling, Court of Justice, jurisdiction, police and judicial cooperation in criminal matters / Preliminary ruling, framework decision for the approximation of laws.

Headnotes:

Under Article 46.b EU, the system under Article 234 EC is capable of being applied to Article 35 EU, subject to the conditions laid down by that provision. Like Article 234 EC, Article 35 EU makes reference to the Court of Justice for a preliminary ruling subject to the condition that the national court 'considers that a decision on the question is necessary in order to enable it to give judgment', so that the case-law of the Court of Justice on the admissibility of references under Article 234 EC is, in principle, transposable to references for a preliminary ruling submitted to the Court of Justice under Article 35 EU.

It follows that the presumption of relevance attaching to questions referred by national courts for a preliminary ruling may be rebutted only in exceptional cases, where it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted. Save for such cases, the Court is, in principle, required to give a ruling on questions concerning the interpretation of the acts referred to in Article 35.1 EU.

In that context, irrespective of the degree of integration envisaged by the Treaty of Amsterdam in the process of creating an ever closer union among the peoples of Europe within the meaning of Article 1.2 EU, it is perfectly comprehensible that the authors of the Treaty on European Union should have considered it useful to make provision, in the context of Title VI of that treaty, dealing with police and judicial cooperation in criminal matters, for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union's objectives. The jurisdiction of the Court of Justice to give preliminary rulings under Article 35 EU would be deprived of most of its useful effect if individuals were not entitled to invoke framework decisions in order to obtain a conforming interpretation of national law before the courts of the Member States (see paragraphs 19, 28-30, 36, 38).

Summary:

This case concerned the jurisdiction of the Court to give preliminary rulings in relation to police and judicial co-operation in criminal matters in the context of criminal proceedings against Mrs Pupino, a nursery school teacher charged with inflicting injuries on pupils aged less than five years at the time of the facts.

In August 2001, the Public Prosecutor's Office had asked the judge in charge of preliminary enquiries to take the testimony of eight children, witnesses and victims of the offences for which Mrs Pupino was being examined, by the special procedure for taking evidence early, provided for by the Italian Code of Criminal Procedure. It had also requested that evidence be gathered by means of a hearing conducted in specially designed facilities, with arrangements to protect the dignity, privacy and tranquillity of the minors concerned.

Mrs Pupino had objected to that application, arguing that it did not fall within any of the cases provided for in the Italian Code of Criminal Procedure.

The judge in charge of preliminary enquiries at the *Tribunale di Firenze* (Italy), having doubts as to the compatibility of certain articles in the Code of Criminal Procedure with Articles 2, 3 and 8 of the Framework Decision, inasmuch as the provisions of that code limited the ability of the judge to apply the special inquiry procedure for the early gathering of evidence, and the special arrangements for its gathering, to sexual offences or offences with a sexual background, had asked the Court of Justice for a preliminary ruling. This request related to the interpretation of Articles 2, 3 and 8 of Council Framework Decision 2001/220/JAI of 15 March 2001 on the standing of victims in criminal proceedings.

The Court examined the extent of its jurisdiction within the meaning of Article 35 EU. It held that the system under Article 234 EC was capable of being applied to Article 35 EU. Accordingly, the case-law of the Court of Justice on the admissibility of references under Article 234 EC was, in principle, transposable to references for a preliminary ruling submitted to the Court of Justice under Article 35 EU.

Furthermore, the Court accepted the arguments of the Greek, French and Portuguese governments and the Commission, that the obligation on the national authorities to interpret their national law as far as possible in the light of the wording and purpose of Community directives applied with the same effects and within the same limits where the act concerned was a framework decision taken on the basis of Title VI of the Treaty on European Union. As the Court underlined, its jurisdiction to give preliminary rulings under Article 35 EU would be deprived of most of its useful effect if individuals were not entitled to invoke framework decisions in order to obtain a conforming interpretation of national law before the courts of the member states.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2008-2-017

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 28.06.2005 / **e)** C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P / **f)** Dansk Rørindustri v. Commission / **g)** *European Court Reports* I-5425 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 3.26 General Principles – **Principles of Community law.**
 5.3.38.1 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Criminal law.**

Keywords of the alphabetical index:

Competition, undertaking, concept / Community law, principle, protection of legitimate expectations, limits / Fine, amount, determination, method of calculation, discretion.

