

# THE BULLETIN

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*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 Venice Commission thanks the **International Organisation of the Francophonie** for their support in ensuring that contributions from its member, associate and observer states can be translated into French.*

*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

**T. Markert**

Secretary of the European Commission for Democracy through Law

# THE VENICE COMMISSION

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

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

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There was no relevant constitutional case-law during the reference period 1 May 2009 – 31 August 2009 for the following countries:

Bulgaria, Denmark, Japan, Luxembourg, United Kingdom.

Précis of important decisions of the reference period 1 May 2009 – 31 August 2009 will be published in the next edition, *Bulletin* 2009/3, for the following countries:

Andorra, Serbia.

# Armenia

## Constitutional Court

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### Important decisions

*Identification:* ARM-2009-2-003

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 08.05.2009 / **e)** DCC-803 / **f)** On the conformity with the Constitution of Article 10.3.1 of the RA Electoral Code / **g)** To be published in *Tegekagir* (Official Gazette) / **h)**.

*Keywords of the systematic thesaurus:*

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

4.9 Institutions – **Elections and instruments of direct democracy**.

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

*Keywords of the alphabetical index:*

Electoral rights / Local self-government.

*Headnotes:*

The notions of “self-government” and “community” are inter-dependent; the community is a commonwealth of residents of the same settlement. A person is entitled to participate in local elections on the basis of being resident in that settlement.

*Summary:*

At the request of the Armenian National Congress pre-election alliance, the Constitutional Court examined the issue of the constitutionality of Article 10.3 of the Electoral Code. The applicant pointed out that this provision has been interpreted in practice so that it is considered lawful to include citizens who are permanent residents but not registered in the community on the voters’ roll in local elections. The applicant also noted that the provision had been formulated so imprecisely that the Central Electoral Commission and the Administrative Court interpret and implement it in a manner that runs counter to the norms of Articles 2, 4, 11.1, 30, 105 of the Constitution.

Having carried out comparative analysis of various constitutional norms and current legislation regarding local government, the Constitutional Court found the notions of “self-government” and “community” to be inter-dependent and that the community is a commonwealth of residents of the same settlement. As a result, a person is entitled to participate in local government elections by virtue of being resident in that settlement. Article 5 of the Law on Local Self-government states that somebody registered within a particular community should be considered a resident of that community.

The Constitutional Court then analysed the law pertaining to elections and concluded that within the electoral legal framework, the registration of residents is conducted according to their settlement. The system of domiciliary registration of citizens was introduced by the Law on State Registration of Population. This law sets out a registration procedure aimed at registering every person residing in the Republic of Armenia, and at excluding the presence of anybody without registration in the country.

The Constitutional Court noted that Article 10.3.1 of the Electoral Code had been interpreted so that the voters’ rolls could include persons not residing in that community, which is not in accordance with the constitutional meaning of local self-government. The above norm should be implemented within national elections to formulate electoral listings; such an approach will not give rise to any issue of constitutionality.

Article 10.4 of the Electoral Code relates to the formulation of electoral rolls in local elections. It states that everyone with the right to vote in local self-government elections shall be included in voter lists compiled during local self-government elections, on general grounds. This is definite and unambiguous, as in local elections, under that norm, only the residents of that community can exercise their suffrage or, according to Article 5 of the Law on Self-Government, electors registered in a community.

The Constitutional Court accordingly held that the applicant’s statement that somebody who was not registered could not be included in voter lists in local elections was well-founded.

Having analysed the legislation, the Constitutional Court concluded that citizens of the Republic of Armenia registered in a particular community who have reached the age of eighteen, and those who have been registered for at least one year and who factually reside in the community, but are not citizens of the Republic of Armenia, will be entitled to vote in local elections.

The Constitutional Court found the disputed norms to be in accordance with the RA Constitution within the legal opinions expressed in this decision.

*Languages:*

Armenian.



*Identification:* ARM-2009-2-004

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 30.06.2009 / **e)** DCC-810 / **f)** On the conformity with the Constitution of Articles 12 and 14 of the Law on Rules of Procedure of the National Assembly / **g)** to be published in *Tegekagir* (Official Gazette) / **h)**.

*Keywords of the systematic thesaurus:*

1.2.1.2 Constitutional Justice – Types of claim – Claim by a public body – **Legislative bodies.**  
4.5.3.4.3 Institutions – Legislative bodies – Composition – Term of office of members – **End.**

*Keywords of the alphabetical index:*

Mandate / Proportional representation.

*Headnotes:*

In the type of proportional electoral system where electors vote for a political power on the basis of the agenda and programme outlined in its public manifesto, without expressing a separate view on the persons proposed by the proportional voting lists, the political entity is the bearer of the political power delegated by the people. Within this type of electoral system, the people's confidence is based on the political entity and the manifesto it has put forward rather than personalities.

Any alteration of the proportion of political power in Parliament in pursuit of concrete interests and the political balance established in the legislative body by declaration of the will of the people is inconsistent with fundamental principles of democracy and cannot therefore be deemed lawful.

*Summary:*

Members of Parliament challenged the constitutionality of the provisions of Articles 12 and 14 of the Law "Rules of Procedure the National Assembly" in an appeal submitted to the Constitutional Court. The applicant pointed out that the lack of constitutionality of the above provisions was manifested in the lack of a norm stipulating that if a deputy retired from or was expelled from a particular party, this could be the basis for terminating his or her mandate, gained by election through the proportional electoral system.

The applicant noted that although Article 66 of the Constitution rejected the imperative mandate institute, in cases where the general principle of exercising the people's power through elected officials under Article 2 of the Constitution has been breached, it becomes necessary to stipulate in legislation the circumstance of the retirement of a Deputy from a faction as a basis for the termination of his or her mandate.

The Constitutional Court noted the importance of the concept of a free representative mandate for the establishment of constitutional democracy in the country. However, it noted the existence of another institute in international practice, which is linked to the imperative mandate institute but has a different legal meaning. This institute is the termination of the mandate as a result of changes to party membership.

The Constitutional Court evaluated the legitimacy of terminating a Deputy's mandate on the basis of changing the membership of the party in the context of a feature of the appropriate electoral system. Having analysed the law pertaining to elections, the Court noted that in the type of proportional electoral system where electors vote for a political power on the basis of the agenda and programme outlined in its public manifesto, without expressing a separate view on the persons proposed by the proportional voting lists, the political entity is the bearer of the political power delegated by the people. Within this type of electoral system, the people's confidence is based on the political entity and the manifesto it has put forward rather than personalities. Analysis of international practice demonstrates that within such electoral systems, the circumstance of leaving the party or changes to party membership pose a serious problem for modern democracies from the perspective of parliamentary stability and adherence to electors' votes. Such a practice leads to situations where voters' decisions are often subject to sweeping changes.

The Constitutional Court stated that the following steps were of relevance to the resolution of the issue:

1. a proper evaluation of the role and place of political parties in the political system of the country;
2. consideration not only of the technical and organisational specifics of majority and proportional electoral systems, but also their role in the establishment of political power and the holding and implementing of political responsibility;
3. emphasis on the need for and the role of the manifestos of political parties and politicians in clarifying the political trends of state development and illuminating electors' views on these matters in the process;
4. facilitation of the proper election of persons to whom voters have delegated the implementation of their rights over state authorities;
5. rejection of further authoritative influence over the parliamentary political proportion established as a result of the free manifestation of the people's political will and prevention of the establishment of a non-elected new proportion in favour with the authorities (especially in transitional countries);
6. consideration of the historical development of the essence and substance of termination of the mandate as a result of changes to party membership.

The Constitutional Court, in the light of the above, held that any changes to the proportion of political powers in parliament pursuing concrete interests and to the political balance established in the legislative body by the declaration of people's will is inconsistent with fundamental principles of democracy and cannot therefore be perceived as lawful.

The Constitutional Court found that within the framework of the electoral system in the Republic of Armenia, a Deputy who has attained his or her mandate due to voting for the party but whose name was not included in the ballot-paper and about whom voters have expressed no political will can only leave the parliamentary faction after voluntary vacation of his or her seat. Otherwise, he or she will facilitate the alteration of the proportion of political power in parliament, which changes the political balance established in the legislative body by the free manifestation of the political will of the people and runs counter to the fundamental constitutional principles of a democratic state under the rule of law.

The Constitutional Court declared the provision of Article 14.3 of the Law on the Rules of procedure of the National Assembly, allowing a Deputy to quit a faction by giving written notice to the head of the corresponding faction, to be inconsistent with the provisions of Articles 1, 2 and 7 of the Constitution and null and void in respect of Deputies who were not listed as candidates on the ballot papers to the extent that it facilitate the alteration of political balance established in the National Assembly by the free manifestation of the political will of the people.

*Languages:*

Armenian.



# Austria

## Constitutional Court

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### Important decisions

*Identification:* AUT-2009-2-001

**a)** Austria / **b)** Constitutional Court / **c)** / **d)** 12.07.2006 / **e)** B 260/05 / **f)** / **g)** Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes VfSlg. 17855 (Official Digest) / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Public hearing / Land, ownership, act, challengeability / Land, ownership, limitation.

*Headnotes:*

The approval of real property transactions falls within the core of Article 6.1 ECHR. Decisions of a court deciding at the same time as the first and the last instance entail the right of the applicant to a public hearing if no exceptional circumstances may be identified dispensing the court from holding a public hearing.

*Summary:*

I. On 18 March 2004 the applicant bought the plot of land, registered as no. 998 of the cadastre community Dietmanns no. 21005, comprising 0,8738 hectares. By notification dated 21 June 2004, the Real Property Transactions Authority, responsible for Waidhofen an der Thaya, denied its approval for the transaction. The subsequent appeal against this notification was lodged with the Lower Austria Regional Real Property Transaction Commission, including a formally expressed request to hold a public hearing in this case. The appeal was eventually dismissed. This decision was based on the argument that the primary

goal of the Lower Austrian Real Property Transaction Law was the strengthening of rural family farms and not – as the applicant suggested – the preservation or the creation of viable farms. In the eyes of the commission, aspects of strengthening viable farms prevailed in favour of the second interested buyer over the applicant's arguments. No public hearing was held.

The applicant filed an application according to Article 144 B-VG alleging a violation of her constitutionally guaranteed rights to equal treatment of all Austrian citizens, to freedom of land acquisition, to inviolability of property, to fair trial before a lawful judge, to a public hearing before an impartial tribunal as put forth in Article 6.1 ECHR and claimed the application of an unconstitutional law.

In order to substantiate the alleged violation of Article 6.1 ECHR, the applicant argued that against her explicit request and despite the fact that questions had arisen over the facts of the case as well as legal questions, no public hearing had been held.

The Lower Austrian Regional Property Transaction Commission opposed these arguments in its refutation and held that it was not within the discretion of the Commission to hold an oral and public hearing, asserting that there was no legal basis for such a hearing before the Commission. Moreover, the Commission argued that the facts of the case were clear, even when considering the applicant's appeal, and the sole question that remained was purely legal in nature.

II. The Austrian Constitutional Court found it to be beyond question that proceedings and decisions on the approval for land transfer fall within the core of "civil rights". It furthermore ruled that according to the jurisprudence of the European Court of Human Rights (ECHR) (*Jacobsson v. Sweden*, ECHR 19.02.1998; ÖJZ 1998, 935; similar arguments, but finding a violation of Article 6 ECHR: *Alge v. Austria*, ECHR 22.01.2004, ÖJZ 2004, 477) any proceedings subject to the requirements of Article 6 ECHR before a court deciding as the first and the last instance at the same time entail the right to a public hearing, if no exceptional circumstances dispensed the court from doing so. The judgment then gave examples of such exceptional circumstances: e.g. clear and undisputed facts, the sole existence of a legal question of simple nature, an unambiguous waiver of the right to a public hearing by the applicant if no question of public interest has arisen, to necessitate a public hearing.

The Court then pointed out that the applicant had explicitly requested a public hearing – a request that the Commission had countered with the assertion that a public hearing was not foreseen within the

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applicable law. Subsequently, the Austrian Constitutional Court clarified that, while the Lower Austrian Real Property Transactions Act of 1989 might not contain any provisions regulating the question of public hearings, Article 2.2.17 of the Introductory Law on the Acts on Administrative Procedure (EGVG) provides for the application of the Administrative Procedure Act (AVG) to proceedings arising from land transfer. Consequently, § 39.2 and § 40 *et seq.* of this Act may serve as a basis for public hearings in the present case.

In previous cases, the Austrian Constitutional Court has held that the Administrative Procedure Act required hearings that were only open to parties to the proceedings, not to the general public (VfSlg. 6808/1972). However, in the present judgment it also found that there was no provision in the Administrative Procedure Act that would prevent a hearing that was accessible to the general public (VfSlg. 16.894/2003).

The Austrian Constitutional Court went on to deal with the question of the legitimacy of the Lower Austrian Regional Real Property Transaction Commission's assumption of a clear set of facts in the present case. It found that it was not legitimate. The Commission had assumed that the applicant had been a farmer within the scope of the definition of the Lower Austrian Real Property Transactions Act. The sales contract had to be denied approval since the prognosis for the second interested buyer was better for the strengthening of a capable farming community, a goal prevailing over the preservation or consolidation of farm land. The Court held that in this regard the Commission had already anticipated a possible result of a public hearing; the aim of such a hearing should have been the collection of evidence and the discussion of this evidence with the parties. At the time of the decision of the Commission, the facts of the case could not have been considered clear. Moreover, no exceptional circumstances were identified which could justify the exclusion of a public hearing.

For these reasons, the Austrian Constitutional Court found that the Lower Austrian Regional Real Property Transactions Commission had violated the applicant's right to a fair trial pursuant to Article 6.1 ECHR by not holding a public hearing.

#### Languages:

German.



## Azerbaijan Constitutional Court

### Important decisions

*Identification:* AZE-2009-2-002

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 13.07.2009 / **e)** / **f)** / **g)** Azerbaijan, *Respublika, Khalq gazeti, Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

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.**

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

*Keywords of the alphabetical index:*

Civil procedure / Access to court / Evidence, new.

*Headnotes:*

If practices are allowed to continue which do not satisfy the requirements of the law, the methods established in the Civil Procedure Code to correct erroneous judicial acts cannot be deployed, and this will lead to infringement of the rights enshrined in Articles 26 and 60 of the Constitution and Articles 6 and 13 ECHR.

*Summary:*

Sayala Teymurova was engaged as an actress in Gazakh State Theatre and under the terms of Order no. 458 of 28 April 1989, issued to her by the Executive Committee of Council of People's Deputies of Gazakh, she was granted a two bed roomed flat for business use.

Having given inadequate reasons for missing work, she was fired. The Housing Maintenance Enterprise lodged a petition with the court, asking them to pronounce the order null and void. The District Court upheld this request.

The executive authority of the district of Gazakh issued Ms Teymurova with Order no. 144, regarding the same flat, and, some time afterwards; it submitted a claim regarding the recognition of the order as void.

By decision of the Gazakh District Court, the second order was also recognised as null and void. Following on from the Housing Maintenance enterprise's claim, the decision was taken at the Gazakh District Court to evict Ms Teymurova from the flat.

She then appealed against the District Court's decision, alleging a lack of information as to the two decisions declaring the orders null and void, her eviction from the flat and the fact that she had not been invited to the court hearings.

The Civil Board of the Court of Appeal, making reference in its decision to Article 82 of the Code of Civil Procedure, upheld the District Court decision.

Ms Teymurova petitioned for restoration of the missed deadline for submitting an appeal complaint against the District Court's decision. This was rejected. However, the decision to reject was then overturned by the Civil Board of the Court of Appeal and referred to the Court of First Instance for review. The petition was upheld, and the case submitted to the Court of Appeal for consideration.

The Appeal Court of Ganja City found that the first instance court had erred in its decision. It established that Ms Teymurova had worked at the theatre for more than ten years and was single; the first instance court had not considered that it was impossible to evict her without arranging other housing. The Appeal Court overturned the first instance court's decision and left the statement of claim without satisfaction.

Ms. Teymurova applied to the Plenum of the Supreme Court on the basis of Article 432 Code of Civil Procedure on newly revealed circumstances, requesting the annulment of the decision of the Civil Board of the Court of Appeal on her eviction. She was informed by letter that her case was brought for examination by the Plenum, and that a hearing date was arranged, but at this hearing, the complaint was not considered, and no official explanation was forthcoming. In a further letter, the Chairman of the Supreme Court informed Ms Tejmurova that her complaint had not been placed before the Plenum due to the absence of the criteria set out in Article 432 of the Code of Civil Procedure.

Ms Teymurova then petitioned the Constitutional Court, arguing that the judicial acts that had taken place were unlawful and that refusal of a legal investigation into newly revealed circumstances violated her right of access to court. The Constitutional Court wrote to the Supreme Court, asking it to reconsider her reference on the newly revealed circumstances and to take appropriate measures. In a letter of response from the Acting Head of Staff of the Supreme Court, Ms Teymurova was told that despite the first order having been pronounced null and void at the appeal stage, the second order remained in force. It did not allow the appeal court decision to be relied upon as newly revealed circumstances.

After this letter, Ms Teymurova submitted an appeal against the decision by the Gazakh District Court. That part of the decision relating to Ms Teymurova was overturned by the decision of the Court of Appeal of Ganja City.

Ms Teymurova sent the Supreme Court the Appeal Court decision overturning the District Court decision in the part concerning her complaint, and again asked for consideration of her case on the basis that new circumstances had come to light. However, she was told that the Chairman of the Supreme Court had already given her an answer on this issue.

Ms Teymurova again addressed the Supreme Court and asked the Chairman of the Supreme Court for an opinion on this point.

On this occasion, the Acting Chairman of the Supreme Court wrote to Ms. Tejmurova and informed her that with regard to granting a third party with a new Order 14 on the apartment in question, there was no basis for consideration by the Plenum of the Supreme Court of the statement on newly revealed circumstances. She could appeal against the order in general proceedings.

The Plenum of the Constitutional Court observed that the actions concerning the examination of freshly revealed circumstances were of high significance to the fundamental right to a fair trial. They should not, therefore, have been dealt with by letter but rather by well-founded judicial decisions by the Plenum of the Supreme Court, as established in the law on civil procedure.

The Plenum of the Constitutional Court reached the conclusion that Ms Teymurova's statements regarding lack of consideration of new circumstances had not been considered by it in accordance with Articles 433, 437 and 438 of the Code of Civil Procedure. Non-acceptance of the relevant decision should be considered as an infringement of her right

of access to court, one of elements of maintenance of judicial protection, provided by Article 60 of the Constitution.

*Languages:*

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



## Belarus Constitutional Court

### Important decisions

*Identification:* BLR-2009-2-007

a) Belarus / b) Constitutional Court / c) / d) 26.03.2009 / e) D-319/09 / f) / g) / *Vesnik Kanstytucyjnaha Suda Respubliki Belarus* (Official Digest), no. 1/2009 / h) CODICES (English, Belarusian, Russian).

*Keywords of the systematic thesaurus:*

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

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

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

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

*Keywords of the alphabetical index:*

Petition, Government, procedure, absence / Constitutional Court, government, appeal / Government, Constitutional Court, appeal, petition, procedure.

*Headnotes:*

A provision of the Code on the Judicial System and Status of Judges gave citizens, public associations and other organisations the right to petition the Government to initiate the process of forwarding motions to the Constitutional Court on the examination of the constitutionality of normative legal acts. There was no provision in the Rules of Procedure of the Council of Ministers for an appropriate exercise of the Government's right to move such motions to the Constitutional Court, either on its own initiative or on that of the subjects mentioned above. The lack of such provision interfered with the realisation of this constitutional right.

*Summary:*

The Constitutional Court made an *ex officio* decision on the Rules of Procedure of the Council of Ministers.

Under the constitutional provisions, the Code on the Judicial System and the Status of Judges (hereinafter the "Code") and the Law on the Council of Ministers, the latter has the right to forward motions to the Constitutional Court on the examination of the constitutionality of normative acts. This right is exercisable on petitions with the initiative to review/examine the Constitutionality of the act to the Council of Ministers by those state bodies which do not have a direct right of appeal to the Constitutional Court as well as by public associations, other organisations and citizens. However, there is no provision in the Rules of Procedure of the Council of Ministers, which regulate its organisation and *modus operandi*, for the procedure of the consideration of these petitions to the Government, neither is there a framework decision for their approval or dismissal.

The above legal gap may result in poor performance of the state duties specified in Article 59 of the Constitution to take all measures at its disposal to create the domestic and international order necessary for the exercise in full of the rights and liberties of the citizens of Belarus. The state bodies, officials and other persons who have been entrusted to exercise state functions are to take the necessary measures to implement and safeguard the rights and liberties of the individual.

In the Constitutional Court's opinion, the right set out in Article 22 of the Code for citizens and organisations to appeal by initiative for a constitutional review to those bodies and persons entitled to forward motions to the Constitutional Court should correspond to the duty of those bodies and persons to consider petitions of this kind. Provision was needed for such a procedure.

In order to fill the legal gap and to ensure the rule of law, the Constitutional Court decided to make the necessary changes and additions to the Rules of Procedure of the Council of Ministers.

*Languages:*

Belarusian, Russian, English (translation by the Court).

*Identification:* BLR-2009-2-008

a) Belarus / b) Constitutional Court / c) / d) 17.07.2009 / e) D-358/09 / f) / g) / *Vesnik Kanstytucyjnaha Suda Respubliki Belarus* (Official Digest), no. 3/2009 / h) CODICES (English, Belarusian, Russian).

*Keywords of the systematic thesaurus:*

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**  
 5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability.**  
 5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**

*Keywords of the alphabetical index:*

Disabled person, rehabilitation, refusal, state obligation, discharge.

*Headnotes:*

The voluntary withdrawal of a disabled person, or his or her legal representative, from an individual programme of reinsertion, may entail the release from responsibility of the relevant state bodies, organisations and persons specialising in the reinsertion of disabled people for that programme. Resignation is to be substantiated by appropriate proof.

*Summary:*

In the exercise of obligatory preliminary control, the Constitutional Court examined the constitutionality of the Law on Making Alterations and Addenda to Certain Laws of Belarus on Social Protection of Disabled People (the Law).

Article 9 of the Law contains a legislative innovation, according to which the withdrawal of a disabled person or his or her legal representative from an individual reinsertion programme, either fully or in part, releases state bodies, organisations and individual entrepreneurs specialising in rehabilitation of the disabled from responsibility for carrying out the programme.

Owing to the lack of an appropriate mechanism for realising the above norm, in order to ensure good law enforcement a number of legal positions have been stated by the Constitutional Court.

The Constitutional Court noted that the release from responsibility of the relevant state bodies, organisations and persons specialising in rehabilitation of disabled people for an individual rehabilitation programme may take place upon the voluntary resignation of a disabled person or his or her legal representative from the programme, either fully or in part. Resignation is to be substantiated by appropriate proofs.

The individual rehabilitation programme of a disabled person does not simply depend on state bodies, organisations and persons specialising in rehabilitation but also on the disabled person and his or her legal representative, and their willingness and readiness to perform all the measures in the programme. Therefore, the firm resignation of a disabled person or his or her legal representative from a programme, in full or in part, may not be imposed as a charge on the bodies responsible for the programme and constitutes grounds to release them from the programme.

Such an interpretation of the norm ensures the correct balance between the state and individual interests, and precludes any opportunity of abuse of disabled persons' rights by a disabled person or his or her legal representative, or by state bodies, organisations and persons. It will also realise the principles of mutual responsibility, rationality and justice.

The Constitutional Court found the Law on Making Alterations and Addenda to Certain Laws of the Republic of Belarus on Social Protection of the Disabled People to be in conformity with the Constitution.

#### *Languages:*

Belarusian, Russian, English (translation by the Court).



#### *Identification:* BLR-2009-2-009

**a)** Belarus / **b)** Constitutional Court / **c)** / **d)** 17.07.2009 / **e)** D-360/09 / **f)** / **g)** / *Vesnik Kanstytucyjnaha Suda Respubliki Belarus* (Official Digest), no. 3/2009 / **h)** CODICES (English, Belarusian, Russian).

#### *Keywords of the systematic thesaurus:*

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

5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age**.

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

#### *Keywords of the alphabetical index:*

Discrimination, prohibited grounds, list.

#### *Headnotes:*

Discriminatory requirements relating to age and sex of potential employees, and other terms with no relevance to their business qualities in their advertisements for job vacancies are illegal.

#### *Summary:*

The Constitutional Court made an *ex officio* decision on providing the equal rights for citizens in employment.

In Belarus, guarantees of the constitutional right to work are provided by significant acts or treaties such as the International Covenant on Economic, Social and Cultural Rights, the Discrimination (Employment and Occupation) Convention no. 111 of 25 June 1958 and the Labour Code. These prohibit any restrictions or preferences on the basis of sex, race, national origin, language, religious or political opinion, membership or non-membership of trade unions or other public associations, property or employment status, physical or mental disability, which do not hinder the performance of employment duties. Similar requirements regarding discriminatory conditions have been stipulated in the provisions of the Law on Employment of the Population, which determines state policy and guarantees to promote the employment of the population.

The omission of a prohibition on discriminatory conditions in Article 14 of the Labour Code or the omission of a reference to age and residence in Article 10 of the Law on Employment of the Population of the Republic of Belarus may result in practice in the above conditions not being considered as discrimination.

The fact that employers have included in their advertisements for job positions stipulations on age, residence and other conditions with no relevance to the applicants' business qualities could give rise to the violation of citizens' constitutional rights, including

the right to choose one's profession, type of occupation and work in accordance with one's vocation, capabilities, education and vocational training, and having regard to social needs (Article 41 of the Constitution); the equality of women's rights with men's in their work opportunities and opportunities for promotion (Article 32 of the Constitution); the right to move freely and choose their place of residence within Belarus (Article 30 of the Constitution).

In order to fill the legal gap and to ensure the exercise of the constitutional right to work, the Constitutional Court resolved to make additions to the Labour Code, to include age and residence as grounds for discrimination. At the same time the need was recognised for the introduction of a special provision in the Law on Employment of the Population, prohibiting employers from introducing discriminatory conditions in their job offers.

#### *Languages:*

Belarusian, Russian, English (translation by the Court).



## Belgium Constitutional Court

### Important decisions

*Identification:* BEL-2009-2-005

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 04.06.2009 / **e)** 96/2009 / **f)** / **g)** *Moniteur belge* (Official Gazette), 30.07.2009 / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

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

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

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

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

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

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

*Keywords of the alphabetical index:*

Bigamy, recognition / Polygamy / Marriage, double / Social security / Retirement, insurance scheme, survivor's pension, bigamy / Private international law, personal status.

*Headnotes:*

Given that the Belgian statutory pension scheme makes no provision for a pension to be paid in full to several beneficiaries, it is not disproportionate that, even when it comes to dealing with the effects of polygamous arrangements with respect to survivor's pension, there should be no provision that would allow a full survivor's pension to be paid to each surviving spouse.

*Summary:*

The industrial tribunal in Antwerp asked the Constitutional Court to consider a preliminary question concerning the law of 20 July 1970 assenting to a bilateral convention between Belgium and Morocco. The purpose of the General Convention on social security between the Kingdom of Belgium and the Kingdom of Morocco, signed in Rabat on 24 June 1968, is to ensure that the social security laws in force in Morocco and Belgium cover those persons to whom these laws apply. According to this Convention, in Belgium, Belgian legislation on the survivor's pension of salaried workers applies to workers of Moroccan nationality who were affiliated to the Belgian life insurance scheme.

More specifically, under Article 24.4 of this Convention, if the worker was Moroccan and had more than one wife, each of his widows can claim a share of the survivor's pension in accordance with the Moroccan law governing the worker's personal status.

Following the death of her Moroccan husband, a Moroccan woman who had married in 1957 in Morocco but who had also acquired Belgian nationality in 2004, challenged the decision of the Belgian Pensions Office to divide the survivor's pension to which she was entitled between herself and another woman whom her husband had married in Morocco in 1975.

The industrial tribunal raised two preliminary questions about the compatibility of the legislation with the constitutional rules on non-discrimination and equality in the exercise of the rights and freedoms guaranteed to women and men (Articles 11 and 11bis of the Constitution), taken in conjunction with Article 14 ECHR and Articles 2.1 and 26 of the UN Covenant on Civil and Political Rights.

The first question was whether it was discriminatory to divide the survivor's pension between two beneficiaries, following the death of a Moroccan national who had worked in Belgium, under the aforementioned Article 24.2, "in that it is applicable to a widow who has Belgian nationality". The second question challenged the constitutionality of this same regulation in that it had the effect of requiring the Belgian widow of a Moroccan national who had been a bigamist or polygamist and who had accrued pension rights in Belgium to share any survivor's pension with one or even several other widows of the same husband, whereas a Belgian spouse who had married someone other than a polygamous Moroccan national would not normally be required to share any survivor's pension.

The Court dealt with the two preliminary questions together.

It began by putting the impugned provision into context. Firstly, the legislator had taken account of the possibility that, on the basis of the insured person's Moroccan nationality – and more specifically the fact that Moroccan laws allowed polygamy –, several widows could be eligible for a survivor's pension. Secondly, it had ensured that, in such an event, the survivor's pension could not be paid in full to more than one person.

The Court considered that, having regard to that aim, it was not unreasonable that, firstly, the surviving spouse who was solely entitled to the survivor's pension should receive the whole of that pension and that, secondly, two or more surviving spouses who were entitled to a survivor's pension should be able to claim only part of it. The Court further held that the fact that in the instant case, one of the widows had also acquired Belgian nationality did not deprive the measure of its justification. The Court observed that in internal law, there were also cases where several claimants to a survivor's pension were taken into account.

In its assessment, the Court specifically took account of the fact that the legislation at issue here was a law assenting to an international convention and therefore not a unilateral act of sovereignty, but rather a treaty provision whereby Belgium entered into an international-law obligation to another state.

The Court observed that, in this way, due account was taken of the effects of the possibility of polygamy in Moroccan law and that it was provided that, in such an event, the various surviving spouses could claim an equal share of this pension, rather than one person being excluded. Furthermore, given that the Belgian statutory pension scheme made no provision for a pension to be paid in full to more than one beneficiary, it was not disproportionate that, even when it came to dealing with the effects of polygamous arrangements with respect to survivor's pension, there should be no provision that would allow a full survivor's pension to be paid to each surviving spouse.

In the Court's view, therefore, the provision in question was compatible with Article 11 and 11bis of the Constitution.

*Supplementary information:*

In 2005, the Constitutional Court, then still known as the Arbitration Court, was called upon to give a ruling on the same regulation. At the time, the complaint

about the discrimination in question was based more on gender (only women were liable to have to share their survivor's pension) or civil status (only the widows of a bigamous or polygamous Moroccan national were liable to have to share their survivor's pension). In its judgment no. 84/2005 of 4 May 2005, the Court held that it could not rule on differences in treatment deriving from Moroccan law (see Codices [BEL-2005-2-009]).

*Cross-references:*

- To compare with Court decision n°84/2005 of 04.05.2005, *Bulletin* 2005/2 [BEL-2005-2-009].

*Languages:*

French, Dutch, German.



*Identification:* BEL-2009-2-006

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 18.06.2009 / **e)** 103/2009 / **f)** / **g)** *Moniteur belge* (Official Gazette), 31.07.2009 / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

1.4.10.7 Constitutional Justice – Procedure – Interlocutory proceedings – **Request for a preliminary ruling by the Court of Justice of the European Communities.**

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

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

5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age.**

*Keywords of the alphabetical index:*

Equality, gender, insurance / Life insurance, premiums, age / European Community, Court of Justice, jurisdiction, validity of acts of EC institutions.

*Headnotes:*

The Constitutional Court asked the European Court of Justice to consider a preliminary question as to whether a provision in a directive of the Council of the European Communities which, exceptionally, allowed consideration to be given to gender when setting insurance premiums, was compatible with the principle of equality and non-discrimination guaranteed in Article 6.2 of the Treaty on European Union.

*Summary:*

A private consumers' organisation and a natural person applied to the Constitutional Court, asking it to repeal the law of 21 December 2007 "amending the law of 10 May 2007 designed to combat discrimination between women and men, in respect of gender in the field of insurance". The law of 10 May 2007, by which a series of European directives were incorporated into Belgian law, seeks to prohibit differences in treatment on the basis of gender in a number of areas such as labour relations and supplementary regulations on social security.

The law of 21 December 2007 is an additional piece of Belgian legislation, drafted to transpose Council directive no. 2004/113/EC of 13 December 2004 "implementing the principle of equal treatment between women and men in the access to and supply of goods and services". As it happens, the impugned law makes use of the possibility afforded to Member States, in Article 5.2 of this directive, "to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data", in the calculation of individual insurance premiums and benefits prior to 21 December 2007.

The applicants argued that this possibility of derogation was contrary to the principle of equality enshrined in the Belgian Constitution (Articles 10, 11 and 11bis of the Constitution), taken in conjunction with Article 13 of the EC Treaty, Council directive no. 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Articles 20, 21 and 23 of the Charter of Fundamental Rights of the European Union, Article 14 of the European Convention on Human Rights, Article 26 of the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Discrimination against Women.

The Court noted that the impugned law had been introduced to transpose Article 5.2 of the aforementioned directive and that the criticisms of the law raised by the applicants in their first plea applied equally to this Article 5.2.

The Court noted that the question of whether or not this provision of the directive was compatible with the prohibition of discrimination based on sex, as set out, *inter alia*, in Article 6.2 of the Treaty on European Union, was one that required a ruling by the European Court of Justice under Article 234 of the Treaty establishing the European Community.

The Constitutional Court accordingly decided to put two preliminary questions to the European Court of Justice.

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2009-2-007

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 09.07.2009 / **e)** 107/2009 / **f)** / **g)** *Moniteur belge* (Official Gazette), 03.08.2009 / **h)** CODICES (French, Dutch, German).

#### *Keywords of the systematic thesaurus:*

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

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

5.2 Fundamental Rights – **Equality**.

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

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

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:*

Education, private / Education, school, choice / Education, compulsory / Home schooling / Education, parental freedom of choice / Education, quality / Child, interest.

#### *Headnotes:*

Although freedom of education includes the freedom for parents to choose the type of education, and in particular the freedom for parents to home school, or to have their children educated in an institution that is neither organised nor subsidised, nor recognised by the public authorities, this parental freedom of choice must nevertheless be interpreted with due regard firstly to the best interests of the child and his or her fundamental right to education and, secondly, to the need to ensure school attendance.

In the context of education, the freedom of expression guaranteed in Article 19 of the Constitution is an aspect of active freedom of education, understood as the freedom to provide education according to one's own ideological, philosophical and/or religious convictions.

Like active freedom of education, however, this freedom of expression in education is not absolute, as it has to be balanced against children's right to education, and the need to foster in children the values of pluralism and tolerance that are essential for democracy.

#### *Summary:*

The Constitutional Court received an application for the repeal of the French Community decree of 25 April 2008 setting out the conditions for satisfying the compulsory education requirement outside the education organised or subsidised by the French Community. The application was lodged by associations wishing to provide education and by parents of children who were being educated at home or in private schools.

The applicants' complaints centred firstly on compliance with the rules governing the division of powers and responsibilities, and secondly on respect for the freedom of education provided for in Article 24 of the Constitution, the principle of equality and non-discrimination provided for in Articles 10 and 11 of the Constitution and the freedom of expression provided for in Article 19 of the Constitution.

With regard to the supervision of home schooling, the Constitutional Court referred to the principles deriving from freedom of education, in particular parental freedom of choice, but it also spelt out the limits of that freedom, bearing in mind the constitutional right of everyone to receive an education in a manner that respects fundamental rights and freedoms and the principle of equality between pupils and students. In this context, the Court relied *inter alia* on Article 22bis of the Constitution, as supplemented by the constitutional revision of 22 December 2008, which guarantees the rights of every child. The Court also cited the case-law of the European Court of Human Rights.

The Court concluded from this that the need to ensure school attendance might lead the communities to introduce supervisory mechanisms that would make it possible to verify that all children were actually receiving, if necessary at home, an education that satisfied the compulsory education requirement, in order to thus guarantee their right to education.

The Court went on to consider whether the requirements and controls introduced by the impugned decree undermined the pedagogical freedom implied by freedom of education and whether the measures taken were disproportionate, in that they went beyond what was necessary to achieve the public-interest objectives pursued, namely to ensure quality and equivalence of education. In exercising this supervision, the Court held that the provision allowing checks to ensure that the education provided was in keeping with the rights and freedoms enshrined in the Constitution and was not advocating values that were manifestly incompatible with the European Convention on Human Rights, was compatible with freedom of education and the freedom of expression of parents and teachers, as long as these last were required to respect the child's right to education.

The Court further held that freedom of education did not prevent the competent legislator from seeking to ensure quality and equivalence of compulsory education through measures that were generally applicable, irrespective of the specificity of the education delivered.

Given the characteristic features of home schooling and freedom of education, allowance should be made, when assessing whether the level of studies was "equivalent", for the teaching methods and also for the ideological, philosophical and/or religious convictions of the parents and teachers, provided that these methods and convictions did not infringe the child's right to receive an education in a way that respected fundamental rights and freedoms and did not affect either the quality of the education or the level of studies to be attained.

The Court also held that the provision whereby, after a lengthy procedure having regard both to the opinion of the persons responsible and the interests of the child, in the event that the level of studies achieved by a child being schooled at home should be found to be unsatisfactory on two successive occasions, the child must be enrolled in an educational institution organised, subsidised or recognised by the French Community, of the parents' choosing, was compatible with freedom of education.

The Court also ruled on the certification tests. It accepted the compulsory nature of these standardised tests: far from undermining freedom of education, they allowed parents and teachers to evaluate, and if necessary adapt, the level of education being delivered by themselves or others, and the teaching materials used.

The Court set aside one provision of the impugned decree because it treated children who were being home-schooled differently from children in formal or subsidised education: home-schooled children had fewer opportunities to obtain the *certificat d'études de base*. It was the responsibility of the decree-maker to organise, bearing in mind the specific nature of home schooling, the common external test and the issuance of the *certificat d'études de base* for children receiving this type of education in a manner that was not discriminatory compared to the treatment of children enrolled in educational institutions.

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2009-2-008

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 16.07.2009 / **e)** 119/2009 / **f)** / **g)** *Moniteur belge* (Official Gazette), 16.09.2009 / **h)** CODICES (French, Dutch, German).

#### *Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Administrative fine, fiscal omission / Penalty, classification / Criminal penalty, concept / Penalty, nature / Principle that penalties must be specific to the offender.

*Headnotes:*

Where the legislator considers that certain failures to fulfil the statutory obligations should be punished, it is within its discretionary power to decide which are more appropriate: criminal penalties *sensu stricto* or administrative penalties.

It follows from Article 6 ECHR and from the guarantees deriving from the general principles of criminal law, which likewise apply to administrative fines that are predominantly punitive in nature, that the basic principle that penalties must be specific to the offender in person and the principle of the presumption of innocence should be respected.

*Summary:*

The Constitutional Court was asked by Antwerp Court of Appeal to consider a preliminary question concerning a provision in the Inheritance Tax Code under which an heir was required to pay a fiscal fine, imposed after the death of the defaulting party, for failure to declare an inheritance, or failure to declare all of it.

The judge of the lower court asked the Constitutional Court about the compatibility of this provision with the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), read in conjunction with Article 6 ECHR.

The Court noted that the fine for omission was payable automatically, merely upon a finding by the authorities. Proof of the existence of a moral element was not required; the fine did not lapse upon the death of the offender and could be passed on to the heirs.

After examining the aim pursued by the legislator, the Court concluded that the fiscal fine for omission was essentially punitive in nature and therefore “criminal” within the meaning of Article 6 ECHR. This did not

have the effect of conferring a criminal character on such fines in Belgian law.

However, the basic principle that penalties must be specific to the offender and the principle of the presumption of innocence must be respected, having regard to Article 6 ECHR and the guarantees deriving from the general principles of criminal law which applied to administrative fines that were predominantly punitive in nature.

The Court concluded that the provision, which infringed, in a manner that discriminated against a person’s heirs, legatees or donors, the basic principle that penalties must be specific to the offender and the principle of the presumption of innocence, was unconstitutional.

*Languages:*

French, Dutch, German.



# Bosnia and Herzegovina Constitutional Court

## Important decisions

*Identification:* BIH-2009-2-002

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 03.07.2009 / **e)** AP 3263/08 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 20/09 / **h)** [www.ustavnisud.ba/eng/odluke/povuci\\_pdf.php?pid=221469](http://www.ustavnisud.ba/eng/odluke/povuci_pdf.php?pid=221469); CODICES (Bosnian, English).

*Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.  
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**.  
5.3.36.2 Fundamental Rights – Civil and political rights – Inviolability of communications – **Telephonic communications**.

*Keywords of the alphabetical index:*

Detention, arrangement / Detainee, rights / Prisoner, family, communication.

*Headnotes:*

If restrictions on prisoners' communication with the outside world, where they are only allowed contact with defence counsel are applied for a limited period, and are in line with the purpose and reasons for which the detention was determined, as provided for by the law, the proportionality between the protection of the legitimate aim sought, on the one hand, and the protection of the right to private and family life on the other, has not been infringed.

*Summary:*

I. The appellant filed an appeal with the Constitutional Court against the rulings of the Court of Bosnia and Herzegovina which prevented him from receiving visits or telephone contacts with anybody other than

his defence counsel during his detention in prison. In the reasoning of the Ruling, the Court stated that it was guided in this particular case by the obligations and restrictions set out in Article 141.2 of the Criminal Procedure Code of Bosnia and Herzegovina (the CPCBiH), which specifies the manner in which the rights and freedoms of detained persons can be restricted. Article 141.2 of the CPCBiH stipulates that the rights and freedoms of persons taken into custody may be restricted only insofar as it is necessary to achieve the purpose for which custody has been ordered and to prevent such persons from absconding, committing criminal offences and endangering the lives and health of others. The Court concluded that the circumstances of the instant case, viewed as a whole, indicated a real risk that the appellant might utilise visits and telephone calls to hide or destroy evidence and clues or to make direct or indirect contact with other suspects or others involved in the commission of criminal acts.

The appellant claimed that the challenged ruling breached his right to a private and family life, home and correspondence safeguarded under Article II.3.f of the Constitution of Bosnia and Herzegovina and Article 8.1 ECHR.

II. The Constitutional Court noted that the aim sought by the measures of restriction of rights and freedoms of detainees as prescribed by Article 141 of the CPCBiH is to ensure the undisturbed conduct of investigations, i.e. the prevention of hindrance of criminal proceedings, which is a legitimate aim in a democratic state. However, in order to accomplish this goal, a reasonable degree of proportionality is needed, between the legitimate aim on the one hand and the protection of the appellant's right to private and family life on the other. In this context, the Constitutional Court noted the general provision within the law that detainees are entitled to receive visits from persons of their choice. There is an exception to this rule, where the preliminary procedure judge issues a written and reasoned decision prohibiting certain visits because of their detrimental effect on the course of proceedings. Furthermore, the law guarantees that the rights and freedoms of detainees may be restricted only insofar as this is necessary to achieve the purpose for which custody has been ordered. The Constitutional Court noted that in these proceedings, the ordinary courts held that the purpose of determination of detention would not be adequately served if the appellant was able to communicating with persons other than his defence counsel (even members of his family). It emphasised that the appellant in this case was suspected of having perpetrated the criminal offence of organised crime in conjunction with the abuse of office or official authority. The ordinary court had

established, through evidence gathered in the course of investigation, that if the appellant communicated with the outside world, including his own family, this might have an impact on the quality of the conduct of the investigation and possibly the presentation of evidence, particularly in view of the nature of the criminal offence and manner and means of perpetration. Furthermore, the Constitutional Court noted the conclusion by the ordinary court that the reasons for which detention was imposed were such as to restrict the contact of the suspected persons with the outside world, which led to the conclusion that restriction was appropriate.

The appellant in this case received a custodial sentence from September 2008 to November 2008, in other words, for a period of less than two months, during which he was not allowed contact with anybody apart from his defence counsel. In essence, the measure imposed was restricted to the period in which the custody measure was in force and during which, cumulatively, legally prescribed reasons must have existed for its pronouncement. In this respect, the Constitutional Court noted that in the challenged rulings, the Court of BiH gave detailed reasoning for the temporary limiting of the appellant's contacts to contact with his defence counsel, and that the measure of detention and, subsequently, the measure of prohibition of contacts with third persons, ceased when the reasons for this measure ceased to exist. The Constitutional Court held that due to the briefness of the period between the appellant's detention to the adoption of a court decision prohibiting visits and telephone contact with anybody apart from his defence counsel, did not give rise to an issue of a breach of his rights under Article II.3.f of the Constitution of Bosnia and Herzegovina and Article 8 ECHR.

Judges Mato Tadic and Krstan Simic delivered a dissenting opinion.

#### *Languages:*

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



## Brazil

### Federal Supreme Court

#### Important decisions

*Identification:* BRA-2009-2-011

**a)** Brazil / **b)** Federal Supreme Court / **c)** Second chamber / **d)** 12.09.2000 / **e)** RE 271.286 AgR / **f)** / **g)** *Diário da Justiça* (Justice Gazette), 24.11.2000 / **h)**.

*Keywords of the systematic thesaurus:*

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**  
5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health.**

*Keywords of the alphabetical index:*

HIV, medication, free / Health policy programme, government.

*Headnotes:*

The right to health, in addition to being a fundamental and universally applicable human right, represents a constitutional consequence that cannot be dissociated from the right to life. The government has a constitutional duty to provide free medication to poor people who are under treatment for acquired immunodeficiency syndrome (AIDS).

*Summary:*

I. An appeal against court regulations (*recurso de agravo regimental*) was filed by the Municipality of Porto Alegre in a decision issued by the Minister Rapporteur of extraordinary appeal, which upheld a ruling from the Court of Justice of the State of Rio Grande do Sul. The ruling from the State Court of Justice, based on Article 196 of the Federal Constitution, recognised that, alongside the State of Rio Grande do Sul, the appellant was also obliged to provide, free of charge, medication necessary for the treatment of Aids, in cases where the patients were HIV positive and lacked financial resources.

II. The Second Chamber of the Federal Supreme Court unanimously denied the appeal. It held that the right to health, in addition to being a fundamental and universally applicable human right, represents a constitutional consequence that cannot be dissociated from the right to life. The Government, notwithstanding the level at which it acts within the Brazilian federative pact, cannot be indifferent to the issue of health of the population, under the penalty that it can incur, through reprehensible omission, in grave unconstitutional conduct. The Chamber also considered that the programmatic nature of the norm contained in Article 196 of the Constitution cannot be translated into an inconsequential constitutional promise, under the penalty that the government body, by failing to meet society's expectations, will unlawfully replace fulfilling a duty it cannot postpone with an irresponsible act of governmental infidelity to what the Federal Constitution itself establishes.

#### Languages:

Portuguese.



#### Identification: BRA-2009-2-012

a) Brazil / b) Federal Supreme Court / c) Plenary / d) 18.08.2004 / e) ADI 3105 / f) / g) *Diário da Justiça* (Justice Gazette), 18.02.2005 / h).

#### Keywords of the systematic thesaurus:

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

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

#### Keywords of the alphabetical index:

Pension, contribution / Pension, solidarity, principle.

#### Headnotes:

The requirement of contributions from pensioners and retired workers to the Social Security Fund does not violate fundamental rights or constitutional guarantees, as this measure is based on the principles of solidarity and the financial and actuarial balance of the Social Security system.

The application of different tax rates for state civil servants and federal civil servants violates the principle of tax isonomy since they both belong to the category of “civil servants”.

#### Summary:

The National Association of the Office of Public Prosecutors (*Associação Nacional dos Membros do Ministério Público – CONAMP*) initiated a direct action for unconstitutionality in respect of Article 4 of Constitutional Amendment 41/2003. Under this provision, retired public servants and pensioners must pay social contributions at the same percentage rate as that established for public servants currently in office.

The petitioner argues that public servants who have already retired under the social security system then applicable are entitled not to have to pay any further social security contributions. Consequently, paying contributions on income from retirement would violate the constitutional guarantee of a vested right and *res judicata* (Article 5.36 of the Constitution). According to the petitioner, the new norm was also in breach of the principle of tax isonomy (equal treatment), as it establishes different rates of contribution, and the principle of income and wage irreducibility.

The Supreme Court noted that the amount of the social security contribution is set as a tax-related obligation and must therefore be analysed in the light of the constitutional principles related to taxes. Thus, it is not possible to cite the guarantee of vested rights in support of an argument for exemption from payment, as there is no norm within the Brazilian legal system that would grant total exemption from payment. Not even the principle of income and wage irreducibility would achieve this. The petitioner pointed out too that using earned income as the circumstance giving rise to the duty to pay social security contributions does not constitute tax *bis in idem* since social security contributions are not taxes. Neither can the fact that social contributions use the same basis for calculation as the tax on income from retired person be classified as double taxation. The Constitution deals expressly with this point (Article 195.2).

The public social security system is aimed at ensuring conditions of subsistence, independence and dignity for elderly public servants by payment of retirement income during their later years. Under the terms of Article 195 of the Constitution, this must be covered directly or indirectly by society as a whole. This can be described as the structural principle of solidarity. The fact that the public servants had already retired on the date when the Amendment was published

does not eliminate the social responsibility for funding it, since their social security treatment differs from that reserved for active public servants.

However, as regards the only paragraph of Article 4 that was under challenge, it was found that a breach had occurred of the principle of equality, as it treated public servants under identical legal circumstances differently. The Supreme Court, by majority vote, rejected the request regarding chapeau of Article 4 of Constitutional Amendment 41, of 19 December 2003, and unanimously deemed unconstitutional the terms “fifty percent” and “sixty percent” which are included respectively in Article 4.1 and 4.2 of Constitutional Amendment 41.

#### Languages:

Portuguese.



#### Identification: BRA-2009-2-013

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 13.04.2005 / **e)** ADI 3.367 / **f)** / **g)** *Diário da Justiça* (Justice Gazette), 22.10.1999 / **h)**.

#### Keywords of the systematic thesaurus:

1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – **Constitution.**

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

3.6.3 General Principles – Structure of the State – **Federal State.**

4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**

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

4.8.8.2.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione materiae.***

#### Keywords of the alphabetical index:

Judiciary, independence / Court, administrative, control.

#### Headnotes:

The creation of a central organ with competence over the administrative control of tribunals and judges does not violate the principle of the separation of powers or the federal pact. Its creation falls within the exclusive remit of the Federal Union and it is not shared with the federal states. The Supreme Federal Court is not submitted to the control of this organ, as it is hierarchically superior to it.

#### Summary:

A direct unconstitutionality action was initiated by the Association of Brazilian Magistrates (*Associação dos Magistrados Brasileiros – AMB*) in respect of that part of Articles 1 and 2 of Constitutional Amendment no. 45/2004 which establishes norms related to the National Board of Justice (*Conselho Nacional de Justiça – CNJ*).

There are two main strands to the legal basis for the petition, and according to these arguments, the establishment of the National Board of Justice implies an undeniable violation of the principle of separate branches of government (Article 2 of the Constitution), which are corollary to the self government of Courts and their administrative, financial and budgetary autonomy (Articles 96, 99 and 168 of the Constitution). It also implies a violation of the federative agreement (Articles 18, 25 and 125 of the Federal Constitution), to the extent that it subjects the agencies of the Judicial Branch of the States to administrative, budgetary, financial and disciplinary oversight by agencies of the Federal Government.

The Plenary of the Federal Supreme Court unanimously rejected the formal taint of unconstitutionality of Constitutional Amendment no. 45, of 8 December 2004, did not accept the action with regard to Article 125.8 of the aforementioned Amendment, and regarding its merit, considered, by a majority vote, that the action was totally unfounded.

The Plenary considered that the norms introduced by the Constitutional Amendment no. 45/2004 are constitutional, and that they created and regulated the National Board of Justice as an administrative body of the national Judicial Branch. It also found that there had been no violation to the unchangeable constitutional clause (*cláusula pétrea*) and that the political core of the principle of the separation and independence of the Branches of Government is preserved, through the preservation of the jurisdictional function, which is typical of the Judiciary, and the material conditions for it to be impartially and independently exercised.

The Court also held that states lack the constitutional competence to create, as an internal or external body of the Judiciary, a board intended to control the administrative, financial or disciplinary activities of their own justice systems. The National Board of Justice is charged with controlling the administrative, financial and disciplinary activities of magistrates. This competence is related only to bodies and judges that are hierarchically located under the Federal Supreme Court. Because it is an exclusively administrative agency, the National Board of Justice has no competence over the Federal Supreme Court and its Minister Judges, as it is the highest body of the national judiciary, to which the Board is itself subject.

#### *Languages:*

Portuguese.



#### *Identification:* BRA-2009-2-014

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 15.09.2005 / **e)** ADI 2.797 / **f)** / **g)** *Diário da Justiça* (Justice Gazette), 19.12.2006 / **h)**.

#### *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.**

4.5.9 Institutions – Legislative bodies – **Liability.**

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

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

4.7.4.3.1 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers.**

#### *Keywords of the alphabetical index:*

Political conduct / Politician, misconduct / Politician, privileged treatment.

#### *Headnotes:*

The statutory law is not entitled to establish jurisdiction under the Constitution. Any ordinary law that interprets constitutional provisions usurps the jurisdiction of the Supreme Court.

Politicians prosecuted for acts of malpractice (misconduct in public life) do not enjoy special privileges once their political activity has ended.

#### *Summary:*

I. A direct claim of unconstitutionality was submitted by the National Association of Members of the Public Prosecution Service (CONAMP), challenging the validity of Article 84.1 and 84.2 of the Code of Criminal Procedure, with the text given by Law 10628/2002. These provisions concern malpractice on the part of political agents.

The defendants, the President of the Republic and the National Congress, represented by the Attorney General's Office, argued that the plaintiff had no standing to bring the action, as it was composed either of individuals or of associations, "so called associations of associations". They also questioned the absence of the requirement of thematic pertinence (lack of effect of the impugned law over the interests and institutional purposes of the plaintiff). They also contended that the contested provisions do not add powers for the courts besides those provided by the Constitution, because the purpose of the impugned law is to explain the meaning and scope of such powers, subject to the constitutional principle of maximum effectiveness of constitutional rules.

II. The Court unanimously held that nationwide professional associations, of which the plaintiff is one, are entitled to file actions with abstract control of constitutionality and that there is a correlation between the thematic relevance of institutional purpose of the applicant and the legal provisions challenged, in that these provisions have repercussions in the vertical distribution of functional competence amongst the bodies of the Judiciary and thus amongst the bodies of the Prosecution Service.

The Court, by a majority, upheld the claim to declare the unconstitutionality of Law 10628 of 24 December 2002, which added Article 84.1 and 84.2 of the Code of Criminal Procedure, as it declared unacceptable the authentic interpretation of the Constitution by statutory legislation and because the power of the Supreme Federal Court had been usurped.

Regarding the action for malpractice brought against a political agent, the Court found that as it has the legal character of a civil action, it is unconstitutional to grant special powers by prerogative function. Such jurisdiction was established only for the criminal process brought against the political agent. Moreover, the law is unconstitutional in that it refers to original jurisdiction not provided by the Constitution.

The original jurisdiction to deal with and judge actions for malpractice belongs to the judge of first degree. Courts have the jurisdiction to judge authorities and political agents of a determined category for common crimes and crimes of responsibility. However, unlike ordinary crimes, the prosecution of crimes of responsibility ascribed to public agents, members of the Legislative Houses and the National Congress cease with the termination of the mandate. This is because such crimes are investigated and judged by the legislative power to which political agents belong.

#### *Languages:*

Portuguese.



#### *Identification:* BRA-2009-2-015

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 31.05.2006 / **e)** ADI 3.645 / **f)** / **g)** *Diário da Justiça* (Justice Gazette), 01.09.2006 / **h)**.

#### *Keywords of the systematic thesaurus:*

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

4.5.6.1 Institutions – Legislative bodies – Law-making procedure – **Right to initiate legislation.**

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

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

5.4.7 Fundamental Rights – Economic, social and cultural rights – **Consumer protection.**

#### *Keywords of the alphabetical index:*

Competence, legislative, limits / Consumer protection / Federal law, scope.

#### *Headnotes:*

The State is competent to enact legislation of a general nature in the sphere of consumer legislation. Member states will then complete the enactment of legislation in response to various demands. If no federal law is enacted, the states will exercise their supplementary competence and enact laws which are both general and specific in nature.

#### *Summary:*

I. The Liberal Front Party (*Partido da Frente Liberal*) initiated a direct unconstitutionality action (*ação direta de inconstitucionalidade*) against Law no. 14.861/2005 of the State of Paraná. This regulated, within that state, the right to information on food and food ingredients that contain or are produced from genetically modified organisms.

According to the petitioner, the state law exceeded the limits of the supplemental competence of the State to legislate, in determining the necessity of providing information to consumers, even when the amount of genetically modified organisms in food is equal to or less than one percent (1%), which is the limit established by federal regulations (Decree no. 4.680/2003). The petitioner also observed that different regulations emanating from the state dilute the effectiveness of the federal norm and create unfair treatment for companies that operate under them.

II. The Supreme Court decided that information labels for genetically modified products are an issue that is outside the purview of the States. Therefore, the state legislator exceeded the legislative limits imposed by Article 24 of the Constitution, which allows for supplementing rather than replacing federal norms. The state norm established a discipline that prevents the application of federal norms in a general manner, thereby hampering the effectiveness of the federal act. Law no. 14.861, of 26 October 2005 of the State of Paraná was unanimously declared unconstitutional and as a consequence, so was Decree 6.253, of 22 March 2006, of the State of Paraná, which regulated the state law.

#### *Languages:*

Portuguese.



*Identification:* BRA-2009-2-016

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 31.08.2006 / **e)** ADI 3.460 / **f)** / **g)** *Diário da Justiça* (Justice Gazette), 16.06.2007 / **h)**.

*Keywords of the systematic thesaurus:*

4.7.4.3.2 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Appointment.**

*Keywords of the alphabetical index:*

Public prosecution department, member / Professional practice.

*Headnotes:*

Candidates wishing to enter the Public Prosecution Service (*Ministério Público*) need to have completed a minimum period of three years of legal practice. The term legal practice covers activities that only a professional with a bachelor's degree in law could perform. Candidates should provide evidence of satisfaction of this requirement upon enrolment for the public recruitment process for the Public Prosecution Service, which is a State organ in charge of prosecuting penal and civil actions with a view to the protection of individual and collective rights and the promotion of the due application of the law.

*Summary:*

I. A direct unconstitutionality action was filed by the National Association of the Members of the Public Prosecution Service (*Associação Nacional dos Membros do Ministério Público – CONAMP*) against Article 7, chapeau, and the single paragraph of Resolution no. 35/2002, as amended by Article 1 of Resolution no. 55/2004, of the Superior Council of the Public Prosecution Service (*Conselho Superior do Ministério Público*) of the Federal District and Territories.

II. The Court, by a majority decision, rejected the action. It held that the rule under dispute was enacted to meet the objective of Constitutional Amendment no. 45/2004 to recruit those aspiring to careers as federal prosecutors, based on more rigorous technical and professional selection criteria. The three years of legal activities commences from the date the bachelor degree in law is concluded and the term legal practice covers activities that only a professional with a bachelor degree in law could perform. Candidates should provide evidence of satisfaction of this requirement upon enrolment for the public recruitment process, in order to promote greater legal security both to society and the applicants.

*Languages:*

Portuguese.

*Identification:* BRA-2009-2-017

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 13.12.2006 / **e)** ADI 2.995 / **f)** / **g)** *Diário da Justiça* (Justice Gazette), 28.09.2007 / **h)**.

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Gambling, regulation, competence.

*Headnotes:*

A State Law regulating the lottery violates the Federal Constitution as it stipulates that the regulation of such matters falls within the remit of the State.

*Summary:*

I. The Office of Attorney of the Republic (*Procuradoria-Geral da República*) initiated a direct unconstitutionality action against Law no. 12.343/2003 and Decree no. 24.446/2002 of the State of Pernambuco. The state law regulated lottery activities within the State whilst the decree regulated bingo.

The Office of the Attorney of the Republic argued that the state norm violated the provisions of Article 22.20 of the Constitution, which establishes that the Federal Government alone has competence to legislate on gambling and gaming systems. The term "lotteries" would be included within the meaning of the term "gambling".

II. The Supreme Court, by a majority vote, considered that the normative acts under dispute violated Article 22.20 of the Constitution, under which the Federal Government has exclusive competence to legislate on lottery services, gambling, bingos and raffles, and does not recognise the competence of the

State of Pernambuco to legislate on the matter. Consequently, it formally declared that Law 12.343, of 29 January 2003, and Decree 24.446, of 21 June 2002, from the State of Pernambuco, are both unconstitutional.

*Languages:*

Portuguese.



*Identification:* BRA-2009-2-018

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 01.08.2008 / **e)** ADI 124 / **f)** / **g)** *Diário da Justiça* (Justice Gazette), 16.04.2009 / **h)**.

*Keywords of the systematic thesaurus:*

2.2.2 Sources – Hierarchy – **Hierarchy as between national sources.**

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

*Keywords of the alphabetical index:*

Tax law / Federal jurisdiction.

*Headnotes:*

A state law that provides for deadlines in issuing a final decision in contentious administrative and tax cases violates the Federal Constitution as this matter falls within the remit of the federal law.

*Summary:*

I. A direct unconstitutionality action was introduced by the Government of the State of Santa Catarina against Article 16.4, of the state Constitution and Article 4 of the Temporary Constitutional Provision Act (Act of *do Ato das Disposições Constitucionais Transitórias*). This legislation covers the deadline for issuing final decisions in contentious administrative and tax cases. The petitioner contended that the provisions violate Articles 146.3.b, 24.1.1, 24.1.4, the chapeau of Article 37 of the Federal Constitution, and Article 34.5 of the Temporary Constitutional Provisions Act of the Federal Constitution.

II. The Supreme Federal Court, in a majority decision, accepted the matter for hearing and declared that the term “under penalty of being dismissed and without the possibility to review or renew the tax item regarding the same initiating factor,” is unconstitutional as included in Article 16.4 and Article 4 of the Temporary Constitutional Provisions Act, both of which are in the Constitution of the State of Santa Catarina. The Court considered that the decision to reject an administrative and tax case for failure to meet the deadline, with no possibility for review, is equivalent to eliminating tax credits, the validity of which is under review in the administrative area. Eliminating a tax credit or the right to create a tax credit for failure to meet a deadline, combined with any other criteria, corresponds to laches.

However, according to the Brazilian National Tax Code (Law no. 5.172/1966), laches in the case of the rights of the Federal Tax Service (*Fisco*) to the tax credit, is linked to the untimely inclusion of a tax item, rather than failure to meet a deadline or failure on the part of the tax authorities to review the item that gave rise to the case. A tax item cannot last indefinitely, as there is a risk of violating legal security, but the Federal Constitution reserves to the federal complementary law the ability to provide for laches in tax-related matters.

*Languages:*

Portuguese.



*Identification:* BRA-2009-2-019

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 13.11.2008 / **e)** ADI 3.817 / **f)** / **g)** *Diário da Justiça Eletrônico* 64 (Justice Gazette), 03.04.2009 / **h)**.

*Keywords of the systematic thesaurus:*

4.8.8.2.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione materiae*.**

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**

*Keywords of the alphabetical index:*

Competence, legislative, limits / Retirement, right / Police, laws regulating police.

*Headnotes:*

The Federal District has no competence to enact laws regarding the legal framework of its civilian police force. The Federal Union has exclusive competence over such matters, including the regulation of the retirement of civilian police officers.

*Summary:*

I. The Government of the Federal District filed a direct unconstitutionality action, seeking a declaration of the unconstitutionality of Article 3 of District Law no. 3.556/2005, as it considered as actual exercise of police activity the period of service provided by policemen granted to other organs of the direct and indirect Public Administration, of any Branches of the Federal Government and the Federal District until the above law was published. The petitioner alleged that this provision unduly extended the benefit of special retirement of civilian police officers, under Article 1 of the Federal Complementary Law no. 51/1985.

II. The Court, by a majority vote, accepted the direct action for hearing and pronounced Article 2 of District Law no. 3.556/2005 unconstitutional. The Court decided that the provision challenged did not directly address the issue of special retirement and therefore did not violate Article 40.4 of the Constitution. However, it considered that there was formal unconstitutionality as Article 2 of the above law did not comply with Article 21.14 of the Constitution, which grants exclusive competence to the Federal Government to regulate the legal framework of civilian police officers of the Federal District. It also found material unconstitutionality in Article 3 of District Law no. 3.556/2005, since the norm established in this provision is not consistent with the constitutional requirements for special retirement, nor does it comply with the stipulations of Complementary Law no. 51/1985, which addresses the subject and was accepted by the Federal Constitution of 1988.

*Languages:*

Portuguese.

*Identification:* BRA-2009-2-020

a) Brazil / b) Federal Supreme Court / c) Plenary / d) 19.02.2009 / e) MS 27.609 / f) / g) *Diário da Justiça Eletrônico* 64 (Justice Gazette), 02.04.2009 / h).

*Keywords of the systematic thesaurus:*

4.7.4.3.2 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Appointment**.

*Keywords of the alphabetical index:*

Public prosecution department, member / Professional practice.

*Headnotes:*

Candidates for the Public Prosecution Service must possess at least three years of legal practice. The computation of the three year period begins at the completion of the bachelor's degree in law. The term legal practice covers activities which can only be performed by somebody possessing a bachelor's degree in law. Candidates should provide evidence of having fulfilled this requirement when they enrol for the recruitment process.

*Summary:*

I. A petition for a personal preliminary injunction (*mandado de segurança*) was filed against an act by the Attorney of the Republic (*Procurador-Geral da Republic*), which prevented the final registration of the petitioner in the recruitment process for the position of Federal Attorney, on the basis that he had not completed three years of legal practice. The petitioner argued that the relevant authority had failed to take into consideration a period of time when he carried out the duties of Secretary to the Office of the Deputy Judge of the Second Degree of Jurisdiction (*Secretário do Gabinete do Juiz Substituto de Segundo Grau de Jurisdição*).

The Attorney of the Republic countered that guidance provided by the National Council of the Office of Public Prosecutors indicated that three years of legal activity means time in office, duty or profession that could only be fulfilled by somebody holding a bachelor's degree in law. As the petitioner had not yet graduated when he was working in the role described above, such duties cannot be described as being exclusively for law graduates.

II. The Plenary of the Federal Supreme Court, by a majority vote, denied the personal preliminary injunction and considered that the requirement of three years of legal activities under Article 129.3 of the Federal Constitution should be demonstrated at registration in the recruitment process. The Plenary also considered that legal activity is one which can only be performed by somebody holding a Bachelor in Law, with a level of exclusivity and a demonstrated preponderance of legal knowledge. Holding a position for which one does not need a law degree does not constitute exercise of legal activity.

*Languages:*

Portuguese.



## Canada Supreme Court

### Important decisions

*Identification:* CAN-2009-2-002

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 26.06.2009 / **e)** 31955 / **f)** A.C. v. Manitoba (Director of Child and Family Services) / **g)** *Canada Supreme Court Reports* (Official Digest), [2009] x S.C.R. xxx / **h)** <http://scc.lexum.umontreal.ca/en/index.html>; [2009] 7 *Western Weekly Reports* 379; 65 *Reports of Family Law* (6th) 239; [2009] S.C.J. no. 30 (*Quicklaw*); CODICES (English, French).

*Keywords of the systematic thesaurus:*

5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age**.  
 5.3.4.1 Fundamental Rights – Civil and political rights – Right to physical and psychological integrity – **Scientific and medical treatment and experiments**.  
 5.3.12 Fundamental Rights – Civil and political rights – **Security of the person**.  
 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.  
 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

*Keywords of the alphabetical index:*

Blood transfusion, refusal / Child, best interest / Minor, maturity, proof, right / Minor, protection / Religion, blood transfusion, refusal / Treatment, medical, refusal, religious grounds.

*Headnotes:*

Although children under 16 are presumed not to have sufficient maturity to make their own autonomous medical decisions under the Manitoba Child and Family Services Act (hereinafter, the “Act”), if the statutory “best interests” standard is properly interpreted to include judicial scrutiny of the child’s level of maturity to make such decisions, the legislative scheme created by Section 25.8 and 25.9 of the Act does not infringe Sections 7, 15 or 2.a of the Canadian Charter of Rights and Freedoms

(hereinafter, the “Charter”) because it is neither arbitrary, discriminatory, nor violative of religious freedom.

### *Summary:*

I. C was admitted to hospital when she was almost 15 years old, suffering from lower gastrointestinal bleeding. She is a devout Jehovah’s Witness, and refused to consent to the receipt of blood, despite medical advice that her life was at risk. The Director of Child and Family Services apprehended her as a child in need of protection, and obtained a treatment order from the Court under Section 25.8 of the Act, by which the court may authorise treatment that it considers to be in the child’s best interests. Section 25.9 of the Act presumes that it is in the best interests of a child 16 or over to allow the child’s views to be determinative, unless the child does not understand the decision or its consequences. Where the child is under 16, no such presumption exists. The applications judge ordered that C receive blood transfusions, concluding that there are no legislated restrictions of authority on the court’s ability to order medical treatment in C’s “best interests”. C and her parents appealed the order arguing that the legislative scheme was unconstitutional because it unjustifiably infringed her rights under Sections 2.a, 7 and 15 of the Charter. The Court of Appeal upheld the constitutional validity of the impugned provisions and the treatment order. A majority of the Supreme Court of Canada dismissed the appeal, holding that the provisions were constitutional.

II.1. Four judges concluded that when the young person’s best interests are interpreted in a way that sufficiently respects her capacity for mature, independent judgment to make a medical decision, the constitutionality of the legislation is preserved. Properly construed to take an adolescent’s maturity into account, the statutory scheme strikes a constitutional balance between her fundamental right to autonomous decision making, and the law’s equally persistent attempts to protect vulnerable children from harm. The “best interests” standard in Section 25.8 of the Act operates as a sliding scale of scrutiny, with the child’s views becoming increasingly determinative depending on his or her maturity. The more serious the nature of the decision and the more severe its potential impact on life or health, the greater the degree of scrutiny required. The result of this interpretation of Section 25.8 of the Act is that young people under 16 will have the right to demonstrate mature medical decisional capacity. It is the ineffability inherent in the concept of “maturity”, however, that justifies the state’s retaining an overarching power to determine whether allowing the child to exercise her autonomy in a given situation

actually accords with her best interests. But “best interests” must be interpreted so as to respect the adolescent’s developing autonomy interest. The more a court is satisfied that a child is capable of making a truly mature and independent decision on her own behalf, the greater the weight that must be given to her views. This brings the “best interests” standard in Section 25.8 of the Act in line with the evolution of the common law and with international principles, and strikes an appropriate balance between achieving the protective legislative goal while at the same time respecting the right of mature adolescents to participate meaningfully in their medical decisions.

The judges held that since a young person is entitled to lead evidence of sufficient maturity, the impugned provisions do not violate a child’s religious convictions under Section 2.a of the Charter. Consideration of a child’s “religious heritage” is one of the statutory factors which a judge must consider in determining the “best interests” of a child, expanding the deference to a young person’s religious wishes as his or her maturity increases, and is a proportionate response both to the young person’s religious rights and the protective goals of Section 25.8 of the Act. With respect to Section 7 of the Charter, the judges concluded that, while it may be arbitrary to assume that no one under the age of 16 has the capacity to make medical treatment decisions, it is not arbitrary to give them the opportunity to prove that they have sufficient maturity to do so. Finally, the judges also rejected the constitutional argument that Section 25.8 and 25.9 of the Act infringed C’s rights under Section 15 of the Charter because they are discriminatory. In their view, in permitting adolescents under 16 to prove sufficient maturity to determine their medical choices, their ability to make treatment decisions is ultimately calibrated in accordance with maturity, not age, and no disadvantaging prejudice or stereotype based on age can be said to be engaged.

2. Two judges held that the legislative authorisation of treatment over C’s sincere religious objection constituted an infringement of her right to religious freedom, but found that infringement was justifiable under Section 1 of the Charter because of the pressing and substantial objective of ensuring the health and safety and of preserving the lives of vulnerable young people, and because the means chosen is a proportionate limit on the right. They also concluded that, while Section 25.8 of the Act may deprive a child under 16 of the “liberty” to decide her medical treatment and may impinge on her “security of the person”, the Section 7 requirement that the limitation be carried out in a procedurally fair manner is satisfied by the notice and participation requirements in the Act.

3. One judge dissented, holding that the irrebuttable presumption of incapacity for a child under 16 rendered Section 25.8 of the Act unconstitutional as it unjustifiably infringed C's freedom of religion and her right not to be deprived of her liberty or security of the person.

*Languages:*

English, French (translation by the Court).



*Identification:* CAN-2009-2-003

a) Canada / b) Supreme Court / c) / d) 17.07.2009 / e) 31892 / f) R. v. Grant / g) *Canada Supreme Court Reports* (Official Digest), [2009] x S.C.R. xxx / h) <http://scc.lexum.umontreal.ca/en/index.html>; (2009), 245 *Canadian Criminal Cases* (3d) 1; 66 *Criminal Reports* (6th) 1; [2009] S.C.J. no. 32 (*Quicklaw*); CODICES (English, French).

*Keywords of the systematic thesaurus:*

3.17 General Principles – **Weighing of interests.**  
 4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**  
 5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**  
 5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence.**  
 5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel.**

*Keywords of the alphabetical index:*

Detention, perception / Detention, definition / Evidence, obtained illegally, exclusion.

*Headnotes:*

Section 9 of the Canadian Charter of Rights and Freedoms (hereinafter, the “Charter”) provides that everyone has the right not to be arbitrarily detained and Section 10.b accords to people who are detained the right to retain and instruct counsel. “Detention” under Sections 9 and 10 refers to a suspension of the individual’s liberty interest by a significant physical or

psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with a restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply. Evidence obtained in a manner that infringed or denied a constitutional right or freedom shall be excluded, pursuant to Section 24.2 of the Charter, if it is established that, “having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute”. This provision looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute. Section 24.2 of the Charter is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns.

*Summary:*

I. Three police officers were on patrol for the purposes of monitoring an area near schools. The accused, a young black man, was walking down a sidewalk when he came to the attention of the police officers. One of them initiated an exchange with the accused, while standing on the sidewalk directly in his intended path. He asked him what was going on, and requested his name and address. At one point, the accused, behaving nervously, adjusted his jacket, which prompted the officer to ask him to keep his hands in front of him. After observing the exchange, the other officers approached the pair on the sidewalk, identified themselves, and took up positions behind their colleague, obstructing the way forward. The accused was then asked whether he had anything he should not have, to which he answered that he had a firearm. At this point, the officers arrested and searched the accused, seizing the loaded revolver. They advised him of his right to counsel and took him to the police station. The trial judge found no Charter breach and admitted the firearm. The accused was convicted of five firearms offences. The Court of Appeal and the Supreme Court of Canada (with the exception of one count) upheld the convictions.

II.1. In the main opinion, five judges held that the accused was detained. The encounter took on the character of an interrogation, going from general neighbourhood policing to a situation where the police had effectively taken control over the accused and were attempting to elicit incriminating information. A reasonable person in his position (18 years old,

alone, faced by three physically larger policemen in adversarial positions) would conclude that his or her right to choose how to act had been removed by the police, given their conduct. Furthermore, the evidence of the firearm was obtained in a manner that breached the accused's rights under Sections 9 and 10.b of the Charter. The officers acknowledged at trial that they did not have legal grounds or a reasonable suspicion to detain the accused prior to his incriminating statements. Therefore, the detention was arbitrary. The police also failed to advise the accused of his right to speak to a lawyer before the questioning that led to the discovery of the firearm.

The majority found that, when faced with an application for exclusion under Section 24.2 of the Charter, a court must assess the effect of admitting the evidence on society's confidence in the justice system having regard to:

1. the seriousness of the Charter-infringing state conduct,
2. the impact of the breach on the Charter-protected interests of the accused, and
3. society's interest in the adjudication of the case on its merits.

Here, the Charter-infringing police conduct was neither deliberate nor egregious and there was no suggestion that the accused was the target of racial profiling or other discriminatory police practices. The officers went too far in detaining the accused and asking him questions, but the point at which an encounter becomes a detention is not always clear and the officers' mistake in this case was an understandable one. Although the impact of the Charter breach on the accused's protected interests was significant, it was not at the most serious end of the scale. Finally, the gun was highly reliable evidence and was essential to a determination on the merits. The admission of the gun into evidence would not, on balance, bring the administration of justice into disrepute. The significant impact of the breach on the accused's Charter-protected rights weighs strongly in favour of excluding the gun, while the public interest in the adjudication of the case on its merits weighs strongly in favour of its admission. However, the police officers were operating in circumstances of considerable legal uncertainty, and this tips the balance in favour of admission.

2. In separate concurring opinions, two judges agreed with the majority that the accused was arbitrarily detained and that the weapon should be admitted in evidence. However, one of them found that the majority's approach to the definition of "detention" lays too much emphasis on the claimant's perception of psychological pressure and does not take into

account adequately what the police know and which information they possess, while the other one found that the majority new Section 24.2 of the Charter test is inconsistent with the purpose of that provision.

#### *Supplementary information:*

The new framework and principles set out in *Grant* were applied in two companion appeals:

In *R. v. Suberu*, [2009] x S.C.R. xxx, a police officer responded to a call about a person attempting to use a stolen credit card at a store. After a brief exchange with the accused, the police officer received further information and he decided that he had reasonable and probable grounds to arrest the accused for fraud. He advised him of the reason for his arrest and cautioned him as to his right to counsel. The trial judge dismissed the application seeking the exclusion of evidence and the accused was convicted. The summary conviction appeal court, the Court of Appeal and the Supreme Court of Canada, in a majority decision, upheld the conviction. The majority held that, while the accused was momentarily delayed when the police asked to speak to him, he was not subjected to physical or psychological restraint so as to ground a detention. Not every interaction with the police will amount to a detention for the purposes of the Charter, even when a person is under investigation for criminal activity, is asked questions, or is physically delayed by contact with the police. In separate dissenting opinions, two judges found that the accused was detained and that the incriminatory statements should have been excluded at trial pursuant to Section 24.2 of the Charter. They would have ordered a new trial.

In *R. v. Harrison*, [2009] x S.C.R. xxx, a police officer on highway patrol stopped and searched the accused's rental vehicle. He found 35 kg of cocaine and the accused was charged with trafficking. The trial judge found breaches of the accused's constitutional rights against arbitrary detention and unreasonable search and seizure, but concluded that the evidence should not be excluded pursuant to Section 24.2 of the Charter and convicted the accused. The Court of Appeal upheld the conviction, but the Supreme Court of Canada, in a majority decision entered an acquittal. In the majority's view, the balancing of the factors favours exclusion of the evidence. The conduct of the police that led to the Charter breaches represented a blatant disregard for Charter rights, further aggravated by the officer's misleading testimony at trial. The seriousness of the offence and the reliability of the evidence, while important, do not in this case outweigh the factors pointing to exclusion. To appear to condone wilful and flagrant Charter breaches amounting to a significant

incursion on the accused's rights does not enhance, but rather undermines, the long-term repute of the administration of justice. One dissenting judge would have admitted the cocaine into evidence and upheld the conviction.

