

THE BULLETIN

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

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

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

*The 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

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

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

Established in 1990 as a partial agreement of 18 member states of the Council of Europe, the Commission in February 2002 became an enlarged agreement, comprising all 47 member States of the organisation and working with some other 14 countries from Africa, America, Asia and Europe.

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European Court of Human Rights	S. Naismith
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Strasbourg, October 2012

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There was no relevant constitutional case-law during the reference period 1 September 2011 – 31 December 2011 for the following countries:

Luxembourg, Norway.

Précis of important decisions of the reference period 1 September 2011 – 31 December 2011 will be published in the next edition, *Bulletin* 2012/1, for the following countries:

Albania, Austria, Ireland, Latvia, Lithuania, Morocco.

Armenia

Constitutional Court

Statistical data

1 September 2011 – 31 December 2011

- 128 applications have been filed, including:
 - 12 applications, filed by the President
 - 114 applications, filed by individuals
 - 1 application, filed by the Administrative Court
 - 1 application, filed by the Human Rights Defender
- 22 cases have been admitted for review, including:
 - 13 applications, concerning the compliance of obligations stipulated in international treaties with the Constitution
 - 7 applications, based on 7 individual complaints concerning the constitutionality of certain provisions of laws
 - 1 application, filed by the Administrative Court
 - 1 application, filed by the Human Rights Defender
- 20 cases heard and 20 decisions delivered (including decisions on applications filed before the relevant period) including:
 - 12 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution (including decisions on applications filed before the relevant period)
 - 5 decisions on 10 individual complaints (including decisions on applications filed before the relevant period)
 - 1 decision on application, filed by the Administrative Court (this decision is the 1000th decision of the Constitutional Court)
 - 1 decision, filed by the Human Rights Defender
 - 1 decision on applications, filed by the General Prosecutor (on applications filed before the relevant period)

Important decisions

Identification: ARM-2011-3-003

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 15.11.2011 / **e)** DCC-997 / **f)** On the conformity with the Constitution of Article 1087.1 of the RA Civil Code / **g)** *Tegekagir* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Human dignity, insult, defamation / Compensation.

Headnotes:

Human dignity has primary importance to the free and guaranteed enforcement of a person's basic rights and freedoms. Legal restrictions on the implementation of these rights and freedoms should be proportional and emanate from the nature of democratic principles of international law and national legislation, which should not endanger basic human rights.

Summary:

I. The Human Rights Defender challenged the constitutionality of Article 1087.1 of the Civil Code, which concerns civil liability for insult and defamation. According to the applicant, provisions within the challenged Article caused legal uncertainty. Because the provisions did not clarify important regulatory terms, the ambiguity created conditions that may result in arbitrary and broad interpretation as well as application of the Article. The applicant posits that the Article fails to sufficiently specify the purpose of the compensation and the principles of the compensation application.

II. In this case, the Constitutional Court analysed the constitutionality of the challenged norms, respective international documents, legal positions of the European Court of Human Rights, and relevant legal

and judicial practice of foreign countries. Based on the analysis, the Constitutional Court determined that the challenged provisions should be interpreted and implemented in the following:

- Any restriction of the right to freedom of expression must be defined by law, aim to protect legitimate interest and be necessary for ensuring the given interest.
- A person's honour, dignity or business reputation is protected from other persons' defamatory actions merely by civil regulation, and the expression "person" does not include state bodies as legal entities.
- The terms "defamation" and "insult" must be considered in the context of the existence of intention and an aim to defame a person.
- Material compensation cannot be defined for value judgments, which will restrict the fundamental right to freedom of speech in an unnecessary and disproportionate way because the media's role is more than reporting just facts: the media is obliged to interpret facts and events to inform society and promote discussions on issues important to it.
- The circumstance that media representatives are respondents cannot be considered as a factor to determine more severe responsibility.
- Domestic bodies' decision must be based on acceptable assessment of facts important to the case.
- One must apply an approach with particular reservation while applying material compensation for insult, considering that the European Court of Human Rights has repeatedly mentioned that tolerance and widely-diverse views are the basis of democracy and the right to freedom of expression protects not only generally acceptable speech but also expressions that may be viewed as thrilling, offensive and shocking.
- Regarding material compensation, its restriction on the freedom of expression should be properly considered, as well as possibility of legitimate protection of reputation through other available means.
- Non-material compensation shall be applied as a priority for the damage caused by defamatory expressions (actions). Material compensation must be restricted by reimbursing the immediate damage caused to a defamed person's honour, dignity or business reputation, and should be applied when non-material compensation is not enough to reimburse the damage.
- While deciding the legitimacy of compensation, the respondent's limited measures should be considered as a factor, his or her income should be taken into consideration, a disproportionate heavy financial burden that will make a crucial

negative financial influence on his/her activity, should not be defined for the respondent.

- An applicant requiring material compensation for non-material damage should prove the existence of that damage.
- The maximum amount of compensation defined by law is applicable only in cases of existence of more serious and solid bases.
- Critical assessment of facts without factual context, the falseness of which is possible to prove, cannot be a ground for a compensation requirement. If a person's good reputation is violated, even if the incorrect information has been a value judgment, non-material compensation may be defined.
- While defining compensation, such factors should be taken into consideration as damage caused to feelings, absence of readiness of apologising.
- The circumstance of invoking the right to not discover a journalist's confidential sources of information deemed a public interest cannot be interpreted to the detriment of respondent while deciding the amount of compensation.
- Regarding politicians and people who hold public positions, publications regarding matters of public interest receive maximum protection; and regarding the amount of compensation, the applicant's status cannot be interpreted to the detriment of the respondent.
- It should be taken into consideration, whether extrajudicial forms of compensation, including volunteer or self-regulating mechanisms, have been supplicated and used to mitigate the damage caused to the applicant's honour and reputation.
- The parties should be granted a compulsory offer to come to peace and a contribution. While estimating the damage, the decision of conciliation should be observed as a mitigating circumstance.
- The right to protect the truth, the right to protect the opinion and the right to transmit other persons' speech should be publicly recognised.

The Constitutional Court decided that Article 1087.1 complied with the Constitution within the constitutional-legal content emanating from the legal positions expressed in the decision and international commitments undertaken by the Republic of Armenia.

Languages:

Armenian.



Belarus

Constitutional Court

Important decisions

Identification: BLR-2011-3-004

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 04.10.2011 / **e)** D-627/2011 / **f)** On some issues of legal regulation on granting parental leave / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 4/2011 / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State**.

3.21 General Principles – **Equality**.

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

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

Keywords of the alphabetical index:

Law, incorrect application, equality, right / Family allowance / Parental leave allowance, father / Discrimination, indirect.

Headnotes:

The right of the father or another relative of a child to social parental leave is not derived from the mother's right to the specified social leave. The right of the working father or other relative of the child, who is actually caring for the child, to social parental leave and state allowance is a separate right.

Summary:

The Constitutional Court considered the issue of granting social parental leave to the father of a child.

According to the relevant provisions of the Labour Code the employer shall grant parental leave to working women, regardless of their seniority, at their request after the interruption in work due to childbirth. This leave is granted until the child reaches the age of three years, with a monthly payment of the state allowance. It is noted in the appeal that, in practice, the parental leave to care for a child up to three years

old is not granted to the father or other relatives if the mother of the child works as a self-employed entrepreneur.

According to the explanation of the Ministry of Labour and Social Protection, where the applicant (the mother of the child) is a self-employed entrepreneur and she is not entitled to parental leave to care for a child up to three years old by virtue of the labour legislation, such leave may not be granted to the father of the child.

The Constitutional Court noted that working as a self-employed entrepreneur is one way of realising the citizen's constitutional right to work, guaranteed by the state. Its realisation should not entail any negative consequences for the family of the self-employed entrepreneur. The family at its own discretion appoints the parent member or other relative of the child who will actually care for the child until he or she is three years old. Thus, such a person will become entitled to social parental leave.

According to Article 22 of the Constitution all shall be equal before the law and have the right to equal protection of their rights and legitimate interests without any discrimination. The Constitutional Court found the approach applied in practice unlawful, in that it views the right of the father or another relative of the child to social parental leave as derived from his mother's right to the specified social leave. The right of the working father or other relative of the child, actually caring for the child, to social parental leave is a separate right. The exercise of this right is guaranteed by the provisions of the Constitution.

The Constitutional Court recognised the necessity to fill the said gap in the legal framework by legislating for the right of the working father and other relatives of the child, actually caring for the child, to be granted the specified parental leave where the child's mother is a self-employed entrepreneur.

The Constitutional Court proposed that the Council of Ministers would, using its legislative initiative, prepare a draft law introducing the relevant alterations and *addenda* to the Labour Code, the Law "On State Allowances for Families with Children", and submit it under the established procedure to the House of Representatives of the National Assembly.

Languages:

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



Identification: BLR-2011-3-005

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 19.12.2011 / **e)** D-655/2011 / **f)** On the conformity of the Law "On Making Alterations and Addenda to the Law "On Fighting Corruption" to the Constitution / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 4/2011 / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 3.10 General Principles – **Certainty of the law**.
 5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation**.
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

Corruption, prevention / Civil service, requirement, specific / Interests, conflict.