Headnotes:

1. In competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. It does not require that the economic unit concerned has legal personality.

2. Traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Commission in the exercise of its discretionary power will be maintained. That principle clearly applies in the field of competition policy, which is characterised by a wide discretion on the part of the Commission, in particular as regards the determination of amount of fines.

Undertakings involved in an administrative procedure in which fines may be imposed cannot therefore acquire a legitimate expectation in the fact that the Commission will not exceed the level of fine previously imposed. It follows that a legitimate expectation cannot be based on a method of calculation fines either.

Furthermore, the legitimate expectation that traders are able to derive from the Leniency Notice is limited to an assurance that their fines will be reduced by a certain percentage, but does not extend to the method calculating fines or, *a fortiori*, to a specific level of the fine capable of being calculate at the time when the trader decides to implement his intention to co-operate with the Commission.

3. The principle of non-retroactivity of criminal laws, enshrined in Article 7 ECHR as a fundamental right, constitutes a general principle of Community law which must be observed when fines are imposed for infringement of the competition rules and requires that the penalties imposed correspond with those fixed at the time when the infringement was committed.

The concept of 'law' (*'droit'*) for the purposes of Article 7.1 corresponds to 'law' (*'loi'*) used in other provisions of that Convention and encompasses both law of legislative origin and that deriving from case-law. Although that provision, which enshrines in particular the principle that offences and punishments are to be strictly defined by law (*nullum crimen, nulla poena sine lege*), cannot be interpreted as prohibiting the gradual clarification of the rules of criminal liability, it may preclude the retroactive application of a new interpretation of a rule establishing an offence. That is particularly true of a judicial interpretation which produces a result which was not reasonably foreseeable at the time when the offence was committed, especially in the light of the interpretation put on the provision in the case-law at the material time.

Following the example of the case-law on new developments in the case-law, a change in an enforcement policy, in this instance the Commission's general competition policy in the matter of fines, especially where it comes about as a result of the adoption of rules of conduct such as the Guidelines adopted by the Commission on the method of setting fines imposed pursuant to Article 15.2 of Regulation no. 17 and Article 65.5 of the ECSC Treaty, may have an impact from the aspect of the principle of non-retroactivity. Having particular regard to their legal effects and to their general application, such rules of conduct come, in principle, within the concept of 'law' for the purpose of Article 7.1 of the Convention.

In order to ensure that the principle of non-retroactivity was observed, it is necessary to ascertain whether the change in question was reasonably foreseeable at the time when the infringements concerned were committed. In that regard, the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed. A law still satisfies the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to

proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such an activity entails.

Having regard to the fact that the proper application of the Community competition rules requires that the Commission may at any time, within the limits indicated in Regulation no. 17, adjust the level of the fines to the needs of Community competition policy and, accordingly, may raise the level of the amount of fines by reference to that applied in the past, not only by raising the level of fines in imposing fines in individual decisions, but also by raising it by the application, in particular cases, of rules of conduct of general application, such as the Guidelines, it follows that those Guidelines and, in particular, the new method of calculating fines contained therein, on the assumption that it has the effect of increasing the level of the fines imposed, were reasonably foreseeable for undertakings at the time when the infringements were committed, before those Guidelines were adopted.

Summary:

Following a complaint by the Swedish undertaking Powerpipe AB, the Commission had carried out a number of investigations and asked for certain information before adopting, in 1998, a decision in which it found that a number of undertakings had participated in a series of prohibited agreements and practices in the European district heating sector. The undertakings in question produced, or marketed, pre-insulated pipes intended for district heating. According to the Commission, four Danish producers had concluded a general co-operation agreement on their national market in late 1990 and two German producers had regularly participated in their meetings from autumn 1991. The negotiations culminated in 1994 in an agreement designed to fix quotas for the whole of the European market. Those quotas were allocated to each undertaking, both at European level and at national level, by the "directors' club" consisting of the chairs or managing directors of the undertakings participating in the cartel.