#### *Languages:*

English, French (translation by the Court).



#### *Identification:* CAN-2009-2-004

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 24.07.2009 / **e)** 32186 / **f)** Alberta v. Hutterian Brethren of Wilson Colony / **g)** *Canada Supreme Court Reports* (Official Digest), [2009] x S.C.R. xxx / **h)** www.droit.umontreal.ca/doc/csc-scc/en/index/html;390 *National Reporter* 202; [2009] S.C.J. no. 37 (*Quicklaw*); CODICES (English, French).

#### *Keywords of the systematic thesaurus:*

3.18 General Principles – **General interest.**  
5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**  
5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship.**

#### *Keywords of the alphabetical index:*

Driver's licence, photograph mandatory / Religion, objection to having photograph taken / Identity theft, prevention.

#### *Headnotes:*

To address the problem of identity theft associated with driver's licences, a province enacted a regulation requiring a photograph in order to hold a driver's licence. While the regulation infringes the Hutterians' religious beliefs prohibiting them from having their photographs taken, the infringement of their freedom of religion guaranteed by the Constitution is justifiable in a free and democratic society.

#### *Summary:*

I. Alberta requires all persons who drive motor vehicles on highways to hold a driver's licence. Since 1974, each licence has borne a photograph of the licence holder, subject to exemptions for people who objected to having their photographs taken on religious grounds. In 2003, the Province adopted a new regulation and made the photo requirement universal. The photograph taken at the time of issuance of the licence is placed in the Province's facial recognition data bank with a view to minimising identity theft associated with driver's licences. The Respondents sincerely believe that the Second Commandment prohibits them from having their photograph willingly taken and objected to having their photographs taken on religious grounds. Unable to reach an agreement with the Province, the Respondents challenged the constitutionality of the regulation alleging an unjustifiable breach of their religious freedom. The case proceeded on the basis that the universal photo requirement infringes Section 2.a of the Canadian Charter of Rights and Freedoms (hereinafter, the "Charter") which protects freedom of religion. The Government argued that, despite this breach, the regulation did not violate the Charter. Under Canadian constitutional law, the government, in an effort to uphold the legislation, can invoke the protection of Section 1 of the Charter. To do so, the government must demonstrate that an infringement of the Charter is "reasonable" and "demonstrably justified in a free and democratic society". In this case, both the chambers judge and the majority of the Court of Appeal held that the infringement of freedom of religion was not justified under Section 1 of the Charter. In a majority decision (4-3), the Supreme Court of Canada set aside the Court of Appeal's judgment and upheld the constitutionality of the provincial regulation.

II.1. The majority of the Court held that the regulation infringed the Respondents' freedom of religion but that the infringement was justified under Section 1 of the Charter. The objective of the impugned regulation of maintaining the integrity of the driver's licensing system in a way that minimises the risk of identity theft was found to be a goal of pressing and substantial importance, capable of justifying limits on rights. The universal photo requirement permits the system to ensure that each licence in the system is connected to a single individual, and that no individual has more than one licence. The regulation also satisfied the proportionality test. First, the universal photo requirement is rationally connected to the objective. The existence of an exemption from the photo requirement would materially increase the vulnerability of the licensing system and the risk of identity-related fraud. Second, the universal photo

requirement for all licensed drivers minimally impairs the Section 2.a right. The impugned measure is reasonably tailored to address the problem of identity theft associated with driver's licences. The evidence discloses no alternative measures which would substantially satisfy the government's objective while allowing the claimants to avoid being photographed. The alternative proposed by the claimants would significantly compromise the government's objective and is therefore not appropriate for consideration at the minimal impairment stage. Although there are many people who do not hold driver's licences and whose pictures do not appear in the data bank, the objective of the driver's licence photo requirement is not to eliminate all identity theft in the province, but rather to maintain the integrity of driver's licensing system so as to minimise identity theft associated with that system. Within that system, any exemptions, including those for religious reasons, pose real risk to the integrity of the licensing system. Third, the negative impact on the freedom of religion of Colony members who wish to obtain licences does not outweigh the benefits associated with the universal photo requirement. The most important of these benefits is the enhancement of the security or integrity of the driver's licensing scheme. It is clear that a photo exemption would have a tangible impact on the integrity of the licensing system because it would undermine the one-to-one and one-to-many photo comparisons used to verify identity. The universal photo requirement will also assist in roadside safety and identification and, eventually, harmonise Alberta's licensing scheme with those in other jurisdictions. With respect to the deleterious effects, the seriousness of a particular limit must be judged on a case-by-case basis. While the impugned regulation imposes a cost on those who choose not to have their photographs taken – the cost of not being able to drive on the highway – that cost does not rise to the level of depriving the claimants of a meaningful choice as to their religious practice, or adversely impacting on other Charter values. To find alternative transport would impose an additional economic cost on the Respondents, and would go against their traditional self-sufficiency, but there is no evidence that this would be prohibitive. When the deleterious effects are balanced against the salutary effects of the impugned regulation, the impact of the limit on religious practice associated with the universal photo requirement is proportionate.

2. In separate opinions, the three dissenting judges concluded that the provincial government did not discharge its burden of demonstrating that the infringement of the Hutterites' freedom of religion is justified under Section 1 of the Charter. An exemption to the photo requirement for the Hutterites was in place for 29 years without

evidence that the integrity of the licensing system was harmed in any way. In addition, more than 700,000 Albertans have no driver's licence and are therefore not in the facial recognition database. The benefit to that system therefore, of adding the photographs of around 250 Hutterites who may wish to drive, is only marginally useful to the prevention of identity theft. While the salutary effects of the mandatory photo requirement are therefore slight and largely hypothetical, the mandatory photo requirement seriously harms the religious rights of the Hutterites and threatens their autonomous ability to maintain their communal way of life. The majority's reasons understate the nature and importance of this aspect of the guarantee of freedom of religion.

#### *Languages:*

English, French (translation by the Court).



# Chile

## Constitutional Court

### Important decisions

*Identification:* CHI-2009-2-001

**a)** Chile / **b)** Constitutional Court / **c)** / **d)** 26.03.2006 / **e)** 681-2006 / **f)** Article 116 of the Tax Code / **g)** Official Journal / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

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

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

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

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

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

*Keywords of the alphabetical index:*

Tax / Administrative decision / Dispute.

*Headnotes:*

The exercise of judicial power only belongs to courts that have been established by law; it cannot be exercised through an administrative decision. People can only be judged by courts established by law.

*Summary:*

A decision adopted on 26 March 2006 stated that Article 116 of the Tax Code was unconstitutional. It was repealed with effect from its publication in the Official Journal.

The Constitutional Court undertook, of its own initiative, a review of the constitutionality of Article 116 of the Tax Code relying on the competence of Article 93.7 of the Constitution. This allows the Court to state the unconstitutionality of a

law if there is at least one previous decision of inapplicability on a specific case. In this decision, the Court considered 34 previous cases in which inapplicability of Article 116 of the Tax Code had been declared.

The Court first referred to the constitutional and procedural requirements it needed to consider when deciding upon constitutional compliance. Whilst procedural requirements are indicated in the Constitution, there are further constitutional elements related to the principle of the supremacy of the Constitution, concentration of constitutional justice and equality before the law. The Court also referred to the principle of rule of law that is guaranteed by the Constitutional Court, especially in its meaning of “checks and balances”.

The Court stated that respect for the legislative power requires it to seek an interpretation of the law that is in accordance with the Constitution. If this proves impossible, the Court may declare the law unconstitutional.

Article 116 of the Tax Code reads: “The Regional Director (of the Income Tax Revenue Service) may authorise his staff to know and decide demands and claims on behalf of the Regional Director”.

The Court considered that this kind of delegation was unconstitutional because the competence to exercise judicial power – as in tax claims – only belongs to courts that have been established by law and cannot be exercised through an administrative decision.

As the Court stated, jurisdiction, as an expression of sovereignty, may only be delegated to courts. Article 116 is therefore in conflict with Article 5 of the Constitution as well as Articles 6 and 7 of the Constitution, which ensure the subordination of all authorities to the Constitution and the law.

Moreover, in Chile, people can only be judged by courts established by law. This is an essential right that binds all the organisms and powers of the State based on Article 5 of the Constitution.

*Languages:*

Spanish.



*Identification:* CHI-2009-2-002

**a)** Chile / **b)** Constitutional Court / **c)** / **d)** 25.05.2009 / **e)** 1345-2009 / **f)** Article 171 of the Sanitary Code / **g)** / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

1.6.3 Constitutional Justice – Effects – **Effect erga omnes.**

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

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

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

Fine / Defence / *Erga omnes* effects.

*Headnotes:*

The obligatory payment of the complete amount of a fine violates the right of access to justice and the principle of effective judicial protection under the Constitution. It also constitutes an unreasonable and disproportionate condition for persons wishing to appeal against fines imposed by administrative authorities.

*Summary:*

A decision adopted on 25 May 2009 stated that Article 171 of the Sanitary Code was unconstitutional. It was accordingly repealed from the Code with effect from its publication in the Official Journal.

The Constitutional Court undertook a review of the constitutionality of Article 171 of the Sanitary Code based on the competence bestowed on it by Article 93.7 of the Constitution. Article 93.7 permits the Court to declare a provision unconstitutional if there exists a previous decision of inapplicability of the same rule on a specific case. In the decision of 25 May, the Court considered six previous cases in which inapplicability of the above mentioned Article 171 had been declared.

The most important consequence of declaring Article 171 unconstitutional is that the provision will be annulled with *erga omnes* effects. This important

effect always necessitates consideration to be given to the principle stated by the Court with regard to respect for legislative power and the need to find an interpretation of the law that is in accordance with the Constitution. If this is not possible, the Court may declare the law unconstitutional, as was the case in these proceedings.

Under Article 171 of the Sanitary Code, appeals against sanctions imposed by the National Health Service may be lodged within the ordinary civil justice system within five working days of notification of sentence. Such claims will be dealt briefly and summarily. The claim will only be admissible if the offender accompanies it with proof of payment of the fine.

*Languages:*

Spanish.

*Identification:* CHI-2009-2-003

**a)** Chile / **b)** Constitutional Court / **c)** / **d)** 29.07.2009 / **e)** 1254-2009 / **f)** Article 595 of the Courts Organisation Code / **g)** / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

1.6.3 Constitutional Justice – Effects – **Effect erga omnes.**

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

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

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

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

*Keywords of the alphabetical index:*

Legal assistance, free, right.

*Headnotes:*

The obligation for lawyers to provide legal aid to the poor without any compensation violates their right to equality and poses a disproportionate burden on them.

*Summary:*

In this decision, the Constitutional Court held the term “free” in Article 595 of the Courts Organisation Code to be unconstitutional. It was therefore revoked with effect from its publication in the Official Journal.

The Lawyers’ Association of Chile requested the Constitutional Court to examine the constitutionality of the term “free” in Article 595 of the Organic Law on Courts, exercising its competence under Article 93.7 of the Constitution. This constitutional provision allows the Constitutional Court to declare a legal precept unconstitutional if it has previously stated its inapplicability – for a specific case – in at least one previous case. In the present case, the same legal rule had been declared inapplicable three times.

In this decision, analysis was carried out on the requirements for declaring a legal provision unconstitutional and the consequences of such a finding. The exceptional nature of the decision was also emphasised. Applying the principle of “reasoned deference”, the Constitutional Court must consider all possible interpretations of a legal precept. If none of these are in accordance with the Constitution, it can declare a legal provision unconstitutional.

Under the Constitution, there is a guarantee of equal protection for all in the exercise of their rights. It also states that everyone is entitled to a legal defence as established by law and that the law will provide the means to give counsel and legal defence to those who cannot procure it for themselves. See Article 19.3 of the Constitution.

Under Article 595 of the Court Organisation Code, which expands upon this constitutional provision, judges are charged each month with appointing in turn, among those who are non-exempt, one lawyer to defend civil cases free of charge, and another to defend “the labour cases of the people who have obtained or should enjoy the aforementioned privilege...”.

The decision noted that the rationale behind the provision was to give free legal assistance to those unable to procure it for themselves. It found this object to be constitutionally permissible and noted that the procedure, imposing a burden on lawyers,

was suitable to fulfil that purpose. However, in the absence of any compensation, the burden would become disproportionately difficult for lawyers. The Court found that the provision violated the right of equality before the law (in particular the prohibition on arbitrary discrimination) and to an equal distribution of public burdens and freedom of work, guaranteed respectively, in Article 19.2, 19.20 and 19.16 of the Constitution.

*Languages:*

Spanish.



# Croatia

## Constitutional Court

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### Important decisions

*Identification:* CRO-2009-2-006

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 30.04.2009 / **e)** U-III-443/2009 / **f)** / **g)** *Narodne novine* (Official Gazette), 65/09 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

1.1.2.1 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Necessary qualifications.**

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

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

*Keywords of the alphabetical index:*

Constitutional Court, judge, appointment / Parliament, committee / Parliament, decision / Judicial review, scope / Administrative Court, jurisdiction / Constitutional complaint, limits of review.

*Headnotes:*

The decision of the Croatian Parliament on the election of judges of the Constitutional Court may be examined from the aspect of the constitutionality and legality of the procedure and manner in which it was rendered, but in different degrees and from the aspects of compliance with the conditions laid down in the Constitutional Act on the Constitutional Court, which depends on the nature of the condition provided.

Examination of the qualification that the candidate for a judge of the Constitutional Court "...has distinguished himself/herself in the legal profession by scientific or professional work or public activity" must be limited to checking whether the candidacy contains facts which allow the conclusion that the candidate meets the condition. The Croatian Parliament has the exclusive competence to evaluate whether these facts are sufficient for a conclusion that the candidate has distinguished himself/herself in the

legal profession by scientific or profession work or public activity, and to evaluate the facts themselves.

The Croatian Parliament is entitled to decide on how to establish compliance with the condition of at least 15 years of "working experience in the legal profession" The control must be limited to whether the Committee for the Constitution, Standing Orders and Political System of the Croatian Parliament could establish this fact from all the documents enclosed with the application.

The constitutionally guaranteed right of access to every job and duty under equal conditions implies the principle of equality but that it also has a procedural aspect, and therefore it should be reviewed together with the provisions of the Constitution that in their entirety imply "legal protection". In this part it has two aspects: the positive one, demanding effective legal protection for every individual candidate who was groundlessly placed in an unequal position in relation to other candidates in an individual act brought in a competition for a certain job or duty, although he or she complied with all the prescribed conditions of the competition, and the negative one, demanding effective prevention of groundless objections of other candidates against any individual candidate who complied with all the conditions in the competition for a certain job or duty and was elected in accordance with the law, under conditions which were equal for all candidates.

*Summary:*

I. The applicant lodged a constitutional complaint against a judgment of the Administrative Court, in which the Administrative Court repealed a decision by the Croatian Parliament electing the applicant as a judge of the Constitutional Court because it found that the applicant failed to submit sufficient documentation for proving that she had met the condition of at least fifteen years of working experience in the legal profession within the meaning of Article 5.1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (the Constitutional Act) on the basis that the applicant's employment book containing her complete working experience did not prove that these years of service were in the legal profession. In addition to the employment book she had supplied certificates from all her employers describing the type of work she had done, to demonstrate whether she had completed years of service in the legal profession.

The procedure and manner of election, including the voting and the number of votes of MPs won by each candidate for the duty of judge of the Constitutional Court was not in dispute, and the unsuccessful

candidate did not dispute it in the proceedings before the Administrative Court instituted under Article 66 of the Administrative Disputes Act. Only one question was under dispute: did the applicant prove that on 29 April 2008 (i.e. the expiry date of the deadline for applying for the position of judge at the Constitutional Court) she had completed at least 15 years of working experience in the legal profession within the meaning of Article 5.1 of the Constitutional Act?

The applicant argued that the Administrative Court judgment violated the constitutional rights guaranteed in the second part of the provision of Article 54.2 of the Constitution (all jobs and duties shall be accessible to everyone under the same conditions) in connection with Article 14.2 of the Constitution (equality of all before the law). Finally, she contended that there had been a breach of her constitutional right to freedom of work guaranteed by Article 54.1 of the Constitution, and right to a fair trial guaranteed by Article 29.1.

II. The Constitutional Court recalled that – in the absence of an explicit legal norm which would exclude the Administrative Court’s judicial protection against a decision of the Croatian Parliament on the election of judges of the Constitutional Court – in Ruling no. U-III-1923/2002 of 13 December 2002 – it had for the first time stipulated the jurisdiction of the Administrative Court to examine potential violations of constitutional rights made by the Decision of the Croatian Parliament on the election of judges of the Constitutional Court, in proceedings conducted in accordance with Article 66 of the Administrative Disputes Act. In the same ruling the Constitutional Court also indirectly recognised the active legitimacy of candidates in elections for judgeships at the Constitutional Court to file a request according to Article 66 of the Administrative Disputes Act. However, the Constitutional Court pointed out that the Administrative Court oversteps the boundaries of the Constitution where it annuls disputed individual acts in proceedings conducted according to Article 66 of the Administrative Disputes Act, because there is no competent body in the State with annulment power in proceedings for the protection of human rights, not even the Constitutional Court.

The Constitutional Court substantiated in detail the following legal views:

The decision of the Croatian Parliament on the election of judges of the Constitutional Court may be examined from the aspect of the constitutionality and legality of the procedure and manner in which it was brought, but in different degrees (Administrative Court and Constitutional Court control). It may also be examined from the aspect of compliance with the

conditions laid down in Article 5.1 of the Constitutional Act, which depends on the nature of the condition prescribed (such as Croatian citizen, graduate jurist, at least fifteen years of work experience in the legal profession, distinguished scientific or professional work or public activity). If the above conditions have been met, the political will expressed during voting cannot be a subject either of judicial or constitutional control.

Examination of the qualification that a candidate for a judicial position at the Constitutional Court “...has distinguished himself/herself in the legal profession by scientific or professional work or public activity” must be limited to checking whether the candidacy contains the facts which allow the conclusion that the candidate meets the condition. The Croatian Parliament has the exclusive competence to evaluate whether these facts are sufficient for a conclusion that the candidate has distinguished himself/herself in the legal profession by scientific or profession work or public activity, and to evaluate the facts themselves.

The Croatian Parliament itself decides on how to establish compliance with the condition of at least 15 years of “working experience in the legal profession” Should the Invitation for candidacy not specify the documents that the candidates must supply to prove their fifteen years of work experience in the legal profession, then control must be limited to the issue whether the Committee for the Constitution, Standing Orders and Political System of the Croatian Parliament could have established this fact from all the documents that had been enclosed with the application.

The facts substantiating compliance with conditions for a judge of the Constitutional Court must exist at the moment the contest is closed and must be presented in the application in the proper manner.

In its consideration of the case, the Constitutional Court firstly established that the candidates who applied in response to the Invitation for the election of three judges of the Constitutional Court of Croatia of 26 February 2008 were not legally obliged to enclose, besides an application and CV, certificates from all previous employers. Therefore, the Constitutional Court found the Administrative Court’s judgment to be a gross encroachment on the power of the Croatian Parliament, because the Administrative Court demanded evidence for validity of the candidacy that is not required either in the Constitution or in the Constitutional Act or in any other regulation. The Croatian Parliament had not asked for it in previous elections of judges of the Constitutional Court. The Administrative Court place the applicant in an unequal position before the law in relation to access

to the duty of judge of the Constitutional Court (Article 54.2 of the Constitution in conjunction with Article 14.2 of the Constitution).

The Constitutional Court pointed out that the legal issue in the Administrative Court's review of the Croatian Parliament's decision on the election of judges of the Constitutional Court should, in this case, have been as follows: could the Committee for the Constitution, Standing Orders and Political System of the Croatian Parliament, on the grounds of the documents that the applicant had submitted to it, have concluded that she had proved she had at least 15 years of working experience in the legal profession on 29 May 2008?

Examining the documentation that the applicant had enclosed with her application to the Committee for the Constitution, Standing Orders and Political System of the Croatian Parliament, and taking into account previous customary parliamentary practice and the views of the Venice Commission of the Council of Europe, the Constitutional Court found that the applicant's application with the documents enclosed was sufficient for the Committee to conclude that she had fulfilled the condition of at least fifteen years of working experience in the legal profession on 29 April 2008. Furthermore, the Constitutional Court found that the applicant had validly enjoyed the status of a judge of the Constitutional Court since the day she entered into office because she was elected to that duty under equal conditions as the other candidates, and before that the competent Committee for the Constitution, Standing Orders and Political System of the Croatian Parliament had validly, on the grounds of the enclosed documents, established that on 29 May 2008 the applicant complied with all the conditions laid down in Article 5.1 of the Constitutional Act.

The Constitutional Court pointed out that the constitutionally guaranteed right of access to every job and duty under equal conditions in the second part of the provision of Article 54.2 of the Constitution, together with the constitutional guarantee of "legal protection" (Articles 18.1, 19.2 and 29.1 of the Constitution) has two aspects: a positive one, demanding effective legal protection for every individual candidate who was groundlessly placed in an unequal position in relation to other contestants in an individual act brought in a contest for a certain job or duty, although he or she complied with all the prescribed conditions of the contest, and a negative one, demanding effective prevention of groundless objections of other candidates against any individual/candidate who complied with all the prescribed conditions in a competition for a certain job or duty and was elected in accordance with the law, under conditions which were equal for all candidates.

The Constitutional Court accordingly found that the Administrative Court's judgment breached the applicant's stated constitutional guarantee in the first place in its negative aspect because the Administrative Court failed to assure her of effective legal protection from unfounded objections by the unsuccessful candidate in the same recruitment contest.

The Constitutional Court found that the applicant's right to work guaranteed in Article 54.1 of the Constitution had been violated. However, it deemed it unnecessary to conduct a separate examination of the alleged violation of the applicant's constitutional right to a fair trial before the Administrative Court.

Given the particular circumstances of the case, the Constitutional Court overturned the Administrative Court's judgment, but did not refer the case back to the Administrative Court for renewed proceedings as it had already decided on the merits of the case i.e. as to the violation of the applicant's constitutional rights.

In view of Article 76.1 and 76.2 of the Constitutional Act, two Constitutional Court judges voted against this decision and provided dissenting opinions. They found it inappropriate for the Constitutional Court to overturn the decision without referring the matter back to the Administrative Court for renewed proceedings.

#### *Languages:*

Croatian, English.



#### *Identification:* CRO-2009-2-007

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 20.05.2009 / **e)** U-III-1902/2008 / **f)** / **g)** *Narodne novine* (Official Gazette), 67/09 / **h)** CODICES (Croatian, English).

#### *Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Child, best interest / Parental contact, joint consideration / Child, guardian, designation / Child, mother, separation / Child, parental rights / Child, right of access / Child, visit, right, procedure / Family ties, break / Fundamental right, essence.

*Headnotes:*

In order to provide protection against arbitrary decisions in the field of family life, all potential violations of the right to respect for family right must be examined by viewing in their totality all the proceedings that preceded those before the Constitutional Court, irrespective of the type of proceedings (administrative, judicial) and the bodies that conducted them (social welfare bodies, courts).

*Summary:*

I. An injunction had been issued, on meetings and companionship between a mother and her child, which was preceded by a three-year period during which the applicant was prevented from meeting and spending time with her child. The control expertise recommended by the court experts was not carried out and the delay in the proceedings of the competent bodies in deciding on meetings and companionship between the mother and child had objectively made it possible to influence the child's attitude to his mother, which resulted in the child categorically refusing to see her. The conduct of the competent bodies, seen as a whole, had violated the applicant's right to respect for her family life over meetings and companionship between the applicant and her child during her stay in the detention/prison.

The applicant lodged a constitutional complaint against a ruling by the Second Instance Court of 28 March 2009, which upheld that part of the First Instance Court judgment of 12 November 2007 which refused the applicant's proposal for the court to order meetings and companionship between herself and her child, born in 1996.

At the time when the proposal was submitted and at the time when the impugned rulings were passed the applicant was serving a prison sentence to which she had been condemned in the final judgment of the Second Instance Court of 11 September 2006, for the murder in excessive self-defence of her husband and the father of their child.

In a ruling by the competent administrative body of 19 May 2005 the applicant's minor child was placed in care and the paternal grandmother was appointed as the child's guardian.

The procedure before the administrative and judicial bodies deciding on the applicant's meetings and companionship with her child lasted for more than three years, and it ended with an injunction by the court on meetings and companionship, during which period the applicant last saw her child on 13 September 2005.

The First Instance Court found that at the time when it decided on the applicant's proposal the conditions for meetings and companionship between the applicant and her child were not met, and it based its conclusion on the findings and opinion of expert psychiatrists and psychologists who found that meetings and companionship between mother and child were not possible at that point, as the child categorically refused contact with his mother. According to the experts' findings, the existing situation could be overcome if the child underwent psychotherapy aimed at working through the tragic event. The Second Instance Court entirely upheld the findings and legal stance of the First Instance Court.

The applicant argued that the disputed rulings and the conduct of the competent administrative and judicial bodies, which culminated in the complete breakdown of the family and the categorical refusal of the child to meet her, violated her constitutional right to respect of family life guaranteed by Article 35 of the Constitution and the right to respect of family life guaranteed by Article 8 ECHR.

II. The Constitutional Court firstly stated principal legal views regarding the meaning and scope of the constitutional guarantee to respect of family life in line with those expressed by the European Court of Human Rights. It also noted that the procedure followed by the competent body in deciding on appointing a guardian and the procedure followed when it decides about enabling meetings and companionship between children and parents or about access to children in foster homes affected the substance of the decision about the main issue, and that there was a strong need for protection from arbitrary decisions in the field of family life, and that all potential violations of the right to respect for family right must be examined by viewing in their totality all the proceedings that preceded those before the Constitutional Court, irrespective of the type of proceedings (administrative, judicial) and the bodies that conducted them (social welfare bodies, courts).

The Constitutional Court noted the very complex and sensitive nature of the case, both from the perspective of the right to respect for family life of the members of the family affected by the tragic event, and from the perspective of the state's obligations to ensure the child's best interests without thereby damaging the

balance in the realisation of the right to family life of the mother and maternal grandmother, on one side, and the paternal grandparents, on the other, in relation to their child/grandchild, or the balance between their individual interests and those of society (the protection of the best interests of the child).

The Constitutional Court found that at the time when the mother was detained a family life existed between her and her child in the meaning of Article 35 of the Constitution and Article 8 ECHR, and it pointed out the duty on the competent bodies to ensure meetings and companionship between the mother/detainee (later prisoner) and her child in accordance with the law, pursuant to a legitimate goal (respect for the family life of the mother and child), with the possibility of proportional restriction of these meetings to the extent necessary in a democratic society. In this context, it also stressed that mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that measures preventing such enjoyment amount to an interference with the right protected by Article 35 of the Constitution and Article 8 ECHR, except in cases where such measures are prescribed by law, pursue a legitimate aim and are necessary in a democratic society.

Therefore, the Constitutional Court had to examine the alleged violations of the applicant's right to respect for her family life in the part referring to her meetings and companionship with her minor child during her stay in detention/prison, by subjecting the proceedings and measures of the competent bodies that decided on the applicant's above rights to the test of justification.

Starting from all particular circumstances of the case – the serious judicial measure of an injunction on meetings and companionship between the applicant of the constitutional complaint and her child (28 March 2008), which was preceded by several years when it was not made possible for the applicant to meet and spend time with her child (since 13 September 2005) in combination with the actual life of the child with his paternal grandparents from the day of the tragic event of the murder of their son and the child's father (19 March 2005) to the present, with the failure to bring court expertise to bear on the situation at an earlier stage, and with the failure of examining in any way (because the child's paternal grandmother had been appointed as his guardian), whether it was necessary to appoint a special-case guardian for the child while he was undergoing psychotherapy to "work through" an event that was tragic and extremely traumatic for the child, but also for his grandmother/guardian. The Constitutional Court noted that the control expertise recommended by the court experts was not carried out, and the delay in the proceedings by the competent bodies in deciding on the meetings and companionship

of the mother and child had objectively made it possible to influence the child's attitude to his mother, which resulted in the child categorically refusing to see her. It therefore found that the conduct of the competent bodies, viewed as a whole, had violated the applicant's right to respect for her family life guaranteed by Article 35 of the Constitution and Article 8 ECHR, in the part concerning meetings and companionship between the applicant as the biological mother and her child.

The Constitutional Court quashed the court injunction on meetings and companionship between the applicant and her child. In so doing, it has opened up possibilities, but has also created an obligation for the social welfare bodies to engage the appropriate experts and to perform, within the framework of their statutory powers, all the necessary actions and procedures to efficiently prepare the applicant and her child for a family reunion.

#### *Languages:*

Croatian, English.



#### *Identification: CRO-2009-2-008*

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 19.06.2009 / **e)** U-I-642/2009 and others / **f)** / **g)** *Narodne novine* (Official Gazette), 76/09 / **h)** CODICES (Croatian, English).

#### *Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
5.2 Fundamental Rights – **Equality**.  
5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

#### *Keywords of the alphabetical index:*

Economic action, freedom / Equality, professional / Equality, inequality, human rights of others, impact / Freedom of enterprise / Fundamental right, restriction, justification / Legitimate aim / Rest, right / Sunday, secular character / Rights of workers, protection / Trade, regulation / Working hours, change, impact / Working time, standard, exception.

*Headnotes:*

The legislative prohibition on Sunday opening for shops is not a measure that would lead to the realisation of the aim for which it was introduced: the protection of the rights of workers employed in shops. In addition to its not being appropriate, this measure could hardly be included among the goods or values defined in the Constitution, the protection of which would allow the legal restriction of entrepreneurial freedom.

On the one hand this legislative measure imposed an excessive burden on retailers affected by this prohibition, especially because it also affected retailers who entirely respected the rights of their employees, which disturbed the balance between the protection of shop workers and the protection of traders' entrepreneurial freedom, in the light of the constitutional requirement that entrepreneurial and market freedoms are the basis of the economic system of the State.

On the other hand, the exceptions the legislator had allowed to this measure, allowing some (but not all) retailers to operate on Sundays, disturbed with no objective and reasonable justification, the constitutionally guaranteed equality within one group of entrepreneurs on the market – retail traders – from the aspect of the State's constitutional obligation to ensure all entrepreneurs an equal position in the market.

*Summary:*

The Constitutional Court initiated proceedings for the review of the constitutionality of Article 58.1, 58.2, 58.3, 58.4 and 58.5, Article 59, Article 60 and Article 62.2 and 62.3 of the Trade Act and repealed them.

One municipal council, five commercial companies and a natural person submitted different proposals for the review of constitutionality of the above provisions of the Trade Act.

The disputed legal provisions provided for daily and weekly shop working hours, indicating that normal weekly working hours were between Monday to Saturday. They stipulated that retailers did not work on Sundays and holidays, but provided for many exceptions to that rule, allowing all shop to open on Sundays between 1 June and 1 October and during December, and some shops to open on Sundays all year round.

The claimants argued that the stipulated prohibition on Sunday opening for shops had no legitimate aim and was unnecessary in a democratic society, because the protection of workers' rights – which was highlighted as a purpose the disputed provisions meant to achieve – could be realised through other measures which would be less intrusive towards entrepreneurial freedom. They also pointed out that the prohibition failed to protect workers' rights, as it did not cover the whole year. They also argued that the provision caused inequality amongst the retailers affected by it, due to the various exceptions, and that entrepreneurial freedom was restricted contrary to Article 49.2 of the Constitution.

The Constitutional Court found a number of constitutional provisions of relevance for the review of the constitutionality of the disputed provisions of the Trade Act. These included Articles 16.2 of the Constitution (the principle of proportionality), Article 49.1 of the Constitution (entrepreneurial and market freedom), Article 49.2 of the Constitution (the State shall guarantee all entrepreneurs an equal legal status on the market), Article 50.2 of the Constitution (exceptional restriction of entrepreneurial freedom for the protection of interests and security of the State, nature, the environment and public health) and Article 55.3 of the Constitution (right of every employee to a weekly rest).

The Constitutional Court emphasised its competence to review the extent to which the legislative measures complied with the relevant constitutional values, whilst acknowledging that the regulation of working hours falls within the legislator's margin of appreciation.

The Constitutional Court emphasised that the constitutional guarantee of a weekly rest for every worker is not correlated with Sunday. It was the national legislator, rather than the Constitution, that proclaimed Sunday as a weekly rest day, and this was confirmed by various international agreements, relevant national regulations, collective agreements and other relevant contracts. However, the request to have Sunday as the weekly rest day is not absolute. The State is under a duty to respect the traditions and customs of its specified religious minorities, and the needs of the community cannot be satisfied without the continuous, permanent and undisturbed functioning of the public services. Furthermore, the country's economic system, under Article 49.1 of the Constitution, has to be based on entrepreneurial and market freedom, and requires Sunday working.

The Constitutional Court found the statutory right of every employee to increased wages for working on Sundays and to one day of rest for each week where he or she worked on a Sunday to be of relevance in constitutional law. They found it to be a measure that struck the necessary balance between the constitutional right of workers to a weekly rest day and appropriate remuneration for Sunday working (Sunday being the statutorily-defined day of weekly rest) and the constitutionally guaranteed entrepreneurial freedom of retailers. It also complies with the general interest in the undisturbed functioning of the community.

The Constitutional Court pointed out that those proposing the Trade Act had highlighted the key role of trade, as an important commercial activity, within the national economy, but noted that there was no substantiation of the aim which gave rise in the Trade Act to the special measure designating Sunday as a non-working day for commercial purposes. Due to this failure, the Constitutional Court started from the presumption that the disputed legal provisions were aimed at the protection of rights of workers employed in trade.

The Constitutional Court found that the legal measure prohibiting Sunday shop opening was a form of legal restriction of the entrepreneurial freedom of traders and that the protection of the rights of workers employed in shops was not a sufficiently compelling reason in constitutional law to justify this measure. In this regard, the Constitutional Court pointed out the duty of the State to organise its system of supervision over the regular implementation of laws and other regulations in a manner that will enable it to guarantee and secure to every employee the efficient realisation of his or her recognised right, and to secure protection against anyone who fails to respect workers' rights recognised by laws and other regulations as well as by contracts. The Constitutional Court was of the opinion that the ban on Sunday shop opening was not a measure that would lead to the realisation of the aim for which it was introduced; it was not appropriate, and could hardly be included among the goods or values defined by the Constitution the protection of which would allow the legislative restriction of entrepreneurial freedom within the meaning of Article 50.2 of the Constitution. Furthermore, it was not necessary in a democratic society for realising the aim it was meant to achieve.

For the reasons outlined above, the Constitutional Court found that the legal prohibition on Sunday shop opening imposed an excessive burden on retailers affected by this prohibition, especially because it also affected retailers who fully respected their workers' rights, which disturbed the balance between the

protection of shop workers and the protection of traders' entrepreneurial freedom, in the light of the constitutional requirement that entrepreneurial and market freedoms are the basis of the economic system of the State (Article 49.1 of the Constitution).

The Constitutional Court also examined the extent to which the legislator had succeeded in achieving an acceptable balance in constitutional law between the rights of retailers who were allowed to work on Sundays (as exceptions to the rule) and the rights of those who were not, and whether a state of affairs pertained which could remove any objections about the inequality of the latter group of retailers by comparison with the first. The Constitutional Court found that the disputed legislative solutions showed that this objection could not be removed, and that there were sufficient reasons for it to establish that they disturbed the constitutionally guaranteed equality within one group of entrepreneurs on the market – retail traders. There were no objective and reasonable justifications for disrupting the equality of the legal position within one group of entrepreneurs, caused by the disputed legal provisions, seen from the aspect of the State's constitutional obligation to assure all entrepreneurs an equal position on the market (Article 49.2 of the Constitution).

#### *Languages:*

Croatian, English.



#### *Identification:* CRO-2009-2-009

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 19.06.2009 / **e)** U-I-4433/2007 and others / **f)** / **g)** *Narodne novine* (Official Gazette), 77/09 / **h)** CODICES (Croatian, English).

#### *Keywords of the systematic thesaurus:*

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

3.16 General Principles – **Proportionality.**

4.5.6.2 Institutions – Legislative bodies – Law-making procedure – **Quorum.**

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:*

Constitutional matter / Constitutional review / Law, organic / Law, quality / Law, precision / Legitimate aim / Legitimate expectation / Legislature, discretionary power / Decision, administrative, judicial review / Fine, determination / Local self-government, law-making power / Misdemeanour proceedings.

*Headnotes:*

The disputed notions of the Misdemeanours Act, including public order, social discipline and social values represent legal concepts that are legal standards, the clarity, comprehensibility and determinability of which are not questionable in legislation, legal practice and legal theory.

The principle of *nullum crimen, nulla poena sine praevia lege poenali* is satisfied even if the misdemeanour is not provided by a law, but by a local and/or regional unit within the framework of its jurisdiction and on the grounds of statutory powers, and if it complies with the requirements for the validity of legal regulations with general effect.

The reasons behind the challenges to particular provisions of the Misdemeanours Act were not issues relevant in constitutional law (such as the amount of the fine or statute of limitation deadlines) but rather issues with a purpose-serving quality of the solutions or models provided in the disputed legal provisions, where the legislator has the legitimate right to choose methods pursuant to Article 2.4.1 of the Constitution. The possibility of an alternative solution does not necessarily mean a conflict between the Misdemeanours Act and the Constitution, provided that the solution offered by the legislator remains within constitutionally acceptable boundaries. The Constitutional Court is not competent to give an opinion about whether this solution is the best way to regulate a specific question or whether the legislative powers in Article 2.4.1 of the Constitution should in this particular issue have been used in a different way.

The amount in which a particular obligation (*a fine*) is provided is not an issue of constitutional law that is examined in proceedings before the Constitutional Court. It could, exceptionally, be the subject of constitutional review if it jeopardised the human rights and fundamental freedoms of an individual, which was not the case here.

It is acceptable in constitutional law that, with the strengthening of the principles of adversarial procedure and proportionality, the challenging of judgments depends entirely on the will of the parties.

*Summary:*

The Constitutional Court did not accept various proposals submitted by several natural persons for the review of the constitutional conformity of the Misdemeanours Act in its entirety as well as that of its separate provisions.

The Constitutional Court found that the challenge to the conformity with the Constitution of the Misdemeanours Act was not well founded, as it had established that the Act was passed through Parliament by a lawful majority of Members of Parliament.

In relation to the disputed conformity in substance of particular, i.e. almost all, provisions of the Misdemeanours Act with the Constitution, the Constitutional Court reviewed the reasons put forward by various proponents and found that their arguments were not well grounded. It established the following.

The Constitutional Court did not accept the argument that the notions referring to 'public order', 'social discipline' and 'social values' in Article 1 of the Misdemeanours Act lacked clarity and precision. These notions represent legal concepts that are legal standards, the clarity, comprehensibility and determinability of which are not questionable in legislation, legal practice and legal theory. Article 1 was, accordingly, in line with the requirements that legal provisions should be precise and appropriate to the legitimate expectations of the individuals to whom they apply.

It also rejected the contention that Article 2 of the Misdemeanours Act, contrary to Articles 4.1, 31.1 and 82.2 of the Constitution, authorises units of local and regional self-government (self-government units) to impose misdemeanours and misdemeanour sanctions in connection with the matters in their competence, on the grounds that the Constitution allows punishment to be prescribed only by organic laws and international law, together with an argument that this Article introduces inequality contrary to Article 3 of the Constitution (equality being one of the highest values of the constitutional order) because different self-government units will impose different sanctions for the same conduct, and that no one can be punished for conduct, defined as a 'misdemeanour', even if this is in accordance with the law, if the conduct is not a criminal offence. Indeed, in the context of Article 2 of the Misdemeanours Act the Constitutional Court found that Article 31 of the Constitution (the principle of the legality of offence and punishment) only refers to criminal offences, not to misdemeanours. However, viewed in the wider context, the principle of *nullum crimen, nulla poena sine praevia lege poenali* is satisfied even if the

misdemeanour is not provided for by law but by a local and/or regional unit within the framework of its authority and on the grounds of statutory powers, provided that it complies with the requirements for the validity of legal regulations with general effect. Furthermore, the Constitutional Court noted that the authority of the units of local and regional self-government to provide the scope of misdemeanour sanctions is limited by Articles 31.2 and 33.6 of the Misdemeanours Act in such a way that these units may only impose a fine between HRK 100 to 2,000 and that different entities will invariably prescribe different misdemeanours and misdemeanour sanctions in connection with the matters in their competence laid down by the Constitution and law, due to the autonomy they enjoy in the performance of local and regional matters.

The Constitutional Court dismissed the argument that Articles 13 and 14 of the Misdemeanours Act, which refer to the statute of limitation periods for the prosecution of misdemeanours and the execution of misdemeanour sanctions, unfairly double the periods of statute of limitation and violate the principle of the rule of law because they lead to the inefficiency of misdemeanour proceedings and violate the right to a trial and execution of misdemeanour sanctions within a reasonable time. The Constitutional Court was of the opinion that the efficiency of statute of limitation periods was not an issue of constitutional law but an issue of the purpose-serving quality of the solutions/models adopted in the impugned legal provisions. The choice of methods used to speed up misdemeanour proceedings, shorten their duration and reduce the misdemeanour courts' burden is the legitimate right of the legislator, grounded on the powers in Article 2.4.1 of the Constitution. The possibility of an alternative solution does not in itself mean that the Misdemeanours Act is in breach of the Constitution, provided that the solution offered by the legislator remains within constitutionally acceptable boundaries. The Constitutional Court is not competent to give an opinion about whether this solution is the best way to regulate a specific question or whether the legislative powers in Article 2.4.1 of the Constitution should in this particular issue have been used in a different way.

The Constitutional Court did not carry out a separate assessment of the allegation that Article 33 of the Misdemeanours Act "drastically" increases fines. It took the view that the amount in which a particular obligation is prescribed is not an issue of constitutional law to be examined in proceedings before the Constitutional Court, unless the human rights and fundamental freedoms of an individual were in jeopardy, which was not the case here.

It also rejected the challenge to Article 82.3 of the Misdemeanours Act, which stipulates the subsidiary application of the provisions of the Criminal Procedure Act. The suggestion was made that the number of such provisions in the Misdemeanour Act introduces legal uncertainty because it is questionable who will establish and determine the "appropriate – meaningful – corresponding purpose" for the application of these provisions and consequently the Misdemeanour Act as a whole is not grounded on the principle of the rule of law. The Constitutional Court pointed out that the matter is about the provision of general nature that, in general, foresees the application of the appropriate provisions of criminal procedure during misdemeanour proceedings. The Constitutional Court found the arguments the proponents used to substantiate the claim that the Misdemeanour Act as a whole contravenes this principle to be especially unacceptable and inappropriate.

The Constitutional Court also dismissed the argument that the part of Article 193.5 of the Misdemeanours Act which only allowed the submission of new facts and new evidence in the appeal if these facts and this evidence did not exist at the time of the first-instance proceedings ran counter to the principle of *beneficium novorum*, which is justified in the interest of establishing the true factual substance of the decision and thus contrary to the principle of the rule of law. It established that this principle was in compliance with the principle of proportionality and legitimate goal aimed at preventing stretching out misdemeanour proceedings by allowing individuals to choose their own time to present evidence during the proceedings.

It also rejected the objections that Article 202 of the Misdemeanours Act failed to prescribe an examination of essential violations of misdemeanour procedure by virtue of office, for the following reasons:

1. the parties, including the defendant, may always file an appeal against a judgment and an objection against a misdemeanour warrant,
2. in the proceedings on the appeal and objection, reference may always be made to all kinds of procedural violations as reasons for the appeal,
3. the principle of proportionality justifies the second-instance court not reviewing violations of procedure by virtue of office in cases when the parties do not find it necessary to refer to them, and
4. even in criminal proceedings, the second-instance court does not review relatively essential violations of procedure by virtue of office.

Therefore it is acceptable in constitutional law that with the strengthening of the principles of accusatorial procedure and proportionality, the challenging of judgments depends entirely on the will of the parties.

The Constitutional Court also dismissed the objections that Article 239 of the Misdemeanour Act (general requirements for issuing a misdemeanour warrant) lacks precision in its entirety, as well as arguments that Article 239.1 (decision-making by administrative agencies on the rights and obligations of the parties carried out in misdemeanour proceedings) violates the principle of the separation of powers. The suggestion was made that the authorised prosecutors when issuing the mandatory misdemeanour warrant, viewed in context, are issuing a first-instance judgment, and that this “judgment” is rendered without the participation, often even without the knowledge, of the defendant, which is contrary to Articles 4 and 29.1 of the Constitution (the right to a fair trial) and Article 6 ECHR, as well as Article 239.2 of the Act (the procedural “position of the suspect depends only on the good will and mood of the authorised prosecutors”). The point was also made that parties do not have the right to file an appeal to the High Misdemeanour Court, which contravenes the principle of the rule of law.

The Constitutional Court noted that in administrative proceedings, the judicial control of the legality of individual acts of the administrative authorities and bodies with public powers is ensured in misdemeanour proceedings through the High Misdemeanour Court, which has legal authority to decide on the legality of the acts of state administrations agencies. In the view of the Constitutional Court, Article 29.1 of the Constitution cannot be interpreted as a constitutional obligation of the court to decide on the rights and obligations of natural or legal person on all levels of proceedings. Seen from the aspect of Article 29.1 of the Constitution, it has been shown as decisive that the control of acts by an independent and impartial court of full jurisdiction is ensured. This has not violated the principle of the separation of power between the legislature, executive and judiciary (Article 4.1 of the Constitution).

In relation to the applicant’s objection that a “judgment” is often passed without the participation or knowledge of the defendant, the Constitutional Court observed that the applicants here were neglecting the consensual nature of solving a misdemeanour dispute. If the defendant deems that he or she did not commit the misdemeanour, that there has been a violation of substantive or procedural law or that the misdemeanour warrant is not grounded on the corresponding facts, he or she may within the statutory deadlines raise the level of decision-making in the dispute to a judicial decision.

Furthermore, a mandatory misdemeanour warrant is issued for misdemeanours which attract fines up to HRK 2,000. For the sake of efficiency and in order to streamline proceedings, the Misdemeanour Act provided for the mandatory misdemeanour warrant in which the duration, form of proceedings and human resources used are proportional to the gravity of the misdemeanour. For the above reasons the Constitutional Court found Article 239 of the Misdemeanour Act in compliance with the constitutional principles of the rule of law, separation of powers and right to a fair trial and with Article 6 ECHR.

Finally, the applicants disputed the majority of legal provisions on the basis that they lacked clarity and definition, on the basis of their expression, with regard to the legitimate expectations of parties, and, on occasions, for their non compliance with the legitimate aims of the institute regulated in the provisions. The applicants, as a rule, did not substantiate these allegations, and the Constitutional Court took the view that for the most part they failed to state reasons relevant in constitutional law. In reviewing these objections the Constitutional Court found that the following Articles of the Misdemeanour Act: 5, 23, 24, 37, 43, 71, 72, 79, 80, 84, 88, 140.2, 144, 157, 174, 185, 207, 213, 220, 230 etc. were in line with the principle of the rule of law (either from the aspect of clarity and precision of legal provisions, or from the aspect of the legitimate expectations of parties, or from the aspect of legitimate aims).

#### *Languages:*

Croatian, English.



#### *Identification: CRO-2009-2-010*

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 07.07.2009 / **e)** U-IIIB-1373/2009 / **f)** / **g)** *Narodne novine* (Official Gazette), 88/09 / **h)** CODICES (Croatian, English).

#### *Keywords of the systematic thesaurus:*

- 3.9 General Principles – **Rule of law.**
- 3.10 General Principles – **Certainty of the law.**
- 3.16 General Principles – **Proportionality.**
- 3.18 General Principles – **General interest.**

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

*Keywords of the alphabetical index:*

Annulment for unlawfulness, validity / Building permit / Legitimate expectation.

*Headnotes:*

The State has no power, by virtue of the right of supervision over the legality of administrative enactments granting parties/individuals the right to build, to stage a one-sided interference into the rights thus recognised by revoking administrative acts after they have become legally valid. Revocation is only possible in the interest of the State and if the individuals who acquired the right to build on the grounds of the revoked legally valid administrative act and who have been prejudiced by this revocation by virtue of the right of supervision of legally valid administrative acts receive compensation at market value as stipulated in the Constitution.

*Summary:*

I. The applicants (two natural persons) lodged a constitutional complaint against the ruling of the Ministry of Environmental Protection, Physical Planning and Construction which revoked a building permit by virtue of the right of supervision. The building permit was revoked at the proposal of a construction inspector on the basis of Articles 177 and 178 of the Construction Act. These allow for a permit to be revoked, by virtue of the right of supervision, within a period of one year after it became final, if it subsequently becomes apparent that the permit has violated substantial provisions of the Act.

In this particular case, the applicant's request for issuing a building permit was well founded, and it was duly issued. In this way the applicants' right to build was recognised in a final and legally valid individual act and they began construction. In order to meet building costs, they invested some of their own money and took out a bank loan with set deadlines for repaying the loan over several years.

The applicants lodged a constitutional complaint before they had exhausted all legal remedies against the disputed administrative enactment. They contended that the disputed individual enactment grossly violated their constitutional rights guaranteed in Article 49 of the Constitution, and that the provisions of Articles 50 and 52.2 of the Constitution, which allow for the property guaranteed in Article 48.1 of the Constitution to be restricted or expropriated, had been grossly violated.

They pointed out that they had been subject to very damaging and irreparable consequences.

II. In its assessment as to whether the applicants' constitutional rights had been infringed, the Constitutional Court found relevant the provisions of Article 48.1 of the Constitution (guarantee of ownership rights), Article 49.4 of the Constitution (rights acquired through the investment of capital shall not be lessened by law, nor by any other legal act), Article 50 of the Constitution (constitutional requirements for restricting or expropriating property), Article 16.2 of the Constitution (the principle of proportionality) and Article 3 of the Constitution (the rule of law as one of the highest values of constitutional order).

The Constitutional Court found, starting from the legal standpoint of the European Court of Human Rights, which it too had accepted in its previous case law, that in this case the applicants had a "legitimate expectation" that the conditions in the building permit, on the grounds of which they had assumed a financial burden, would be met, considering that it was based on reasonably justified confidence in a final and legally valid administrative act which had a valid statutory foundation. Thus there is no doubt that their claim was sufficiently well established and thus "enforceable", which qualifies it as "property" for the purpose of Article 1 Protocol 1 ECHR.

The Constitutional Court firstly interpreted the principal legal views on three constitutional rules on the guarantee of ownership rights. The first rule provides the guarantee of ownership (Article 48.1 of the Constitution); the second rule expounds the possibility by law, in the national interest, of restricting or expropriating property upon payment of compensation equal to its market value (Article 50.1 of the Constitution); and the third rule stipulates that, exceptionally, property rights may be limited by law in order to protect national interests and security, nature, the environment and public health (Article 50.2 of the Constitution). These rules are not "stand-alone" and independent. The second and third rules, which allow a certain degree of interference in property rights, must always be interpreted in the light of the general guarantee in Article 48.1 of the Constitution. Moreover, interference in ownership must be in proportion to the nature of the necessity for restriction in each individual case (Article 16.2 of the Constitution).

In applying the principal legal views on the constitutional guarantee of ownership rights, the Constitutional Court concluded that in this case the interference by the State, in revoking a final and legally valid building permit by virtue of the right of supervision, must be seen as *de facto* expropriation of the applicants' property.

The Constitutional Court then went on to explore whether it was acceptable, under constitutional law, to revoke by virtue of the right of supervision a building permit that became final and legally valid at the same time, in the light of both the legal objective of the institute of revocation by virtue of the right of supervision and of the competent ministry's statutory authority to revoke only final administrative acts by virtue of the right of supervision, within the term of one year after they have become final, provided that they have obviously substantively violated the law. It noted the lack of express permission in the General Administrative Procedure Act, the Administrative Disputes Act and the relevant Construction Act for the revocation of legally valid administrative enactments by virtue of the right of supervision for any substantive violations of the law, irrespective of whether they are obvious. These acts expressly restrict the application of this extraordinary legal remedy to final administrative enactments. Furthermore, the Constitutional Court noted that it does not as a rule consider constitutionally relevant the reason why the competent body made an error or omission when applying the relevant substantive law to a specific case and adopting the individual act, and that it only considers it relevant in constitutional law that the error or omission of the competent bodies must not be to the detriment of individuals.

Accepting the requirements of the Constitution, and also the above opposing state (public or general) and private interests, and starting from the fact that the legal validity of administrative acts is not absolute in the national legal order, the Constitutional Court is under a duty to lay down the following constitutional principle in the field of building rights:

The State has no power, by virtue of the right of supervision over the legality of administrative enactments granting parties/individuals the right to build, to stage a one-sided interference into the rights thus recognised by revoking administrative acts after they have become legally valid. Revocation is only possible in the interest of the State and if the individuals who acquired the right to build on the grounds of the revoked legally valid administrative act and who have been prejudiced by this revocation by virtue of the right of supervision of legally valid administrative acts receive compensation at market value within the meaning of Article 50.1 of the Constitution. This must be paid by the Republic of Croatia, and from 1 January 2008 by counties, large cities and cities that are the seats of the counties whose competent bodies adopted an obviously illegal administrative act granting a party a legally valid right to build.

Whilst accepting the above points, in this particular case the Constitutional Court had limited its review to assessing whether, even before the completion of judicial control proceedings over the legality of the impugned individual act, serious violations had taken place of the applicants' constitutional rights. It was not convinced that the building permit with final effect was obviously substantively illegal, and even if the challenged ruling revoking the building permit by virtue of the right of supervision was found to be in accordance with the law, because of the circumstances of the case this fact could not affect the finding of the Constitutional Court that the ruling had violated the applicants' constitutional right to property, guaranteed in Article 48.1 of the Constitution, taken in conjunction with Article 50.1 of the Constitution. It was noted that the impugned ruling revoked the applicants' right to build, which was already legally valid, because the body that issued the building permit (the competent first-instance administrative body), had (allegedly) violated the substantive provisions of the Construction Act, and despite the possibility of such a serious encroachment into the applicants' constitutional right of ownership, the interest of the Republic of Croatia was not even examined. Neither were the applicants paid market value for the confiscated property within the meaning of Article 50.1 of the Constitution. On the other hand, there was no doubt that the applicants acted in accordance with the demands and conditions of the legally valid building permit and had assumed a financial burden in the confidence that the permit would not subsequently be found invalid to their detriment.

In conclusion, due to the one-sided interference by the State in their right of ownership, expressed in the passing of the challenged ruling revoking their building permit because of an alleged mistake by the competent body that issued it, the applicants were subjected to an excessive individual burden which could not be considered to be in proportion to the nature of the need for restriction in this case i.e. with the legitimate aim that the revocation was intended to fulfil. The Constitutional Court therefore found that the applicants' ownership rights in Article 48.1 of the Constitution in connection with Article 50.1 of the Constitution had been infringed. It overturned the challenged ruling and referred the case to the Ministry for resumed proceedings.

*Languages:*

Croatian, English.



# Cyprus

## Supreme Court

### Important decisions

*Identification:* CYP-2009-2-001

a) Cyprus / b) Supreme Court / c) / d) 15.01.2008 / e) 1/2008 / f) General Principles of Administrative Law (Amendment) Act 2008 / g) / h).

*Keywords of the systematic thesaurus:*

1.2.2 Constitutional Justice – Types of claim – **Claim by a private body or individual.**

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

1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest.**

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

4.1 Institutions – **Constituent assembly or equivalent body.**

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

*Keywords of the alphabetical index:*

Constitution, interpretation, by way of legislation / Supreme Court, power to interpret Constitution, exclusive / *Actio popularis*.

*Headnotes:*

In attempting to define by way of ordinary legislation constitutional provisions, such as the concept of legitimate interest, as provided by Article 146 of the Constitution and as interpreted by the jurisprudence of the Supreme Court, Parliament entered the sphere of the exclusive jurisdiction of the judiciary. Such legislation is an impermissible attempt to interpret constitutional provisions and at worst an effort to amend the Constitution by transforming the Recourse for Annulment to an *actio popularis*.

*Summary:*

I. The Full Bench of the Supreme Court was asked by the President of the Republic of Cyprus to pronounce on the constitutionality of the General Principles of Administrative Law (Amendment) Act 2008. In particular, the Supreme Court in the Reference

no. 1/2008 was asked to decide whether the definition of the term legitimate interest as inserted in the impugned Act was contrary and inconsistent with the provisions of Articles 61, 146 and 179 of the Constitution.

The Attorney General indicated that the newly inserted provisions of the amended Act, interpreting the term legitimate interest as well as its provisions regarding the right of filing recourses by members of legal entities were contrary and inconsistent with the provisions of Article 146 of the Constitution. Article 146 of the Constitution is the principal provision upon which individuals having legitimate interest base their recourses, when challenging administrative acts and decisions.

The Attorney General contended further that the impugned Act fell beyond the limits conferred on the House of Representatives by Article 61 and therefore violated the fundamental principle of separation of powers entrenched in the Constitution.

Counsel for the House of Representatives, on the other hand, argued that there was no violation of the Constitution, especially of Article 146 as the inserted provisions within the challenged Act merely codified and integrated the case law of the Supreme Court and therefore did not affect the definition of legitimate interest in the sense of Article 146.2.

The Attorney General, further, pointed out that the interpretation of the Constitution is in the exclusive jurisdiction of the judiciary. He referred to *Diagoras Development v. National Bank* (1985) 1 C.L.R. 581, where the Court in that case, in regard to the doctrine of separation of powers, said the following:

“As it is to be derived from the respective provisions of Parts IV, IX and X of our Constitution there exists constitutionally entrenched Separation of Powers between the Legislative Power and the Judicial Power in our Republic; and the separation of the two Powers in question has been stressed in, *inter alia*, the judgment of *Pikis J. in Malachtou v. Attorney-General of the Republic*, (1981) 1 C.L.R. 543, 549, the contents of which are adopted to the extent to which this is necessary for the purposes of the present judgment.”

“The interpretation of laws – and that includes the Constitution and statute law – is by its nature a judicial function. It was recognised as such by the Supreme Constitutional Court in *The Republic and Charalambos Zacharia* and more recently by the Supreme Court in *Malachtou v. The Attorney-General*. Consequently, any

attempt by the legislature to interpret its own laws is unconstitutional for lack of authority to do so. It is not in their power to interpret the law.”

II. On the basis of the constitutional framework and in the light of the fundamental principles of the separation of powers, the Full Bench of the Supreme Court concluded that the House of Representatives, with the impeached enactment, had attempted mainly to interpret constitutional provisions, such as the concept of legitimate interest, as defined by Article 146 of the Constitution and as interpreted by the jurisprudence of the Supreme Court. It stressed further that there was an attempt to widen the term “legitimate interest” in order to justify recourse under Article 146, jeopardising thus the process for annulment and transforming it to an *actio popularis*. The enactment of the amended Act 2008 was an impermissible attempt to interpret constitutional provisions and at worst an effort to amend the Constitution.

For the reasons explained above, the full bench of the Supreme Court held that the General Principles of Administrative Law (Amendment) Act of 2008 was unconstitutional as it contravened the cardinal principles of the separation of powers and of the independence of the Judiciary, both of which form integral parts of the constitutional structure.

#### Languages:

Greek.



## Czech Republic Constitutional Court

### Statistical data

1 May 2009 – 31 August 2009

- Judgment of the Plenary Court: 7
- Judgment of panels: 73
- Other decisions of the Plenary Court: 4
- Other decisions of panels: 1 027
- Other procedural decisions: 61
- Total: 1 172

### Important decisions

*Identification:* CZE-2009-2-004

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 28.04.2009 / **e)** Pl. ÚS-st. 27/09 / **f)** On compensation for imposed limitation of property rights under Article 11.4 of the Charter in matters of unconstitutional rent control / **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:*

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.**

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

*Keywords of the alphabetical index:*

Housing, rent control / Compensation, damages / Property right, restriction.

*Headnotes:*

The ordinary courts are required to consider actions taken by landlords (flat owners) against the state for compensation of damages, which are to have been

incurred as a result of the long-term unconstitutional inactivity of Parliament, in terms of their right to compensation for mandatory limitation of property rights under Article 11.4 of the Charter of Fundamental Rights and Freedoms. An entitlement *vis-à-vis* the state for compensation for mandatory limitation of property rights under Article 11.4 of the Charter of Fundamental Rights and Freedoms is of a subsidiary nature against the entitlement of a flat owner *vis-à-vis* the tenant to increase the rent only for the period beginning on the day that a complaint is filed. As regards the period before that date, the landlord may exercise his claim for compensation for mandatory limitation of property rights directly against the state.

### Summary:

On 28 April 2009, the Plenum of the Constitutional Court adopted the above-mentioned opinion, which unified the legal opinions stated in earlier judgments over the question of the point at which ordinary courts may rule on rent increases and whether landlords may seek compensation for damages from the state for incorrect official procedure under the Act on Liability for Damages Caused in the Exercise of State Authority by a Decision or Incorrect Official Procedure, where the damage is alleged to have been incurred due to unconstitutional inactivity by Parliament. The inactivity here consisted of not passing special legal regulation to define cases where a landlord is entitled to unilaterally raise rent or payment for services provided in connection with the use of an flat, and change other terms of the lease.

The Constitutional Court stated that the general courts may rule on rent increases for the period from the filing of a claim until 31 December 2006. They cannot increase rent for the period preceding the filing of a claim, because that is prevented by the nature of a decision with constitutive effects; increasing rent for the period beginning from 1 January 2007 cannot be allowed, because as of that date unilateral increases of rent are permitted by the Act on Unilateral Increases of Flat Rents. The Constitutional Court also stated that the above unconstitutional inactivity by Parliament cannot be considered incorrect official procedure, because the right to compensation for damage does not apply to the exercise of Parliament's legislative power. Likewise, compensation for damage that the Constitutional Court recognised in its previous judgments cannot be interpreted in this manner.

The Constitutional Court also concluded that the ordinary courts are required to consider the complainant's claim in terms of the right to compensation for mandatory limitation of property rights under Article 11.4 of the Charter. In the

Constitutional Court's opinion, this provision cannot be interpreted as a fundamental right to compensation for any kind of limitation of property rights provided by statute. The content of the constitutionally guaranteed right to own property under Article 11 of the Charter, as well as the right to the peaceful enjoyment of property under Article 1 Protocol 1 ECHR is not unlimited. In other words, a statute may generally set limits on property rights, without that limitation being connected to a right to compensation under Article 11.4 of the Charter. Mandatory limitation of property rights, for which compensation is due, applies only to certain qualified cases of limitation, not to all.

In the Constitutional Court's opinion, another condition for making a particular limitation subject to Article 11.4 of the Charter is the extent of the limitation. In view of the extent of expenses that individual landlords incurred as a result of rent control, as well as the long-term inactivity of Parliament, which passed a statute permitting unilateral increases of controlled rent more than four years after the deadline provided by the Constitutional Court in its judgment file no. Pl. ÚS 3/2000 of 21 June 2000, the Constitutional Court considered in general that the condition of intensity had been met.

In the Constitutional Court's opinion, the ordinary courts may not *a priori* reject actions against the state as a result of interference in the property rights of landlords that was caused by unconstitutional rent control and subsequent legislative inactivity. It is in their competence to evaluate whether, in a particular matter, conditions have been met for compensation under Article 11.4 of the Charter, and in relation to that legal classification they are required to provide adequate procedural means for parties to the proceedings to give their responses to that evaluation. The amount of any compensation granted need not be equal to the difference between "market" rent and the controlled rent.

The judge rapporteur in the matter was Ivana Janů. A dissenting opinion against the verdict and reasoning of the plenum's judgment was filed by judges Vlasta Formánková, Pavel Holländer, Vladimír Kůrka, Jiří Mucha and Jiří Nykodým. A dissenting, supplementary opinion to the reasoning of the plenum's judgment was filed by judges Ivana Janů and Eliška Wagnerová.

### Languages:

Czech.



*Identification:* CZE-2009-2-005

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 12.05.2009 / **e)** Pl. ÚS 10/08 / **f)** On the constitutional conformity of the legal regulation concerning the detention of a foreigner for purposes of deportation / **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:*

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

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

5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**

*Keywords of the alphabetical index:*

Foreigner, expulsion / Foreigner, difference of treatment, detention.

*Headnotes:*

The principle of equal rights under Article 1 of the Charter of Fundamental Rights and Freedoms applies only in the relationship between at least two persons in the same or comparable position. From that point of view, one cannot regard a foreigner who was detained for purposes of deportation and a person who is in custody or held for institutionalised health care as persons in a comparable position; both the Charter of Fundamental Rights and Freedoms and the Convention for the Protection of Human Rights and Fundamental Freedoms distinguish between them.

Article 5.1.f of the Convention for the Protection of Human Rights and Fundamental Freedoms does not require that deprivation of liberty of a foreigner who is subject to proceedings on deportation or extradition is a necessary means for achieving the aim pursued by that Article.

*Summary:*

The Supreme Administrative Court, in connection with the review of a decision to detain the complainant in proceedings arising from a cassation complaint, filed

a petition under Article 95.2 of the Constitution seeking to have Article 124.1 of the Act on the Stay of Foreigners in the Czech Republic declared unconstitutional; under that provision the police are entitled to detain a foreigner if there is a risk that he or she could endanger national security, disrupt the public order in a serious manner, or obstruct or complicate the execution of a decision on deportation. The foundation of the petitioner's arguments was that the contested provision would not stand in terms of the principle of equality. It drew attention to the fact that in comparable cases, specifically in the case of custody and reception into and detention for institutionalised medical care, the legislature regulated the deprivation of liberty in a manner that is more advantageous for the persons concerned.

In its own judgment, the Constitutional Court rejected inconsistency with the principle of equality under Article 1 of the Charter, as claimed by the petitioner, because that principle can only be applied to the rights and obligations of persons in comparable situations, but not to comparison of the legal frameworks of two or more legal institutions. In terms of the principle of equality, it is fundamental that under the law all foreigners are subject to the same conditions as regards staying in this country, that is, they have the same rights and obligations, regardless of sex, skin colour, language, faith and religion, political or other convictions, national or social origin, membership of a national or ethnic minority, property, birth, or other status. Moreover, in the Constitutional Court's opinion, the Convention for the Protection of Human Rights and Fundamental Freedoms, in Article 5.1.f, distinguishes between the detention of foreigners and, for example, custody or detention for institutionalised medical care. It referred to the conclusions of the European Court of Human Rights, under which deprivation of liberty under the cited Article can be justified only by ongoing expatriation or extradition proceedings, which must be conducted with due care, and must conform to the substantive and procedural rules of domestic law. However, unlike with the institution of custody, it is not required that the deprivation of liberty be necessary. The Constitutional Court noted another difference between the compared institutions, in that whereas in criminal proceedings a person who has been detained or accused of committing a crime is deprived of liberty against his or her will, and has no choice, a foreigner detained for purposes of deportation may voluntarily leave the country where he is staying at any time. In this regard the Constitutional Court added that none of the fundamental rights and freedoms provided by the Charter guarantee foreigners the right to stay in the Czech Republic.

In relation to the alleged violation of the principle of proportionality, the Constitutional Court stated that from the petitioner's point of view the question of pursuing a legitimate aim or rational connection between the aim and means chosen to implement it (the suitability criterion) do not raise doubts. The petitioner raised its objection in relation to the criterion of necessity, because in its opinion, in terms of the fundamental rights, there was a less restrictive alternative, in which the deprivation of liberty would be decided by a court rather than a police body, and under a procedural regime that was more advantageous for the petitioner. However, this cannot be considered a less restrictive alternative, because it still involves the same measure, deprivation of liberty through detention. The petitioner's arguments addressed only the regime of legal protection, not the question of whether, through some less restrictive alternative, a situation could be achieved whereby a foreigner is not deprived of liberty at all; it is done in a narrower scope or different manner, which is supposed to be the aim of seeking less restrictive alternatives. The Constitutional Court emphasised that a foreigner can avoid detention by voluntarily leaving the Czech Republic. For these reasons, the Constitutional Court denied the Supreme Administrative Court's petition to declare the contested provision unconstitutional.

The judge rapporteur in the case was Jan Musil. None of the judges submitted a dissenting opinion.

#### *Languages:*

Czech.



#### *Identification:* CZE-2009-2-006

**a)** Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 03.06.2009 / **e)** I.ÚS 420/09 / **f)** Constitutional Requirements for the Publication of International Treaties / **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:*

3.10 General Principles – **Certainty of the law.**  
3.15 General Principles – **Publication of laws.**

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

#### *Keywords of the alphabetical index:*

Treaty, enactment / Legitimate expectation / Pension / Treaty, international, validity.

#### *Headnotes:*

A constitutional interpretation of the Act on the Collection of Laws and the Collection of International Treaties (hereinafter, the "publication norm") requires that notifications of unilateral legal acts that end the validity of the Czech Republic's international law obligations also be published. Until such termination is published domestically, the state cannot rely on it *vis-à-vis* individuals and deny them rights arising under the international treaty in question. This is the only interpretation fully consistent with the principle of foreseeability of law, which arises from Article 1.1 of the Constitution, and the principle of legitimate expectation guaranteed in Article 1 Protocol 1 ECHR.

#### *Summary:*

On 13 January 2005, the complainant (an Armenian citizen) applied for an old-age pension in the Czech Republic, and asked that periods worked abroad be recognised for purposes of calculating his pension insurance, on the basis of the Agreement between the Czechoslovak Republic and the Union of Soviet Socialist Republics on Social Security. The Czech Social Security Administration (hereinafter the "CSSA") denied the complainant's petition on the grounds of failure to meet the requirements of provisions of the Social Security Act. A complaint against the CSSA's decision was denied by decision of the Municipal Court in Prague. The Supreme Administrative Court (hereinafter the "SAC") denied the complainant's cassation complaint. In the reasoning of the decision, the SAC referred to the statement of the Ministry of Foreign Affairs of the Czech Republic, according to which, at the time when the complainant applied for the pension, the Agreement on Social Security was no longer valid in relation to certain successor states to the former USSR. In relation to Armenia, on 28 April 2004 the Czech Republic ended the succession negotiations by a unilateral declaration in the form of a diplomatic note, stating that treaties concluded between the former Czechoslovakia and the USSR did not apply to their relationship. Because the complainant applied for an old-age pension on 13 January 2005, it was no longer possible to take that treaty into account. The SAC rejected the complainant's objection that the termination of the treaty was not duly published.

Under Article 10 of the Constitution, which sets the conditions for the incorporation of international treaties into the Czech legal order, duly promulgated international treaties, to the ratification of which Parliament has consented, and by which the Czech Republic is bound, are part of the legal order of the Czech Republic. Thus, an international treaty that is supposed to be part of the legal order must be accessible to the public, which is done through a publication with statutory mandate.

Under Article 5.1.b of the publication norm, notice of withdrawal from international treaties and other facts that are important for the implementation of individual international treaties are published in the Collection of International Treaties by a notification. However, a notification on the formal termination by diplomatic note of succession negotiations relating to Armenia was not published in the Collection of International Treaties, although the Ministry of Foreign Affairs had an obligation to do so under the cited provision.

The Constitutional Court stated that its conclusions from previous judgments concerning the interpretation of legitimate expectation apply fully to the complainant's case. The complainant rightly trusted that the state authorities would respect this fundamental right and would grant his claim, which was based on a duly published and unambiguous legal regulation. If it is generally the case with international treaties that individuals cannot benefit from an international treaty until that treaty is published, then neither can the state benefit from the termination of an obligation before it duly publishes that fact, so that individuals can familiarise themselves with it and adapt their conduct to the new legal framework.

The Constitutional Court stated that the decisions of the courts did not respect the principle of a law-based state (Article 1 of the Constitution) and the legitimate expectation guaranteed in Article 1 Protocol 1 ECHR. Therefore, it granted the constitutional complaint and annulled the contested decisions.

The judge rapporteur in the matter was Eliška Wagnerová. None of the judges submitted a dissenting opinion.

### Languages:

Czech.



## Estonia

### Supreme Court

### Important decisions

*Identification:* EST-2009-2-006

**a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 19.05.2009 / **e)** 3-4-1-1-09 / **f)** Review of constitutionality of Article 28.1.25 of the Public Information Act / **g)** *Riigi Teataja III* (Official Gazette), 2009, 27, 199, www.riigikohus.ee / **h)** CODICES (Estonian, English).

*Keywords of the systematic thesaurus:*

4.6.9.3 Institutions – Executive bodies – The civil service – **Remuneration.**

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

*Keywords of the alphabetical index:*

Civil servant, salary, disclosure / Salary, confidentiality.

*Headnotes:*

The term “*palgamäär*” (wage/salary rate) in the Public Information Act means a rate of remuneration corresponding to specific positions or offices, established by legislation of general application or employer's internal legislation. For the purposes of the provision under discussion the salary rate subject to disclosure was only the abstract remuneration rate, and did not relate to specific persons.

*Summary:*

I. OG, an individual, filed a request with the Loksa City Government for a list of employees of the Loksa Cultural Centre, their official titles and valid salary rates. He was issued with a list of the Cultural Centre employees and later given an extract from an order by the City Government on the approval of the salary of the director of the Cultural Centre. He was informed that in order to receive the rest of the information he should address the director of the Cultural Centre.

The director of the Cultural Centre denied OG the information he requested, referring to Article 8.3 of the Wages Act (WA), which prevents employers from disclosing information regarding wages calculated, paid or payable to an employee or information concerning the employee's wage conditions without the consent of the employee or justifiable grounds arising from the law.

OG filed an action with the Tallinn Administrative Court, requesting the court to direct the Loksa City Government to comply with his request for information. The administrative court turned his request down; it was of the opinion that Article 28.1.25 of the Public Information Act (PIA) required the disclosure of salary rates valid in state and local government agencies, rather than the salaries of specific individuals.

OG filed an appeal with the Tallinn Circuit Court. The Circuit Court declared Article 28.1.25 of the PIA unconstitutional in part. It did not apply the unconstitutional section of the provision, and partially upheld the appeal. It held that under the PIA, the complainant was entitled to examine the salary rates valid in the Cultural Centre. However, there were no grounds to satisfy the action in this respect and Article 28.1.25 of the PIA should not be applied due to its unconstitutionality, as it required disclosure of the employees' wages to a wider extent than that required by Article 151 of the Anti-corruption Act.

II. The Constitutional Review Chamber took the view that the Tallinn Circuit Court had erroneously interpreted Article 28.1.25 of the PIA.

The issue in these proceedings was the correct definition of wage rate. The term *palgamäär* [wage/salary rate] used in Article 28.1.25 of the PIA has different meanings in the Wages Act and in the Public Service Act (PSA). It means a rate of remuneration corresponding to specific positions or offices, established by legislation of general application or employer's internal legislation (Articles 81.3, 9.3 and 11.1 of the PSA and Article 9 of the WA). It also encompasses the remuneration payable to a specific person for work performed within a specific period, and it is determined by a directive or an order upon assuming office, or by a contract of employment agreed between the parties (Article 24.2.3 of the PSA and Article 10.1 of the WA).

The Chamber was of the opinion that for the purposes of the provision under discussion the salary rate subject to disclosure was only the abstract remuneration rate, not related to specific persons. If the term *palgamäär* in this provision were to be interpreted as the remuneration determined in the employment contract of a concrete person, the

provision would require the disclosure of the actual salaries of employees without their consent. Such disclosure of information concerning wages would infringe everyone's right to the inviolability of private life, established by Article 26 of the Constitution.

It was therefore important to interpret Article 28.1.25 of the PIA in such a way that it would not infringe the inviolability of employees' private lives. An interpretation to the effect that it only requires the disclosure of abstract salary rates, rather than those relating to specific persons, and those which have been established for administrative agencies by local government.

Such an interpretation is also preferable in terms of Article 4.3 of the PIA, which stipulates that the inviolability of private life must be ensured, when access is granted to information.

Disclosure of salary information contained in employment contracts is also precluded by Article 8.3 of the WA, pursuant to which an employer may not disclose information concerning wage conditions (including wage rates) without the consent of the employee or basis arising from the law.

This interpretation, while guaranteeing broader protection to inviolability of private life, does not violate the right of the appellant to receive information about the activities of state agencies and local governments, established in Article 44.2 of the Constitution.

In summary, the complainant's request for information could not be complied with either in the case of constitutionality or unconstitutionality of Article 28.1.25 of the PIA. The unconstitutionality of the provision did not affect the adjudication of the main dispute. Consequently, Article 28.1.25 of the PIA was not a relevant provision and the request of the Tallinn Circuit Court was returned without review.

#### Cross-references:

- Decision no. 3-4-1-10-02 of 24.12.2002 of the Constitutional Review Chamber, *Bulletin* 2002/3 [EST-2002-3-010];
- Decision no. 3-4-1-9-03 of 25.11.2003 of the Constitutional Review Chamber, *Bulletin* 2004/1 [EST-2004-1-002];
- Decision no. 3-2-1-73-04 of 22.02.2005 of the Supreme Court *en banc*;
- Decision no. 3-4-1-2-07 of 02.05.2007 of the Constitutional Review Chamber.

*Languages:*

Estonian, English.

*Identification:* EST-2009-2-007

**a)** Estonia / **b)** Supreme Court / **c)** *En banc* / **d)** 08.06.2009 / **e)** 3-4-1-7-08 / **f)** Review of constitutionality of Articles 126.6, 129.1 and 129.2 of the Public Procurement Act / **g)** *Riigi Teataja III* (Official Gazette), 2009, 30, 218, [www.riigikohus.ee](http://www.riigikohus.ee) / **h)** CODICES (Estonian, English).

*Keywords of the systematic thesaurus:*

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

1.3.1.1 Constitutional Justice – Jurisdiction – Scope of review – **Extension.**

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

4.6.6 Institutions – Executive bodies – **Relations with judicial bodies.**

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

4.7.9 Institutions – Judicial bodies – **Administrative courts.**

*Keywords of the alphabetical index:*

Public procurement, dispute, settlement, procedure / Constitutional justice, diffuse control.

*Headnotes:*

The settling of disputes in the protest committee of the Public Procurement Office is not unconstitutional in itself, but the exclusion of administrative courts from the adjudication of such disputes does not meet the principle pursuant to which all court cases start in the courts of first instance, and restricts the constitutional competence of the judicial power.

Every court, when adjudicating a case, must review the constitutionality of applicable law, if relevant doubts have arisen. They must also do this at their own instigation, rather than wait to be prompted by parties to proceedings.

*Summary:*

I. On 7 March 2008 the protest committee of the Public Procurement Office (hereinafter “the protest committee”) upheld a complaint by a corporation AS KPK Teedeehitus (hereinafter “the corporation”), but did not allow the application for the award of legal aid costs. The corporation filed an appeal with the Tallinn Circuit Court, requesting the repeal of the protest committee’s decision to the extent that it failed to award the legal aid costs.