Headnotes:

The Law under review fully implements the approaches set forth in the UN Convention against Corruption of 2003. Restrictions imposed on public officials and equivalent persons in relation to their ownership of shares of participation (shares of stock, rights) in the authorised funds of commercial organisations, as well as the procedure to settle conflicts of interest, are consistent with the Constitution and international instruments.

Summary:

The Constitutional Court in the exercise of obligatory preliminary review examined the constitutionality of the Law "On Making Alterations and Addenda to the Law "On Fighting Corruption".

According to the Constitution the State shall take all measures at its disposal to establish the domestic and international order necessary for the full exercise of the rights and freedoms of citizens of the Republic of Belarus that are specified in the Constitution; state bodies, officials and other persons who have been entrusted to exercise state functions shall, within their

competence, take necessary measures to implement and protect personal rights and freedoms (Article 59.1 and 59.2).

Article 5.1 of the United Nations Convention against Corruption of 31 October 2003 (hereinafter the "Convention"), to which the Republic of Belarus is a party, establishes that each State Party shall develop and implement or maintain effective and coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, the proper management of public affairs and public property, integrity, transparency and accountability.

The provisions of Article 1 of the Law, providing for additional measures against corruption, reflect the said principles and meet the approach embodied in the Convention as regards matters such as the employment of public officials (Article 7), their code of conduct (Article 8), public information activities (Article 13), and the protection of persons reporting information (Article 37).

The Law updates the list of restrictions imposed on public officials and equivalent persons, requiring civil servants who own shares of participation (shares of stocks, rights) in the authorised capital of commercial organisations to transfer them for the period of service in trust under state guarantee within three months after their appointment (election) to their post (Article 17.3 of the Law "On Fighting Corruption").

The Constitution, guaranteeing the rights and freedoms of citizens contained therein, states that their restriction is permitted only in the instances specified by law, in the interest of national security, public order, protection of the morals and health of the population as well as rights and freedoms of other persons (Article 23.1).

A citizen exercising his constitutional right to equal access to any post in a state body, is obliged to meet the requirements (restrictions, in particular) of the civil service, one of which is a requirement to transfer shares of participation (shares of stocks, rights), owned in the authorised capital of commercial organisations, for the period of service in trust under state guarantee. In the opinion of the Constitutional Court, such obligations shall not be regarded as an undue restriction of the right, guaranteed by the Constitution to the citizens of the Republic of Belarus, of equal access to any post in state bodies in accordance with their abilities and professional training (Article 39), or of the right to property (Article 44).

In view of the foregoing the Constitutional Court considered that the provisions of the Law establishing special terms in relation to persons who have public law status, acquired by virtue of their holding certain public posts, are in conformity with the rules of the Constitution.

The Law (Article 1.9) lays down the rules regulating the procedure to prevent and settle a conflict of interest related to a public official's performance of his or her duties. The Law states that a public official shall, in particular, notify in writing his supervisory official of any conflict of interest raised, or the possibility of its occurrence, as soon as he becomes aware of it. He may resign in writing from decision-making, participation in decision-making or commission of other acts of service that cause, or may cause, a conflict of interest. The head of a state body, or any other organisation, which has become aware of the conflict of interest raised or the possibility of its occurrence, shall immediately take measures to prevent or settle it (Article 18¹ of the Law "On Fighting Corruption").

The Constitutional Court emphasised that the provision in the Law aimed at settling a conflict of interest when the exercise of the public official's personal rights as a citizen of the Republic of Belarus may be in conflict with the performance of his official duties in connection with his status, is consistent with Article 59 of the Constitution and Title II of the International Code of Conduct for Public Officials, adopted by the General Assembly of the United Nations on 12 December 1996, regulating the actions of public officials where conflicts of interest arise.

The procedure to prevent and settle a conflict of interest stipulated in Article 1.9 of the Law is proportionate in terms of balancing the personal interests of a public official and the proper performance of his official duties.

In addition, the Constitutional Court considered it necessary to draw attention to the fact that the exercise of powers, provided by law to the head of a state body or another organisation, to prevent or settle conflicts of interest, including the right to transfer a public official in accordance with the legislation of the Republic of Belarus from the post where his duties have caused or may cause a conflict of interest to another equivalent post, must not violate the right to work, guaranteed by the Constitution to citizens of the Republic of Belarus, as the worthiest means of an individual's self-assertion, that is, the right to choose a profession, type of occupation and work in accordance with their vocation, capabilities, education, professional training, and with regard to social needs (Article 41.1).

The Constitutional Court noted that the provisions of the Law are aimed at the implementation of the rules of the Constitution as well as of international treaties such as the United Nations Convention against Corruption of 2003 and the International Code of Conduct for Public Officials of 1996.

The Constitutional Court recognised the Law "On Making Alterations and Addenda to the Law "On Fighting Corruption" to be in conformity with the Constitution.

Languages:

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



Belgium

Constitutional Court

Important decisions

Identification: BEL-2011-3-010

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 05.10.2011 / **e)** 146/2011 / **f)** / **g)** *Moniteur belge* (Official Gazette), 15.12.2011 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.2.2.2 Constitutional Justice – Types of claim – Claim by a private body or individual – **Non-profit-making corporate body.**

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

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

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

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

Keywords of the alphabetical index:

Interest, collective, association, statutory aim / Interest, class action / Association, non profit-making / Procedure before the Court, defence of the law, Council of Ministers / Fundamental rights, entitlement / Human being, rights, human embryo and foetus / Human embryo and foetus, donation and use / Rights of the child, applicability, human embryo and foetus.

Headnotes:

The rights secured by Article 22bis of the Constitution to children do not extend to embryos and fetuses.

Summary:

I. The law of 19 December 2008 regulates the procurement and use of human bodily material intended for human medical applications or for purposes of scientific research. This law applies in principle to the “donation, removal, procurement, control, processing, preservation, storage, distribution and use of human bodily material intended for human

applications or for purposes of scientific research” (Article 3.1.1).

Responsibility had been vested primarily in the Crown for settling the list of the provisions of this law that also applied to the donation, removal, manipulation and use of embryos (from fertilisation to the eighth week) or fetuses (from the ninth week to birth). Through Article 26.3 of the law of 23 December 2009, the legislator nevertheless gave its own indication as to which provisions of the law of 19 December 2008 applied to embryos and fetuses.

The “Jurivie” non-profit organisation, with the purpose, according to its articles of association, of “furthering respect for human life and the integrity of the human person as a subject of law upon conception and at all stages of existence”, together with other associations, applied to have Article 26.3 of the law of 23 December 2009 set aside.

II.A. The Council of Ministers, upholding the law before the Court, began by contending that the first applicant did not demonstrably have the requisite interest in its application.

The Court observed that Article 142.3 of the Constitution and Article 2.2 of the special law of 6 January 1989 on the Constitutional Court required any corporate body bringing an application to set aside to have a demonstrable interest in so doing. Only persons whose situation might be directly and adversely affected by the impugned statute had the stipulated interest. Class action was inadmissible.

Where a non-profit association not pleading its personal interest took action before the Court – as in the instant case – it was required, according to the set precedent of the Court, that the association's corporate object should be of a specific nature and thus distinct from the general interest, that it should uphold a collective interest, that the impugned statute could potentially affect that object, and finally that there should be no evidence that the object was not, or no longer genuinely, being pursued.

The Court held that the first applicant did indeed have a demonstrable interest in taking action, given that the rules whose scope the impugned provision helped to define had the potential for a direct and adverse effect on respect for human life within the meaning of the first applicant's corporate object.

The Court did not consider it necessary to determine in addition whether the other applicants also demonstrated the requisite interest.

II.B. On the merits, the applicant claimed in one of its submissions that Article 26.3 of the law of 23 December 2009 was contrary to Article 22bis of the Constitution, in conjunction with Article 2.1 ECHR, with Article 6.1 of the International Covenant on Civil and Political Rights and with Article 6.1 of the Convention on the Rights of the Child, in that it would henceforth permit the “removal” and “use” of embryos *in vivo* and of fetuses *in vivo*, for human applications or for purposes of scientific research.

The Court considered the plea unfounded because the rights secured by Article 22bis of the Constitution to children did not extend to the embryos and fetuses referred to by the law.

Languages:

French, Dutch, German.



Identification: BEL-2011-3-011

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 05.10.2011 / **e)** 148/2011 / **f)** / **g)** *Moniteur belge* (Official Gazette), 14.12.2011 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.4.5 Constitutional Justice – Procedure – **Originating document.**

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

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

Keywords of the alphabetical index:

Law, suspension, grave prejudice / Veil, full veil, public place.

Headnotes:

Women of the Muslim faith living in Belgium and wearing the full veil, who are asking the Court to suspend and set aside the law of 1 June 2011 on the prohibition of wearing any garment that completely or predominantly conceals the face, have a

demonstrable interest in bringing an action before the Court at the stage of the request for suspension.