The Commission had imposed fines totalling ECU 92,210,000 on the companies which had participated in the cartel.

Following the actions brought by eight of the ten undertakings concerned by the Commission's decision, the Court of First Instance had reduced the fine imposed on ABB Asea Brown Boveri Ltd and essentially dismissed the actions for annulment of the decision.

Seven undertakings then appealed to the Court of Justice. They put forward a number of pleas in law, concerning certain breaches of the Rules of Procedure of the Court of First Instance, the imputability of the infringement, the determination of the amount of the fines and also breach of the right to be heard and of the obligation to state reasons.

The Court of Justice, however, dismissed all appeals, confirming the judgments delivered by the Court of First Instance (Press release no. 60/05).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



European Court of Human Rights

Important decisions

Identification: ECH-2008-2-003

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 28.02.2008 / **e)** 37201/06 / **f)** Saadi v. Italy / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.1.4.1 Fundamental Rights – General questions – Limits and restrictions – **Non-derogable rights**.
5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.

Keywords of the alphabetical index:

Foreigner, expulsion, danger of ill treatment / Foreigner, national security, threat, expulsion / Terrorism, combat.

Headnotes:

For a forcible expulsion to be in breach of the Convention, substantial grounds must be shown for believing that there is a risk that the applicant will be subjected to ill-treatment in the receiving country.

It is not possible to weigh the risk that a person might be subjected to ill-treatment against his dangerousness to the community if he is not sent back; therefore, a higher standard of proof cannot be applied where the person is considered to represent a serious danger to the community or even a threat to national security, in view of the absolute nature of Article 3 ECHR. Reliance on reports of NGO's referring to torture inflicted on persons accused of terrorism in a particular State; reference to absence of diplomatic assurances.

Summary:

I. The applicant is a Tunisian national. In 2001 he was issued with an Italian residence permit. In 2002 he was arrested and placed in pre-trial detention on suspicion of international terrorism. In 2005 he was

sentenced by an Assize court in Italy to imprisonment for criminal conspiracy, forgery and receiving stolen goods. On the date the *European Court's* judgment was adopted an appeal was pending in the Italian courts. Also in 2005 a military court in Tunis sentenced the applicant in his absence to 20 years' imprisonment for membership of a terrorist organisation acting abroad in peacetime and for incitement to terrorism. In August 2006 he was released from prison, having served his sentence in Italy. However, the Minister of the Interior ordered him to be deported to Tunisia under the legislation on combating international terrorism. The applicant's request for political asylum was rejected. Under Rule 39 of the Rules of Court (interim measures), the Court asked the Italian Government to stay his expulsion until further notice.

In his application to the Court, the applicant claimed that if he were deported to Tunisia he would be exposed to a risk of ill-treatment. He relied on Article 3 ECHR.

II. The Court could not underestimate the danger of terrorism and the considerable difficulties States were facing in protecting their communities from terrorist violence. However, it was not possible to weigh the risk that a person might be subjected to ill-treatment against his dangerousness to the community if he was not sent back. The prospect that he might pose a serious threat to the community did not diminish in any way the risk that he might suffer harm if deported. For that reason it would be incorrect to require a higher standard of proof where the person was considered to represent a serious danger to the community or even a threat to national security, since such an approach was incompatible with the absolute nature of Article 3 ECHR. This amounted to asserting that, in the absence of evidence meeting a higher standard, protection of national security justified accepting more readily a risk of ill-treatment for the individual. The Court reaffirmed that for a forcible expulsion to be in breach of the Convention it was necessary – and sufficient – for substantial grounds to have been shown for believing that there was a risk that the applicant would be subjected to ill-treatment in the receiving country. The Court referred to reports by Amnesty International and Human Rights Watch which described a disturbing situation in Tunisia and which were corroborated by a report from the US State Department. These reports mentioned numerous and regular cases of torture inflicted on persons accused of terrorism. The practices reported – said to be often inflicted on persons in police custody – included hanging from the ceiling, threats of rape, administration of electric shocks, immersion of the head in water, beatings and cigarette burns. It was reported that allegations of torture and ill-treatment were not