The Tallinn Circuit Court upheld the corporation’s appeal in part, annulling the protest committee’s decision to the extent that it did not satisfy the application by the corporation for the award of legal aid costs. The circuit court declared unconstitutional and did not apply Article 129.2 of the Public Procurement Act (hereinafter “the PPrA”), to the extent that it makes no provision for somebody lodging a complaint to have recourse to the courts where the protest committee has turned down their application for the award of legal aid costs, and Article 126.6 of the PPrA to the extent that it does not allow for the award of legal aid costs incurred in proceedings before the protest committee when the complaint is upheld. The court delivered the judgment to the Supreme Court, thus initiating a constitutional review proceeding.

II. When examining the case referred to it by the Constitutional Review Chamber, the Supreme Court *en banc* had concerns that in addition to the provisions declared unconstitutional by the Tallinn Circuit Court, Article 129.1 of the PPrA could be unconstitutional too. The Supreme Court justified its “activism” by referring to the second sentence of Article 15.1 of the Constitution and Article 15.2 of the Constitution. It follows from these articles that courts, when adjudicating a case, must review the constitutionality of applicable law, if relevant doubts have arisen. They must also do so on their own initiative and not wait for parties to proceedings to prompt them. Consequently, a court adjudicating a case, as well as the Supreme Court as the court of constitutional review, is also competent to review the constitutionality of provisions the constitutionality of which has not been questioned by parties to the proceedings. Therefore, the Supreme Court must verify whether the request for constitutional review was submitted by a competent court, person or body. Within concrete norm control, it is the court which is entitled to adjudicate the main dispute that has the competence to initiate a constitutional review.

In the present case, which served as the basis of the constitutional review matter, it was Article 129.1 of the PPrA that gave the circuit court (as an appellate

court) the competence to adjudicate the appeal against the decision of the protest committee. If this provision was unconstitutional and did not exist, the circuit court should have refused to accept the appeal and the appeal against the protest committee's decision should have been adjudicated by an administrative court instead. The Supreme Court expressed concerns over the conformity of Article 129.1 of the PPrA with the provisions on the organisation of the judicial system as established in Chapter XIII of the Constitution. These provisions describe the procedure for fair and effective protection of individual rights, the existence of which is one of the characteristics of a state based on the rule of law. The Supreme Court found that it had the obligation to examine this conformity.

The institutional framework for the resolution of public procurement disputes regulated by Council Directives 89/665/EEC of 21 December 1989 and 92/13/EEC of 25 February 1992 does not preclude a review of constitutionality of Article 129.1 of the PPrA. These directives leave member states with a wide margin of appreciation as to the choice of institutions competent to resolve public procurement disputes and the establishment of the review procedure. In exercising this right the legislator is bound by the Estonian Constitution. The legislation should, in addition to the EU law, be in conformity with the Estonian Constitution.

As to the constitutionality of Article 129.1 of the PPrA, the Supreme Court was of the opinion that it was in conformity with the procedural requirement arising from Article 104.2.14 of the Constitution, as it was passed by a majority of the membership of the Parliament, as is obligatory for procedural laws. The Court noted, however, that in the interests of clarity it would be preferable if this regulation were to be found directly in the legislation regulating court procedure.

However, Article 129.1 of the PPrA was in conflict with Article 149.1 and 149.2 of the Constitution and with the first sentence of Article 146 in conjunction with Article 4 of the Constitution. The obligation of the circuit courts to adjudicate public procurement disputes as a court of first instance is not in conformity with the constitutional status of circuit courts as appellate courts. Furthermore, this provision necessitates a review of protest committee decisions by way of appeal proceedings. The protest committee is not a court of first instance, but an administrative authority and not a part of the judicial system described in Article 148 of the Constitution. Its members are not appointed for life. Administrative proceedings conducted in the protest committee are not comparable to judicial proceedings as regards the procedural guarantees of parties to the proceedings.

The exclusion of administrative courts from the adjudication of public procurement disputes does not meet the principle pursuant to which all court cases start in the courts of first instance. An Act which excludes administrative courts from the adjudication of concrete court cases, so that such cases are heard by an administrative agency instead, restricts the constitutional competence of the judicial power.

In view of the above the Supreme Court *en banc* declared Article 129.1 of the PPrA unconstitutional and invalid. Due to the unconstitutionality, the circuit court was not competent to review the appeal filed against the decision of the protest committee; neither was it competent to submit the request for constitutional review. In this situation the Supreme Court *en banc* could not review the request to review the constitutionality of the provisions declared unconstitutional in the judgment of the Tallinn Circuit Court.

Out of eighteen justices, five delivered two dissenting opinions. The five dissenting judges disagreed with excessive activism of the majority of the Supreme Court *en banc*. They found that the Supreme Court could not go beyond the provisions that are relevant to the adjudication of the case. By declaring Article 129.1 of the PPrA unconstitutional, the Supreme Court *en banc* ignored the requirement of relevance of provisions (which is not permissible from a procedural angle in the context of concrete norm control). The declaration of unconstitutionality and invalidity of Article 129.1 PPrA substantially damaged the interests and rights of the party in whose interests the constitutional review proceeding was initiated. The issue of legal aid costs in the protest committee, for the resolution of which the person had recourse to the court in the first place, remained unresolved.

#### *Supplementary information:*

The judgment also prompted discussion amongst legal journalists.

It has resulted in public procurement disputes now being settled in four instances, as the provisions determining the protest committee of the Public Procurement Office as an obligatory pre-trial dispute resolution body remain in force.

#### *Cross-references:*

- Decision no. 3-4-1-5-08 of 26.06.2008 of the Constitutional Review Chamber, *Bulletin* 2008/2 [EST-2008-2-011].

*Languages:*

Estonian, English.

*Identification:* EST-2009-2-008

**a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 09.06.2009 / **e)** 3-4-1-2-09 / **f)** Review of constitutionality of Articles 7.2.5, 8.4 and 9.2 of the Local Government Council Election Act / **g)** *Riigi Teataja III* (Official Gazette), 2009, 2, 7; www.riigikohus.ee / **h)** CODICES (Estonian, English).

*Keywords of the systematic thesaurus:*

3.3.1 General Principles – Democracy – **Representative democracy.**  
 3.21 General Principles – **Equality.**  
 4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities.**  
 4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy.**  
 4.8.6.1 Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Deliberative assembly.**  
 4.8.7 Institutions – Federalism, regionalism and local self-government – **Budgetary and financial aspects.**  
 4.8.8.2.2 Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione loci.***  
 5.1.1.4 Fundamental Rights – General questions – Entitlement to rights – **Natural persons.**  
 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.**

*Keywords of the alphabetical index:*

Local self-government, right / Local government, finances / Municipality, election, equality / Municipality, resource, sufficiency, guarantee / Local council, efficiency, requirement.

*Headnotes:*

Local government's right to self-management does not extend to the provisions determining council elections, which establish the external organisation of local government. The establishment of a detailed procedure for elections, based on the principles of the electoral system, is a national issue.

Sufficient financial resources are primarily necessary for independent resolution and management of local issues on the basis of law. Consequently, the rights relating to the financial guarantee are of secondary nature and aimed at the creation of necessary conditions for the exercise of the right of self-management.

The establishment of a minimum size for councils is also a national issue.

*Summary:*

I. The Tallinn City Council submitted to the Supreme Court a request to repeal firstly, Article 7.2.5, and secondly, either Article 8.4 or Article 9.2 or both of these articles of the Local Government Council Election Act ("the LGCEA"), due to unconstitutionality. These articles were recently amended by an Act passed by Parliament, prompted by a proposal of the Chancellor of Justice to bring Articles 8.4 and 9.2 of the LGCEA into conformity with the Constitution.

The City Council argued that the change in the procedure of local government council elections infringed the constitutional guarantees of local government. The City Council pointed out that the determination of the number, boundaries and common enumeration of electoral districts, and determination of the number of mandates in each electoral district fell within the exclusive competence of a local government council.

The City Council argued that the special arrangements of formation of electoral districts in Tallinn (Article 8.4 of the LGCEA), and of distribution of mandates in Tallinn, a local government unit with several electoral districts, (Article 9.2 of the LGCEA) violated both active and passive electoral rights, due to conflict with the principle of uniform elections. As regards the increase of the number of council members from 63 to 79 (Article 7.2.5 of the LGCEA) the City Council argued that the aim of this amendment was not clear and that this measure was not suitable, necessary nor reasonable for the achievement of the aim.

With regard to Articles 8.4 and 9.2 of the LGCEA, the City Council argued that the contested provisions infringed the constitutional guarantees of the local government as they amended the procedure of local elections.

II. The Constitutional Review Chamber was of the opinion that the contested provisions could not have an adverse impact on the independent resolution and management of local issues. The right of local government to self-management does not extend to provisions determining council elections. These provisions establish the external organisation of local government. The establishment of a detailed procedure for elections, based on the principles of the electoral system, is a national issue. The state is under an obligation to ensure that elections are carried out in all local government units pursuant to uniform and comparable rules, which are based on the principles established in Article 156 of the Constitution. If every local government could decide on the rules pursuant to which the council would be elected in that local government unit, this could give rise to very different functioning of representative democracy in different local governments. It could result in the creation of units, running parallel to the state but independent from it. The fact that local authorities are supposed to act at a lower level than that of the state is indicated by Article 154 of the Constitution, pursuant to which local governments are subject to the requirement of legality.

As the establishment of procedures for local government elections is not a local issue, the right of local government to self-management is not included in the issues resolved by the referred provisions. Thus, Articles 8.4 and 9.2 of the LGCEA do not interfere with the management of local issues.

As regards the City Council's argument that the provisions infringe the constitutional guarantees of local government due to violation of uniform and proportionate local government elections, the Chamber pointed out that these principles create rights for members of local communities, not local government. A local government council cannot submit constitutional review requests for the protection of subjective rights of persons.

Consequently, as Articles 8.4 and 9.2 of the LGCEA could not infringe the constitutional guarantees of local government, the City Council's request in regard to these provisions was found inadmissible and the Chamber did not hear it.

With regard to Article 7.2.5 of the LGCEA, the City Council argued that this provision infringes the principle of independence of the local budget, established in Article 154 of the Constitution.

The Chamber explained that the most important constitutional guarantee of local government is, nevertheless, the right of self-management, established in Article 154.1 of the Constitution. The basic guarantee of local government to independently resolve and manage local issues is inevitably accompanied by the need for an independent budget, provided in Article 157.1 of the Constitution. In addition, proceeding from Article 157.2 of the Constitution, local government has the right to levy and collect taxes and to impose duties on the basis of law.

The establishment of the minimum size of councils is a national issue, the purpose of which is to put in place the conditions to form efficient councils of a comparable size in all local authorities throughout the state. As it is not a local issue, it does not directly infringe the right of self-management.

However, indirectly, any change in the resources allocated to or duties imposed on a local authority will inevitably result in the necessity to amend the budget of the local government. But the right to have sufficient resources for the performance of local government functions cannot be deemed infringed merely because of the probability of changes in the financial situation due to the adoption of legislation. The existence of sufficient resources is not an independent end in itself; rather, it is established in order to guarantee the existence of sufficient resources for the resolution of local issues.

The Chamber conceded that an increase of the number of council members may result in an increase in the expenses required for the performance of the mandatory duties of the local government and may thus infringe the right to have sufficient resources. Consequently, in this regard the request of the City Council was admissible. Nevertheless, to establish such an infringement the Chamber must ascertain that the contested provision not only has the potential to make the performance of the local government's duties more difficult, but that it actually has this effect. It was not clear from the City Council's request, the performance of which functions might be hindered by the expenditure incurred due to the increase in the number of council members. It was not apparent to the Chamber either, in the light of the size of the budget of the city of Tallinn.

As the Chamber could not conclude that the provision increasing the number of council members infringed the right of the local government to have sufficient resources for the performance of its duties, the request of the City Council concerning Article 7.2.5 of the LGCEA was dismissed.

#### *Cross-references:*

#### Case-law of the Supreme Court:

- Decision no. III-4/1-3/93 of 06.09.1993 of the Constitutional Review Chamber;
- Decision no. 3-4-1-2-03 of 21.02.2003 of the Constitutional Review Chamber;
- Decision no. 3-1-3-10-02 of 17.03.2003 of the Supreme Court *en banc*, *Bulletin* 2003/2 [EST-2003-2-003];
- Decision no. 3-3-1-46-03 of 19.04.2004 of the Supreme Court *en banc*;
- Decision no. 3-4-1-1-05 of 19.04.2005 of the Supreme Court *en banc*, *Bulletin* 2005/3 [EST-2005-3-001];
- Decision no. 3-4-1-9-06 of 16.01.2007 of the Constitutional Review Chamber, *Bulletin* 2007/1 [EST-2007-1-001];
- Decision no. 3-4-1-4-07 of 08.06.2007 of the Constitutional Review Chamber, *Bulletin* 2007/2 [EST-2007-2-003].

#### *Languages:*

Estonian, English.



#### *Identification:* EST-2009-2-009

**a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 25.06.2009 / **e)** 3-4-1-3-09 / **f)** Review of constitutionality of Article 50.3 and Article 46<sup>1</sup> of the Minister of Justice Regulation no. 72 of 30.11.2000 "Internal Rules of Prison" / **g)** *Riigi Teataja III* (Official Gazette), 2009, 37, 279, www.riigikohus.ee / **h)** CODICES (Estonian, English).

#### *Keywords of the systematic thesaurus:*

3.13 General Principles – **Legality**.

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

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

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

#### *Keywords of the alphabetical index:*

Prison rules / Prison, correspondence.

#### *Headnotes:*

The Imprisonment Act does not allow the Minister of Justice to impose additional constraints on a prisoner's right to correspondence by means of internal prison rules. The Minister is only authorised to establish procedural rules to regulate the organisation of correspondence. In the absence of a provision delegating the appropriate authority, he or she must not accord a different definition to "a letter" from the definition in the current legislation, irrespective of whether the definition in point only referred to prisoners.

#### *Summary:*

I. According to the Tallinn Prison search report, two A4-format printouts from the Internet were removed from a letter sent to a prisoner (AV), and confiscated. AV applied to the Tallinn Administrative Court, requesting that the court order Tallinn Prison to return the confiscated documents to him and issue a precept prohibiting the confiscation of printed material sent by letter. The Administrative Court partially upheld the application. The Court declared unconstitutional and did not apply Article 50.3 and Article 46<sup>1</sup> of Ministry of Justice Regulation no. 72 of 30 November 2000 "Internal Rules of Prison" (hereinafter the "IRP"), thus initiating constitutional review proceedings.

Articles 46<sup>1</sup> and 50.3 of the IRP in their conjunction established the rules surrounding the type of consignments that prisoners were allowed to receive within the right to correspondence established in Article 28 of the Imprisonment Act (hereinafter the "ImprA"). Items that did not meet these requirements were not forwarded to prisoners. The court took the view that these requirements restricted prisoners' rights. The right of a person to receive items sent to him or her is primarily included in the general right to freedom, (Article 19 of the Constitution). As the confiscated items were sheets of paper containing written text, sent by post, there was potential for an infringement of confidentiality of messages (Article 43 of the Constitution).

II. The Constitutional Review Chamber ascertained that there was no need to review the constitutionality

of an infringement of Article 19.1 of the Constitution because the contested provision infringed another specific fundamental right. As the addressee of a letter was present when the letter was opened, there was no infringement of the sphere of protection of Article 43 of the Constitution, either. However, the Chamber found that the contested IRP provisions infringed the right to inviolability of family life, established in Article 26 of the Constitution, including the right of a prisoner's spouse to send to prison, by letter, documents and items the holding of which is not prohibited in prison.

The Chamber agreed that Article 46<sup>1</sup> and the first sentence of Article 50.3 of the IRP set constraints on the items that prisoners were entitled to receive under the right to correspondence, established in 28 of the ImprA. The Imprisonment Act did not entitle the Minister of Justice to establish, by internal rules of prison, additional restrictions on the prisoner's right to correspondence. The Minister was only authorized to establish procedural rules to regulate the organisation of correspondence.

Article 4.1.1 of the Postal Act (in the wording in force at the time of the performance of the act contested in the administrative case) refers to a letter consignment as one type of postal items. In the absence of a provision delegating the appropriate authority, the Minister of Justice must not define "a letter" differently from the definition in the current legislation, irrespective of the fact that this definition only refers to prisoners. A person sending a postal consignment is entitled to proceed from the Postal Act when using postal services. Therefore, the activity of the Minister of Justice in establishing a definition of "a letter" that differed from that contained in the law was in conflict with the principle of legality, established in the first sentence of Article 3.1 of the Constitution.

Consequently, Article 46<sup>1</sup> and the first sentence of Article 50.3 of the IRP were found to be in formal conflict with the Constitution. Further evaluation of potential conflict with the Constitution for substantive reasons was not necessary. The contested articles were declared unconstitutional and invalid.

#### *Cross-references:*

- Decision no. 3-4-1-10-02 of 24.12.2002 of the Constitutional Review Chamber, *Bulletin* 2002/3 [EST-2002-3-010];
- Decision no. 3-4-1-5-05 of 13.06.2005 of the Constitutional Review Chamber.

#### *Languages:*

Estonian, English.



#### *Identification: EST-2009-2-010*

**a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 26.06.2009 / **e)** 3-4-1-4-09 / **f)** Request by the Tallinn City Council to repeal Article 105.6 of the Taxation Act, and Article 11.1 and 11.2 of Ministry of Finance Regulation no. 51 of 19 December 2008 "Procedure for recording in the accounts, payment and refund of claims and obligations administered by the tax authority for state taxes" / **g)** *Riigi Teataja III* (Official Gazette), 2009, 37, 280, [www.riigikohus.ee](http://www.riigikohus.ee) / **h)** CODICES (Estonian, English).

#### *Keywords of the systematic thesaurus:*

4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy.**  
 4.8.7 Institutions – Federalism, regionalism and local self-government – **Budgetary and financial aspects.**  
 4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods.**  
 4.10.7.1 Institutions – Public finances – Taxation – **Principles.**

#### *Keywords of the alphabetical index:*

Municipality, financial independence / Tax, municipal.

#### *Headnotes:*

Local government rights relating to financial security are of secondary nature and have the sole purpose of the creation of necessary conditions for the exercise of the right of self-management.

A local authority is only deprived of taxes when somebody liable to pay tax does not fulfil his or her fiscal obligations on time. The effect on the regularity of tax income receipts is not sufficient to hinder the proper performance of duties of the state or duties relating to local government functions. When collecting tax arrears, the state does not have to

accord preference to taxes accrued to local governments over those retained by the state; the state must ensure local government has sufficient funds.

### Summary:

I. On 4 December 2008 the Estonian Parliament enacted legislation to amend the Taxation Act and other related legislation. Article 1.9 of this amending Act altered Article 105 of the Taxation Act (hereinafter the "TA"), which regulates the payment and set-off of the financial obligations of those liable to pay tax. On the basis of Article 105.9 of the TA and Article 65.3 of the Customs Act, the Minister of Finance issued Regulation no. 51 "Procedure for recording in the accounts, payment and refund of claims and obligations administered by the tax authority for state taxes" (hereinafter "Regulation no. 51").

The Tallinn City Council submitted a request to the Supreme Court to repeal Article 105.6 of the TA and Article 11.1 and 11.2 of Ministry of Finance Regulation no. 51. The City Council pointed out that the contested provisions do not take into consideration the purpose of collecting taxes and the interests of the local authority, which is the recipient of taxes. Income tax from natural persons, land taxes and local taxes which are meant to be received by a local authority may instead be used to cover arrears from other claims which have arisen earlier and which are meant to accrue to the state budget only. In this situation, the state can cover arrears of taxes accruing to the state budget out of the tax revenue which, pursuant to the Acts concerning taxes, should be transferred to local government. The provisions in dispute compromise the financial security of local government and thus violate the constitutional guarantees of local government.

II. The Constitutional Review Chamber began by considering which local government rights might be infringed by Article 105.6 of the TA and Article 11.1 and 11.2 of Regulation no. 51. The procedure for payment and set-off of financial obligations of taxable persons might affect the right arising from Article 154.1 of the Constitution (right to sufficient financial resources for the performance of local government function) as well as the right arising from Article 154.2 of the Constitution (right to have expenditure related to duties of the state imposed by law on local government funded from the state budget).

The Chamber noted that local government rights to financial security are of secondary nature, with the sole purpose of creating the necessary conditions for the exercise of the right of self-management. This

also needs to be taken into consideration when considering a possible infringement of:

1. the right to sufficient funds for the performance of local government functions or
2. the right to have expenditure related to duties of the state imposed by law on local government funded from the state budget.

The first right exists in order to guarantee the existence of sufficient resources for the resolution of local issues, and the second to prevent local government authorities having to use their own resources in order to perform state duties imposed on them by law.

The Chamber agreed that the establishment of a procedure for the performance and set-off of tax obligations pursuant to which obligations are fulfilled in the order of their creation, may affect the periodic nature of receipt of financial resources by local government. The request was therefore deemed admissible.

However, in order for an infringement to exist, the Chamber had to establish that the contested provisions also *de facto* impede the proper performance by local authorities of duties of the state or those arising from local government functions. The Chamber referred to the procedure in force before 1 January 2009, when those liable to tax could decide on the order of performance of tax liabilities. There were no grounds to believe then that those liable to tax would have preferred to pay those taxes first that accrue partly or fully to the local government budget. Under the new procedure, the performance of tax obligations is not accounted for by the category of tax, but generally – each taxpayer has a single account and one reference number for all taxes. Under both procedures, local government is only deprived of tax revenue when those liable to tax fail to meet their fiscal obligations on time. This does not affect the regularity of tax receipts to such an extent as to hinder the proper performance of duties of the state or duties relating to local government functions. The Constitution does not prescribe that when collecting tax arrears the state should in all cases accord preference to taxes accrued to local government over those retained by the state; the state must ensure sufficient funds to local government.

In the light of the above the Chamber concluded that Article 105.6 of the TA and Article 11.1 and 11.2 of Regulation no. 51 did not reduce the revenue of the local government or render the performance of local government functions more difficult. Neither did the contested provisions infringe the right to have sufficient resources for the performance of local

government functions or the right to have the expenditure related to duties of the state imposed by law on local government funded from the state budget. The request of the City Council was dismissed.

*Cross-references:*

- Decision no. 3-4-1-9-06 of 16.01.2007 of the Constitutional Review Chamber, *Bulletin* 2007/1 [EST-2007-1-001];
- Decision no. 3-4-1-2-09 of 09.06.2009 of the Constitutional Review Chamber, *Bulletin* 2009/2 [EST-2009-2-008].

*Languages:*

Estonian, English.



*Identification:* EST-2009-2-011

**a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 30.06.2009 / **e)** 3-4-1-12-09 / **f)** Request of the Chancellor of Justice to declare Articles 1 and 2 of the Tallinn City Council Regulation no. 3 of 1 July 2009 “Amendment of the Statutes of Tallinn” partly unconstitutional and Article 3 thereof partially unconstitutional and invalid / **g)** *Riigi Teataja III* (Official Gazette), 2009, 37, 282; www.riigikohus.ee / **h)** CODICES (Estonian, English).

*Keywords of the systematic thesaurus:*

4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy**.  
 4.8.6 Institutions – Federalism, regionalism and local self-government – **Institutional aspects**.  
 4.8.8.2.2 Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione loci***.

*Keywords of the alphabetical index:*

Infrastructure, public, facilities / Local services, organisational structure, choice, local autonomy.

*Headnotes:*

The organisational structure necessary for the provision of public services in local government authorities can only be established by local government itself. Only the local authority can assess, by reference to local circumstances, which organisational structure would be most expedient for the provision of services to the members of its community. It is therefore an issue arising from within the local community and directly affecting the members of the community. The sphere of protection of the right of self-management is extended to this issue.

*Summary:*

I. On 19 February 2009 the Tallinn City Council passed Regulation no. 3 “Amendment of the Statutes of Tallinn” (hereinafter the “regulation”). The Chancellor of Justice made a proposal to the City Council to bring the regulation into conformity with the Constitution. The City Council did not consent to this proposal. The Chancellor of Justice submitted to the Supreme Court a request to declare Articles 1 and 2 of the regulation partially unconstitutional and Article 3 partially unconstitutional and invalid.

The contested articles provided for the transformation of the city district governments into regional agencies of the city government. The Chancellor of Justice noted that there was nothing in the Constitution or the European Charter of Local Self-Government to directly oblige the formation of city districts or to prohibit their liquidation, although Article 160 of the Constitution required that the organisation of local government shall be provided by law. The formation of city districts was also necessary for administrative-territorial deconcentration. The Chancellor of Justice argued that the Local Government Organisation Act (hereinafter the “LGOA”) established exhaustively the forms of territorial deconcentration of local government, i.e. this can only be achieved through formation of rural municipality or city districts. The City Council, having abandoned the general framework created by the Parliament “jumbled up the cards”, which might result in both legal and practical problems, and was in conflict with Article 56 571 of the LGOA and Articles 154.1 and 160 of the Constitution.

II. The Constitutional Review Chamber considered whether the transformation of the institutions of city district government into regional agency of the city government was a local issue, protected by the right of self-management, and whether the state had restricted the right of self-management when resolving this issue.

The Court confirmed that the organisational structure necessary for the provision of public services in local government could only be established by the local authority itself. Only the local authority can assess, in the light of local circumstances, the most expedient organisational structure for the provision of services to the members of its community. Thus, it is an issue arising from within the local community and directly affecting the members of the community. The sphere of protection of the right of self-management is extended to this issue.

The Local Government Organisation Act establishes the provision of public services in different regions of a local government unit through city districts as one possibility. However, this is not the only possibility for the formation of organisational structures that take into account local circumstances and peculiarities. Also, in several Acts different legal consequences arise, depending on the existence of city districts. This state of affairs cannot give rise to restrictions on the right of self-management.

Therefore the contested provisions of the regulation were not found to be in conflict with Article 56 571 of the LGOA or the Constitution. The request of the Chancellor of the Justice was dismissed.

#### *Cross-references:*

#### Case-law of the Supreme Court:

- Decision no. 3-4-1-9-06 of 16.01.2007 of the Constitutional Review Chamber, *Bulletin* 2007/1 [EST-2007-1-001];
- Decision no. 3-4-1-4-07 of 08.06.2007 of the Constitutional Review Chamber, *Bulletin* 2007/2 [EST-2007-2-003];
- Decision no. 3-4-1-2-09 of 09.06.2009 of the Constitutional Review Chamber, *Bulletin* 2009/2 [EST-2009-2-006].

#### *Languages:*

Estonian, English.



#### *Identification: EST-2009-2-012*

**a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 17.07.2009 / **e)** 3-4-1-6-09 / **f)** Request by the Tallinn Circuit Court to declare Article 56.18<sup>1</sup> of the State Fees Act to be unconstitutional, insofar as it provides for payment of a state fee of 200 kroons upon filing of an appeal against a ruling rendered in administrative proceedings / **g)** *Riigi Teataja III* (Official Gazette), 2009, 38, 287, www.riigikohus.ee / **h)** CODICES (Estonian, English).

#### *Keywords of the systematic thesaurus:*

2.3 Sources – **Techniques of review.**

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

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

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.**

#### *Keywords of the alphabetical index:*

Fee / Administrative proceedings.

#### *Headnotes:*

Procedural requirements arising from the Constitution are satisfied when an Act, although not a constitutional Act, is passed by a majority of the membership of the Parliament.

The establishment of a state fee of 200 kroons upon filing of an appeal against a ruling is a suitable and necessary measure to ensure procedural economy.

#### *Summary:*

I. Based on an appeal against a ruling by the Tallinn Administrative Court, the Tallinn Circuit Court found that Article 56.18<sup>1</sup> of the State Fees Act (“the SFA”) should be pronounced unconstitutional insofar as it required a state fee to be paid when an appeal was lodged. The court referred to the legal ambiguity of the norm and to contradictions with formal requirements set for the legislation in Article 104.2.14 of the Constitution. The Circuit Court therefore launched constitutional review proceedings.

II. The Constitutional Review Chamber took the view that application of the principle of *lex posterior derogat legi priori*, would, with appropriate legal

advice, lead to a conclusion as to the interpretation of Article 56.18<sup>1</sup> of the SFA. The issue in this instance was regulated by an ordinary Act and not by a constitutional law as required by Article 104.2.14 of the Constitution. However, the procedural requirement arising from this article was satisfied because the relevant Act was passed by a majority of the membership of the Parliament. The content of Article 56.18<sup>1</sup> of the SFA was therefore unambiguous and did not lack legal clarity.

With regard to the substantive reasons for the limitation of the right of an appeal, the Chamber held that this right could be limited, taking into account other constitutional values. The establishment of a state fee of 200 kroons on the filing of an appeal against a ruling is a suitable and necessary measure to ensure procedural economy. An increase on fees payable for recourse to the courts may pose a serious threat to the accessibility of legal protection, but within concrete norm control the constitutionality of a norm can only be reviewed against the background of the facts of the case. The Chamber noted that in certain cases the requirement to pay a state fee of 200 kroons upon filing an appeal against a ruling might not be reasonable, but this was not the case here. It therefore held that Article 56.18<sup>1</sup> of the SFA was not unconstitutional and dismissed the request by the Tallinn Circuit Court.

#### *Languages:*

Estonian, English.



## Georgia Constitutional Court

### Important decisions

*Identification:* GEO-2009-2-005

**a)** Georgia / **b)** Constitutional Court / **c)** Second Chamber / **d)** 31.03.2008 / **e)** 2/1-392 / **f)** Citizen of Georgia Shota Beridze and others v. the Parliament of Georgia / **g)** *Sakartvelos Respublika* (Official Gazette) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.5 General Principles – **Social State**.  
5.2 Fundamental Rights – **Equality**.  
5.3.39.4 Fundamental Rights – Civil and political rights – Right to property – **Privatisation**.

*Keywords of the alphabetical index:*

Privatisation, limited to one region / Discrimination, place of residence.

*Headnotes:*

A provision of Georgian legislation on the privatisation of state property granted certain privileges to those working for companies in the trade, food provision and utility supply sectors in the Autonomous Republic of Adjara. The territorial limitations in this provision did not result in discrimination for those working elsewhere in Georgia.

*Summary:*

The case concerned the compliance with the Constitution of the words “on the territory of Autonomous Republic of Adjara” of Article 12.6 of the Law concerning Privatisation of State Property, with particular reference to Articles 14 and 31 of the Constitution.

Article 12.6 of the Law concerning Privatisation of State Property provided for the sale of small companies transacting business on the territory of the Autonomous Republic of Adjara, specialising in trade, food provision and the supply of utility services, the value of which did not exceed 100,000 GEL. The law

provided for the sale of these companies to their employees. The sale price of these companies was determined by their balance value at the time of privatisation and by zone coefficient valid on the date of adoption of this law.

Article 14 of the Constitution provides that “Everyone is free by birth and equal before the law regardless of race, colour, language, sex, religion, political and other opinions, national, ethnic and social belonging, origin, property and title, place of residence.”

Article 31 of the Constitution provides that “The state shall take care of the equal socio-economic development of the whole territory of the country. In order to ensure the socio-economic progress of the high mountain regions, special privileges will be determined by the law.”

Representatives of the claimants argued that Article 12.6 contravened the Constitution, as it only covered one region of Georgia and did not apply to employees of small businesses situated in other regions of Georgia. By comparison with employees of small companies located in the Autonomous Republic of Adjara, other persons, including the claimants, who were in a position to buy small companies and real property subject to privatisation suffered discrimination. The claimants supported the establishment of certain privileges and discounts for employees during the privatisation process, but contended that the principle of equality should be respected, and those privileges should cover the whole territory of Georgia.

The claimants took the view that Article 12.6 violated the constitutional right to non-discrimination, specifically non-discrimination on the basis of place of residence. They argued that the opinion of the respondent that the list of criteria of discrimination in Article 14 of the Constitution was exhaustive was erroneous. A wider interpretation of discrimination was needed, and the criteria of “place of residence” from a constitutional perspective should be understood more extensively than simply a place where somebody chooses to reside.

The respondent’s representatives argued that the above norm was adopted due to the practical impossibility, due to the political situation, of undertaking the privatisation process on the territory of Adjara. In September 2005, privatisation commenced through auction of state property located in the Autonomous Republic of Adjara. There was a danger that the legitimate interests of employees working in small companies in the trade, food provision and utility service sectors would be overridden during the process of privatisation through

auction, and property subject to privatisation would have been sold to whoever paid the highest price. There was a real threat of these people losing their jobs and of various social problems.

The rationale behind the adoption of the impugned norm was to maintain and improve the economic well-being of individuals, to achieve social justice and to prevent severe social problems. The principle of proportionality was also respected; there was no element in the impugned norm that would have indicated any other usage for the norm than those indicated above. Article 12.6 was the most justifiable, efficient and effective means to achieve the stated objective. There had not been a different level of differentiated treatment of persons in similar conditions. The principle of equality stated in Article 14 of the Constitution was not violated.

From a grammatical perspective, the criteria enumerated in the article were exhaustive; however, the purpose of the norm was more extensive, than prohibiting discrimination solely on the basis of these criteria. Article 14 of the Constitution does not make direct reference to non-discrimination on the basis of place of employment, but this flows naturally from the essence and purpose of this norm. A strict grammatical interpretation would make Article 14 meaningless and undermine its importance within the constitutional sphere. The Constitutional Court was therefore of the opinion that the granting of privileges by the legislator to a certain group of people on the basis of their place of employment amounted to *prima facie* interference within the protected sphere of Article 14 and should be the subject of a constitutional review.

The claimants would have been covered by the norm had it not been for the limitations it contained on territorial application. Thus, on the basis of the norm, substantially equal subjects were accorded different legal treatment. Under Article 12.6 of the Law on State Property Privatisation, advantageous conditions applied to individuals, depending on the location of the company employing them. At the same time, other individuals working for companies located in other parts of Georgia did not benefit from the same legal regime.

The materials of the case show that it was not the intention of the Parliament of Georgia, when adopting the impugned norm, to place the claimants and individuals in general within this category in a disadvantageous situation. In order to establish a breach of the principle of equality before the law, it is not necessary to establish that the body adopting the norm in dispute set out to create an unequal legal situation. In this case, the intention of the legislator

was less important than the actual result produced. Advantages were given on the strength of the phrase “on the territory of Autonomous Republic of Adjara” of Article 12.6 of the Law on Privatisation of State Property and individuals were placed in an unequal situation by comparison with those who did not receive the same treatment.

Unequal treatment of claimants resulting from a norm does not automatically establish a breach of Article 14 of the Constitution. This point emerges clearly not only in case-law from the European Court of Human Rights, but also in judgments of the Constitutional Court. In its Judgment no. 2005 N1/2/213, 243, 16 February, the Constitutional Court stated that differentiated legal regulation would evidently not amount in every case to a breach of the principle of equality. It also stated that the legislator has a right to establish different conditions through legislation, but this should be justified, reasonable and legitimate.

The Constitutional Court was of the opinion that the granting of certain privileges in the privatisation process to employees of companies located in the Autonomous Republic of Adjara in the trade, food provision and utility service supply sectors analogously to the situation established by Order no. N178 of 1994 represents a restoration of justice with respect to these individuals and optimal, necessary and appropriate means for the protection of their social interests. When Article 12.6 of the Law on State Property Privatisation was adopted, no better means existed to achieve the aim set by the legislator. The scope of application of Article 12.6 was determined appropriately and was proportional to the aim.

The claimants suggested that Article 12.6 ran counter to Article 31 of the Constitution. In order to assess the legal grounds of this argument, the Court had to analyse the essence and purpose of the norm. In the constitutional claim and statements made at the hearing the claimants challenged the first sentence of the article.

Article 31 of the Constitution is to be found in the second chapter of the Constitution dealing with issues of citizenship and of fundamental rights and freedoms. This does not mean that it protects certain fundamental rights and that the claimants may base their arguments on it. Article 31 of the Constitution expresses solidarity of the state with respect to its territorial units. From this perspective, the norm has two subjects – the state and a territorial unit. There is no direct provision for the individual’s role in this relationship.

Thus, Article 31 of the Constitution does not establish a fundamental right, but is an expression of the state’s solidarity and of the principle of social state. Constitutional assessment of a norm with respect to this article of the Constitution is not undertaken separately but only with other articles establishing a fundamental right.

#### *Languages:*

English.



#### *Identification:* GEO-2009-2-006

**a)** Georgia / **b)** Constitutional Court / **c)** Second Chamber / **d)** 23.06.2008 / **e)** 2/2/425 / **f)** Citizen of Georgia Salome Tsereteli-Stievens v. Parliament of Georgia / **g)** *Sakartvelos Respublika* (Official Gazette) / **h)** CODICES (English).

#### *Keywords of the systematic thesaurus:*

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**  
5.3.34 Fundamental Rights – Civil and political rights – **Right to marriage.**

#### *Keywords of the alphabetical index:*

Marriage, right, restriction / Marriage, foreign, official permission, legitimate aim.

#### *Headnotes:*

The requirement for consent by the Civil Registry Agency for marriage between a Georgian citizen and a foreign citizen or a stateless person interferes with the natural freedom of the individual, which is particularly extensive in the sphere related to the private life of an individual. The Constitution bestows a universal right of freedom of marriage to one’s chosen partner (including foreign citizens). Coercing somebody to marry and putting obstacles in the way of marriage both represent interference with the basic right to marry. Any restriction on the right to marry, including requiring consent for marriage to a foreign citizen, would need to serve a legitimate aim, which the respondents were not able to demonstrate in respect of the norms under dispute in this case.

### Summary:

I. The claimant, Ms. Tsereteli-Stephens challenged Article 44.5 of the Law on Registration of Civil Acts, which imposed an obligation to acquire permission from the Civil Registry Agency for a marriage between a Georgian citizen and a foreign citizen or stateless person. The claimant asserted that her freedom of marriage, under Article 36.1 of the Constitution, had been violated by this norm. She pointed out that it was her natural freedom to make choices and if the realisation of that freedom depended on permission from an administrative body, this would constitute a restriction of that freedom. Such a limitation is only justifiable if it has a legitimate aim and is necessary within a democratic society.

The respondents' representatives argued that there was a legitimate aim behind the requirement for permission for marriage to a foreigner. They referred to the Organic Law on Citizenship in support of their contention that marriage to a Georgian citizen had legal implications connected with a preferential regime for a foreigner in the acquisition of Georgian citizenship. Additional guarantees, such as permission from the Civil Registry Agency, were needed to screen the legality of this process. They also referred to the decision of the European Commission of Human Rights in the case of *Hamer v. the United Kingdom*, to emphasise that certain limitations on the right to marry may be set by the national legislation.

II. The Constitutional Court declared that marriage and family are indispensable components of the private life of an individual. The degree of freedom is especially high in this sphere. Freedom to marry is a reflection and part of individual freedom and Article 36.1 of the Constitution encapsulates a basic human right.

Free development of the individual, which is also reflected in the freedom to marry, incorporates positive, as well as negative, freedom of action. Article 36.1 of the Constitution guarantees freedom of marriage with one's chosen partner to everyone, including foreign citizens. It is unacceptable to force somebody to marry or create a family, and to create obstacles for those wishing to marry and to intervene in their affairs in a manner that is disproportionate and intolerable for a democratic society.

The Constitutional Court emphasised that a marriage between a Georgian citizen and a foreigner could only be registered with permission from the Civil Registry Agency. By imposing a requirement to obtain permission, the state had imposed an obstacle on the claimant, restricting her freedom to marry. Having

analysed the essence of the permission needed from the Civil Registry Agency permission and the way one acquired it, the Constitutional Court noted that no additional information or documentation was required, and no separate enquiry was conducted in order for the head of the Civil Registry Agency to grant permission. Permission from the Civil Registry Agency was, therefore, an independent document, with no independent meaning or aim. The Civil Registry Agency did not examine or reveal any new facts and circumstances when issuing the permission.

As the respondents' representatives had themselves stated, the Civil Registry Agency gave permission to marry in all cases where the couple satisfied general requirements for the marriage. This was equally applicable to marriage between Georgian citizens. Thus the legitimate aim of introducing a requirement for permission of marriage between a Georgian citizen and a foreigner was not evident.

The Constitutional Court could not consider it relevant to the Civil Registry Agency permission, that marriage to a foreign citizen might entail special legal consequences, related to the obtaining of Georgian citizenship, citizenship of the children and other issues. Registration of marriage and acquisition of Georgian citizenship were totally different procedures. Moreover, it was not possible, during the marriage registration process, to resolve issues arising from the acquisition of Georgian citizenship by a foreign citizen. The Court therefore decided that the respondents could not claim that the restriction introduced by the norm on the right to marry had a legitimate aim. It held that the norm contravened Article 36.1 of the Constitution and declared it null and void.

### Languages:

English.



### Identification: GEO-2009-2-007

**a)** Georgia / **b)** Constitutional Court / **c)** Second Chamber / **d)** 30.10.2008 / **e)** 3/406, 408 / **f)** The Public Defender of Georgia and Georgian Young Lawyers' Association v. The Parliament of Georgia / **g)** *Sakartvelos Respublika* (Official Gazette) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Personal data / Taxation.

*Headnotes:*

In contrast to Article 41.1 of the Constitution which enshrines freedom of information, the constitutional value protected in Article 41.2 of the Constitution is the right of the individual to control the dissemination of information related to his or her private affairs, one of the most fundamental aspects of privacy. With regard to information relating to private matters, the Constitution sets forth the presumption that the individual does not wish to disseminate this information and the state is obliged to protect it from disclosure until they themselves ask for the dissemination of relevant information. Only information identifying a taxpayer is considered to be within the tax secrecy scope. The Constitution does not provide for the right of a person to acquire information from official sources pertaining to somebody else's health, finances or other private affairs.

*Summary:*

I. The claimants, the Public Defender of Georgia and a Georgian NGO, the Georgian Young Lawyers' Association challenged the norms of the Tax Code, which regulated the institute of tax secrecy. They pointed out a lack of precise definition in the norms as to the type of information that fell within the category of tax secrecy, which resulted in any information acquired by Tax Authorities falling into that category, even if this information could not be defined as a type of secret information (state secrecy, commercial secrecy, professional secrecy) listed in Article 41.1 of the Constitution. They argued that the norms imposed a blanket and disproportionate restriction on freedom of information enshrined in Article 41 of the Constitution. The Respondent, (a representative of the Parliament) asserted that information classified as tax secrecy under the challenged articles always belonged substantially to private secrecy or commercial secrecy and so its disclosure would in any case result in damages to a taxpayer and its competitiveness.

II. The Constitutional Court found several characteristics shared by all information belonging to the category of tax secrecy:

1. the information relates to a taxpayer;
2. it makes it possible to identify a taxpayer;
3. it is acquired in the process of administration of taxes and is held by tax authorities;
4. it is related to and reflects tax relationships.

The Chamber also upheld the argument that information falling within the scope of tax secrecy is linked to finances.

The Constitutional Court emphasised the importance of freedom of information for maintaining ongoing public debate in a democratic society and for personal development. The Court declared that freedom of information entrenched in Article 41.1 of the Constitution differs from freedom of expression, enshrined in Article 24.1, which enshrines the universal right "to freely receive and impart information". The Court was of the view that Article 24.1 guaranteed the free receipt of information from generally accessible sources, whereas Article 41.1 referred specifically to information stored in official records and held by state institutions.

The Constitutional Court identified four groups of information stored by state authorities and regulated under Article 41 of the Constitution, which differed in their levels of public accessibility:

1. information concerning a person, who applies for information;
2. information, which is not directly related to the person applying for it, but is available to anyone;
3. official information, which contains state, commercial or professional secrecy;
4. data stored in official records, dealing with private matters, such as health and finances.

The Constitutional Court stressed that in contrast to Article 41.1 of the Constitution which enshrines freedom of information, the constitutional value protected in Article 41.2 of the Constitution is the right of the individual to control the dissemination of information related to his or her private affairs, one of the most fundamental aspects of privacy. With regard to information relating to private matters, the Constitution sets forth the presumption that the individual does not wish to disseminate this information and the state is obliged to protect it from disclosure until they themselves ask for the dissemination of relevant information. Although Article 41.2 refers to "individual's health, finances or other private matters", it is also applicable to legal persons, aside from the section on health-related personal data.

The Court decided that information relating to finances for the purposes of Article 41.2 of the Constitution embraces any data which directly or indirectly reflects the material aspects of somebody's private affairs or the material basis of his or her activities or being. The Court also pointed out that only information identifying a taxpayer is considered to be within the tax secrecy scope. This was taken as additional proof that information in the tax secrecy category fell within the scope of Article 41.2 of the Constitution. The Court accordingly found that information falling within the category of tax secrecy was protected under Article 41.2 of the Constitution from disclosure and the challenged norms regulating tax secrecy served the constitutional goal of inviolability of personal data.

In response to the claimants' argument that the challenged norms imposed a disproportionate restriction on their freedom of information, the Constitutional Court declared that the Constitution does not provide for the right of a person to acquire information from official sources pertaining to somebody else's health, finances or other private affairs.

The Constitutional Court declined to analyse whether the information falling within the category of tax secrecy had any commercial value and whether its disclosure would damage the financial situation of a particular taxpayer. It declared that the value protected in Article 41.2 of the Constitution was the right of an individual to assurance that information pertaining to his or her private affairs and stored in official sources was not accessible. Disclosure of this information, irrespective of the consequences this would entail, is in itself a breach of a constitutional right and there was no need to assess the possible consequences.

In response to the claimants' contention that the norms did not satisfy the criteria of foreseeability and legal certainty, the Court noted that although the disputed articles of the Tax Code, particularly the definition of tax secrecy, did not give an exhaustive list of what was contained therein, it was quite possible to discern which information should be classified as tax secrecy and who could have access to it and when.

The Court held that the norms met the requirements of legal certainty and did not leave scope for arbitrary decision-making. They were therefore held to be fully compliant with Article 41.2 of the Constitution and the complainants' claims were not upheld.

#### *Languages:*

English.



#### *Identification: GEO-2009-2-008*

**a)** Georgia / **b)** Constitutional Court / **c)** First Chamber / **d)** 19.12.2008 / **e)** 1/2/411 / **f)** LTD "Russenergосervice", LTD "Patara Kakhi" and JSC "Gorgota", individual company "Farmer" of Givi Abalaki and LTD "Energiа" v. the Parliament of Georgia and the Ministry of Energy of Georgia / **g)** *Sakartvelos Respublika* (Official Gazette) / **h)** CODICES (English).

#### *Keywords of the systematic thesaurus:*

3.17 General Principles – **Weighing of interests.**  
 3.18 General Principles – **General interest.**  
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**  
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

#### *Keywords of the alphabetical index:*

Energy, sector, regulation / Energy, distribution, company, minimum capacity.

#### *Headnotes:*

The right to property and the right to inherit property are inalienable rights recognised by the Constitution. These rights may only be overridden by pressing social needs determined by law.

#### *Summary:*

A question arose over the constitutional compliance of Article 2.d of the Law on Energy and Natural Gas (under the head of the realisation of energy exceeding the amount established by "The Energy (Power) Market Rules" for retail customers of energy; and Article 7.1 of Order of the Minister of Energy of Georgia no. 77 of 30 August 2006 on Approving "The Energy (Power) Market Rules" in the context of Article 21.1-21.2 and the first sentence of Article 30.2 of the Constitution.

Article 2.d of the Law on Energy and Natural Gas defines the notion of the distribution of energy. It defines the distribution of energy as "reception of energy (power) from two or more supply points being independent from each other, exploitation of the distributive network and the realisation of the amount

of energy exceeding the capacity established by “The Energy (Power) Market Rules” for retail customers.”

Article 7.1 of Order no. 77 of 30 August 2006 of the Minister of Energy on Approving Energy (Power) Market Rules determines a particular capacity of energy, in the realisation of which by a retail customer it is possible to conduct energy distribution activity. Under the said provision, “for the distribution of energy a respective person shall realise no less than 120 million kilowatt/hour of energy in a year (including September-August)”.

The claimants argued that the above norms ran counter to Article 21.1-21.2 of the Constitution, which recognises and guarantees the right to property and the right to inherit and provides that abrogation of the universal right to property, and the right to acquire, alienate and inherit it is impermissible, except in instances of pressing social need in cases determined by law and in accordance with a procedure established by law, and Article 30.2.1 of the Constitution under which the state is bound to promote the development of free entrepreneurial activity and competition.

The claimants explained that the enforcement of the provisions under dispute had resulted in the cancellation of their energy distribution licenses. They were small distributing companies and now no longer had access to the electricity distribution market.

Electricity distribution falls within the sphere of economic relations, which is to be regulated due to the existence of subjects enjoying a dominant position in the sector. The regulation, therefore, serves to protect the property interests of customers and other entrepreneurs dependent on natural monopolies. The legislator was seeking to protect the customer from arbitrariness on the part of distribution companies by determining electricity tariffs. Such interferences by the State are aimed at balancing the interests of entrepreneurs and customers and averting the introduction of unfair prices by natural monopolists. Since the regulation limits the free will of an entrepreneur, the State is obliged to confine its scope in the way this would have been done by the most conscientious entrepreneur if such an instrument did not exist. This type of approach to the limitation of a right can ensure express protection of customer rights as well as respect for the legitimate interests of an entrepreneur. Such a balancing of interests is a characteristic of all fair business transactions. The regulation should not, in any event, cause a rift between participants to the transaction. The electricity market, as a value distinct in character, should be preserved. A regulatory agency can intervene in the functions of a market without prejudice to free and fair trade of energy.

The Court held that the economic failure of companies did not constitute a justifiable ground for the impugned provisions. It was also impermissible to consider the simplification of the energy system to be the motivation for the adoption of the impugned provisions. The respondents argued that it was easier to manage large companies than a number of small companies. A simple and flexible management system is undoubtedly far more effective but it cannot serve as a justification if it is not necessitated by the relations to be regulated.

The respondents referred to the positioning of distribution companies in equal conditions as one of the major arguments for the introduction of the impugned provisions. In their opinion, this implied that, in future, the burden of supplying electricity would be equally divided. In particular, companies reaching the threshold would have both potential payers and indigent customers, unlike small companies, which only operate in the area of potential payers.

The Constitutional Court noted that the positioning of companies in equal conditions means affording them equal legal guarantees. The scope of interference on the part of the legislature ends where relationships are regulated by the natural laws of the market. When distribution companies enter the market, they choose their territories freely and go wherever they can derive profit. Any administrative interference in this choice should be considered a limitation on entrepreneurial freedom. In terms of the interests of energy security and customer rights, it is appropriate for a distribution company to be oriented towards customers of all categories but the market laws cannot force this state of affairs; neither can the provisions under dispute generate such an obligation. Where there is a company merger, such a result is possible but it would not be comprehensive as companies choose their own customers. It is feasible that the normative threshold could be reached by a company at the cost of “good-faith” customers only. Equally, this threshold may be surmountable only with the help of the population in mountainous regions. This reasoning leads to a conclusion that only so-called “cheap” customers will get electricity as entrepreneurs cannot be forced to carry out non-profitable activities. Entrepreneurial activity must not be limited by public interest to a greater degree than is necessary for the normal exercise of private interests. Entrepreneurs should be afforded legal guarantees to allow them effectively to carry out their activities on their own territory, irrespective of their profits and losses. Any normative interference distanced from and confronting natural market laws will be forced and inefficient.

It was apparent from consideration of the merits that in cases of violation of a licence, the regulatory commission is entitled to force licensees to fulfil their obligations. There is already a regulation in force to ensure the stability of energy supply, and so the setting of a mandatory capacity of realisation and limitation of constitutional rights for the same motive is inexpedient. It was also apparent that the given quota of realisation did not in any way exclude the risk of unstable supply of energy.

With regard to the compliance of the provision to Article 21 of the Constitution, their exclusion from the market deprived the claimants of the right of use of property for distribution. They were cut off from the road leading to their property, which jeopardised the "use" element of the right to property. The claimants could, however, lease the property and thus make use of it: an owner is never deprived of that possibility. Nonetheless, because they were barred from distribution, the implication of use was narrowed, so that it caused the distancing of the owner. Limitation of constitutional rights can be justified when the legitimate aim is attained so that the value and the owner are not separated. The limitation implies fair balancing of interests, rather than replacing one interest with another. In this case, the limitation of property was even less justifiable as there are no full guarantees during leasing; nobody is obliged to take a lease over the claimants' property. Distribution companies are fully entitled to install their own networks which would leave the claimants' property without any function.

The respondents failed to convince the Court that the method of limitation of rights they had chosen was the only and indispensable means, which would cause the least restriction to the claimants' rights. The necessity of a means arises from objective circumstances and affords no alternatives. Such a stance precludes artificial limitations. Limitation caused by necessity is justified by necessary means. Only such a limitation can answer the requirements of common sense and the disposition of a subject to consider the limitation of a right to be an overriding necessity.

#### Languages:

English.



## Germany

### Federal Constitutional Court

#### Important decisions

*Identification:* GER-2009-2-013

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 05.05.2009 / **e)** 1 BvR 1155/03 / **f)** Married double-barrelled name / **g)** / **h)** *Neue Juristische Wochenschrift* 2009, 1657-1660; *Zeitschrift für das Gesamte Familienrecht* 2009, 939-943; *Europäische Grundrechte-Zeitschrift* 2009, 254-260; *Deutsches Verwaltungsblatt* 2009, 774-777; *Das Standesamt* 2009, 179-185; *Monatsschrift für Deutsches Recht* 2009, 752-753; *Familie-Partnerschaft-Recht*, 2009, 358-361; *Bayerische Verwaltungsblätter* 2009, 502-505; 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.**

#### *Keywords of the alphabetical index:*

Names, law / Names, multiple / Name, choice, marriage / Name, double-barrelled, married couple / Name, chain.

#### *Headnotes:*

A decision regarding the constitutionality of preventing the formation of multiple names (sentence 2 of § 1355.4 of the German Civil Code).

Preventing the formation of multiple names under sentence 2 of § 1355.4 of the Civil Code is constitutional. A constitutional complaint lodged with the objective of attaching another name to a double-barrelled name that had been chosen as the married name was unsuccessful. The encroachment on Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law is constitutional.

### Summary:

I. § 1355.4 of the Civil Code (hereinafter, the “Act”) provides that when concluding marriage, the spouses should make a declaration at the registry office to designate a common family name, which will become their married name. In order to do so, they may choose between the husband’s or the wife’s birth name or the name he or she has used so far. If they do not choose a joint married name, each spouse continues to bear his or her name after concluding marriage. If they choose a married name, the spouse whose name does not become the married name may add his or her own name before or after the married name. This possibility, however, is excluded or restricted under sentence 2 and 3 of § 1355.4 of the Act if the spouses already have multiple names: if a spouse’s name that already consists of more than one name is designated as the married name, the other spouse may not add his or her name to the married name. If, however, the name that is not chosen as the married name consists of more than one name, only one of these names may be added to the married name.

The first complainant uses a double-barrelled name and has owned a law firm for many years. The second complainant uses only one name and is a practising dentist. The complainants married without choosing a married name. They later decided that they wanted to choose the first complainant’s double-barrelled name as their married name; the second complainant intended to add her name before the married name. This was denied by the Registry Office. An application lodged to this effect before the Local Court (*Amtsgericht*), as well as the subsequent appeals, were unsuccessful.

II. The First Panel of the Federal Constitutional Court rejected the constitutional complaint as unfounded. In essence, the decision is based on the following considerations:

Sentence 2 of § 1355.4 of the Act pursues a legitimate legislative objective. The legislature attributed various functions to the concept of “name”, which is contained in the law on family names. On the one hand, name-bearers are intended to find and express themselves through their names. On the other hand, the function of the law on names is to clearly identify the name-bearer as belonging to a family, to ensure a name’s power of identification and to retain such power for future generations. In order to achieve this, the legislature has enacted legal regulations that are intended to prevent, where possible, the formation of double-barrelled and multiple names. Sentence 2 of § 1355.4 of the Act takes account of this concept.

The provision follows the concern of forming names which are, on the one hand, useful in legal and business relations and will, on the other hand, not lead to name chains for future generations. The provision prevents a name-bearer from using a name that may consist of up to four names in cases in which the spouses have so far used genuine double-barrelled names (i.e. double-barrelled names which have not come into being through marriage). At the same time, the legislature thus rules out that, at birth, children can receive a multiple name which consists of three names.

In the meantime, the legislature has opened the possibility, through §§ 1617.1 and 1617.a of the Act, of choosing as the birth name of a child the double-barrelled name of one parent composed of a married name used before and an added name. In this context, the question arises why the legislature permits a double-barrelled name of one parent, which consists of a previous married name and an added name to be transferred to a child, but prohibits the formation of a double-barrelled name from the spouses’ names as their married name or the formation of a double-barrelled name from the parents’ names as their child’s birth name. Even though with these regulations, the legislature does not consistently pursue its aim of preventing double-barrelled names, especially as birth names for children, sentence 2 of § 1355.4 of the Act at any rate serves the legitimate purpose of excluding the emergence of names used that consist of more than two names, thus also preventing them from becoming children’s birth names. The provision is also suitable and necessary for containing the formation of name chains, as wished by the legislature.

The encroachment by sentence 2 of § 1355.4 of the Act on the spouse’s right to bear a name, which is protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law, is proportionate. Admittedly, reasons of practicability are not sufficient for justifying the regulation. However, the legislative concern of generally excluding multiple names that go beyond double-barrelled names in order to preserve the name’s identity-creating function bears a certain weight. It is true that other possibilities of drafting are possible. It is, however, up to the legislature to decide whether it should prevent long name chains already where the point at issue is the possibility for a spouse to use his or her previous name in addition to the married double-barrelled name chosen by both spouses, or if it performs the reduction of names to at most a double-barrelled name only when the names used by the parents are transferred to their children.

Finally, the restriction under sentence 2 of § 1355.4 of the Act is also reasonable. In the context of its concept for the law on names, the legislature has left spouses

various possibilities as regards the selection of names which they will use after concluding marriage. These possibilities allow spouses to express their own identity. In particular, if one spouse's double-barrelled name is chosen as the married name, the possibility exists for the other spouse to continue using as a firm name in business relations the name that he or she has used so far (§ 21 of the Commercial Code) and to bear the name together with his or her married name. The law on names has no rigid regulations on using one's name; it is sufficient if the signature of the name makes it possible to identify the person. The legally acknowledged name must merely be indicated with respect to public authorities.

Sentence 2 of § 1355.4 of the Act also does not violate Article 6.1 of the Basic Law (protection of marriage and the family). The provision does not oblige spouses to choose a uniform married name; however, it does support the wish of spouses to be able to express their unity in a joint married name. The legislature has accommodated this concern by allowing spouses to choose one of the names used so far as their married name.

The regulation also does not infringe Article 12.1 of the Basic Law (occupational freedom). Sentence 2 of § 1355.4 of the Act shows no tendency to regulate an occupation or a profession. If the choice of a married name results in the name of one of the spouses being cancelled, this is not an impairment of the freedom of practicing an occupation or a profession that is equivalent to an encroachment. The spouse affected is free not to designate a married name or, if a married double-barrelled name is chosen, to continue using his or her previous name at any rate in professional relations.

Article 3.1 of the Basic Law (principle of equal treatment) has also not been violated. The circumstances which exist here are unequal, which makes it possible for the legislature to treat them unequally. Furthermore, the legislative objective of avoiding name chains justifies the unequal treatment.

The decision was reached by five votes to three.

#### *Languages:*

German, English press release on the website of the Federal Constitutional Court.



#### *Identification:* GER-2009-2-014

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 12.05.2009 / **e)** 2 BvR 890/06 / **f)** / **g)** / **h)** *Europäische Grundrechte-Zeitschrift* 2009, 388-399; *Landes- und Kommunalverwaltung*, 2009, 363-365; CODICES (German).

#### *Keywords of the systematic thesaurus:*

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

5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship.**

#### *Keywords of the alphabetical index:*

Society, religious, advancement, financial, by state / State, neutrality, religious and ideological creeds / Society, religious, state funding, administration, commissioning.

#### *Headnotes:*

A decision regarding the constitutional requirements placed on the grant of state funding to religious societies.

A state regulation which entrusts a religious *Land* association with the administration of the funding provided in a *Land* (individual federal state) is incompatible with Article 4 of the Basic Law (freedom of faith) if this infringes the precept of state neutrality.

#### *Summary:*

I. On 11 January 2005, the *Land* Brandenburg and the Jewish Community, *Land* Brandenburg concluded an agreement. Under the terms of the agreement, the *Land* Brandenburg contributes 200,000 euros annually to the Jewish Community in Brandenburg for the maintenance of Jewish community life. Article 8.1 of the agreement provides for the amount to be administered by the *Land* Association of Jewish Communities, *Land* Brandenburg on behalf of all of the *Land*'s Jewish communities irrespective of whether or not they belong to the *Land* Association. The *Land* Association is a public corporation and is the Jewish religious community in Brandenburg with the most members. The *Land* Association is obliged to give a reasonable share of the amount provided by the *Land* Brandenburg to all communities. In addition, the agreement grants the *Land* Association certain privileges, among others, in relation to public holidays, pastoral care in institutions, the operation of

schools and cemeteries, exemptions from fees as well as in relation to the availability of broadcasting time on public radio.

In Brandenburg there is, apart from the *Land* Association, a registered association called the Law-Abiding Jewish *Land* Community of Brandenburg. It does not share the religious convictions of the *Land* Association and therefore does not belong to it. On the contrary, the two religious communities are rivals. After the agreement was concluded, the *Land* Association did not initially give the Law-Abiding Jewish *Land* Community a share of the funds provided by the *Land*. Only since December 2007 has the latter retrospectively received a monthly amount of 1,020 euros, which is payable also in the future.

In their constitutional complaint, the Law-Abiding Jewish *Land* Community of Brandenburg and one of its members object directly to the provisions of the agreement in conjunction with the Act Approving the Agreement (*Zustimmungsgesetz*) passed by the Brandenburg *Landtag* (parliament).

II. The Second Panel of the Federal Constitutional Court dismissed the constitutional complaint lodged by the member of the Law-Abiding Jewish *Land* Community as inadmissible because he was not directly affected by the provisions.

The constitutional complaint lodged by the Law-Abiding Jewish *Land* Community was partly successful. The Federal Constitutional Court found as follows:

The provision on the allocation of funds by the *Land* Association in Article 8.1 of the agreement is not compatible with those aspects of the fundamental right to freedom of religion which affect grants and the right to participate in grants contained in Article 4.1 and 4.2 of the Basic Law (freedom of faith) in connection with the requirement of impartiality that can be derived from the rule of law principle embodied in Article 20.3 of the Basic Law. The provision is therefore void. Over the past and until such time as there is a new law, the *Land* Brandenburg is obliged to allocate funds to the Law-Abiding Jewish *Land* Community of Brandenburg for its advancement, which take into account the amounts already given to it by the *Land* Association and which measured against the amount contributed to the *Land* Association, establish parity between the two organisations. The constitutional complaints are inadmissible to the extent they object to other provisions of the agreement.

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

The fundamental right to freedom of faith in Article 4 of the Basic Law guarantees, *inter alia*, the freedom of religious association, i.e. freedom to form a religious society on the basis of a common faith. In this connection, funding is highly significant for the freedom of religious societies to exercise their religion. It is true that a right to receive specific state grants cannot be derived from Article 4 of the Basic Law. However, as far as the financial advancement of religious societies is concerned, there are aspects of Article 4 of the Basic Law that relate to grants and the right to participate in grants. They can also oblige the state to make organisational arrangements. In this connection, it is also necessary to take into account the requirement of neutrality imposed on the state as regards religious and ideological creeds.

If the state delegates the task of allocating to religious societies the funds which it has already made available, it must in addition comply with the requirements of the rule of law principle. It is evident from this principle that those entrusted with a task may only to a limited extent make decisions that affect them personally. It is true that the case-law has not yet recognised the existence in other legal areas of a general requirement of impartiality on the part of the administration and the officials representing it. In any case, in the area of financial advancement of religious societies by the state that is impacted by Article 4 of the Basic Law, the state is, however, obliged to ensure that structures are not put into place which could endanger the content of Article 4 of the Basic Law. The delegation of the task may not lead to a situation in which the religious society entrusted with the decision-making task is itself a subject of fundamental rights with an entitlement and is as a rule called upon to decide a matter in respect of which another possibly competing religious society can assert the same entitlement under the Basic Law. This kind of conflict of interest, which is at the same time associated with a dependency that negatively affects the other religious society concerned, prevents the realisation of the fundamental right in Article 4 of the Basic Law.

On the basis of its historical development and its spirit and purpose, the challenged provision should be understood as having been intended to provide a conclusive arrangement covering the advancement of Jewish communities in Brandenburg. At the same time, additional claims by Jewish communities against the *Land* would be excluded. The aim was to relieve the *Land* of the responsibility of ensuring that the funds were equitably distributed and to limit the funds for the Jewish communities to the contractually agreed amount. As a consequence, the *Land* subsequently

persistently refused to accept its responsibility towards the Law-Abiding Jewish *Land* Community of Brandenburg by making reference instead to the contractual agreement.

The challenged provision violates the Law-Abiding Jewish *Land* Community's fundamental right in Article 4.1 of the Basic Law because entrusting the *Land* Association with the task of passing on the funds provided by the *Land*, places it in a position in which it as an institution open to bias. The *Land* Association is itself a subject of fundamental rights with regard to the *Land*. Since the Agreement leaves the decision as to the amount of the funds that it will pass on entirely in the hands of the *Land* Association, the Association is obliged to set the limits on its own entitlement itself. In this connection, it must also be taken into account that the *Land* Association has a strong self-interest in the funds. The fact that the challenged provision places the Law-Abiding Jewish *Land* Community in a position of dependence in relation to the *Land* Association is also incompatible with the requirements of state neutrality and of an administrative organisation in a state governed by the rule of law.

The violation of the fundamental right established by the Court only relates to entrusting the *Land* Association with the task of administering the funds already provided by the *Land* and the task of giving all Jewish communities a share in it. No constitutional objections exist as regards the grant of funds to advance and develop Jewish community life. There is no need and no reason to extend the nullification of the entrustment of the *Land* Association with the administration of the funds to other provisions.

#### *Languages:*

German, English press release on the website of the Federal Constitutional Court.



#### *Identification:* GER-2009-2-015

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 13.05.2009 / **e)** 2 BvR 718/08 / **f)** / **g)** / **h)** *Landes- und Kommunalverwaltung* 2009, 315-316; *Zeitschrift für offene Vermögensfragen* 2009, 183-184; *Europäische Grundrechte-Zeitschrift* 2009, 401-404; CODICES (German).

#### *Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality.**

5.2 Fundamental Rights – **Equality.**

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

5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty.**

#### *Keywords of the alphabetical index:*

Deprivation of liberty / Rehabilitation / Compensation / German Democratic Republic (former).

#### *Headnotes:*

The refusal of the non-constitutional courts to grant rehabilitation in connection with compulsory committal to a home in the GDR infringes the prohibition of arbitrary decisions under the Basic Law. It was based on an interpretation that is mistaken and against the intention of the legislature in enacting legislation on the Rehabilitation and Compensation of Victims of Unconstitutional Criminal Prosecution Measures in the Area of the Former German Democratic Republic.

#### *Summary:*

I. The constitutional complaint is directed against the refusal of an application for rehabilitation on account of committal to children's homes and other youth welfare institutions in the GDR.

On the subject of rehabilitation, §§ 1 and 2 of the Act on the Rehabilitation and Compensation of Victims of Unconstitutional Criminal Prosecution Measures in the Area of the Former German Democratic Republic (the Act) provide as follows:

#### § 1

"1. On application, the decision of a public German court in a criminal matter in the area named in Article 3 of the Unification Treaty, the area of the German Democratic Republic, in the time from 8 May 1945 to 2 October 1990, shall be declared unconstitutional and be annulled (rehabilitation), insofar as it is incompatible with essential principles of a free order under the rule of law, in particular because:

1. the decision served political persecution; this is usually the case in convictions under the following provisions: ...or

2. the legal consequences ordered are grossly disproportionate to the act on which they are based..."

## § 2

“1. The provisions of this Act apply with the necessary modifications to a judicial or administrative decision made outside criminal proceedings which deprived a person of liberty. This includes without limitation committal to a psychiatric hospital where this was for political persecution or other inappropriate purposes.

2. Life in conditions similar to arrest or forced labour in conditions similar to arrest is treated as equivalent to deprivation of liberty.”

The complainant, who was born in 1955, was brought up in a home from 1961 to 1967 and subsequently lived under compulsion in various institutions in the GDR until January 1972. In December 2006, the complainant applied to the Magdeburg Regional Court (*Landgericht*) for his rehabilitation with regard to his committal to children’s homes.

The Magdeburg Regional Court refused his application. The grounds given for the refusal included the lack of local jurisdiction. Another ground given was that deprivation of liberty under § 2 of the Act did not normally exist in the case of children’s homes and other youth welfare institutions of the GDR with no punitive element.

The Court held that it was by no means clear in any case that committal to a children’s home, considering the state of pedagogical studies in the year 1961, was incompatible with essential principles of a free order under the rule of law. There were no indications of political persecution. The complainant’s appeal against this decision was dismissed by the Naumburg Higher Regional Court (*Oberlandesgericht*). He then filed a constitutional complaint against the Naumburg Higher Regional Court’s order, on the basis that there had been a violation of his human dignity under Article 1 of the Basic Law, of his right of personality under Article 2 of the Basic Law and of the principle of equality before the law under Article 3 of the Basic Law with regard to the treatment he received in the various homes.

II. The Second Chamber of the Second Panel of the Federal Constitutional Court reversed the order of the Naumburg Higher Regional Court and referred the matter back for a new trial. The decision infringed the complainant’s fundamental right under Article 3.1 of the Basic Law which prohibits arbitrary decisions. The Higher Regional Court’s interpretation was found to be very narrow, taking the stance that only measures that were occasioned by an act relevant to the criminal law could be rehabilitated under the Rehabilitation Act, which is part of criminal law. This interpretation of § 2 of the Act did not satisfy constitutional requirements and ran counter to its meaning. As regards the

requirement of incompatibility with essential principles of a free order under the rule of law in § 1.1 of the Act, this interpretation, which goes beyond the wording of the Act, led to an impermissible restriction of rehabilitation to cases based on an act which the justice system of the GDR classified as relevant to criminal law. This interpretation defeated the intention of the legislature to make rehabilitation possible following deprivation of liberty outside criminal proceedings and committals to psychiatric hospitals and resulted in a narrowing of the area of application of the Act in a manner that was indefensible and contrary to the intention of the legislature. The contents of the Act had been grossly misinterpreted, and were based on inappropriate and therefore arbitrary considerations.

*Languages:*

German.

*Identification:* GER-2009-2-016

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 10.06.2009 / **e)** 1 BvR 706/08, 1 BvR 814/08, 1 BvR 819/08, 1 BvR 832/08, 1 BvR 837/08 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2009, 2033-2045; *Die Beiträge zur Arbeitslosen- und Sozialversicherung – Rechtsprechung Beilage* 2009, 197-224; 227-250; *Versicherungsrecht* 2009, 957-968; *ZFSH/SGB Sozialrecht in Deutschland und Europa* 2009, 396-422; *Neue Zeitschrift für Sozialrecht*, 2009, 436-446; *GesundheitsRecht* 2009, 421-431; CODICES (German).

*Keywords of the systematic thesaurus:*

3.5 General Principles – **Social State**.  
5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.  
5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one’s profession**.

*Keywords of the alphabetical index:*

Health, insurance, private / Health, insurance, contract, obligation / Health, reform / Health, insurance, basic rate / Health, insurance, change / Health, insurance, private, reserves, portability (transfer).

*Headnotes:*

1. The introduction of the basic rate in the 2007 health reform, to ensure lifelong comprehensive cover of persons insured by private health insurance, is constitutional.
2. In order to make it easier to change insurer and to improve competition in private health insurance, the legislature was entitled to provide for partial portability (i.e. transfer) of ageing reserves.
3. Compulsory insurance in statutory health insurance may be extended to three years in which the annual earnings limit is exceeded.
4. The legislature has a duty to observe the consequences of the reform for the insurance undertakings and their insured.

*Summary:*

I. The First Panel of the Federal Constitutional Court had to decide on several constitutional complaints directed against provisions of the Act to Strengthen Competition in Statutory Health Insurance of 26 March 2007 (*Gesetz zur Stärkung des Wettbewerbs in der gesetzlichen Krankenversicherung*, hereinafter: *GKV-WSG*) and against provisions of the Act for the Reform of Private Insurance Law (*Gesetz zur Reform des Vertragsversicherungsrechts*) of 23 November 2007.

The *GKV-WSG* maintains the bipartite health insurance system of statutory and private health insurance, but has introduced substantial reforms from 1 January 2009. It makes statutory or private health insurance compulsory for all inhabitants of Germany. In addition to a number of new provisions, which are intended to strengthen competition by giving the health insurance funds greater freedom of contract, the *GKV-WSG* aims to improve rights of choice and possibilities to change insurance to private health insurance. To achieve this, a partial portability (i.e. transfer) of ageing reserves and a basic rate were introduced. Statutory and private health insurance are each, as separate pillars, to ensure that the categories of persons allocated to them have permanent and adequate insurance cover against the risk of illness, even in situations of social need.

II. The Federal Constitutional Court has rejected as unfounded the constitutional complaints lodged by five health insurance companies and three complainants with private health insurance. The provisions reviewed do not infringe the complainants' fundamental rights, in particular their occupational

freedom and freedom of association. The predictions on which the Act is based are constitutionally unobjectionable; however, the legislature has a duty to observe the consequences of the reform.

The following considerations were conclusive for this result:

It is true that the provisions on the basic rate in private health insurance restrict the private health insurance companies' exercise of their occupation. However, they are justified with regard to the aims these provisions pursue. Furthermore, according to the legislature's predictions, which are unobjectionable, they are at present not to be regarded as so serious as to prevent private health insurance from functioning in the future. The companies now have to offer a basic rate in addition to and alongside their normal rates, and upon application, they have to grant insurance cover under that rate. But, this does not make it either impossible or more difficult in the long term to meaningfully exercise the occupation of a private health insurer. Where persons choose the basic rate, it is true that the companies might be forced in individual cases not to insure them at a premium commensurate with the risk. For the amount of the premium is limited in the basic rate and risk loading and exclusions of benefits are not permitted. However, the insufficiency of cover that may arise is borne not by the insurance companies, but by the insured in private health insurance, in the form of a contribution.

It was reasonable for the legislature, within its scope to make predictions, to proceed on the basis that in the foreseeable future the basic rate will have no significant effects on the business of the private insurance companies. The possibility of many insured persons moving to the basic rate is unlikely at present. For the basic rate entails a high premium of approximately 570 euros per month. At the same time, the main benefits of the basic rate are narrower in scope than the customary benefits of the normal rates of private health insurance. The legislature was therefore able to assume that there would be no disproportionate increases of premium in the normal rates of private health insurance as a result of the need to finance the basic rate, whose premiums might not be sufficient to cover costs. The legislature was also able to assume that this would not in the future lead to a substantial move to the basic rate, which in the long term would destroy the complete business model of private health insurance. If it should transpire in the future that this reasonable prediction was mistaken, the legislature would, if necessary, have the duty to correct it.

To justify the goal set out in the GKV-WSG of ensuring that all the inhabitants of the Federal Republic of Germany have affordable health cover in the statutory or private health insurance system, the legislature may invoke the principle of the social welfare state contained in the Basic Law. The combination of compulsory insurance and obligation to enter into contracts in the basic rate is appropriate to achieve the legislature's goal of guaranteeing adequate and affordable health insurance cover for the category of persons allocated to private health insurance. If there were no obligation to enter into contracts, in particular persons with serious pre-existing conditions would have no possibility of being accepted by a private health insurance company, because it would not accept them due to the increased risk. Nor did the legislature exceed the drafting discretion to which it is entitled in the further provisions on the basic rate.

The absolute prohibition of the termination of comprehensive health insurance policies introduced by the GKV-WSG is a justified encroachment in order for members of private health insurance companies, just as in state health insurance, to be covered fully, permanently and without legal risks. The same applies to the duty of the companies to provide emergency treatment for their insured even where there has been a default in payment.

The introduction of partial portability of ageing reserves for new insured of private health insurance is compatible with the Basic Law. Previously, the companies have without exception chosen contracts under which, if the insurance contract is terminated, there is no claim to transfer the ageing reserve created for the insured; as a result of this provision, this will not happen in the future. This encroachment upon the freedom of health insurance companies to practise an occupation is justified by legitimate public interests. In making ageing reserves portable, the legislature is pursuing the goal of creating a functioning competition in the private insurance market and making it easier for the insured to move to another insurance company. In the proceedings, the complainant companies themselves admitted that for the existing insured persons of private health insurance companies it was practically impossible after a certain age to change their health insurance company. For the loss of ageing reserves entailed by this meant that a new insurer had to make its calculations without these reserves and therefore charged higher premiums.

The introduction of partial portability of the ageing reserve does not constitute an unreasonable encroachment as a result of the danger of risk selection among the companies' existing insured. It is

true that if the companies are to be able to perform their health insurance contracts in the long term, this in principle presupposes that their insured include a sufficient number of persons who are good risks. A constant migration of insured who are good risks, with the consequence that a company only insures persons who are bad risks and have high sickness costs, could ultimately lead to the insolvency of the company. However, the GKV-WSG does not provide for the transfer of the total calculated ageing reserve, but merely for its transfer to the extent of the benefits covered by the basic rate. Consequently, where a person changes insurer, under the new law a considerable proportion of the ageing reserve created for the insured in his or her normal rate will still remain with the previous company. Although the reform increases the risk of migration of the insured, it also offers increased opportunities of obtaining new insured as a result of their changing their insurers. In this way, competition between the insurance companies is encouraged in an acceptable manner.

The introduction, limited to the first six months of 2009, of partial portability in the case of contracts entered into before 1 January 2009 is also constitutionally unobjectionable. This is a provision which is only slightly onerous for the companies, for transferring part of the ageing reserve is permitted only in the basic rate, which, however, is as a general rule not of financial interest to the average person with private health insurance by reason of its inferior range of benefits together with a high premium.

The provision of § 6.1 no. 1 of the Fifth Book of the Code of Social Law (*Sozialgesetzbuch V*) as amended by the GKV-WSG, challenged by a complainant who has had private health insurance to date, but also by a number of health insurance companies, is compatible with the Basic Law. Previously wage-earners and salary-earners were released from compulsory insurance if their regular earnings exceeded a specific sum in one year. It is now necessary for the earnings to be higher in three consecutive calendar years before they are released from compulsory insurance. This arrangement is reasonable for the insured affected. The legislature has merely extended the period in which the insured have to remain in the statutory health insurance system before they may decide to move to private health insurance. When requiring evidence that the annual earnings limit is exceeded, the legislature may require that this situation continues for a certain period of time and remains consistent.

The decision on the three-year period was passed by five votes to three; the remainder of the decision was unanimous.

*Cross-references:*

Also see Decision no. 1 BvR 825/08 (in this *Bulletin*) on the health reform which was passed on the same day, in which the First Panel of the Federal Constitutional Court ruled on the obligation for small private mutual insurance associations to enter into contracts with non-members.

*Languages:*

German, English press release on the website of the Federal Constitutional Court.