The prejudice pleaded by these women in support of their request for suspension, in that allegedly they are either compelled to remain at home or run the risk of being reported if they appear in a place accessible to the public, does not constitute a risk of grave prejudice difficult to redress which may justify suspension of the law.

Summary:

The Constitutional Court had before it an application to set aside and a request to suspend the law of 1 June 2011 against the wearing of any garment that completely or predominantly conceals the face. These actions were brought by two women of the Muslim faith living in Belgium and both wearing the full veil.

In line with its jurisprudence, the Court firstly verified the admissibility of the application to set aside, since the request for suspension was dependent on this application. It considered in particular whether the applicants had a demonstrable interest in challenging the law. They submitted that the contested law, despite the generality of its terms, unduly interfered with freedoms which they expected to be able to exercise as Muslims wearing the full veil for religious reasons and as women. The Court acknowledged that their situation could be directly and adversely affected by the contested law as it provided that a criminal sanction could be imposed on any person appearing in places accessible to the public with their face masked or wholly or partially concealed, so as to make them unidentifiable. At the conclusion of the limited examination made by the Court in connection with the request for suspension, the application to set aside and the request for suspension were ruled admissible.

Next, the Court had also to determine whether the conditions stipulated for suspending the law were fulfilled. Article 20.1 of the special law of 6 January 1989 laid down two conditions in that regard: serious grounds must be adduced; the immediate execution of the contested rule must be liable to cause grave prejudice difficult to redress.

The Court began by examining whether the second condition was fulfilled.

The applicants considered that the law compelled them to remain at home or to run the risk of having criminal sanctions imposed on them, or to forgo the exercise of certain fundamental freedoms.

The Court verified whether the applicant substantiated the existence of the risk of prejudice, its gravity, and its link with the application of the impugned provisions.

In this connection it argued that, if the applicants were to be prosecuted before the criminal court for infringement of the contested law, nothing prevented them from asking, during those proceedings, to put a preliminary question to the Constitutional Court on the constitutionality of the contested law. Should they be penalised by a criminal court's decision, it would be permissible for them to petition for a reversal of that decision if the contested law came to be set aside by the Constitutional Court. The Court concluded that the presence of a risk of grave prejudice difficult to redress was thus not proven in the event of possible proceedings before the criminal court.

The Court went on to observe that if the applicants complied with the impugned provisions, they could incur no criminal sanction. Concerning the claim that they would thereby be compelled to forgo the exercise of certain fundamental freedoms, the resulting prejudice could not be deemed sufficiently grave to warrant suspension of the contested law. The applicants had pointed out during the proceedings that they wore the full veil out of personal conviction, but that in certain circumstances they derogated from the expression of their conviction. In the Court's view, the applicants at that stage failed to show the reason why they could not countenance such derogation for the limited time taken by the proceedings before the Court.

Supplementary information:

The Court delivered a second judgment on the same law, Judgment no. 179/2011 of 17 November 2011. In that case it heard an application to set aside and a request to suspend brought by a Belgian woman living in Belgium, an atheist asserting her freedom to dress as she pleased and to express herself by means of her clothing, her individual freedoms and her right to move freely on the public thoroughfare without needing to forfeit other rights. At the end of an accelerated procedure called "preliminary procedure", the Court also dismissed this request for suspension because the applicant did not adduce specific material facts adequately proving that the application of the law was liable to cause her prejudice difficult to redress. The Court observed that the alleged prejudice was not personal and was furthermore not difficult to redress as it would disappear if the Court concluded its examination of the application to set aside the impugned provision by deciding to do so.

Languages:

French, Dutch, German.



Identification: BEL-2011-3-012

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 20.10.2011 / **e)** 161/2011 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

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

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

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

Keywords of the alphabetical index:

High Council of Justice, organisation of judicial service examinations / Judiciary, candidate, right of appeal / Legislative lacuna / Law, application, lacuna, unconstitutionality / Judgment of the Court, publicity, party, anonymity / Parties before the Court, identification / Council of State, powers / High Council of Justice, independence.

Headnotes:

The Court, at a party's request, limits his or her identification to his or her initials.

It is contrary to the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) that judicial service candidates should have no possibility of bringing an appeal before the Council of State against decisions of the Higher Council of Justice on the entrance competitions, when candidates in a civil service entrance competition

have a remedy before the Council of State against decisions taken in respect of them by the board that organises the civil service entrance competitions.

Summary:

I. A participant in the judicial service entrance competition challenged before the Council of State the results of the competition organised by the Higher Council of Justice which, in accordance with Article 151.2 and 151.3 of the Constitution, enjoys independence in its own right as regards the objectification of appointments to the judiciary.

Both the Higher Council of Justice and certain other participants who made submissions to the Council of State maintained that the application to set aside was inadmissible because Article 14 of the co-ordinated laws on the Council of State did not vest this high administrative court with power to rule on acts of the Higher Council of Justice.

The Council of State asked the Court whether it was compatible with the rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) that candidates for judicial service entrance examinations, who were unable to bring an appeal against the decisions of the Higher Council of Justice concerning the entrance examinations, were treated differently from candidates for other public offices who had a right to appeal against the decisions of the "Selor" board (Service for selecting candidates to a public post in the federal authority).

II.A. The applicant before the Council of State asked the Court for non-disclosure of his identity when the judgment answering the preliminary question was published.

The Court limited the identification of the person concerned to his initials.

II.B. On the merits, the Court found that only decisions of the Higher Council of Justice on staff and public procurement could be challenged before the Council of State.

The Court acknowledged firstly that the distinctive character of the Higher Council of Justice, a constituted body, required its independence to be guaranteed. But the need to preserve this independence did not, in the Court's view, justify the fact that the candidates undergoing the competition for admission to a judicial traineeship were denied a remedy against decisions taken in the matter by the Higher Council of Justice.

The absence of this judicial guarantee, which conversely was secured to candidates for a civil service entrance competition, who had a remedy before the Council of State against decisions taken in respect of them by the "Selor" board, was therefore contrary to the principle of equality and non-discrimination; it was disproportionate to the proper concern for preserving the freedom of action of the Higher Council of Justice. The interest protected by the institution of a remedy, the Court held, was as real and as legitimate for candidates denied access to a preparatory post for the judicial service as for candidates denied access to another public appointment.

The Court found that this situation could be redressed only by the legislator's intervention in which, out of consideration for the independence which must be secured to the Higher Council of Justice, it might contemplate providing specific guarantees to which it must not have attended during the preparation of the co-ordinated laws on the Council of State. The discrimination therefore did not stem from the aforementioned Article 14, but from a gap in the legislation, ie the lack of provision for a remedy to set aside decisions taken by the Higher Council of Justice concerning candidates taking part in the competition for admission to a judicial traineeship.

Supplementary information:

A petition challenging one of the Court judges, who was a member of the Council of State at the time of the proceedings before the Council of State, was dismissed by Judgment no. 155/2011 of 13.10.2011 (www.const-court.be).

Cross-references:

- To compare (by analogy) with Judgment no. 79/2010 of 01.07.2010, *Bulletin* 2010/2 [BEL-2010-2-007].

Languages:

French, Dutch, German.



Identification: BEL-2011-3-013

a) Belgium / b) Constitutional Court / c) / d) 10.11.2011 / e) 166/2011 / f) / g) *Moniteur belge* (Official Gazette) / h) CODICES (French, Dutch, German).

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.**

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

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

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

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

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

Keywords of the alphabetical index:

Right to private life, medical questionnaires / Insurance, medical questionnaires / Right to private life, obligation, positive / Human rights, violation, state, tolerance / Freedom of trade and industry, limits / Freedom of contract, limits.

Headnotes:

The legislator is able, in accordance with the Constitution and notwithstanding freedom of trade and industry for insurance companies and freedom of contract, to establish regulations on the medical questionnaires to be completed by applicants for a loan on mortgage with insurance for the balance remaining due, in order to prevent irrelevant or inordinate questions from being asked during the conclusion of an insurance contract and thus disproportionately interfering with the right to respect for the privacy of the persons concerned.

Summary:

I. The *Union professionnelle des entreprises d'assurances* "Assuralia" brought an application before the Court to set aside part of the law of 21 January 2010 amending the law of 25 June 1992 on life and damage insurance contracts with regard to insurance on the balance remaining due for persons displaying a heightened health risk. The law settles the possibility for

persons with health problems to take out insurance on the balance remaining due in respect of a loan on mortgage. The law seeks to deal with the problems encountered by the chronically ill, cancer sufferers or former cancer victims or persons suffering from rare diseases. The legislator intended to draw up regulations for easier and more transparent access to insurance for such persons, without however wishing to create a right to insurance.

Under Article 15 of the law of 21 January 2010, Articles 138ter-1 to 138ter-12 of the aforementioned law of 25 June 1992 are applicable in this context. Article 138ter.1 lays down a "code of good practice", and provides *inter alia* that this must specify "in which cases and for which types of loan or which insured amounts a standardised medical questionnaire must be completed".

The applicant submitted that by establishing the mandatory code of good practice and the standardised medical questionnaire for insurance companies, the legislator imposed discriminatory obligations violating Articles 10 and 11 of the Constitution, in conjunction with the freedom of trade and industry and with the "general principle of freedom of contract".