investigated by the competent Tunisian authorities and that the latter regularly used confessions obtained under duress to secure convictions. The Court did not doubt the reliability of those reports and noted that the Italian Government had not adduced any evidence capable of rebutting such assertions. Given the applicant's conviction of terrorism related offences in Tunisia, there were substantial grounds for believing that there was a real risk that he would be subjected to treatment contrary to Article 3 ECHR if he were to be deported to Tunisia. Furthermore, the Tunisian authorities had not provided the diplomatic assurances requested by the Italian Government. The existence of domestic laws guaranteeing prisoners' rights and accession to relevant international treaties, referred to in the *notes verbales* from the Tunisian Ministry of Foreign Affairs, were not sufficient to ensure adequate protection against the risk of ill-treatment where, as in the applicant's case, reliable sources had reported practices manifestly contrary to the principles of the Convention. Furthermore, even if the Tunisian authorities had given the diplomatic assurances, that would not have absolved the Court from the obligation to examine whether such assurances provided a sufficient guarantee that the applicant would be protected against the risk of treatment. There would therefore be a violation of Article 3 ECHR if the decision to deport the applicant to Tunisia were to be enforced.

Cross-references:

- *Ireland v. the United Kingdom*, Judgment of 18.01.1978, Series A, no. 25; *Special Bulletin Leading Cases ECHR* [ECH-1978-S-001];
- *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28.05.1985, Series A, no. 94; *Special Bulletin Leading Cases ECHR* [ECH-1985-S-002];
- *Soering v. the United Kingdom*, Judgment of 07.07.1989, Series A, no. 161; *Special Bulletin Leading Cases ECHR* [ECH-1989-S-003];
- *Vilvarajah and Others v. the United Kingdom*, Judgment of 30.10.1991, Series A, no. 215;
- *Boujlifa v. France*, Judgment of 21.10.1997, *Reports of Judgments and Decisions* 1997-VI;
- *Chahal v. the United Kingdom*, Judgment of 15.11.1996, *Reports* 1996-V; *Bulletin* 1996/3 [ECH-1996-3-015];
- *Ahmed v. Austria*, Judgment of 17.12.1996, *Reports* 1996-VI; *Bulletin* 1997/1 [ECH-1997-1-003];
- *H.L.R. v. France*, Judgment of 29.04.1997, *Reports* 1997-III;
- *Aydin v. Turkey*, Judgment of 25.09.1997, *Reports* 1997-VI; *Bulletin* 1997/3 [ECH-1997-3-016];
- *Selmouni v. France* [GC], no. 25803/94, ECHR 1999-V; *Bulletin* 1999/2 [ECH-1999-2-008];

- *Labita v. Italy* [GC], no. 26772/95, ECHR 2000-IV; *Bulletin* 2000/1 [ECH-2000-1-002];
- *Jabari v. Turkey*, no. 40035/98, ECHR 2000-VIII;
- *Hilal v. the United Kingdom*, no. 45276/99, ECHR 2001-II;
- *Fatgan Katani and Others v. Germany* (dec.), no. 67679/01, 31.05.2001;
- *Price v. the United Kingdom*, no. 33394/96, ECHR 2001-VII;
- *Indelicato v. Italy*, no. 31143/96, 18.10.2001;
- *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI;
- *Mouisel v. France*, no. 67263/01, ECHR 2002-IX;
- *Venkadajalasarma v. the Netherlands*, no. 58510/00, 17.02.2004;
- *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I;
- *Shamayev and Others v. Georgia and Russia*, no. 36378/02, ECHR 2005-III;
- *Müslim v. Turkey*, no. 53566/99, 26.04.2005;
- *Said v. the Netherlands*, no. 2345/02, ECHR 2005-VI;
- *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006-IX; *Bulletin* 2006/3 [ECH-2006-3-005];
- *Ramirez Sanchez v. France* [GC], no. 59450/00, ECHR 2006-IX;
- *Salah Sheekh v. the Netherlands*, no. 1948/04, 11.01.2007;
- *Al-Moayad v. Germany* (dec.), no. 35865/03, 20.02.2007.