*Identification:* GER-2009-2-017

a) Germany / b) Federal Constitutional Court / c) First Panel / d) 10.06.2009 / e) 1 BvR 825/08, 1 BvR 831/08 / f) / g) / h) *Versicherungsrecht* 2009, 1057-1061; CODICES (German).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Health insurance, obligation to contract / Health insurance.

*Headnotes:*

The obligation to enter into contracts at the basic rate created by the health reform of 2007 was found to encroach on the freedom of association (of small mutual insurance associations). Such an obligation therefore only exists towards applicants for insurance who satisfy the association's membership requirements as stated in its articles of association.

*Summary:*

I. Two complainants lodged a constitutional complaint challenging various provisions of the Act to Strengthen Competition in Statutory Health Insurance (*Gesetz zur Stärkung des Wettbewerbs in der gesetzlichen Krankenversicherung*, or GKV-WSG) of

26 March 2007 and of the Act for the Reform of Private Insurance Law (*Gesetz zur Reform des Versicherungsvertragsrechts*) of 23 November 2007. The new provisions impose an obligation on private health insurance companies to offer a uniform basic rate across the whole sector (§ 12.1b.1 of the Act on the Supervision of the Insurance Undertakings – *Gesetz über die Beaufsichtigung der Versicherungsunternehmen*), in which an obligation to contract exists for the insurance company (sentence 1 of § 193.5 of the Insurance Contract Act – *Versicherungsvertragsgesetz*). Furthermore, the new regulations provide an absolute prohibition of termination for all comprehensive health insurance policies (§ 206.1.1 of the Insurance Contract Act).

The complainants are small mutual insurance associations which offer their members, exclusively priests, comprehensive health insurance and specific supplementary policies. They have an obligation only to enter into insurance contracts with persons who are members. They are prohibited by law from entering into insurance transactions without membership, which is something large mutual insurance associations are allowed to do. The main point of contention for the complainants was that for them, the provisions on the obligation to enter into contracts in the basic rate constituted a de facto prohibition of insurance provided solely for one profession. They also saw the absolute prohibition of termination of all comprehensive health insurance policies as an infringement of their freedom of association.

II. The First Panel of the Federal Constitutional Court decided that to the extent that they are admissible, the constitutional complaints prove to be unfounded if the provisions on the obligation to contract are interpreted in conformity with the Constitution.

The decision is based on the following considerations:

Sentence 1 of § 193.5 of the Insurance Contract Act and § 12.1b.1 of the Act on the Supervision of the Insurance Undertakings are to be interpreted, in conformity with the Constitution, to the effect that an insurer is only obliged to accept an applicant at the basic rate if the applicant belongs to the group of members of the relevant small insurance association.

The duty to issue insurance cover at the basic rate is an encroachment upon the right to freedom of association under Article 9.1 of the Basic Law of small insurance associations, which, unlike large mutual insurance associations may only enter into contracts with members. However, an interpretation in conformity with the Constitution in the light of this fundamental right shows that the obligation to enter

into contracts at the basic rate does not apply fully to small mutual insurance associations, and thus there is no infringement of the freedom of association.

In accordance with their intended purpose, the sphere of activity of small insurance associations is restricted objectively, locally or with regard to the persons with whom they can deal. The significance of the element of the persons accepted by a small insurance association is particularly apparent in the complainants' case, where only one professional group is insured, united in occupation and belief. In this case, it is often not solely the business aspect that will determine the decision as to membership, but also the specific idea of the solidarity of a particular community of policyholders.

The provisions on the obligation to enter into contracts encroach upon the freedom of association because small mutual insurance associations are no longer free to decide on the acceptance of new members solely on the basis of their articles of association. Instead, they must also accept as members persons who satisfy the requirements of sentence 1 of § 193.5 of the Insurance Contract Act. The obligation to enter into contracts at the basic rate would force the complainants, whose organisation is structured on the basis of the persons forming its membership, to accept as members persons bearing no relationship to the group of persons previously insured. The legislative aim of the GKV-WSG, which is to ensure that all persons allocated to private health insurance have adequate insurance cover, is already fulfilled by large mutual insurance associations and joint-stock companies. They almost cover the market. A different interpretation is not necessary because the complainants would obtain an unjustified competitive advantage. They participate in the balance of risks under § 12g of the Act on the Supervision of the Insurance Undertakings in the same way as the large companies. Since a small insurance association can only be licensed if it meets strict requirements, no incentive to set up small insurance associations is created by the need to avoid the obligation to enter into contracts at the basic rate.

Insofar as the absolute prohibition of the termination of sentence 1 of § 206.1 of the Insurance Contract Act, which applies to all comprehensive health insurance policies is challenged, the provision was found to encroach on the protection of the freedom of association (Article 9.1 of the Basic Law). For reasons of public welfare, however, this encroachment is justified. The prohibition of termination fulfils the legitimate purpose of preventing the loss of insurance cover and thus guaranteeing that private health insurance policies function in full

for the group of persons allocated to them. Furthermore, the loss of ageing reserve associated with the termination of the insurance contract is intended to be prevented. In this case, the Panel was able to leave undecided the question as to whether it may for constitutional reasons be necessary in exceptional cases to permit a deviation from the absolute prohibition of termination.

#### *Cross-references:*

See also Decision no. 1 BvR 706/08 (above) of the same day, in which the First Panel of the Federal Constitutional Court ruled that the provisions of the GKV-WSG and of the Act for the Reform of Private Insurance Law are fundamentally in harmony with the Constitution.

#### *Languages:*

German, English press release on the website of the Federal Constitutional Court.



#### *Identification:* GER-2009-2-018

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 17.06.2009 / **e)** 2 BvE 3/07 / **f)** **g)** / **h)** CODICES (German).

#### *Keywords of the systematic thesaurus:*

4.5.2.2 Institutions – Legislative bodies – Powers – **Powers of enquiry.**  
 4.5.7.1 Institutions – Legislative bodies – Relations with the executive bodies – **Questions to the government.**  
 4.11.3 Institutions – Armed forces, police forces and secret services – **Secret services.**

#### *Keywords of the alphabetical index:*

Committee of inquiry, parliamentary / Parliament, right to information / Intelligence service / Parliament, committee, inquiry.

*Headnotes:*

The limitations placed on the permissions to testify granted to civil servants who had been summoned to appear as witnesses before the committee of inquiry dedicated to the Federal Intelligence Service violated the *Bundestag's* right under Article 44 of the Basic Law to convene committees of inquiry. The same applies to the refusal to submit files. A sweeping claim that the interests of the state are in jeopardy does not substantiate why the specifically required documents are relevant to security.

*Summary:*

I. In 2004 and 2005 there were reports in the media about activities by the US and the German intelligence service (*Bundesnachrichtendienst – BND*) in connection with the processing of CIA flights with suspected terrorists on board via German airports. There were also reports about the activities of BND staff in Baghdad during the Iraq war, about the kidnapping of German nationals or of persons living in Germany by US agencies and about the observation of journalists by the BND.

Both the German *Bundestag* and the Parliamentary Control Committee addressed these issues in 2005. In 2006 the Federal Government presented its final report, which was analysed by the Parliamentary Control Committee and published in parts.

Subsequently a committee of inquiry was convened by the plenum upon the application of the parliamentary groups of the FDP, The Left Party and Alliance 90/The Greens as well as a qualified minority consisting of 3 members of parliament (the applicants). The committee of inquiry was essentially instructed to clarify on the basis of specific occurrences and questions “which political requirements were established for the activities of the BND, the Federal Office for the Protection of the Constitution (BfV), the Military Counterintelligence Service (MAD), the Federal Public Prosecutor General (GBA) and the Federal Criminal Police Office (BKA), and how the political management and supervision were structured and guaranteed.”

The committee of inquiry first devoted its attention to the kidnapping of two persons, taking witness testimony from members and civil servants of the Federal Government (respondent) and its subordinate authorities. With reference to the limited permission they had been granted to testify, witnesses repeatedly refused to continue to testify or to respond to questions posed by members of the committee of inquiry. Furthermore, the Federal Government

refused on several occasions to submit files or parts of files to the committee of inquiry.

The limitations placed on permission to testify, the refusal to surrender the documents and organisational charts requested as well as the relevant grounds stated, were objected to by the applicants in their various specific motions in the *Organstreit* proceedings (proceedings on a dispute between supreme federal bodies) before the Federal Constitutional Court.

II. The Second Panel of the Federal Constitutional Court held that the admissible motions were for the most part well-founded. This decision is based on the following considerations:

The Federal Government unlawfully restricted the claim for information based on Article 44 of the Basic Law. The restrictions contained in the permissions to testify relating to the core area of executive responsibility and state interests as well as the interpretation of such restrictions that became apparent when the witnesses testified, are in breach of the right of the *Bundestag* to take evidence. The interpretation of the permissions to testify unlawfully restricts the parliamentary right to investigate. Under the interpretation, matters deriving from the meetings of the State Secretaries of the Federal Ministries of the Interior and of Justice and of the Federal Foreign Office, the presidents of the three federal intelligence services and the BKA with the Head of the Federal Chancellery and the secret service coordinator (known as presidents' meetings (*Präsidentenrunde*)) and from the intelligence-situation meetings (*Nachrichtendienstliche Lage*), in which representatives of other ministries besides the participants outlined above take part, are not covered by the permission to testify.

The restriction on obtaining evidence is in breach of the rights of the German *Bundestag*, not simply those of the committee of inquiry. The committee of inquiry exercises its authority as an auxiliary organ of the *Bundestag*. Within the context of the investigation commissioned, the committee is entitled to obtain witness testimony from members of the government and from civil servants and employees within the Federal Government's sphere of responsibility, and to take evidence as it deems necessary. Pursuant to Article 44.2 of the Basic Law, the provisions of the Code of Criminal Procedure apply *mutatis mutandis* to the taking of evidence. If the witnesses to be heard by the committee of inquiry belong to a group of persons who are subject to a particular confidentiality obligation, then such witnesses can only testify if they are in possession of corresponding permission.

Subject to limitations under constitutional law, the Federal Government has to grant witnesses such permission to testify. This obligation is limited by the investigation commissioned as determined in the convening resolution, which commission has to remain within the bounds of parliamentary competence to control and has to be sufficiently specific. In the present case the permissions to testify contained an excessive restriction in the sweeping exclusion of "in particular, information about the formation of intent within the Federal Government in the cabinet or about agreement processes spanning or within departments, for the preparation of cabinet or department decisions."

When interpreting the investigation commissioned, the committee of inquiry and the Federal Government have no discretionary scope and no prerogative of assessment. However, grounds on which information may be withheld from a committee of inquiry can arise under the principle of the separation of powers. Although the parliamentary competence to control extends in principle to completed matters alone, the principle of the separation of powers requires that such parliamentary control be effective. It would not be effective if the requisite information deriving from the preparation of government decisions were to remain unavailable to the parliament after completion of the relevant matters. Information from the sphere of the formation of intent within the government can therefore be accessed by the parliament in principle. A sweeping reference made to a committee of inquiry with regard to completed matters that the sphere of the formation of intent within the government is affected does not justify the withholding of information.

The fact that the core area of executive responsibility is affected can only be raised as an objection to the parliamentary right of investigation with regard to completed matters within a case-specific weighing of the parliamentary interest in obtaining information on the one hand, against the risk that the ability to function and the responsibility will be impaired, on the other hand. The necessity of weighing conflicting interests corresponds to the dual function of the principle of the separation of powers, both as a foundation for and a limitation on the rights of parliamentary control. It has to be taken into account in this respect that the deeper a parliamentary request for information penetrates the core of the government's formation of intent, the more important has to be the parliamentary request for information in order to prevail against the interest in confidentiality invoked by the government. In contrast, the preceding advisory and decision-making processes are removed from parliamentary control to a lesser degree. The parliamentary interest in information carries particular weight where the discovery of

potential violations of the law and similar grievances within the government are concerned. In order to permit verification of the weighing of interests and the interests concerned, the refusal has to be accompanied by substantiated reasoning if information is to be withheld from a committee.

Another boundary of the right of a parliamentary committee of inquiry to obtain evidence is the interest of the state, which could be jeopardised by the disclosure of classified information. The interests of the state are not entrusted to the Federal Government alone, but likewise to the *Bundestag*. The handling of information within a committee of inquiry is therefore subject to separate provisions on secrecy. Restrictions on access to information by a committee of inquiry where state interests are invoked therefore come into question only in very particular circumstances.

Communications concerning contacts with foreign intelligence services cannot be automatically withheld from a committee of inquiry on grounds of jeopardising the interests of the state. It is not obvious that the disclosure of estimations by the US intelligence services concerning the dangerousness of one of the kidnapped persons affected the secrecy interests of such services and could therefore burden necessary future cooperation. It was held that the mere fact that disclosure of such information could lead to problems for the Federal Government with regard to its own handling of the relevant knowledge did not jeopardise the interests of the state, but, rather, constituted an acceptable and constitutionally intended consequence of the exercise of the parliamentary right of investigation.

A sweeping claim that the interests of the state are in jeopardy does not substantiate why the specifically required documents are relevant to security. Where there is a risk of disclosure of classified information, the submission of documents cannot be refused for that reason without taking into account enhanced organisational precautions within the committee in the interim. It is also necessary to state reasons which indicate why the relevant information is so important that a minimal risk of disclosure cannot possibly be accepted.

Insofar as the preparation for meetings of parliamentary bodies in the individual departments belongs to the core sphere of executive responsibility, it is exempt from parliamentary access to information during this preparatory phase. However, this does not apply automatically after completion of the relevant matter. Rather, considerations are required which take into adequate account the parliamentary interest in obtaining information.

The interest of the Federal Government in the confidentiality of information merits all the more protection the deeper a request for information penetrates the innermost sphere of the formation of intent by the government. Here again, the matter has to be considered on a case-specific basis, also taking into account the importance of the specific parliamentary interest in obtaining information.

If documents are to be withheld from a committee of inquiry on the basis of sentence 2 of Article 44.2 of the Basic Law, the requisite grounds not only have to specify the extent to which the information is based on an encroachment on Article 10 of the Basic Law (privacy of correspondence, posts and telecommunications). Reasons are also required as to why the information obtained is subject to a ban on utilisation by the committee.

A breach of Article 44 of the Basic Law was found, in that the respondent failed to comply wholly or partly with orders to take evidence, invoking a lack of relevance to the matter under investigation. Once again, the required reasons were not stated. Furthermore, the respondent claims a right to make a narrow interpretation of the investigation commissioned, a right which it does not have.

#### Languages:

German, English press release on the website of the Federal Constitutional Court.



#### Identification: GER-2009-2-019

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 30.06.2009 / **e)** 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 / **f)** Lisbon decision / **g)** / **h)** *Neue Juristische Wochenschrift* 2009, 2267-2295; *Europäische Grundrechte-Zeitschrift* 2009, 339-388; *Deutsches Verwaltungsblatt* 2009, 1032-1040; *ZFSH/SGB Sozialrecht in Deutschland und Europa* 2009, 469-501; *Recht der Internationalen Wirtschaft*, supplement 2009, 537-565; *Europäisches Wirtschafts- und Steuerrecht* 2009, 319-322; CODICES (German, English, French).

#### Keywords of the systematic thesaurus:

- 3.1 General Principles – **Sovereignty**.
- 4.16.1 Institutions – International relations – **Transfer of powers to international institutions**.
- 4.17 Institutions – **European Union**.
- 4.17.2 Institutions – European Union – **Distribution of powers between Community and member states**.
- 5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.

#### Keywords of the alphabetical index:

European Union, Treaty of Lisbon / Treaty of Lisbon, Act Approving / European lawmaking procedures and treaty amendment procedures, participation of the Parliament / European Union, legal instrument transgressing the boundaries of its sovereign powers / European Union, Member States, room for the political formation of living conditions.

#### Headnotes:

1. Article 23 of the Basic Law grants powers to take part in and develop a European Union designed as an association of sovereign states (*Staatenverbund*). The concept of *Verbund* covers a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States remain the subjects of democratic legitimation.

2.a. Insofar as the Member States elaborate treaty law in such a way as to allow treaty amendment without a ratification procedure, whilst preserving the application of the principle of conferral, a special responsibility is incumbent on the legislative bodies, in addition to the Federal Government, within the context of participation which in Germany has to comply internally with the requirements under Article 23.1 of the Basic Law (responsibility for integration) and which may be invoked in any proceedings before the Federal Constitutional Court.

2.b. A law within the meaning of Article 23.1 second sentence of the Basic Law is not required, in so far as special bridging clauses are limited to subject areas which are already sufficiently defined by the Treaty of Lisbon. However, in such cases it is incumbent on the *Bundestag* and, in so far as legislative competences of the Länder are affected, the *Bundesrat*, to assert its responsibility for integration in another appropriate manner.

3. European unification on the basis of a treaty union of sovereign states may not be achieved in such a way that not sufficient space is left to the Member States for the political formation of economic, cultural and social living conditions. This applies in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop within public discourse in the party political and parliamentary sphere of public politics.

4. The Federal Constitutional Court examines whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral (see BVerfGE 58, 1 <30-31>; 75, 223 <235, 242>; 89, 155 <188>: see the latter two concerning legal instruments transgressing the limits), whilst adhering to the principle of subsidiarity under Community and Union law (Article 5.2 ECT; Article 5.1 second sentence and 5.3 of the Treaty on European Union in the version of the Treaty of Lisbon < Lisbon TEU >). Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law is respected (see BVerfGE 113, 273 <296>). The exercise of this review power, which is rooted in constitutional law, follows the principle of the Basic Law's openness towards European Law (*Europarechtsfreundlichkeit*), and it therefore also does not contradict the principle of sincere cooperation (Article 4.3 Lisbon TEU); otherwise, with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 first sentence Lisbon TEU, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area.

#### Summary:

I. The Federal Constitutional Court had to decide on constitutional complaints and applications in *Organstreit* proceedings (proceedings on a dispute between supreme constitutional bodies) challenging the German Act Approving the Treaty of Lisbon (*Zustimmungsgesetz zum Vertrag von Lissabon*) of 13 December 2007, the Act Amending the Basic Law (Articles 23, 45 and 93) and the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters (*Gesetz über die Ausweitung und Stärkung*

*der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*).

The Treaty of Lisbon, among other things, extends the European Union's competences, expands the possibilities of qualified majority voting in the Council, strengthens the European Parliament's participation in the lawmaking procedures and dissolves the European Union's pillar structure. At the same time, it confers legal personality on the European Union. Furthermore the Treaty incorporates provisions of the failed Treaty establishing a Constitution for Europe. Moreover, it provides for a number of reforms of the European Union's institutions and procedures.

In October 2008, the Act Approving the Treaty of Lisbon and the accompanying laws successfully passed through the German legislative process.

II. The Second Panel of the Federal Constitutional Court has decided that the Act Approving the Treaty of Lisbon is compatible with the Basic Law. In contrast, the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters infringes Article 38.1 in conjunction with Article 23.1 of the Basic Law insofar as the *Bundestag* and the *Bundesrat* have not been accorded sufficient rights of participation in European lawmaking procedures and treaty amendment procedures. The Federal Republic of Germany's instrument of ratification of the Treaty of Lisbon may not be deposited before the rights of participation set out in law as constitutionally required have entered into force. The decision was reached unanimously as regards the result and by seven votes to one as regards the reasoning.

The judgment focuses on the connection between the democratic system prescribed by the Basic Law at Federation level and the level of independent rule which has been reached at European level. The structural problem of the European Union is at the centre of the review of constitutionality: The extent of the Union's freedom of action has steadily and considerably increased, not least by the Treaty of Lisbon, so that in some policy areas, the European Union has a shape that corresponds to that of a federal state, i.e. is analogous to that of a state. In contrast, the internal decision-making and appointment procedures remain predominantly committed to the pattern of an international organisation i.e. are analogous to international law.

As before, the structure of the European Union essentially follows the principle of the equality of states.

As long as no uniform European people, as the subject of legitimation, can express its majority will in a politically effective manner that takes due account of equality in the context of the foundation of a European federal state, the peoples of the European Union, which are constituted in their Member States, remain the decisive holders of public authority, including Union authority. In Germany, accession to a European federal state would require the creation of a new Constitution, which would go along with the declared waiver of the sovereign statehood safeguarded by the Basic Law. There is no such act here. The European Union continues to constitute a union of rule (*Herrschaftsverband*) founded on international law, a union which is permanently supported by the intention of the sovereign Member States. The primary responsibility for integration is in the hands of the national constitutional bodies which act on behalf of the peoples. With increasing competences and further independence of the institutions of the Union, safeguards are required to keep pace with this development, in order to preserve the fundamental principle of conferral exercised in a restricted and controlled manner by the Member States. With progressing integration, fields of action which are essential for the development of the Member States' democratic opinion-formation must be retained. In particular, a guarantee is vital that the responsibility for integration can be exercised by the state bodies of representation of the peoples.

The further development of the competences of the European Parliament can reduce, but not completely fill, the gap between the extent of the decision-making power of the Union's institutions and the citizens' democratic power of action in the Member States. Neither as regards its composition nor its position in the European competence structure is the European Parliament sufficiently prepared to take representative and assignable majority decisions as uniform decisions on political direction. Measured against requirements placed on democracy in states, its election does not take due account of equality, and it is not competent to take authoritative decisions on political direction in the context of the supranational balancing of interests between the states. It therefore cannot support a parliamentary government and organise itself with regard to party politics in the system of government and opposition in such a way that a decision on political direction taken by the European electorate could have a politically decisive effect. Due to this structural democratic deficit, which cannot be resolved in an association of sovereign states (*Staatenverbund*), further steps of integration that go beyond the *status quo* may not undermine the States' political power of action or the principle of conferral.

The peoples of the Member States are the holders of the constituent power. The Basic Law does not permit the special bodies of the legislative, executive and judicial power to dispose of the essential elements of the Constitution, i.e. of the constitutional identity (sentence 3 of Article 23.1 and Article 79.3 of the Basic Law). The constitutional identity is an inalienable element of the democratic self-determination of a people. To ensure the effectiveness of the right to vote and to preserve democratic self-determination, it is necessary for the Federal Constitutional Court to ensure, within the boundaries of its competences, that the Community or Union authority does not violate the constitutional identity by its acts or evidently transgress the competences conferred on it. The transfer of competences, which has been increased again by the Treaty of Lisbon, and the independence of decision-making procedures therefore require an effective *ultra vires* review and an identity review of instruments of European origin in the area of application of the Federal Republic of Germany.

#### *Languages:*

German, English, French.



#### *Identification:* GER-2009-2-020

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 01.07.2009 / **e)** 2 BvE 5/06 / **f)** **g)** / **h)** CODICES (German).

#### *Keywords of the systematic thesaurus:*

4.5.2.2 Institutions – Legislative bodies – Powers – **Powers of enquiry.**  
 4.5.7.1 Institutions – Legislative bodies – Relations with the executive bodies – **Questions to the government.**  
 4.11.3 Institutions – Armed forces, police forces and secret services – **Secret services.**

#### *Keywords of the alphabetical index:*

Parliamentary right to information / Intelligence services.

*Headnotes:*

Insufficient substantiation of the refusal to provide information violated the German *Bundestag's* right to submit questions and to obtain information to which it is entitled under the Basic Law in respect of the Federal Government.

*Summary:*

I. On 13 June 2006 and 1 August 2006, four members of the German *Bundestag* and the parliamentary group Alliance 90/The Greens submitted so-called “minor interpellations” to the Federal Government. Their intention was to learn whether and, if so, what information was collected by the German Federal Intelligence Service and the intelligence services of the *Länder* (individual federal states) about members of the *Bundestag*. The Federal Government refused to respond, justifying its refusal on the grounds that as a matter of principle it only issued statements on the manner of working, on the strategy and the current knowledge of the federal intelligence services, constituting classified information, within the relevant committees of the *Bundestag*. The Federal Government also pointed out that it had reported on the matter to the Parliamentary Control Committee on 5 April 2006. It further argued that it had issued statements to the Council of Elders of the *Bundestag* regarding the legal requirements of and limitations on the observation of members of parliament by the intelligence services. The Federal Government refused to provide information in response to individual questions on the grounds that the work of the intelligence services would be jeopardised. As regards the questions concerning matters preceding the 9<sup>th</sup> electoral term of the *Bundestag*, the Federal Government referred to the statutory deletion obligations, as a result of which the corresponding data was not longer available. Any existing information on past files relating to the periods in question could not be obtained on the basis of a “minor interpellation” within the time frame available under § 104 of the Rules of Procedure of the *Bundestag*.

In *Organstreit* proceedings (proceedings on a dispute between supreme federal bodies), the four members of the *Bundestag* and the parliamentary group Alliance 90/The Greens as applicants requested a finding that in its responses to the “minor interpellations”, the Federal Government had violated their rights and those of the *Bundestag*. They also requested that the Federal Government be compelled to provide the information requested, or alternatively to provide the information to the extent and in a form consistent with the objective secrecy interests of the Federal Republic of Germany.

II. The Second Panel of the Federal Constitutional Court held that the Federal Government had refused to provide the information requested by the applicants in the “minor interpellations” on grounds that do not stand up to scrutiny under constitutional law. The Federal Government therefore acted in breach of the applicants’ rights under sentence 2 of Article 38.1 of the Basic Law, and those of the *Bundestag* under sentence 2 of Article 20.2 of the Basic Law. In particular, it was held that reference to reporting made to other parliamentary control bodies did not release the Federal Government from its obligation to report to the *Bundestag*. In addition, the sweeping refusal to provide information on grounds of its classified nature was not consistent with the requirements of constitutional law. The applications are in part inadmissible since their grounds do not address the responses to the questions mentioned. The application to oblige the Federal Government to provide information is also inadmissible.

The decision is based on the following considerations:

It is clear from the case-law of the Federal Constitutional Court and undisputed by the parties that a right to submit questions and to obtain information accrues to the *Bundestag* against the Federal Government pursuant to sentence 2 of Article 38.1 of the Basic Law and sentence 2 of Article 20.2 of the Basic Law. Individual members of parliament and parliamentary groups as associations of members of parliament may avail themselves of the right in accordance with the rules of procedure of the *Bundestag*. Nor is there any doubt that the obligation of the Federal Government to respond is subject to limitations. However, such limitations require evaluation in each individual case. In particular, insofar as questions concern matters that are classified in the interest of the state, the question arises whether and how this interest can be aligned with the relevant parliamentary claim for information.

The question of the legislature’s right to regulate the parliamentary claims for information by reason of constitutional law so that the Federal Government would only have to provide information about the work of the federal intelligence services that it considered to be classified information to a certain committee of the *Bundestag*, was allowed to remain unanswered. This was because no such provision exists; the Parliamentary Control Committee is an additional instrument of parliamentary control of the government, which does not supersede parliamentary claims for information. Otherwise, in establishing the Parliamentary Control Committee, the *Bundestag* would have deprived itself of essential possibilities to obtain information, and the control of the Federal Government would have

deteriorated, not improved, as regards the work of the federal intelligence services.

The above considerations also apply insofar as the view taken by the respondent relates to other committees of the *Bundestag*. In particular, the parliamentary right to raise questions is not superseded by the institution of a committee of inquiry or by the fact that the Council of Elders addresses such questions (§ 6 of the Rules of Procedure of the *Bundestag*).

The refusal to provide information based solely on its classified nature also constitutes a violation. The Federal Government must place the *Bundestag* in a position to perform its duty of parliamentary control of the acts of government effectively, in view of the requirement of mutual consideration in relations between constitutional bodies. Except in cases where secrecy is clearly necessary, it is only on the basis of detailed grounds appropriate to the relevant situation that the *Bundestag* is able to judge and decide whether to accept a refusal to respond, or what further steps it will take in order to enforce its request for information in whole or in part.

Nor is it apparent that the information requested by the applicants is classified insofar as the questions concern information about the collection, storage and disclosure of data on members of the *Bundestag* by the federal intelligence services. It is not evident that the response to these questions entails the disclosure of details on the manner of work, strategies, methods and the current knowledge of the intelligence services which would jeopardise their ability to operate and perform their duties.

The respondent's argument that a response to the questions would permit conclusions about the work of the intelligence services which would jeopardise their ability to operate and perform their duties, does not contain any specific indication to render the refusal to provide information plausible. The observation of members of parliament by the intelligence services involves considerable risks with regard to their independence (sentence 2 of Article 38.1 of the Basic Law), with regard to the participation of the relevant political parties in the formation of the political will of the people (Article 21 of the Basic Law), and therefore for the entire process of the formation of a democratic will. The corresponding need of the *Bundestag* to obtain information is highly significant. If the protection of classified information is to prevail over that need as a conflicting interest, specific grounds must be stated.

The respondent responded to the question whether it was aware of cases in which information about members of parliament had been collected, stored or disclosed by other services, especially in *Länder*, to the effect that it would not comment on matters falling within the competence of the *Länder*. By doing so, it also violated the applicants' constitutional rights.

The Federal Government was under an obligation to provide detailed grounds because the questions evidently related also to the sphere of responsibility of the Federal Government. The interpellations concerned the work of the authorities directly subordinate to the respondent as well as the respondent's current knowledge about the activities of other intelligence services.

The reference made to the statutory deletion obligations does not suffice as grounds for the refusal to provide information. The parliamentary claim for information also extends to matters from the past with regard to their potential political significance, which concern the sphere of responsibility of previous Federal Governments. The present Federal Government could therefore be under an obligation of reconstruction insofar as is reasonable. The mere reference to statutory deletion obligations meant the respondent failed to state adequately that it was unable to procure the information requested. Nor did the respondent state that the information could only be obtained with unreasonable effort.

The reference to the impossibility of providing a response within the period set out in the Rules of Procedure of the *Bundestag* failed to take into account the fact that the 14-day period laid down in § 104.2 half-sentence 1 of such Rules of Procedure, can be extended in consultation with the party raising the question pursuant to half-sentence 2 of the provision.

#### *Languages:*

German, English press release on the website of the Federal Constitutional Court.



# Hungary

## Constitutional Tribunal

### Statistical data

1 May 2009 – 31 August 2009

Number of decisions:

- Decisions by the Plenary Court published in the Official Gazette: 30
- Decisions in chambers published in the Official Gazette: 9
- Other decisions by the Plenary Court: 20
- Other decisions in chambers: 15
- Number of other procedural orders: 27

Total number of decisions: 101

### Important decisions

*Identification:* HUN-2009-2-003

a) Hungary / b) Constitutional Court / c) / d) 06.05.2009 / e) 53/2009 / f) / g) *Magyar Közlöny* (Official Gazette), 2009/62 / h).

*Keywords of the systematic thesaurus:*

- 3.10 General Principles – **Certainty of the law.**
- 5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty.**
- 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**
- 5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

*Keywords of the alphabetical index:*

Violence, domestic / Injunction (restraining order) / Vagueness.

*Headnotes:*

Where a person repeatedly injures a relative's dignity and mental health, but not so severely or in such a way as to cause immediate concern, a protection order is unconstitutional. Verbal insults, expressions

that harm self-esteem and self-respect are not in themselves legitimate reasons for restricting fundamental rights (personal freedom and property rights) of a person.

*Summary:*

I. On 15 December 2008 Parliament adopted legislation to deal with protection orders in cases of violence towards relatives, referred to here as “the Act”. Once the Act had been adopted but before its promulgation, the President of the Republic referred it to the Constitutional Court for *ex ante* review.

Restraining as a new legal instrument became part of Hungarian law with effect from 1 July 2006. Provisions on restraining orders were introduced into the Hungarian legal system as part of Act XIX of 1998 on Criminal Procedure. These rules enable anybody needing protection during the course of criminal proceedings to apply for a restraining order. The restriction may last from ten to a maximum of thirty days, and is issued by the criminal judge with responsibility for the criminal proceedings. The problem with this amendment is that it has introduced restraining into the Hungarian legal system without linking it to the phenomenon of domestic violence in general.

The Act declared that protection orders would restrain the defendant or perpetrator from causing further violence to the complainant or survivor, his or her dependents and other relatives and relevant persons. The Act removes the necessity to file charges in order to avail oneself of these protective measures, and the police can issue an order *ex officio* expelling somebody temporarily from their home if they are endangering the life, health or freedom of another. A civil judge will issue the restriction, and a respondent may be ordered out of the house and to keep away from the survivor.

The President raised concerns over the clarity of the definition of the notions of ‘violence’ and ‘relatives’. There is no requirement under the Act for the police to have formed a suspicion that a crime has been committed before they issue the measure. The notion of ‘violence’ is ambiguous and too vague. The Act allows restraint from seventy-two hours to a maximum of thirty days. In view of the ambiguity of the notion of ‘violence’, this may result in a breach of the right to property guaranteed by Article 13 of the Constitution and personal freedom under Article 55 of the Constitution.

The President noted the broad scope of the concept of “relative” under the Act. For instance, a complainant in an intimate relationship with the

respondent, whilst not living with them, could lodge a complaint that might result in the defendant being restricted from his or her own property.

II. Section 1.1 of the Act defines violence between relatives for the purposes of the legislation as grievous and immediate, repetitive or repeated endangering of the life, dignity, right to sexual self-determination, physical and psychological health of a relative. Endangering can also be manifested in omission.

Section 1.5 of the Act defines “relatives” as spouses, next of kin, adopted persons, stepchildren, foster children, adoptive parents, step-parents, foster parents, brothers, and sisters; common-law spouses, spouses of the next of kin, fiancé(e)s; next of kin, brothers, and sisters of a spouse; and spouses of brothers and sisters. Relatives can also include former spouses, former partners, former fiancé(e)s, legal guardians, and persons under the care of the legal guardian, carers, wards and those in an intimate relationship but not living together.

Having considered the relevant international instruments dealing with domestic violence, and the international legal principles, recommendations and best practice of other countries, the Constitutional Court held that protection orders restrict the perpetrator’s right to property and personal freedom. This limitation is constitutional, if the legislation in question is narrowly tailored to the aim to be achieved, i.e. the safety of the complainant.

Under the Act, protection orders can only be granted if evidence with a bearing on the place and circumstances of the violence, together with a statement by the complainant, is submitted. In the Court’s view, however, the facility to grant protection orders is unconstitutional where somebody is endangering their relative’s dignity and mental health on a repeated basis but not in a severe manner that raises immediate concern. Verbal insults, expressions that endanger self-esteem and self-respect are not in themselves legitimate reasons for restricting the fundamental rights (personal freedom and property right) of the respondent.

With regard to the concerns over the definition of relatives, the Court pointed out that the fact that the complainants’ circle might include the perpetrators’ relatives is not unconstitutional. It is in line with the aims of the Act, to protect the safety of all those who live together. The problem with the definition of ‘relative’ is that it includes those who have an intimate relationship with the perpetrator but do not live with them.

The aim of protection orders is to expel somebody posing a threat to the life, health or safety of another from their shared dwelling for a period of time to protect the safety of the relative. The complainant and the defendant can use the same apartment for a short period of time without living together. Nonetheless, the Act even allows a protection order to be made against the owner of the property in case of violence, a facility that represents a disproportionate limitation on the owner’s right to property and privacy.

Justice András Bragyova attached a separate opinion to the judgment, in which he emphasised that regulating restriction orders is an important constitutional goal. The essence of such legislation is that where there are allegations of immediate danger of violence, it provides police officers with the authority to order a respondent out of the home. The legislator cannot avoid using vague legal notions, since police officers and civil judges will be interpreting the relevant provisions in each and every case in the application of the law.

Justice László Kiss also attached a separate opinion to the decision, stressing that the Act provides for the issue of emergency protection orders in situations when there is immediate danger of an act of violence. The police and the courts can duly interpret the procedural requirements. The procedure is transparent and in harmony with the Constitution in prioritising the safety of the survivor over property rights and other considerations. Significantly too, the Act provides legal remedies that serve as a guarantee against arbitrary application of the law.

#### *Supplementary information:*

On 22 June 2009 Parliament adopted Act LXXII of 2009 on protection orders applicable in the case of violence between family members. The Act entered into force in September 2009.

#### *Languages:*

Hungarian.



*Identification:* HUN-2009-2-004

a) Hungary / b) Constitutional Court / c) / d) 10.07.2009 / e) 74/2009 / f) / g) *Magyar Közlöny* (Official Gazette), 2009/96 / h).

*Keywords of the systematic thesaurus:*

5.1.1.4.2 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated.**

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

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

*Keywords of the alphabetical index:*

Capacity, contractual / Guardianship, register, access.

*Headnotes:*

In the course of certain legal relations, parties need to know the mental capacity of those with whom they are dealing. Public access is possible to the register of persons under legal guardianship, but any data disclosed from this register should be limited to that which is absolutely necessary for the realisation of the objective of the request.

*Summary:*

I. A Hungarian human rights NGO asked the Constitutional Court to assess the constitutionality of certain provisions of Act III of 1952 on the Code of Civil Procedure (“the Act”) and the whole of 13/2002 Ministerial Decree (“the Decree”). These rules require the courts to register the fact that somebody has been placed under guardianship. Anyone who can prove that they have a legal interest may obtain information from the register of incapable adults. The petitioner raised concerns over the compliance of these provisions with Article 59.1 of the Constitution, which ensures the right to informational self-determination, as well as the lack of precise definition within the Act or Decree of the concept of “legal interest” and the way it should be justified.

II. The Court first considered whether the personal data protected by the Constitution includes the status of a person’s placement under guardianship. Under Article 59.1 everyone is entitled to protection of his/her personal secrets and data. Since 1991 the Court has accorded an active and broad interpretation to the right to personal data protection

in the sense of a ‘right to informational self-determination’. This right generally protects against the collection and processing of personal data by the state. Disclosing of data from the register of incapable adults is a special type of data transmission by the state. The data in question is information relating to someone’s mental condition. Therefore, the Court held that personal data protected by the Constitution includes the act and status of placing somebody under guardianship as well as the personal circumstances that led to this placement. The Court based its reasoning on the relevant decision by the German Federal Constitutional Court BVerfGE 78 (84) and the Council of Europe Council of Ministers Recommendation no. R(99)4 on adults and incapacity.

The Act and Decree restricted the right to informational self-determination, which protects data relating to someone’s state of mind. The Court went on to consider whether the statutory restriction observed the principle of necessity and proportionality.

Local courts make capacity determinations and maintain up to date registers of incapable adults. Members of the public can obtain information from the register by filing a request with the Court.

According to the Constitutional Court, the regulation has a legitimate aim: the protection of legal relations, participants in which are intended to be informed about the restricted legal capacity of those placed under guardianship. It is important to protect those under guardianship against loss incurred in connection with legal transactions entered into without the necessary permission or approval of the guardian. However, it is equally important for those entering a legal transaction to be apprised of all relevant information about the contracting parties, including their ability to conduct their own affairs. In order to achieve these legislative objectives, public access to the information is necessary. The Court however had to balance the gravity of the encroachment against the reasons justifying it. Having done so, the Court concluded that the boundaries of what is reasonable had been overstepped in this instance, as there was a possibility that archived data might be transmitted as well as current data. Also, the documentation with the help of which data could be obtained gave access to more personal information about the person under guardianship than necessary. It did not simply make a statement about the type of a person’s legal capacity, material which is relevant to legal relations, but divulged what almost amounted to a full documentary on the guardianship. The current regulations did not restrict the use of data to the verification of legal capacity. The Court accordingly upheld the

challenged regulation with a given constitutional sense. It held that in the application of the Act and Decree, those seeking information should only be given access to personal data indispensably necessary for the realisation of the objective of the request.

Justice Lenkovics attached a separate opinion to the judgment, in which he was joined by Justice Trócsányi. They found that the current legal regulations were sufficient to protect personal data and so the Court should not have determined constitutional requirements for the possible interpretation of the Act.

*Languages:*

Hungarian.



## Ireland

### Supreme Court

#### Important decisions

*Identification:* IRL-2009-2-002

a) Ireland / b) High Court / c) / d) 01.07.2009 / e) SC 354/07 / f) Mahon Tribunal v. Keena and another / g) [2009] IESC 64 / h) CODICES (English).

*Keywords of the systematic thesaurus:*

3.18 General Principles – **General interest.**  
 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.**

*Keywords of the alphabetical index:*

Journalist, sources, disclosure / Journalist, refusal to give evidence, right / Freedom of speech / Freedom of expression, aspects, individual, social.

*Headnotes:*

Under the Constitution of Ireland and Article 10 ECHR, journalists have a right to protect their sources. Interference with journalistic sources is only justified by an overriding requirement in the public interest that must be clearly established.

*Summary:*

I. The Supreme Court of Ireland is the final court of appeal in civil and constitutional matters. It hears appeals from the High Court, which is a superior court of full original jurisdiction in all matters, including civil and constitutional matters. As the decision of the Supreme Court summarised here is an appeal decision, the parties will be referred to as the “Tribunal” and the “appellants”, even when discussing the original High Court decision.

II. The Tribunal (formally known as the Tribunal of Inquiry into Certain Planning Matters and Payments) is a body, headed by a Judge, which is investigating allegations of corrupt payments to politicians in return for certain political decisions concerning planning

permission and related matters in the 1990s. The Tribunal conducts private investigations into matters that may require public hearings. As part of its private investigations the Tribunal had sent a letter on 29 June 2006 to a businessman, requesting information in relation to certain payments allegedly made to Bertie Ahern, who was *Taoiseach* (Prime Minister) of Ireland from 1997-2008, and had been Minister for Finance at the time of the alleged payments.

This letter was sent by an anonymous source to the first appellant Mr Colm Keena, a journalist from a national newspaper (the Irish Times), who wrote an article on the basis of its contents which was published on the front page of the newspaper by the second appellant, the editor of the Irish Times Ms Geraldine Kennedy, on 21 September 2006.

Following publication of the article, on 25 September 2006 the Tribunal ordered Mr Keena and Ms Kennedy to produce all documents on which the article was based. Ms Kennedy replied that she could not do so as the documents had been destroyed. On 26 September 2006 the Tribunal summonsed Mr Keena and Ms Kennedy to appear before it and to produce all documents requested. They appeared before the Tribunal on 29 September 2006 but were unable to produce the documents and also refused to answer any questions which would, in their view, provide any assistance in identifying the anonymous source who had sent the letter to Mr Keena.

The Tribunal took an action in the High Court against both appellants to obtain a court order directing the respondents to produce the documents sought and to answer all questions put to them by the Tribunal concerning the article published.

III. The High Court noted that where material provided under an assurance of confidentiality to the Tribunal could be leaked to the media, this would impair the proper functioning of the Tribunal. However, the High Court held that the Tribunal's right to enforce confidentiality should be balanced against the right to freedom of expression of the journalists under Article 10 ECHR. (The European Convention on Human Rights was incorporated into Irish law at sub-constitutional level by the European Convention on Human Rights Act 2003 which requires Irish courts to interpret the law, in so far as is possible, in a manner that is compatible with the European Convention on Human Rights).

Having reviewed a number of relevant decisions of the European Court of Human Rights, the High Court emphasised the "critical importance of a free press as an essential organ in a democratic society" and the

existence of "a very great public interest in the cultivation of and protection of journalistic sources of information as an essential feature of a free and effective press." The High Court confirmed that "the non-disclosure of journalistic sources enjoys unquestioned acceptance in [Irish] jurisprudence" and that interference with such sources could only be allowed where the requirements of Article 10.2 ECHR are "clearly met". This was the first time the Irish courts recognised this privilege in such clear terms. The Court recognised that the interference must be "prescribed by law" and "necessary in a democratic society".

However, in balancing the interests of the Tribunal against the rights of the respondents, the High Court placed great weight on the fact that the appellants had deliberately destroyed the documents sought by the Tribunal, describing it as an "outstanding and flagrant disregard of the rule of law". The High Court stated that by their actions the appellants had cast themselves as the adjudicators of the proper balance to be struck between the competing rights and interests, when this was exclusively a function of the courts.

The High Court held that, given that the documents had been destroyed, there was little risk of identification of the source if the appellants were required to submit to the Tribunal's questioning. The High Court also noted that, since the source was anonymous, the privilege of non-disclosure should not be invoked at all or, if invoked, should be accorded "only the slightest of weight" on the basis that the appellants could not claim to be obliged to protect a source whose identity was unknown to them. The Court concluded therefore that "very slight weight" attached to the respondents' privilege of non-disclosure of their sources.

On the other side of the balance, the Court held that there was potentially a real benefit to the Tribunal as it could possibly ascertain, by questioning the appellants, whether the letter sent to the appellants was on headed Tribunal paper and it would thus have the possibility of obtaining information which indicated the Tribunal was not the source of the leaked information.

The Court found that the Tribunal had satisfied the test that its interference with the appellants' sources was necessary in a democratic society. The High Court therefore found in favour of the Tribunal and ordered the appellants to submit to questioning by the Tribunal regarding their sources.

IV. The appellants appealed the High Court decision to the Supreme Court. Central to the appeal was the balance struck by the High Court between the Tribunal's power to investigate and the appellants' right to refuse to disclose any information about their sources.

Like the High Court, the Supreme Court focused on the jurisprudence of the European Court of Human Rights. It referred in particular to *Goodwin v. United Kingdom* in which the European Court of Human Rights held that interference with journalistic sources "cannot be compatible with Article 10 ECHR unless it is justified by an overriding requirement in the public interest" and that any restriction of freedom of expression of this nature would have to be "convincingly established". The Supreme Court agreed with the High Court that it was for the courts alone to decide when a journalist is obliged to disclose his or her source, and that it was "reprehensible" of the appellants to destroy the documents sought by the Tribunal.

However, the Supreme Court disagreed with the reasoning of the High Court in striking the proper balance. Crucially, the Supreme Court held that the great weight attached by the High Court to the fact that the appellants had destroyed the documents was incorrect. The Supreme Court stated that the issue had to be decided according to the situation as it existed at the time of the proceedings before the High Court, not by the need to mark disapproval of the conduct of the appellants.

The Supreme Court also agreed with the High Court that lesser weight would attach to the privilege of non-disclosure regarding an anonymous source as opposed to a source known to a journalist. However, the Supreme Court held that if the anonymity of the source weakened the appellants' case for claiming a privilege of non-disclosure, it must also correspondingly weaken the Tribunal's case for obtaining disclosure. The Supreme Court held that, given that the source was anonymous, the benefit for the Tribunal, recognised by the High Court, was speculative at best: even if the document was not on headed Tribunal paper it would not rule out the Tribunal as the source of the leak, as the person who sent the letter to the first appellant may have simply removed the heading on the paper using a photocopier or other means.

The Supreme Court concluded that the excessive weight attached by the High Court to the reprehensible conduct of the appellants in destroying the documents led it to adopt an erroneous approach to striking the balance in this case. Given that ordering the appellants to submit to questioning regarding their source could

only be "justified by an overriding requirement in the public interest" and that the Tribunal had failed to establish any clear benefit from such disclosure, the Supreme Court found in favour of the appellants and dismissed the Tribunal's application to question the appellants.

*Languages:*

English.



# Israel

## Supreme Court

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### Important decisions

*Identification:* ISR-2009-2-009

**a)** Israel / **b)** High Court of Justice (Supreme Court) / **c)** Panel / **d)** 06.08.2009 / **e)** H.C.J 1067/08 / **f)** Noar KeHalacha Association *et al.* v. Ministry of Education *et al.* / **g)** / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.17 General Principles – **Weighing of interests.**  
 5.2 Fundamental Rights – **Equality.**  
 5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin.**  
 5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education.**

*Keywords of the alphabetical index:*

Equality, principle, tests / Education, school, choice / Education, school, pupil, religious identity.

*Headnotes:*

The right of various sectors to education that is consistent with their beliefs was recognised as a central component of the general right to education. Yet, within the framework of the recognition of the right to education, the right of students to equality in education has also been recognised. Thus, the right of a community to denominational education is not sufficient to reduce the state's obligations to outline an equal policy, to supervise its implementation and to determine the core curriculum as stated in the law.

The principle of equality is a cornerstone of the Israeli legal system, without which it is not possible to have a proper education system. However, equal treatment does not mean identical treatment. The principle of equality does not rule out different laws for different people. It assumes the existence of objective reasons that justify a difference. Therefore, when a certain school has determined characteristics by means of which a sector of the population will be distinguished, this policy should be examined in accordance with its concrete characteristics, as well as its actual results.

Within this framework, the actions of the school making the distinction should be examined in the light of the purposes of the education and the basic values of the legal system. If the distinction serves the purpose – namely the right to denominational education – in a relevant manner, it will be a permitted distinction. If the distinction serves the purposes in a manner that is not relevant – namely in a manner whose characteristics, purpose or results create a distinction that is, in the circumstances of the case, irrelevant – this will constitute prohibited discrimination.

Not every special characteristic – whether it is a difference in culture, religion, custom or ideology – can justify discrimination. The characteristic needs to be an inherent part of the outlook of the educational institution that seeks to impart the values of a particular denomination, it should be relevant to the purpose of the distinction, and it should be a characteristic without which it will be difficult to maintain the denominational education system according to its own criteria. It is the Court that will determine whether a certain denomination has been distinguished justly – in order to allow a certain denomination to live freely in its community – or whether the case is one of prohibited discrimination, the whole purpose of which is to exclude people who are different and to isolate them from proper society.

*Summary:*

I. Education services in Israel are provided today through official schools – i.e. state education. In addition, alongside the official schools, there are recognised schools that are not run by the state. These schools seek to give their students an education that is consistent with the ethical outlook that the school is seeking to foster. These are the 'recognised unofficial schools', which, together with the 'exempt schools' that are not relevant to the case at hand, constitute the majority of the schools in Israel that are not state schools. The state may recognise an unofficial school, provided that it operates under a licence. Granting a licence depends upon compliance with certain conditions, including physical, pedagogic, financial and sanitary conditions. An institution that is given a licence receives a budget from the state in an amount determined by the Minister of Education, and is subject to the supervision of the Ministry of Education.

The *Beit Yaakov* Girls' School in the town of Immanuel is a recognised unofficial school that operates under a licence from the Ministry of Education and is subsidised by the state. In 2007 changes were made to the school, and a new 'Hassidic track' was introduced alongside the 'general track.' These tracks were completely separate from one another, and the

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new 'Hassidic track' was housed in a separate wing of the school, with a separate playground, a separate teachers' room, a wall separating the two tracks and a different uniform from the one worn by girls in the 'general track.' Thus, the school was effectively split into two schools. An investigation carried out on behalf of the Independent Education Centre (the organisation that operates and manages the school) found that 73% of the girls in the new school (the 'Hassidic track') were of Ashkenazi origin (i.e. their families came from northern European countries), whereas only 27% were of Oriental or Sephardic origin (i.e. their families came from Middle-Eastern or North African countries). In the old school (the 'general track') only 23% of the girls were of Ashkenazi origin. Nonetheless, the investigation found no evidence of any girls having been refused admission into the Hassidic track. The Independent Education Centre ordered the school to remove the physical separations between the two tracks and to eliminate the separate uniforms. However the school did not comply.

The Petitioners argued that the physical and ideological segregation of the girls of Sephardic origin constituted prohibited discrimination.

The petition was granted.

II. The recognised unofficial schools have received legislative recognition, as well as being subject to supervision. The operation and budgeting of these schools is subject to the discretion of the Ministry of Education. Notwithstanding, the right to denominational education in itself has not yet been recognised as a positive right and the Ministry of Education is not required to take active steps to realise it.

A school may have a special track in which the religious practices and outlook of a certain denomination are taught. The school may also determine relevant rules of conduct for students in the track, in order to integrate the academic content studied in it. However, the school should allow each student who satisfies the relevant basic conditions and who seeks to adopt the lifestyle that accompanies them to study in the track of his or her choice. Above all, it is clear that the denominational affiliation of a student should not be a relevant condition for admitting him or her to a certain track, and creating segregation within one school (by separating the students at all times of the day, introducing a different uniform, separating the teachers' room and charging extra tuition) is not a relevant measure for the purpose of student education. The school may distinguish between students in different tracks solely for the purpose of studying content that is unique to those tracks, but the regular studies and the rules of the school should

be the same for everyone studying in the school throughout the study hours. A policy of 'equal separation' cannot atone for improper discrimination where this exists.

The Ministry of Education has the authority to supervise the balance between the right to denominational education and the right to equality. It should protect these rights and deal strictly with those who violate the balance between them. Admittedly, the Ministry of Education's power to cancel the licence of a school is a discretionary power. Yet, it is a well-known rule that the authority should exercise its power reasonably, and the High Court has held in the past that a discretionary power becomes non-discretionary when the factual circumstances are such that the basic values of the constitutional and legal system make a failure to exercise the power unreasonable in a way that goes to the heart of the matter. A gradual process of remedying the defect is unacceptable, and the Ministry of Education should take effective and unequivocal steps to eradicate discrimination and return the school to the path of constitutional balance.

After examining the circumstances of the case, the High Court concluded that the purpose of the rules set out by the school was simply the separation of girls of Hassidic denomination from their Sephardic counterparts. The High Court was convinced that it was not dealing with a 'track whose purpose is the study of the Hassidic way of life,' but rather with an attempt to separate different sectors of the population on an ethnic basis, under the cloak of a cultural difference.

The Ministry of Education, in view of its authority and responsibility to supervise the school, and in view of the continuing violation of the right to equality on the part of the school, should have taken all the steps available to it in order to eradicate the discrimination and return the policy of the school to the framework of the constitutional balance. When the Independent Education Centre and the school failed to comply with the instructions of the Ministry of Education, it should have exercised its powers to cancel the school's licence and stop its subsidy.

After reviewing the data presented to it, the High Court reached the conclusion that the *Beit Yaakov* School and the Independent Education Centre have violated the right of the Sephardic students to equality, and thus they have departed from the constitutional balance between the right to education and the right to equality. The Court further held that the Ministry of Education acted *ultra vires* when it failed to exercise the means available to it for the purpose of preventing the discrimination.

*Cross-references:*

- HCJ 4363/00 *Upper Poria Board v. Minister of Education* [2002] IsrSC 56(4) 203;
- HCJ 2599/00 *Yated v. Ministry of Education* [2002] IsrSC 56(5) 834; [2002-3] IsrLR 57;
- HCJ 4112/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv Municipality* [2002] IsrSC 56(5) 393;
- HCJ 4298/93 *Jabarin v. Minister of Education* [1994] IsrSC 48(5) 199;
- HCJ 6698/95 *Kadan v. Israel Land Administration* [2000] IsrSC 54(1) 258.

*Languages:*

Hebrew, English (translation by the Court).



## Italy

### Constitutional Court

#### Important decisions

*Identification:* ITA-2009-2-001

a) Italy / b) Constitutional Court / c) / d) 16.07.2009 / e) 239/2009 / f) / g) *Gazzetta Ufficiale, Prima Serie* (Official Gazette), 29.07.2009 / h) CODICES (Italian).

*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.**

2.2.1.5 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and non-constitutional domestic legal instruments.**

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

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

*Keywords of the alphabetical index:*

Construction, law / Confiscation / Penalty.

*Headnotes:*

The Constitutional Court is required to review the conformity of a provision of the collection of laws and regulations in the construction field with Articles 3, 25.2 and 27.1 of the Constitution, in so far as that provision authorises the criminal court, where it finds that there has been an unlawful division of land into plots, to seize the land and the buildings unlawfully constructed thereon:

- a. independently of the establishment of liability;
- b. and even in respect of persons having no connection with the unlawful acts.

### Summary:

I. The referring court was required to try a number of persons accused of unlawful construction and although the proceedings were to culminate in a discharge on the ground that they were out of time, the court queried the conformity of the provision in question with the Constitution. That provision was interpreted by the Court of Cassation as requiring the court, in a case of that type, to seize the unlawfully divided plots of land and the buildings unlawfully constructed thereon. The case-law of the Court of Cassation defined that seizure as an administrative penalty applicable by the criminal court either to the accused, where the construction was found to be illegal and even if the accused were acquitted (save where the acquittal was ordered because the prosecution had become devoid of purpose) or to third parties having no connection with the acts in question. That was the case here.

The referring court considered that the above-mentioned effects depended on the administrative nature of the seizure, as accepted by the Court of Cassation. The referring court took the view, on the contrary, that the seizure must be regarded as a “criminal penalty”, as the European Court of Human Rights has recognised in regard to Article 7 ECHR. In that case, the rule providing that the seizure may be carried out without a prior conviction and even vis-à-vis third parties was contrary to the principles of equality and personal liability and the principle of conformity with statute in criminal matters. Although the referring court did not rely on Article 117.1 of the Constitution, which requires the legislative bodies of the State and the Regions to comply with “the obligations arising under Community law and international commitments”, it referred to the decision of the European Court of Human Rights of 30 August 2007 (application no. 75909/01), which defined seizure following illegal construction as a “penalty” within the meaning of Article 7 ECHR. The referring court thus implicitly complained that the contested norm was incompatible with Article 117.1 of the Constitution.

II. The Court declared that the question referred to it for a preliminary decision on constitutionality was inadmissible, for a number of reasons.

First, it was inadmissible because the referring court had not described the facts of the case before it and, in consequence, the Court was unable to determine whether the norm was applicable to the present case and therefore whether the question of constitutionality was necessary (“*rilevante*”) for the outcome of the case. Second, the referring court had not specified whether in the case before it seizure must be ordered

as against the persons who were acquitted or, rather, as against third parties having no connection with the unlawful acts. Once again, the Constitutional Court had not been put in the position of being able to evaluate the “*rilevanza*” of the question. The referring court had thus placed the two categories of persons at whom the norm was aimed on the same level, although the question of constitutionality might have a different solution in each of the two cases.

Last, in defining seizure as a criminal measure (contrary to what had thus far been asserted in the case-law of the Court of Cassation, but in accordance with the decision of 30 August 2007 of the European Court of Human Rights), the referring court had considered that a measure of that type did not satisfy the conditions laid down by Articles 3, 25.2 and 27.1 of the Constitution, without seeking to give the contested norm an interpretation which took into account the nature of the “penalty” recognised in such a matter by the Strasbourg Court. It had to be borne in mind, in that regard, that the Constitutional Court had clearly stated that where there was an incompatibility between a norm of domestic law and a provision of the European Convention on Human Rights as interpreted by the Strasbourg Court, a question of constitutionality could be raised before the Constitutional Court for violation of Article 117.1 of the Constitution only where that incompatibility could not be resolved by means of interpretation. It is for the court dealing with the substance of the case to give the provision of domestic law an “interpretation consistent” with international law. Only where that is impossible is the court required to refer to the [Constitutional] Court a question of constitutionality on account of incompatibility with Article 117.1 of the Constitution.

That was notably the case here: the ordinary court must interpret the law on seizure in a way that is compatible with the decision of the Strasbourg Court. Only where that “interpretation consistent” with that decision proves impossible should the court in question refer the matter to the Constitutional Court.

### Supplementary information:

On the ordinary court's obligation to interpret the provision of domestic law in a manner consistent with the provision of international law and to refer it to the Constitutional Court only where a “consistent” interpretation is not possible on account of the wording of the provision of domestic law in question, see Judgments nos. 348 and 349 of 2007. For a declaration of unconstitutionality of a norm of domestic law on the ground that it is incompatible with Article 8.2 ECHR, see Judgment no. 39 of 2008.

*Languages:*

Italian.



## Latvia Constitutional Court

### Important decisions

*Identification:* LAT-2009-2-002

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 07.04.2009 / **e)** 2008-35-01 / **f)** On Compliance of the Law “On the Treaty of Lisbon Amending the Treaty of European Union and the Treaty Establishing the European Community” with Article 101 of the Constitution of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), no. 56(4042), 09.04.2009 / **h)** CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

1.3 Constitutional Justice – **Jurisdiction**.  
 1.3.4.6 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of referendums and other instruments of direct democracy**.  
 3.1 General Principles – **Sovereignty**.  
 3.3.2 General Principles – Democracy – **Direct democracy**.  
 4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy**.  
 4.16.1 Institutions – International relations – **Transfer of powers to international institutions**.  
 4.17.2 Institutions – European Union – **Distribution of powers between Community and member states**.  
 5.3.29 Fundamental Rights – Civil and political rights – **Right to participate in public affairs**.

*Keywords of the alphabetical index:*

Treaty, ratification / Treaty, Lisbon, ratification, referendum, obligation / European Union, membership, termination and suspension / Competence, transfer to the European Union / Ratification, procedure, decision-making / Subsidiarity, principle / Foreign policy.

*Headnotes:*

The task of the Constitutional Court is, on the one hand, to ensure the protection of the Constitution as the supreme law of the State and, on the other hand,

to ensure, within its scope of jurisdiction, that Latvia enters into international obligations according to the procedures established in the Constitution. Thus, it must guarantee the supremacy of the Constitution and ensure that the procedures, according to which the State has undertaken certain international obligations, will not be contested *post factum*.

The right of the people to participate in the decision-making process regarding issues relevant to the State shall be regarded as a fundamental human right which serves as a guarantee for democracy and is aimed at ensuring the legitimacy of the democratic State.

The Treaty of Lisbon does not provide for any norm that would confirm that the European Union claims to become a State, and the people of the European Union Member States have not asked to exercise their rights to self-determination within the European Union. The Consolidated Treaty on the European Union provides *expressis verbis* for the respect of the identity and sovereignty of the Member States, which is given greater emphasis in this Treaty than in other European Union Treaties which are currently in force.

The Constitutional Court recognises that the State of Latvia is based on fundamental values such as human rights and fundamental freedoms, democracy, the sovereignty of the State and its people, the division of powers and the rule of law. The State is obliged to guarantee these values and they cannot be infringed by amending the Constitution by law. Therefore, the delegation of competences cannot violate the rule of law and the basis of an independent, sovereign and democratic republic. Likewise, the European Union cannot affect the rights of citizens to decide upon the issues that are essential to a democratic State.

The transfer of certain competences to the European Union should not be regarded as a dilution of sovereignty but rather as an exercise of sovereignty of the people to reach the aims set forth in the European Union.

There is no express provision in the law on the duty of the State to disseminate information to the public. Therefore, the conduct of the state institutions in this regard depends primarily on politically-shaped considerations of utility which are not subject to strict judicial review by reference to legal standards.

#### Summary:

I. On 8 May 2008, the Parliament adopted the law entitled "On the Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing

the European Community". It was proclaimed on 28 May 2008. The Contested Act came into force on the day after the proclamation, 29 May 2008. The Act was contested by several applicants in Constitutional Court proceedings, claiming that it violated their fundamental rights under Article 101 of the Constitution, namely, the right to participate in the conduct of State affairs. They argued that these rights had been infringed by means of the ratification of the Treaty of Lisbon because they were denied the right to participate in a referendum regarding the Treaty of Lisbon.

The applicants also claimed that the principle of sovereignty enshrined in Article 2 of the Constitution was breached.

II. The Constitutional Court ruled that it was not necessary to hold a national referendum to discuss Latvia's ratification of the Treaty of Lisbon and that the Parliament's actions were in compliance with Article 101 of the Constitution, which regulates the rights of citizens to participate in the decisions of the State and local government through national referenda. The Court reasoned that holding a national referendum was a right, not a duty of the government, and, therefore Parliament was under no obligation to the people of Latvia to hold a referendum. The Court indicated that entrance into the Treaty of Lisbon does not violate Latvia's sovereignty and that a national referendum was not constitutionally necessary in this case.

The Constitutional Court established that Article 68.4 of the Constitution only provides for the right of the Members of Parliament to submit substantial changes in the membership conditions of Latvia within the European Union to a referendum. Members of Parliament use this right taking into account considerations of political utility. Under the provision at least half of the Members of Parliament may request a referendum, irrespective of the opinion or recommendations of other institutions.

The Constitutional Court therefore concluded that a referendum was not obligatory here and indeed Members of Parliament were entitled to choose whether to submit any issue related to European Union integration to a referendum.

#### Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2005-02-0106 of 14.09.2005;
- Judgment no. 2005-12-0103 of 16.12.2005;
- Judgment no. 2007-10-0102 of 29.11.2007, *Bulletin* 2007/3 [LAT-2007-3-006].

## European Court of Human Rights:

- *Kovach v. Ukraine*, Judgment of 07.02.2008, paragraph 44;
- *Blumberga v. Latvia*, Judgment of 14.10.2008, paragraph 61;
- *Matthews v. The United Kingdom*, Judgment of 18.02.1999.

## Court of Justice of the European Communities:

- C-145/04 *Kingdom of Spain v. United Kingdom of Great Britain and Northern Ireland* [2006] ECR I-7917.

*Languages:*

Latvian, English (translation by the Court).

*Identification:* LAT-2009-2-003

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 28.05.2009 / **e)** 2008-47-01 / **f)** On Compliance of the Words “not later than within 60 days” of the Third Part of Section 32 of the Law “On Prevention of Laundering of the Proceeds from Crime and Financing of Terrorism” with Article 105 of the Constitution of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), no. 85(4071), 02.06.2009 / **h)** CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

- 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.**  
 5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**  
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

*Keywords of the alphabetical index:*

Bank, transaction, prohibition, suspicion of money laundering, remedy / Money laundering, suspicion, prohibition of financial transaction / Terrorism, prevention / Drug, trafficking, prevention.

*Headnotes:*

The aim of guaranteeing security through a provision whereby banks or credit or financial institutions could not process transactions where there was a suspicion of laundering of the proceeds of crime or the funding of terrorism, could be achieved by less restrictive means and such a provision is therefore disproportionate.

*Summary:*

I. The provision under dispute prevents the institutions listed in the legislation, such as credit and financial institutions, from processing debits or any other transactions in a client's account if the transaction is related to or suspected of being connected with the laundering of proceeds of crime and the funding of terrorism. It allows for the funds to be blocked for up to sixty days.

A legal entity initiated proceedings, contending that it had been unable to make payments to fulfil contractual obligations or to settle its partners' invoices, as its financial resources had been blocked under the challenged provision.

II. The Constitutional Court concluded that the legitimate objective of the contested norm is to ensure the security of society as a whole; an objective that could, however, be attained by the application of other means with a less restrictive impact on individual rights.

The Constitutional Court also noted the lack of provision in the law to mitigate the negative consequences for those concerned, if the decision to block financial resources proved to be ungrounded. Banks or other financial or credit institutions take decisions as to the blocking of funds, resulting in the restriction of the basic rights of the person concerned for a period of sixty days. He or she does not have a hearing, they have no right of appeal against the decision, neither do they have any right to demand recovery for their losses should the decision prove ungrounded or unlawful.

The Constitutional Court decided that the restriction provided for in the contested provision is not proportionate and out of line with Article 5 of the Constitution.

#### Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2001-06-03 of 22.02.2002, *Bulletin* 2002/1 [LAT-2002-1-002];
- 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. 2002-01-03 of 20.05.2002;
- Judgment no. 2002-04-03 of 22.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008];
- Judgment no. 2004-18-0106 of 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];
- Judgment no. 2005-18-01 of 14.03.2006;
- Judgment no. 2005-19-01 of 22.12.2005;
- Judgment no. 2005-22-01 of 23.02.2005;
- Judgment no. 2006-38-03 of 26.04.2007, *Bulletin* 2007/3 [LAT-2007-3-003];
- Judgment no. 2008-02-01 of 21.10.2008, *Bulletin* 2008/3 [LAT-2008-3-004];
- Judgment no. 2008-04-01 of 05.11.2008, *Bulletin* 2008/3 [LAT-2008-3-005];
- Judgment no. 2008-05-03 of 12.11.2008;
- Judgment no. 2008-09-0106 of 16.12.2008;
- Judgment no. 2008-12-01 of 04.02.2009;
- Judgment no. 2008-36-01 of 15.04.2009.

#### European Court of Human Rights:

- *Gülmez v. Turkey*, Judgment of 20.05.2008, paragraph 46;
- *AGOSI v. the United Kingdom*, Judgment of 24.10.1986, paragraph 48;
- *Air Canada v. the United Kingdom*, Judgment of 05.05.1995, paragraphs 29 and 30, *Bulletin* 1995/2 [ECH-1995-2-008];
- *Saccoccia v. Austria*, Judgment of 18.12.2008, paragraphs 85 and 86.

#### Court of Justice of the European Communities:

- 283/81 *CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* (CILFIT), *Rec.* 1982, p. 3415.

#### Courts of other countries:

- Judgment of 19.01.2006, Federal Constitutional Court, Germany, 2 BvR 1075/05.

#### Languages:

Latvian, English (translation by the Court).



# Liechtenstein

## State Council

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### Important decisions

*Identification:* LIE-2009-2-003

**a)** Liechtenstein / **b)** State Council / **c)** / **d)** 31.03.2009 / **e)** StGH 2008/63 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

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

4.13 Institutions – **Independent administrative authorities.**

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

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

5.3.13.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Suspensive effect of appeal.**

*Keywords of the alphabetical index:*

Administrative decision, withdrawal / Preventive measure, annulment, amendment / Judicial protection.

*Headnotes:*

Unless legal rules provide otherwise, an administrative decision is not hard and fast for the issuing authorities. Nor is it an arbitrary act to withdraw or amend a decision which has not substantively produced its full legal effects, if no significant interest can be invoked to justify upholding it as it stands. This is the case, for example, where the decision in question is immediately acknowledged to be insufficiently grounded.

Where irreparable infringements of fundamental rights are at issue, it should be possible to lodge an application for the suspension of the decision or for preventive measures, pursuant to Section 53 StGHG (Constitutional Court Act). This principle derives directly from the interpretation applied by the State

Council in this regard. The possibility of individual applications under Section 15 StGHG ensures appropriate and effective legal protection to that effect. However, this possibility becomes merely notional where a decision revokes the suspensive effect or the preventive measures, within the meaning of Section 21.4 of the Financial Markets Abuse Act (MG – *Marktmißbrauchsgesetz*). Pursuant to such a decision, it is thus no longer possible to set aside an unconstitutional proceeding which occurred in the context of a request for mutual assistance in administrative matters. Consequently, a general restriction on the suspensive effect and on the pronouncement of preventive measures taken in the context of individual appeals concerning the mutual administrative assistance procedure provided for under the Financial Markets Abuse Act (MG) would prove disproportionate, as the public interest does not necessitate immediate mutual assistance in every case. Such restrictive measures are not necessary to ensure that the mutual administrative assistance procedure is prompt and in keeping with the MG. There are more effective measures which are less injurious to fundamental rights.

*Summary:*

In the context of a mutual administrative assistance procedure on suspicion of insider dealing, the authority overseeing the financial markets decided to withdraw a decision which it had taken and replaced it by one with more specific content. The case was brought before the State Council, which did not set aside the Administrative Court's judgment confirming the decision but held that Section 21.4 MG should be rescinded on the grounds that it was unconstitutional. This position was thus at variance with the German Federal Court's decision BverfG 94-166, on which the Government relied in its final submissions.

*Languages:*

German.



# Lithuania

## Constitutional Court

### Important decisions

*Identification:* LTU-2009-2-004

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 15.05.2009 / **e)** 13/04-21/04-43/04 / **f)** On dismissing the judge upon expiry of the term of powers / **g)** *Valstybės Žinios* (Official Gazette), 58-2251, 19.05.2009 / **h)** CODICES (English, Lithuanian).

*Keywords of the systematic thesaurus:*

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

4.4.3.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**

4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**

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

4.7.4.1.4 Institutions – Judicial bodies – Organisation – Members – **Term of office.**

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

*Keywords of the alphabetical index:*

Parliament, member / Parliament, free mandate, limits / Judge, removal / Parliament, member, duties / Supreme Court, president, age limit, dismissal.

*Headnotes:*

Under the Constitution, when Parliament implements the constitutional powers relating to the dismissal of the President of the Supreme Court from office upon expiry of his term of office, and when the corresponding individual act of application of law regarding this issue is adopted during a parliamentary session, Members of Parliament are under an obligation to act in such a way that Parliament would be able to dismiss the President of the Supreme Court upon the expiry of his or her term of office. Otherwise, their mandate as Members of Parliament would be used to disregard the requirements arising from the Constitution and the oath they swore as Members of Parliament. In cases where it has been objectively ascertained that the term of office of the President of the Supreme Court has expired, there

are no constitutionally justifiable circumstances under which non-dismissal of the President of the Supreme Court from office once his or her term of office has expired would be compatible with the Constitution.

*Summary:*

I. The petitioner, the President of the Republic, required an assessment as to whether the free mandate of a Member of Parliament allows him or her to vote in such a way that a judge holding the office of president of a court, who is to be dismissed by parliament, would not be dismissed once his or her term of office came to an end, despite the factual circumstance of the expiry of their term of office having been recognised and not disputed. The President asked whether any circumstances existed, which would be constitutionally justifiable, whereby the voting of a Member of Parliament against the dismissal of such an official at the expiration of his or her term of office would be compatible with his or her duty as a Member of Parliament, which stems from the oath they swear to respect and execute the Constitution and laws.

II. The Court emphasised that the interaction of state powers should not be treated as conflict or competition, and the checks and balances that the judicial power and other state powers (and their institutions) have towards each other may not be treated as mechanisms of the opposition of powers.

There are various grounds for the dismissal of a judge within the Constitution, which are linked with facts of objective character, but not with the free decision of the judge. When there is such a constitutional ground for dismissal of an official or the President of the Supreme Court, the President of the Republic must ascertain whether the said fact of objective character really exists, i.e. whether the official's term of office has expired, and he must submit the person in question to Parliament, to be dismissed from office. Having received the President's submission, Parliament must ascertain whether the said fact of objective character really exists and, if it is recognised, Parliament must adopt the corresponding individual act of application of law. If the existence of the objective fact is established that the term of office of the President or one of the justices of the Supreme Court has expired, dismissal of this person from office is mandatory. The powers of the Presidents of courts may not be extended by law or by any other legal act establishing general norms. There are no constitutionally justifiable circumstances under which the non-dismissal of Presidents of courts at the expiry of their terms of office would be compatible with the Constitution, since the expiry of a term of office is a fact of objective character; it is not related to their free decision.

The Court also held that the constitutional status of Members of Parliament integrates the duties, rights and guarantees of their activity as national representatives; this status is based upon the constitutional principle of the free mandate of the Member of the Parliament. The activity of a Member of Parliament cannot be opposed to the powers of the Parliament as representative of the Nation. In implementing constitutional powers, Parliament has a duty to adopt corresponding decisions emerging from Constitution. Thus, all Members of Parliament not only acquire corresponding rights, but must also discharge certain duties arising from the Constitution and laws. The free mandate of a Member of Parliament may not be identified with total freedom of action as a parliamentarian, at his or her discretion with no respect of the Constitution. It is implicit in the Constitution that there are to be no gaps between the discretion and conscience of the Member of Parliament on the one hand, and the requirements of the Constitution and the values protected and defended in it, on the other.

The Court concluded that the constitutional principle of the free mandate of a Member of the Parliament may not be understood as absolute freedom, not restricted by the Constitution and laws, to act in such a manner that Parliament would not be able to implement the requirements arising from the Constitution and that decisions incompatible with the Constitution would be adopted. A different construction of the constitutional principle of the free mandate of a Member of the Parliament would mean disregard of the imperatives incumbent on the Member of Parliament from the Constitution and the oath he or she has sworn.

#### *Supplementary information:*

The necessity of this case emerged when after the expiry of the term of his powers the President of the Supreme Court was not dismissed by the Parliament even after the President issued two decrees submitting the question of dismissing to the Parliament. Some parliamentarians tried to invoke the freedom of their mandate telling that the President can not indicate to the Parliament how to vote.

After the decision of the Constitutional Court, the President of the Supreme Court was dismissed following the third decree of the President on this matter.

#### *Cross-references:*

This decision explains some provisions of the former Constitutional Court's Ruling no. 13/04-21/04-43/04 of 09.05.2006, *Bulletin* 2006/2 [LTU-2006-2-006].

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2009-2-005

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 08.06.2009 / **e)** 34/2008 - 36/2008 - 40/2008 - 1/2009 - 4/2009 - 5/2009 - 6/2009 - 7/2009 - 9/2009 - 12/2009 -13/2009 - 14/2009 - 17/2009 - 18/2009 - 19/2009 - 20/2009 - 22/2009 / **f)** On some provisions of the Criminal Code regulating criminal liability of legal persons / **g)** *Valstybės Žinios* (Official Gazette), 69-2798, 11.06.2009 / **h)** CODICES (English, Lithuanian).

#### *Keywords of the systematic thesaurus:*

5.1.1.5.2 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Public law**.  
 5.2.2 Fundamental Rights – Equality – **Criteria of distinction**.  
 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**.

#### *Keywords of the alphabetical index:*

Legal person, criminal responsibility, act committed by a natural person / Legal person, criminal liability / Punishment, legal person, nature.

#### *Headnotes:*

When establishing criminal liability of the legal person, the legislator must take account of the specificity of the legal person as a subject of legal relations. The specificity of the legal person is determined *inter alia* by the fact that having legal capacity and capability, he or she is a participant of legal relations through natural

persons (as head or authorised representative, for instance). The activity of a legal person is inseparable from the activity of the corresponding natural persons through which he or she acts and without their activity it would be impossible.

The specificity of the legal person also implies specificity of its guilt. The guilt of the legal person is to be linked to the guilt of the natural person who acts for the benefit or in the interests of the legal person. However, it does not mean that the guilt of the legal person should not be proven according to the procedure established by law and recognised by an effective court judgment.

### Summary:

I. This case was initiated by two groups of petitioners, a group of parliamentarians and sixteen ordinary courts. The petitioners challenged the constitutionality of several provisions of Criminal Code concerning the liability of a legal person. Articles 20.1, 20.2, 20.3, 20.5 and 43.4 of the Criminal Code provide the basis of criminal liability for the legal person and the punishments to which legal persons are subject. The petitioners alleged *inter alia* that these provisions violate the constitutional principle of equality under Article 29 of the Constitution, the principle of presumption of innocence of persons enshrined in Article 31 of the Constitution, the right of a person to a fair trial, the rule that punishment is to be imposed by law, and the constitutional principle of a state under the rule of law.

The petitioners argued that the legislator, while establishing criminal liability for the specific subject (legal person), did not define the notion of this subject and conditions of the criminal liability of the legal person. Such regulation implies that, in the sphere of criminal liability, the legislator equalled the status of legal persons to that of natural persons. However, the constitutional principle of equality was violated as natural persons may only be brought to criminal liability for criminal deeds they have committed themselves, while Articles 20.2, 20.3 of the Criminal Code provide for criminal liability of legal persons, not for criminal deeds they themselves have committed, but for those committed by other subjects, namely natural persons.

The petitioners expressed concern as to the compliance of Article 20.5 of Criminal Code with the Constitution on the basis that the state while regulating the activity of economic entities and while consolidating by laws the regulation of their activity and liability, provides a different criminal liability for them. It totally exempts certain economic entities from criminal liability.

The petitioners noted that the legislator does not specify the criteria whereby a punishment should be imposed on the legal person, and the kind and size thereof remains to be determined.

II. The Constitutional Court stressed that the consolidation of criminal liability of the legal person in the Criminal Code is linked *inter alia* to the objective of the legislator to harmonise the provisions of the Criminal Code with the requirements which stem from international documents, *inter alia* EU law.