II. The Court replied that freedom of trade and industry could not be conceived as an absolute freedom. It raised no impediment to the economic activity of persons and enterprises being regulated by law. It would only be violated if it was limited needlessly and with manifest disproportion to the aim pursued. The same applied to freedom of contract, which was limited by other people's freedom of contract and other rights, including the right to be treated without discrimination.

Failing a code of good practice drawn up by the Insurance Commission, it was for the Crown, in accordance with Article 138ter.1.2, to settle the code of good practice after consulting the Commission for the Protection of Privacy. Under Article 138ter.1.3, where the code had not yet been settled the Crown could already regulate or prohibit the use of medical questionnaires, determine, reformulate or prohibit questions on the insured person's health, limit the range of a question in time and determine the insured amount below which only the medical questionnaire could be used.

The Court observed that it emerged from the preparatory texts for the law that in providing for a code of good practice and a standardised medical questionnaire, the legislator's primary intention had been to secure the right of insurance applicants to respect for privacy.

The Court recalled that Article 8 ECHR embodied not only a prohibition of arbitrary interference in private and family life but also an obligation for Contracting States to take the requisite measures to guarantee the effective enjoyment of private and family life (see *inter alia*, European Court of Human Rights, 26 March 1985, *X and Y v. Netherlands*, § 23; 22 October 1996, *Stubbings and others v. United Kingdom*, § 62; 24 February 1998, *Botta v. Italy*, § 33; 25 January 2000, *Ignaccolo-Zenide v. Romania*, § 94; 7 February 2002, *Mikulic v. Croatia*, § 57; 17 July 2003, *Craxi no. 2 v. Italy*, § 73). The European Court of Human Rights had inferred from this article, notably, the obligation to make sufficient efforts to put an end to repeated interferences with enjoyment of the right to respect for private and family life (*Surugiu v. Romania* of 20 April 2004, § 68) and, in the event of infringement of this right, to conduct an effective inquiry into the material circumstances of the case and, if necessary, to punish the persons responsible for certain breaches (*Craxi no. 2 v. Italy* of 17 July 2003, §§ 74 and 75).

Article 22.2 of the Constitution embodied a similar positive obligation. Its preparatory texts indicated that the constitution-making body “had sought to make the proposal as compatible as possible with Article 8 ECHR, in order to avert any dispute over the respective content of the article in the Constitution and of Article 8 ECHR”.

The Court held that the use of medical questionnaires when determining the insurance risk and the insurance premium constituted interference with the right to respect for the privacy of prospective insurance holders.

In the Court's view, the legislator may have considered that the use of these questionnaires should be regulated in order to prevent irrelevant or inordinate questions from being asked during the conclusion of an insurance contract and thereby disproportionately interfering with the right to respect for privacy of the persons concerned. It may also have considered that the insurers' stipulating a supplementary medical examination and asking for its findings, over and above the use of a medical questionnaire, could constitute a disproportionate restriction of the right to respect for privacy of the person concerned in cases where the insured amount remained limited. Finally, it may also have considered, on the basis of the positive obligation deriving from the right to respect for private life, that penalties should attach to infringement of the rules at issue.

Languages:

French, Dutch, German.



Identification: BEL-2011-3-014

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 10.11.2011 / **e)** 176/2011 / **f)** / **g)** *Moniteur belge* (Official Gazette), 14.12.2011 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living**.

Keywords of the alphabetical index:

Social assistance, amount, cohabitation with a foreigner in an illegal situation / Integration allowance, amount, cohabitation with a foreigner in an illegal situation.

Headnotes:

Integration allowance beneficiaries who cohabit with a foreigner residing illegally in the territory and lacking means so as to be prevented from contributing in any way to the household expenses are placed in an essentially different situation from those beneficiaries who derive an economic or financial advantage from such cohabitation. It is contrary to the constitutional rules of equality and non-discrimination to treat these two categories of persons alike.

Summary:

The Labour Court of Liège had referred to the Constitutional Court some preliminary questions concerning Article 14.1.1.2 of the law of 26 May 2002 concerning the right to social integration. The amount of the integration allowance varies according to the beneficiary's personal situation. The law draws a

distinction between persons living with a dependent family, single persons and persons cohabiting with one or more persons. Entitlement to integration allowance is individualised, so that no amount for a couple is prescribed. The Liège Labour Court questioned the Constitutional Court on the situation of a recipient of the integration allowance whose cohabiting partner was a foreigner residing illegally in the territory. Under Article 57.2 of the law of 8 July 1976 instituting the *Centres Publics d'Action Sociale* (welfare centres), such a foreigner was only entitled to emergency medical assistance. He had no entitlement to a welfare allowance and in principle could not acquire an occupational income either.

The Constitutional Court observed that the preliminary questions put to it prompted it to make a comparison between, on the one hand, welfare allowance recipients for whom cohabitation with another person generated an economic or financial advantage and, on the other hand, welfare allowance recipients for whom this was not so because they cohabited with a foreigner residing illegally in the territory.

The Constitutional Court observed that these two categories of persons were in an essentially different position with regard to the justification which had been given for the law during the parliamentary procedure. The legislator had in fact considered that a single person must bear greater expenses than a person cohabiting and able to share these with someone else.

The Court noted that it would not be justified for an integration allowance beneficiary to be able to obtain an increase in the allowance to which he was entitled as a result of cohabitation with an illegally resident foreigner. However, neither would it be justified, in the light of the objectives pursued by the legislator regarding integration income, for a beneficiary thereof to have his allowance reduced for cohabiting with a foreigner residing illegally in the territory, lacking means, and unable to contribute to the household expenditure. In that case, cohabitation generated no economic or financial advantage for the beneficiary.

The Court concluded that if interpreted to the effect that the chiefly joint settlement of household matters between a beneficiary of the integration allowance and the cohabiting foreigner illegally resident in the territory consisted solely of sharing household tasks, without the requirement that the cohabitation should generate an economic or financial advantage for the welfare allowance recipient, the provision at issue was devoid of reasonable justification and consequently incompatible with Articles 10 and 11 of the Constitution. It noted nevertheless that the provision could also be interpreted to the effect that

cohabitation presupposed that the chiefly joint settlement of household matters demanded that cohabitation should generate an economic or financial advantage for the welfare allowance recipient. According to that interpretation, there was no like treatment that could infringe Articles 10 and 11 of the Constitution, and so the provision at issue was compatible with Articles 10 and 11 of the Constitution.

Languages:

French, Dutch, German.



Identification: BEL-2011-3-015

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 17.11.2011 / **e)** 178/2011 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.5.4.3 Constitutional Justice – Decisions – Types – **Finding of constitutionality or unconstitutionality.**
 2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**
 5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment.**
 5.3.13.2 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:

Worker, part-time worker, legal presumption / Presumption, legal, irrebuttable / Employment, illegal, combating of.

Headnotes:

The presumption of full-time coverage of part-time workers in respect of whom the formalities regarding welfare documents have not been complied with, to the extent that it is irrebuttable, has a general and absolute character that is disproportionate towards

the employer concerned as it denies the latter the right to substantiate that the amount of the social security contributions paid by him corresponds to the work actually performed by the worker he employs under a part-time employment contract.

Summary:

The Constitutional Court had before it preliminary questions from the Huy Labour Court concerning Article 22ter of the law of 27 June 1969 revising the legislative order of 28 December 1944 on workers' social security.

The Labour Court entertained an appeal from an employer in whose firm checks had been carried out by a welfare inspector who found that the flexitime for two workers had not been posted up in accordance with the law. Under the provision subjected to the Constitutional Court's scrutiny, these two workers were thus irrebuttably presumed, for the purposes of the social security contributions, to have performed their work under a full-time employment contract.

The Constitutional Court was asked about the compatibility of this provision with Articles 10 and 11 of the Constitution, read singly or in conjunction with Articles 6.1 and 13 ECHR, to the extent that the presumption established was irrebuttable.

The Court noted that under a law of 27 December 2004, the legislator had replaced a rebuttable presumption with an irrebuttable presumption, the onus being on the labour inspector to verify that the worker inspected was not materially incapable of performing full-time work.

The Constitutional Court found that the legislative measure was consistent with the aim pursued by the legislator and that its irrebuttable character may have been considered necessary to guarantee, as indicated by the preparatory texts, the proper collection of social security contributions, particularly in the context of fighting illegal employment. The Court nevertheless observed that its irrebuttable character gave the presumption a generality and absoluteness, disproportionate towards the employer concerned as it denied him the right to substantiate that the amount of the welfare contributions paid by him corresponded to the work actually performed by the worker whom he employed in pursuance of a part-time employment contract. According to that interpretation, the provision violated the constitutional provisions relied upon. The Court found, however, that the provision could be interpreted otherwise, on the basis of Article 1352 of the Civil Code. The presumption was inapplicable where the welfare inspector found it materially impossible for the

workers concerned to work full-time. If interpreted as establishing a rebuttable presumption, the provision did not violate the constitutional provisions relied upon.