Languages:

English, French.



Identification: ECH-2008-2-004

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 08.07.2008 / **e)** 10226/03 / **f)** *Yumak and Sadak v. Turkey* / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system**.

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

Keywords of the alphabetical index:

Election, threshold / Election, population distribution.

Headnotes:

While States do not have an obligation to adopt an electoral system guaranteeing parliamentary representation to parties with an essentially regional base irrespective of the votes cast in other parts of the country, a problem may arise if such parties are deprived of parliamentary representation. In general, a 10% electoral threshold may be regarded as excessive but it may be acceptable in the light of the electoral system and the political evolution of the country concerned, the specific political context of the elections in question and the existence of correctives and other guarantees which limit its effects in practice.

Summary:

I. The applicants stood in the parliamentary elections of November 2002 as candidates for the DEHAP (Democratic People's Party) in a constituency covering a province. As a result of the ballot, DEHAP obtained approximately 45.95% of the vote (47,449 votes) in that province, but secured only 6.22 % of the vote nationally. In accordance with Law no. 2839 of 1983 on the election of members of the National Assembly, which states that "parties may not win seats unless they obtain, nationally, more than 10% of the votes validly cast", the applicants were not elected. Of the three parliamentary seats allotted to the province, two were filled by a party which obtained 14.5% of the vote (14,460 votes), and the third by an independent candidate who obtained 9.69% of the vote (9,914 votes). Of the 18 parties which took part in the elections, only two succeeded in passing the 10% threshold and thus obtaining seats in Parliament. One of them, which polled 34.26% of the votes cast, won 66% of the seats, while the other obtained 33% of the seats, having polled 19.4% of the votes. Nine independent candidates were also elected. The National Assembly which emerged from the elections was the least representative since the multi-party system was first introduced. The proportion of voters not represented reached approximately 45% and the abstention rate exceeded 20%.

In their application the applicants alleged that the electoral threshold of 10% imposed nationally for parliamentary elections interfered with the free expression of the opinion of the people in the choice of the legislature. They relied on Article 3 Protocol 1 ECHR.

II. The electoral threshold of 10% imposed nationally for the representation of political parties in Parliament constituted interference with the applicants' electoral rights. The threshold pursued the legitimate aim of avoiding excessive and debilitating parliamentary fragmentation and thus of strengthening governmental stability. The choice made by the legislature was not as such incompatible with Article 3 Protocol 1 ECHR, which did not in principle impose on Contracting States the obligation to adopt an electoral system guaranteeing parliamentary representation to parties with an essentially regional base irrespective of the votes cast in other parts of the country. On the other hand, a problem might arise if the relevant legislation tended to deprive such parties of parliamentary representation. The electoral threshold used in Turkey was the highest among the member States of the Council of Europe. Only three other member States had opted for high thresholds (7 or 8 %). A third of the States imposed a 5% threshold and 13 of them had chosen a lower figure. The Court noted, however, that the effects of an electoral threshold could differ from one country to another and the various systems could pursue different, sometimes even antagonistic, political aims. None of these aims could be considered unreasonable in itself. The role played by thresholds varied in accordance with the level at which they were set and the party system in each country. A low threshold excluded only very small groupings, which made it more difficult to form stable majorities, whereas in cases where the party system was highly fragmented a high threshold deprived many voters of representation. While the Court could agree that an electoral threshold of about 5% corresponded more closely to the member States' common practice, it could not assess the threshold concerned without taking into account the electoral system and the political evolution of the country concerned. The Court had accordingly to assess the effects of the correctives and other safeguards with which the impugned system was attended. As regards the possibility of standing as an independent candidate, the Court noted that in Turkey independent candidates were subject to a number of unfavourable restrictions and conditions not applicable to political parties. However, this method could not be considered to be ineffective in practice, as shown by the elections of 2007 in particular, where the fact that no threshold applied to independent candidates had enabled small parties to win seats in the legislature. The same applied to the possibility of forming an electoral coalition with other political groups. Admittedly, since about 14.5 million of the votes in the November 2002 elections had been cast for unsuccessful candidates, these electoral strategies could have only a limited effect. However, the 2002 elections had taken place in a crisis climate for a number of reasons (economic and political