The Court ruled that legal persons may be brought to criminal liability under the following conditions. The criminal deed he or she has committed must fall within the list of criminal deeds specified in the special part of the Criminal Code dealing with the criminal liability of legal persons. It must have been committed by a natural person acting on behalf of legal person or individual holding a leading office with the legal person and who has the right to represent the legal person or to adopt decisions on their behalf, or to control their activities. Alternatively, the activity of the legal person or the criminal deed was committed by a natural person who is an employee or authorised representative of the legal person and was committed due to insufficient supervision or control of the person who holds a leading office, or it was committed for the benefit or in the interests of the legal person.

The Court noted that the principle *non bis in idem* means that somebody cannot be punished twice for the same criminal deed. However, it does not exclude the possibility of bringing two or more persons whose guilt has been proved to criminal liability. Thus, if a legal person is brought to criminal liability for the commission of a deed which was committed by a natural person, who has certain defined features and the legal person who is recognised guilty of the fact that the natural person with certain defined features committed the criminal deed for the benefit (or in the interests) of the legal person, two different subjects – the natural person and the legal person – are brought to criminal liability for one deed. Therefore, the natural person and the legal person, as subjects of criminal liability, may not be identified.

The Court also emphasised that not all public legal persons are attributed to the legal persons specified in Article 20.5 of the Criminal Code to whom criminal liability is not applied. This provision of the Criminal Code mentions specific legal persons and singles them out from the whole category of public legal persons on the basis of the features enumerated below. They are founded for implementation of purposes which are important to society and are not usually engaged in economic activity. Therefore, the

legal situation of the public legal persons – (the state, a municipality, a state and municipal institution and establishment, an international public organisation) enumerated in Article 20.5 of the Criminal Code, differs from the legal situation of other public legal persons. The nature and degree of difference between these public legal persons is sufficient to justify different treatment so that some can be brought to criminal liability and others cannot.

The Court pointed out that the specificity of the legal person, as a subject of legal relations, (including criminal legal relations, as well as criminal liability) dictates that the system of punishments established for him or her differs from that established for the natural person. Punishments that are applied to a natural person such as restriction of freedom, arrest, public works, and deprivation of the right to work in a certain job may not be objectively imposed on a legal person. On the other hand, certain punishments provided for the legal person, such as liquidation, may not be imposed on the natural person. The contested provision of the Criminal Code (Article 43.4) does not provide any criteria for the type of punishment to be imposed on the legal person and the size (if it is a fine) or term and extent (if restriction of activity is imposed). The court when imposing punishment on the legal person may follow other norms of the Criminal Code and the principles enshrined therein, *inter alia* the basic principles of imposition of a punishment. Therefore, the contested legal regulation does not prevent the court from taking account of the basic requirements of imposition of punishments, such as the rules on individualisation of punishment and the rules of summation.

The Constitutional Court held that none of the disputed provisions of the Criminal Code were in conflict with the Constitution.

#### Languages:

Lithuanian, English (translation by the Court).



## Mexico Supreme Court

### Important decisions

*Identification:* MEX-2009-2-006

**a)** Mexico / **b)** Supreme Court / **c)** Third Chamber / **d)** 03.04.1969 / **e)** 62 / **f)** Judicial review 7146/66 / **g)** *Semanario Judicial de la Federación*, Fourth part, 13; IUS 242, 480; *Relevant Decisions of the Mexican Supreme Court*, 185 / **h)**.

*Keywords of the systematic thesaurus:*

5.4 Fundamental Rights – **Economic, social and cultural rights.**

*Keywords of the alphabetical index:*

Alimony, amount / Family, burdens, equalisation / Family, financial situation.

*Headnotes:*

The amount of alimony must be determined on the basis of percentages. Although a woman may not be required to work in order to maintain the home, she is required to contribute to its maintenance should she decide to work.

*Summary:*

Direct relief proceedings no. 7146/66 resolved by the former Third Chamber of the Supreme Court confirmed that the amount of alimony payable should be computed as a percentage of the payer's income. This would allow for an increase or decrease in the amount of alimony payable, on the basis of potential fluctuations in the payer's income, and would eliminate the need for the payer or recipient of alimony to go to court to request an increase or decrease in the alimony amount.

Were the amount to be fixed, any increase or decrease in the payer's income would have to be reported to the judicial authorities, with the potential for delays and complications inherent in all suits.

The income of both husband and wife is to be taken into account when setting the amount of alimony needed for her maintenance and that of the children. However, this should not be interpreted as meaning that a wife is not obliged to contribute to the family upkeep should she decide to work.

*Languages:*

Spanish.



*Identification:* MEX-2009-2-007

**a)** Mexico / **b)** Supreme Court / **c)** Third Chamber / **d)** 21.09.1979 / **e)** 78 / **f)** Direct Judicial review 4300/78 / **g)** *Semanario Judicial de la Federación*, 27-132, Fourth Part, 28; IUS 240, 863; *Relevant Decisions of the Mexican Supreme Court*, 233-234 / **h)**.

*Keywords of the systematic thesaurus:*

3.15 General principles – Equality  
5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.  
5.4 Fundamental Rights – **Economic, social and cultural rights**.

*Keywords of the alphabetical index:*

Alimony, amount / Married couple / Woman, advancement of rights.

*Headnotes:*

A married woman is assumed to require alimony. This situation is derived from a historical limitation imposed on women in terms of their social, economic, and cultural development. It will take time to eradicate these consequences from society, despite the fact that it is a constitutional principle prescribed by law that men and women should be equal.

*Summary:*

The Third Chamber of the Supreme Court resolved direct relief proceedings 4300/78 and determined that a married woman is presumed to need a food pension. Such an assumption does not follow from

any legal ruling but from a well-known fact which, according to Article 286 of the Federal District Code of Civil Procedure, is not dependent on any evidence and may be invoked by the Judge even if none of the parties have raised it. This is because in a Mexican family, the man usually provides the economic means to cover the domestic costs, while the woman contributes through housework and childcare.

The Chamber therefore concluded that the assumption that a married woman requires a food pension should remain in force until such equality, contemplated under the Constitution, becomes a generalised social reality.

It was also established that whenever a husband refuses to respond to the demands for a food pension made by a wife on the grounds that the woman has sufficient wealth or income to provide for herself, the man is required to provide evidence supporting such rejection.

It was also noted that because the food pension includes food, clothes, housing, and health care, the fact that the pension recipient resides in property belonging to the provider should be taken into account in setting a lower pension.

*Languages:*

Spanish.



*Identification:* MEX-2009-2-008

**a)** Mexico / **b)** Supreme Court / **c)** Second Chamber / **d)** 22.09.1995 / **e)** 107 / **f)** Conflicting resolutions 16/95 Between the First and Second Collegiate Courts of the Fourth Circuit / **g)** *Semanario Judicial de la Federación*, Tome II, November 1995, 278; IUS 200, 690; *Relevant Decisions of the Mexican Supreme Court*, 327-329 / **h)**.

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Employment / Collective agreement / Remuneration, gross / Salary, aggregation / Salary, increase, trade union, condition / Worker, conditions, collective settlement.

*Headnotes:*

A bonus for attendance and punctuality is an integral part of a salary.

*Summary:*

I. The Fourth Circuit First and Second Collegiate Courts both decided upon direct relief proceedings 391/91 and 77/94, and arrived at opposing conclusions. The first court stated that incentives relating to attendance and punctuality are an integral part of the salary of employees of the Mexican Social Security Institute, whilst the second court ruled that such incentives are not an integral part of their salary.

II. The Second Chamber of the Supreme Court resolved this contradiction in resolution by studying the applicable legal provisions, including Articles 84, 89, 386, 391, Section VI and temporary Article 3 of the Mexican Labour Law, and Clauses 1, 47, 53, 93 and 135 of the union contract entered into by Mexican Social Security Institute and its Trade Union for the two year period 1991-1993. These were applicable because the labour-related cases that resulted in this contradiction were conducted in 1991 and 1993, when this contract was still in force. Articles 2, 6, 7, 17, 27 and 91 to 94 of the Domestic Labour Regulation were also reviewed. Their legal basis can be found under Article 133 of the union work contract, the regulations of which comply with the Domestic Labour Regulation and with Mexican Labour Law.

The Court concluded that Clause 93 of the union contract regulating labour relations between Mexican Social Security Institute and its employees is a literal reproduction of the contents of Article 84 of the Mexican Labour Law which establishes that salary not only comprises cash payments in accordance with a daily quota (wages), but also includes quantities and benefits in kind and any other quantity or benefit provided to an employee in exchange for his or her work.

In addition, salary includes all the economic advantages established in the union work contract that benefit employees. However, these must be provided in exchange for services rendered if they are to be considered as an integral part of the salary.

This is so because factors included in the salary are closely linked to its concept and, by being linked to the concept of work rather than to the concept of working relations, produce benefits that are not the consequence of work itself but of working relationships, such as travel, scholarships, assistance with vehicle purchase, and cannot therefore be considered as elements forming part of the salary.

In this case, a decision was needed as to whether the concept of "punctuality and attendance incentive" under Clauses 91 and 93 of the Domestic Work Regulations, represented a benefit that was part of the salary, used to quantify compensation payable to the employee as wage adjustment, in accordance with Clause 53 of the union contract. Thus, as a result of the joint interpretation of Clauses 91 and 93 of the above Domestic Work Regulations governing incentives for punctuality and attendance, in accordance with Article 53 of the union work contract that defines the composition of salaries, it was noted that the incentive in question could be regarded as a basis to quantify compensation set forth under Article 53. As mentioned in Clauses 1 and 93, "salary comprises payments in cash for wages, allowances, dividends, lodgings, premiums, commissions, benefits in kind or any other amount or benefit granted to the employee in exchange for his/her work under the conditions of this contract". Undoubtedly, because the benefit in question is generated in exchange for work – seeking to promote greater productivity by the employee as a result of his/her punctuality and dedication – it should be regarded as an integral part of the salary. It is envisaged as such in Clause 9 of the union contract that refers to "any other amount or benefit granted to the employee in exchange for his/her work under the conditions of this contract". The Chamber also noted that since this characteristic does not prevent the incentive from being regarded as an integral part of the salary, as emerges from the reading of Clause 93 of the union contract, the variable nature of the attendance and punctuality incentive was no obstacle to arriving at this conclusion.

*Languages:*

Spanish.



*Identification:* MEX-2009-2-009

a) Mexico / b) Supreme Court / c) Plenary / d) 05.03.1996 / e) 108 / f) Action of unconstitutionality 1/96 / g) *Semanario Judicial de la Federación*, Tome XI, April 2000, 556; IUS 192, 079; *Relevant Decisions of the Mexican Supreme Court*, 331-332 / h).

*Keywords of the systematic thesaurus:*

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

5.3.12 Fundamental Rights – Civil and political rights – **Security of the person**.

*Keywords of the alphabetical index:*

Armed forces, use within the country / Authority, public security / National Security Council / Public safety.

*Headnotes:*

The Armed forces may participate in civilian actions with a view to public safety.

*Summary:*

The Supreme Court unanimously established that the Armed Forces (Army, Air Force, and Navy), may participate in civil actions favouring public security in situations that do not require a suspension of civil rights, and in strict compliance with the Constitution and its laws.

The Supreme Court established that actions that promote public security must be respectful of individual and civil rights. The Armed Forces must act in response to a clear and well-founded request by civilian authorities, to whom they report without usurping their sphere of competence. The Court therefore found the participation of the Armed Forces in support of the civilian authorities, and the intervention of the National Defence and Navy ministries in the National Public Security Council was constitutional, because the purpose of these actions is to prevent the type of serious situation that might force the suspension of such civil rights.

Similarly, the Supreme Court acknowledged that the addition of Article 21 of the Federal Constitution, establishing the coordination of the Federation, Federal District, States, and Municipalities in a National Public Security System, does not exclude the authority of any of the three levels of government.

Rather, it seeks to achieve an efficient coordination to confront increasing crime with appropriate urgency.

Finally, the Court stated that public security would be pointless if it did not seek to create adequate conditions for citizens to enjoy their civil rights.

*Languages:*

Spanish.

*Identification:* MEX-2009-2-010

a) Mexico / b) Supreme Court / c) Plenary / d) 28.08.1997 / e) 113 / f) Relief proceedings under review 205/96 / g) *Semanario Judicial de la Federación*, Tome VI, October 1997, 172; IUS 197, 483; *Relevant Decisions of the Mexican Supreme Court*, 341-343 / h).

*Keywords of the systematic thesaurus:*

5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing**.

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

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

*Keywords of the alphabetical index:*

Administrative decision, definition / Regulation, scope.

*Headnotes:*

If a legal action is to be regarded as a regulation, legal provisions need to be developed for its general and abstract support, to enable it to determine the means to apply the law to specific cases.

Orders by the Governor to establish wildlife sanctuaries must comply with the guarantee of a prior hearing.

### *Summary:*

I. The plaintiffs in relief proceedings under review 205/96 challenged the constitutional nature of the approval and issuing of the State of Sonora Ecological Balance and Environmental Protection Law of 18 December 1990, published in the Official Gazette on 3 January, 1991. They contended that this law violated the guarantee of a hearing stipulated under Article 14 of the Federal Constitution by failing to provide the aggrieved parties with the opportunity to participate in the legislative procedure so that the Governor may issue orders to establish wildlife sanctuaries, as outlined in Chapters I and II of the third section of the law.

The action challenged was an order issued by the Governor to establish a wildlife sanctuary, under the category of a zone subject to ecological conservation, in the area of land containing the dam system "Abelardo Rodríguez Luján-El Molinito" and surrounding areas, required for the preservation of the region's ecosystems. Since it dealt with matters of social interest, such as the conservation of the water quality of the dam system, such an order was not an administrative resolution, but possessed the legal attributes of a regulation that contains abstract provisions for general compliance, referring to the community and all those falling within its regulatory framework.

II. The Supreme Court stated that if a legal action by the Governor is to be regarded as a regulation, it requires legal provisions to be developed for its general and abstract support, so that it may determine the means to apply the law to specific cases. The provisions of the third section, Chapter II, of the State of Sonora Ecological Balance and Environmental Protection Law that regulate orders to establish wildlife sanctuaries should be observed.

In this case, the order in question possessed the characteristics of an administrative resolution, rather than a regulation, because it did not seek to develop the legal provisions related to the establishment, conservation, administration, development and surveillance of wildlife sanctuaries. This did not constitute the determination of the legal means for the application of these regulations, but their actual application. Appropriation consisting in dispossession was limited to the owners or holders of the land specified in the statement. Therefore, this was obviously not a general and abstract regulation, but a specific and individualised action.

This conclusion was supported by the provisions contained in the fourth transitory article of the order, which stipulated that owners or holders of land should

be notified in person. This aspect was not present in the general and abstract regulations, because it is impossible to individualise such regulations to ensure that stakeholders have personal knowledge of them.

The point was also made that the guarantee of a hearing was not ensured by providing an appeal to be used as an action following enforcement of the law, but through the establishment of a procedure capable of facilitating – prior to the issuing of an order aimed at the establishment, conservation, administration, development and surveillance of wildlife sanctuaries – the notice given to owners or holders of the land in question, to enable them to put forward their own interests.

It was evident in this case that the order that constituted the enforcement of the State of Sonora Ecological Balance and Environmental Protection Law possessed the characteristics of an act of dispossession detrimental to the owners and holders of the real estate included within its radius, because it ordered them to vacate forthwith, thus legally depriving them of their ownership rights immediately the order was issued.

This order constituted an act that undermined the right to possession. In order to comply with the guarantee of a hearing, the relevant law should allow parties who might be affected the opportunity to put forward evidence to the authorities before its approval. Consequently, it was not sufficient to provide an administrative procedure to challenge the act of dispossession, because that means of defence is applicable after the order is issued.

In conclusion, since legal precepts related to the order to create wildlife sanctuaries in Sonora did not give the parties affected the chance to put forward their case, the Supreme Court granted relief and protection in respect of the State of Sonora Ecological Balance and Environmental Protection Law and actions arising from it.

### *Languages:*

Spanish.



*Identification:* MEX-2009-2-011

a) Mexico / b) Supreme Court / c) Plenary / d) 12.05.1999 / e) 118 / f) Action of unconstitutionality 1/96 / g) *Semanario Judicial de la Federación*, Tome IX, May 1999, 5; IUS 193, 868; *Relevant Decisions of the Mexican Supreme Court*, 361-362 / h).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Trade union, freedom / Collective interest / Collective agreement / Freedom of association, negative.

*Headnotes:*

No worker can be forced to belong to a specific trade union.

*Summary:*

On 12 May 1999, the Supreme Court dealt with relief proceedings under review 408/98, 1475/98, 1339/98 and 3004/98, instituted by the Tax Authority Workers Union, Francisco García Pacheco, the National Air Traffic Controllers Union, and Oscar Mariano Cuesta Vázquez. The Court also created jurisprudence to strengthen the freedom of unions.

In a private session held on 27 May 1999, the Supreme Court, in plenary, approved the thesis P./J. 43/99, that states:

Laws or statutes that contemplate unionisation violate the trade union freedom stipulated in constitutional Article 123.B.X of the Federal Constitution which guarantees trade union freedom with a full sense of universality, starting with workers; individual rights to association and recognising collective rights once the trade union acquires legal existence and its own personality. Such freedom must be understood in its three fundamental aspects:

1. A positive aspect consisting of the right of the worker to join a trade union already established or to create a new one;
2. A negative aspect involving the possibility of not joining a specific trade union and of withholding membership of any trade union; and

3. The freedom to leave or to refuse to join an association.

In consequence, the mandate of a single trade union for civil servants per government entity establishing legislation or labour law violates the social right of free unionisation of workers established under Article 123.B.X of the Federal Constitution. The regulation of individual affiliation to a single trade union restricts the freedom of association of workers to defend their interests.

*Languages:*

Spanish.

*Identification:* MEX-2009-2-012

a) Mexico / b) Supreme Court / c) Plenary / d) 09.08.1999 / e) 120 / f) Constitutional controversy 31/97 / g) *Semanario Judicial de la Federación*, Tome X, September 1999, 703-710; IUS 193, 257-193, 267; *Relevant Decisions of the Mexican Supreme Court*, 365-367 / h).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Constitutional control, federal entity, exception / Constitutional Court, exclusive jurisdiction / Constitutional Court, jurisdiction, limit / Federation, constituent entities, equality of rights / Federation constituent entity, territory / Jurisdiction, territorial / Jurisdictional dispute.

*Headnotes:*

The control of constitutional regularity through constitutional disputes authorises the examination of all types of breaches of the Mexican Political Constitution.

The constitutional control mechanisms provided for by the Constitution serve to preserve the full respect of legal order, without admitting any limitation that may give rise to arbitrariness detrimental to the public interest.

*Summary:*

I. In regard to constitutional dispute 31/97, brought by the Municipality of Temixco (Morelos) against Congress and the government of the above state, the Supreme Court declared Decree 92 issued by the state legislature and published in the official gazette on 3 September 1997, to be invalid. The decree recognised the jurisdiction of the Municipality of Cuernavaca over various geographical areas located to the south of Cuernavaca, corresponding to the communal land of Chipitlán and the areas under the jurisdiction of the Municipality of Temixco.

The Council of Temixco stipulated that since its creation in 1933, population centres have emerged that have been involved with conflicts between that municipality and the Municipality of Cuernavaca due to the lack of territorial demarcation. The parties accordingly requested the intervention of the State Congress in order to define the territorial jurisdiction of its inhabitants. The plaintiff Council explained that the situation had political and fiscal effects, as well as ramifications for its delivery of public and patrimonial services. The Council claimed that by enacting Decree 92, the State Congress failed to respect the constitutional right to a hearing and to seek the opinion of the State Governor. It had also disregarded the documentary evidence offered by Temixco.

II. The Supreme Court ruled in favour of the Council of Temixco based on the State Congress's omission to study the documentary evidence. It declared Decree 92 invalid.

Based on the above, the State Congress is required to issue any resolution on the conflict of territorial limits within thirty days of notification. The new resolution fully examined the material provided in accordance with the above procedure, and the material that it gathered in the exercise of its authority for the resolution of the conflict of territorial limits.

In order to solve this dispute, the Court deemed it necessary to review the framework of the attributes conferred upon it by the Constitution with regard to the study of the concepts of invalidity that may be proposed in constitutional disputes. Article 105.i.I of the Federal Constitution provides for the admissibility of constitutional disputes between the state and any of its municipalities with reference to the constitutionality of its general acts or provisions. In

the present case, the Decree challenged did not confer the character of general legal standards in the formal sense but rather the character of a resolution that settles a territorial conflict. Nonetheless, the Supreme Court established that the above resolution to the conflict produced general effects, given that these effects had a direct impact on the inhabitants of the territory in question.

This determined the approval of Jurisprudential Thesis 91/99 to 101/99. Thesis 98/99 should be highlighted, as it establishes that the control of constitutional regularity through constitutional disputes authorises the examination of all types of breaches of the Mexican Political Constitution. The Supreme Court departed from the stance it had maintained in previous disputes, in which the analysis bypassed concepts of invalidity which did not have had a direct or immediate relationship with the precepts of the fundamental law.

Thesis 101/99 is also of special importance, as it shows that although the constitutional controversies were instituted as a means of defence for authorities and bodies of power, their purposes also contemplated the welfare of individuals under the remit of the above authorities and bodies of power. The foregoing justifies that the constitutional control mechanisms provided for by the Constitution serve to preserve the full respect of legal order, without admitting any limitation that may give rise to arbitrariness which would be detrimental to the public interest.

*Languages:*

Spanish.



# Norway

## Supreme Court

### Important decisions

*Identification:* NOR-2009-2-001

**a)** Norway / **b)** Supreme Court / **c)** Plenary / **d)** 21.09.2007 / **e)** 2007-1593P, 2007-1594P, 2007-21595P / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2007, 1281, 2007, 1306, 2007, 1308 / **h)** CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

3.10 General Principles – **Certainty of the law.**  
 5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law.**  
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**  
 5.3.39.1 Fundamental Rights – Civil and political rights – Right to property – **Expropriation.**

*Keywords of the alphabetical index:*

Amendment, legislative, effect retroactive.

*Headnotes:*

A provision of the Ground Lease Act, which entitles the tenant of ground on which a dwelling or holiday home is built the right to extend the lease on the same conditions after the agreed term of the lease has expired, was not a violation of the prohibition against retroactive legislation of Article 97 of the Constitution, or Article 105 of the Constitution, which provides that the owner of property that is expropriated shall be entitled to full compensation.

*Summary:*

Three cases concerned similar facts with respect to Section 33 of the Ground Lease Act and Articles 97 and 105 of the Constitution.

Two cases concerned Section 33 of the Ground Lease Act, which entitles the tenant of ground on which a dwelling or holiday home is built the right to extend the lease on the same conditions after the agreed term of the lease has expired. The issue

before the Supreme Court was whether the application of this provision was a violation of the prohibition against retroactive legislation in Article 97 of the Constitution, or Article 105 of the Constitution, which provides that the owner of property that is expropriated shall be entitled to full compensation from the Treasury. A second question was whether the application of the provision was a breach of Norway's obligations pursuant to Article 1 Protocol 1 ECHR.

The Court found that the provision was neither a violation of Article 97 nor Article 105 of the Constitution, and application of the provision was not a breach of Norway's obligations pursuant to Article 1 Protocol 1 ECHR.

The third case concerned Ground Lease Act Section 37 where a claim by a ground tenant that the price upon redemption of a leased plot of land should be fixed at 40 % of the value of the plot at the date of redemption (see the Ground Lease Act Section 37.1.2 and 37.1.3). The main question before the Supreme Court was whether the determination of the redemption price in accordance with the said provisions of the Ground Rent Act gave the landlord full compensation in accordance with Article 105 of the Constitution. The Court found that a redemption of a leased plot of land fixed at 40 % of the value, violated Article 105 of the Constitution.

*Languages:*

Norwegian, English (translated by the Court).



*Identification:* NOR-2009-2-002

**a)** Norway / **b)** Supreme Court / **c)** Grand Chamber / **d)** 29.10.2008 / **e)** 2008-1861S / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2008, 1409 / **h)** CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Surtax, imposition / Tax, offence, surtax, standard of proof / Tax, proceedings, burden of proof, scope.

*Headnotes:*

The imposition of ordinary surtax requires that the facts are proven on a clear balance of probabilities. Article 6.2 ECHR contains a requirement as to the standard of proof in penal cases.

*Summary:*

The tax authorities had imposed a 60 % surtax on the appellant, who appealed the decision of the tax authorities to the courts. The District Court upheld the decision, while the Court of Appeal reduced the surtax to 30 %. The case before the Supreme Court concerned the standard of proof for the imposition of ordinary surtax, see the Tax Assessment Act Sections 10-2 and 10-4.

The Supreme Court overruled the decision of the Court of Appeal. A majority of seven justices held as set out in the headnotes.

*Languages:*

Norwegian, English (translated by the Court).

*Identification:* NOR-2009-2-003

**a)** Norway / **b)** Supreme Court / **c)** Grand Chamber / **d)** 19.12.2008 / **e)** 2008-2175S, 2008-2176S, 2008-2177S / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2008, 1764, 2008, 1783, 2008, 1786 / **h)** CODICES (Norwegian, English).

*Keywords of the systematic thesaurus:*

1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties**.  
5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Reasoning**.

*Keywords of the alphabetical index:*

Criminal procedure / Judgment, ground, reasoning, obligation.

*Headnotes:*

Article 14.5 of the United Nations Covenant on Civil and Political Rights requires the disclosure of reasons for denying an appeal to the Court of Appeal.

*Summary:*

Three cases concerning a criminal appeal against an interlocutory decision. The issue was whether a decision to deny an appeal against a conviction pursuant to Section 321.2.1 of the Criminal Procedure Act, where the reasons for the decision were not disclosed except for a reference to the statutory condition that an appeal may be disallowed if the court finds it obvious that the appeal will not succeed, was in breach of Article 14.5 of the United Nations (hereinafter, the “ICCPR” Covenant on Civil and Political Rights). A unanimous Supreme Court held that compliance with Article 14.5 requires that the decision to disallow an appeal must be accompanied by a duly reasoned judgment, and that this must also apply as a matter of Norwegian law, see Section 3 of the Human Rights Act. The Supreme Court quashed the decision of the Court of Appeal.

*Languages:*

Norwegian, English (translated by the Court).

*Identification:* NOR-2009-2-004

**a)** Norway / **b)** Supreme Court / **c)** Grand Chamber / **d)** 12.06.2009 / **e)** 2009, 397 / **f)** / **g)** *Norsk retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial by jury**.

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*Keywords of the alphabetical index:*

Jury, reasoning, fair trial.

*Headnotes:*

A criminal system where a jury determines the question of guilt without giving a reason for its decision is not in conflict with the right to a fair trial where there are other mechanisms to satisfy these purposes.

*Summary:*

I. The case concerned an appeal against a judgment of the Court of Appeal in a criminal case following conviction for, among other things, attempted murder. The main issue raised in the appeal was whether the defendant's right to a fair trial or his right to review of a criminal conviction had been violated because the question of guilt was determined by a jury, which does not give reasons for its decision.

A was acquitted by the District Court, but convicted by the Court of Appeal for attempted murder. The Court of Appeal sat with a jury, and A alleged that the lack of a reason for the jury's guilty verdict violated his right to a fair trial as laid down in Article 6.1 ECHR and Article 14.1 ICCPR, and his right to review by a higher tribunal as laid down in Article 14.5 ICCPR. He also alleged that Norway's reservation to Article 14.5 ICCPR was invalid.

II. The Supreme Court heard the case in plenary and held unanimously that Norway's reservation to Article 14.5 ICCPR was not invalid and that the procedure did not violate the Convention's provisions. The Supreme Court found that it cannot be deduced from the case-law of the Convention organs that a conviction based on an affirmative answer from the jury is incompatible with the right to a fair trial or the right to review by a higher tribunal. The decisive issue is whether the purpose behind the requirement to give a reason is sufficiently satisfied in some other way. The Supreme Court found that the Norwegian jury system contains mechanisms to satisfy these purposes, and that they were in fact satisfied in A's case.

Notwithstanding, the Supreme Court set aside the Court of Appeal's conviction for attempted murder and the appeal proceedings, because the description of the requirement of guilt in the reasons that were given for the sentence were wrong. This created uncertainty as to whether the jury had correctly understood the requirement of guilt.

*Languages:*

Norwegian, English (translated by the Court).



## Poland

### Constitutional Tribunal

#### Statistical data

1 January 2009 – 30 April 2009

Number of decisions taken:

Judgments (decisions on the merits): 11

- Rulings:
  - in 4 judgments the Tribunal found some or all challenged provisions to be contrary to the Constitution (or other act of higher rank)
  - in 7 judgments the Tribunal did not find the challenged provisions to be contrary to the Constitution (or other act of higher rank)
- Initiators of proceedings:
  - 3 judgments were issued at the request of courts – question of legal procedure
  - 2 judgments were issued at the request of private individuals (physical or natural persons) – the constitutional complaint procedure
  - 1 judgment was issued at the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
  - 2 judgments were issued at the request of legal persons (limited liability companies)
  - 1 judgment was issued at the request of the Supreme Council of the Judiciary
  - 1 judgment was issued at the request of the President of the Republic – preliminary review procedure
  - 1 judgment was issued at the request of a group of Deputies (members of the first chamber of Parliament)
- Other:
  - 2 judgments were issued by the Tribunal in plenary session
  - 2 judgments were issued with dissenting opinions

#### Statistical data

1 May 2009 – 31 August 2009

Number of decisions taken:

Judgments (decisions on the merits): 24

- Rulings:
  - in 12 judgments the Tribunal found some or all challenged provisions to be contrary to the Constitution (or other act of higher rank)
  - in 12 judgments the Tribunal did not find the challenged provisions to be contrary to the Constitution (or other act of higher rank)
- Initiators of proceedings:
  - 6 judgments were issued at the request of courts – question of legal procedure
  - 5 judgments were issued at the request of private individuals (physical or natural persons) – the constitutional complaint procedure
  - 3 judgments was issued at the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
  - 2 judgments were issued at the request of legal persons (limited liability companies)
  - 1 judgment was issued at the request of the National Council of Enforcement Officers
  - 1 judgment was issued upon the request of a Municipal Council
  - 1 judgment was issued upon the request of an Employers' Organisation
  - 2 judgments were issued at the request of the President of the Republic – preliminary review procedure
  - 3 judgments were issued at the request of a group of Deputies (members of the first chamber of Parliament)
- Other:
  - 3 judgments were issued by the Tribunal in plenary session
  - 6 judgments were issued with dissenting opinions

## Important decisions

*Identification:* POL-2009-2-001

a) Poland / b) Constitutional Tribunal / c) / d) 30.09.2008 / e) K 44/07 / f) / g) *Dziennik Ustaw* (Official Gazette), 2008, no. 177, item 1095; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2008, no. 7A, item 126 / h) CODICES (Polish).

*Keywords of the systematic thesaurus:*

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

3.11 General Principles – **Vested and/or acquired rights.**

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

5.1.4.1 Fundamental Rights – General questions – Limits and restrictions – **Non-derogable rights.**

5.1.5 Fundamental Rights – General questions – **Emergency situations.**

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

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

*Keywords of the alphabetical index:*

Terrorism, fight / Organised crime, fight / Aircraft, renegade, shooting down.

*Headnotes:*

When undertaking a “vertical” assessment of the compatibility between the elements of the legal system in critical areas such as the weight accorded to public security issues and the right to legal protection of the lives of particular individuals, including those on board a renegade aircraft, the Constitutional Tribunal unequivocally gives priority to values such as human life and dignity. These values constitute the foundation of European civilisation and outline the semantic content of humanism, a notion that is central to our culture (including legal culture).

The values are inalienable in the sense that they do not allow for any “suspension” or “forfeiture” in a particular context. Humanism is not an attitude to be followed solely in times of peace and prosperity, but rather a value best measured during critical and sometimes extremely difficult situations. Any other conclusion is completely unacceptable from the perspective of the most rudimentary assumptions of our legal system.

The Tribunal noted that organised crime can be combated and regular wars conducted without the need for a total suspension or negation of fundamental human rights and freedoms. It is therefore also possible to fight terrorism without extensive intrusion into the fundamental rights of uninvolved parties, in particular their right to life.

Summary:

I. The abstract review, initiated by the First President of the Supreme Court, challenged the conformity of Article 122a of the Act of 3 July 2002 (the Aviation Law) with Articles 38, 31.3, 26 and 30 of the Constitution.

Questions arose over the conformity of the challenged provisions with the constitutional protection of life; human dignity, the constitutional principle of a democratic state ruled by law; and the goals and tasks of the Armed Forces of the Republic.

The applicant emphasised that the concept of a terrorist attack provides information about the specificity of the threat, but does not prejudice the nature of the legal values under threat. Human life may not be evaluated according to the criterion of chance of survival. If the Minister of National Defence ordered a renegade to be shot down, the passengers and crew would be unfairly used without their consent and knowledge.

In a written statement submitted to the Tribunal, the President of the Civil Aviation Authority stressed that the risk of endangering the life of civilians due to a terrorist attack is more or less equal to an analogous risk due to random technical failures, which, he suggested, undermines the necessity for the regulation of Article 122a of the Aviation Law.

II. The Tribunal decided that, from a purely pragmatic perspective, it could simply pronounce the disputed provision to be inconsistent with the principle of diligent legislation. It would then lose its binding force. However, taking this course of action would entail bypassing several constitutional issues of high significance which had arisen in this case.

The Tribunal found that there was no need for a reinterpretation of human rights protection standards in order to protect public safety from terrorist attacks. This opinion is shared by other Constitutional Courts, including the House of Lords, the Federal Constitutional Court of Germany and the Supreme Court of the USA.

### 1. Protection of human life.

Although the legal protection of life is not unlimited, any limitations in this field must be interpreted particularly restrictively, in convergence with the criterion of “absolute necessity” developed in the case-law of the European Court of Human Rights. It is necessary to determine whether the violation of the protection of life is to be legalised by the legislator by a constitutional value, whether the violation may be justified on the grounds of constitutional values and whether the legislator respected the constitutional criteria for resolving such conflicts, such as the requirement of proportionality.

In view of the unusually general content of Article 122a of the Aviation Law as well as the unclear system of references and the delegation to a sub-statutory regulation of essential elements of an assessment undertaken while taking a decision on the destruction of the aircraft, it can be concluded that the statutory form of a regulation, required in such circumstances, has not been fully observed. The challenged regulation is not indispensable for the protection of a constitutionally protected legal value that does not stand lower in the constitutional hierarchy than the value sacrificed. Human life is not subject to evaluation on account of age, state of health of the individual, the expected life span or any other criteria. The mechanism prescribed in Article 122a has to be regarded, in most cases, as inadequate for the intended goal, exposing to certain death passengers and crew members, who are not aggressors, but victims.

### 2. Protection of human dignity.

Human dignity should be recognised as a constitutional value, which is of fundamental significance to the axiological basis of current constitutional solutions. A democratic state ruled by law is a state founded on the respect for the individual and on the respect for, and the protection of life and human dignity. The recognition of both the inalienable dignity of a person as a constitutional principle and the right of every human being – irrespective of their qualification or psychophysical condition, constitutes the basis for regarding individuals as the holders of rights.

The application of the challenged legal provisions results in a “depersonalisation” and “reification” of those on board of a renegade aircraft who are not aggressors. The argument that they have found themselves in such a situation solely as a result of the unlawful activity of the perpetrators must be considered false; it is indirectly indicative of a failure by the state to fulfil its positive obligation to protect.

The legal provisions in question would not have resulted in such serious constitutional doubts if they had simply envisaged the shooting down of an aircraft with only perpetrators on board, since they decided of their own free will to die, simultaneously threatening the lives of innocent people.

### 3. Diligent legislation, democratic state ruled by law.

Finally, the legislator may not endow organs applying the law with excessive freedom to determine the subjective and objective scope of a legal norm. For a legal provision to conform to the constitutional principle of diligent legislation (and consequently with the principle of the democratic state ruled by law), it must be sufficiently precise to enable its uniform interpretation and application.

Among the prerequisites justifying the decision to destroy a civil aircraft with passengers on board are such ambiguous phrases as “state security considerations” or the necessity to ascertain that a civil aircraft has been used for “unlawful acts”. Furthermore, it is doubtful, whether a sub-statutory act may regulate a decision-making mechanism, with the potential consequence of the loss of several hundreds of human lives.

### 4. Goals of the Armed Forces of the Republic.

The Tribunal decided not to adjudicate upon the conformity of the contested legal provisions with the constitutional goals of the Armed Forces of the Republic.

#### *Cross-references:*

#### Decisions of the Constitutional Tribunal:

- Judgment U 6/92 of 19.06.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 13; CODICES [POL-1992-X-002];
- Judgment W 16/92 of 17.03.1993, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1993, item 16;
- Judgment K 11/94 of 26.04.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 12;
- Judgment K 26/96 of 28.05.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 2, item 19; *Special Bulletin Leading Cases* [POL-1997-S-001];
- Judgment K 2/98 of 23.03.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 3, item 38; CODICES [POL-1999-X-004];

- Judgment K 34/99 of 28.06.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 5, item 142; *Bulletin* 2000/2 [POL-2000-2-018];
  - Judgment SK 5/99 of 17.10.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 7, item 254; *Bulletin* 2000/3 [POL-2000-3-023];
  - Judgment K 33/00 of 30.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 217; *Bulletin* 2002/1 [POL-2002-1-005];
  - Judgment K 36/00 of 08.10.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 5A, item 63; *Bulletin* 2002/3 [POL-2002-3-032];
  - Judgment K 28/02 of 24.02.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 2A, item 13;
  - Judgment K 7/01 of 05.03.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 3A, item 19; *Bulletin* 2003/2 [POL-2003-2-017];
  - Judgment P 14/01 of 24.03.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 3A, item 22;
  - Judgment K 53/02 of 29.10.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 8A, item 83; *Bulletin* 2003/3 [POL-2003-3-032];
  - Judgment K 14/03 of 07.01.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 1A, item 1;
  - Judgment SK 56/04 of 28.06.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 6A, item 67;
  - Judgment SK 41/05 of 24.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 126;
  - Judgment SK 54/06 of 06.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 3A, item 23;
  - Judgment K 42/07 of 03.06.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 5A, item 77; *Bulletin* 2008/3 [POL-2008-3-007].
- United Kingdom); *Special Bulletin Leading Cases ECHR* [ECH-1981-S-002];
- Judgment no. 10126/82 of 21.06.1988 (*Plattform "Ärzte für das Leben" v. Austria*);
  - Judgment no. 18984/91 of 27.09.1995 (*McCann et al. v. the United Kingdom*);
  - Judgment no. 21987/93 of 18.12.1996 (*Aksoy v. Turkey*); *Bulletin* 1996/3 [ECH-1996-3-017];
  - Judgment no. 23818/94 of 28.07.1998 (*Ergi v. Turkey*);
  - Judgment no. 23452/94 of 28.10.1998 (*Osman v. the United Kingdom*);
  - Judgment no. 41488/98 of 18.05.2000 (*Velikova v. Bulgaria*);
  - Judgment no. 30054/96 of 04.05.2001 (*Kelly et al. v. the United Kingdom*).

#### Decisions of other Constitutional Courts:

- *Bundesverfassungsgericht*: Judgment no. 1 BvR 357/05 of 15.02.2006, *Bulletin* 2006/1 [GER-2006-1-004];
- House of Lords Judgments, *A (FC) and others (FC) v. Secretary of State for the Home Department* [2004] UKHL 65;
- House of Lords Judgments, *A (FC) and others (FC) v. Secretary of State for the Home Department* [2005] UKHL 71;
- US Supreme Court, *Rasul v. Bush*, Case no. 03-334, 542 US 466 (2004) 321 F. 3d 1134;
- Israeli Supreme Court, Judgment HCJ 5100/94 of 15.07.1999 (*Public Committee against Torture on Israel v. The State of Israel et al.*); CODICES [ISR-1999-X-001];
- Israeli Supreme Court, Judgment HCJ 3278/02 of 18.12.2002 (*The Center for the Defense of the Individual founded by Dr. Lota Salzberger et al. v. The Commander of IDF Forces in the West Bank*);
- Israeli Supreme Court, Judgment HCJ 3239/02 of 05.02.2003 (*Marab v. The Commander of IDF Forces in the West Bank*).

#### Languages:

Polish.

#### Decisions of the European Court of Human Rights:

- Judgment no. 5856/72 of 25.04.1978 (*Tyrer v. the United Kingdom*); *Special Bulletin Leading Cases ECHR* [ECH-1978-S-002];
- Judgment no. 6833/74 of 13.06.1979 (*Marckx v. Belgium*); *Special Bulletin Leading Cases ECHR* [ECH-1979-S-002];
- Judgment nos. 7601/76 and 7806/77 of 13.08.1981 (*Young, James and Webster v. the*



*Identification:* POL-2009-2-002

a) Poland / b) Constitutional Tribunal / c) / d) 18.02.2009 / e) Kp 3/08 / f) / g) *Monitor Polski* (Official Gazette), 2009, no. 13, item 170; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2009, no. 2A, item 9 / h) CODICES (Polish).

*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.**

5.3.13.13 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:*

European Union, European Court of Justice, preliminary question, excessive length of proceedings / Court, ordinary, verification of the constitutionality of laws.

*Headnotes:*

The right to trial consists of the right to access to court, the right to adequate court procedure, the right to a court decision and the right to an adequate régime and standing of organs issuing court decisions.

Excessive length of legal proceedings occurs only if the inactivity of a legal organ is unjustified. In addition to the length of the proceedings, several other factors should be taken into account, such as the complexity of the case, its importance for the claimant, or his or her behaviour.

The removal of any potential for doubt as to the interpretation or scope of the binding force of EU law at an early stage of the proceedings could lend additional strength to the legal standing of the accused or of the victim.

*Summary:*

I. An abstract review, initiated by the President of the Republic, challenged the conformity of Article 1 of the Act of 10 July 2008 (the Act on authorisation of the President of the Republic of Poland to accept the jurisdiction of the Court of Justice of the European Communities under Article 35.2 of the Treaty on the European Union, *Journal of Laws* 2009, no. 33, item 253 (hereinafter: the “Act”)), with Article 45.1 of the Constitution.

The President did not question the constitutionality of himself having the right to declare the acceptance of the jurisdiction of the Court. Rather, he challenged the constitutionality of every common court having the possibility to address preliminary questions to the Court. In his opinion, this might lead to an infringement of Article 45.1 of the Constitution, because of a “widespread practice” of addressing preliminary questions under Article 234 of the Treaty Establishing the European Community; because of the strict formal requirements of lodging a prejudicial question, and because of a long average time of processing a preliminary question by the Court.

A member state acquires the competence to accept the jurisdiction of the Court, ratifying the Treaty. Until the date of issue of the judgment, 17 member states of the European Union have accepted the facultative jurisdiction of the Court under Article 35.2 of the Treaty.

In the Polish legal system, there is a possibility for the common courts to address preliminary questions to the Supreme Court, to the Supreme Administrative Court, and to the Constitutional Tribunal.

On 1 March 2008 the Court adopted urgent preliminary proceedings, with a view to significant reductions in the amount of time needed to issue a preliminary judgment in certain fields of law.

II. The Court cited several judgments of the European Court of Human Rights, with respect to the right to trial within a reasonable time in the context of preliminary proceedings before the Court of Justice of the European Communities. On the one hand, the excessive length of legal proceedings may occur only if the inactivity of a judicial organ is unjustified. Several factors should be taken into account in addition to the duration of proceedings, such as the complexity of the case, the importance of the case to the claimant, and his or her behaviour. On the other hand, extra time due to the preliminary proceedings before the Court may not be qualified as excessive length of proceedings, and that time may not result in states facing charges for having infringed the right to trial within reasonable time. Legal organs should above all try to strike a balance between proceeding at a reasonable pace and the general rule of the administration of justice.

The analogous preliminary proceedings under Polish law have never been subjected to constitutional review.

Allowing ordinary courts the possibility to address a preliminary question to the Court under Article 35.2 of the Treaty could remove the potential for doubts over

the interpretation or the scope of the binding force of EU law at an early stage of the proceedings. It could also strengthen the legal standing of the accused or of the victim.

The practice of addressing preliminary questions by administrative courts under Article 234 of the Treaty Establishing the European Community is not widespread. Ordinary courts issuing judgments in criminal proceedings make their own decisions as to the legal and factual basis of their rulings.

Between the entry into force of the Treaty of Amsterdam and the issue of this decision, there were only sixteen judgments of the Court under Article 35 of the Treaty. Concerning Article 234 of the Treaty Establishing the European Community, from the point of Poland's accession to the EU to the issue of this judgment, one motion has been lodged by the Supreme Court, eleven by administrative courts and only four by the ordinary courts.

There are no particular formal requirements for preliminary questions addressed to the Court. The motion simply needs to be formulated in a simple, clear and precise way, and should include the legal and factual tenor of the proceedings in the member state.

The urgent preliminary procedure, adopted on 1 March 2008 has significantly reduced the average length of preliminary proceedings before the Court from an average of twenty months to between one and three months.

The Tribunal found Article 1 of the Act to be in line with the chosen standard of constitutional control. The judgment was issued by the Tribunal sitting in a plenary session (i.e. 15 judges). No dissenting opinions were put forward.

#### Cross-references:

##### Decisions of the Constitutional Tribunal:

- Judgment SK 19/98 of 16.03.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 3, item 36; *Bulletin* 1999/1 [POL-1999-1-007];
- Judgment SK 12/99 of 10.07.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 5, item 143; *Special Bulletin Inter-Court Relations* [POL-2000-C-001];
- Judgment K 33/99 of 03.10.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 6, item 188; *Bulletin* 2000/3 [POL-2000-3-020];

- Judgment SK 10/99 of 04.12.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 8, item 300; *Special Bulletin Inter-Court Relations* [POL-2000-C-002];
- Judgment SK 10/00 of 02.04.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 3, item 52;
- Judgment SK 32/01 of 13.05.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 3A, item 31;
- Judgment SK 5/02 of 11.06.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 4A, item 41; *Bulletin* 2002/2 [POL-2002-2-018];
- Judgment P 13/02 of 03.12.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 7A, 90; *Bulletin* 2003/1 [POL-2003-1-008];
- Judgment P 4/04 of 07.09.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 8A, item 81;
- Judgment P 1/05 of 27.04.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 4A, item 42; *Bulletin* 2005/1 [POL-2005-1-005];
- Judgment K 18/04 of 11.05.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 5A, item 49; *Bulletin* 2005/1 [POL-2005-1-006];
- Judgment K 53/05 of 14.06.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 6A, item 66;
- Judgment SK 7/06 of 24.10.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 9A, item 108; *Bulletin* 2008/1 [POL-2008-1-004];
- Judgment K 39/07 of 28.11.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 10A, item 129; *Bulletin* 2008/1 [POL-2008-1-005];
- Judgment P 49/06 of 19.02.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 1A, item 5.

##### Decisions of the European Court of Human Rights:

- Judgment no. 2614/65 of 16.07.1971 (*Ringeisen v. Austria*);
- Judgment no. 6232/73 of 28.06.1978 (*König v. Germany*); *Special Bulletin Leading Cases ECHR* [ECH-1978-S-003];
- Judgment no. 12919/87 of 12.10.1992 (*Boddaert v. Belgium*);
- Judgment no. 12728/87 of 25.11.1992 (*Abdoella v. the Netherlands*);
- Judgment no. 13089/87 of 25.02.1993 (*Dobbertin v. France*);

- Judgment no. 15530/89 of 25.03.1996 (*Mitap and Müftüoğlu v. Turkey*); CODICES [ECH-1996-X-002];
- Judgment no. 20323/92 of 26.02.1998 (*Pafitis v. Greece*); Judgment no. 26614/95 of 15.10.1999 (*Humen v. Poland*);
- Judgment no. 38670/97 of 04.04.2000 (*Dewicka v. Poland*);
- Judgment no. 40892/98 of 30.09.2003 (*Koua Poirezz v. France*).

Decisions of the Court of Justice of the European Communities:

- Judgment no. 6/64 *Flamino Costa* of 15.07.1964;
- Judgment C-99/00 *Lyckeskog* of 04.06.2002;
- Judgment in the joint cases C-187/01 *Hüseyin Gözütok* and C-385/01 *Klaus Brügge* of 11.02.2003;
- Judgment C-555/03 *Warbecq* of 10.06.2004;
- Judgment C-469/03 *Filomeno Miraglia* of 10.03.2005;
- Judgment C-105/03 *Pupino* of 16.06.2005; *Bulletin* 2008/2 [ECJ-2008-2-016];
- Judgment C-150/05 *Jean van Straaten* of 29.09.2006;
- Judgment C-467/05 *Dell'Orto* of 28.06.2007;
- Judgment C-195/08 *PPU Rinau* of 11.07.2008;
- Judgment C-66/08 *Kozłowski* of 17.07.2008;
- Judgment C-296/08 *PPU Sansebastian Goicoechea* of 12.08.2008;
- Judgment C-388/08 *PPU Leymann and Pustovarov* of 01.12.2008;
- Judgment C-210/06 *Cartesio* of 12.12.2008.

Decisions of the Supreme Court:

- Judgment I KZP 21/06 of 20.07.2006, *Orzecznictwo Sądu Najwyższego, izba karna i wojskowa* (Official Digest), 2006, no. 9, item 77;
- Judgment I KZP 30/05 of 27.10.2005, *Orzecznictwo Sądu Najwyższego, izba karna i wojskowa* (Official Digest), 2005, no. 11, item 107;
- Judgment IV KKN 617/99 of 05.02.2003, *Orzecznictwo Sądu Najwyższego, izba karna i wojskowa* (Official Digest), 2003, item 284.

*Languages:*

Polish.



## Portugal Constitutional Court

### Statistical data

1 May 2009 – 31 August 2009

Total: 218 judgments, of which:

- Prior review: 2 judgments
- Abstract *ex post facto* review: 3 judgments
- Appeals: 159 judgments
- Appeals against refusals to admit: 31 judgments
- Declarations of assets and income: 2 judgments
- Political parties: 16 judgments
- Political parties' accounts: 1 judgment
- Election campaign accounts: 4 judgments

### Important decisions

*Identification:* POR-2009-2-005

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 05.05.2009 / **e)** 221/09 / **f)** / **g)** *Diário da República* (Official Gazette), 113 (Series II), 15.06.2009, 23439 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Health care, cost-free / Health protection.

*Headnotes:*

The rule requiring a National Health Service user to pay for services provided simply because he has not demonstrated, as required, that he holds a user's card within ten days of being called on to pay the costs of healthcare, does not constitute a disproportionate restriction on the protection of health, neither does it represent a breach of the constitutional right to health protection.

*Summary:*

The representative of the Public Prosecutors' Office at the Constitutional Court asked the Court to declare unconstitutional, with generally binding force, a provision of the legislation on the National Health Service user identity card that prohibits the charging of sums other than user charges for the provision of healthcare, when interpreted in such a way as to require payment for services provided due to the user's failure to demonstrate that he holds a user's card within ten days of being called on to pay the costs of healthcare. The Constitutional Court had already held this interpretation to be materially unconstitutional in at least three concrete cases. The issues in this case were: whether this interpretation could be described as being in conformity with the principle of a democratic state based on the rule of law and on respect for and the guarantee of the fundamental rights; the legal force which the Constitution gives to those rights; and the constitutional right to health protection.

The idea behind the National Health Service user identity card was to simplify access to the National Health Service, without undermining the principles of the Service's universality and fairness, and to make it easier for people to provide proof of their identity when using health services, although the card was identical to those that already existed for those using health subsystems. According to the legislation then in force, the card was to be optional and was designed to enable holders to prove their identity both to National Health Service institutions and services, and private bodies in the health field.

The legislation was subsequently changed to make it obligatory for users to present their identity cards. The new text expressly states that a user's failure to identify himself by means of the card can never lead to a refusal to provide healthcare, but does impose consequences for such failure: users who are not properly identified and do not prove, within ten days of being asked to pay the expenses of the healthcare provided, that they hold, or have applied for, a National Health Service user identity card, are now required to directly pay those expenses.

The Ruling emphasises that the provision of healthcare via the establishments and services comprising the National Health Service (which is defined as a service that is universal in terms of the population it covers, and designed to provide, or ensure the provision of, global care that is free of charge to users) constitutes the practical implementation of the constitutional right to the protection of health which possesses the nature of a social right that is, to a degree, normatively binding. The Constitution has charged the state with

this obligation, as a means of implementing a fundamental right, rather than a line of action whose nature is merely that of an element of a political programme.

As this right to health protection possesses the nature of a constitutional rule requiring practical implementation, it serves as a parameter for controlling the constitutionality of legal or regulatory measures that affect the right, or render it impossible to exercise. It can be argued that rules concerning the provision of services by the state are unconstitutional if they violate either the minimum content of a fundamental social right, or the constitutional principles applicable to a democratic state based on the rule of law – as would be the case if unjustifiable restrictions were imposed on the right to benefit from it. In the Ruling in this case, it is stated that the change which the legislative authorities made to the nature of the National Health Service user identity card, making it the only way somebody can prove their identity to the health services, and imposing a liability to pay medical assistance costs on somebody who does not prove, within ten days of being called on to do so, that he either holds the identity card or has applied for one from the relevant authorities, and which concomitantly established the presumption that the interested party is not a National Health Service beneficiary – does not in itself affect the constitutional right to health protection. Instead, the Court considered that this legal requirement simply imposes a procedural condition on the exercise of the right, allowing health centres and establishments in the hospital network to control people's access to the healthcare provided within the scope of the National Health Service.

In the Ruling that created the first jurisprudence on this matter, the generalisation of which with generally binding force was requested by the Public Prosecutors' Office in the present case, the Court found that a rule requiring a user who lacks financial resources to pay for clinical services, simply because of his failure to fulfil some procedural or formal requirement, is incompatible with both the principle of proportionality and the universal and free nature of the National Health Service, which is itself an expression of the fact that the Constitution enshrines the right to health.

However, in the jurisprudence established by the present case, the Constitutional Court found that the National Health Service is a public service which is subject to its own organisational and operational rules, which can be modified in the light of changes in the way in which, at any given point, it is felt that this public interest should be pursued. Users of a public service, whether free or fee-paying, are subject to the legal and regulatory rules on the conditions of access

and use, so that in order to benefit from the advantages offered by the service, they must fulfil the corresponding duties, burdens and requirements. There is therefore no justification to raise the principle of guilt in this context, as if a question of civil, criminal or administrative liability had arisen.

Private individuals wishing to gain access to goods or services provided by the Public Administration place themselves in a special legal situation that derives from the relationship involved in the use of a public service. This relationship presupposes that the individuals concerned possess rights on the one hand, but are simultaneously placed in legal positions which result from the law, regulations or the mere exercise of legal/public powers to regulate, and which entail corresponding “disadvantages” or burdens forming a counterpoint to the benefits obtainable via the practise of an administrative activity that is in the general interest. The legal consequences arising from a user’s failure to fulfil the duties or requirements to which he is subject are not dependent on any prior finding of wrongdoing (unless there is provision in the law for this eventuality), and are a mere objective product of the organisational and operational scheme of the service in question, as set out in the applicable legal rules.

The Constitutional Court accordingly held that the rule before it should not be declared unconstitutional.

#### *Supplementary information:*

The Ruling was the object of five dissenting votes, including that of the President of the Court (cases involving the generalisation of existing jurisprudence are subject to the procedure applicable to the successive abstract review of constitutionality, which requires that the Constitutional Court sit in plenary). All bar one of the dissenting opinions, which also raises the issue of the extent of the Court’s powers to address particular issues in cases concerning the “generalisation of rulings of unconstitutionality”, are based on a violation of the principle of proportionality that ought to be observed in matters involving a restriction of fundamental rights. This principle, according to the dissenters, is not observed if one accepts this interpretation of the rule. The dissenting opinions emphasise that the difficulty here is not the obligatory nature of the requirement to present the card, but rather the requirement for a guarantee that the user is aware that such presentation is a condition for exemption from payment for the service. Users are not told that they have to present the card or prove they have applied for one. The Public Administration simply sends them a notification to pay healthcare costs provided to them, and if a private individual does not receive the payment demand through no fault of his own, this has no effect on the imposition of the

ensuing consequences. The demands made on the beneficiary of the healthcare may not be especially burdensome, but does not obviate the disproportionate nature of the consequences of failing to comply with the rule, especially when the beneficiary was not informed of those consequences, or proof exists that he did not receive the payment demand through no fault of his own. The issue at stake here is the exercise of a fundamental social right, of equal importance to the right to health protection. The dissenting judges therefore considered that conditioning that exercise by imposing a procedural burden, whereby failure to fulfil that burden is linked to prevention of the exercise of the right in question, can only be considered a flagrant violation of the principle of proportionality when restrictions or conditions are imposed on a right that is both tendentially free and enshrined by the Constitution. They considered that the rule does not fulfil the requirement of need (the Public Administration can control a user’s entitlement to the services of the National Health Service via computerised databases); and that the extremely serious nature of the consequences (having to pay the full costs of hospital assistance) is disproportionate to the much less serious nature of any lack of procedural cooperation by the interested party.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2009-2-006

**a)** Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 12.05.2009 / **e)** 248/09 / **f)** / **g)** *Diário da República* (Official Gazette), 113 (Series II), 15.06.2009, 23444 / **h)** CODICES (Portuguese).

#### *Keywords of the systematic thesaurus:*

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

#### *Keywords of the alphabetical index:*

Evidence, evaluation.

*Headnotes:*

The Code of Civil procedure empowers judges to evaluate evidence freely. An interpretation that allows judges to accord value to testimony for which the witness has provided no grounds means that this rule is not unconstitutional, neither does it undermine the constitutional requirement for fair procedure, or any other constitutional parameter.

*Summary:*

The petitioner asked the Constitutional Court to assess the constitutionality of the principle of the freedom to evaluate evidence in civil cases, when interpreted in such a way as to allow value to be attached to the evidence given by a witness who does not give a concrete indication of the grounds for it.

Under the general principle of the freedom to evaluate evidence set out in the Code of Civil Procedure, judges are free to decide whether to attach weight to evidence provided by witnesses. They must do so in the light of the impressions they gain from listening to or reading it, in accordance with their experience.

The adoption of the Roman system of “free evidence” means that emphasis is placed on obtaining the material truth of the facts, to the detriment of the certainty of the result of the evidence that governs the “legal evidence” system. However, freedom to evaluate evidence is not the same as arbitrarily taking that evidence into consideration, inasmuch as the inherent duty on the part of the judge to provide grounds for the end result precludes “despotic” judgments. The source of the knowledge of the facts a witness presents is a particularly important factor in the judge’s assessment of the credibility of the account.

Under due process, the procedural rules comply with the material principles of justice, which the Constitutional Court has been rendering more precise on a case-by-case basis. In doing so the Court has often resorted to setting out sub-principles, with particular attention to the jurisprudence of the European Court of Human Rights.

With regard to the list of situations in which it is prohibited to attach value to evidence in civil cases, it has been argued that the constitutional provision setting out the guarantees applicable to criminal procedure and rendering evidence liable to be deemed null and void where it has been obtained by means that violate fundamental rights should be applied by analogy. The present case concerns the

breach of a procedural rule governing the presentation of a means of evidence in a civil case – a rule which is designed to make it easier to determine the truth. If a witness indicates the source of his knowledge about the facts he reports, the judge can more easily gauge the credibility of his account.

However, the need to protect the process of determining the truth of the facts does not necessarily imply that the breach of a procedural rule governing the presentation of evidence, which is designed to make it easier to gauge the value of that evidence, should be sanctioned by making it impossible to present. Despite such a breach, and although the evidence may have been presented in an improper manner, the evidence may still be of some use in discerning the material truth. These problems do not prevent the judge from wholly fulfilling the duty to provide the grounds for his decision on factual matters.

Whatever conclusion may be drawn as to the constitutionality of the legislative solution in cases where the judge is unaware of the grounds for a witness’s testimony, the fact that a witness does not indicate in his statement the sources of his knowledge does not necessarily prevent the judge from discerning the grounds for the testimony. As stated in the decision giving rise to the present appeal, those grounds may be deduced from other elements in the case file. They may be implicit from the facts presented in the testimony, or discernible from the nature of the relationship between the parties to the case and the witness.

A breach of the procedural rule in question does not necessarily prejudice the determination of the truth and the fulfilment of the duty to give full grounds for court decisions.

*Languages:*

Portuguese.



*Identification:* POR-2009-2-007

a) Portugal / b) Constitutional Court / c) Plenary / d) 18.05.2009 / e) 250/09 / f) / g) Diário da República (Official Gazette), 218 (Series II), 10.11.2009, 45762 / h) CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

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

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

*Keywords of the alphabetical index:*

Election, ineligibility for election.

*Headnotes:*

Justices of the peace are judges who administer justice in the name of the people and thus perform a jurisdictional function. They are not covered by the status which the Constitution affords to judges, but are subject to the rules on impediments and suspicions laid down in the legislation on judges. Thus, although the general constitutional rule governing access to public office is freedom of access for all citizens, justices of the peace are justifiably subject to the same restricted access to elected office as that applicable to the judges of law courts. A request by a justice of the peace to be included on a list of candidates for election to the European Parliament should be denied.

*Summary:*

An appeal was lodged against a Constitutional Court ruling rejecting a political party's proposed list of candidates for election to the European Parliament, on the grounds that one of the candidates, who performed the functions of justice of the peace, was not eligible.

The Constitutional Court noted that the Constitution expressly defines magistrates' courts as a category of court. The fact that their actual existence is optional does not invalidate the constitutional provision for their inclusion in one of the categories. The Constitution defines the courts as bodies exercising sovereign power which possess the responsibility to administer justice in the name of the people, and states that "in administering justice the courts shall ensure the defence of those citizens' rights and interests that are protected by law, repress breaches of the democratic rule of law and rule on conflicts between interests, public and private".

Interpreted in conjunction, these constitutional precepts mean that justices of the peace administer justice in the name of the people and ensure the defence of certain rights and interests that accrue to citizens and are protected by law. They therefore perform a jurisdictional function and magistrates' courts are included within the jurisdictional order and organisational structure. In the legislation providing for the organisation, competence and *modus operandi* of the magistrates' courts, amongst the general principles governing these courts are requirements that the work of justices of the peace be designed to permit the civic participation of the interested parties and to stimulate the just resolution of disputes by agreement between the parties, and that procedures in magistrates' courts shall be designed in accordance with, and guided by, principles of simplicity, appropriateness, informality, orality, and absolute economy of procedure. Magistrates' courts hand down decisions in disputes over which they have competence, based upon the application of the same rules as those applied by other categories of court with competence to hear the same questions of law. Criteria of strict legality will apply unless the parties agree otherwise, and the value of the suit does not exceed half the maximum limit of the monetary value of cases that can be brought before courts of first instance, when they can take decisions based on judgments of fairness.

Justices of the peace are not covered by the status which the Constitution affords to judges, who are formed into a "single body" and are "governed by a single statute". This is mainly because justices of the peace are appointed for a period of three years by the Council which monitors their appointment to office and which has disciplinary authority over them. However, they perform jurisdictional functions, not on an occasional or sporadic basis, but constantly for the duration of their appointment. From a constitutional perspective, this state of affairs justifies the decision by the legislative authorities to restrict the right of access by justices of the peace to public office by setting out the causes of ineligibility needed to "guarantee electors' freedom of choice" and "lack of bias and independence in the performance of their offices".

These necessary "guarantees of independence" must function "in every hypothesis applicable to the exercise of jurisdictional power".

The status accorded to justices of the peace varies from jurisdiction to jurisdiction. In Spain, for example, they are almost entirely subject to the rules governing "judicial magistrates", whereas in Italy the status of "honorary magistrate" differs from that of the "ordinary magistrate". The configuration established by the

Constitution means that there must always be provision for a body of measures designed to guarantee the independent performance of such functions. These rules are derived from the need to prevent possible conflicts of interest and to ensure the impartiality of the public authorities and, in the specific field of the jurisdictional function, the requirement to protect both the image and the substance of judges' independence, whichever category they belong to.

To the extent that it concerns the right to take part in politics, the constitutionally permitted restriction on the fundamental right of access to public office does not mean that everyone who may be subject to that restriction must possess the same legal status, simply because there is a situation which justifies it and which is provided for by the Constitution.

The forms of ineligibility associated with those holding positions that entail the performance of a jurisdictional function presuppose an acknowledgement that the occupation of these positions can lead to the imposition of an electoral condition with the potential to restrict the free exercise of the right to vote.

Although sitting judges may be subject to different frameworks created by different statutes, they may still be subject to identical restrictions on the fundamental right of access to public office, provided that the reasons that justify the restriction in constitutional terms apply.

The Constitutional Court accordingly resolved to reject the appeal and confirmed that the candidate was ineligible to stand for election.

#### *Supplementary information:*

The Ruling includes three dissenting opinions, which contend that there is no ineligibility in this case. The authors of the opinions state that when provision is made for cases of ineligibility, a restriction is placed on the fundamental right of citizens to participate in political life – a right of the greatest importance to the genuineness of the democratic system. In this case, not only is it intolerable to resort to an interpretation that extends the categories of ineligible persons or to any analogy in that process, but, in the event of any doubt, the recognition of eligibility must prevail. It is also argued that even if magistrates' courts are characterised as courts, and their work is included in the definition of the performance of the jurisdictional function, this must not necessarily lead to the recognition of ineligibility at stake in this Ruling. Indeed, there are members of true courts who perform jurisdictional functions and to whom it is not appropriate to apply the qualification "judges

performing jurisdictional functions", which results in ineligibility. These include the jurors in a jury court, social judges in minors' or labour courts, and arbiters in arbitration tribunals (whether permanent or ad hoc, optional or compulsory). Another argument, which one of the dissenters considered to be decisive, was that the incompatibility rules that are subsidiarily applicable to justices of the peace are those governing the civil service rather than judges, and thus the prohibition on engaging in party political activities of a public nature does not apply to justices of the peace. As there is no parallel prohibition in the civil service rules governing incompatibilities – particularly as regards senior civil servants – the author of the dissenting opinion deemed it impossible to sustain the argument that justices of the peace should be denied the right to perform party political functions of a public nature, particularly those involving belonging to the governing body of a political party, as this would constitute a restriction on the exercise of fundamental rights for which the law makes no provision. It would be entirely inappropriate to accept that a justice of the peace can publicly perform the functions of chairman of a political party, but cannot stand as that party's candidate at any election.

One dissenting opinion noted that magistrates' courts do not describe themselves as courts of law, but position themselves outside the Portuguese judicial organisational system as laid down by the Constitution and the Law governing the Organisation and Operation of the Courts of Law. The author of this opinion suggested that the relationship between magistrates' courts and the courts of first instance is not one that would limit the former's competence; rather, magistrates' courts are an alternative means of resolving certain disputes. They have not taken over or replaced the competences of the judicial courts, but instead belong to the category of conflict-resolving courts the existence of which is optional. The legislation on judges does not apply to justices of the peace, because they perform an office that is not jurisdictional. Furthermore, in terms of their duties and rights – especially with regard to remuneration – they are subject to the rules governing the civil service rather than those governing judges.

#### *Cross-references:*

- Ruling no. 231/2009 of 12.05.2009;
- Ruling no. 364/91 of 31.07.1991;
- Ruling no. 532/89 of 17.11.1989.

#### *Languages:*

Portuguese.



**Identification:** POR-2009-2-008

**a)** Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 08.07.2009 / **e)** 357/09 / **f)** / **g)** Diário da República (Official Gazette), 158 (Series II), 17.08.2009, 33459 / **h)** CODICES (Portuguese).

**Keywords of the systematic thesaurus:**

1.4 Constitutional Justice – **Procedure.**

**Keywords of the alphabetical index:**

Proceedings, irregularity.

**Headnotes:**

The object of an appeal for a concrete review of constitutionality must be one or more legal rules that allegedly violate constitutional precepts or principles. In an appeal on the grounds of unconstitutionality it is not possible to control the concrete judicial decision. Even if it directly applies constitutional precepts or principles, the judicial decision cannot in itself be the object of a review of constitutionality as regards either the correctness on the *infra*-constitutional legal plane of the normative interpretation reached by the court, or the way in which a normative criterion that had already been determined was applied to the specific circumstances of the case in point.

In any appeal to the Constitutional Court, the constitutionality of a rule or rules must necessarily be questioned. Appeal procedures such as the German *Verfassungsbeschwerde* or the Spanish *recurso de amparo*, which seek the review *sub specie constitutionis* of the concrete application of the law by another court, to seek a finding that the judicial act of application is in direct breach of one or more constitutional-law parameters, are not admissible.

**Summary:**

An appeal was lodged against a decision by the Supreme Court of Justice denying a request for compensation for non-material damage that was incurred as a consequence of a road accident and was attributed to the loss of the life of the petitioner's *intra*-uterine child and to the latter's suffering during the period preceding its death.

In the arguments she presented in her appeal to the Supreme Court of Justice, the petitioner in the present case expressed concern over an interpretation which denies that an offence against the right to *intra*-uterine life constitutes an unlawful fact which generates liability. Article 66 of the Civil Code states that personality is acquired at the moment of complete, live birth, and that the rights that the law attributes to a human entity as yet unborn but already conceived are dependent on its birth). The petitioner argued that this interpretation was materially unconstitutional, because it is in breach of the article of the Constitution that enshrines the inviolability of the right to life. However, in her appeal to the Constitutional Court, the petitioner only argued a "breach of Article 24 of the Constitution of the Portuguese Republic, which protects the inviolability of human life, including *intra*-uterine life, the unlawful violation of which is subject to civil compensation". When invited by the Ruling's first rapporteur to clearly state the normative interpretation she said was contained in the decision against which she was appealing and the constitutionality of which she wished the Court to consider, the petitioner maintained that there was a direct breach of Article 24 of the Constitution. In effect, she directly subsumed the factual situation in question to Article 24, in the sense that the latter should be directly applied to the concrete facts of the case and not used as a means of determining the content of the constitutional parameter with which the *infra*-constitutional-law rule should have been compared in order to gauge its legal validity.

The petitioner should, instead, have challenged the constitutionality of the Supreme Court of Justice's interpretation of Article 66 of the Civil Code. However, the Constitutional Court is not permitted to control such an erroneous assumption in her arguments concerning the concrete facts and the predetermined law, and was accordingly unable to hear the object of this appeal on the grounds of unconstitutionality.

**Supplementary information:**

The majority of the Justices took the view outlined above. The original rapporteur, however, dissented, was unable to continue to perform that role and was replaced. In his view, the Court should have ruled on the merit of the appeals, because in her arguments to the Supreme Court of Justice, the petitioner had raised the question of the unconstitutionality of the interpretation of Article 66 of the Civil Code so that a human entity still *in utero* does not possess a right to life, which would attract compensation for any injury. The dissenting Justice pointed out that the rule the constitutionality of which the petitioner had disputed was indicated in the petition to appeal to the

Constitutional Court by reference to the question which was raised before the Supreme Court of Justice. He said that the interpretation of Article 66 of the Civil Code that was adopted in the Ruling against which the present appeal was lodged – that the status of a subject of rights should be denied to a conceived but as yet unborn human entity – was that accepted by most legal theorists and jurisprudence. Nonetheless, other opinions were in circulation, according to which, despite the provisions of Article 66, the legal system does acknowledge the legal personality of a human entity that has been conceived, but has not yet been born. He also took note of the previous statement by the Constitutional Court to the effect that, despite the fact that gestating life is a legal asset that is protected by the Constitution and shares the objective protection which the latter grants to human life in general, Article 24 cannot be interpreted as granting a fundamental right to life on the part of the conceived but as yet unborn human entity, of which that entity is itself the subject. Although the unborn human entity has already been conceived, until it is born it is not included amongst the citizens who belong to the political/legal community whose possession of the subjective rights enshrined by the Constitution is recognised by law. Such an entity is therefore not recognised as a subject of the rights that accrue to all citizens on the basis of Article 12.1 of the Constitution.

However, as *intra*-uterine life is considered to be one of the stages of human life and is covered by the requirement of inviolability, the *infra*-constitutional order is obliged to adopt measures to protect it. At stake is the most important dimension of *intra*-uterine life – its very existence. An assessment is needed, as to whether the Civil Law's failure to recognise a subjective right to life on the part of a conceived but as yet unborn human entity implies a lack of protection that undermines the guarantee of a minimum level of protection. The dissenting Justice felt that the protection of *intra*-uterine life is not dependent on recognition of a right to life on the part of the conceived, but as yet unborn, human entity. It may be more effective to raise an entity to the category of a legal asset, to secure its protection, rather than recognising that it possesses legal subjectivity. The Civil Law contains a number of different measures designed to protect legal assets, including *intra*-uterine life. These include the institution of civil liability, under which anyone who commits an offence against assets that are protected by the legal order must reconstruct the situation which would have existed if the event that requires reparation had not happened, or provide monetary compensation should such reconstruction prove impossible.

### Languages:

Portuguese.



### Identification: POR-2009-2-009

a) Portugal / b) Constitutional Court / c) First Chamber / d) 09.07.2009 / e) 359/09 / f) / g) *Diário da República* (Official Gazette), 214 (Series II), 04.11.2009, 44970 / h) CODICES (Portuguese).

### Keywords of the systematic thesaurus:

5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.

### Keywords of the alphabetical index:

Marriage, equality / Marriage, right / Homosexuality, couple.

### Headnotes:

The Constitution's acceptance of the historical concept of marriage as a union between two persons of different sexes does not mean that the Constitution can be interpreted as directly requiring recognition of marriages between persons of the same sex. However, the Constitution does not prevent the legislative authorities from legally recognising unions between persons of the same sex, or considering those unions to be the same as marriages.

### Summary:

The petitioners lodged an appeal against a ruling of the Lisbon Court of Appeal that confirmed the decision of a lower court which denied them the possibility of entering into matrimony with each other. They began by alleging that various provisions of the Civil Code are materially unconstitutional, as well as the existence of an unconstitutionality by omission because the law does not provide for the possibility of marriage between persons of the same sex.

They based their position on the principle of equality enshrined in the Constitution. They made specific reference to the prohibition of discrimination based on

sexual orientation, and the right to found a family and to marry under terms of full equality. They added that marriage is an instrument for exercising the right to personal identity and the development of personality, with respect for the protection of the privacy of personal life.

In its arguments, the Public Prosecutors' Office (PPO) emphasised that it was inappropriate to begin by arguing the existence of an unconstitutionality by omission because this argument is incompatible with the concrete-review nature of the present case. The PPO then went on to point out that the *infra*-constitutional legislative authorities are under no obligation to accept the various sociological concepts of "family" on an entirely equal footing, in such a way that every type of family would have to be granted exactly the same degree of legal recognition. In the PPO's opinion, if the Constitutional Court were to uphold the appeal, it would have to hand down an "additional decision" which would expand upon the legal institution of marriage from a jurisprudential perspective.

The PPO went on to say that this type of "additional decision" is the appropriate format for the restoration of the constitutional principle of equality where this has been breached. However, it must be used sparingly; its excessive use may not be compatible with the constitutional prohibition on the performance of materially legislative functions by a jurisdictional body. As it is possible for any of a variety of different sets of legal rules to be fully compatible with the principles laid down by the Constitution, in such a case it would then be necessary for the legislative authorities to take the matter into consideration or adopt appropriate legislative measures.

The petitioners argued that the rule set out in Article 1577 of the Civil Code, whereby marriage can only be contracted between "persons of different sexes" is unconstitutional to the extent that it prohibits marriage between persons of the same sex. The petitioners did not allege that the rule allowing persons of different sexes to marry is unconstitutional. Their position was that persons of the same sex should be allowed to marry – a requirement that they deduced directly from the Constitution. In their view, a situation had arisen where the regulation that was needed to implement a constitutional requirement did not exist. However, to pose the issue in these terms is to define it as a question of unconstitutionality by omission. Under the Constitution, private individuals do not have the powers to raise such questions.

Nevertheless, the Constitutional Court decided to hear the appeal, as the Lisbon Court of Appeal in its decision had effectively applied the challenged rule in a manner that the petitioners considered unconstitutional. However, the Constitutional Court emphasised that the petition, the structure of which resembled an allegation of the existence of an unconstitutionality by omission, necessarily had to restrict itself to the rule that was actually applied in an allegedly unconstitutional sense. The Ruling therefore emphasised that within the scope of the present appeal, the Court was not only precluded from adding rules needed to implement a hypothetical finding that the appeal should be upheld, but was also unable to evaluate the conformity with the law of other rules derived from the legal treatment of marriage, such as those concerning the effect of the latter.

The Constitutional Court also took the view that the crux of the question posed in the appeal was not whether the Constitution allows the creation of a system of homosexual marriage, but rather whether it requires the institution of marriage to be configured so as to include unions between persons of the same sex. In analysing this question the Court felt that importance should be attached to the fact that the text of Article 36.1 and 36.2 of the Constitution (which enshrine the right to found a family and to marry on terms of full equality) has remained unchanged since the original version of the Constitution was passed in 1976. At that historic moment, when the Constitution handed the ordinary legislative authorities the task of writing the rules on the "requirements for" and effects of marriage, Article 1577 of the Civil Code already stated that "marriage shall be a contract entered into by two persons of different sexes". If the constitutional legislative authorities had wanted to change the legal configuration of marriage by ordering their counterparts to pass legislation permitting persons of the same sex to marry, they would have stated it explicitly. The petitioners placed special emphasis on the amendment to Article 13.2 of the Constitution (on the principle of equality) which was introduced by the sixth revision of the Constitution (2004), and which expressly prohibits discrimination based on "sexual orientation". However, the Court felt that the addition of sexual orientation only means that the legal order is "indifferent" to somebody's sexual orientation. The Court noted that the petitioners' argument does not deal with the issue as to why, in 2004, the constitutional legislative authorities did not complete the supposed imposition of homosexual marriage. One cannot simply assume that they thought it unnecessary to include an express normative reference to that end.

The Court also noted that the petitioners were working on the assumption that extending marriage to persons of the same sex would not entail a redefinition of the legal order, but a simple removal of the restriction of marriage to persons of different sexes. However, the fact that marriage is expressly mentioned in the Constitution, although it is not defined, indicates that those drafting the Constitution had no intention of overturning the common concept, which is rooted in the community and accepted by the civil law. The Court confirmed the opinion of several authors, who were of the opinion that the Constitution's acceptance of the historical concept of marriage as a union between two persons of different sexes does not mean that the Constitution can be interpreted as directly requiring recognition of marriages between persons of the same sex. However, the Constitution does not prevent the legislative authorities from legally recognising unions between persons of the same sex, or considering those unions to be the same as marriages. The Ruling says that the fact that the Court accepts that the marriage contemplated by Article 36 must be entered into by persons of different sexes does not imply an endorsement by the Court of the notion that Article 36 possesses the scope of a guarantee, so that the constitutional rule limits itself to definitively accepting the concept of marriage that was in force in the civil law at a particular point. Institutional guarantees should not be viewed in this way; neither should the ordinary law (as opposed to the Constitution itself) be viewed as the parameter for gauging the extent of constitutional protection. The Court did not therefore accept that the form of marriage which is protected by the Constitution necessarily entails petrifying the existing civil-law definition of marriage and excluding the legal recognition of other ways in which people share their lives. The Court referred to the comments it had made in an earlier Ruling, to the effect that the historical/cultural implementation of the content of the idea of the dignity of the human person falls within the remit of the legislative authorities. Within the framework of the bodies that exercise sovereign power, they are primarily responsible for the creation of the legal order and for its dynamics.