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2011-3-004

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 30.01.2010 / **e)** AP 519/07 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 20/10 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Conviction, criminal / Court, appellate, review / Crime against humanity / Criminal law, retroactive.

Headnotes:

There is no violation of the right to a fair trial where the proceedings for the offences of war crimes and crimes against humanity were conducted by the State Court, which is a tribunal established by law.

There is no violation of the right to have a conviction or sentence reviewed by a higher tribunal, safeguarded by Article 2 Protocol 7 ECHR, as the said Article does not establish an obligation that, where a conviction has been pronounced following an appeal against acquittal, it must be reviewed by a higher tribunal. Article 2.2 Protocol 7 ECHR permits exceptions to the rule that the criminal verdict shall be reviewed by a higher tribunal, *inter alia*, in cases where the conviction has been pronounced following an appeal against acquittal.

Summary:

I. The appellant lodged an appeal with the Constitutional Court against the verdicts of the Court of Bosnia and Herzegovina (hereinafter, the “State

Court”) whereby he was found guilty of the criminal offence of crimes against humanity and sentenced to long-term imprisonment.

The appellant contended that the State Court, by its decision to take over the case from the County Court in Trebinje, had violated his right to a trial before a competent court.

The Criminal Procedure Code prescribes the subject matter jurisdiction of the State Court, and, in this context, there is no question that the State Court is “the court defined beforehand by law as competent to adjudicate in criminal matters within the scope of its jurisdiction”. It also stipulates the conditions under which the State Court can, and cannot, take over a case falling under its jurisdiction, which was pending before another court at the time when the Criminal Procedure Code entered into force.

II. The Constitutional Court held that the State Court had not violated the appellant’s right to a fair trial in respect of the requirement that he be tried by “a tribunal established by law”.

The appellant further contended that the State Court, by declaring him guilty of the criminal offence prescribed in the Criminal Code and not of the criminal offence prescribed in the Criminal Code of the Socialist Federal Republic of Yugoslavia (hereinafter, “SFRY”), which had been applicable at the time of commission of the criminal offence, breached the guarantees established in Article II.2 of the Constitution, which stipulates that the rights and freedoms set forth in the European Convention on Human Rights and its Protocols shall apply directly and shall have priority over all other law. The appellant argued that it was clear that the death penalty, which was prescribed in the SFRY Criminal Code, could not be imposed, and, therefore, that this Law was more lenient than the Criminal Code, which prescribes a sentence of long-term imprisonment. In this regard, the appellant argued that the guarantee under Article 7 ECHR had been breached in his case.

As to the allegations by way of which the appellant raised the issue of a ‘more lenient punishment’ (i.e. “more lenient law”) and “the retrospective application of laws”, the Constitutional Court referred to its reasoning on the same issues in case no.AP 1785/06. In that decision, the Constitutional Court held that Article 7.2 ECHR refers to ‘the general principles of law recognised by civilised nations’, and the provision of Article III.3.b of the Constitution establishes that ‘the general principles of international law shall be an integral part of the law of BiH [Bosnia and Herzegovina] and the Entities’. In the view of the Constitutional Court, war crimes are ‘crimes

according to international law' in terms of universal jurisdiction to conduct criminal proceedings, so that the convictions for such acts under the law which subsequently defined and determined certain acts as criminal and stipulated a special criminal sanction, but which did not constitute criminal offences under the law that was applicable at the time the criminal offence was committed, are not inconsistent with Article 7.1 ECHR.

Furthermore, the appellant held that, the State Court, while assessing the issue of the 'more lenient law', disregarded that, pursuant to Article 1 Protocol 6 ECHR and Articles 1 and 2, Protocol 13 ECHR, the death penalty prescribed by the SFRY Criminal Code could not be imposed and, therefore, this Law was more lenient to the appellant. In this regard, the Constitutional Court recalled that all laws stipulating the death penalty were manifestly in opposition to the Constitution after 14 December 1995 and, therefore, could have no legal effect after that date. The concept of the SFRY Criminal Code was such that it stipulated the death penalty for a serious crime, rather than long-term imprisonment or a life sentence, and a 15 years maximum sentence for a less serious crime. Hence, it is clear that a sanction cannot be separated from the totality of goals sought to be achieved by the criminal policy at the time of application of the law. In this context, the Constitutional Court stated that it is simply not possible to 'eliminate' the more severe sanction under both earlier and later laws, and apply only other, more lenient, sanctions, so that the most serious crimes would, in practice, be left inadequately sanctioned.

Next, the Constitutional Court inferred that the appeal was ill-founded as regards the assertion that the death penalty prescribed in the SFRY Criminal Code could not be imposed given that the European Convention on Human Rights and its Protocols apply directly and have priority over all other law. The appellant's argument was that he was accused of and convicted for the criminal offence of crimes against humanity, as crimes defined under international law, which is prescribed and sanctioned under the Criminal Code, but which was not prescribed as punishable under the SFRY Criminal Code and, accordingly, it was not subject to sanction.

In its recent case-law, the State Court had stated that Article 4.a of the Criminal Code applies to the criminal offence of crimes against humanity, as a criminal offence under the general principles of international law, committed at the time when the adopted Criminal Code was in effect, since the latter Law did not provide for that criminal offence at all. In this regard, the State Court underlined that it is necessary to apply Article 7.2 ECHR directly, which does not allow

the perpetrators to evade trial and punishment in cases where specific conduct, which constitutes a criminal offence according to the general principles of international law, is not criminalised.

The Constitutional Court concluded that, in the case at hand, the application of the Criminal Code in the proceedings conducted before the State Court did not give rise to a violation of Article 7 ECHR.

Furthermore, the appellant argued that his right to have his conviction or sentence reviewed by a higher tribunal safeguarded by Article 2 Protocol 7 ECHR was violated by the State Court, in the verdict of the Appellate Division Panel of Section I for War Crimes (hereinafter, the "Appellate Division"), by which he was found guilty of committing the criminal offences for which he was acquitted by the first instance verdict, as there is no possibility to file a petition against the challenged verdict in this part.

Taking into account that Article 2.1 Protocol 7 ECHR prescribes that the exercise of the right of appeal shall be determined by domestic law and that the Contracting States to the European Convention on Human Rights have a wide margin of appreciation to determine how this right is to be exercised, and that Article 2.2, Protocol 7 ECHR, establishes exceptions to the rules laid down in Article 2.1 Protocol 7 ECHR, leads to the conclusion that this right is neither absolute nor unconditional. Therefore, the Constitutional Court concluded that the impossibility of filing an appeal against the verdict of the Appellate Division of the State Court did not give rise to a violation of the appellant's right to have his conviction or sentence reviewed by a higher tribunal. Moreover, it follows from Article 2 Protocol 7 ECHR that the European Convention on Human Rights, itself permits such restriction. In this regard, the Constitutional Court held that the fact that the Criminal Procedure Code did not provide for the possibility for review of the criminal verdict in the third instance at the time when the Appellate Division of the State Court passed the challenged verdict did not give rise to a violation of the appellant's right guaranteed under Article 2 Protocol 7 ECHR.

Cross-references:

- Decision no. AP 1785/06 of 30.03.2007, *Bulletin* 2007/2 [BIH-2007-2-003].

Languages:

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



Identification: BIH-2011-3-005

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 09.07.2010 / **e)** AP 1307/08 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 95/10 / **h)** CODICES (Bosnian, 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:

Decision, judicial, non-execution / Enforcement, judgment, law / Delay, undue / Fair trial.

Headnotes:

There has been a violation of the appellant's right to a fair trial under Article II.3.e of the Constitution as well as under Article 6.1 ECHR where there are no guarantees that the appellant will be able, as the holder of an enforceable court document, to settle his claims against the Federation within a reasonable time.

Summary:

I. The appellant has a claim against the Federation of Bosnia and Herzegovina – the Federal Ministry of Defence (hereinafter, the "Federation") for a sum of KM 1,352,952.91 plus the costs of civil proceedings awarded by the legally binding judgment of the Municipal Court in Sarajevo no. Ps-422/00 of 16 January 2002, for a debt incurred in 1994 (during the war in Bosnia and Herzegovina) based on an Agreement on production and delivery of arms and military equipment.

The Constitutional Court noted that, in the present case, the enforcement proceedings before the court were finalised and the ruling on enforcement communicated to the bank for execution. The appellant had no objections to the course of the enforcement proceedings conducted by the Municipal Court. The problems appeared when the enforcement ruling was transmitted to the bank, because there were no funds in the transaction account of the enforcement debtor (the Federation) for the ruling to

be carried out. Several thousand claims were registered before the appellant's claim. The case file of the appeal indicated that the appellant was informed that he would settle his claim when the enforcement debtor had available funds in the account, i.e. when the creditors whose enforcement rulings have been registered before the appellant's are settled, all in accordance with the relevant provisions of the applicable laws and bye-laws. The main issue raised in the case therefore related to the failure by the appellant to enforce a legally binding court decision.