crises, earthquakes), and the representation deficit observed after the elections could have been partly contextual in origin and not solely due to the high national threshold. These were the only elections since 1983 where such a high percentage of votes had given rise to no representation in parliament. This meant that the political parties affected by the threshold had managed in practice to develop strategies whereby they could attenuate some of its effects, even though such strategies also ran counter to one of the threshold's declared aims, which was to avoid parliamentary fragmentation. The Court also attached importance to the role of the Constitutional Court. In exercising vigilance to prevent any excessive effects of the impugned electoral threshold by seeking the point of equilibrium between the principles of fair representation and governmental stability, the Constitutional Court, provided a guarantee calculated to stop the threshold concerned impairing the essence of the right enshrined in Article 3 Protocol 1 ECHR. In conclusion, the Court considered that in general a 10% electoral threshold appeared excessive, and concurred with the organs of the Council of Europe, which had recommended that it be lowered. The high threshold compelled political parties to make use of stratagems which did not contribute to the transparency of the electoral process. In the present case, however, the Court was not persuaded that, when assessed in the light of the specific political context of the elections in question, and attended as it was by correctives and other guarantees which had limited its effects in practice, the threshold had had the effect of impairing in their essence the rights secured to the applicants by Article 3 Protocol 1 ECHR. There had therefore been no violation of that provision.

Cross-references:

- *X. v. the United Kingdom*, no. 7140/75, Commission decision of 08.10.1976, *Decisions and Reports* (DR) 7;
- *Liberal Party, Mrs R.. and Mr P. v. the United Kingdom*, no. 8765/79, Commission decision of 18.12.1980, DR 21;
- *X. v. Iceland*, no. 8941/80, Commission decision of 08.12.1981, DR 27;
- *Serge Moureaux and Others v. Belgium*, no. 9267/81, Commission decision of 12.07.1983, DR 33;
- *Etienne Tête v. France*, no. 11123/84, Commission decision of 09.12.1987, DR 54;
- *Silvius Magnago and Südtiroler Volkspartei v. Italy*, no. 25035/94, Commission decision of 15.04.1996, DR 85-A;
- *Lingens v. Austria*, Judgment of 08.07.1986, Series A, no. 103; *Special Bulletin Leading Cases ECHR* [ECH-1986-S-003];