The Court also pointed out that the history of constitutionalism is marked by the progressive constitutionalisation of human rights, and that it is possible to observe the way in which the thinking of the majority has evolved since the time when rights such as the right to vote were reserved for citizens who were adult, male and land-owners. However, the process of incorporating such rights into a Constitution is based on the concern to ensure that the constitutional legislator catalogues them, rather than the rights becoming part of a process ordered by a

court. A key consequence of accepting the sovereignty of the people is the enshrining of the system of the separation of powers. With it also comes acceptance of decisions issued by impartial and independent bodies, such as the courts, as well as acceptance that the reform of the legal order is in the hands of bodies that represent the will of the people.

The Court recognised the necessity of accepting that the changes the petitioners were seeking involves a far-reaching revision of the existing civil-law concept of marriage, but stressed that this did not mean that this concept had to be imposed at constitutional-law level. One could interpret the institutional guarantee format as an obligation on the part of the legislative authorities to create rules establishing a functional content for same-sex unions which is equivalent to that of marriage. However, these rules do not necessarily entail an extension of the institution of marriage to persons of the same sex. Any other conclusion would presuppose that the legislative authorities – but not the Court – opt for a concept that views marriage as a simple private relationship.

#### *Supplementary information:*

The Ruling includes two dissenting opinions. The author of one of the opinions explains that he hesitated over the solution adopted by the majority but could not see any arguments in its favour other than traditional ones that he felt were unacceptable. The second dissenting Justice said that she agreed with the notion that determining whether the challenged rule is in breach of the principle of equality is a question to which the answer is to be found in the concept of marriage that is adopted. She considered that marriage is not “a social institution that is presented to spouses as possessing a relatively stable meaning – that of a union between man and woman, which is particularly based on its function in the reproduction of society”, and which constitutes “a specific means of involving one generation in creating and raising the following one, and the only such means that ensures that a child enjoys the right to know and be educated by his/her biological parents”. On the contrary, the author of the second dissenting opinion felt that the constitutional rule means that everyone has the right to marry on terms of full equality, i.e. everyone has the right to gain access, without any differentiation, to the legal (and symbolic) meaning of the act of entering into a marriage undertaken by two persons who want to found a family by fully sharing their lives. The dissenting Justice said that she had arrived at this conclusion in the absence of sufficient material grounds for differentiation, which she had been unable to find.

*Cross-references:*

The Ruling makes extensive reference to comparative jurisprudence, including that of the European Commission of Human Rights and the Court of Justice of the European Communities.

*Languages:*

Portuguese.

*Identification:* POR-2009-2-010

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 28.08.2009 / **e)** 427/09 / **f)** / **g)** *Diário da República* (Official Gazette), 181 (Series II), 17.09.2009, 38013 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Imprisonment, open scheme / Prison, administration, powers, open scheme, placement, decision.

*Headnotes:*

Subject to certain conditions that are necessary to safeguard order, security and discipline in prison, the protection of victims and the defence of public order and peace, and subject to the consent of the inmate concerned, the rule included in the Decree of the Assembly of the Republic that approved the new Code governing the Execution of Sentences (CEP) empowers the Director-General of Prison Services to place inmates in an open scheme outside prison.

*Summary:*

The President of the Republic asked the Constitutional Court to conduct a prior review of the constitutionality of a rule included in the Decree of the Assembly of the Republic that approved the new Code governing the Execution of Sentences. He asked for the review due to concerns that this rule would significantly change

both the existing legislative model governing this matter, and the penal paradigm for the purpose of sentences. A further justification for his request was the fact that the Public Prosecutors' Office would now replace the judges of the Sentence Execution Court as the authority responsible for regularly visiting prisons, verifying the legality of decisions taken by the prison services, and performing other functions linked to the execution of sentences; and the fact that prison administration bodies would now have the power and duty to decide whether an inmate should be placed in an open scheme when various preconditions in terms of both the essence and the form of the situation are fulfilled.

The President of the Republic argued that the legal rules he was asking the Court to consider raised doubts as to the practical compatibility between the protection of new rights that were to be granted to inmates on the one hand and the pursuit of the purposes of social reparation, the effective safeguarding of fundamental legal values and assets and the prevention of situations that cause disquiet in society, on the other.

He expressed the view that there were aspects of the new system that undermined the current paradigm for the execution of custodial sentences, which consists in distinguishing between a material domain involving the control and modelling of the execution of sentences, with which the jurisdictional function is charged, and a domain covering the organisation and inspection of penitentiary facilities, which is the responsibility of the administrative function.

In its Ruling the Court noted that the placing of a convicted inmate in an open scheme falls within the framework of fundamental political/criminal guidelines set out in a number of international instruments on the execution of criminal sanctions. These include Committee of Ministers of the Council of Europe Recommendations Rec(2003)23 and Rec(2006)2, of which the latter specifically covers European Prison Rules. These recommendations set out principles such as individualisation, normalisation, responsibility, and progression, and call for sentences to be served under progressively less restrictive conditions. They also state that the restrictions imposed on persons who are deprived of their freedom must be limited to those which are strictly necessary and proportionate to the legitimate objectives that underlie them.

The decision to place a convicted inmate in an open scheme is based on two fundamental premises: that the execution of sanctions involving the deprivation of freedom must be designed to socialise the offender; and that the deprivation of freedom is the *ultima ratio* of criminal policy. The former is dictated by the

principle of sociality, under which the state is responsible for the task of providing convicts with conditions they need in order to achieve reintegration into society; the latter is derived from the principle of the necessity of a penal intervention.

The Constitutional Court considered the question of whether, when it reserves the jurisdictional function to the courts, the scope of Article 202.2 of the Constitution covers the decision to grant permission to leave the prison. The Court took the view that compliance with this provision requires that the court have the last word, not the first. The legislation in question ensures that this is the case, because although it makes the Director-General of Prison Services responsible for the decision to place an inmate in an open scheme outside prison, he must notify the representative of the Public Prosecutors' Office (PPO) at the Sentence Execution Court, in order for the decision's legality to be verified. If the PPO finds that the decision is legal, it simply orders that it be filed; if not, it must challenge the decision and ask the Sentence Execution Court to annul it.

The Constitutional Court pointed to a clear evolution in the path towards the jurisdictionalisation of prison sentences, driven in part by the legal position which inmates came to occupy in the execution of custodial sentences. Under Article 30.5 of the Portuguese Constitution, convicted persons who are the object of a sentence or security measure that deprives them of their freedom retain their fundamental rights, subject only to such limitations as are inherent to their convictions and to the specific requirements imposed by the execution of the respective sentences.

The Court considered that if the existing penal law is taken as the point of reference, one must conclude that placing an inmate in an open scheme outside prison is not comparable to the decisions that can only be taken by a judge and in particular it is not comparable to the grant of parole or home leave. When parole is granted, there is a change in the content of the sentence; it loses the element of deprivation of freedom.

The same applies to home leave, which traditionally falls within the competence of the Sentence Execution Courts. This too entails a change in the content of the sentence. However, when the Director-General of Prison Services places an inmate in an open scheme outside prison, this is different; there is no change in the content of the sentence to which the inmate was convicted. This decision "continues to entail" the deprivation of freedom, in that there is only a change in the content of the execution of the custodial sentence.

The execution of a custodial sentence must be guided by the principle of the individualisation of prison sentences. A programme is necessary for the duration of the sentence, divided into phases in order to prepare the inmate for eventual freedom. "Access to a free environment" – serving the custodial sentence in an open scheme outside prison – is in addition to the possibility that already exists in the original custodial sentence. Placing the inmate in an open scheme outside prison is one of the formats for his or her service of their custodial sentence. It is the judicial decision to convict and sentence the person who committed the criminal infraction which deprives him or her of their freedom in order to safeguard other rights or interests protected by the Constitution.

#### *Supplementary information:*

The Ruling was the object of two dissenting opinions, one of which was that of the President of the Court. The author of the first opinion took the view that the Constitution requires that decisions to place inmates in open schemes outside prison be issued by a judge. He said that one of the main characteristics of the open system is that it involves education, vocational training, work, or programmes undertaken in a free environment without direct surveillance. It is a semi-parole system. "Semi" because it only lasts as long as is strictly necessary for the inmate to study or work outside the prison, and "parole" because the inmate can only use this period of freedom to engage in those activities. This system is identical to the semi-detention system, which trial judges may impose in the case of prison terms of up to one year, on condition that the law does not require their substitution by another kind of punishment, or by imprisonment only on non-working days. Whether one considers placing an inmate in an open scheme outside prison to be a change in the content of the original conviction and sentence, a way of making the punishment that was imposed at that time more flexible, or a possible format for the execution of the original sentence, the decision to apply this scheme determines, during one phase of the sentence's execution, the content of the custodial penalty to which the inmate was sentenced.

While the original sentence defined the type and extent of the punishment, the decision to place the inmate in an open scheme outside prison defines the concrete system under which the sentence is served, so it plays a role that is at least as important than the original one.

The decision must evaluate and take into account the inmate's previous behaviour in prison, the danger that he may avail himself of this period of freedom to escape execution of the sentence or commit new offences, the protection of his victim(s), and the

defence of public order and peace. In the opinion of the dissenting Justice, the crux of this decision is the resolution of the conflict between the values of freedom and individual rights on the one hand, and the defence of society in its present form on the other.

The author of this dissenting opinion also pointed out that with regard to the division of the state's powers, there is no doubt as to the judicial nature of sentences imposing criminal sanctions. Because it leads to the determination of the essential content of an earlier custodial sentence, a decision to place inmates in an open scheme outside prison must share this nature.

The author of the second dissenting opinion argued that the possibility created by the legislation in question of placing an inmate in an open scheme outside prison, constitutes a modelling of the execution of custodial sentences which is more than a mere instrument for making prison terms more flexible that is intrinsic to the management of the life inside prisons. Both the legal design of the institution and the process of weighing up interests bring the adoption of this measure closer to the performance of the jurisdictional function. The second dissenting Justice argued that although it does not involve restoring a convict's freedom (as is the case when an inmate is paroled), this measure is central to the execution of his prison term and thus to his re-socialisation – a role that continues to warrant placing the competence to decide in the hands of the judge of the Sentence Execution Court. It is thus the importance of the instrument for modelling the execution of sentences which involve the deprivation of freedom, and the scope which that instrument is acknowledged to possess, that require judicial intervention. This is especially significant because, from the perspective of the convict's re-socialisation, that importance and scope are equal in format to home leave, and the latter falls within the competence of the Sentence Execution Court. One precondition for this measure is that the inmate must have successfully completed some form of short-term release authorised by a jurisdictional body. It would be strange if the need for jurisdictional intervention were to be dispensed in the adoption of one scheme, when this did not apply to one of its preconditions.

#### *Languages:*

Portuguese.



## Russia Constitutional Court

### Important decisions

*Identification:* RUS-2009-2-003

a) Russia / b) Constitutional Court / c) / d) 16.07.2009 / e) 14 / f) / g) *Rossiyskaya Gazeta* (Official Gazette), 05.08.2009 / h) CODICES (Russian).

*Keywords of the systematic thesaurus:*

4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment**.

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

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

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

*Keywords of the alphabetical index:*

Judiciary, independence, guarantees.

*Headnotes:*

The provisions of the Law on the Status of Judges allowing retired judges to be appointed to dispense justice are unconstitutional.

*Summary:*

The case concerned a complaint by a person who had been sentenced to imprisonment by a court. The President of the court in question was a judge whose term of office had expired four years previously. However, despite having retired, he was still performing judicial functions owing to the existence of vacant posts and the large number of cases pending before the court.

According to the applicant, the judge in question no longer had the status of judge because his term of office had not been duly extended. This situation therefore permits doubt as to his competence, independence and impartiality. The applicant also

alleges that his constitutional rights are infringed by the provision of the Law on the Status of Judges making it possible for a retired judge to dispense justice.

Under the Constitution, “everyone is guaranteed protection of his or her rights and liberties in a court of law”. In accordance with international standards relating to justice, the guarantees include the requirement that a court should be composed of trained and competent judges possessing full powers.

In Russia, judges enjoy independence, irremovability and immunity. In accordance with international standards and domestic legislation, candidates must satisfy specific requirements such as impartiality, honesty, competence and conscientiousness.

According to the Constitution, the federal parliament may require judges, as the bearers of judicial power, to fulfil certain specific conditions (competence, age, and education, length of service or completion of a qualifying period) and to possess certain moral qualities. Parliament must lay down the rules relating to the training of judges and ensure that candidates are selected in accordance with these requirements.

The Law on the Status of Judges provides that judges – and candidates for judicial posts – must fulfil these requirements and also lays down the rules relating to their appointment, their term of office and the termination of their duties. However, when the number of pending cases increases and judges’ posts remain vacant, it may become more difficult for citizens to have access to justice and this will then affect their constitutional rights. In the case in point, Article 7.1 of the above-mentioned law provides that retired judges may be called upon to take up their duties again. This should not be confused with the appointment of a judge. The terms “judge” and “retired judge” cannot be regarded as synonyms because retired judges retain only the title of judge, the guarantees of immunity and membership of the judicial community.

The three-year term of office of newly appointed judges is actually a trial period. This trial period is necessary to bring out any deficiencies which may prevent the appointment of a judge for life. However, the main basis for refusing to recommend an indefinite appointment is an assessment of the judge’s moral and professional qualities.

For these reasons, a retired judge whose term of office has expired and who had not been given an indefinite appointment cannot be called upon to take up his duties again. This privilege is reserved for

judges with “honoured” status who have retired after completing a minimum of 10 years’ service.

Consequently, the decisions taken by the Court in respect of the applicant under the unconstitutional provisions must be reviewed.

*Languages:*

Russian.



# Slovakia

## Constitutional Court

### Statistical data

1 May 2009 – 31 August 2009

Total number of judgments:

Number of decisions made: 791

- Decisions on the merits by the plenum of the Court: 4
- Decisions on the merits by the Court panels: 91
- Number of other decisions by the plenum: 5
- Number of other decisions by the panels: 321

### Important decisions

*Identification:* SVK-2009-2-001

**a)** Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 11.02.2009 / **e)** PL. ÚS 6/08 / **f)** / **g)** *Zbierka nálezov 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.**

4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility.**

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:*

Electoral rights / Prisoner.

*Headnotes:*

Election deposits to both the national and the European Parliament at the present level is constitutionally acceptable. Preventing those serving prison sentences from exercising the right to stand for election does not breach the Constitution. Preventing prisoners from exercising the right to vote in elections to both the national and the European Parliament is not in conformity with the Constitution, but preventing them from voting in elections to local and regional councils is constitutionally acceptable.

*Summary:*

The Prosecutor General filed a petition with the Constitutional Court challenging the duty of political parties to pay a sum of money (election deposit) as a necessary precondition to stand for election to the European Parliament or to the national Parliament. It was suggested in the petition that the system of deposit infringed the principle of equality, the right to stand for election and the right to vote. It was also argued that it hampered the principle of free competition of political parties.

The rationale behind the Prosecutor General's argument that the election deposit restricts the right to stand, the principle of equality and thus the right to vote was that only citizens supported by economically strong political parties could participate in political competition. This also affects the right to vote and violates the principle of equality because it prevents the electorate from voting for candidates not supported by rich parties. Lack of resources does not automatically mean lack of voters. The final election results themselves show how each political party is represented, so every political party should have the possibility of being elected. The minimum vote clause (electoral threshold) is a sufficient measure to secure the integrity and functionality of both the national and the European Parliament. There is no need for an election deposit in this sense.

Under the Law on Elections the electoral threshold is 5% and if a political party gains at least 2% of the vote, the government repays the election deposit.

The Court found the election deposit to both the European and the national Parliament to be in conformity with the Constitution. The Court took the position that the principle of free competition is not absolute and the right to stand for election may be subject to legitimate restriction. The official explanation for the governmental bill stated as a reason for election deposits the bad experience with the previous system of candidacy based on verifying the number of members or supporters of non-parliamentary political parties. This aim of the election deposit (to eliminate the previous problems) was not considered as legitimate by the Court.

Nevertheless, election deposits have several other purposes. Contribution to election expenses is not legitimate, due to the public interest in democratic elections. Securing integrity and functionality was not fully accepted as a legitimate aim, because less intrusive means (such as a minimum vote clause) are available. The Court found that the main and fully acceptable legitimate aim for election deposits is to prevent political parties that are not serious contenders from participating in the elections. The deposit should serve as a motivating factor for political parties which genuinely wish for power and which have a real chance of success, as opposed to parties which merely wish to publicise themselves or undermine others. The Court also took into consideration the sum of money required as election deposit. Election deposit for the European Parliament is 1670 Euro, which the Court found completely acceptable. The deposit for the national Parliament is 16 600 Euro, which the Court considered to be almost too much, but still acceptable.

The Prosecutor General also challenged provisions preventing those serving prison sentences from exercising their right to vote or the right to stand for election to the European Parliament, national Parliament, or local and regional councils. He suggested that these provisions resemble the penal sanction of losing political rights, which is no longer part of the Slovakian legal order. He went on to observe that whilst service of a prison sentence may prevent a prisoner from carrying out public office, it should not prevent him/her from competing for such office or supporting a candidate for such office through voting. From the technical point of view, there are no obstacles to the exercise of the right to vote in prison. Ultimately laws adopted by Parliament are also binding on prisoners.

The Court decided that preventing prisoners from exercising the right to stand for any type of election conforms to the Constitution. This prevention is implicit in their restriction of personal liberty. For practical reasons prisoners cannot compete in

electoral campaigns. Candidacy for and membership of Parliament cannot be practically exercised by prisoners. The Court also pointed out that under Article 81a.f of the Constitution, a prison sentence will result in a Member of Parliament losing his mandate. Thus it is a *minore* and *maius rationale* to prevent prisoners from exercising the right to stand for election.

The Court decided that preventing prisoners from voting in election to national and the European Parliament is not in conformity with the constitutional right to vote, with basic electoral principles, the principle of a state governed by the rule of law and the principle of democracy. The Court noted that there is no legitimate aim for such restriction. The territory of the Slovak Republic is one constituency for the parliamentary elections. There are no obstacles to organizing these elections in prison. Ultimately Parliament adopts laws which are binding on everyone under Slovakian jurisdiction including prisoners. The Court adopted a similar approach to elections to the European Parliament. It pointed out that the European Parliament has some effect on prisoners. The Court applied the European Court of Human Rights decision *Hirst v. United Kingdom* in this part of its reasoning.

The Court decided that denying prisoners the right to vote for both local and regional elections conforms to the Constitution, principally because while serving their sentences, prisoners are not part of their local community and local governments does not affect their lives in prison.

#### *Supplementary information:*

A dissenting opinion was expressed regarding the part of the decision relating to election deposits by Justice Mészáros. He stressed that post-totalitarian countries should be more careful when restricting political rights. This is the reason for Article 31 of the Constitution. Preventing political parties that are not "serious contenders" is not a legitimate aim. All registered parties fulfil the criteria for elections. Their level of success in Parliament should be a matter of popularity rather than sponsorship. Election deposits are not helpful to small and non-parliamentary parties. Although the European Court of Human Rights allows for election deposits, a margin of appreciation should have been applied in this case. Although some Eastern European Constitutional Courts have recently upheld election deposits [UKR-2002-1-002, EST-2002-2-006, EST-2003-2-001, ROM-2008-1-001], the dissenting judge concurred with the opposite stance of the Czech Constitutional Court in PL. ÚS 42/00 [CZE-2001-1-001].

**Cross-references:**

- *Hirst v. The United Kingdom* (no. 2)[GC], Application no. 74025/01, judgment of 06.10.2005, *Bulletin* 2004/1 [ECH-2004-1-003].

**Foreign case-law:**

- *Bulletin* 2002/1 [UKR-2002-1-002];
- *Bulletin* 2002/2 [EST-2002-2-006];
- *Bulletin* 2003/2 [EST-2003-2-001];
- *Bulletin* 2008/1 [ROM-2008-1-001];
- *Bulletin* 2001/1 [CZE-2001-1-001].

**Languages:**

Slovak.



## Slovenia

### Constitutional Court

#### Statistical data

1 May 2009 – 31 August 2009

The Constitutional Court held 18 sessions during the above period. 8 were plenary and 10 were in Chambers. Of these, 4 were in civil chambers, 3 in penal chambers and 3 in administrative chambers. The statistics show that on 31 August 2009, there were 277 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 1 062 unresolved cases in the field of human rights protection (denoted Up- in the Constitutional Court Register). The Constitutional Court accepted 93 new U- and 5 329 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court resolved 51 (U-) cases in the field of the protection of constitutionality and legality (11 decisions and 41 rulings issued by the Plenary Court). 1 case joined to the above-mentioned cases for common treatment and adjudication.

Accordingly the total number of U- cases resolved was 52.

In the same period, the Constitutional Court resolved 224 (Up-) cases in the field of the protection of human rights and fundamental freedoms (37 decisions issued by the Plenary Court, 187 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.

treatment of such disadvantaged social groups or individuals (disadvantaged due to a particular personal circumstance, as determined in Article 14.1 of the Constitution) the requirement that discrimination is prohibited can in certain instances entail a further requirement that necessary and appropriate adjustments be made to prevent these groups or individuals being in a disadvantaged position. Positive measures adopted for this purpose do not entail an interference with the principle of equality but are intended for its implementation. Therefore, an omission or denial of necessary and appropriate accommodation in such instances constitutes an interference with the right to equal, i.e. non-discriminatory, treatment as determined in Article 14.1 of the Constitution, which is constitutionally admissible only if it passes the strict test of proportionality.

## Important decisions

*Identification:* SLO-2009-2-002

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 13.11.2008 / **e)** U-I-146/07 / **f)** / **g)** *Uradni list RS* (Official Gazette), 100/08 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability**.

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**.

*Keywords of the alphabetical index:*

Civil procedure / Adversarial principle / Disability, discrimination / Discrimination, indirect / Discrimination, positive, appropriate measures / Disabled person, right.

*Headnotes:*

The requirement for *de facto* as well as formal equal treatment stems from the principle of non-discrimination (as a fundamental element of the principle of equality) under Article 14.1 of the Constitution. Direct and indirect discrimination are therefore constitutionally inadmissible. Indirect discrimination exists where individuals or social groups are formally guaranteed equal rights or an equal scope of rights, but individuals who are in a less favourable position as a result are deprived in terms of exercising their rights or fulfilling their obligations. In order to ensure the equal

Although they are an objectively disadvantaged social group, the existing civil procedure regulations do not allow blind and partially sighted persons the necessary and appropriate adjustments which would enable them to exercise their right to fair treatment in proceedings (Article 22 of the Constitution) on equal terms. Such an omission by the legislature amounts to a constitutionally inadmissible interference with their right to non-discriminatory treatment (Article 14.1 of the Constitution). The legislature did not demonstrate that any constitutionally admissible reason existed for denying necessary and appropriate accommodation.

*Summary:*

As regards written communication between the court and parties to proceedings, under Article 103 of the Civil procedure Act (CPA), summonses, decisions, and other court documents shall be sent to the parties and other participants in proceedings in the language officially being used by the court. In accordance with Article 104 CPA, the same applies to applications that the parties (or other participants) send to the court. It is not clear from the statutory text whether the court in civil proceedings should order a Braille transcript of court documents and the written applications of participants in proceedings upon the motion of the party on the basis of, *mutatis mutandis*, application of the above-cited statutory provisions. Moreover, the basis for the interpretation that, at the expense of the court, blind persons are ensured transcripts of court documents and written applications of other participants in proceedings in a form that they are capable of perceiving cannot be found in the provisions of the CPA.

Article 152 CPA determines that (as a general rule) each party shall provide in advance the payment for costs resulting from their acts. In the final analysis, the unsuccessful party in litigation will bear the costs of proceedings (Article 154 CPA), which is supplemented by the principle of guilt (Article 156 CPA), which has a corrective nature, and special individual rules (Articles 158 to 161 CPA), which are not relevant to the case at issue. If blind persons are not ensured a Braille transcript of court and other documents in proceedings at the expense of the state, then once cannot say there is a right to use Braille.

The petitioner argued that due to equal treatment which does not take their special needs into account, blind persons do not have the same opportunities to review the content of court and other documents in proceedings as the opposing party, and consequently they do not have equal opportunities to communicate effectively with the court and with the opposing party. The content of the petitioner's above-mentioned allegations is that blind persons do not have equal opportunities to exercise their right to an adversarial procedure and the right to the equal treatment of parties in civil proceedings.

The principle of non-discrimination (as a fundamental element of the principle of equality) within the meaning of Article 14.1 of the Constitution is established in an essentially different manner by comparison with Article 14.2, since non-discrimination with regard to guaranteeing human rights, regardless of the individual's personal circumstances, supersedes the usual formal frameworks of equality. The standpoint that the requirement of *de facto* equal treatment (as well as formal equal treatment) stems from the requirement of non-discriminatory treatment, has been adopted in recent (Slovene and comparative) constitutional case-law, as well as in the case-law of the European Court of Human Rights. A substantive approach to understanding and exercising equality indicates that the (formal) equal treatment of individuals in equal (relevantly similar) positions does not guarantee *de facto* equality for those individuals who are formally treated equally but who are in a less privileged position, due perhaps to a position on the margins of society, experiencing subtle prejudice and stereotyping, past discrimination or under-representation in certain areas of society. It can therefore be argued that the principle of equality also has a normative power in the sense that the law should legitimately create certain differences in order to abolish differences which are a result of traditional and long-lasting discrimination. This constitutes implementation of the principle of equal opportunities. The Constitutional Court has already recognised this positive aspect of equality.

In the light of the above, the Constitutional Court found that the existing rule of civil procedure which, although they are an objectively disadvantaged social group, does not accord special rights to blind persons but treats them on an equal footing with other participants in proceedings, results in an infringement of their right to non-discriminatory treatment (Article 14.1 of the Constitution). Preventing access to court and other documents in civil proceedings in a form that blind persons are capable of perceiving presents a significant obstacle for blind persons, which (by comparison with others in the same position) makes exercising their right to fair treatment significantly more difficult.

With regard to the possibility of reviewing the content of the written procedural acts from the court and participants in proceedings, blind persons are not only in a disadvantaged position by comparison with those who do understand the Slovene language, but they are also in a substantially more difficult position by comparison with those who do not understand it. Unlike those who do not understand the Slovene language, blind persons cannot avail themselves of court or other documents in proceedings in a form that they can understand.

The institution of authorised representation does not guarantee blind persons an equal position in exercising their rights in civil proceedings. If it is required only of blind persons that they exercise their rights with the assistance of an authorised representative, even if such representation were provided at the expense of the state, this would not be a special benefit for blind persons, but would discriminate against them, as they are not able to exercise their rights in judicial proceedings under the same conditions as those who can choose freely whether to enlist the help of an authorised representative.

Having established an omission on the part of the legislator in terms of allowing blind persons necessary and appropriate adjustments to allow them to exercise their right to fair treatment in civil proceedings on an equal basis, which is an impingement upon their right to non-discriminatory treatment (Article 14.1 of the Constitution), the Constitutional Court proceeded to examine whether such an interference is constitutionally admissible. The legislature is under a duty to regulate the position of blind persons in civil proceedings within the frameworks of its field of discretion, so as not to interfere excessively with the human rights of other participants in proceedings. Account must also be taken of the fact that there already exists a statutory basis for introducing electronic operations into civil proceedings, which will significantly facilitate the

possibility of ensuring reasonable accommodations for blind persons. The National Assembly did not demonstrate the existence of a constitutionally admissible reason for the established interference with this human right by alleging that it is obliged to prevent excessive costs for the parties.

The Constitutional Court therefore held that the challenged regulation of civil proceedings which does not take into consideration the special position of blind (and partially sighted) persons who participate in them and are not ensured an equal position in exercising their right to fair treatment (Article 22 of the Constitution) is inconsistent with Article 14.1 of the Constitution (paragraph one of the disposition). The Constitutional Court indicated the existence of a gap in the law on the regulation of civil proceedings which cannot be filled. This gap is substantively deficient to the extent that filling it on a "case by case" basis when necessary would be arbitrary; no predictable and legally reliable criteria exist to govern how to proceed in individual cases.

#### *Supplementary information:*

Legal norms referred to:

- Articles 14.1 and 22 of the Constitution [URS];
- Articles 40.2 and 48 of the Constitutional Court Act [ZUstS].

#### *Cross-references:*

- Decision no. Up-39/95, dated 16.01.1997, the *Court's Official Annual Collection* OdlUS VI, 71;
- Decision no. Up-108/00, dated 20.02.2003, *Official Gazette RS*, no. 26/03 and the *Court's Official Annual Collection* OdlUS XI, 49;
- Order no. Up-43/96, dated 30.05.2000, the *Court's Official Annual Collection* OdlUS IX, 141;
- Decision no. Up-404/05, dated 21.06.2007, *Official Gazette RS*, no. 64/07 and the *Court's Official Annual Collection* OdlUS XVI, 101;
- Decision no. U-I-283/94, dated 12.02.1998, *Official Gazette RS*, no. 20/98 and the *Court's Official Annual Collection* OdlUS VII, 26;
- Order no. Up-1378/06, dated 20.05.2008, *Official Gazette RS*, 59/08;
- Decision no. U-I-298/96, dated 11.11.1999, *Official Gazette RS*, no. 98/99 and the *Court's Official Annual Collection* OdlUS VIII, 246;
- Decision no. U-I-18/02, dated 24.10.2003, *Official Gazette RS*, no. 108/03 and the *Court's Official Annual Collection* OdlUS XII, 86.

#### *Languages:*

Slovenian, English (translation by the Court).



#### *Identification:* SLO-2009-2-003

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 20.11.2008 / **e)** U-I-344/06 / **f)** / **g)** *Uradni list RS* (Official Gazette), 113/08 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

#### *Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.

#### *Keywords of the alphabetical index:*

Civil procedure, imprisonment / Judgment, execution / Debt, imprisonment.

#### *Headnotes:*

It does not follow from the Constitution that a person may be deprived of his or her liberty only as a result of criminal proceedings or if he or she is suspected of having committed a criminal offence. Deprivation of liberty within the scope of execution proceedings due to conduct determined in Articles 31 and 33.1 of the Execution of Judgments in Civil Matters and Securing of Claims Act, is not a sanction intended to punish, but an attempt to influence the debtor's willingness to perform the acts which prevent the effective protection of a creditor or the debtor's willingness to refrain from acts which prevent such protection. Such deprivation is therefore not comparable to sanctions for criminal offences, neither can it be compared to the position the Constitutional Court has adopted over applications with an insulting content in accordance with the Civil Procedure Act.

As regards the above provisions of the Execution of Judgments in Civil Matters and Securing of Claims Act, the interference with the right to personal liberty is proportionate to the aim of ensuring the effective implementation of the right to judicial protection determined in Article 23 of the Constitution. The conduct of the debtor, who has made a conscious decision not to comply with the obligations imposed on him by a judicial decision, does not need to be protected at the constitutional level.

### Summary:

Under Article 33.1 of the Execution of Judgments in Civil Matters and Securing of Claims Act ("the EJCMSCA"), courts may impose a fine on a debtor who:

1. contrary to the court's decision hides, damages, or destroys his own property;
2. contrary to the court's decision, performs acts which could cause damage to a creditor that is difficult or impossible to remedy;
3. hinders an executor from performing individual acts of execution of a judgment or of securing a claim;
4. acts contrary to an order securing a claim; or
5. refuses to allow or hinders the inspection or appraisal of a piece of real estate.

In cases in which the debtor is a natural person or a sole proprietor, Article 33.4 of the EJCMSCA determines that if the fine imposed is not paid within the time limit determined by the court, it is recovered *ex officio*; if this is not possible, the sanction is exacted in such a way that, for every 10,000 SIT (41.73 EUR) of the fine, one day of imprisonment is determined. Imprisonment in this regard for a natural person may not exceed 30 days, and for a sole proprietor it may not exceed 100 days. A sanction is enforced in accordance with the provisions of the act which regulates the enforcement of penal sanctions.

The enforcement of imprisonment in accordance with Article 33.4 EJCMSCA is undoubtedly an interference with the right to personal liberty determined in Article 19.1 of the Constitution. However, it must be emphasised that it does not follow from the Constitution that a person may only be deprived of his or her liberty as a result of criminal proceedings or if he or she is suspected of having committed a criminal offence. The standpoint that the deprivation of liberty should always, regardless of the nature and purpose of this measure, be decided in criminal proceedings or in proceedings which ensure the guarantees determined in the Constitution regarding criminal proceedings, does not follow from the Constitution. However, there are special guarantee within the

Constitution regarding all instances of the deprivation of liberty, not only those connected to criminal offences.

In its constitutional review, the Constitutional Court had to assess the consistency of the regulation that the sanction of imprisonment in civil execution proceedings may be imposed and enforced is consistent with the guarantee determined in Article 19.2 of the Constitution. The requirement determined in Article 19.2 of the Constitution that only the law may determine the cases and procedures for the deprivation of liberty is therefore met. Articles 33.1 and 31 EJCMSCA determine the cases in which liberty may be deprived, whereas Article 33.3 and 33.4 EJCMSCA determine the procedure for implementing such. However, this is still not sufficient for the purpose of the constitutional review. The Constitution provides that only the law may determine a limitation of human rights, but this does not mean that there are no restrictions on the legislature when determining such limitations. It must be taken into consideration that the deprivation of liberty is an interference with the human right determined in Article 19.1 of the Constitution and that in accordance with the established constitutional case-law as regards Article 15.3 of the Constitution, human rights and fundamental freedoms may be limited only in such cases as are provided by the Constitution or by the rights of others.

In view of the fact that the case concerns a review of the provision regarding execution proceedings in which two individuals are in dispute with one another, rather than a review of an interference by the state with the individual's rights, the content of proportionality in a narrower sense is different. It entails a comparison of two constitutionally protected positions. If it is established that the implementation of the creditor's right to judicial protection, which is the objective of the interference, outweighs the importance of the debtor's right affected by the interference, the interference passes this aspect of the proportionality test. In this regard, the specific nature and special importance of execution proceedings must be taken into consideration. Execution proceedings, due to the essentially different quality of the positions of the parties, are not comparable to civil proceedings, for example, in which the parties must at the outset be in a balanced position. The parties in execution proceedings are, on the one hand, a creditor who will usually already have been awarded a final and executable judgment, and on the other hand, a debtor upon whom, by way of execution, is imposed a certain obligation. The balance in execution proceedings can be spoken of only in the sense of defining the appropriate relationship between the protection of the creditor and

the position of the debtor and not in the sense of the equal consideration of the interests of both parties. In execution proceedings, differently from substantive civil law, it is not the case that the law should ensure the balance of the positions of the parties when regulating this field of law in its substance. The purpose of execution proceedings, in accordance with the constitutional requirement that the right to judicial protection must be effective, is to ensure the fulfilment of the obligation which in general stems from a final judgment. The limitation of the creditor's right to effective execution may be considered only if the fundamental rights of the debtor are significantly affected. Taking into consideration the criteria regarding the constitutional protection of the debtor's rights in execution proceedings, which follow from the privileged position of the creditor in such proceedings, an interference with the creditor's right to effective judicial protection determined in Article 23.1 of the Constitution is, with regard to the protection of the debtor's rights, substantiated only in cases in which execution entails a disproportional burden for the debtor and where his or her human rights are significantly affected.

When reviewing the relationship between a creditor and a debtor in execution proceedings, or the debtor's position in execution proceedings, a degree of differentiation is needed between positions in which objective reasons (e.g. an unfavourable financial situation) prevent the debtor from fulfilling his obligations entirely and without endangering his existence, on the one hand, and positions which concern merely the debtor's decision not to perform acts which are required from him by a title of execution, on the other (which is as a general rule a final judgment). In the first instance it follows from the principles of a social state that in execution proceedings the principle of the protection of a debtor must also be respected. However, as regards the sanctions prescribed for conduct determined in Article 31 and in Article 33.1 EJCMSA, the position is different. It does not concern a review of the protection of the debtor's existence or his property right, but merely of his conscious decision not to refrain from certain acts which endanger the effectiveness of the execution. The sanction of imprisonment as such is indeed difficult for a debtor; however, it is connected with the debtor refraining from acts which he could carry out any time without difficulty. The debtor always had the possibility to prevent the deprivation of his liberty; all he or she needed to do was to respect the judicial decision which refers to fulfilling obligations stemming from the title of execution. The conduct of a debtor who takes a conscious decision not to comply with the obligations imposed on him by a judicial decision, does not need to be protected at the constitutional

level. Furthermore, a debtor can prevent the enforcement of imprisonment by paying a fine. As regards the above, it is demonstrated that the prescribed interference with the debtor's right to personal liberty determined in Article 19 of the Constitution, which may occur by the imposition and enforcement of a fine in accordance with Article 33.4 EJCMSA is not disproportionate with the creditor's right to effective judicial protection determined in Article 23 of the Constitution.

#### *Supplementary information:*

Legal norms referred to:

- Articles 19, 20 and 23 of the Constitution [URS];
- Article 21 of the Constitutional Court Act [ZUstS].

#### *Cross-references:*

- Decision no. U-I-60/03, dated 04.12.2003, *Official Gazette RS*, no. 131/03 and the *Court's Official Annual Collection OdlUS XII*, 93;
- Decision no. U-I-145/03, dated 23.06.2005, *Official Gazette RS*, no. 69/05 and the *Court's Official Annual Collection OdlUS XIV*, 62;
- Decision no. U-I-220/03, dated 13.10.2004, *Official Gazette RS*, no. 123/04 and the *Court's Official Annual Collection OdlUS XIII*, 61;
- Decision no. U-I-18/02, dated 24.10.2003, *Official Gazette RS*, no. 108/03 and the *Court's Official Annual Collection OdlUS XII*, 86;
- Decision no. Up-181/99, dated 18.10.2002, *Official Gazette RS*, no. 7/03 and the *Court's Official Annual Collection OdlUS XI*, 292;
- Decision no. U-I-339/98, dated 21.01.1999, *Official Gazette RS*, no. 11/99 and the *Court's Official Annual Collection OdlUS VIII*, 13;
- Decision no. U-I-93/03-26, dated 18.11.2004, *Official Gazette RS*, no. 132/04 and *OdlUS XIII*, 77.

#### *Languages:*

Slovenian, English (translation by the Court).



*Identification:* SLO-2009-2-004

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 26.03.2009 / **e)** U-I-218/07 / **f)** / **g)** *Uradni list RS* (Official Gazette), 27/09 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.  
 5.4.17 Fundamental Rights – Economic, social and cultural rights – **Right to just and decent working conditions**.  
 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

*Keywords of the alphabetical index:*

Working conditions / Smoking, ban.

*Headnotes:*

A statutory regulation which prohibits smoking in indoor public places and indoor working places and the consumption of food and beverages in smoking areas constitutes an interference with the general right of freedom of action (Article 35 of the Constitution). However, the above-mentioned interference is not inadmissible, as it is the only way in which the constitutionally admissible aim pursued by the legislature can be effectively achieved, i.e. the protection of employed persons and all persons against the adverse effects of second-hand smoking and environmental tobacco smoke.

The characteristics of spending time and socializing in hospitality establishments cannot be regarded as association within the meaning of Article 42.2 of the Constitution; this is not an organised and permanent community of individuals with a close connection gathering to pursue common interests, nor can it be regarded as assembly within the meaning of Article 42.1 of the Constitution. These gatherings are in general coincidental, they do not entail a group expression, and the element of internal connection between visitors in general does not exist.

*Summary:*

The first sentence of Article 16.1 of the Restrictions on the Use of Tobacco Products Act (“RUTPA”) reads as follows:

“Smoking is prohibited in all indoor public places and indoor workplaces.”

It is the case with personality rights, which are protected by Article 35 of the Constitution, as well as all human rights and fundamental freedoms, that they are not absolute and unlimited. In accordance with Article 15.3 of the Constitution, they are limited by the rights of others and in such cases as are provided by the Constitution. In the view of the Constitutional Court, the challenged statutory regulation which prohibits smoking in indoor public places and indoor workplaces, entails an interference with the general right of freedom of action (Article 35 of the Constitution). Interferences with human rights or fundamental freedoms are, in accordance with the established case-law, admissible if they are consistent with the principle of proportionality. The Constitutional Court assesses whether an interference with a human right is admissible on the basis of the so-called strict test of proportionality. The Constitutional Court must first establish (review) whether the legislature has pursued a constitutionally admissible aim.

In order to afford employed persons in all occupational groups full protection against exposure to the adverse health effects of tobacco smoke, smoking must be banned in all indoor public places and indoor workplaces. A hospitality establishment is a workplace for persons employed in the hospitality sector and protecting such employees from second-hand smoking can only be ensured by the complete prohibition of smoking in hospitality establishments. The measures laid down in the RUTPA before the implementation of the RUTPA-C, which comprised the prohibition of smoking in public places except in areas which were specially designated and separated from areas designated for non-smokers, leaving it to the owners of hospitality establishments to designate these areas for smokers as well as their size, did not achieve their objective. The RUTPA before the implementation of the RUTPA-C did not afford employed persons in all positions of employment or workers in all occupational groups appropriate protection from tobacco smoke. In addition, employed persons in the hospitality industry, who are to a greater extent and for longer periods exposed to tobacco smoke, did not exercise their right to require that their employer ensure a smoke-free work environment, as they were not aware of

the adverse effects of second-hand smoking or they were afraid to lose their jobs. Furthermore, in accordance with recent scientific evidence, the statutory provision of the RUTPA before the implementation of the RUTPA-C, which introduced the requirement of appropriate ventilation in order to prevent the mixing of smoky and non-smoky air, is no longer appropriate, as none of the accessible ventilation technologies or air purification systems can ensure protection against exposure to tobacco smoke without extensive and impractical increased ventilation. Even separate areas for smokers and non-smokers do not protect workers. What is more, there is a high concentration of carcinogens and toxins from tobacco smoke in separated areas for smokers. In view of the fact that there is no safe level of exposure to tobacco smoke, the Constitutional Court finds that the prohibition of smoking in all indoor public places and indoor workplaces is the only measure which enables the legislature's pursued aim to be achieved, i.e. the protection of workers and other persons from the adverse effects of environmental tobacco smoke.

Article 17.1.4 of the RUTPA determines that food and beverages may not be consumed in smoking areas.

The Constitutional Court finds here that in order to ensure the possibility of working in an environment where the air is not polluted and in order to prevent employed persons from being exposed to the adverse effects of environmental tobacco smoke against their will, the legislature had a constitutionally admissible aim in limiting the petitioners' right to act freely, which is protected within the framework of Article 35 of the Constitution.

The interference must also be necessary, appropriate, and proportionate in a narrower sense in order not to be excessive. In view of the fact that the petitioners' allegations only refer to smoking areas in hospitality establishments, the Constitutional Court limited the strict test of proportionality to these areas. The Constitutional Court holds that in the case of the prohibition of the consumption of food and beverages in smoking areas in hospitality establishments all three conditions are still met. In the case of smoking areas in hospitality establishments, it is assumed that employed persons have to enter them in order to carry out their work duties, including serving and cleaning up after guests (except self-service restaurants, which nonetheless require a degree of cleaning). It follows that they are exposed to environmental tobacco smoke, regarding which it follows from the scientific evidence that there is no safe level of exposure to tobacco smoke. It is particularly dangerous in separate areas for smokers

where a high concentration of carcinogens and toxins from tobacco smoke are present. If consumption of food and beverages were allowed in smoking areas in hospitality establishments, the aim that the legislature pursues would not be achieved. Thus the interference with the general right of freedom of action is not excessive; especially if it is considered that the limitation is only of a temporary nature. Smokers tend to stay in smoking rooms only for a short time and can consume food and drinks immediately after they leave these areas. The objective of the law is to protect the health of employed persons so that they are protected from second-hand smoke in situations in which they are not smoking themselves. Article 17.1.4 RUTPA, which prohibits food and beverages from being consumed in smoking areas is not inconsistent with the general right of freedom of action protected in Article 35 of the Constitution.

#### *Supplementary information:*

Legal norms referred to:

- Articles 14.2, 35 and 42 of the Constitution [URS];
- Articles 21 and 25.3 of the Constitutional Court Act [ZUstS].

#### *Cross-references:*

- Decision no. U-I-226/95, dated 08.07.1999, *Official Gazette RS*, no. 60/99 and the *Court's Official Annual Collection OdlUS VIII*, 174;
- Decision no. U-I-137/93, dated 02.06.1994, *Official Gazette RS*, no. 42/94 and the *Court's Official Annual Collection OdlUS III*, 62;
- Decision no. U-I-290/96, dated 11.06.1998, *Official Gazette RS*, no. 49/98 and the *Court's Official Annual Collection OdlUS VII*, 124;
- Decision no. U-I-18/02, dated 24.10.2003, *Official Gazette RS*, no. 108/03 and the *Court's Official Annual Collection OdlUS XII*, 86.

#### *Languages:*

Slovenian, English (translation by the Court).



*Identification:* SLO-2009-2-005

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 02.07.2009 / **e)** U-I-425/06 / **f)** / **g)** *Uradni list RS* (Official Gazette), 55/09 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation.**

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

*Keywords of the alphabetical index:*

Discrimination, prohibited grounds, list / Inheritance, statutory rules / Inheritance, right / Homosexuality, partnership.

*Headnotes:*

In terms of the right to inheritance following the death of one's partner, under the legislation on the registration of a same-sex civil partnership, the position of partners in registered same-sex partnerships is in its essential factual and legal aspects comparable with the position of spouses. Differences in the regulation of inheritance between spouses and between partners in registered same-sex partnerships are not, therefore, based on any objective, non-personal circumstance, but on sexual orientation. Sexual orientation is one of the personal circumstances determined in Article 14.1 of the Constitution. As no constitutionally admissible reason can be found for such differentiation, the challenged regulation is inconsistent with Article 14.1 of the Constitution.

*Summary:*

Article 22.1 of the Registration of a Same-Sex Civil Partnership Act (the RSSCPA) determines that in the event of a partner's death, the surviving partner of a registered same-sex partnership (referred to here as a same-sex partner) has the right to inheritance of the deceased's share of the community property in accordance with this act. This provision establishes a legal foundation for inheritance between same-sex partners. Neither the Inheritance Act ("the IA") as a general regulation, nor any other regulation in the field of inheritance includes same-sex partners within the circle of heirs. Article 22.2 and 22.3 RSSCPA regulate the manner of inheritance of the community property between same-sex partners. If a deceased has children, the community property is inherited by the surviving partner and the deceased's children in

equal shares (Article 22.2); if a deceased has no children, the surviving partner inherits the entire share on the community property (Article 22.3). Article 22.4 RSSCPA regulates the inheritance of the deceased's separate property and determines that this property is inherited in accordance with the general regulations on inheritance. These regulations also apply to the share of the deceased's community property, if the RSSCPA does not determine otherwise. Article 22.5 RSSCPA determines that local courts have subject-matter jurisdiction to decide in probate proceedings in accordance with this act.

It is evident that there are essential, important differences in the regulation of inheritance between spouses and between same-sex partners. The differences, which have also been stated by the petitioners, can be summarised as follows:

- If a deceased has no children, the surviving same-sex partner inherits the entire share of the community property, whereas a spouse, as an heir in the second degree, inherits only one half of the estate, while the deceased's parents inherit the other half (or their descendants on the basis of their right to assume their parents' position). If a deceased has no children, the surviving spouse only inherits the entire estate if both of the deceased's parents died without descendants before the deceased.
- Same-sex partners (differently from spouses), cannot inherit the separate property of their partners.
- Same-sex partners, (differently from spouses) do not fall within the circle of forced heirs and do not enjoy the right to have household goods excluded from the estate.

There is clearly discriminatory treatment in cases where the state (on the basis of personal circumstances) treats individuals in the same situation differently. If the situations being compared are not essentially the same, it is not a matter of unconstitutional discrimination. From the perspective that is important for the review of this particular regulation (the right to inheritance from a deceased partner, Article 22 RSSCPA), it is essential to discern whether the petitioners' position is comparable in its essential and legal elements to the position of spouses. The Constitutional Court finds the answer to be affirmative. A registered partnership is a relationship that is in substantive terms similar to a marriage or a common-law marriage. The essential characteristic of such partnerships is also the stable connection of two persons who are close to and help and support each other. The ethical and emotional essence of registered partnerships, which is expressed in Article 8 RSSCPA, and according to which partners

must respect, trust, and help each other, is similar to the community between a woman and a man. Moreover, the legal regulation of this relationship is similar to that of marriage. The RSSCPA guarantees partners certain mutual rights and obligations, protects the weaker partner, and regulates legal positions toward third persons, the state, and the social environment. In the field of property relations during the period of a registered partnership, the RSSCPA almost entirely follows the regulation of property regime between spouses laid down in the Marriage and Family Relations Act (Articles 9 through 18 RSSCPA). It also regulates the obligation to ensure the maintenance of a partner who does not have sufficient funds for living (Article 19 RSSCPA).

However, the legislator has regulated inheritance between partners in registered partnerships differently. An example is the provision the legislator makes for “presumed wills” by the deceased partner in a marriage, where although he or she has not made a will, the person with whom he or she shared their life will be economically provided for by inheritance. In both a marriage and a registered partnership, the deceased’s presumed will is based on the same empirical and ethical arguments – to ensure that after one’s death the financial security and stability of the person with whom one was emotionally, intimately, financially, and in all areas of life most closely connected will be protected.

With regard to all these actual and legal bases for partnerships, registered same-sex partnerships as well as partnerships between a woman and a man – it is evident that differences in the regulation of inheritance are not based on any objective, non-personal circumstance, but on sexual orientation. Sexual orientation is, although not explicitly mentioned therein, undoubtedly one of the personal circumstances provided for in Article 14.1 of the Constitution.

The Constitutional Court began by assessing whether there are any constitutionally admissible reasons for different regulation of inheritance between spouses and common-law partners, on the one hand, and same-sex partners, on the other. In the case at issue, no such reason could be found. The National Assembly did not reply to the petition, and the legislative materials did not give rise to a constitutionally admissible reason for the challenged regulation, which interferes with the right determined in Article 14.1 of the Constitution. Consequently, the very first condition which is required by the Constitution in cases of the limitation of human rights is not satisfied. The Constitutional Court therefore established that the challenged regulation of inheritance in accordance with the RSSCPA is inconsistent with Article 14.1 of the Constitution.

### *Supplementary information:*

Legal norms referred to:

- Article 14.1 and 14.2 of the Constitution [URS];
- Articles 40.2 and 48 of the Constitutional Court Act [ZUstS].

### *Cross-references:*

- Decision no. U-I-146/07, dated 13.11.2008, *Official Gazette RS*, no. 111/08, and the *Court’s Official Annual Collection OdlUS XVII*, 59;
- Decision no. U-I-18/02, dated 24.10.2003, *Official Gazette RS*, no. 108/03, and the *Court’s Official Annual Collection OdlUS XII*, 86.

### *Languages:*

Slovenian, English (translation by the Court).



## South Africa Constitutional Court

### Important decisions

*Identification:* RSA-2009-2-005

a) South Africa / b) Constitutional Court / c) / d) 07.05.2009 / e) CCT 77/08; [2008] ZACC 11 / f) Bertie Van Zyl and Another v. Minister for Safety and Security and Others / g) [www.constitutionalcourt.org.za/Archimages/13482.PDF](http://www.constitutionalcourt.org.za/Archimages/13482.PDF) / h) CODICES (English).

*Keywords of the systematic thesaurus:*

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

2.3.7 Sources – Techniques of review – **Literal interpretation.**

2.3.9 Sources – Techniques of review – **Teleological interpretation.**

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

3.20 General Principles – **Reasonableness.**

4.15 Institutions – **Exercise of public functions by private bodies.**

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

*Keywords of the alphabetical index:*

Agricultural worker, vulnerability / Employee, labour, economic and social conditions / Employment, conditions / Farm, private, protected / Interpretation, contextual / Interpretation, purpose / Legislation, interpretation / Property, protection / Regulation, scope, permissible / Security guard, private, powers / Vagueness, statutory.

*Headnotes:*

Section 39.2 of the Constitution requires Courts to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights through a purposive approach to statutory interpretation, by ensuring that, where reasonably possible, statutes be interpreted as constitutionally compliant.

The payment of a minimum wage and the prohibition against the exploitation of workers are an integral aspect of the right to fair labour practices guaranteed and protected in the Constitution.

*Summary:*

I. This case concerns the interpretation of Sections 20.1.a and 28 of the Private Security Industry Regulation Act 56 of 2001 (the Act) as it relates to employers using their own staff as private security service providers to protect the employers and their property and premises and to what extent this service should be regulated.

The applicants were two farming companies employing 6000 and 2000 employees respectively. They were of a significant size and had many assets. They were frequently the victims of theft, in particular of motor vehicles, cash and other equipment. In order to protect these assets, the applicants employed some of their general workforce as security personnel. It was common cause that these security guards were unarmed and that the South African Police Service (SAPS) was contacted in cases of emergency.

In terms of Section 20.1.a of the Act, only registered security service providers may perform security services. Because the security guards were not registered, they were arrested by the SAPS. The applicants accordingly challenged the constitutionality of Sections 20.1.a, 28.2 and 28.3.b in both the High Court and then on appeal in the Constitutional Court. The application was opposed by the SAPS, the Minister for Safety and Security (who was responsible for the impugned legislation) and the Private Security Industry Regulatory Authority.

A “security service” is defined in the Act as including the service of “protecting or safeguarding a person or property in any manner.” The applicants contended that the definition of “security service” was overbroad in that it encompassed almost all employees in almost all industries, requiring them to register as security service providers.

II. In dismissing this contention, the majority, per Justice Mokgoro, noted that, interpreted literally, Section 20.1.a seemingly could apply to all workers in all industries who in their line of employment simply happen to protect or safeguard the person or property of others in any particular circumstance that may arise. On this interpretation, Section 20.1.a would bring within the ambit of the Act people such as childminders, teachers and doctors. Such an interpretation would, however, lead to alarming results and border on absurdity. In declining to adopt

such an interpretation, the majority held that it was bound by Section 39.2 of the Constitution which requires Courts to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. This requires a purposive approach to statutory interpretation which requires that where reasonably possible, statutes be interpreted as constitutionally compliant.

In line with this purposive and contextual approach to statutory interpretation, the majority also held that the Act should be interpreted in the context of the substantial size of the private security industry, as well as the coercive power it wields during the regular conduct of its business. These factors underscored the need for regulation and adherence to appropriate standards. In contrast, it was held that people like childminders and teachers were only engaged in a form of protection that is not aimed at the kinds of dangers to which the private security industry is placed to respond to and accordingly, such groups of people fell outside the ambit of the Act. The majority thus held that "security service" in terms of Section 20.1.a, must be interpreted narrowly to apply to only the protection or safeguarding of persons or property from unlawful physical harm, including injury, physical damage, theft, or kidnapping caused by another person. Thus the provision was found to be neither over-broad nor vague.

The applicants furthermore contested the constitutionality of Section 28.2 of the Act, which required all security service providers, including in-house security providers irrespective of whether they are registered with the Private Security Industry Regulatory Authority, to be bound by a Code of Conduct. The applicants also contested Section 28.3.b which required the Code to provide for the payment of minimum wages and for compliance with standards aimed at preventing the exploitation or abuse of employees. The applicants argued that the provisions were unconstitutional because they were too wide and too vague for employers to know which tasks they can entrust to their employees. The majority held that this requirement was not unconstitutional because of the need for in-house security personnel to observe the law. Accordingly in-house security personnel should be subject to the Code. Moreover, the majority held that the payment of a minimum wage and the prohibition against the exploitation of workers was an integral aspect of the right to fair labour practices guaranteed and protected in the Constitution. In particular, it noted the vulnerability of farm-workers which necessitated that the Code apply to them. Accordingly it held that these requirements were not unconstitutional.

In a minority judgment Justice O'Regan, whilst agreeing that the private security industry should be regulated, held that Section 21.1.a was impermissibly vague and therefore, unconstitutional and invalid. She, however, agreed with the majority in their interpretation of Section 28.2 and 28.3.b.

#### *Supplementary information:*

Legal norms referred to:

- Section 39.2 of the Constitution, 1996;
- Sections 20.1.a, 28.2 and 28.3.b of the Private Security Industry Regulation Act 56 of 2001.

#### *Cross-references:*

Investigating Directorate:

- *Serious Economic Offences and Others v. Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others*, Bulletin 2000/2 [RSA-2000-2-011];
- *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others*, Bulletin 2004/1 [RSA-2004-1-004];
- *Union of Refugee Women and Others v. Director, Private Security Industry Regulatory Authority and Others*, Bulletin 2006/3 [RSA-2006-3-017];
- *Private Security Industry Regulatory Authority and Another v. Anglo Platinum Management Services Ltd and Others* [2006] ZASCA 176, available at [www.saflii.org/za/cases/ZASCA/2006/176.html](http://www.saflii.org/za/cases/ZASCA/2006/176.html);
- *Private Security Industry Regulatory Authority and Another v. Association of Independent Contractors and Another* 2005 (5) South African Law Reports (SCA) 416.

#### *Languages:*

English.



*Identification:* RSA-2009-2-006

a) South Africa / b) Constitutional Court / c) / d) 03.06.2009 / e) CCT 80/08; [2009] ZACC 14 / f) Biowatch Trust v. Registrar, Genetic Resources and Others / g) [www.constitutionalcourt.org.za/Archimages/13569.PDF](http://www.constitutionalcourt.org.za/Archimages/13569.PDF) / h) CODICES (English).

*Keywords of the systematic thesaurus:*

1.2.2.2 Constitutional Justice – Types of claim – Claim by a private body or individual – **Non-profit-making corporate body.**

1.4.14.3 Constitutional Justice – Procedure – Costs – **Party costs.**

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

*Keywords of the alphabetical index:*

Cost, award / Costs, court, discretion / Information, confidential, access / Information, duty to provide / Information, request, specifically, requirement.

*Headnotes:*

In matters of genuine constitutional import between private parties and the state, a court should be reluctant to make a costs award against the private party if it is unsuccessful; and if such a private party is substantially successful against the state, powerful reasons would have to exist to deny the private party its costs. When the state is sued for a failure to fulfil its responsibilities for regulating competing claims between private parties, costs awards should be governed by the over-arching principle of not discouraging the pursuit of constitutional claims.

*Summary:*

I. This case deals with costs awards. In particular, it spells out the proper judicial approach to determining costs awards in constitutional litigation.

Biowatch, an environmental watchdog, sought information from governmental bodies with statutory responsibilities for overseeing genetic modification of organic material. Monsanto SA (Pty) Ltd (Monsanto), the South African component of a multinational diversified biotechnology company, intervened in the litigation to oppose the requests for information.

The North Gauteng High Court in Pretoria held that the Registrar for Genetic Resources (the Registrar) had been in default of his responsibilities in a number of respects, and made several orders in Biowatch's

favour. But to mark its displeasure at what it regarded as inept requests for information, the High Court decided to make no costs order in Biowatch's favour against the governmental bodies. The High Court further held that Monsanto had been compelled by Biowatch's conduct to intervene in the litigation, more particularly to prevent Biowatch from having access to confidential information which Monsanto had supplied to the Registrar. Because of its displeasure at the lack of precision as to the information Biowatch sought, the court ordered Biowatch to pay Monsanto's costs.

Biowatch appealed to the Transvaal Provincial Division (Full Court) on the costs decisions only, but the Full Court, by a two to one majority, ruled against it. The net result was that although Biowatch had been largely successful in its claim against the government agencies, and even though it obtained information the release of which Monsanto had strongly opposed, it had to foot the bill for all its own costs plus pay the costs incurred by Monsanto.

In the Constitutional Court, three public interest non-governmental organisations applied for and were granted the status of *amici curiae*. The Centre for Child Law and Lawyers for Human Rights presented joint argument dealing with the deleterious effect that negative costs orders would have on the capacity of public interest law bodies to initiate litigation in defence of constitutional rights. The Centre for Applied Legal Studies emphasised the particular importance of facilitating public interest litigation to protect environmental rights.

II. Justice Sachs, writing for a unanimous Court, spelt out several principles regarding costs awards in constitutional litigation. First, he held that costs awards in constitutional litigation should not be determined by the status or character of the parties, but by the nature and conduct of the litigation. The primary consideration is whether a costs award would hinder or promote constitutional justice.

Second, in matters of genuine constitutional import between private parties and the state, a court should be reluctant to make a costs award against the private party if it is unsuccessful. In constitutional matters in which a private party is substantially successful against the state, powerful reasons would have to exist to deny the private party its costs.

Third, when the state is sued for a failure to fulfil its responsibilities for regulating competing claims between private parties, costs awards should be governed by the over-arching principle of not discouraging the pursuit of constitutional claims, irrespective of the number of private parties seeking

to support or oppose the state's posture in the litigation.

Finally, Justice Sachs reaffirmed the discretion of lower courts in making costs awards and the principle that appellate courts require good reason to interfere. The question is not whether the appeal court would have exercised its discretion in the same way, but whether the lower court failed to act judicially in exercising its discretion, or based the exercise of its discretion on wrong principles of law or a misdirection on the material facts.

Applying these principles, Justice Sachs ruled that the omission of the High Court and the Full Court on appeal to consider the constitutional dimension of the case amounted to a serious misdirection. In the circumstances, the Constitutional Court was at large to reconsider the High Court's failure to award costs against the state in favour of Biowatch and the decision to make a costs award against Biowatch in Monsanto's favour.

As it was substantially successful in its efforts to vindicate the constitutional right of access to information in terms of Section 32 of the Constitution, Biowatch was entitled to its costs against the state. That was the order that the High Court should have made. The Court also set aside the costs order in Monsanto's favour against Biowatch and replaced it with an order that both parties bear their own costs.

#### *Supplementary information:*

Legal norms referred to:

- Sections 9.1, 24 and 32 of the Constitution, 1996;
- Schedule 2 of Section 6 of the Constitution, 1996;
- The Genetically Modified Organisms Act 15 of 1997;
- Section 21A of the Supreme Court Act 59 of 1959;
- The Promotion of Access to Information Act 2 of 2000;
- Sections 31 and 32 of National Environmental Management Act 107 of 1998.

#### *Cross-references:*

- *The Affordable Medicines Trust and Others v. Minister of Health and Others*, *Bulletin* 2005/1 [RSA-2005-1-002];
- *Giddey NO v. JC Barnard and Partners*, *Bulletin* 2006/2 [RSA-2006-2-009];
- *Ferreira v. Levin NO and Others*;
- *Vryenhoek and Others v. Powell NO and Others*, *Bulletin* 1995/3 [RSA-1995-3-010];

- *Barkhuizen v. Napier*, *Bulletin* 2007/1 [RSA-2007-1-005];
- *South African Broadcasting Corporation Ltd v. National Director of Public Prosecutions and Others*, *Bulletin* 2006/3 [RSA-2006-3-011].

#### *Languages:*

English.



#### *Identification: RSA-2009-2-007*

a) South Africa / b) Constitutional Court / c) / d) 10.06.2009 / e) CCT 22/08; [2009] ZACC 16 / f) Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others / g) [www.constitutional.court.org.za/Archimages/13625.PDF](http://www.constitutional.court.org.za/Archimages/13625.PDF) / h) CODICES (English).

#### *Keywords of the systematic thesaurus:*

3.22 General Principles – **Prohibition of arbitrariness.**  
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**  
 5.4.13 Fundamental Rights – Economic, social and cultural rights – **Right to housing.**  
 5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

#### *Keywords of the alphabetical index:*

Housing, access / Housing, construction, need / Housing, eviction / Housing, unlawful occupation / Occupancy, right / Property, illegally occupied.

#### *Headnotes:*

In order to facilitate the state's housing development programme under the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998, it may be just and equitable to grant an eviction order against an unlawful occupier. The express or tacit consent of an owner of land to occupation renders the occupier thereof a lawful occupier. Thus an absence of express or tacit consent is required in order to justify the granting of an eviction order.

**Summary:**

I. In this case, five judgments were prepared by different members of the Court. All the judgments, however, supported the final order. The case concerns an eviction order secured by government agencies against some 20 000 residents of the Joe Slovo informal settlement (the Joe Slovo settlement). The eviction was sought in order to enable the construction of a new housing development on the land in the exercise of the state's constitutional obligations under Section 26.1 and 26.2 of the Constitution. This eviction was sought and granted in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE Act). The legislation authorises the eviction of unlawful occupiers while giving effect to the constitutional right to protection from unlawful eviction. The applicants appealed to the Constitutional Court against the High Court's decision to grant the eviction order. The applicants argued that the state had either expressly or tacitly consented to their occupation of the Joe Slovo settlement, making their eviction in terms of the PIE Act unlawful. As proof of this consent, they relied on the provision of services including the provision of water, toilets, refuse removal, roads, drainage and electricity.

II. All the judgments accepted that by the time the eviction proceedings were launched, the applicants were unlawful occupiers within the meaning of the PIE Act. The difference between the judgments concerns whether the applicants at any stage enjoyed a right of occupation stemming from the government's consent to their occupation of the land. In this regard, Justice Yacoob found that they did not have consent at all. Deputy Chief Justice Moseneke, and Justices Ngcobo, O'Regan and Sachs found that they did have consent but that it was conditional and was subsequently revoked.

Accordingly, the Court found that it was just and equitable to grant the eviction order in terms of the PIE Act in order to facilitate the state's housing development programme. The Court however significantly altered the terms of the eviction order as granted by the High Court. First, the Court obliged the government to ensure that 70% of the new homes to be built on the site of the Joe Slovo informal settlement are allocated to people who had been residents of the settlement but were relocated to allow for the development. Secondly, the Court's order specified the quality of the temporary accommodation to be provided for the occupiers after their eviction. Lastly, the Court ordered that there be an ongoing process of engagement between the residents and the government concerning the relocation process.

**Supplementary information:**

Legal norms referred to:

- Sections 7.2, 10, 26.1, 26.2 and 26.3, 152.1.b, 152.1.c and 152.1.d, 153, 156 and 229 of the Constitution, 1996;
- Sections 1, 4, 5 and 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998;
- Section 2.1 of the Housing Act 107 of 1997.

**Cross-references:**

- *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) *South African Law Reports* 217 (CC);
- *Government of the Republic of South Africa and Others v. Grootboom and Others*, *Bulletin* 2000/3 [RSA-2000-3-015];
- *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v. City of Johannesburg and Others*, *Bulletin* 2008/1 [RSA-2008-1-002];
- *President of the Republic of South Africa and Another v. Modderklip Boerdery (Pty) Ltd*, *Bulletin* 2005/1 [RSA-2005-1-003];
- *Soobramoney v. Minister of Health, Kwa-Zulu-Natal* 1998 (1) *South African Law Reports* 765 (CC);
- *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Another*, *Bulletin* 2001/1 [RSA-2001-1-006].

**Languages:**

English.

**Identification: RSA-2009-2-008**

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 15.07.2009 / **e)** CCT 83/08; [2009] ZACC 19 / **f)** Fatima Gabie Hassam v. Johan Hermanus Jacobs NO and Others (with the Muslim Youth Movement of South Africa and the Women's Legal Centre Trust as *amici curiae*) / **g)** [www.constitutionalcourt.org.za/Archimages/13665.PDF](http://www.constitutionalcourt.org.za/Archimages/13665.PDF) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

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

5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion.**

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

*Keywords of the alphabetical index:*

Deceased, will, intestacy / Discrimination, spouse, polygynous marriage / Inheritance, spouse, polygynous marriage / Fundamental right, implementation by statute / Heritage, cultural / Inheritance rights on intestacy / Islam, rules on marriage / Maintenance, entitlement, spouse, polygynous marriage / Marriage, polygynous, non-recognition / Marriage, religious / Religious custom / Religion, free exercise / Woman, married, discrimination.

*Headnotes:*

The exclusion of widows in polygynous Muslim marriages from inheriting or claiming from estates when the husband dies without leaving a will is unconstitutional.

*Summary:*

I. The applicant had been married to Mr Ebrahim Hassam (the deceased) in accordance with Muslim rites. The deceased then married Mrs Mariam Hassam as a second wife, also according to Muslim rites without the applicant's knowledge or consent. The deceased died intestate in August 2001 and the executor of the deceased's estate, relying on Section 1.4.f of the Intestate Succession Act 81 of 1987 (Intestate Succession Act), refused to regard the applicant as a spouse for purposes of the Intestate Succession Act, which would have entitled her to inherit a "child's portion" of the intestate estate.

The applicant challenged the constitutional validity of Section 1.4.f of the Intestate Succession Act which failed to recognise her as a "spouse" in terms of the Act, as she was a widow in a polygynous union and was married in terms of Muslim rites. The Intestate Succession Act made provision for only one spouse in a marriage to be the heir in the intestate estate of the deceased spouse. The applicant contended that this limited her rights to religious freedom and equality before the law and sought an order from the High Court recognising her as a spouse and surviving spouse of the deceased for the purposes of the

Intestate Succession Act and the Maintenance of Surviving Spouses Act 27 of 1990 (Maintenance Act). Further, she sought an order directing the executor of the deceased's estate to give effect to that recognition. The High Court declared Section 1.4.f of the Intestate Succession Act to be inconsistent with the Constitution to the extent that it made provision for only one spouse in a Muslim marriage. It held that the exclusion of widows of polygynous Muslim marriages from the benefits of the Intestate Succession Act was unfairly discriminatory and in conflict with the equality provisions in the Constitution.

II. In a unanimous judgement written by Justice Nkabinde, the Constitutional Court confirmed the declaration of constitutional invalidity made by the High Court, although for slightly different reasons. It held that the objective of the Intestate Succession Act, to lessen the dependence of widows on family benevolence, would be frustrated by the persistent exclusion of widows in polygynous Muslim marriages. The Court emphasised the fact that this case was not concerned with the constitutional validity of polygynous marriages entered into in accordance with Muslim rites, nor with the religious and cultural debates that abound on that issue, but rather with the exclusion of spouses in polygynous Muslim marriages from the intestate succession regime and whether this was in conflict with the equality provisions of the Constitution.

Justice Nkabinde held that the failure to afford the benefits of the Intestate Succession Act to widows of polygynous Muslim marriages, would generally cause widows significant and material disadvantage of the sort expressly intended to be avoided by the constitutional equality provisions. The Intestate Succession Act, by discriminating against women in polygynous Muslim marriages on the grounds of religion, gender and marital status, reinforces a pattern of stereotyping and patriarchal practices that considers women in these marriages unworthy of protection. The impugned provisions in the Intestate Succession Act accordingly conflicted with the principle of gender equality in the Constitution, which cannot be countenanced in a society based on democratic values, social justice and fundamental human rights.

Justice Nkabinde stated that statutory interpretation could not save the provision, since the word "spouse" could not be reasonably understood to include more than one spouse in the context of a polygynous marriage. The omission of the word "spouses" was therefore inconsistent with the Constitution and the Act was amended by reading in the words "or spouses" after the word "spouse" in the relevant provisions of the Intestate Succession Act.

*Supplementary information:*

Legal norms referred to:

- Sections 9.3, 15.3, 30, 36, 172.2 of the Constitution, 1996;
- Sections 1.1.a-1.1.f and 1.4.f of the Intestate Succession Act 81 of 1987, The Maintenance of Surviving Spouses Act 27 of 1990.

*Cross-references:*

- *Brink v. Kitshoff* NO 1996 (6) *Butterworths Constitutional Law Reports* 752 (CC);
- *Hassam v. Jacobs NO and Others* [2008] 4 *All South Africa Law Reports* 359 (C);
- *Daniels v. Campbell NO and Others*, *Bulletin* 2004/1 [RSA-2004-1-003];
- *Van Der Merwe and Another v. Taylor and Others* 2007 (11) *Butterworths Constitutional Law Reports* 1167 (CC);
- *Harksen v. Lane NO and Others*, *Bulletin* 1997/3 [RSA-1997-3-011];
- *Amod v. Multilateral Vehicle Accident Fund (Commission for Gender Equality Intervening)* 1999 (4) *South African Law Reports* 1319 (SCA);
- *Bhe and Others v. Magistrate Khayelitsha and Others*;
- *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 [2004-3-011];
- *Khan v. Khan* 2005 (2) *South African Law Reports* 272 (TPD).

*Languages:*

English.

*Identification:* RSA-2009-2-009

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 15.07.2009 / **e)** CCT 98/08; [2009] ZACC 18 / **f)** Centre for Child Law v. Minister for Justice and Constitutional Development and Others / **g)** [www.constitutional.court.org.za/Archimages/13669.PDF](http://www.constitutional.court.org.za/Archimages/13669.PDF) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.

*Keywords of the alphabetical index:*

Minors, minimum sentence / Child, best interest / Rights of the Child / Sentence, mandatory minimum, for minors.

*Headnotes:*

A minimum sentence for 16 and 17 year old offenders limits the court's power of individuation in sentencing child offenders. The minimum sentencing regime precludes the Court from engaging in a close and individualised examination of the particular child being sentenced.

*Summary:*

I. Section 51 of the Criminal Law Amendment Act 105 of 1997 (CLAA) creates a minimum sentencing regime for specified classes of serious offences. Before 2007, the minimum sentencing regime had limited application to children who were under 18 at the time of the offence in that it created a distinctive regime for children under the age of 8 years and it exempted children under the age of 16 altogether. In 2007, the Criminal Law (Sentencing) Amendment Act 38 of 2007 (the Amendment Act) was introduced to extend the application of the minimum sentencing regime to children who were 16 or 17 at the time the offence was committed.

The applicant obtained an order in the High Court declaring Sections 51.1, 51.2, 51.6, 51.5.b and 53A.b of the CLAA as amended by Section 1 of the Amendment Act inconsistent with Section 28.1.g and 28.2 of the Constitution. It applied to the Constitutional Court for confirmation of it.

The issue before the Court was whether the application of minimum sentencing to offenders aged 16 and 17 constitutes an unjustifiable limitation of their rights in Section 28 of the Constitution, in particular, the right not to be detained except as a measure of last resort (Section 28.1.g of the Constitution).

II. Justice Cameron, writing for the majority, held that, in applying the full rigour of the minimum sentencing regime to 16 and 17 year old offenders, the amended CLAA fails to give effect to the provisions of Section 28 of the Constitution which requires the differential treatment of child offenders and adult offenders.

Justice Cameron emphasised that the distinction drawn between children and adults was not a sentimental one, but was based on the following practical reasons: children are less physically and psychologically mature than adults, they are more vulnerable to influence and pressure from others and they are generally more capable of rehabilitation than adults. Justice Cameron found further that by making the prescribed minimum sentence the starting point for a sentencing court, the CLAA went against the injunctions of Section 28 of the Constitution. Whilst the impugned provisions allow for a departure from the minimum sentencing regime if “substantial and compelling circumstances” are found to exist, and for the suspension of half of a minimum sentence for 16 and 17 year old offenders, the majority held that the minimum sentencing regime nevertheless limits the court’s power of individuation in sentencing child offenders. In other words, the minimum sentencing regime precludes the court from engaging in a close and individualised examination of the particular child being sentenced.

In finding that the CLAA limits the rights of children under Section 28 of the Constitution, Justice Cameron turned to analyse whether the limitation was justifiable in terms of Section 36 of the Constitution. It was argued that the purpose of amending the CLAA was to tackle the increase in serious offences committed by juveniles. While the Court took note of generally high levels of crime, and acknowledged that child offenders commit heinous crimes, the Court found that it could not properly assess the validity of the justification because of a lack of evidence on the papers demonstrating both the legitimacy of this purpose, as well as the efficacy of its execution. The majority therefore declared the limitation of Section 28.1.g of the Constitution to be unjustifiable and unconstitutional.

In a dissenting judgment, by Justice Yacoob, the minority found that a court is bound by Section 28.1.g of the Constitution whenever it decides the sentence of a 16 or 17 year old offender, including under the minimum sentencing regime. A court is thus obliged under Section 28.1.g of the Constitution to take into account the relevant circumstances of a child, including their vulnerability and immaturity when it applies the provisions of the CLAA, and a court may rely on Section 28.1.g to justify a departure from the minimum sentence in relation to an offender of 16 or 17 years. The minority held further that the starting point of the enquiry into an appropriate sentence does not matter, as all Section 28.1.g requires is that, where a court finds a custodial sentence to be unavoidable, it should be imposed for the shortest appropriate period. The minority also found that Section 28.1.g does not prevent Parliament from enacting minimum sentencing legislation and that the

Court should not unduly limit the role of Parliament and the executive in sentencing children.

#### *Supplementary information:*

Legal norms referred to:

- Sections 28 and 36 of the Constitution, 1996;
- Sections 51.1, 51.2, 51.6, 51.5.b and 53A.b of the Criminal Law Amendment Act 105 of 1997 as amended by Section of the Criminal Law (Sentencing) Amendment Act 38 of 2007.

#### *Cross-references:*

- *S v. B* 2006 (1) *South African Criminal Law Reports* 311 (SCA);
- *S v. Malgas* 2001 (2) *South African Law Reports* 1222 (SCA);
- *Dodo v. the State*, *Bulletin* 2001/1 [RSA-2001-1-004].

#### *Languages:*

English.



#### *Identification: RSA-2009-2-010*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 13.08.2009 / **e)** CCT 25/09; [2009] ZACC 21 / **f)** Stefaans Conrad Brümmer v. Minister for Social Development and Others / **g)** [www.constitutional.court.org.za/Archimages/23.PDF](http://www.constitutional.court.org.za/Archimages/23.PDF) / **h)** CODICES (English).

#### *Keywords of the systematic thesaurus:*

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

#### *Keywords of the alphabetical index:*

Information, reasonable access / Administration, public confidence / Administrative act, judicial review / Administrative decision, judicial review / Information, access / Information, denial, review, time-limit / Time-limit, reasonableness.

### Headnotes:

The provisions of Section 78.2 of the Promotion of Access to Information Act 2 of 2000 are unconstitutional in that they provide for an insufficient period in which to lodge a review of a refusal by government to grant a request for access to information. Such an unreasonable time limit violates the rights of access to court as well as access to information guaranteed in the Constitution.

### Summary:

I. Section 78.2 of the Promotion of Access to Information Act 2 of 2000 (PAIA) permits members of the public to request information from the government and upon the refusal of such request, to challenge the refusal in court. The challenge must, however, be brought within 30 days. After the Department of Social Development refused his request for information and after a subsequent unsuccessful internal appeal, Mr Brümmer, an investigative journalist, approached the Cape High Court for relief. His application was made well out of the specified 30 day time limit and he therefore applied for condonation of the late filing. In the event of the court not granting condonation, he challenged the constitutionality of the 30 day time limit. He contended that this time limit violated his rights of access to court as well as access to information guaranteed by the Constitution.

In the High Court, the Minister for Social Development and the Director-General of the same Department opposed the application. They submitted that Mr Brümmer should have brought the application to court under Section 77.5.c of PAIA, a different provision which appeared to allow him 60 days to bring the application to court. Anyhow, they submitted that the 30 day limit prescribed by Section 78.2 is not unconstitutional. The Minister for Justice and Constitutional Development joined the proceedings to defend this section.