II. The Constitutional Court highlighted that, pursuant to Article I.2 of the Constitution as well as Article 1 ECHR, all levels of power in Bosnia and Herzegovina are obliged to secure respect for individual human rights including the right to enforcement of legally binding court decisions under Article 6.1 ECHR. Such obligation may not be reduced by the fact that, in the present case, the enforcement must be made against the budgetary funds of one of the Entities and that, due to a great number of creditors, there are no funds available for the enforcement to be carried out. The Constitutional Court supported the position of the European Court of Human Rights adopted in case *Jelicic v. Bosnia and Herzegovina* (Judgment of 31 October 2006) that the lack of funds may not be an excuse for non-compliance with the obligations arising from a judgment.

The Constitutional Court noted that, in the present case, the Federation undertook steps in order to enforce legally binding court decisions in that it adopted amendments to the Law on Enforcement Procedure. In the relevant part of the aforementioned Law (Article 138.3 and 138.5) it is stipulated that the enforcement against the budgetary funds of the Federation shall be carried out "in the amount specified in the relevant budget position in accordance with the Law on Budget Execution", and that "several judgment creditors who are satisfying their claims against the budget funds shall be paid in the order they acquired the right to settlement from that budget, and the statute of limitations shall not run until the judgment creditor's claim is satisfied."

In the opinion of the Constitutional Court, the steps taken by the Federation by adoption of the said amendments to the Law on Enforcement Procedure and the Decision on Issuing Bonds on the Basis of the War-related Civil Claims were positive insofar as the adopted amendments introduced the obligatory nature of budgetary funds allocated for payments to the creditors in possession of legally binding court decisions; introduced the order of payments depending on the date of obtaining the right; guaranteed full settlement in accordance with the

court's decision; and excluded the application of the statute of limitations. In this manner a certain postponement in the enforcement of legally binding court decisions has been prescribed which might be justified from the general aspect of the protection of the public interest because by simultaneous disbursements related to all legally binding court decisions the financing of other budgetary users would be brought into question as well as the functioning of the Federation as one level of power in Bosnia and Herzegovina. Pursuant to the Decision on Issuing Bonds on the Basis of the War-related Civil Claims that postponement shall last for 14 years. In the opinion of the Constitutional Court, the manner in which, in the present case, the enforcement of legally binding court decisions was postponed did not satisfy the standards of Article 6.1 ECHR. Moreover, it could be stated that "... the essence of the right protected by Article 6.1 has been violated" (see paragraph 39 of the Judgment of the European Court of Human Rights in *Jelicic v. Bosnia and Herzegovina*).

The Constitutional Court emphasised that the Federation, having adopted the amendments to the Law on Enforcement Procedure and, particularly, the Decision on Issuing Bonds on the Basis of the War-related Civil Claims, is on the right track to finally addressing the issue of enforcement of the legally binding court decisions based on war-related civil claims. However, in the opinion of the Constitutional Court, there still remained the problem of enforcement of such decisions within a "reasonable time" as referred to in Article 6.1 ECHR. The Constitutional Court reiterated its earlier position that the legislator is entitled to find an adequate *modus operandi* for the enforcement of legally binding decisions. However, the Constitutional Court has the jurisdiction to evaluate whether the solution chosen by the legislator ensures respect for human rights.

In spite of all the difficulties encountered, without doubt, by the public authorities in the Federation in their endeavours to ensure the enforcement of the legally binding court decisions based on war-related civil claims, the Constitutional Court could not hold that the Federation had complied with its positive obligation to ensure the enforcement of the aforesaid court decisions within a reasonable time by adopting the amendments to the Law on Enforcement Procedure and the Decision on Issuing Bonds on the Basis of the War-related Civil Claims. In adopting that Decision, the Federation had prescribed that the creditors in possession of legally binding court decisions shall settle their claim within 14 years with a 9-year grace period and statutory default interest on a yearly basis of 2.5% calculated on the amount as established by the judgment, following which the

awarded amount should be paid in four equal instalments on specific dates within the remaining four years.

In the opinion of the Constitutional Court, it was unacceptable that the creditors who, in principle, had been involved in long-lasting proceedings which resulted in legally binding court decisions awarding them war-related claims mostly related to the rendered services, sold goods, and damage incurred, now had to wait for the enforcement for another 14 years, entailing a very realistic question of whether they would live long enough to be paid their claims which were, in Court's view, of utmost significance to the creditors. The Constitutional Court held that an excessive burden had been imposed in this way upon the creditors, which was not in accordance with the requirement of Article 6.1 ECHR that legally binding court decisions must be enforced within a reasonable time.

Languages:

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



Bulgaria

Constitutional Court

Statistical data

1 September 2011 – 31 December 2011

Number of decisions: 4

Important decisions

Identification: BUL-2011-3-003

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 22.11.2011 / **e)** 11/11 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 95, 02.12.2011 / **h)** CODICES (Bulgarian).

Keywords of the systematic thesaurus:

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

4.4.3 Institutions – Head of State – **Powers.**

4.6.2 Institutions – Executive bodies – **Powers.**

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

5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment.**

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

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

Keywords of the alphabetical index:

Powers, horizontal apportionment / Public-sector jobs, discrimination.

Headnotes:

When implementing the foreign policy of the Republic of Bulgaria, including the country's participation in "the building and development of the European Union" (Article 4.3 of the Constitution), consideration is given to the long-term interests of the nation and its democratic values. The foreign policy must neither serve the narrow interests of the parliamentary majority of the day, whatever that majority may be,

nor be governed by random or temporary factors. For that reason the Constitution apportions powers in matters of foreign policy between various state bodies so that they are not concentrated in the hands of any one of the three branches of government or in the hands of a single institution.

The appointment of diplomatic representatives is subject to the following procedure: the Council of Ministers submits to the President of the Republic his/her decision concerning the chosen nominee and proposes that he/she issue a decree appointing that person. The head of state then signs the decree appointing the extraordinary and plenipotentiary ambassador or the permanent representative of Bulgaria to an international governmental organisation; this decree is countersigned by the Prime Minister in accordance with Article 102.2 of the Constitution.

In the case of procedures for the appointment and dismissal of extraordinary and plenipotentiary ambassadors and permanent representatives of Bulgaria to international governmental organisations, there is what may be termed "power sharing" between the President of the Republic and the Council of Ministers. Since there are no mechanisms for settling any disputes that may arise from the exercise of this shared power, the two authorities mentioned above must bow to the need to co-operate and work together in order to come to an agreement.

The Constitution states that where powers are shared, state bodies must exercise them according to the principles of the separation of powers and the rule of law, in a spirit of constructive co-operation and mutual respect.

Some of the provisions of the Law on the Diplomatic Service (hereinafter, "LDS") prohibit a group of citizens from obtaining positions of responsibility and public-sector jobs in the diplomatic service because of their affiliation with the secret services of the totalitarian regime.

Negative public reactions to the activities of the secret services of the totalitarian era cannot be denied, but they must not be allowed to interfere with the rights of citizens in a modern democratic society. The negative attitude to the past cannot be a ground for restricting citizens' rights as set forth in the democratic Constitution that has been in force since 1991.

Summary:

Opposition MPs applied to the Constitutional Court asking it to establish the unconstitutionality of a number of provisions of the LDS. They claim that the provisions in question undermine the constitutional

principle of the separation of powers, as they allow an unacceptable encroachment on the power of the constitutionally established bodies, that they are contrary to the principle of career development in the diplomatic service and that they restrict the rights of citizens who worked for the secret services of the totalitarian state.

According to Article 92.1 of the Constitution, the President of the Republic represents the state in international relations. Representation of the country in international relations is enshrined in the basic law as the primary function of the President of the Republic, in accordance with the constitutional principle of the separation of powers and with the principles and rules of international law.

The Council of Ministers directs and implements the country's domestic and foreign policy in accordance with the Constitution and the laws (Article 105.1 of the Constitution). The exercise of this government power is provided for in the Constitution itself and in the laws that are enacted by parliament. Accordingly, the conduct and implementation of the country's foreign policy by the executive, through the government, are limited by the constitutional powers of the President of the Republic and by those of the National Assembly, particularly as the government's activities are entirely governed by sub-statutory acts.

The impugned provisions of the LDS allow the diplomatic service, headed by the Minister of Foreign Affairs, to encroach on the powers of other state bodies established by the Constitution, thus coming into conflict with the constitutional provisions on the representative function of the head of state and certain functions of the government.

The government directs and implements the country's foreign policy, whereas the Minister of Foreign Affairs and the diplomatic service that he heads are required to execute the decisions of the Council of Ministers. The Minister of Foreign Affairs can have no independent authority, let alone sole authority, in matters relating to the implementation of foreign policy other than in the case of political decisions taken by the Council of Ministers.

The applicants likewise dispute the constitutionality of the provisions governing the functioning of the diplomatic service. In their view, the impugned provisions allow the Minister of Foreign Affairs to take biased and unfounded decisions according to confused criteria, bypassing or disregarding the principles on which the diplomatic service is organised, such as stability, transparency and career development. Since the basic law contains no provisions on the criteria for holding diplomatic posts

or for appointment to the diplomatic service, it is for the National Assembly to deal, through legislation, with all matters relating to the diplomatic service.