- *Mathieu-Mohin and Clerfayt v. Belgium*, Judgment of 02.03.1987, Series A, no. 113; *Special Bulletin Leading Cases ECHR* [ECH-1987-S-001];
- *Castells v. Spain*, Judgment of 23.04.1992, Series A, no. 236; *Special Bulletin Leading Cases ECHR* [ECH-1992-S-003];
- *Informationsverein Lentia and Others v. Austria*, Judgment of 24.11.1993, Series A, no. 276; *Bulletin 1997/2* [ECH-1997-2-013];
- *Gitonas and Others v. Greece*, Judgment of 01.07.1997, *Reports of Judgments and Decisions 1997-IV*;
- *United Communist Party of Turkey and Others v. Turkey*, Judgment of 30.01.1998, *Reports 1998-I*;
- *Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999-I; *Bulletin 1999/1* [ECH-1999-1-004];
- *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999-VI;
- *Labita v. Italy* [GC], no. 26772/95, ECHR 2000-IV; *Bulletin 2000/1* [ECH-2000-1-002];
- *Briķe v. Latvia* (dec.), no. 47135/99, 29.06.2000;
- *Federación nacionalista canaria v. Spain* (dec.), no. 56618/00, ECHR 2001-VI;
- *Podkolzina v. Latvia*, no. 46726/99, ECHR 2002-II;
- *Aziz v. Cyprus*, no. 69949/01, ECHR 2004-V;
- *Melnychenko v. Ukraine*, no. 17707/02, ECHR 2004-X;
- *Py v. France*, no. 66289/01, ECHR 2005-I;
- *Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, ECHR 2005-IX; *Bulletin 2004/1* [ECH-2004-1-003];
- *Ždanoka v. Latvia* [GC], no. 58278/00, ECHR 2006-IV; *Bulletin 2006/1* [ECH-2006-1-003];
- *Lykourazos v. Greece*, no. 33554/03, ECHR 2006-VIII;
- *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia* (dec.), nos. 10547/07 and 34049/07, 29.11.2007.

Languages:

English, French.



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* 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 sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

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 For questions other than jurisdiction, see 4.9.

²⁰ Including other consultations. For questions other than jurisdiction, see 4.9.

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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.

³⁰ For the withdrawal of proceedings, see also 1.4.10.4.

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³¹ Pleadings, final submissions, notes, etc.

³² May be used in combination with Chapter 1.2. Types of claim.

³³ For the withdrawal of the originating document, see also 1.4.5.

³⁴ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

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³⁵ For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

³⁶ Only for issues concerning applicability and not simple application.

³⁷ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

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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.

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.

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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.

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.

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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.

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.

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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.

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.

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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.

⁸⁰ See also 3.6.

⁸¹ And other units of local self-government.

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⁸² See also keywords 5.3.41 and 5.2.1.4.

⁸³ Organs of control and supervision.

⁸⁴ Including other consultations.

⁸⁵ For questions of jurisdiction, see keyword 1.3.4.6.

⁸⁶ Proportional, majority, preferential, single-member constituencies, etc.

⁸⁷ For example, Panachage, voting for whole list or part of list, blank votes.

⁸⁸ For aspects related to fundamental rights, see 5.3.41.2.

⁸⁹ For the creation of political parties, see 4.5.10.1.

⁹⁰ For example, names of parties, order of presentation, logo, emblem or question in a referendum.

⁹¹ Tracts, letters, press, radio and television, posters, nominations, etc.

⁹² Impartiality of electoral authorities, incidents, disturbances.

⁹³ For example, signatures on electoral rolls, stamps, crossing out of names on list.

⁹⁴ For example, in person, proxy vote, postal vote, electronic vote.

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⁹⁵ For example, Auditor-General.

⁹⁶ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁹⁷ For example, Court of Auditors.

⁹⁸ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

⁹⁹ *Staatszielbestimmungen*.

¹⁰⁰ Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

¹⁰¹ Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

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¹⁰² Positive and negative aspects.

¹⁰³ For rights of the child, see 5.3.44.

¹⁰⁴ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in chapter 3.

¹⁰⁵ Includes questions of the suspension of rights. See also 4.18.

¹⁰⁶ Taxes and other duties towards the state.

¹⁰⁷ Universal and equal suffrage.

¹⁰⁸ 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).

¹⁰⁹ For example, discrimination between married and single persons.

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¹¹⁰ This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

¹¹¹ Detention by police.

¹¹² Including questions related to the granting of passports or other travel documents.

¹¹³ May include questions of expulsion and extradition.

¹¹⁴ 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.

¹¹⁵ This keyword covers the right of appeal to a court.

¹¹⁶ Including the right to be present at hearing.

¹¹⁷ Including challenging of a judge.

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¹¹⁸ Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

¹¹⁹ This keyword also includes the right to freely communicate information.

¹²⁰ Militia, conscientious objection, etc.

¹²¹ Aspects of the use of names are included either here or under "Right to private life".

¹²² Including compensation issues.

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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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