The High Court held that applications to court are governed by Section 78.2 and not Section 77.5.c as argued by the government. It accepted that it had the power to excuse non-compliance with the 30 day period but refused to condone Mr Brümmer's non-compliance with that period holding, among other things, that Mr Brümmer would not succeed in his application for the information. It held however that Section 78.2 was unconstitutional in that it does not give a person who is refused information adequate time to approach a court for relief. Even though it barred Mr Brümmer's application (holding it late) and also ruled on substance, it declared Section 78.2 unconstitutional and referred the matter to the Constitutional Court for confirmation.

Mr Brümmer asked the Constitutional Court to confirm the order declaring Section 78.2 invalid, and additionally applied for leave to appeal directly to that Court against the decision of the High Court refusing to condone his non-compliance with the 30 day limit. The respondents opposed the confirmation of the order of invalidity as well as the application for leave to appeal. The respondents contended that Section 78.2 does not limit any of the constitutional rights of the applicant and that, if it did, the limitation was justifiable under the Constitution.

In opposing the application for leave to appeal, the respondents submitted that the applicant had not provided a satisfactory explanation for the delay in approaching the High Court. The South African History Archives Trust, a non-governmental organisation that collects, preserves and catalogues materials of historic, contemporary, political, social, economic and cultural significance was admitted as *amicus curiae*. It told the Court about the difficulties encountered by the requestors of information in complying with the 30 day limit. It joined the applicant in submitting that Section 78.2 was unconstitutional. The South African Human Rights Commission also applied for admission as *amicus curiae* shortly before the hearing.

II. On the application for leave to appeal against the refusal of condonation, Justice Ngcobo, writing for a unanimous Court, held that it was not necessary for the High Court to consider condonation as the provisions of Section 78.2 were unconstitutional. It was accordingly held that the order of the High Court refusing condonation as well as the order for costs against Mr Brümmer should be set aside.

In relation to the constitutionality of Section 78.2, Justice Ngcobo's reasoning was that a person who seeks to challenge the refusal of access to information must be afforded an adequate and fair opportunity to do so. He found that the 30 day period limits the right of access to court as well as the right of access to information. This limitation was unreasonable and unjustifiable and accordingly unconstitutional.

Parliament was ordered to enact legislation that prescribes a time limit which is consistent with the Constitution, bearing in mind the rights of access to court and access to information. Pending the enactment of this legislation, a person who wishes to challenge the refusal of access to information must lodge an application to court within 180 days of being notified of a decision of an internal appeal refusing access to information. The 180 day period should be flexible in the sense that courts should be empowered to condone non-compliance where the interest of justice requires it.

The Court ordered that Mr Brümmer's application should be referred back to another judge in the High Court.

#### *Supplementary information:*

Legal norms referred to:

- Sections 16, 32, 34 and 36 of the Constitution, 1996;
- Sections 39.1.iii, 77, 78 and 82 of the Promotion of Access to Information Act 2 of 2000.

#### *Cross-references:*

- *Barkhuizen v. Napier*, *Bulletin* 2007/1 [RSA-2007-1-005];
- *Chief Lesapo v. North West Agricultural Bank and Another* 2000 (1) *South African Law Reports* 409 (CC);
- *Fose v. Minister of Safety and Security*, *Bulletin* 1997/2 [RSA-1997-2-005];
- *Mohlomi v. Minister of Defence*, *Bulletin* 1996/3 [RSA-1996-3-018];
- *The Affordable Medicines Trust and Others v. Minister of Health and Others*, *Bulletin* 2005/1 [RSA-2005-1-002].

#### *Languages:*

English.



#### *Identification: RSA-2009-2-011*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 18.08.2009 / **e)** CCT 91/08; [2009] ZACC 22 / **f)** Wybrand Andreas Lodewicus Du Toit v. Minister for Safety and Security of the Republic of South Africa and Another / **g)** [www.constitutionalcourt.org.za/Archimages/13800.PDF](http://www.constitutionalcourt.org.za/Archimages/13800.PDF) / **h)** CODICES (English).

#### *Keywords of the systematic thesaurus:*

3.9 General Principles – **Rule of law**.  
 3.12 General Principles – **Clarity and precision of legal provisions**.  
 4.6.10.1 Institutions – Executive bodies – Liability – **Legal liability**.

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces**.

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

#### *Keywords of the alphabetical index:*

Amnesty, function / Amnesty, scope / Civil servant, dismissal, ground / Interpretation, contextual / Law, social context, change / Police, law on police / Political offence, politically motivated offence.

#### *Headnotes:*

The grant of amnesty in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 does not result in the expungement of all of the consequences of conviction and sentence.

#### *Summary:*

I. The applicant was convicted and sentenced in 1996 for the murder of four people, collectively known as the “Motherwell Four”. The murders were politically motivated. Following his conviction and sentencing, and in terms of the legislation governing the South African Police Service (SAPS), the applicant was deemed to have been discharged from his position in the SAPS as of the day after the date of sentencing. The applicant was later granted amnesty for the murders under the Promotion of National Unity and Reconciliation Act 34 of 1995 (Reconciliation Act). The result of the amnesty is that the record of the crime is deemed to be expunged from official records and documents and the crime is deemed not to have taken place.

The applicant approached the National Commissioner of the SAPS requesting reinstatement from the date of his deemed discharge, given that the granting of amnesty expunged the record of the crime and therefore, the applicant claimed, the consequences of his conviction and sentence ought to be expunged as well. The National Commissioner refused this request and the applicant then approached the High Court and, when unsuccessful in that court, the Supreme Court of Appeal, for an order reinstating him to his previous position from the date of his discharge. The Supreme Court of Appeal refused to grant the order. The applicant then approached the Constitutional Court.

II. In a unanimous judgment written by Chief Justice Langa, the Court held that Section 20.10 of the Reconciliation Act which provided for the expungement of the record of a crime upon amnesty being granted, must be interpreted in its historical

context and in the light of its purpose, being the achievement of national unity and reconciliation by the development of a collective memory through truth-telling. In order for the truth to be told, perpetrators of crimes committed with a political purpose were granted amnesty. This was meant to lift the burden of the crime from the shoulders of the perpetrator, while giving a measure of closure to victims. Due to the tensions and strains that amnesty imposes on the rule of law, it was important that the benefits accorded to perpetrators did not outweigh those enjoyed by the victims. The interplay of benefit and disadvantage was, and is, vital to the success of the process.

The Court held that the statutory context of Section 20.10 is also helpful in ascertaining its meaning. Sub-sections 20.7 to 20.10 of the Reconciliation Act deal with the consequences of the grant of amnesty. Read together, these sub-sections lay out a scheme in terms of which the grant of amnesty does not render unlawful steps lawfully taken before amnesty was granted, nor do the sub-sections undo legal consequences which were already complete by the time amnesty was granted. The sections make a distinction, in relation to pending proceedings and past liability, between civil and criminal liability. The effect of amnesty on criminal liability is both prospective and retrospective so that criminal liability in respect of the acts for which amnesty is granted is extinguished; and where there has been a conviction, it is deemed not to have taken place. This is a simple process as the criminal effect of the grant of amnesty relates primarily to an entry in official records and affects only those involved in the amnesty process. By contrast, the effect of granting amnesty on civil liability that has already been determined is prospective only. This is because civil or administrative liability tends to affect those outside of the amnesty process and has far-reaching consequences. Decisions taken may have been acted upon and decision-makers may have organised their affairs in accordance with the decision already taken. Undoing civil judgments or administrative decisions already lawfully taken would have disruptive consequences and result in uncertainty.

In this light, the Court concluded that Section 20.10 ought to be interpreted so as to operate prospectively on the civil and administrative consequences of the grant of amnesty. This approach is in line with the presumption against retrospectivity that provides that where, as in this case, there is an indication of retrospectivity, its extent must be limited unless there is direct indication to the contrary. While the Reconciliation Act seeks to advance reconciliation and national unity, it cannot undo what has happened in the past. The aim of the legislation is not to restore to the victims what they have lost – an impossible

task – and equally it does not seek to restore the perpetrator in every respect to his or her position prior to the commission of the offence. To seek to undo all the consequences of the conviction would be an endless task and would place an undue burden on the state and third parties.

Accordingly, the appeal was dismissed.

#### *Supplementary information:*

Legal norms referred to:

- Epilogue to the interim Constitution, 1993;
- Section 22.1 of Schedule 6 of the Constitution, 1996;
- Section 20.7, 20.8, 20.9 and 20.10 of the Promotion of National Unity and Reconciliation Act 34 of 1995;
- Section 36 of the South African Police Service Act 68 of 1995.

#### *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];
- *Department of Land Affairs and Others v. Goedgelegen Tropical Fruits (Pty) Ltd*, Bulletin 2007/2 [RSA-2007-2-008];
- *Chief Lesapo v. North West Agricultural Bank and Another* 2000 (1) South African Law Reports 409 (CC);
- *De Lange v. Smuts NO and Others*, Bulletin 1998/2 [RSA-1998-2-004];
- *Jaga v. Dönges, NO and Another; Bhana v. Dönges, NO and Another* 1950 (4) South African Law Reports 613 (A);
- *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Others*, Bulletin 2004/1 [RSA-2004-1-004];
- *Affordable Medicines Trust and Others v. Minister of Health and Another*, Bulletin 2005/1 [RSA-2005-1-002].

#### *Languages:*

English.



*Identification: RSA-2009-2-012*

a) South Africa / b) Constitutional Court / c) / d) 27.08.2009 / e) CCT 110/08; [2009] ZACC 24 / f) Reflect-All 1025 CC and Others v. Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government and Another / g) [www.constitutionalcourt.org.za/Archimages/13831.PDF](http://www.constitutionalcourt.org.za/Archimages/13831.PDF) / h) CODICES (English).

*Keywords of the systematic thesaurus:*

3.17 General Principles – **Weighing of interests.**  
 3.18 General Principles – **General interest.**  
 5.1.4.3 Fundamental Rights – General questions – Limits and restrictions – **Subsequent review of limitation.**  
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**  
 5.5.2 Fundamental Rights – Collective rights – **Right to development.**

*Keywords of the alphabetical index:*

Expropriation, *de facto* / Expropriation, elements / Expropriation, purpose / Expropriation, zoning plan / Unconstitutionality, declaration.

*Headnotes:*

Under Section 25.1 of the Constitution, no one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property. Provisions allowing provincial authorities to determine provincial routes and preliminary provincial road designs, which overlap portions of privately owned land, place a clog on the development of the land even before a decision about whether the roads will be built is taken. However, they were found not to amount to arbitrary deprivation of property because the Act strikes a balance between the province's legitimate interests in protecting the hypothetical road network, while ensuring that the interests of property owners are protected.

*Summary:*

I. The applicants were land owners in the province of Gauteng. Portions of their properties were affected because these portions fell within the "road" or "rail reserve" of the road network which constituted the full width of a road intended to be used for traffic. The applicants applied to the South Gauteng High Court, Johannesburg ("the High Court"), complaining, amongst other things, that the impugned provisions arbitrarily deprived owners of their land in violation of

Section 25.1 of the Constitution, and that these provisions amounted to expropriation without just and equitable compensation. The respondents, the Member of the Executive Council and the Premier for the Province of Gauteng, maintained that the impugned provisions were constitutionally valid.

The applicants sought the confirmation of an order made by the High Court declaring unconstitutional Section 10.3 of the Gauteng Transport Infrastructure Act 8 of 2001 ("the Act") together with its corresponding regulations. The High Court found that the restrictions invoked under Section 10.3 of the Act arbitrarily deprived property owners of their property and were therefore invalid. The High Court, however, refused to declare Section 10.1 invalid. It found that the restrictions invoked by Section 10.1 were not excessive and that even though Section 10.1 deprived the applicants of their property, the deprivation was not arbitrary.

II. Justice Nkabinde, writing for the majority, stressed that although the protection of the right to property is a fundamental human right, property rights in our new constitutional democracy are not absolute. They are determined and afforded by law and can be limited in the light of a greater public interest.

Justice Nkabinde found that the long-term planning of a strategic road network is for the benefit of the public. An inadequate transport system could stifle economic growth and lead to expensive re-routing, especially if planning is done piecemeal.

Justice Nkabinde found that the expenses incurred by the province in relation to route determinations and preliminary designs were based on fundamentally sound planning policy. A mass review of these route determinations and preliminary designs at the instance of the state would both cripple the state financially and be extremely burdensome to implement.

Justice Nkabinde therefore concluded that whilst both provisions deprive the applicants of portions of their land that fall within a road reserve, neither deprivation is arbitrary. She reasoned that the Act strikes a balance between the province's legitimate interests in protecting the hypothetical road network, while ensuring that the interests of property owners are protected.

The Act enables affected property owners to apply for amendments of the routes and designs affecting their properties, yet none of the applicants had applied for such amendments.

The applicants argue that Section 10.3 amounted to expropriation without just and equitable compensation. Justice Nkabinde held that the provincial government had not acquired any rights in the affected property as its action amounted only to route determinations and preliminary designs, and the process had not reached the actual building of the roads.

The Court accordingly refused to confirm the order of constitutional invalidity in respect of Section 10.3 made by the High Court.

Justice O'Regan dissented with regard to the constitutionality of Section 10.3. She held it to be unconstitutional because of the indefinite nature of the restriction of the rights and the fact that there is no mechanism in place for periodic public review. Justices van der Westhuizen and Cameron concurred in the judgment of Justice O'Regan.

#### *Supplementary information:*

Legal norms referred to:

- Sections 25.1, 25.2, 25.3, 172.2.a of the Constitution, 1996;
- Sections 8.8, 9, 9.1.a, 9.2, 10.1 and 10.3 of the Gauteng Transport Infrastructure Act 8 of 2001;
- Notice no. 2626 of 2003 published in *Provincial Gazette Extraordinary* no. 331.

#### *Cross-references:*

- *Mkontwana v. Nelson Mandela Metropolitan Municipality and Another* 2005 (1) *South African Law Reports* 530 (CC);
- *First National Bank of SA Limited t/a Wesbank v. Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v. Minister of Finance*, *Bulletin* 2002/2 [RSA-2002-2-006];
- *Masetlha v. President of the Republic of South Africa and Another*, 2008 (1) *South African Law Reports* 566 (CC);
- *Harksen v. Lane NO and Others*, *Bulletin* 1997/3 [RSA-1997-3-011].

#### *Languages:*

English.



## Spain Constitutional Court

### Important decisions

*Identification:* ESP-2009-2-006

**a)** Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 23.03.2009 / **e)** 70/2009 / **f)** José Álvarez Rocha / **g)** *Boletín oficial del Estado* (Official Gazette), 102, 27.04.2009; [www.boe.es/boe/dias/2009/04/27/pdfs/BOE-A-2009-7030.pdf](http://www.boe.es/boe/dias/2009/04/27/pdfs/BOE-A-2009-7030.pdf) / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

3.12 General Principles – **Clarity and precision of legal provisions.**  
 4.6.9 Institutions – Executive bodies – **The civil service.**  
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**  
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**

*Keywords of the alphabetical index:*

Health, mental / Data, medical, confidentiality / Civil servant, compulsory retirement.

#### *Headnotes:*

A public authority which obliges a teacher to retire because of permanent disability, on the basis of medical reports in his private clinical record obtained without his consent and without any legal basis, violates the right to privacy (Article 18 of the Constitution).

Information concerning a person's physical or mental health is private and particularly sensitive.

Any restriction on the fundamental right to privacy must be based on a legal provision, pursue a legitimate aim, be proportionate to that aim and respect the essence of the right in question.

### Summary:

I. The instant appeal, brought before the Constitutional Court, fulfilled the condition of admissibility established by the Implementing Act of 2007 on the Constitutional Court, in that it raised a question with a new constitutional dimension.

The authorities had decreed that a secondary school teacher had to retire on grounds of permanent disability, after having studied the contents of his clinical record, including several medical reports drawn up by the authorities' technical services (reporting only that the individual in question had not turned up for his medical visits) and two medical reports by his private psychiatrist. The appeal against this decision had been dismissed on the ground, amongst others, that, as teaching was deemed to be an activity of public interest, it was justified for the authorities to be given access to private medical reports.

II. In the judgment handed down pursuant to the appeal for constitutional protection, the Constitutional Court held that it was irrefutable that the administrative procedure had breached the appellant's right to privacy in that it had been based on two preliminary medical reports on his mental health drawn up by his psychiatrist.

The right to personal privacy enshrined in Article 18.1 of the Constitution protects individuals against not only the unlawful acquisition of information concerning their private lives by third parties, but also the disclosure, dissemination or publication of such information without their consent or without lawful authorisation. The right in question safeguards individuals' right to privacy and forbids third parties, whether other individuals or public authorities, from deciding what constitutes the boundaries of privacy.

Personal privacy undoubtedly includes information concerning a person's physical or mental health. Respect for the confidentiality of information concerning health matters is a fundamental principle of the legal system of all European states. Domestic legislation must provide appropriate safeguards to prevent any communication or disclosure of information concerning a person's health incompatible with the provisions of Article 8 ECHR.

The Constitutional Court went on to state that fundamental rights were neither unlimited nor absolute and might in some cases be restricted. The right to privacy may have to yield to other constitutionally important rights, provided that the restriction is founded on a legal provision with a constitutional justification, is necessary in the pursuit

of a legitimate aim, is proportionate and is in keeping with the essence of the right. Consideration must also be given to judicial review and the grounds for the restrictive administrative or judicial decision: they should not only be based on the legal provision providing for restrictions on citizens' private lives but should also strike a balance between the fundamental right concerned and the relevant interest protected by the Constitution in order to determine whether the steps taken are justified, necessary and proportionate.

Neither the laws concerning health and patients' clinical records nor the laws concerning the retirement of public officials constitute sufficient legal provisions to justify such interference in a person's medical files. The legal provisions invoked by the public authorities and the courts do not state, as is required, the cases and conditions in which it is justified to place restrictions on this fundamental right.

The lack of a legal basis for this interference was in itself a sufficiently compelling reason to grant the appellant constitutional protection. However, the Constitutional Court pointed out that this was not the only reason, given that no mention was made in the disputed administrative or judicial decisions of the need to breach the privacy of the person whose retirement had been decreed. It should also be noted that there was absolutely no obvious need to use private reports concerning his mental health given that the authorities already had numerous documents on this subject and that it would have been sufficient to consult his superiors, his colleagues and perhaps even the pupils he taught to assess his teaching abilities.

### Cross-references:

- European Court of Human Rights of 10.10.2006, *L.L. v. France* and *Z. v. Finland* of 25.02.1997;
- European Court of Justice of the European Communities of 05.10.1994, *X. v. the Commission*, no. C-404/92-P.

### Languages:

Spanish.



**Identification:** ESP-2009-2-007

**a)** Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 18.05.2009 / **e)** 116/2009 / **f)** Fresh calculation of previously cancelled charges for port services / **g)** *Boletín oficial del Estado* (Official Gazette), 149, 20.06.2009; [www.boe.es/boe/dias/2009/06/20/pdfs/BOE-A-2009-10249.pdf](http://www.boe.es/boe/dias/2009/06/20/pdfs/BOE-A-2009-10249.pdf) / **h)** CODICES (Spanish).

**Keywords of the systematic thesaurus:**

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

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

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

3.13 General Principles – **Legality.**

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

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

**Keywords of the alphabetical index:**

Tax, retroactive, arbitrariness.

**Headnotes:**

Any retroactive regulations concerning the calculation of charges for port services which had been cancelled by a final binding judicial decision are unconstitutional on the grounds that they violate the principles of legal certainty and prohibition against arbitrary action on the part of the public authorities (Article 9.3 of the Constitution).

The amounts which public ports charge to shipping companies or other companies for the services they provide are “property contributions for public purposes”, governed by the constitutional principle stipulating that such taxes can only be imposed in accordance with the law (Article 31.3 of the Constitution).

The law on charges for port services cannot have a retroactive effect and relate to the payment of services rendered prior to its entry into force, unless such could be considered to be in the public interest.

The modification of a legal provision, after the court dealing with the case had asked the Constitutional Court for a preliminary ruling on the constitutionality of the case, in no way prevents the latter from ruling on its validity, given that the norm was applied in the context of judicial proceedings during which the relevant question was raised.

**Summary:**

A shipping company had succeeded in having various calculations of charges for port services, established by ministerial decree and dating back to 1992, declared null and void *ipso jure*. Later, in 1999, a law governing such charges was enacted and one of its additional provisions provided for a fresh calculation of the charges declared null and void prior to its enactment. The court dealing with the appeal lodged by the shipping company against the Bilbao port authorities raised a preliminary question of the constitutionality of this legal provision.

The Constitution does not prohibit retroactive fiscal measures. However, that in no way means that fiscal measures which have a retroactive effect are applicable in all cases, as other constitutional principles may come into play, for example the principle of prohibition against arbitrary action on the part of the public authorities and the principle of legal certainty (Article 9.3 of the Constitution). The latter protects the confidence of citizens whose economic conduct is in keeping with the legislation in force against normative changes which cannot reasonably be foreseen.

The degree of retroactivity of the norm and the specific circumstances of each case, are key factors. A distinction must be made between:

1. “Authentic” retroactivity, concerning legal provisions whose purpose is to ensure that de facto situations which occurred in the past and ended before the entry into force of the law produce certain retroactive effects, which is expressly prohibited by the Constitution; and
2. Improper retroactivity, involving current situations or legal relationships which still exist, in which the lawfulness or unlawfulness of the provision is determined by an assessment of assets on a case-by-case basis, taking account of legal certainty, of the various requirements which may have entailed a change in the legal and fiscal provisions, and of the actual circumstances of each case.

The disputed norm is unconstitutional in that it authorises the recalculation of charges for port services by determining the charges to be applied to de facto situations which no longer exist and which came under previous legislation, and which had also previously been calculated in keeping with that legislation and subject to review by the relevant judicial authorities. Moreover, in the instant case, there was no general interest overriding the requirements deriving from the principles of legal certainty and the prohibition against arbitrary action.

*Supplementary information:*

To date, Law no. 48/2003 of 26 November 2003 on the economic regime and the provision of port services of general interest distinguishes between services for which there is only one provider, which relate to the exercise of public functions and are subject to port taxes fixed by law, and those which are in competition with the private sector, where prices are privately fixed.

*Cross-references:*

Port charges must be considered “property contributions for public purposes” and are therefore governed by the constitutional principle that taxes can be imposed only in accordance with the law (Article 31.3 of the Constitution): Constitutional Court judgments no. 63/2003 of 27.03.2003, no. 102/2005 of 20.04.2005 and no. 121/2005 of 10.05.2005.

*Languages:*

Spanish.

*Identification:* ESP-2009-2-008

**a)** Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 18.05.2009 / **e)** 120/2009 / **f)** Abdelilah Aziar / **g)** *Boletín oficial del Estado* (Official Gazette), 149, 20.06.2009; [www.boe.es/boe/dias/2009/06/20/pdfs/BOE-A-2009-10253.pdf](http://www.boe.es/boe/dias/2009/06/20/pdfs/BOE-A-2009-10253.pdf) / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**

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

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:*

Witness, hearing, video recording / Evidence, free evaluation, principle / Appeal, evidence, direct.

*Headnotes:*

A Court of Appeal cannot find guilty an accused person, who was acquitted at first instance, without itself holding a public hearing of the accused and of the witnesses for the prosecution; it is not sufficient to view a video recording of the hearing in the lower court.

The constitutional safeguards of a prompt, public, oral and adversarial hearing are not fulfilled if a Court of Appeal finds an accused person, who was acquitted at first instance, guilty on the basis of personal evidence of which a different assessment was made in the appeal court from that made at first instance, without holding a public and adversarial hearing.

*Summary:*

I. While conducting surveillance of a park, after having seized some hashish from two youngsters, several members of the Civil Guard had arrested Abdelilah Aziar and another person, who were subsequently accused of committing a public health offence. At the hearing, the court acquitted the two accused on the grounds that there were doubts as to the reliability of the statements made by the civil guards, which were the only evidence put forward by the public prosecutor against the accused. The Court of Appeal later found the accused guilty, saying that the civil guards' statements were veracious and trustworthy. It handed down its decision without holding a public hearing, on the grounds that viewing a video-recording of the hearing at first instance respected the constitutional safeguards of a prompt and adversarial hearing.

II. In judgment no. 120/2009, in accordance with the case law of the European Court of Human Rights and the previous decisions of the Spanish Constitutional Court itself, the latter stated that when a court of appeal has to rule on the facts and the points of law of a case, and particularly when it is called on to decide whether an accused person is guilty or innocent, it cannot hand down a judgment without directly hearing in person the accused who denies committing the offence and the witnesses, along with an examination of any other personal evidence.

It is not obligatory for the Court of Appeal to hold a public hearing before sentencing an accused person who has previously been acquitted at first instance. It can hand down its judgment without a preliminary hearing in the following cases:

- a. if the sentence imposed in appeal proceedings does not alter the facts fully established in the judgment handed down at first instance;
- b. if the established facts are altered by the Court of Appeal on the basis of non-personal evidence which may be evaluated by the Court of Appeal without it being necessary for such evidence to be submitted directly to the court; or
- c. when the Court of Appeal reaches different conclusions from those reached by the court which presided over the hearing, making it possible to draw fresh conclusions from the established facts given in the judgment handed down at first instance and not altered in the appeal proceedings.

The Court of Appeal's viewing of the video recording of the hearing held at first instance is not in keeping with the safeguards of a prompt, public and adversarial hearing, which are part of the fundamental right to a fair trial (Article 24.2 of the Constitution), a right which in turn refers to another constitutional principle, whereby proceedings shall be predominantly oral, especially in criminal cases (Article 120.2 of the Constitution).

There are two dimensions to this constitutional safeguard: the person judging the case must have before him or her the declarant; and the declarant, irrespective of whether it is the accused, a witness or an expert, must be able to address the person responsible for evaluating his/her statements. This enables the judge to appraise all of the statements made and the way and the context in which they are made, including both verbal and non-verbal communication by the declarant and by third parties. This also enables the judge to take steps to check the veracity of the facts, provided that this does not compromise his/her impartiality.

The use of new technologies, such as the audiovisual recording of hearings, is acceptable provided it is for a legitimate purpose and is compatible with the rights of defence. Spanish case law accepts the viewing in the Court of Appeal of the statements made at the preliminary hearing provided it is in the presence of those who made the statements, so that they can be questioned as to the content. It also accepts that statements made at first instance can be evaluated by the chamber of appeal if their content can be orally presented in the court of second instance and if both parties are given an opportunity to comment in public,

even if the prompt and adversarial nature of the hearing is not safeguarded during the appeal proceedings because the declarants are unable to appear, in accordance with the law. All personal evidence produced without the simultaneous appearance in court of both the declarant and the judge, in no way constitutes an alternative method of producing evidence that can be freely chosen by the court, but can only be a subsidiary method of producing evidence, subject to the existence of justifiable grounds, provided for by law.

In the instant case, there was no reason why the accused and the witnesses could not appear before the Court of Appeal. The chamber of appeal was therefore deprived of the opportunity of evaluating the personal evidence other than by relying on the hearing at first instance, because there was no public, adversarial hearing during which it could have personally and directly heard those who had provided evidence at the hearing in the court of first instance. By failing to abide by this principle, the chamber of appeal violated the appellant's right to a fair trial and the right to be presumed innocent until proven otherwise, in that the evidence against him comprised only statements which were evaluated in the appeal proceedings without the safeguards of a prompt, oral, public and adversarial hearing.

#### *Cross-references:*

- Constitutional Court Judgment n°167/2002 of 18.09.2002;
- Judgment of the European Court of Human Rights, 26.05.1988, *Ekbatani v. Sweden*.

#### *Languages:*

Spanish.



# Switzerland

## Federal Court

### Important decisions

*Identification:* SUI-2009-2-003

a) Switzerland / b) Federal Court / c) Court of Criminal Law / d) 06.02.2009 / e) 6B\_413/2008 / f) A.X. and Y. v. Z. and the Public Prosecutor of the Canton of Zurich / g) *Arrêts du Tribunal fédéral* (Official Digest), 135 I 113 / h) CODICES (German).

*Keywords of the systematic thesaurus:*

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

4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**

4.7.16.2 Institutions – Judicial bodies – Liability – **Liability of judges.**

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

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

5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing.**

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

*Keywords of the alphabetical index:*

Immunity, judge, lifting / Judge, criminal prosecution against, authorisation / Parliament, decision, motivation, obligation.

*Headnotes:*

Article 10.1 of the Federal Constitution (right to life); Article 2.1 ECHR (right to life, authorisation to prosecute a cantonal judge).

The right to life on the one hand affords protection against the state and, on the other, imposes an obligation on the latter to ensure the fullest possible protection of its citizens, investigate offences against life and prosecute those responsible (recital 2.1).

Where offences against life are concerned, any privilege granted in the context of criminal proceedings is inconsistent with the right to life. Consequently, the state must balance the interest in bringing criminal proceedings against the interest in impeding them. Thus, when an application is made for leave to prosecute, the state must, whatever the applicable procedure, guarantee that both the accused (person enjoying privileges) and the victim's next of kin are able to exercise their procedural rights (recitals 2.2 and 2.3).

*Summary:*

I. In September 2007, a taxi-driver was stabbed to death by C., who was free despite a warrant for his arrest issued by cantonal judge Z. which had not been immediately executed. The Attorney General of the Canton of Zurich subsequently asked the cantonal parliament to authorise the opening of a criminal investigation against Z. for negligent homicide. The parliament refused permission.

The victim's mother and stepfather appealed to the Federal Court against this decision.

II. The Federal Court allowed the appeal as a subsidiary constitutional appeal. It set aside the impugned decision and referred the matter back to the parliament for a fresh decision.

Article 10.1 of the Federal Constitution guarantees full protection of human life. This provision on the one hand affords protection against the state and, on the other, contains a positive obligation requiring the state to protect human life from assaults by private individuals. The state is therefore obliged to impose penalties in the case of offences against human life (intentional or negligent homicide) and to guarantee an effective criminal prosecution. This obligation also stems from Article 2.1 ECHR. However, it is not absolute. It does not rule out the possibility of the state waiving criminal prosecution if this is justified by overriding grounds or interests. This may apply in the case of amnesties or when the immunity of judges or MPs is at issue. In such a situation, immunity comes into conflict with the protection of human life, but it may also come into conflict with provisions guaranteeing an effective remedy, such as Article 29a of the Federal Constitution or Article 6.1 ECHR. It is therefore a case of balancing the interests requiring the commencement of criminal proceedings against the grounds which justify immunity.

The judicial authorities must conduct such a weighing of interests in fair proceedings guaranteeing in particular the right to a hearing. The parliament heard only judge Z. and gave no reasons for its decision. In

so doing, it failed to take due account of the interests at stake and failed to grant the mother and stepfather basic procedural rights. For this reason, the parliament's decision is set aside and the matter is referred back to it so that it can reach a decision in fair proceedings, giving all the parties a hearing and providing reasons for its decision. Such requirements also apply to a parliament.

#### Languages:

German.



#### Identification: SUI-2009-2-004

**a)** Switzerland / **b)** Federal Court / **c)** First Chamber of Social Law / **d)** 15.06.2009 / **e)** 8C\_807/2008 / **f)** N. v. La Mobilière Assurance (Swiss Insurance company) / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 135 I 169 / **h)** CODICES (German).

#### Keywords of the systematic thesaurus:

3.12 General Principles – **Clarity and precision of legal provisions.**  
 3.13 General Principles – **Legality.**  
 3.16 General Principles – **Proportionality.**  
 3.18 General Principles – **General interest.**  
 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.**

#### Keywords of the alphabetical index:

Insurance, surveillance of insured person / Insured person, obligation to provide information / Social security, benefits, abuse.

#### Headnotes:

Articles 13.1 and 36 of the Federal Constitution (protection of privacy and restriction of fundamental rights). Surveillance of insured persons. Accident insurance companies are authorised to arrange surveillance of an insured person by a private detective (recitals 4 and 5).

#### Summary:

I. Mr N., born in 1968, ran his own business. He was insured against occupational accidents with the *La Mobilière* insurance company. In late 2003 he fell five metres from the top of a lifting platform. The doctors found that he had suffered serious injuries. *La Mobilière* recognised that the consequences of the accident were covered by its insurance policy and awarded benefits in accordance with the relevant legislation.

Following surveillance of N. by a private detective, *La Mobilière* suspended its payments in 2004. It withdrew N.'s entitlement to benefits on the ground that there was no causal link between his persistent pains and the accident suffered in 2003. This decision was upheld by the Administrative Court of the Canton of Bern.

N. lodged a public-law appeal with the Federal Court asking it to set aside the decisions of *La Mobilière* and the administrative court and to order the former to resume its payments.

II. The Federal Court dismissed the appeal. *La Mobilière* is a private insurance company which also provides compulsory insurance against accidents. As such it is competent to take decisions under the law on administrative procedure. It is also obliged to respect fundamental rights.

Surveillance constitutes an invasion of privacy within the meaning of Article 13.2 of the Federal Constitution. It was limited to observation in public areas. The detective was not authorised to encroach on the private sphere of the person under surveillance or to come into contact with him. The interference therefore requires a sufficiently clear legal basis and must satisfy the principle of proportionality.

The general rules governing the social insurance field require insurance companies to take the necessary investigative measures on their own initiative and to gather the information they require. Insured persons and employers must assist free of charge with implementing the law. Anyone who claims entitlement to benefits must supply the necessary information. There is also an obligation to provide information on the part of doctors, insurance institutions, official bodies and others. In the light of these various rules, there is a sufficiently clear legal basis justifying interference in the private sphere. Surveillance meets a public interest, namely preventing improper payment of benefits in order to protect the community of insured persons. Observation is an appropriate means of uncovering abuses of all kinds. Surveillance constitutes as medical examinations, do not always

produce conclusive results and also entail interference with personal liberty. Provided surveillance is confined to public areas and does not encroach on the private sphere, it complies with the principle of proportionality. For these reasons, the hiring of a private detective by the insurance company is consistent with fundamental rights. It follows that the private detective's findings can be used in considering whether *La Mobilière* can discontinue the accident insurance benefits.

*Languages:*

German.



## "The former Yugoslav Republic of Macedonia" Constitutional Court

### Important decisions

*Identification:* MKD-2009-2-005

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 13.05.2009 / e) U.br.200/2008 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 63/2009, 20.05.2009 / h) CODICES (Macedonian, English).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Leave, unused, right to compensation.

*Headnotes:*

The right to annual leave is a constitutionally guaranteed right, which a worker may not waive. Replacing this right with pecuniary compensation is unconstitutional.

*Summary:*

The Association of Trade Unions of Macedonia requested the Court to review the constitutionality of part of Article 145 of the Law on Working Relations ("Official Gazette of the Republic of Macedonia", nos. 62/2005, 106/2008 and 161/2008) which provided for the possibility for compensation for the unused part of the annual leave of workers. Under Article 145.1 of this Law, if an employer fails to enable the worker to use his or her annual leave, the worker is entitled to compensation for any unused days or his or her leave, in the amount of his or her average salary for those days. Under Article 145.2,

any agreements under which a worker would waive his or her right to annual leave or compensation for it as outlined in Article 145.1 are null and void.

The petitioner claimed that this provision was contrary to the Constitution, as it allowed the employer to disregard the constitutionally guaranteed right to annual leave by way of providing compensation for it, making the right to annual leave virtually inexistent.

The Court took account of Articles 9 and 32 of the Constitution which guarantee the principle of equality of all citizens, and which prevent employees from waiving their rights to paid daily, weekly and annual leave.

The Court noted that by enacting Article 145.1 of the Law, the legislator had made it possible for employers to pay workers compensation for unused days of leave, rather than enabling them to use their holiday. This state of affairs ran counter to Article 32.4 of the Constitution, which places employers under a duty to create conditions for their workers to use annual leave and to pay for that leave. The provision could also be interpreted in such a way that employers could, with complete impunity, replace their workers' annual leave entitlement with pecuniary compensation, if they found this to be more profitable.

The above legal provision entails workers being deprived of their constitutionally prescribed right to use paid annual leave, which they may not waive. The Court therefore found Article 145.1 of the Law to be in breach of Article 32.4 of the Constitution, and it directed its repeal.

#### *Languages:*

Macedonian.



#### *Identification:* MKD-2009-2-006

**a)** "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 13.05.2009 / **e)** U.br.201/2008 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 68/2009, 02.06.2009 / **h)** CODICES (Macedonian, English).

#### *Keywords of the systematic thesaurus:*

3.18 General Principles – **General interest.**

3.25 General Principles – **Market economy.**

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

#### *Keywords of the alphabetical index:*

Expropriation, purpose / Energy, sector, regulation.

#### *Headnotes:*

Expropriation as an administrative-legal measure may be carried out not only for the purpose of constructing facilities, but also in order to perform other matters of public interest, (for example in order to ensure the rapid and unhindered activities of the transmission of electricity and natural gas).

#### *Summary:*

I. Two individuals, by separate petition, requested a constitutional review of Articles 2.2 and 3.4 of the Law on Expropriation ("Official Gazette of the Republic of Macedonia", nos. 33/95, 20/98, 40/99, 31/2003, 46/2005, 10/2008 and 106/2008).

Article 2.2 of the Law allowed for the expropriation of facilities, plants and pipelines for the transmission of electricity and natural gas for the purposes of carrying out an activity of public interest defined by law. Article 3.4 of the Law, allowed for expropriation to serve the needs of the legal entities carrying out an activity such as the transmission of electricity or natural gas.

The petitioners argued that expropriation was strictly functional in character and could only be carried out with a view to the construction of facilities and the performance of works of public interest; beyond the accomplishment of that public interest there was no justification for carrying out expropriation. It could not, therefore, be carried out on a facility that was already in place and in operation, as is the case with plants and pipelines for the transmission of electricity and natural gas. They contended that Articles 2.2 and 3.4 diverted the nature of expropriation into nationalisation, i.e. taking away property where facilities were already built and in operation for the transmission of electricity and natural gas. These articles therefore violated fundamental constitutional values, including the rule of law, legal protection of property, and the freedom of market and entrepreneurship.

II. The Court rejected the petitioners’ arguments, and held that expropriation could be used as an administrative-legal measure not only to construct facilities, but also in order to perform other matters of public interest. It drew a distinction between these two legal situations. In the first one, immovable property is expropriated in order to construct a new facility. In the second, immovable property is expropriated for the performance of matters of public interest, such as the transmission of natural gas and electricity, which are defined in the Law on Energy as matters of public interest. Public interest may also be defined by another law, as in this case. At the same time, the legislator had not envisaged expropriation for the purpose of building in this particular instance (where facilities, plants and pipelines were already in existence and in operation for the transmission of electricity and natural gas). The Court defined the purpose here as the fast and unobstructed continuation of the transmission of electricity and natural gas, in a situation where the licences of those performing these activities had been taken away after a legally conducted procedure and the building of a completely new system for a short period of time was practically impossible.

Having analysed the relevant provisions of the Energy Law (“Official Gazette of the Republic of Macedonia”, nos. 63/2006, 36/2007 and 106/2008), the Court concluded that legal entities transmitting electricity or natural gas have the duties of a public service and the public interest in the performance of the activities is ensured by those performing the activity, by meeting the obligation for providing a public service in a manner and procedure defined by the licence for performing the relevant energy activity. If the licence to transmit electricity and natural gas is taken away, the Law has put in place measures to ensure the reliable, qualitative, efficient and unobstructed supply of energy to consumers. To serve that aim, the last measure set out in Article 51 of the Law is expropriation, which is by nature an administrative-legal measure, following determination upon a proposal by a new holder of as licence to transmit electricity and natural gas, to expropriate the system for transmitting electricity and natural gas pursuant to the Law on Expropriation.

The Court also stressed that other methods exist to resolve legal property disputes, and the removal of property (the transfer of property or its use from one owner to another) will only be applied in situations where the existing owners and the new licence-holders are unable to solve their disputes within the legally defined time limit, giving rise to a serious risk of interruption or absence of performance of activities of vital significance for the state – such as the transmission of electricity and natural gas. In that

case, property will undoubtedly be taken away due to the existence of matters of public interest once all available measures under Article 51 of the Law on Energy have been exhausted. The common good – the unobstructed supply of energy – then prevails over the individual right to property.

The Court noted the provision within the Law on Expropriation for just compensation for the expropriated property. It accordingly dismissed the petitioners’ contentions that the provisions under dispute effectively resulted in nationalisation.

Finally, the Court concluded that the provisions referred to above constitute a form of state regime governing the manner and conditions of electricity and natural gas provision in the Republic of Macedonia, and the disputed provisions of the Law on Expropriation and the Law on Energy allow for the administrative-legal measure of expropriation. The expediency and suitability of these measures are not issues dealt with by the Court in proceedings for their constitutional review. The unobstructed and continuous performance of energy supply is a significant national interest, giving rise to a need for the state to enable unobstructed continuity in the performance of these public services. The Court did not, therefore, find the contested provision to be contrary to the Constitution.

#### *Supplementary information:*

Judge Liljana Ingilizova Ristova expressed a dissenting opinion, to the effect that the state intervention between two legal subjects under the provisions under dispute goes beyond the essence of expropriation. The continued supply of energy could be achieved between the existing licence-holder and the new incumbent, through existing legal instruments for contract relations, where both sides could determine their economic interest, and the public interest could be safeguarded, through the continued supply of both types of energy.

#### *Languages:*

Macedonian.



*Identification: MKD-2009-2-007*

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 03.06.2009 / e) U.br.36/2009 / f) / g) / h) CODICES (Macedonian, English).

*Keywords of the systematic thesaurus:*

3.25 General Principles – **Market economy**.  
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.  
 5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.  
 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

*Keywords of the alphabetical index:*

Alcohol, sale.

*Headnotes:*

The special regime governing the sale of alcoholic and energy beverages, prohibiting its sale in certain outlets, is in accordance with the constitutional provision allowing the Republic to impose restrictions through legislation on the freedom of the market and entrepreneurship, in order to protect public health.

*Summary:*

I. A company trading in oil and oil derivatives asked for a constitutional review of Article 24-a.1 of the Law on Trade, which introduced a ban on the sale of alcohol in shops at petrol stations. It suggested that the ban breached certain constitutional principles, such as the rule of law, equality, legality and freedom of the market and entrepreneurship.

Article 24-a.1 of the Law on Trade prohibits the sale of alcoholic and energy beverages in the shops and kiosks in petrol stations and related outlets.

II. The Court noted the principles of freedom of the market and entrepreneurship and equality as fundamental principles of the constitutional order. It noted that the Constitution allows restrictions on commercial freedom by law only for the purposes of the defence of the Republic, the protection of natural and living environment or public health. The Court further noted that the freedom of the market and entrepreneurship cannot be viewed from the sole perspective of the subjects of the petition, as the state, as a guarantor of this freedom, has an important role as regulator of the economic course of the economy.

The Court rejected the petitioners' arguments, and recognised the legitimate right of the legislator to regulate the special regime of sale of alcoholic and energy beverages, so as to prohibit the sale of this special category of goods to those under eighteen years of age, only allowing these products to be sold in certain outlets and at certain times of the day, in order to protect public health.

In the Court's view, the ban on the sale of alcoholic and energy beverages in the outlets described above is in accordance with the constitutional provision whereby, in order to safeguard public health, the Republic may by law restrict the freedom of the market and entrepreneurship. As a result, the issue of the conformity of the above article of the Law on Trade with the Constitution did not arise.

*Languages:*

Macedonian.

*Identification: MKD-2009-2-008*

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 01.07.2009 / e) U.br.226/2008 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 88/2009, 16.07.2009 / h) CODICES (Macedonian, English).

*Keywords of the systematic thesaurus:*

3.9 General Principles – **Rule of law**.  
 3.10 General Principles – **Certainty of the law**.  
 4.6.8 Institutions – Executive bodies – **Sectoral decentralisation**.  
 5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

*Keywords of the alphabetical index:*

Education, school, examination, external.

*Headnotes:*

The organisation and implementation by the Ministry of Education and the State School Inspectorate, as bodies of executive power which are outside the school and educational process, of external

evaluation of students’ performance with an impact on the final general success of the student is incompatible with the Constitution and the rule of law.

*Summary:*

I. An individual requested a constitutional review of Article 45.3.4.5 of the Law on Secondary Education and Article 71.3.4.5 of the Law on Primary Education. The contested provisions of both laws were almost identical and provided for so-called “external evaluation of the student’s performance”.

Under these provisions, an external evaluation of a student’s performance takes place at the end of each academic year on the basis of standardised tests prepared by the Education Development Bureau and the Professional Education and Training Centre, and is organised and conducted by the Ministry of Education and the State Education Inspectorate. The results of the external evaluation of the student’s performance and progress do not affect the general success of the student and his or her grades, unless there is a difference of more than one mark between the mark obtained in the external evaluation and the mark given by the teacher. Having undergone this external evaluation, students are issued with a certificate of completion of the academic year.

The petitioner argued that these articles violated Article 44 of the Constitution, and that the external evaluation of students was unconstitutional, since neither the Ministry of Education, nor the State Education Inspectorate had a legal basis to conduct such an evaluation, and indeed no body which is out of the educational process could conduct such an evaluation of students’ performance.

II. The Court noted the constitutional guarantees ensuring a universal right to education under equal conditions, entitling citizens to gain knowledge and professional training at all levels of education under equal conditions. In the interpretation of the provisions expressing the right to education, the Court took as a starting point the fact that education is not simply a private matter for the individual, but is essential and in the interests of society as a whole. In bestowing a universal right to education, the Constitution refers to the acquisition of knowledge and professional training.

The evaluation of students encompasses following and checking their achievements and progress, as well as collecting and analysing indicators for their development in the educational system. The Court accordingly took the view that in determining the mark, it is essential to consider a number of aspects, such as: the scope and quality of the knowledge

acquired, working habits, level of interest and attitude towards instruction, ability to apply knowledge, the development of the ability and the creation of moral viewpoints. The following, checking and evaluation of students, in the context of the aspects noted, should be continuous and systematic.

The Court found that the provisions relating to the so called “external evaluation of students” both in the Law on Secondary Education and the Law on Elementary Education, are not in accordance with the Constitution and the implementation of the principle of the rule of law and legal safety of citizens, due to the absence in both laws of an express, clear and precise provision that the conduct or carrying out of testing will be within the competence of the school as an educational institution, instead rendering exclusive competence to the executive power, by empowering the Ministry of Education and the State School Inspectorate. The Court directed the repeal of both articles.

*Languages:*

Macedonian.



# Turkey

## Constitutional Court

### Important decisions

*Identification:* TUR-2009-2-004

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 15.01.2009 / **e)** E.2004/70, K.2009/7 / **f)** Annulment of the Law no. 5177 (The Law Amending the Law on Mines) / **g)** *Resmi Gazete* (Official Gazette), 11.06.2009, 27255 / **h)** CODICES (Turkish).

*Keywords of the systematic thesaurus:*

4.5.2.3 Institutions – Legislative bodies – Powers – **Delegation to another legislative body.**  
4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

*Keywords of the alphabetical index:*

Delegation of powers / Legislation, delegated / Environment, impact, assessment.

*Headnotes:*

Changes had been made to legislation on mines, whereby regulation of the principles of mining activities including assessment of environmental impact in the sphere of forestry, forestry conservation, hunting areas, special preservation areas, national parks, natural parks, natural preservation areas, agricultural lands, feeding grounds, water fields, coasts, territorial waters, tourism areas, cultural and tourism protection and development areas and military restricted zones was carried out by bye-law.

*Summary:*

Article 3 of Law no. 5177 made certain changes to Article 7 of the Law on Mines, introducing a provision whereby the principles of mining activities in the fields outlined above were to be prescribed by by-laws issued by the Council of Ministers following consultation with the relevant ministries.

Several deputies asked the Constitutional Court to annul the provision, arguing that it represented an unconstitutional delegation of legislative power to the

Council of Ministers and ran counter to Articles 2, 6, 7, 11, 43, 45, 56, 63, 90, 168 and 169 of the Constitution.

Article 168 of the Constitution stipulates that:

“Natural wealth and resources shall be placed under the control of, and put at the disposal of the State. The right to explore and exploit resources belongs to the State. The State may delegate this right to individuals or public corporations for specific periods. Of the natural wealth and resources, those to be explored and exploited by the State in partnership with individuals or corporations, and those to be directly explored and exploited by individuals or public corporations shall be subject to the explicit permission of the law. The conditions to be observed in such cases by individuals and public corporations, the procedure and principles governing supervision and control by the State, and the sanctions to be applied shall be prescribed by law.”

Article 43 of the Constitution enshrines that:

“The coasts are under the sovereignty and at the disposal of the State. In the utilisation of sea coasts, lake shores or river banks, and of the coastal strip along the sea and lakes, public interest shall be taken into consideration with priority. The width of coasts and coastal strips according to the purpose of utilisation and the conditions of utilisation by individuals shall be determined by law.”

Article 63 of the Constitution enumerates that:

“The State shall ensure the conservation of the historical, cultural and natural assets and wealth, and shall take supportive and encouraging measures towards this end. Any limitations to be imposed on such assets and wealth which are privately owned, and the compensation and exemptions to be accorded to the owners of such, as a result of these limitations, shall be regulated by law.”

The Constitutional Court stated that the conditions to be observed by individuals and corporations related to natural resources should be prescribed by law according to Article 168 of the Constitution. Furthermore, Articles 43 and 63 of the Constitution require that utilisation of coasts (and the conditions of their use by individuals), and the limitations on privately owned historical, cultural and natural assets must be regulated by law. The Court ruled that Article 7 of the Law on Mines which left the

prescription of principles of mining including environmental impact assessment to a by-law issued by the Council of Ministers is in conflict with the above Articles of the Constitution. It unanimously decided to annul the provision.

*Languages:*

Turkish.



*Identification:* TUR-2009-2-005

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 15.01.2009 / **e)** E.2006/99, K.2009/9 / **f)** Annulment of the Law no. 5491 (Law Amending the Law on Environment) / **g)** *Resmî Gazete* (Official Gazette), 08.07.2009, 27282 / **h)** CODICES (Turkish).

*Keywords of the systematic thesaurus:*

5.5.1 Fundamental Rights – Collective rights – **Right to the environment.**

*Keywords of the alphabetical index:*

Environment, impact assessment / Environment, protection.

*Headnotes:*

The exemption of prospecting activities of oil, geothermal sources and mines from environmental impact assessment is detrimental to the environment and contravenes the duty incumbent on the state to protect the environment.

*Summary:*

Article 7 of Law no. 5491 made changes to Article 10 of Law no. 2872 (Law on Environment), adding the following provision:

“Prospecting activities of oil, geothermal sources and mine are exempted from environmental impact assessment.”

Several deputies asked the Constitutional Court to annul the provision, on the basis that exempting the prospecting activities of oil, geothermal sources and mines from environmental impact assessment may cause environmental pollution and may be detrimental to the ecological balance and is according contrary to the right to environment. The applicants also pointed out that the provision was in breach of several Articles of the Constitution including Article 56. This Article stipulates that everyone has a right to live in a healthy and balanced environment and it is the duty of the state and citizens to improve the natural environment and to prevent environmental pollution.

The Constitutional Court noted the duty of the state to protect the environment under Article 56. Prospecting activities may pose a risk of irrevocable harm to the environment and ecological balance which may affect human health. Environmental impact assessment aims to restrict the potential effects of any activity on the environment. The Court stated that the exemption of prospecting activities from environmental impact assessment is not compatible with the state's obligation to protect the environment. The provision is therefore contrary to Article 56 of the Constitution, and the Court annulled it. Four members of the Court, namely, President Mr Kılıç, Judge Mr Adalı, Judge Mr Özgüldür and Judge Mr Kaleli put forward dissenting opinions.

*Languages:*

Turkish.



# Ukraine

## Constitutional Court

### Important decisions

*Identification:* UKR-2009-2-010

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 12.05.2009 / **e)** 10-rp / **f)** On compliance with the Constitution of Article 17.1 of the Law on Elections of the President and of the Resolution of Parliament on designation of regular presidential elections / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 37/2009 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

4.4.4.3 Institutions – Head of State – Appointment – **Direct/indirect election.**

*Keywords of the alphabetical index:*

President, elections / President, term of office.

*Headnotes:*

A provision of the legislation on presidential elections was declared unconstitutional and its repeal was directed, along with the parliamentary resolution on the designation of regular presidential elections.

*Summary:*

The President asked the Constitutional Court to recognise as unconstitutional Article 17.1 of the Law on presidential elections (hereinafter the “Law”) and a parliamentary resolution on designating regular elections of the President, (hereinafter the “Resolution”).

Ensuring that elections of the President are held within the periods envisaged by the legislation is of great significance for a democratic state and its republican foundations (item 3.1.1 of motivation part of Decision no. 8-rp dd. 28 April 2009).

Under Article 85.1.7 of the Constitution, it falls within the remit of Parliament to designate presidential elections within the terms provided for by the Constitution. Under Articles 103.1, 103.5 and 104.1 of the Constitution, the President is elected for a term of

five years; he or she assumes office from the day of taking the oath to the people at a solemn session of Parliament; regular elections of the President are held on the last Sunday of the last month of the fifth year of the President’s term of authority.

When calculating the President’s term of office, designating regular elections of the President and fixing the date of the elections, Parliament is guided by Articles 85.1.7, 103.1, 103.5 and 104.1 of the Constitution.

Sunday, 25 October 2009 was fixed by parliamentary resolution as the date for regular presidential elections. In this Resolution, Parliament referred in particular to Article 58 of the Constitution, under which laws and other normative-legal acts have no retroactive force except in cases when they mitigate or annul the responsibility of a person, and Article 17.1 of the Law, whereby regular presidential elections are held on the last Sunday of October of the fifth year of the president’s term of authority.

Article 17.1 of the Law reproduces Article 103.5 of the Constitution that was effective before 1 January 2006. However, this Article as amended by the Law no. 2222 has been in force since 1 January 2006.

Chapter II “Final and Transitional Provisions” of the Law no. 2222 is silent regarding the application of Article 103.5 of the Constitution that was effective before 1 January 2006 to fixing the date of presidential elections that are held after the entry into force of Law no. 2222. Therefore, there is no basis for referring in the Resolution to Article 58 of the Constitution.

According to the amended Article 103.5 of the Constitution, regular elections of the President are held on the last Sunday of the last month of the fifth year of the term of authorities of the President. Thus, Article 17.1 of the Law does not comply with Article 103.5 of the Constitution; it is unconstitutional.

Under the Fundamental Law, Ukraine is a law-based state where laws as well as other normative-legal acts are adopted on the basis of and in conformity with the Constitution, and where bodies of state power (i.e. legislative, executive and judicial) are obliged to act only on the basis, within the limits of authorities and in the manner envisaged by the Constitution and laws (Articles 1, 6.2, 8.2, 19.2).

These fundamental constitutional norms are binding on each body of state power in the exercise of its authorities.

As the parliamentary resolution was not based on the above constitutional provisions on calculating the term of office of the President and fixing the date for regular presidential elections, the Constitutional Court concluded that it did not comply with Articles 6.2, 8.2, 19.2, 85.1.7 and 103.5 of the Constitution.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2009-2-011

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 20.05.2009 / **e)** 11-rp / **f)** On compliance with the Constitution of provisions of Article 57 of the Law on the 2009 State Budget / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 40/2009 / **h)** CODICES (Ukrainian).

#### *Keywords of the systematic thesaurus:*

4.8.7.3 Institutions – Federalism, regionalism and local self-government – Budgetary and financial aspects – **Budget**.

4.10.2 Institutions – Public finances – **Budget**.

#### *Keywords of the alphabetical index:*

Local self-government, work, employee, remuneration, right.

#### *Headnotes:*

The process of drafting local budgets is regulated by Article 75 of the Budget Code. When planning expenditure of raion and oblast budgets, legal strictures, resolutions by the Cabinet of Ministers and normative acts by the Ministry of Finance that regulate the process of budget drafting are to be taken into consideration. When determining the volume of inter-budgetary transfers, expenses of public administration are to be included, including local government authorities at raion level (Article 89.1.1.b of the Budget Code) and oblast councils (Article 90.1.1.b of the Budget Code).

However, although they are entitled to independently approve budgets of a certain level, oblast and raion councils remain under a duty to adhere to provisions

of laws that regulate the process of drafting, consideration and implementation of such budgets.

#### *Summary:*

Fifty-five People's Deputies petitioned the Constitutional Court to assess the conformity with the Constitution of Article 57 of the Law on the 2009 State Budget dated 26 December 2008 (hereinafter the "Law"), according to which "oblast and raion councils when approving their respective budgets are to take into account that salaries of employees of the executive secretariats of councils should not exceed the average salaries of employees of secretariats of respective local state administrations".

The Constitution recognises and guarantees local self-government (Article 7). Local self-government is exercised by a territorial community both directly and through village, settlement and city councils, and their executive bodies (Article 140.3). Local self-government bodies that represent common interests of such territorial communities are raion and oblast councils with the authority to approve district and oblast budgets that are formed from the funds of the state budget for appropriate distribution among territorial communities or for implementation of joint projects, and from funds drawn on the basis of agreement from local budgets for implementation of joint socio-economic and cultural programmes, and to control their implementation (Articles 140.4 and 143.2 of the Constitution).

The Fundamental Law provides for basic legal principles of legislative regulation of social relations in the local government domain and places raion and oblast councils under a duty to adhere to constitutional provisions and legislation when resolving problems falling within their competence (Articles 19.2 and 140.1).

Pursuant to Law no. 280/97-BP on Local Self-Government of 21 May 1997 (hereinafter the "Law no. 280") local government authorities, including oblast and raion councils, are guided in their activities by the Constitution and laws, acts of the President, Cabinet of Ministers, and in the Autonomous Republic of Crimea – also by normative legal acts of Parliament and the Council of Ministers of the Autonomous Republic of Crimea that were adopted within the limits of their competence (Article 24.3) and approve raion and oblast budgets in accordance with the established procedure.

When determining the content of a right to remuneration for work of a local government authority, the Law "On Service in Local Self-Government Body" no. 2493-III dated 7 June 2001 (hereinafter the "Law no. 2493") states that such remuneration is commensurate to the

position of such an employee, his/her rank, quality, experience and length of service (Article 9.3).

Under Article 21 of Law no. 2493, terms of remuneration for the work of local government employees are determined by the relevant local government institution on the basis of the terms of remuneration for work established for public servants of a particular category (Article 21.3); terms of remuneration for the work of employees of executive secretariats of oblast councils are determined by the Cabinet of Ministers (Article 21.8) and in the context of these norms, a local budget is a source for the formation of a fund for the remuneration of local government employees (Article 21.4).

Under Article 8 of Law no. 108/95-BP "On Remuneration for Work" dated 24 March 1995 (hereinafter the "Law no. 108"), the state regulates the remuneration of those who work for businesses, institutions and organisations that are financed or subsidised from the budget (Article 8.1).

It follows from the provisions of Article 21 of Law no. 2493 and Articles 8 and 10 of Law no. 108 that the state can regulate the amount of remuneration for the work of local government employees by adopting laws or through norms set out in certain circumstances by the Cabinet of Ministers. In regulating individual aspects of the remuneration package of a particular category of employee, Parliament did not violate the basic principles of formation of salaries of employees of the executive secretariats of raion and oblast councils.

The Constitution reads that state expenditure for the needs of society as a whole and the extent and purpose of this expenditure is determined exclusively by the law on the State Budget (Article 95.2). Pursuant to Article 2.1 of the Budget Code, the budget is a plan of formation and use of financial resources for the fulfilment of tasks and functions carried out by state authorities, authorities of the Autonomous Republic of Crimea and local government authorities during the budget period.

The legislator identified the priority of certain budgetary laws by mentioning in Article 4.2 of the Budget Code that when "exercising budget process, provisions of normative legal acts are applied only in the part that does not violate provisions of the Constitution, this Code and the law on the State Budget".

Under Article 43 of the Constitution, everyone has a right to remuneration at a level at or above the minimum wage as determined by law (Article 43.4) and a right to a timely payment (Article 43.7). Under

Article 10 of Law no. 108, the amount of salary may not be lower than the minimum salary that is determined by the annual law on the State Budget.

Under Article 2 of Law no. 108, there are permanent elements to the salary of employees of the executive secretariat of raion and oblast councils as well as additional components that are not guaranteed and are individual in nature, such as bonuses and individual increments. Thus, there is no maximum level to the salary of a certain category of employee and this may change depending on the specific conditions determining the components of the salary to be paid.

Furthermore, when Parliament imposed a duty in Article 57 of the Law on oblast and raion councils, when approving respective budgets, to take into consideration that the average monthly salary of employees of executive secretariats of councils should not exceed the average monthly salary of employees of secretariats of respective local state administrations, it did not provide for any other legal regulation mechanism than that provided for in Article 21.3 of Law no. 2493.

The Constitutional Court accordingly concluded that the determination of the level of monthly salary of employees of executive secretariats of raion and oblast councils under Article 57 of the Law does not violate the provisions of Articles 22, 24, 95, 140 and 143 of the Constitution.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2009-2-012*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 27.05.2009 / **e)** 12-rp / **f)** On compliance with the Constitution of provisions of Articles 9.4, 10.4, 10.5, 24.1.d and 26.3 of the Law on Organisational and Legal Principles of Fighting Organised Crime / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 42/2009 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

- 3.4 General Principles – **Separation of powers.**
- 4.5.2 Institutions – Legislative bodies – **Powers.**
- 4.6.4.1 Institutions – Executive bodies – Composition – **Appointment of members.**
- 4.6.5 Institutions – Executive bodies – **Organisation.**

*Keywords of the alphabetical index:*

Parliamentary committees, function.

*Headnotes:*

Powers and authorities concerning approval of the structure of law enforcement bodies (establishment and elimination of individual departments) pursuant to the Constitution are to be exercised by Parliament directly.

*Summary:*

The President asked the Constitutional Court to review the constitutional compliance of Articles 9.4, 10.4, 10.5.d, 24.1 and 26.3 of the Law on Organisational and Legal Principles of Fighting Organised Crime with subsequent amendments (described here as “the Law”).

Legislation on the organisational and legal principles of fighting organised crime of 30 June 1993 with subsequent amendments concerning approval by a parliamentary committee was set up to deal with the following matters:

- appointment of the Head of the Main Department on Fighting Organised Crime of the Ministry of the Interior;
- appointment to and dismissal from office of the Head of the Main Department on Fighting Corruption and Organised Crime of the Central Department of the Security Service, heads of the offices of the fight against corruption and organised crime in the Autonomous Republic of Crimea and in the oblasts;
- establishment and elimination of special departments for fighting corruption and organised crime, appointment to and dismissal from office of the heads of these special departments;
- appointment of heads of department for the control of the implementation of laws by special departments on fighting organised crime of the Office of Prosecutor General and its divisions.

Pursuant to the Fundamental Law, state power is exercised on the principles of its division into legislative, executive and judicial; bodies of state power, including legislative bodies, act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and laws (Articles 6 and 19.2).

Under the Fundamental Law, Parliament establishes parliamentary committees consisting of Members of Parliament; the organisation and operational procedure of such committees are established by law in order to carry out legislative drafting, to prepare and conduct the preliminary consideration of issues ascribed to the authority of Parliament, and to exercise control functions as provided for in the Constitution (Article 89.1 and 89.5).

The legal status, functions and organisational principles of the work of parliamentary committees are set out in the Law on Committees of Parliament. Article 1 of this Law restates the provisions of Article 89.1 of the Constitution and states that a committee is accountable to and reports to Parliament. The Law on Committees of Parliament also lists the functions of parliamentary committees (legislative, organisational and control). The organisational function of parliamentary committees includes the preliminary discussion of candidates for offices falling within respective competences of the committee that are to be elected, appointed or approved by Parliament as provided for in the Constitution, and preparation for parliamentary consideration of conclusions as to such candidates (Article 13.1.3).

The control functions of committees enumerated in Article 14 of the above law do not include the function of decision-making on personnel issues.

An analysis of the legislation and constitutional provisions governing the activities of parliamentary committees demonstrates the absence of powers and authorities to approve the appointment and dismissal of officials or to consent to the establishment or elimination of special departments mentioned in the legal provisions under dispute.

Committee activities imply decision-making only at the stage of preparation and preliminary consideration of issues ascribed to the authority of Parliament. They are only authorised to exercise their organisational functions in personnel matters by carrying out preparatory work for the appointment, dismissal, approval and consent to appointment of officials by Parliament.

Having assessed these provisions, the Constitutional Court was of the opinion that functions related to personnel issues were ascribed by the legislators not for control but for organisational purposes.

Under the Constitution, Parliament is not entitled to make decisions on appointment to and dismissal from office of heads of department of law-enforcement bodies responsible for fighting organised crime and corruption mentioned in the Law. Hence, the function of the committee as provided for in the provisions of the Law in question concerning appointment to and dismissal from office of heads of such departments goes beyond the powers and authorities of Parliament provided for in the Constitution.

Under Articles 85.1.22 and 92.1.14 of the Constitution, Parliament confirms the general structure and numerical strength, and defines the functions of the Security Service and the Ministry of Interior, and organisation and operation of the procuracy; the bodies of inquiry and investigation are determined exclusively by laws. The Constitutional Court considers that the provisions of Article 24.1.d of the Law, according to which the Committee is entitled to approve the establishment and elimination of special departments on fighting corruption and organised crime, violate the above constitutional norms. Such powers and authorities concerning approval of the structure of law enforcement bodies (establishment and elimination of individual departments) pursuant to the Constitution are to be exercised by Parliament directly.

The Constitutional Court also took into consideration the fact that the Law was adopted on 30 June 1993 and thus these particular provisions violated the norms of the Constitution adopted in 1996, according to which state power is exercised on the principles of its division into legislative, executive and judicial, acting within the limits of authority and in the manner envisaged by the Constitution and laws, approval of the general structure and definition of the functions of law-enforcement bodies by Parliament, etc. When examining the constitutionality of these provisions of the Law one has to proceed from the norms of Chapter XV.1 "Transitional Provisions" of the Fundamental Law, according to which laws and other normative acts adopted prior to the entry into force of the Constitution are in force to the extent that they do not contradict the Constitution.

Therefore, Articles 9.4, 10.4, 10.5, 24.1.d and 26.3 of the Law, which bestow power on the Committee to approve appointment to and dismissal from office of certain officials, to consent to the establishment and the winding-up of special departments on fighting

corruption and organised crime were found to be out of line with Articles 6.2, 19.2, 85.1.22, 85.1.33, 89.1 and 92.1.14 of the Constitution.

The provisions of this Law and its subsequent amendments were unconstitutional.

Judges V. Bryntsev and V. Shyshkin attached a dissenting opinion.

*Languages:*

Ukrainian.



*Identification:* UKR-2009-2-013

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 04.06.2009 / **e)** 13-rp / **f)** On official interpretation of provisions of Article 141.1 and 141.2 of the Constitution / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 11/2009 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

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

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

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

*Keywords of the alphabetical index:*

Local self-government body, election.

*Headnotes:*

The provisions of Article 141.1 and 141.2 of the Constitution establishing the term of office of members of village, settlement, city, raion or oblast councils and village, settlement or city mayors are to be understood as reading that their respective terms of office, when elected at regular or early elections as provided for in the Constitution, will be five and four year terms.

### *Summary:*

The constitutional proceedings in the case on the official interpretation of provisions of Article 141.1 and 141.2 of the Constitution regarding the term of office of members of village, settlement, city, raion or oblast councils and village, settlement and city mayors after election at first, repeat and mid-term local elections were terminated pursuant to Article 45.1.2. of the Law on the Constitutional Court as this part of the constitutional petition did not meet the requirements envisaged by the Constitution and the Law on the Constitutional Court.

Constitutional proceedings in the case on the official interpretation of Article 141.1 and 141.2 of the Constitution concerning the possibility of applying the provisions of Article 14.2.2 of Law no. 1667-IV dated 6 April 2004 on Elections of Members of Parliament of the Autonomous Republic of Crimea, Local Councils and Village, Settlement and City Mayors when designating local elections were ordered to be terminated pursuant to Article 45.1.4 of the Law on the Constitutional Court, as the issues raised in this part of the constitutional petition are beyond the jurisdiction of the Constitutional Court.

A provision of Article 2 of Law no. 1866-IV dated 24 June 2004 on the "Procedure for Calculation of Convocations of Representative Bodies of Local Self-Government (Councils)" was unconstitutional and would lose its effect on the day of adoption of this Decision by the Constitutional Court.

Pursuant to its Fundamental Law, Ukraine is a democratic state (Article 1); the people are the bearers of sovereignty and the only source of power; the people exercise power directly and through bodies of state power and bodies of local self-government (Article 5.2); citizens have the right to participate in the administration of state affairs, in All-Ukrainian and local referenda, to freely elect and to be elected to bodies of state power and bodies of local self-government (Article 38.1).

Representative bodies of local self-government are village, settlement, city, raion and oblast councils that are formed upon the results of the expression of the will of the people exercised through elections, which, under Article 69 of the Constitution, is one of the forms of direct democracy. The expression of the will of the people is guaranteed by provision for the terms of office of elected persons within the Constitution.

The Constitution sets out the terms of office of Parliament, President, members of village, settlement, city, raion and oblast councils and village, settlement and city mayors (Articles 76.5, 103.1,

141.1, 141.2) and regulates certain aspects of the designation and conduct of regular and early elections to representative bodies (Articles 77.1, 77.2, 85.1.7, 85.1.28, 85.1.30, 138.1.1).

In Ukraine, local self-government is recognised and guaranteed as the right of a territorial community to independently resolve issues of local character within the limits of the Constitution and laws (Articles 7 and 140.1 of the Constitution). Pursuant to the Fundamental Law, local self-government is exercised by a territorial community according to the procedure established by law, both directly and through bodies of local self-government: village, settlement and city councils, and their executive bodies; raion and oblast councils are bodies of local self-government that represent common interests of territorial communities of villages, settlements and cities (Article 140.3 and 140.4); a village, settlement, raion and city council is composed of members elected for a five-year term by residents of a village, settlement, raion and city on the basis of universal, equal and direct suffrage, by secret ballot; territorial communities elect for a four-year term on the basis of universal, equal and direct suffrage, by secret ballot, the mayor of the village, settlement and city, respectively, who leads the executive body of the council and presides at its meetings (Article 141.1 and 141.2).

According to the Fundamental Law, the organisation and procedure for the conduct of elections and referenda are determined exclusively by laws (Article 92.1.20). To ensure implementation of this norm, Ukrainian parliament adopted the Law. Article 14 of this Law provides that regular local elections are held after the expiry of the term of office, as determined in the Constitution, of the Parliament of the Autonomous Republic of Crimea, local councils, and village, settlement or city mayor (Article 14.2); early elections will be called in the event of pre-term termination of authorities of Parliament of the Autonomous Republic of Crimea, local councils, and village, settlement or city mayors (Article 14.3).

Based on the results of regular and early elections, legitimate membership of a village, settlement, city, and raion or oblast council is formed or a village, settlement or city mayor is elected.

The Constitution sets forth the terms of authorities of representative bodies. In particular, according to Article 76.5 the term of authority of Parliament is five years; according to Article 103.1 the President is elected for five years; according to Article 141.1 village, settlement and city councils comprise members elected for a five-year term; according to Article 141.2 a village, settlement or city mayor is

elected for four years. Thus, the above constitutional norms do not contain any provisions distinguishing the terms of authority of the parliament, the Head of State or members of village, settlement, city, raion or oblast councils and village, settlement or city mayors depending on the type of elections as a result of which they were elected.

As the constitutional provisions establishing the terms of authority of representative bodies have general nature, the Constitutional Court reached the conclusion that the calculation of the respective terms is done in the same way regardless of whether members of a representative body or an official were elected at regular or early elections.

Exceptions to the constitutional provisions establishing the terms of authority of representative bodies for a certain period may be defined only in the form of appropriate amendments to the Fundamental Law.

The provisions of Article 141.1 and 141.2 of the Constitution that establish the periods for which members of village, settlement, city, raion or oblast councils or village, settlement or city mayors are elected should be understood as reading that when these officials are elected at regular or early elections, they are elected for five and four years respectively.

Under Article 2 of the Law on Procedure for Calculation of Convocations of Representative Bodies of Local Self-Government (Councils) no. 1866–IV dated 24 June 2004, the election of a new membership of a representative body of local self-government (council) at early elections is not considered to be a new convocation of a representative body.

One such representative body is Parliament, the procedure for calculation of convocations of which follows from analysis of provisions of the Constitution. If a Parliament's term of office is terminated early, it is considered to be the Parliament of the previous convocation; the Parliament of the new convocation is based on the results of the early elections.

Since the Constitution and laws provide for similar legal approaches to the organisation and activities of representative bodies, the calculation of convocations of village, settlement, city, raion or oblast councils, and the Parliament of the Autonomous Republic of Crimea formed upon the results of early elections should be based on the same approach as that used for calculation of convocations of Parliament. In view of this, the procedure set out in legislation for calculating the convocations of village, settlement, city, raion or oblast councils results in Council members being granted a different term of office from

that provided for in the Constitution. The procedure for calculation of convocations of a representative body of local self-government (council) provided for in Article 2 of the Law on Procedure for Calculation of Convocations of Representative Bodies of Local Self-Government (Councils) runs contrary to the provisions of Article 141.1 of the Constitution and, pursuant to Article 61.3 of the Law on the Constitutional Court, this leads to a conclusion that this provision is unconstitutional.

#### *Cross-references:*

- Decision no. 5-zp dated 30.10.1997 in the case of K.H. Ustymenko;
- Decision no. 1-rp/2001 dated 27.02.2001;
- Decision no. 12-rp/2004 dated 20.05.2004.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2009-2-014*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 10.06.2009 / **e)** 14-rp / **f)** On the compliance with the Constitution of the Parliamentary Resolution recognising invalid the Resolution of Parliament on the Designation of Extraordinary Election of Members of Ternopil Oblast Council" / **g)** *Ophitsyynyi Visnyk Ukrainy* (Official Gazette), 47/2009 / **h)** CODICES (Ukrainian).

#### *Keywords of the systematic thesaurus:*

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

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:*

Parliament, powers / Local self-government, election.

*Headnotes:*

Parliament, as the single body of legislative power, performs other tasks provided for by the Constitution besides legislative activity, notably those connected with the realisation of the will of the people, including the designation of the All-Ukrainian referendum, presidential and local authority elections.

When implementing these tasks, Parliament adopts laws, resolutions and other acts (Article 91 of the Constitution). While normative-legal acts of Parliament establish, amend or suspend legal norms, acts of legal application result in the emergence of, changes to and termination of legal rights and obligations. The termination of legal rights or obligations by the subjects of law, for instance by pronouncing them invalid, may only be performed by Parliament within the limits of its authorities.

*Summary:*

The President petitioned the Constitutional Court to declare unconstitutional Parliamentary Resolution no. 1058-VI dated 3 March 2009 on the recognition of the Parliamentary Resolution on Designating Special Elections of Deputies to Ternopil Oblast Council (hereinafter, the "Resolution").

According to the Constitution, the plenitude and supremacy of power belongs to the people who may exercise it directly (i.e. through elections and referendums) or through bodies of state power and bodies of local self-government (Articles 5.2 and 69). Bodies of local self-government, which represent common interests of territorial communities of villages, settlements and cities include district and oblast councils (Article 140.4 of the Constitution). Article 7 of the Constitution guarantees local self-government.

In providing for the possibility for the exercise of power by the people, the Constitution enshrined the rights of citizens to freely elect and to be elected to the bodies of state power and local government authorities (Article 38.1).

Parliament adopted Resolution No. 771-VI on Designating Special Elections of Deputies to Ternopil Oblast Council no. 771-VI on 18 December 2008. In accordance with Article 85.1.30 of the Constitution, Article 78.1, 78.4 of the Law on Local Self-Government, Articles 14.3, 15.2, 15.6, 82, 83 of the Law on Elections of Deputies to the Parliament of the Autonomous Republic of Crimea, Local Councils and Village, Settlement and City Heads, the Resolution designated special elections of deputies to Ternopil

Oblast Council to be held on 15 March 2009, and tasked the Central Election Commission with determining the scope of budgetary assignments necessary for holding these elections and the Cabinet of Ministers to take measures to provide their financing.

Referring to Article 85.1.30 of the Constitution and Article 48.2 of the Rules of Procedure of Parliament, Parliament adopted a Resolution recognising the above Resolution as invalid on 3 March 2009.

Having examined the parliamentary resolution on the designation of special elections of deputies to the Ternopil Oblast Council, the Constitutional Court concluded that the resolution was an act of legal application. On the grounds established by law it designated the date for holding elections to the local council, i.e. the date for citizens' realisation of their electoral rights.

The Resolution under dispute is also an act of legal application. Its legal substance is determined by the act recognised as invalid by Parliament. Recognising the Resolution of Parliament on Designating Special Elections of Deputies to Ternopil Oblast Council constitutes termination of realisation of citizens' rights, in particular the right to elect and be elected to the body of local self-government. In this way, Parliament adopted a decision cancelling the extraordinary elections to the Ternopil Oblast Council.

In adopting the Resolution, Parliament referred to Article 85.1.30 of the Fundamental Law. These provisions provide for the authority of Parliament to designate regular and extraordinary elections to local government bodies. In view of these authorities and the legal nature of elections to local government bodies as one of the main forms of direct democracy, the Constitutional Court was of the opinion that designating elections on legal grounds is of an obligatory character for Parliament except for instances provided for by the Constitution and laws. At the same time the constitutional provisions mentioned above may not be considered as grounds for Parliament to cancel the elections that had been designated to local authority institutions.

However, the Constitutional Court noted that Article 64 of the Fundamental Law allows for specific restrictions to the right to elect and to be elected under conditions of martial law or a state of emergency. According to Article 19 of the Law on Martial Law and Article 21 of the Law on State of emergency, such restrictions imply that the holding of local government elections in cases where their authority has been terminated is prohibited during periods of martial law or under a state of emergency,

and previously formed bodies will continue their activities. Thus, where martial law or a state of emergency has been introduced, Parliament has the right to cancel regular or extraordinary local elections that were designated on the respective territories during a period of martial law or a state of emergency.

The Constitutional Court concluded that by virtue of Article 85.1.30 of the Constitution the Parliament lacked the authority to cancel extraordinary elections to the Ternopil Oblast Council.

Article 141 of the Constitution establishes a five-year term of office for the deputies of village, settlement, city, district and oblast. This term determines the periodicity of elections to the local authority. At the same time Article 85.1.30 of the Constitution and the effective legislation provide for extraordinary elections to local councils, which suggests that under certain circumstances the terms of elections may be different.

In particular, such circumstances and terms are established in the Laws on Local Self-Government (Article 78.1 and 78.4) and on the Elections of Deputies of Parliament of the Autonomous Republic of Crimea, Local Councils and Village, Settlement and City Heads (Articles 14.3, 15.2, 15.6). Parliament adopted the decision on designating special elections to Ternopil Oblast Council in accordance with these laws.