The issue of the principles governing the organisation and operation of the diplomatic service is a question of expediency that is left to the National Assembly, in particular to the majority of MPs who enact the laws. The criteria for appointments to the diplomatic service depend entirely on the circumstances at the time.

The applicants also contest the provision that allows the Minister of Foreign Affairs to sign orders terminating long-term foreign postings of diplomatic representatives whose appointments abroad, as prescribed by the LDS, have expired.

Under Article 69 of the LDS, the Minister of Foreign Affairs is required to terminate the long-term posting of the head of a Bulgarian representation abroad in two instances: on expiry of the appointment of the head of the representation and where the President of the Republic has issued a decree dismissing him/her.

By requiring the Minister of Foreign Affairs to sign an order terminating the long-term posting of a head of a Bulgarian representation abroad before the decree dismissing him/her has been signed, the LDS bypasses the provisions of Article 98.6 of the Constitution and allows the Minister of Foreign Affairs to exercise a power that the Constitution has expressly reserved for the President of the Republic.

Terminating long-term postings of ambassadors and permanent representatives to international organisations before the President of the Republic has signed the decree dismissing them constitutes an encroachment by the Minister of Foreign Affairs on the powers of the President of the Republic. The Constitutional Court accordingly holds that the impugned provisions represent an unacceptable infringement of the constitutional powers of the head of state in matters relating to the appointment and dismissal of the heads of Bulgarian representations abroad and that they are unconstitutional.

According to the case-law of the Constitutional Court, affiliation with the former secret services of the totalitarian regime is no justification for restricting constitutional rights, in this case eligibility for certain public-sector jobs.

The provisions contested by the MPs introduce, in a way that is unacceptable, a collective responsibility, since they take no account of the fact that the persons concerned performed different duties.

Irrespective of the negative public attitude towards the former State Security Service and those who collaborated with it, it is constitutionally unacceptable to create a presumption of collective guilt without taking account of the work that each of these persons performed.

The contested provisions of the LDS are contrary to the principle of equality before the law (Article 6.2 of the Constitution). Equality of all citizens before the law, however, has been elevated to the rank of constitutional principle inherent in any democratic society. Any failure to observe this principle, even if it is temporary and arises from a statutory restriction, undermines the constitutional provisions. The equality of citizens necessarily requires that they be treated equally by the state authorities.

Affiliation with the secret services of the totalitarian state is considered to be a social condition on the basis of which the Constitution prohibits any restriction of rights, failing which discrimination in violation of Article 6.2 of the Constitution would be deemed to have occurred. The limitation of rights provided for in the impugned provisions is disproportionate within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms and the practice of the European Court of Human Rights.

Languages:

Bulgarian.



Canada Supreme Court

Important decisions

Identification: CAN-2011-3-004

a) Canada / **b)** Supreme Court / **c)** / **d)** 30.09.2011 / **e)** 33556 / **f)** Canada (Attorney General) v. PHS Community Services Society / **g)** *Canada Supreme Court Reports* (Official Digest), 2011 SCC 44, [2011] 3 S.C.R. 134 / **h)** <http://scc.lexum.org/en/index.html>; [2011] 336 *Dominion Law Reports* (4th) 385; 421 *National Reporter* 1; 310 *British Columbia Appeal Cases* 1; 22 *British Columbia Law Reports* (5th) 213; [2011] S.C.J. no. 44 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the Court.**
 1.6.7 Constitutional Justice – Effects – **Influence on State organs.**
 3.16 General Principles – **Proportionality.**
 3.22 General Principles – **Prohibition of arbitrariness.**
 5.3.2 Fundamental Rights – Civil and political rights – **Right to life.**
 5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty.**
 5.3.12 Fundamental Rights – Civil and political rights – **Security of the person.**

Keywords of the alphabetical index:

Public health, drugs, supervised safe injection site / Drugs, Act, constitutionality / Health, Minister, discretion to grant an exemption from the application of the Act, respect for fundamental rights / Remedy, constitutional exemption.

Headnotes:

Section 7 of the Canadian Charter of Rights and Freedoms provides that “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. Section 4.1 of the Controlled Drugs and Substances Act (hereinafter,

the “Act”) directly engages the liberty interests of the health professionals who provide the supervised services at a safe facility for drug use because of the availability of a penalty of imprisonment provided by the Act. It also directly engages the rights to life, liberty and security of the person of the clients of the facility. In order to make use of the lifesaving and health-protecting services offered at the facility, clients must be allowed to be in possession of drugs on the premises. Prohibiting possession at large engages drug users’ liberty interests; prohibiting possession at the facility engages their rights to life and to security of the person. However, because Section 56 gives the federal Minister of Health a broad discretion to grant exemptions from the application of the Act if, “in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest”, Section 4.1 does not violate Section 7 of the Charter. However, the discretion vested in the Minister of Health is not absolute. If the Minister’s decision results in an application of the Act that limits the Section 7 rights of individuals in a manner that is not in accordance with the Charter, then the Minister’s discretion has been exercised unconstitutionally.

Summary:

I. Since 2003, the Insite safe injection facility (hereinafter, “Insite”) has provided medical services to intravenous drug users in a neighbourhood of Vancouver. Operating this supervised injection site required an exemption from the prohibitions of possession and trafficking of controlled substances under Section 56 of the Act, which provides for exemption at the discretion of the federal Minister of Health, for medical and scientific purposes. In

site received a conditional exemption in September 2003, and opened its doors days later. North America’s first government-sanctioned safe injection facility, it has operated constantly since then. In 2008, a formal application for a new exemption was made before the initial one expired. The Minister had granted temporary extensions in 2006 and 2007, but he indicated that he had decided to deny the application. When the expiry of the extensions loomed, this action was started in an effort to keep Insite open. The trial judge found that the application of Sections 4.1 and 5.1 of the Act violated the claimants’ rights under Section 7 of the Charter. He granted Insite a constitutional exemption, permitting it to continue to operate free from federal drug laws. The Court of Appeal dismissed the appeal.

II. In a unanimous decision, the Supreme Court of Canada dismissed the appeal. The Court determined

that the criminal prohibitions on drug possession and trafficking in the Act are constitutionally valid.

The Court held that neither the prohibition on drug possession nor the prohibition on drug trafficking provided by Sections 4.1 and 5.1 of the Act violate their rights under Section 7 of the Charter. However, it was held that the Minister’s failure to grant a Section 56 exemption to Insite engaged the claimants’ Section 7 rights. The Minister’s decision, but for the trial judge’s interim order, would have prevented injection drug users from accessing the health services offered by Insite, threatening their health and indeed their lives. It thus engages the claimants’ Section 7 interests and constitutes a limit on their Section 7 rights. Based on the information available to the Minister, this limit is not in accordance with the principles of fundamental justice. It is arbitrary regardless of which test for arbitrariness is used because it undermines the very purposes of the Act – the protection of health and public safety. It is also grossly disproportionate: during its eight years of operation, Insite has been proven to save lives with no discernable negative impact on the public safety and health objectives of Canada. The effect of denying the services of Insite to the population it serves and the correlative increase in the risk of death and disease to injection drug users is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics.

The Court added that if a Section 1 analysis were required, no Section 1 justification could succeed.

With respect to the appropriate remedy, the Court concluded that as the infringement is ongoing, and the concern is a governmental decision, Section 24.1 allows the court to fashion an appropriate remedy. In the special circumstances of this case, an order in the nature of *mandamus* is warranted. The Minister is ordered to grant an exemption to Insite under Section 56 of the Act forthwith. A declaration that the Minister erred in refusing the exemption would be inadequate, given the seriousness of the infringement and the grave consequences that might result from a lapse in Insite’s current constitutional exemption granting a permanent constitutional exemption would be inappropriate. On future applications, the Minister must exercise that discretion within the constraints imposed by the law and the Charter, aiming to strike the appropriate balance between achieving public health and public safety. In accordance with the Charter, the Minister must consider whether denying an exemption would cause deprivations of life and security of the person that are not in accordance with the principles of fundamental justice. Where a supervised injection site will decrease the risk of

death and disease, and there is little or no evidence that it will have a negative impact on public safety, the Minister should generally grant an exemption.

Languages:

English, French (translation by the Court).



Identification: CAN-2011-3-005

a) Canada / **b)** Supreme Court / **c)** / **d)** 14.10.2011 / **e)** 33645 / **f)** R. v. Côté / **g)** *Canada Supreme Court Reports* (Official Digest), 2011 SCC 46, [2011] 3 S.C.R. 215 / **h)** <http://scc.lexum.org/en/index.html>; 87 *Criminal Reports* (6th) 1; 421 *National Reporter* 112; [2011] S.C.J. no 46 (*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.**

5.3.13.17 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.**

5.3.13.24 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the reasons of detention.**

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

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

Keywords of the alphabetical index:

Search / Seizure / Evidence, obtained unlawfully, exclusion / Police, investigation, rights denigrated / Warrant, search, validity.