The Constitutional Court noted that terms of elections are an important safeguard for the realisation of citizens' electoral rights. Cancelling local elections or changing the terms of elections on grounds not provided for by law contravenes citizens' electoral rights. The resolution under dispute was accordingly also in contravention of Article 38.1 of the Constitution.

Judge V. Kampo attached his dissenting opinion.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2009-2-015*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 23.06.2009 / **e)** 15-rp / **f)** On compliance with the Constitution of Article 3.3.5 and 3.3.6 "Final Provisions" of the Law on Customs Tariff, Article 9.2.8 of the Law on Foreign Economic Activities (the case on temporary increase of applicable import customs duties) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 48/2009 / **h)** CODICES (Ukrainian).

#### *Keywords of the systematic thesaurus:*

3.4 General Principles – **Separation of powers.**  
4.6.2 Institutions – Executive bodies – **Powers.**

#### *Keywords of the alphabetical index:*

Taxation / Import duty / Separation of powers.

#### *Headnotes:*

The constitutional provisions concerning the obligatory establishment by law of the system of taxation, taxes and levies also determine the legal regime of the temporary increment to the effective import duty rate.

Under the constitutional provisions, the right to establish and abrogate state taxes and levies (mandatory payments), including import duty and the amount of the temporary increment to effective import duty rates falls within the legislative authority of parliament. This exclusive authority provides for the right of Parliament to determine all elements of mandatory payments (taxes and levies) regulatory mechanism, including tax rate (the amount of tax per taxable item) and the terms (periods) of taxation.

Under the Constitution, the Cabinet of Ministers is responsible for ensuring the implementation of tax policy (Article 116.3 of the Constitution). Taking into consideration the constitutional authorities of Parliament over taxation, the Constitutional Court concluded that the above authority of the Cabinet of Ministers does not provide for the right to establish state taxes and levies (mandatory payments) or determine certain elements of their regulatory mechanism.

#### *Summary:*

I. The President asked the Constitutional Court to consider the issue of the compliance with the Constitution of Article 3.3.5 and 3.3.6 of the final provisions of Law no. 237-III of the Law on Customs

Tariff, dated 5 April 2001 (described here as Law no. 2371), and of Article 9.2.8 of Law no. 959-XII on External Economic Activities, referred to here as Law no. 959. Under the above sub-items of Law no. 2371, the Cabinet of Ministers has the right to reduce (abrogate) the temporary increment to the effective import duty rates by adopting a resolution, and also decide on prolongation of the procedure of introducing, altering and abrogating the temporary increment to the effective import duty rates on some goods (referred to here as the temporary procedure). Article 9.2.8 of Law no. 959 confers on the Cabinet of Ministers the right to reduce and abrogate, within its competence, the temporary increment to the effective import duty rates on some goods in accordance with the procedure determined by international agreements.

II. The Constitutional Court was guided by Article 67.1 of the Constitution whereby everyone is obliged to pay taxes and levies in accordance with the procedure and in the amount established by law, and Article 92.2.1 of the Constitution whereby the system of taxation, taxes and levies are established exclusively by laws.

Under the Law on the System of Taxation, duty is one of the state taxes and levies (Article 14.1.5). Customs duty is a tax on goods and other items transferred through the customs border (Article 6 of the Law on the Unified Customs Tariff).

Law no. 2371 establishes that the temporary increment to the effective import duty rate shall be considered import duty in the meaning of the Law on the Unified Customs Tariff (Sub-item 3.3 of "Final Provisions").

Generally recognised elements of the regulatory mechanism of mandatory payments (taxes and levies) include a taxable person (taxpayer), taxable item, source of tax payment, tax rate, tax period, tax quota, terms (periods) and the procedure of tax payment, taxable activities and assets and tax incentives.

Analysis of Article 3.3.5 of "Final Provisions" of Law no. 2371 suggests that its provisions allow the Cabinet of Ministers to reduce (abrogate) an element of the import duty regulatory mechanism such as a tax rate, the amount of tax established by law on a taxable item. This norm also allows the cabinet of Ministers to reduce (abrogate) the temporary increment in the manner of adopting the respective resolution which shall enter into force on the tenth calendar day after its official promulgation and shall be deemed invalid from the day the temporary procedure ceased to exist. The same right of the

Cabinet of Ministers is provided for by Article 9.2.8 of the Law no. 959, i.e. the right to reduce and abrogate the temporary increment to the effective import duty rates on some goods in accordance with the procedure established by the international agreements.

Under Law no. 2371, the Cabinet of Ministers may decide to prolong the temporary procedure but only for a further six months. Such a decision shall be adopted in the form of a resolution officially promulgated not later than 30 days before the day of expiration of the first six-month period. In this case the procedure for the notification of and consultations with the WTO Committee of Balance of Payments Restrictions shall be resumed if it has not otherwise been decided during the preliminary consultations with the Committee (Article 3.3.6 of "Final Provisions"). Analysis of this norm shows that it confers authority on the Cabinet of Ministers to establish a separate type of import duty, i.e. the temporary increment to the effective import duty rate as defined in Article 3.3.3 of "Final Provisions" of the Law no. 2371.

Thus, the disputed norms of Law no. 2371 and Law no. 959 provide for the authority of the Cabinet of Ministers to determine the elements of regulatory mechanism of the import duty as a type of tax.

The adoption of laws falls within the authorities of Parliament as the single body of legislative power (Articles 75, 85.1.3, 91 of the Constitution).

Delegation by Parliament of the legislative function to another body violates the Fundamental Law requirements regarding the obligation of the bodies of legislative, executive and judicial power to execute their authorities within the limits established by the Constitution and in accordance with the laws (Article 6.2 of the Constitution) and the obligation of the bodies of state power and bodies of local self-government and their officials to act only on the grounds, within the limits and in the manner envisaged by the Constitution and laws (Article 19.2 of the Constitution).

Given the constitutional authorities of Parliament and the Cabinet of Ministers regarding taxation, the Constitutional Court concluded that by virtue of Article 3.3.5 and 3.3.6 of Law no. 2371 and Article 9.2.8 of Law no. 959, the legislator delegated the authority to determine certain elements of the import duty regulatory mechanism to the Cabinet of Ministers.

Therefore, the disputed provisions of these laws were in breach of the constitutional principle of separation

of the state powers, and thus inconsistent with Articles 6, 8.2, 19.2, 67, 75, 85.13, 91, 92.2.1 of the Constitution.

Judge V. Dzhun' attached his dissenting opinion.

*Cross-references:*

- Decision of the Constitutional Court no. 15-rp/2000 dated 14.12.2000;
- Decision of the Constitutional Court no. 22-rp/2008 dated 09.10.2008.

*Languages:*

Ukrainian.



*Identification:* UKR-2009-2-016

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 30.06.2009 / **e)** 16-rp / **f)** On compliance with the Constitution (constitutionality) of provisions of Articles 2368.7, 2368.9, 2368.16.2 of the Code of Criminal Procedure / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 52/2009 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Court, proceeding / Criminal proceedings.

*Headnotes:*

Courts administer justice with a view to ensuring protection of human rights, citizens' rights and freedoms, the rights and lawful interests of legal entities, and the interests of society and state. Rendering a lawful, reasoned and fair court decision is impossible without a comprehensive, full-scale and impartial examination of all the circumstances of a case. Furthermore, a court decision shall be founded on the principles of the rule of law, unbiased approach, independence, adversarial procedure and equality of all participants in the court proceedings.

*Summary:*

The following constitutional provisions were noted:

“The human being, and his or her life and health, honour and dignity, inviolability and security are recognised as the highest social value.

Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. The State is answerable to the individual for its activity. To affirm and ensure human rights and freedoms is the main duty of the State.” (Article 3);

“The Constitution has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution and shall conform to it.” (Article 8.2);

“Human and citizens' rights and freedoms are protected by the Court.

Everyone has a guaranteed right to challenge in court the decisions, actions or omission of bodies of state power, local government authorities, officials and officers.” (Article 55.1 and 55.2).

Criminal justice is administered by the courts of general jurisdiction. Their authorities include both deciding on the issue of a person's guilt or innocence in committing a crime on the merits and judicial supervision over law enforcement bodies in order to ensure legality (the due process of law) during the inquiry stage and pre-trial investigation. The objective of judicial supervision is to provide timely protection of human and citizens' rights and freedoms.

A complaint against an order initiating criminal proceedings against a particular person or arising from a crime that may have been committed issued by an inquiry body, investigator or public prosecutor may be lodged with a local court according to the rules of territorial and subject matter jurisdiction (Article 236.77 of the Criminal Procedure Code).

Articles 124.5 and 129.3.9 of the Constitution provide that judicial decisions are binding throughout the whole territory. The binding character of judicial decisions is one of the fundamental principles of the judiciary and a guarantee of its effectiveness. Under Article 129.5 of the Constitution, persons liable for the contempt of court or the judge are to be held legally responsible.

According to Article 236.3.48 of the Code, a court order on opening court proceedings as a result of a complaint will set the timescale for the submission of

the documents on the basis of which criminal proceedings were opened. Such a court order shall enter into force and be executed immediately after its issuance (Article 236.58). An inquiry body, investigator or a public prosecutor responsible for this case is obliged to submit the materials mentioned above to the Court within the period set by the court order (Article 236.68).

Submission of the materials on the basis of which criminal proceedings were opened is an obligation of inquiry bodies, investigators and public prosecutors. In view of the timescale for courts to review complaints against orders on opening criminal proceedings, those mentioned above shall take all measures necessary for these materials to be submitted in timely fashion to the Court. Failure to fulfil this obligation may be considered as grounds for the legal responsibility of the persons liable.

The availability of this material allows the Court to examine the arguments of the parties as to the lawfulness of an order on opening criminal proceedings. These materials also allow the Court to verify the existence of causes and validity of grounds and they are valuable sources of the information needed to issue such an order. By virtue of Article 236.78 of the Code, if the materials on the basis of which the criminal proceedings were opened are not submitted to the Court within the timescale set by a judge, the judge may recognise the absence of such materials as the grounds to annul the order on opening criminal proceedings.

Article 236.78 of the Code, which gives courts the power to overturn an order on opening criminal proceeding can give rise to the rendering of court decisions that are not founded on a full-scale, impartial and comprehensive examination of all the materials on the basis of which the criminal proceedings were opened but simply on the fact that the materials were not submitted within the timescale set by the judge.

Judicial review of a case without the materials on the basis of which criminal proceedings were opened denies parties to proceedings access to the right to judicial protection enshrined in Article 55.1 of the Constitution. Overturning an order on opening criminal proceeding on the above grounds also excludes the adversarial principle, the freedom of the parties to present arguments relevant to the dispute and to prove their weight before the Court in order to substantiate the lawfulness of criminal proceedings.

Under Article 236.98 of the Code, the burden of proving the lawfulness of opening criminal proceedings is on a public prosecutor whose failure to appear

before the Court shall not hinder the examination of the case.

The Constitutional Court infers a public prosecutor's obligation to prove the lawfulness of opening criminal proceedings from the supervisory functions of Prokuratura under the Constitution over the bodies which conduct operational investigatory activities, inquiry and pre-trial investigations. A public prosecutor participates in the judicial review of complaints against an order on opening criminal proceedings with the aim of presenting arguments to prove the lawfulness of opening criminal proceedings and possibly to negate the statements of the other side. This is to ensure that adversarial principle – a fundamental principle of justice – is observed (Article 129.3.4 of the Constitution).

Public prosecutor's offices should take all necessary measures to ensure the participation of a public prosecutor in judicial review of this type of case. Improper organisation of his or her participation in judicial review, and failure to appear before the Court without valid reason, may be grounds for bringing the persons liable to legal responsibility. By allowing for the review of cases in the absence of a public prosecutor, the legislator effectively basically released a public prosecutor from a proper performance of the functions set out in Article 121.3 of the Constitution. Participation of a public prosecutor in judicial review of a complaint against an order on opening criminal proceedings should be compulsory.

When reviewing a complaint arising from an order on opening criminal proceedings, the Court must verify the existence of causes and grounds for opening criminal proceedings, as well as the lawfulness of sources of information on the basis of which the proceedings were opened. At the same time, the Court may not examine and decide on the issues which shall be decided during the examination of a case on merits (Article 236.158 of the Code).

Having reviewed a complaint against an order on opening court proceedings, depending on whether the requirements of Articles 94, 97, 98 of the Code were observed, a judge shall, by issuing a reasoned court order, either dismiss a complaint or annul the order on opening criminal proceedings followed by a court order on refusal to open criminal proceedings (Article 236.16.18, 236.16.28 of the Code).

Article 236.16.28 of the Code, which empowers courts to issue orders on refusal to open criminal proceedings, is inconsistent with the principle of the division of power provided for by Article 6 of the Constitution. Such a conclusion is based on

Article 124.3 of the Constitution from which it follows that inquiry, investigation and construction of pre-trial procedural documents in public prosecution cases is not the subject matter of judicial examination of such cases.

The unconstitutionality of another provision of Article 236.12.38 which reads: “a judge, after verifying the presence of the parties, shall hear the opinion of a public prosecutor if he or she appears before the Court” was established. The clause “if he or she appears before the Court” allows a public prosecutor not to appear before the Court in judicial review of a case upon a complaint against an order on opening criminal proceedings. Therefore this provision does not comply with the requirements of Articles 121.3 and 129.3.4 of the Constitution.

Judges M. Markush and A. Stryzhak attached their dissenting opinion.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2009-2-017

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 07.07.2009 / **e)** 17-rp / **f)** On compliance with the Constitution of the Law on Introducing Amendments to Some Laws Concerning the Authorities of the Constitutional Court, Specific Features of Consideration of Cases on Constitutional Petition and Prevention of Abuse of the Right to Constitutional Appeal, Articles 6.1, 6.2, 44.3, 44.4, 45.1.3, 45.2, 71.2 and 73.3 of the Law on the Constitutional Court”, and Article 52.6 of the Law on the Cabinet of Ministers” (case on the constitutionally established procedure of taking effect by a law) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 55/2009 / **h)** CODICES (Ukrainian).

#### *Keywords of the systematic thesaurus:*

1.1.2.3 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointing authority.**  
3.15 General Principles – **Publication of laws.**

4.4.3.2 Institutions – Head of State – Powers – **Relations with the executive powers.**

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

#### *Keywords of the alphabetical index:*

President, decree / Enactment, presidential, date.

#### *Headnotes:*

An obligation for the President to consult the Prime Minister and the Minister of Justice over candidates for the offices of Judges of the Constitutional Court contradicts Article 106.1.31 of the Constitution and is unconstitutional as the legislation cannot provide for any other powers of the Head of State except for those determined by the Constitution, neither can it provide for any restrictions of such powers since they also have to be determined directly by the Constitution.

#### *Summary:*

The President asked the Constitutional Court to review the constitutional compliance of Law no. 1168 – VI of 19 March 2009 on Introducing Amendments to Some Laws Concerning the Authorities of the Constitutional Court, Specific Aspects of Constitutional Proceedings in Cases upon Constitutional Appeals and Prevention of Abuse of the Right to Constitutional Petition (referred to here as Law no. 1168), Articles 6.1, 6.2, 44.3, 44.4, 45.1.3, 45.2, 71.2 and 73.3 of Law no. 422/96 BP on the Constitutional Court dated 16 October 1996 in the wording of Law no.1168 (referred to here as Law no. 422), Article 52.6 of Law no. 279/VI on the Cabinet of Ministers of 16 May 2008 in the wording of Law no. 1168 (referred to here as Law no. 279).

Pursuant to the Constitution, the Constitutional Court is composed of eighteen judges of the Constitutional Court; the President, Parliament and the Congress of Judges each appoint six judges to the Constitutional Court (Articles 85.1.26, 106.1.22, 148.1 and 148.2).

Law no. 422 was adopted on 16 October 1996 following the provisions of Article 153 of the Constitution.

Under Article 6.1 of Law no. 422, the President is to consult with the Prime Minister and the Minister of Justice over candidates for the offices of Judges of the Constitutional Court.

Pursuant to the Fundamental Law, the President appoints one third of the Constitutional Court members (Articles 106.1.22 and 148.2). The Constitution contains no provisions for consultation related to the exercise of this power by the President.

Under Article 106.1.31 of the Constitution, the President exercises other powers determined by the Constitution. The legislation cannot provide for any other powers of the Head of State except for those determined by the Constitution, neither can it provide for any restrictions of such powers since they also have to be determined directly by the Constitution.

There is no provision in the Constitution for any preliminary consultations between the President, the Prime Minister and the Minister of Justice cover candidates for the office of judge of the Constitutional Court. The Constitutional Court therefore concluded that Article 6.1 of the Law no. 422 runs counter to the provisions of Article 106.1 of the Constitution.

Pursuant to Article 6.2 of the Law no. 422, a person is deemed appointed to the office of Constitutional Court judge once a presidential decree has been adopted and countersigned by the Prime Minister and the Minister of Justice. This procedure, namely a requirement for counter-signature of this type of presidential decree by the Prime Minister and the Minister of Justice, complied with the provisions of Article 106.4 of the Constitution in the wording of 28 June 1996.

However, pursuant to Law no. 2222-IV on Introducing Amendments to the Constitution dated 8 December 2004 (referred to here as Law no. 2222), the Constitution was amended.

In accordance with Article 106.4 of the Constitution in the wording of Law no. 2222, presidential decrees issued within the authorities provided for in Articles 106.1.5, 106.1.18, 106.1.21, and 106.1.23 of the Fundamental Law are to be countersigned by the Prime Minister and the minister responsible for the decree and implementation thereof. Hence, pursuant to Law no. 2222, Article 106.1.22 of the Constitution is not included in the list contained in Article 106.4.

Parliament did not reconcile the disputed provisions of Article 6.2 of Law no. 422 concerning the need to counter-sign the presidential decree by the Prime Minister and the Minister of Justice with the provisions of Article 106.4 of the Constitution (in the wording of Law no. 2222). Since the norms concerning the countersigning of the presidential decree by the Prime Minister and the Minister of Justice contradict the provisions of Article 106.4 of the Constitution, there are grounds to recognise them unconstitutional.

Pursuant to Article 88.2.3 of the Constitution, the Chair of Parliament signs the acts adopted by Parliament. According to the legal position of the Constitutional Court, acts of Parliament are decisions of Parliament adopted on issues falling within its authorities, i.e. the documents (primarily laws and resolutions) adopted by the number of members of Parliament defined by the Constitution. These documents formalise the expression of Parliament's will and the signature of the Chair under the text of a law certifies its conformity with the contents of the decision adopted by the legislature, and adherence to the procedure established by the Constitution during the process of adoption of the law (by the definitive number of votes of the constitutional composition of Parliament).

Under the Constitution, the Chair signs a law and forwards it without delay to the President; the President may veto laws adopted by Parliament (except for laws on introducing amendments to the Constitution) and refer them back to Parliament with substantiated and reasoned proposals for repeat consideration (Articles 94.1, 94.2 and 106.1.30).

Article 94.4 of the Fundamental Law contains a requirement concerning a repeat adoption of a law by at least two thirds of its constitutional composition. This applies only to laws where the presidential proposals were rejected in full or in part. The same requirement applies with regard to adoption of a law as a whole. Hence, when the presidential proposals in the stated wording are accepted in full, repeat adoption of the law by minimum two thirds of the constitutional composition of Parliament is not necessary. When the presidential proposals on rejection of the law as a whole are not supported by members of Parliament, the law is adopted as a whole (veto overridden).

Even if all presidential proposals have been rejected and the text of a law remains unchanged, the law is to be adopted by repeat voting of members of Parliament. The number of votes should be as provided for in Article 94.4 of the Constitution since the previous voting results were cancelled when the President vetoed the disputed law. Under such conditions, the day of adoption of the law will be the day when the last voting took place after repeat consideration. This is the date to be used for the purposes of the enactment of laws and their publication.

If the President did not sign a law within the established timescale, responsibility for the official enactment is vested in the Chair who will publish the law without delay with his or her signature (second sentence Article 94.4 of the Constitution).

Pursuant to Article 94.5 of the Constitution, a law enters into force on the day of its official enactment unless otherwise envisaged by the Law itself, but not prior to the day of its publication.

Parliament adopted Law no. 1168 on 19 March 2009. The Chair signed it on 25 March 2009 and forwarded it to the President. The Head of State returned this Law to Parliament with his substantiated and formulated proposals on 8 April 2009.

During the repeat consideration on 14 April 2009, Parliament rejected presidential proposals to Law no. 1168 in full and adopted it by a majority of at least two-thirds. On 17 April 2009 the Chair forwarded Law no. 1168 for signature to the Head of State who returned it to Parliament without his signature.

On 13 May 2009 Law no. 1168 dated 19 March 2009 was published in the official Parliament newspaper, *Holos Ukrainy*, stating the name and position of the Chair of Parliament, V. Lytvyn and the note “published pursuant to Article 94.4 of the Constitution”.

The Law adopted by Parliament on 19 March 2009, with regard to which the President used his right to veto as provided for in Article 106.1.30 of the Constitution (with subsequent return to Parliament for repeat consideration) was published. A legal consequence of the right to veto is annulment of the last voting results and commencement of the repeat consideration procedure in Parliament whereas the latter has a right to accept or reject proposals by the Head of State and to repeatedly adopt the Law.

Pursuant to Article 94.4 of the Constitution, the Chair had to sign and promulgate without delay the Law adopted by at least two thirds of the constitutional membership of Parliament during the repeat consideration, i.e. Law no. 1168 but dated 14 April 2009.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2009-2-018*

a) Ukraine / b) Constitutional Court / c) / d) 14.07.2009 / e) 18-rp / f) On the constitutional compliance of the Law on Amending Some Laws Concerning Minimisation of Impact of Financial Crisis on Ukrainian Industry Development / g) *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 56/2009 / h) CODICES (Ukrainian).

#### *Keywords of the systematic thesaurus:*

3.15 General Principles – **Publication of laws.**  
4.4.3.4 Institutions – Head of State – Powers – **Promulgation of laws.**  
4.5.6 Institutions – Legislative bodies – **Law-making procedure.**

#### *Keywords of the alphabetical index:*

Legislative procedure / Enactment.

#### *Headnotes:*

The official enactment and publication of a law is regulated by the procedure defined in the Constitution and necessary for its entering into legal force.

#### *Summary:*

The President asked the Constitutional Court to assess the conformity with the Constitution of the Law on Introducing Amendments to Some Laws Concerning Minimisation of Impact of Financial Crisis on Development of Domestic Industry” no. 694–VI dated 18 December 2008 (referred to as “the Law”) published in the *Uriadovy Kurier* newspaper on 3 February 2009. The Law, *inter alia* amends Article 19 of the Law on Single Customs Tariff dated 5 February 1992 and Article 5 of the Law on Value Added Tax dated 3 April 1997.

Having examined the case materials, the Constitutional Court concluded that there was a need for a preliminary assessment of adherence to the procedure for laws entering into legal force as provided for in Article 94 of the Constitution.

The Law was adopted by Parliament on 18 December 2008. However, the President returned it to Parliament with substantiated and formulated proposals for repeat consideration. Parliament adopted the Law again on 15 January 2009 by the minimum two thirds of its constitutional membership.

On 20 January 2009 the Chairman forwarded the newly adopted Law to the President. The President signed it on 30 January 2009 and published in the *Uriadovy Kurier* newspaper on 3 February 2009 and other official publications stating the date of adoption of the Law as being 18 December 2008.

According to the Constitution, the Chairman signs the adopted law and forwards it without delay to the President; the President has a right to veto the laws adopted by Parliament (except for laws on introducing amendments to the Constitution) and return them to Parliament with substantiated and formulated proposals for repeat consideration (Articles 94.1, 94.2 and 106.1.30).

Under Article 94.4 of the Fundamental Law, the president is under a duty to sign and to officially enact within ten days a law that, during repeat consideration by Parliament was adopted by at least two thirds of its constitutional membership. If the President does not sign such a law, it is to be officially enacted without delay by the Chairman of Parliament and published with his or her signature.

Pursuant to Article 94.5 of the Constitution, a law enters into force within ten days of the day of its official enactment unless otherwise envisaged by the law itself, but not prior to the day of its publication.

The Constitutional Court emphasised that a legal consequence of a right to veto used by the President is elimination of the results of the last voting on the matter, and the start of the procedure for its repeat consideration by Parliament which in turn has a right to accept or reject the presidential proposals and to adopt this law again.

In view of the above, the date of adoption of the law is to be the date of the last vote on the matter during repeat consideration. This is the date to be used for the purposes of official enactment and publication of a law.

Since the Law was adopted by Parliament during repeat consideration on 15 February 2009 the latter date was to be indicated in official enactment and publication of the Law as provided for in Article 94.4 of the Constitution.

When the law that was returned by the President with respective proposals was adopted during repeat consideration by Parliament, this was the law that would be officially enacted and published. That is why the date of repeat adoption is to be used. Any other date indicated in a law adopted after repeat consideration and officially enacted and published by the President or the Chairman violates the procedure

established in the Constitution for the entry into force of the law, as the date of adoption of a law is a mandatory, i.e. integral part thereof.

The procedure for the entry into legal force of the law, as provided for in Article 94.4 of the Constitution, was violated, which, pursuant to Article 152.1 of the Fundamental Law gives rise to grounds for declaring the Law unconstitutional.

Judge S. Vdovichenko attached his dissenting opinion.

*Languages:*

Ukrainian.



# United States of America

## Supreme Court

### Important decisions

*Identification:* USA-2009-2-004

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 08.06.2009 / **e)** 08-22 / **f)** Caperton v. A.Y. Massey Coal Company, Inc. / **g)** 129 *Supreme Court Reporter* 2252 (2009) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

4.7.4.1.3 Institutions – Judicial bodies – Organisation – Members – **Election**.

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

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

*Keywords of the alphabetical index:*

Bias, judicial, risk / Judge, election, campaign, contribution, financial / Due process / Recusal, judicial, conditions.

*Headnotes:*

A fair trial in a fair tribunal is a requirement of due process.

Due process requires recusal when a judge has a direct, personal, substantial, pecuniary interest in a case; however, even when those circumstances are not present, due process may be implicated if a serious risk of bias is posed.

Due process does not require proof of actual, subjective bias for judicial recusal to be mandated in certain circumstances; instead, the question is an objective one that asks whether the average judge in a judicial position is likely to be neutral or if an unconstitutional potential for bias exists.

A serious risk of actual bias for purposes of due process may be posed when a person with a personal stake in a particular adjudicatory proceeding

had a significant and disproportionate influence in placing the judge on the case by raising funds when the case was imminent.

*Summary:*

I. West Virginia is one of 39 States in the United States in which judges in the State courts are chosen by popular election. The question presented in this case is whether, in circumstances where the predominant amount of funding for a judicial candidate's campaign came from one source, the constitutional requirement of due process is implicated if that source subsequently is a party to adjudication before a court in which the successful candidate is a member.

In a West Virginia trial court, a jury ruled in favour of Mr Hugh Caperton and three other plaintiffs (collectively, "Caperton") who sued the defendant A.T. Massey Coal Company, Inc. (hereinafter "Massey") on claims of fraudulent misrepresentation, concealment, and tortious interference with contractual relations. The jury awarded Caperton the sum of 50 million U.S. Dollars (\$50,000,000) in damages.

After the verdict, but before any appeal, West Virginia held its 2004 judicial elections. One of the candidates for the West Virginia Supreme Court of Appeals was an attorney, Mr Brent Benjamin. Mr Don Blankenship, the chairman, chief executive officer, and president of Massey, supported Mr Benjamin's candidacy. Mr Blankenship made approximately \$3,000,000 in contributions, donating the statutory maximum of \$1,000 to Benjamin's campaign committee and almost \$2,500,000 to a separate political organisation that supported Mr Benjamin, and spending approximately \$500,000 in independent expenditures for mailings and media advertisements expressing support for Mr Benjamin. The \$2,500,000 to the separate political organisation accounted for more than two-thirds of the total funds that the organisation raised, and Mr Blankenship's total of \$3,000,000 in contributions were more than the total amount spent by all other Mr Benjamin supporters and three times the amount spent by Mr Benjamin's own campaign committee. Mr Benjamin won the election, gathering 53.3 % of the vote.

Subsequently, Massey filed its appeal of the trial court decision to the Supreme Court of Appeals, and the latter court in a 3-2 decision in November 2007 issued a judgment that reversed the \$50,000,000 verdict against Massey. Before Massey filed its appeal, Caperton had moved to disqualify now-Justice Benjamin from participating in deliberations regarding the anticipated appeal. Justice Benjamin denied the motion. After the issuance of the decision,

Caperton on two occasions unsuccessfully moved for Justice Benjamin to recuse himself from the proceedings. The court did grant a re-hearing of its November 2007 judgment, and ultimately issued an April 2008 3-2 decision in which it again reversed the jury verdict.

Caperton sought review in the U.S. Supreme Court, claiming that Justice Benjamin's refusal to recuse himself violated the Due Process guarantee in the Fourteenth Amendment to the U.S. Constitution. Section One of that Amendment states in relevant part that no State shall "deprive any person of life, liberty, or property, without due process of law."

II. In a 5-4 decision, the U.S. Supreme Court reversed the April 2008 judgment of the West Virginia Supreme Court of Appeals. A basic requirement of due process, according to the Court, is a fair trial in a fair tribunal; however, most matters relating to judicial disqualification do not have constitutional implications. But in the circumstances of the instant case, due process did require Judge Benjamin's recusal, even though the due process requirement that requires recusal when a judge has a "direct, personal, substantial, pecuniary interest in a case" was not implicated. Instead, the Court ruled, due process also will require recusal in cases where the "probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable."

Thus, the Court concluded, the standard in circumstances such as those in the instant case is an objective one: it does not require proof that the judge was actually, subjectively biased, but asks whether the average judge in a judicial position is likely to be neutral or whether there is an unconstitutional potential for bias. In the instant case, the Court noted, a serious risk of actual bias is posed when a person with a personal stake in a particular adjudicatory proceeding had a significant and disproportionate influence in placing the judge on the case by raising funds when the case was imminent. The question was not whether Mr Blankenship's campaign contributions were a necessary and sufficient cause of Mr Benjamin's victory; instead, the inquiry must centre on factors such as the relative size of the contributions in comparison to the total amount contributed to the campaign, the total amount spent in the election, and the apparent effect of the contributions on the electoral outcome.

Four of the Court's nine Justices dissented from the Court's decision. Chief Justice Roberts and Justice Scalia authored dissenting opinions.

### *Languages:*

English.



### *Identification: USA-2009-2-005*

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 25.06.2009 / **e)** 07-591 / **f)** Melendez-Diaz v. Massachusetts / **g)** 129 *Supreme Court Reporter* 2527 (2009) / **h)** CODICES (English).

### *Keywords of the systematic thesaurus:*

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

5.3.13.28 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to examine witnesses.**

### *Keywords of the alphabetical index:*

Cross-examination, laboratory analyst / Evidence, admissibility, witness, cross-examination / Testimony, forensic.

### *Headnotes:*

In criminal proceedings, the testimony of a witness against a defendant is inadmissible under the right to a fair trial unless the witness appears at trial and is subject to cross-examination or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.

Reports by laboratory analysts introduced as evidence are formalised testimonial statements, written down and sworn to by declarants before officers authorised to administer oaths; as such, they fall within the core class of testimonial statements covered by the constitutional fair trial requirement that a defendant have the right to confront a declarant at trial.

**Summary:**

I. Mr Luis Melendez-Diaz was convicted in trial court in the State of Massachusetts of trafficking in cocaine. Part of the evidence introduced against him at trial was a laboratory report stating that bags of white powder said to have belonged to him contained cocaine. The report was in the form of certificates signed by laboratory analysts, who stated that the material seized by the police and connected to Mr Melendez-Diaz was cocaine of a certain quantity. As required by Massachusetts law, the certificates were sworn to before a notary public.

Mr Melendez-Diaz appealed to the Appeals Court of Massachusetts contending, among other things, that admission of the certificates violated his right under the Sixth Amendment to the U.S. Constitution to be confronted with the witnesses against him. The Sixth Amendment, which is made applicable to the States via the Fourteenth Amendment to the U.S. Constitution, states in its Confrontation Clause that “In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.” The Appeals Court of Massachusetts rejected the appeal, holding that authors of certificates of forensic analysis are not subject to confrontation under the Sixth Amendment. The Supreme Judicial Court of Massachusetts denied review.

II. The U.S. Supreme Court accepted review, and reversed the decision of the Appeals Court of Massachusetts. The Court observed that, under its Sixth Amendment jurisprudence, the testimony of a witness against a defendant will be inadmissible at trial unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. The question in the instant case then was whether the testimony found in the laboratory analysts’ certificates lies within the class of testimonial statements covered by the Confrontation Clause. The Court noted that in its Sixth Amendment jurisprudence the class of testimonial statements includes “affidavits” as formalised testimonial materials, and that the Massachusetts certificates quite plainly are affidavits: declarations of fact written down and sworn to by the declarant before an officer authorised to administer oaths.

In so ruling, the Court rejected the argument of the State of Massachusetts that laboratory analysts are not “accusatory” witnesses: that is, they do not directly accuse a defendant of wrongdoing, but instead acquire culpatory effect only when taken together with other evidence linking the defendant to the illegal items in question. The Court rejected this argument by stating that the laboratory analysts’

certificates in the instant case provided testimony against Mr Melendez-Diaz, proving one fact necessary for his conviction – that the substance he possessed was cocaine. The Court also rejected the proposition that laboratory analysts were not historically the sort of “conventional” witnesses whose *ex parte* testimony, if allowed, was most suspect in the common law tradition.

Justice Thomas filed a concurring opinion. Four of the Court’s nine Justices dissented from the Court’s decision, claiming that the Court’s decision represented a sharp departure from accepted rules governing the admission of scientific evidence. Justice Kennedy authored the dissenting opinion. According to the dissenting Justices, scientific evidence should be treated differently from statements such as those by witnesses to a crime. On practical grounds, they warned that the decision would subject both State and Federal laboratory analysts to a “crushing burden” of having to testify in numerous proceedings.

**Languages:**

English.



# Inter-American Court of Human Rights

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## Important decisions

*Identification:* IAC-2009-2-004

a) Organisation of American States / b) Inter-American Court of Human Rights / c) / d) 28.01.2009 / e) Series C 195 / f) Perozo *et al.* v. Venezuela / g) / h) CODICES (English, Spanish).

*Keywords of the systematic thesaurus:*

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

5.3.12 Fundamental Rights – Civil and political rights – **Security of the person.**

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.**

5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press.**

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

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

*Keywords of the alphabetical index:*

Freedom of expression, aspects, individual, social / Human rights violation, state, tolerance / Investigation, effective, requirement / Media, journalism, restriction / Victim, report, scrutiny, obligation.

*Headnotes:*

States, in their role as guarantors of fundamental human rights, are obligated to refrain from making statements that may cause or encourage interference with, or the impairment of the rights of, persons who intend to contribute to the public discourse by way of the expression and dissemination of ideas, especially in situations of great social conflict, public disorder, or political or social polarisation.

When evaluating the diligence and effectiveness of the State in carrying out investigations, the Court must consider the alleged victims' delays in notifying the State of alleged illegal acts. The passage of time frustrates, and may render nugatory, the State's collection of probative evidence.

States must immediately evaluate and classify injuries that are reported by alleged victims so that the crimes alleged may be prosecuted under the appropriate legal categories.

A claimant alleging a violation of Article 13.3 ACHR must prove that the governmental action at issue effectively restricts, either directly or indirectly, communication and the free exchange of ideas and opinions.

Public prosecutors must timely decide, in accordance with domestic law, whether a criminal complaint shall proceed to the investigative stage of a proceeding or be dismissed.

A claim alleging violations of Articles 1, 2 and 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women ("Convention of Belem do Pará") cannot be sustained absent evidence that female victims were targeted directly or affected disproportionately on account of their sex or gender.

A claimant who alleges an impermissible governmental restraint on the exercise of the freedom to seek, receive, and disseminate information and ideas, based on *de facto* restrictions rather than actions legally ordered by the State, bears the burden of proving that the State impermissibly restricted his or her access to certain official sources of information. After the claimant successfully proves this allegation, the burden shifts to the State to prove that such restrictions are justified.

*Summary:*

I. During the years 2001 to 2005, unidentified private individuals committed various acts of harassment, verbal threats, and physical violence against forty-four news reporters and other employees of Globovisión Television Station. These incidents occurred in the context of a period of political and social turmoil, during which high-ranking officials of the Bolivarian Republic of Venezuela (hereinafter "the State") made numerous public statements labelling the private Venezuelan news media in general and Globovisión, as well as its shareholders and executives, in particular, as enemies of the State. Although the State initiated criminal investigations relating to several of the reported incidents of violence and harassment, these proceedings remained pending in preliminary stages

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for varying lengths of time – some for up to six years – in the absence of domestic legislation stipulating a maximum term for such criminal investigations.

On 12 April 2007, the Inter-American Commission on Human Rights (hereinafter “the Commission”) filed an application with the Inter-American Court of Human Rights (hereinafter “the Court”) against the State, alleging violations of Article 5 ACHR (Right to Humane Treatment), Article 8 ACHR (Right to a Fair Trial), Article 13 ACHR (Right to Freedom of Thought and Expression), and Article 25 ACHR (Right to Judicial Protection), in relation to Article 1.1 ACHR, to the detriment of forty-four named victims. The representatives of thirty-seven of the forty-four victims (hereinafter “the representatives”) alleged additional violations of Article 21 ACHR (Right to Property) and Article 24 ACHR (Right to Equal Protection) in relation to Article 13 ACHR and of Articles 5, 8, 13 and 25 ACHR, “in connection with” Articles 1, 2 and 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention of Belem do Pará”).

II. In its Judgment of 28 January 2009, the Court dismissed the State’s preliminary objections, observing that the President of the Court had already disposed of the State’s objection to the alleged untimely submission of the representatives’ brief in a prior Order; that the State’s objection to the alleged inadmissibility of new arguments in the representatives’ brief was without merit, since the victims may advance new pleadings as long as they are related to the same facts alleged in the Commission’s application; that the President had already rejected in a prior Order the State’s motion for recusal of two of the Court’s judges; and that the State failed to timely object to the victims’ alleged failure to exhaust domestic remedies.

Additionally, the Court held that the State had failed to comply with the obligation contained in Article 1.1 ACHR to ensure the right to freely seek, receive, and impart information established in Article 13.1 ACHR, to the detriment of thirty-three named victims; and to ensure the right to humane treatment established in Article 5.1 ACHR, to the detriment of twenty-six of those victims. The Court did not find sufficient evidence to declare that State agents perpetrated or in some way supported the acts of aggression, intimidation, and harassment against the employees of Globovisión. Indeed, the case file showed that State agents had acted to protect the victims in several instances. However, the Court held that those private acts of aggression and harassment, which had effectively restricted, impeded, and intimidated the victims in their practice of journalism, gave rise to the State’s duty to prevent and investigate the facts.

In that regard, the Court found that statements made by high-ranking governmental officials during a period of social conflict and polarisation exacerbated the danger faced by the victims. Moreover, despite the fact that the State had received 48 complaints, it had investigated only 19 of these; the majority of the investigations initiated had remained idle for extended periods of time without justification; and, in some of the investigations, State agents did not undertake all the measures necessary to gather relevant evidence. Additionally, in some of the proceedings initiated, prosecutors and judicial authorities delayed the emission of decisions that they were required by domestic law to make.

However, the Court declined to find a violation of Articles 13.3 or 24 ACHR because the evidence presented failed to show that the prior restraint on access to certain official events and sources of information was adopted specifically to bar the victims. Likewise, the Court declined to find a violation of Article 21 ACHR because the alleged property damage caused to the premises and assets of Globovisión was suffered by the company as a legal entity and the representatives had failed to show that the rights of the victims, in their capacity as the company’s shareholders, had been directly affected. Finally, the Court did not analyse the facts of the case under Articles 1, 2 and 7.b of the Convention of Belem do Pará because the representatives failed to allege how female victims were targeted directly or affected disproportionately on account of their sex or gender.

Accordingly, the Court ordered the State, *inter alia*, to initiate any criminal investigations necessary to determine the parties responsible for the facts of the case and to conclude those investigations still pending at the domestic level; to publish the Judgment; to adopt all measures necessary to prevent unwarranted restraints on the exercise of the freedom to seek, receive, and impart information; and to reimburse the costs and expenses of the parties.

Judge *ad hoc* Pasceri Scaramuzza wrote a dissenting opinion.

*Languages:*

Spanish.



*Identification:* IAC-2009-2-005

a) Organisation of American States / b) Inter-American Court of Human Rights / c) / d) 03.04.2009 / e) Series C 196 / f) *Kawas Fernández v. Honduras* / g) / h) CODICES (English, Spanish).

*Keywords of the systematic thesaurus:*

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

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.**

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

5.5.1 Fundamental Rights – Collective rights – **Right to the environment.**

*Keywords of the alphabetical index:*

Extrajudicial execution / Human rights violation, state, tolerance / Investigation, effective, requirement / State, responsibility, international / Treatment or punishment, cruel and unusual / Truth, right to know / Human rights, defence, elements.

*Headnotes:*

When there is evidence that State agents were involved in the perpetration of human rights violations, the State may not rely on its own lack of diligence in a judicial proceeding intended to assess criminal responsibility for those acts in order to release itself from international responsibility for the violation of Article 4.1 ACHR.

Under Articles 8.1 and 25 ACHR, a 14-year domestic investigation into a murder exceeds the reasonable length of time available to a State to fulfil its obligation to undertake a serious, complete, and effective investigation of the events surrounding the crime where the case can be characterised as non-complex, the relatives of the victim do not take actions aimed at hindering the investigation, and the investigating authorities unjustifiably keep the investigation inactive for eight years and later undertake actions aimed at derailing the investigation and intimidating witnesses.

The defence of human rights is not limited to civil and political rights but necessarily encompasses the work

of educating, monitoring, and reporting on the status of economic, social, and cultural rights.

Environmental protection and the enjoyment of other human rights are undeniably linked in virtue of the ways in which environmental degradation and the adverse effects of climate change tend to impair the effective enjoyment of human rights.

A State incurs international responsibility for the violation of the right to freedom of association when an agent of the State has been implicated in the murder of an environmental activist and there is evidence that the activist's defence of the environment was a motive for the murder.

The State's failure to adequately investigate and punish the murder of an environmental activist when there is evidence that the activist's defence of the environment was a motive for the murder produces a chilling effect on other people engaged in the defence of the environment.

States have a duty to adopt legislative, administrative, and judicial measures, or to perfect those already in place, which guarantee the free exercise of the activities of defenders of the environment, provide immediate protection to environmental activists facing danger or threats as a result of their work, and ensure the diligent and effective investigation of acts endangering the life or integrity of environmentalists on account of their work.

*Summary:*

I. On 6 February 1995, Blanca Jeannette Kawas-Fernández was shot and murdered inside her home. The victim had been president of PROLANSATE, a foundation organised to promote the protection and preservation of the areas surrounding the Tela Bay in the Department of Atlantida, Honduras, and to improve the quality of life of the area's residents. In this capacity, she had denounced damage caused by private interests to Punta Sal, contamination of the lakes, and illegal logging of the region's forests, as well as other economic development projects in the area. State authorities initiated a criminal investigation immediately after Ms Kawas-Fernández's murder, but subsequently allowed the investigation to remain idle until 2003. At the time that the Inter-American Court's Judgment was emitted, fourteen years after the murder, State authorities had not implemented any measures aimed at arresting suspected perpetrators. Evidence also suggested that State agents had been involved in planning the murder. Moreover, in the years following Ms Kawas-Fernández's murder, various acts of aggression and coercion and the murder of environmental activists in Honduras were reported.

On 4 February 2008, the Inter-American Commission on Human Rights filed an application with the Inter-American Court of Human Rights (hereinafter "the Court") against the State of Honduras (hereinafter "the State") to determine its international responsibility for the alleged violations of Article 4 ACHR (Right to Life) in relation to Article 1.1 ACHR (Obligation to Respect Rights) to the detriment of Ms Kawas-Fernández; and Article 8 ACHR (Right to a Fair Trial) and Article 25 ACHR (Right to Judicial Protection), in relation to Articles 1.1 and 2 ACHR (Domestic Legal Effects), to the detriment of Ms Kawas-Fernández's next of kin. The representatives of the victim and her next of kin alleged additional violations of Article 16 ACHR (Freedom of Association) to the detriment of Ms Kawas-Fernández and of Article 5 ACHR (Right to Humane Treatment) to the detriment of Ms Kawas-Fernández's next of kin. For its part, the State admitted international responsibility for the violation of Articles 8 and 25 ACHR, in conjunction with Articles 1.1 and 2 ACHR, to the detriment of Ms Kawas-Fernández's next of kin.

II. In its Judgment of 3 April 2009, the Court first found that the State had violated Article 4.1 ACHR, in relation to Article 1.1 ACHR, to the detriment of Ms Kawas-Fernández, by its failing to initiate a prompt, serious, impartial, and effective investigation into her murder. Indeed, because State agents had attempted to derail the investigation and intimidate witnesses, were negligent in the gathering of evidence, did not carry out standard operating procedures for arresting suspected perpetrators of the crime, and unjustifiably allowed the investigation to remain inactive until 2003, the State had failed to fulfil its duty to respect and guarantee the victim's right to life.

Furthermore, the Court found, in accordance with the State's partial acceptance of international responsibility, a violation of Articles 8 and 25 ACHR, in relation to Article 1.1 ACHR, to the detriment of Ms Kawas-Fernández's next of kin, given that the delays in investigations were due solely to the acts of State agents. However, the Court declined to find a violation of Article 2 ACHR given that the parties did not provide arguments and supporting evidence in that respect.

The Court also found that the State had violated Article 5.1 ACHR, in relation to Article 1.1 ACHR, to the detriment of Ms Kawas-Fernández's next of kin, on account of the pain, suffering, and feelings of insecurity, frustration, and impotence caused by the State's inefficiency in investigating the victim's murder and punishing the perpetrators. The Court did not, however, find a violation of Article 5.2 ACHR to the

detriment of Ms Kawas-Fernández's next of kin, in accordance with its jurisprudence on the subject of torture and other cruel, inhumane, or degrading treatment.

Finally, the Court found the State responsible for a violation of Article 16.1 ACHR, in relation to Article 1.1 ACHR, to the detriment of Ms Kawas-Fernández, because an agent of the State had been implicated in Ms Kawas-Fernández's murder and the State had failed to adequately investigate the murder and punish those responsible when there was evidence that her activities in the defence of the environment were a motive for the commission of the crime. These factors produced a chilling effect on other activists engaged in the defence of the environment.

Accordingly, the Court ordered the State to pay pecuniary and non-pecuniary damages, to reimburse the costs and expenses of the parties, to carry out pending criminal proceedings and any other proceedings initiated with respect to the facts that gave rise to the violations in the case within a reasonable period of time, to publicise the Judgment, to publicly acknowledge its international responsibility, to construct a memorial honouring the memory of Ms Kawas-Fernández, to erect signs at the national park named after her, to provide free psychological and psychiatric care to the victim's next of kin, and to launch a campaign promoting national awareness and sensitivity regarding the importance of the work performed by environmentalists in Honduras and their contribution to the defence of human rights.

Judge García Ramírez wrote a concurring opinion, which was joined by Judge García-Sayán.

#### *Languages:*

Spanish.



#### *Identification:* IAC-2009-2-006

**a)** Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 30.06.2009 / **e)** Series C 197 / **f)** Reverón Trujillo v. Venezuela / **g)** / **h)** CODICES (English, Spanish).

*Keywords of the systematic thesaurus:*

4.7.4.1.4 Institutions – Judicial bodies – Organisation – Members – **Term of office.**

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

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

5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**

*Keywords of the alphabetical index:*

Human rights violation, state, tolerance / Integrity, physical, right / Judge, tenure, permanent, exception / Judge, appointment / Judge, tenure, provisional / Right to rehabilitation and compensation / State, responsibility, international / Judge, dismissal.

*Headnotes:*

To comply with their obligation to ensure judicial independence, States must provide all judges, whether permanent or provisional, with adequate procedures for appointment, guarantees of job security, and freedom from undue external pressures.

Domestic procedures for the appointment of judges, whether permanent or provisional, must serve the goal of selecting candidates based on the objective criteria of personal merit and professional qualifications and ensure equal competition for judicial offices.

To ensure equal competition for judicial offices, domestic procedures for the appointment of permanent or provisional judges may not provide unfair advantages or disadvantages to candidates based on the office that they may currently occupy.

Any effective judicial remedy to an arbitrary dismissal of a provisional judge requires that judge's reinstatement and the payment of back wages.

Litigants are entitled to have their claims decided by judges, whether permanent or provisional, who are and appear to be independent.

The stipulation that permanent and provisional judges must enjoy the same guarantees of judicial independence does not also require that they enjoy the same kinds of protections.

States must provide all judges, whether permanent or provisional, with a certain measure of tenure, so that, in the case of provisional judges, such judges may enjoy all of the benefits that are characteristic of permanence up to and until the time that their provisional term expires in accordance with domestic law.

To ensure that those who have the power to decide on dismissals within the Judicial Branch do not exert undue pressure on judges, States must ensure that judicial appointments of a provisional nature have a fixed duration in time and may not indefinitely extend provisional judicial appointments such that they effectively become permanent appointments.

A State is exempt from the obligation to provide the effective legal remedy of reinstatement to a provisional judge who has been arbitrarily removed from office only if the reasons for refusing to do so are appropriate, necessary, and narrowly tailored to achieve a customarily recognised purpose. Examples of acceptable justifications may include the fact that the court to which the provisional judge belonged no longer exists, the judicial office previously held by the provisional judge has been filled by a permanent judge, or the provisional judge no longer possesses the mental or physical capacity required to hold that office.

A State which implements a transitional domestic regime of provisional judges in order to achieve the legitimate purpose of filling permanent judicial seats with the best qualified candidates infringes the guarantee of judicial independence where the transitional regime remains in place for ten years, the State fails to adopt a code of judicial ethics and laws governing judicial discipline in accordance with its constitution, the proportion of provisional judges to permanent judges reaches 40%, and the State fails to grant a system of tenure to its provisional judges.

The right of equal opportunity of access to public office established in Article 23.1.c ACHR requires that permanence in an office attained be effectively protected. States must provide all judges, whether permanent or provisional, equal guarantees of reinstatement in the case of arbitrary dismissal or removal.

Article 8.1 ACHR obligates States to refrain from illegally interfering in the activities of the judiciary, to prevent such interferences, to investigate and punish those who may engage in such interference, and to establish an appropriate normative framework for providing judges with necessary guarantees of judicial independence.

Article 8.1 ACHR entitles litigants to have their cases heard by independent judges, but does not entitle judges themselves to independence.

*Summary:*

I. On 6 February 2002, Ms Maria Cristina Reverón-Trujillo was dismissed from her provisional position as a First Instance Judge of the Criminal Judicial Circuit of the Caracas Judicial District for purported disciplinary offenses. On 13 October 2004, the Supreme Court of Justice (hereinafter “the Supreme Court”) found that she had not committed those offenses, overturned her dismissal, and ordered the Government to consider her candidacy for a permanent judicial seat. However, the Supreme Court abstained from ordering her reinstatement or the payment of back wages because her position was provisional and the judicial system was being restructured domestically in such a way that all judicial positions were to be filled through a competitive process.

On 9 November 2007, the Inter-American Commission for Human Rights (hereinafter “the Commission”) filed an application with the Inter-American Court of Human Rights (hereinafter “the Court”) against the State of Venezuela (hereinafter “the State”), alleging violations of 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 Ms Reverón-Trujillo. The representatives of the victim alleged additional violations of Article 8 ACHR (Right to a Fair Trial), Article 23 ACHR (Right to Participate in Government) and Article 5 ACHR (Right to Humane Treatment).

II. In its Judgment of 30 June 2009, the Court first dismissed the State’s preliminary objection alleging that the victim failed to exhaust domestic remedies.

Additionally, the Court found that the State had violated Article 25.1 ACHR, in relation to Articles 1.1 and 2 ACHR, because the most appropriate legal remedy for Ms Reverón-Trujillo’s arbitrary dismissal would have been reinstatement with payment of back wages, and the State’s failure to provide this remedy was not justified by the victim’s provisional status or the ongoing process of judicial restructuring, which had been underway for ten years. Thus, the recourse available was not effective. However, the Court also held that the facts of the case did not support the representatives’ claim that the victim had been dismissed for political and economic reasons.

The Court next found that the State had arbitrarily discriminated against Ms Reverón-Trujillo with respect to her right to enter and remain in public office, in violation of Article 23.1.c ACHR, in relation to Article 1.1 ACHR, by failing to reinstate her following her arbitrary dismissal from office, despite the fact that a similarly situated permanent judge would be entitled to reinstatement.

However, the Court declined to find a violation of Article 8.1 ACHR on the ground that the right protected therein belongs to litigants, which are entitled to have their cases heard by independent tribunals. In addition, the Court declined to address the alleged violation of Article 5.1 ACHR on the ground that the facts giving rise to the alleged violation had not been presented in the Commission’s application, were not limited to explaining or clarifying the facts properly before the Court, and did not constitute supervening events.

Accordingly, the Tribunal ordered the State to reinstate Ms Reverón-Trujillo to a position similar in rank, remuneration, and social benefits to the one that she previously occupied within six months of the date that the judgment was served; if this proved to be impossible, the State was to pay the victim an indemnification established in equity. The Court also ordered the State to expunge any notation of dismissal from her personnel file; to immediately adopt the measures necessary to approve the Code of Judicial Ethics; to conform its domestic legislation to the American Convention on Human Rights with respect to the removal of provisional judges; to publish portions of the Judgment; to pay pecuniary and non-pecuniary damages; and to reimburse the costs and expenses of the parties.

Judge *ad hoc* Einer Elias Biel Morales wrote a dissenting opinion.

*Languages:*

Spanish.



# Court of Justice of the European Communities and Court of First Instance

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## Important decisions

*Identification:* ECJ-2009-2-006

a) European Union / b) Court of Justice of the European Communities / c) Grand Chamber / d) 13.03.2007 / e) C-432/05 / f) Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern / g) *European Court Reports*, I-2271 / h) CODICES (English, French).

*Keywords of the systematic thesaurus:*

3.26.2 General Principles – Principles of Community law – **Direct effect**.

3.26.3 General Principles – Principles of Community law – **Genuine co-operation between the institutions and the member states**.

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:*

Community law, principles, right to effective judicial protection / Community law, direct effect, individual rights, safeguard by national courts.

*Headnotes:*

The principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 ECHR, which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union (see paragraph 37).

Under the principle of co-operation laid down in Article 10 EC, it is for the Member States to ensure judicial protection of an individual's rights under Community law. In the absence of Community rules governing the matter, it is for the domestic legal system

of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law.

Although the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community Court, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law. It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law. Thus, while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection. It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right.

In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). Each case which raises the question whether a national procedural provision is effective must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. Moreover, it is for the national courts to interpret the procedural rules governing actions brought before them, in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under Community law (see paragraphs 38-44, 54).

The principle of effective judicial protection of an individual's rights under Community law must be interpreted as meaning that it does not require the national legal order of a Member State to provide for a free-standing action for an examination of whether national provisions are compatible with Community law, provided that other effective legal remedies, which are no less favourable than those governing similar domestic actions, make it possible for such a question of compatibility to be determined as a preliminary issue, which is a matter for the national court to establish.

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Effective judicial protection is not ensured if the individual is forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Community law (see paragraphs 61, 64-65, operative part 1).

The principle of effective judicial protection of an individual's rights under Community law must be interpreted as requiring it to be possible in the legal order of a Member State for interim relief to be granted until the competent court has given a ruling on whether national provisions are compatible with Community law, where the grant of such relief is necessary to ensure the full effectiveness of the judgment to be given on the existence of such rights.

Where it is uncertain under national law, applied in accordance with the requirements of Community law, whether an action to safeguard respect for an individual's rights under Community law is admissible, the principle of effective judicial protection requires the national court to be able, none the less, at that stage, to grant the interim relief necessary to ensure those rights are respected. However, the principle of effective judicial protection of an individual's rights under Community law does not require it to be possible in the legal order of a Member State to obtain interim relief from the competent national court in the context of an application that is inadmissible under the law of that Member State, provided that Community law does not call into question that inadmissibility.

Where the compatibility of national provisions with Community law is being challenged, the grant of any interim relief to suspend the application of such provisions until the competent court has given a ruling on whether those provisions are compatible with Community law is governed by the criteria laid down by the national law applicable before that court, provided that those criteria are no less favourable than those applying to similar domestic actions and do not render practically impossible or excessively difficult the interim judicial protection of those rights.

In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to determine the conditions under which interim relief is to be granted for safeguarding an individual's rights under Community law (see paragraphs 72-73, 77, 80, 83, operative part 2-3).

#### *Summary:*

Wishing to promote its online betting and gaming services in Sweden, the Unibet group, purchased advertising space in a number of different Swedish

media organs. However, under the Swedish Law on Lotteries, all activities relating to games in which the possibility of gain is based on chance require an administrative licence. Furthermore, promoting such activities is forbidden, and any violation of this prohibition is liable to an administrative or criminal sanction. Pursuant to this law, the Swedish State took a number of measures (injunctions and commencing criminal proceedings) against the media which had agreed to provide Unibet with advertising space.

It was against this background that Unibet, without even having been subject to any administrative or criminal proceedings, brought an action against the Swedish State in the court of first instance, in order to obtain confirmation of its entitlement to advertise its services in Sweden and, consequently, a declaration that the Law on Lotteries was incompatible with Article 49 EC on the freedom to provide services. Unibet also submitted an application for interim relief, in order to offset any prohibition measure imposed upon it and an application for reparation of the harm suffered as a result of the prohibition of promoting its services.

Unibet's application was dismissed at first instance and on appeal, as the Swedish courts considered that they were unable to conduct an abstract review of a legislative provision where there was no provision for such an action under national law. Unibet then submitted an appeal to the Swedish Supreme Court, and a fresh application for interim relief before the court of first instance. As this latter application was dismissed, Unibet applied in a second appeal to the Supreme Court, for interim relief to be ordered, in accordance with its application at first instance.

Taking the view that to reach a decision in the main action required an interpretation of Community law, the Swedish Supreme Court decided to stay the proceedings and to refer a number of questions to the Court for a preliminary ruling relating to the scope of the right to effective judicial protection. More specifically, the referring court wished to ascertain whether Community law required a member state's legal order to provide for, on the one hand, a self-standing action to verify the compatibility of a national provision with Community law, and on the other, suspension of the operation of a national provision pending a substantive decision.

The Court, referring to its established case-law regarding the procedural autonomy of member states, not surprisingly stated that Community law did not require there to be such a self-standing action. It further clarified the scope of the requirement for interim judicial protection, resulting from its well-known *Factortame* judgment (CJEC, 10.06.1990, case C-213/89, *Factortame I*).

*Cross-references:*

- CJEC, 14.12.1995, *Peterbroeck*, C-312/93, *E.C.R.* 1995, p. I-4599, *Bulletin* 1995/3 [ECJ-1995-3-018];
- CJEC, 18.01.2007, *PKK and KNK v. Council*, C-229/05 P, *E.C.R.* 2007, p. I-439.

*Languages:*

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

*Identification:* ECJ-2009-2-007

a) European Union / b) Court of Justice of the European Communities / c) Grand Chamber / d) 03.05.2007 / e) C-303/05 / f) *Advocaten voor de Wereld VZW v. Leden van de Ministerraad* / g) *European Court Reports*, I-3633 / h) CODICES (English, French).

*Keywords of the systematic thesaurus:*

- 1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**
- 1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**
- 1.4.10.7 Constitutional Justice – Procedure – Interlocutory proceedings – **Request for a preliminary ruling by the Court of Justice of the European Communities.**
- 3.13 General Principles – **Legality.**
- 3.14 General Principles – ***Nullum crimen, nulla poena sine lege.***
- 3.21 General Principles – **Equality.**
- 3.26.2 General Principles – Principles of Community law – **Direct effect.**

*Keywords of the alphabetical index:*

European Union, Court of Justice, preliminary ruling, jurisdiction, co-operation, police and judicial, criminal matters / European Union, co-operation, police and judicial, criminal matters / Approximation of laws and regulations / European arrest warrant, surrender procedures between Member States.

*Headnotes:*

Under Article 35.1 EU, the Court has jurisdiction, subject to the conditions laid down in that article, to give preliminary rulings on the interpretation and validity of, inter alia, framework decisions, which necessarily implies that it can, even if there is no express power to that effect, be called upon to interpret provisions of primary law, such as Article 34.2.b EU where the Court is being asked to examine whether a framework decision has been properly adopted on the basis of that latter provision (see paragraph 18).

Framework Decision no. 2002/584 on the European arrest warrant and the surrender procedures between Member States, which provides for the approximation of the laws and regulations of the Member States with regard to judicial cooperation in criminal matters and, more specifically, of the rules relating to the conditions, procedures and effects of surrender as between national authorities convicted persons or suspects for the purpose of enforcing judgments or of criminal proceedings, was not adopted in breach of Article 34.2.b EU.

In so far as it lists and defines, in general terms, the different types of legal instruments which may be used in the pursuit of the objectives of the Union set out in Title VI of the EU Treaty, Article 34.2 EU cannot be construed as meaning that the approximation of the laws and regulations of the Member States by the adoption of a framework decision under Article 34.2.b EU cannot relate to areas other than those mentioned in Article 31.1.e EU and, in particular, the matter of the European arrest warrant.

Furthermore, Article 34.2 EU also does not establish any order of priority between the different instruments listed in that provision. While it is true that the European arrest warrant could equally have been the subject of a convention, it is within the Council's discretion to give preference to the legal instrument of the framework decision in the case where the conditions governing the adoption of such a measure are satisfied.

This latter conclusion is not invalidated by the fact that, in accordance with Article 31.1 of the Framework Decision, the latter was to replace from 1 January 2004, only in relations between Member States, the corresponding provisions of the earlier conventions on extradition set out in that provision. Any other interpretation unsupported by either Article 34.2 EU or by any other provision of the EU Treaty would risk depriving of its essential effectiveness the Council's recognised power to adopt framework decisions in fields previously governed by international conventions (see paragraphs 28-29, 37-38, 41-43).

The principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*), which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, in particular in Article 7.1 ECHR. This principle implies that legislation must define clearly offences and the penalties which they attract. That condition is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable.

In so far as it dispenses with verification of the requirement of double criminality in respect of the offences listed in that provision, Article 2.2 of Framework Decision no. 2002/584 on the European arrest warrant and the surrender procedures between Member States is not invalid on the ground that it infringes the principle of the legality of criminal offences and penalties. The Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract. While Article 2.2 of the Framework Decision dispenses with verification of double criminality for the categories of offences mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover, stated in Article 1.3 of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties (see paragraphs 49-50, 52-54).

In so far as it dispenses with verification of double criminality in respect of the offences listed therein, Article 2.2 of Framework Decision no. 2002/584 on the European arrest warrant and the surrender procedures between Member States is not invalid inasmuch as it does not breach the principle of equality and non-discrimination.

With regard, first, to the choice of the 32 categories of offences listed in that provision, the Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality. Consequently, even if one were

to assume that the situation of persons suspected of having committed offences featuring on the list set out in Article 2.2 of the Framework Decision or convicted of having committed such offences is comparable to the situation of persons suspected of having committed, or convicted of having committed, offences other than those listed in that provision, the distinction is, in any event, objectively justified.

With regard, second, to the fact that the lack of precision in the definition of the categories of offences in question risks giving rise to disparate implementation of the Framework Decision within the various national legal orders, suffice it to point out that it is not the objective of the Framework Decision to harmonise the substantive criminal law of the Member States and that nothing in Title VI of the EU Treaty makes the application of the European arrest warrant conditional on harmonisation of the criminal laws of the Member States within the area of the offences in question (see paragraphs 57-60).

#### *Summary:*

The European arrest warrant was instituted by Council Framework-Decision no. 2002/584/JHA of 13 June 2002 in order to simplify extradition procedures between member states of the European Union. This framework-decision was transposed into Belgian law by the Law on the European Arrest Warrant of 19 December 2003.

*Advocaten voor de Wereld*, a non-profit-making association of lawyers, filed an appeal before the Belgian Court of Arbitration seeking the annulment of the law in question.

The association relied on three arguments in support of its appeal. The first, based on Article 34.6.b EU on the approximation of the laws and regulations of the member states, challenged the choice of a framework-decision as the instrument for regulating the subject-matter of the European arrest warrant. Secondly, the association claimed a violation of the principle of equality and non-discrimination, because of derogation, without objective and reasonable justification, from the requirement of double criminality in the event of enforcement of a European arrest warrant. Lastly, the association alleged a violation of the principle of legality in criminal matters, insofar as the provisions of the Belgian law did not list sufficiently clearly and precisely the offences falling within the scope of the European arrest warrant.

Observing that the law of 19 December 2003 was merely a faithful transposition of the Council framework-decision, and that, consequently, the arguments relied on by the association in challenging

the validity of the Belgian law held good in equal measure with regard to the framework-decision, the Court of Arbitration decided to stay the proceedings and to refer two questions to the Court for a preliminary ruling concerning the assessment of the validity of the framework-decision, pursuant to Article 35.1 EU.

The Court first ruled on whether the reference for a preliminary ruling was admissible and confirmed its jurisdiction to give a preliminary ruling on the validity of framework decisions adopted under the third pillar. In conclusion, it confirmed the legality of the Framework Decision on the European arrest warrant.

#### *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-2009-2-004

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 10.03.2009 / e) 4378/02 / f) *Bykov v. Russia* / g) *Reports of Judgments and Decisions of the Court* / h) CODICES (English, French).

*Keywords of the systematic thesaurus:*

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

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

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

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

*Keywords of the alphabetical index:*

Conversation, recording / Evidence, admissibility / Evidence, obtained unlawfully.

*Headnotes:*

The use by the police of a remote radio-transmitting device to record a conversation of the applicant was virtually identical to telephone tapping, in terms of the nature and degree of the intrusion into the privacy of the individual concerned. However, the applicant had enjoyed very few, if any, safeguards in the procedure by which the interception of his conversation had been ordered and implemented. In particular, the legal discretion of the authorities to order the interception had not been subject to any conditions, and the scope and the manner of its exercise had not been defined; no other specific safeguards had been provided for. The possibility for the applicant to bring court proceedings seeking to declare the “operative experiment” unlawful and to request the exclusion of

its results as unlawfully obtained evidence could not remedy those shortcomings. In the absence of specific and detailed regulations, the use of this surveillance technique as part of an "operative experiment" had not been accompanied by adequate safeguards against various possible abuses. Accordingly, its use had been open to arbitrariness and inconsistent with the requirement of lawfulness. There had therefore been a violation of Article 8 ECHR.

*Summary:*

I. The applicant was an important businessman and a member of a regional parliamentary assembly. In 2000 he allegedly ordered Mr V., a member of his entourage, to kill Mr S., a former business associate. V. did not comply with the order, reported the applicant to the Federal Security Service ("the FSB") and handed in the gun he had allegedly received from him. Shortly afterwards, the FSB and the police conducted a covert operation to obtain evidence of the applicant's intention to murder S. The police staged the discovery of two dead bodies at S.'s home. It was officially announced in the media that one of those killed had been identified as S. Under the instructions from the police, V. met the applicant at his home and engaged him in conversation, telling him that he had carried out the murder. As proof, he handed the applicant several objects borrowed from S. He carried a hidden radio-transmitting device and a police officer outside received and recorded the transmission. As a result, the police obtained a 16-minute recording of the conversation between V. and the applicant. The next day, the applicant's house was searched. The objects V. had given him were seized. The applicant was arrested and remanded in custody. Two voice experts were appointed to examine the recording of the applicant's conversation with V. They found that V. had shown subordination to the applicant, that the applicant had shown no sign of mistrusting V.'s confession to the murder and that he had insistently questioned V. on the technical details of its execution. In 2002 the applicant was found guilty of conspiracy to commit murder and conspiracy to acquire, possess and handle firearms and sentenced to six and a half years' imprisonment. He was conditionally released on five years' probation. The sentence was upheld on appeal.

In his application to the Court, the applicant claimed that the covert operation had involved an unlawful intrusion into his home and that the interception and recording of his conversation with V. had interfered with his private life. He invoked Article 8 ECHR. He further complained that he had been tricked by the police into making self-incriminating statements in his conversation with V. and that the court had admitted the record of this conversation as evidence at the trial. He invoked Article 6 ECHR in that respect.

II. With regard to Article 6 ECHR, the Court found that the applicant had been able to challenge the methods employed by the police in the adversarial procedure at first instance and on appeal. He had been able to argue that the evidence adduced against him had been obtained unlawfully and that the disputed recording had been misinterpreted. The domestic courts had addressed all these arguments in detail and had dismissed each of them in reasoned decisions. Furthermore, the impugned recording, together with the physical evidence obtained through the covert operation, had not been the only evidence relied on by the domestic court as the basis for the applicant's conviction. In fact, the key evidence for the prosecution had been the initial statement by V., made before, and independently from, the covert operation, in his capacity as a private individual and not as a police informant. Furthermore, V. had reiterated his incriminating statements during his subsequent questioning and during the confrontation between him and the applicant at the pre-trial stage. The failure to cross-examine V. at the trial was not imputable to the authorities, who had taken all necessary steps to establish his whereabouts and have him attend the trial, including by seeking the assistance of Interpol. The applicant had been given an opportunity to question V. on the substance of his incriminating statements when they had been confronted. Moreover, the applicant's counsel had expressly agreed to having V.'s pre-trial testimonies read out in open court. The trial court had thoroughly examined the circumstances of V.'s subsequent withdrawal of his incriminating statements and had come to a reasoned conclusion that the repudiation was not trustworthy. Finally, V.'s incriminating statements were corroborated by circumstantial evidence, in particular numerous witness testimonies confirming the existence of a conflict of interest between the applicant and S. The statements by the applicant that had been secretly recorded had not been made under any form of duress; had not been directly taken into account by the domestic courts, which had relied more on the expert report drawn up on the recording; and had been corroborated by a body of physical evidence. Having regard to the safeguards which had surrounded the evaluation of the admissibility and reliability of the evidence concerned, the nature and degree of the alleged compulsion, and the use to which the material obtained through the covert operation had been put, the proceedings in the applicant's case, considered as a whole, had not been contrary to the requirements of a fair trial. There had therefore been no violation of Article 6 ECHR.

With regard to Article 8 ECHR, the Court found that the measures carried out by the police had amounted to interference with the applicant's right to respect for his private life. The Russian Operational-Search Activities Act was expressly intended to protect individual privacy by requiring judicial authorisation for any operational activities that might interfere with the privacy of the home or the privacy of communications by wire or mail services. In the applicant's case, the domestic courts had held that since V. had entered his house with his consent and no wire or mail services had been involved (as the conversation had been recorded by a remote radio-transmitting device), the police operation had not breached the regulations in force.

*Languages:*

English, French.



*Cross-references:*

- *Malone v. the United Kingdom*, 02.08.1984, Series A, no. 82;
- *Schenk v. Switzerland*, 12.07.1988, Series A, no. 140;
- *Huvig v. France*, 24.04.1990, Series A, no. 176-B;
- *A. v. France*, 23.11.1993, Series A, no. 277-B;
- *John Murray v. the United Kingdom*, 08.02.1996, *Reports of Judgments and Decisions 1996-I*;
- *Saunders v. the United Kingdom*, 17.12.1996, *Reports 1996-VI*;
- *Teixeira de Castro v. Portugal*, 09.06.1998, *Reports 1998-IV*;
- *Valenzuela Contreras v. Spain*, 30.07.1998, *Reports 1998-V*;
- *Amann v. Switzerland* [GC], no. 27798/95, ECHR 2000-II;
- *Khan v. the United Kingdom*, no. 35394/97, ECHR 2000-V;
- *Heaney and McGuinness v. Ireland*, no. 34720/97, ECHR 2000-XII;
- *J.B. v. Switzerland*, no. 31827/96, ECHR 2001-III;
- *P.G. and J.H. v. the United Kingdom*, no. 44787/98, ECHR 2001-IX;
- *Allan v. the United Kingdom*, no. 48539/99, ECHR 2002-IX;
- *M.M. v. the Netherlands*, no. 39339/98, 08.04.2003;
- *Wood v. the United Kingdom*, no. 23414/02, 16.11.2004;
- *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006-IX;
- *Heglas v. the Czech Republic*, no. 5935/02, 01.03.2007;
- *O'Halloran and Francis v. the United Kingdom* [GC], nos. 15809/02 and 25624/02, ECHR 2007-VIII.



## **Systematic thesaurus (V20) \***

\* 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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<sup>1</sup> 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.

<sup>2</sup> Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

<sup>3</sup> For example, rules of procedure.

<sup>4</sup> For example, age, education, experience, seniority, moral character, citizenship.

<sup>5</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>6</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>7</sup> Vice-presidents, presidents of chambers or of sections, etc.

<sup>8</sup> For example, State Counsel, prosecutors, etc.

<sup>9</sup> (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

<sup>10</sup> For example, assessors, office members.

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<sup>12</sup> Including questions on the interim exercise of the functions of the Head of State.

<sup>13</sup> Referrals of preliminary questions in particular.

<sup>14</sup> Enactment required by law to be reviewed by the Court.

<sup>15</sup> Review *ultra petita*.

<sup>16</sup> Horizontal distribution of powers.

<sup>17</sup> Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

<sup>18</sup> Decentralised authorities (municipalities, provinces, etc.).

<sup>19</sup> For questions other than jurisdiction, see 4.9.

<sup>20</sup> Including other consultations. For questions other than jurisdiction, see 4.9.

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<sup>22</sup> As understood in private international law.

<sup>23</sup> Including constitutional laws.

<sup>24</sup> For example, organic laws.

<sup>25</sup> Local authorities, municipalities, provinces, departments, etc.

<sup>26</sup> Or: functional decentralisation (public bodies exercising delegated powers).

<sup>27</sup> Political questions.

<sup>28</sup> Unconstitutionality by omission.

<sup>29</sup> Including language issues relating to procedure, deliberations, decisions, etc.

<sup>30</sup> For the withdrawal of proceedings, see also 1.4.10.4.

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<sup>31</sup> Pleadings, final submissions, notes, etc.

<sup>32</sup> May be used in combination with Chapter 1.2 Types of claim.

<sup>33</sup> For the withdrawal of the originating document, see also 1.4.5.

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<sup>35</sup> For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

<sup>36</sup> Only for issues concerning applicability and not simple application.

<sup>37</sup> 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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<sup>39</sup> Presumption of constitutionality, double construction rule.

<sup>40</sup> Including the principle of a multi-party system.

<sup>41</sup> Includes the principle of social justice.

<sup>42</sup> See also 4.8.

<sup>43</sup> Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

<sup>44</sup> Including maintaining confidence and legitimate expectations.

<sup>45</sup> Principle according to which sub-statutory acts must be based on and in conformity with the law.

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<sup>47</sup> Including compelling public interest.

<sup>48</sup> Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

<sup>49</sup> Including questions of treason/high crimes.

<sup>50</sup> Including prohibition on monopolies.

<sup>51</sup> For the principle of primacy of Community law, see 2.2.1.6.

<sup>52</sup> Including the body responsible for revising or amending the Constitution.

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<sup>54</sup> For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

<sup>55</sup> For example, the granting of pardons.

<sup>56</sup> For regional and local authorities, see Chapter 4.8.

<sup>57</sup> Bicameral, monocameral, special competence of each assembly, etc.

<sup>58</sup> Including specialised powers of each legislative body and reserved powers of the legislature.

<sup>59</sup> In particular, commissions of enquiry.

<sup>60</sup> For delegation of powers to an executive body, see keyword 4.6.3.2.

<sup>61</sup> Obligation on the legislative body to use the full scope of its powers.

<sup>62</sup> Representative/imperative mandates.

<sup>63</sup> Presidency, bureau, sections, committees, etc.

<sup>64</sup> Including the convening, duration, publicity and agenda of sessions.

<sup>65</sup> Including their creation, composition and terms of reference.

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<sup>66</sup> State budgetary contribution, other sources, etc.

<sup>67</sup> For the publication of laws, see 3.15.

<sup>68</sup> For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

<sup>69</sup> For local authorities, see 4.8.

<sup>70</sup> Derived directly from the Constitution.

<sup>71</sup> See also 4.8.

<sup>72</sup> 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.

<sup>73</sup> Civil servants, administrators, etc.

<sup>74</sup> Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

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<sup>76</sup> Positive and negative conflicts.

<sup>77</sup> Notwithstanding the question to which to branch of state power the prosecutor belongs.

<sup>78</sup> For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

<sup>79</sup> Comprises the Court of Auditors in so far as it exercises judicial power.

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<sup>81</sup> And other units of local self-government.

<sup>82</sup> See also keywords 5.3.41 and 5.2.1.4.

<sup>83</sup> Organs of control and supervision.

<sup>84</sup> Including other consultations.

<sup>85</sup> For questions of jurisdiction, see keyword 1.3.4.6.

<sup>86</sup> Proportional, majority, preferential, single-member constituencies, etc.

<sup>87</sup> For example, *Panachage*, voting for whole list or part of list, blank votes.

<sup>88</sup> For aspects related to fundamental rights, see 5.3.41.2.

<sup>89</sup> For the creation of political parties, see 4.5.10.1.

<sup>90</sup> For example, names of parties, order of presentation, logo, emblem or question in a referendum.

<sup>91</sup> Tracts, letters, press, radio and television, posters, nominations, etc.

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<sup>93</sup> For example, signatures on electoral rolls, stamps, crossing out of names on list.

<sup>94</sup> For example, in person, proxy vote, postal vote, electronic vote.

<sup>95</sup> This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

<sup>96</sup> For example, Auditor-General.

<sup>97</sup> Includes ownership in undertakings by the state, regions or municipalities.

<sup>98</sup> Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

<sup>99</sup> For example, Court of Auditors.

<sup>100</sup> The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

<sup>101</sup> *Staatszielbestimmungen*.

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<sup>102</sup> Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

<sup>103</sup> Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

<sup>104</sup> Positive and negative aspects.

<sup>105</sup> For rights of the child, see 5.3.44.

<sup>106</sup> The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

<sup>107</sup> Includes questions of the suspension of rights. See also 4.18.

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<sup>111</sup> For example, discrimination between married and single persons.

<sup>112</sup> This keyword also covers “Personal liberty”. It includes for example identity checking, personal search and administrative arrest.

<sup>113</sup> Detention by police.

<sup>114</sup> Including questions related to the granting of passports or other travel documents.

<sup>115</sup> May include questions of expulsion and extradition.

<sup>116</sup> 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.

<sup>117</sup> This keyword covers the right of appeal to a court.

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<sup>118</sup> Including the right to be present at hearing.

<sup>119</sup> Including challenging of a judge.

<sup>120</sup> Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

<sup>121</sup> This keyword also includes the right to freely communicate information.

<sup>122</sup> Militia, conscientious objection, etc.

<sup>123</sup> Aspects of the use of names are included either here or under "Right to private life".

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<sup>124</sup> Including compensation issues.

<sup>125</sup> This keyword also covers "Freedom of work".

<sup>126</sup> Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

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## **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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