Headnotes:

Section 24.2 of the Canadian Charter of Rights and Freedoms provides that the trial judge must exclude evidence that is obtained in a manner that violates rights guaranteed by the Charter if, having regard to all of the circumstances, its admission would bring the administration of justice into disrepute. To decide whether to exclude such evidence, the judge must analyse three issues:

- a. the seriousness of the state conduct;
- b. the seriousness of the impact of the Charter violation on the Charter-protected interests of the accused; and
- c. society's interest in an adjudication on the merits.

In appropriate cases, the fact that the evidence could have been obtained by constitutional means may be relevant to the first two branches of this analysis. After considering these issues, the judge must then balance the assessments under each of these avenues of inquiry in making a Section 24.2 determination as to whether admission of the evidence would bring the administration of justice into disrepute. Where the trial judge has considered the proper factors and has not made any unreasonable finding, his or her determination is owed considerable deference on appellate review.

Summary:

I. Around 9 p.m. on 22 July 2006, C called 9-1-1 (emergency number) to report that her spouse, H, had been injured. The attending physician at the hospital established that H was suffering from head injuries and confirmed the presence of a metal object in H's skull, and communicated this information to the police. The police attended at C's home around midnight. The lights of the house were off and the house was calm. C answered the door in her pyjamas. The police explained that they were there to find out what happened and to make sure the premises were safe, but they did not tell C that they believed that H was suffering from a gunshot wound. The police, accompanied by C, inspected the interior and the exterior of the residence. The police questioned C about the presence of firearms in the house. She confirmed the presence of two firearms but could only locate one, to which she led the police. The police later obtained warrants which were executed at C's residence. A .22 calibre rifle, of the same calibre as the bullet recovered from H's skull, was located by the police. C was brought to the police station around 3 a.m. but not until 5:23 a.m. was she given a warning as an important witness in the attempted murder of H and advised of her right to counsel. After being warned, C spoke with a lawyer and invoked her right to silence. She then described the

events to the police and was placed under arrest for attempted murder. She was cautioned again, advised of her right to counsel, and spoke with a lawyer again. After being placed under arrest, C was interrogated by the police throughout the day. C's interrogation ended at 8 p.m. on 23 July when she was advised of H's death and charged with second degree murder.

C applied to the trial judge to exclude the evidence against her. The trial judge concluded that, from the time they first entered onto her property until the end of her interrogation, the police investigators had violated virtually every Charter right accorded to a suspect in a criminal investigation (right to silence, unreasonable searches and seizures, right to be informed about the reasons of detention, right to counsel – Sections 7, 8, 10.a and 10.b of the Charter). These violations, he held, were not the result of isolated errors of judgment on the part of the police investigators, but rather were part of a larger pattern of disregard of the appellant's Charter rights. The seriousness of this misconduct was aggravated by the facts that the investigators had misled a judicial officer in order to obtain search warrants and that, as witnesses at trial, they had refused to admit obvious facts, offered improbable hypotheses and tried to justify their actions on untenable grounds. The trial judge found that to admit the evidence in the face of this extraordinarily troubling police misconduct, even when his decision would lead to an acquittal of a serious crime, would bring the administration of justice into disrepute. He therefore ordered its exclusion. In response to this ruling, the Crown stated that it had no other evidence and the appellant was acquitted of the charge. The Court of Appeal found that the trial judge was right to exclude C's statements to police. However, it concluded that the trial judge had erred by excluding the observations the police made of the exterior of C's home before the warrants were issued as well as the physical evidence obtained at C's home in execution of the warrants. It ordered a new trial.

II. The Supreme Court of Canada, in a majority decision, allowed the appeal and restored the acquittal entered at trial.

The Court found that the Court of Appeal erred in intervening on the basis that the police had not deliberately acted in an abusive manner. By its re-characterization of the evidence which departed from express findings by the trial judge which were not tainted by any clear and determinative error, the Court of Appeal exceeded its role. The Court of Appeal also erred in reweighing the impact of the seriousness of the offence. This consideration was fully addressed by the trial judge who was aware of the seriousness of the offence and of the consequences of excluding the

evidence. Furthermore, its principal basis for appellate intervention was that the physical evidence could have been obtained legally by warrant, without C's participation, but the Court concluded that the Court of Appeal erred by placing undue weight on the "discoverability" of the evidence in its Section 24.2 analysis.

III. In a dissenting opinion, one judge concluded that the application of the three-stage test proposed in *Grant* leads to the conclusion that the physical evidence should not have been excluded. On the whole, it is the exclusion of the physical evidence that would bring the administration of justice into disrepute.

Supplementary information:

The Court applied in this case the principles established in *R. v. Grant*, [2009] 2 S.C.R. 353 where it established a revised approach to the exclusion of evidence under Section 24.2 of the Charter. However, it stated that while discoverability may still play a useful role in the Section 24.2 of the Charter analysis, it is not determinative. A finding of discoverability does not necessarily lead to admission of evidence.

Cross-references:

- *R. v. Grant*, *Bulletin* 2009/2 [CAN-2009-2-003].

Languages:

English, French (translation by the Court).



Chile

Constitutional Court

Important decisions

Identification: CHI-2011-3-003

a) Chile / **b)** Constitutional Court / **c)** / **d)** 04.01.2011 / **e)** 1683-2010 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation.**

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

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**

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

5.3.43 Fundamental Rights – Civil and political rights – **Right to self fulfilment.**

Keywords of the alphabetical index:

Same-sex relationships / Sodomy / Carnal knowledge.

Headnotes:

A provision which criminalises carnal knowledge of a male minor by an adult, regardless of consent, is not in breach of the right to equality before the law, the right to free development of personality or the right to private life; it targets a purpose which the legislator considers to be reasonable and legitimate and is not arbitrary or discriminatory.

Summary:

I. A question had arisen over the constitutionality of Article 365 of the Penal code, which criminalises carnal knowledge of a consenting male minor between fourteen and eighteen years of age by an adult.

II. The legally protected interest at stake here is sexual indemnity, undisturbed adolescence in terms of sexual self-determination and the child's best interests. The legislator considered the sexual acts described in Article 365 damaging to a male minor in terms of his psycho-social development. The

Constitutional Court recognised in this context the margin of appreciation of the legislature, in which it cannot intervene.

The Court also held that the targeted purpose was reasonable and legitimate. The provision did not contain any arbitrary discrimination. Criminalisation is due to the impact anal penetration has on the psycho-social development of a male minor, which cannot be stated in the same terms regarding relations between two women. It does not, therefore, represent arbitrary discrimination between men and women.

The Court noted that the right to protection of private life is subject to legitimate restrictions by the legislature. It must be subordinate to the important purpose of safeguarding the male minor's physical, psychological and spiritual integrity.

The Constitution of 1980 did not define the right to freedom as a right to free development of personality or a right to freedom in terms of sexual self-determination. The Constitutional Court held that the right to free development of personality is based on human dignity and does not constitute a legitimate basis to impinge on the human rights of others by acting against socially desirable standards.

Languages:

Spanish.



Identification: CHI-2011-3-004

a) Chile / **b)** Constitutional Court / **c)** / **d)** 17.11.2011 / **e)** 1892-2011 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

4.4.3.2 Institutions – Head of State – Powers – **Relations with the executive bodies.**

4.6.8.1 Institutions – Executive bodies – Sectoral decentralisation – **Universities.**

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

5.3.25.1 Fundamental Rights – Civil and political rights – Right to administrative transparency – **Right of access to administrative documents.**

Keywords of the alphabetical index:

University, autonomy / Public service / Information, right to seek, obtain and disseminate / Information, classified, protection.

Headnotes:

The Transparency Law is an unquestionable way to raise citizen awareness of public information, thereby causing no harm to the regular functioning of the public institutions.

Summary:

The University of Chile is an institution with legal personality under public law. It integrates the State's Administration, carrying all the peculiar and distinctive features of public services, such as submission to the Transparency Law and to the Council for Transparency's supervision.

The principle of lawful official action (*principio de juridicidad*) means that all of the State's organs, without distinction or any exception, must submit not only to the norms that apply to its respective area of specialty but also to the legal system as a whole. Thus, since the constitutional amendment was introduced by Law no. 20.050 of 2005, these organs must obey the rule of Article 8.2 of the Constitution, according to which all their acts and resolutions, as well as its fundamental principles and the employed proceedings, are made available through public information (principle of publicity).

Because the University of Chile can independently and autonomously develop its activities, the Head of State does not exercise control over it. However, this does not prevent other types of supervision. The Council for Transparency, for instance, monitors it to ensure that it complies with the obligations set by the Transparency Law. This is especially the case when the referred Council is an independent service subjected to the general rules and when basic principles apply to all the institutions of the State's Administration.

Nevertheless, the principle of publicity cannot be applied at the expense of the Administration's duty to provide for public needs continuously and permanently (Article 1.4 of the Constitution and Article 3 of the Law no. 18.575). If it is not possible to harmoniously balance these goals, both equally desirable, Article 8.2 of the Constitution states that a qualified quorum law may set the secrecy or restraint of certain administrative matters "when the publicity affects the proper performance of these organs functions".

Languages:

Spanish.

*Identification:* CHI-2011-3-005

a) Chile / **b)** Constitutional Court / **c)** / **d)** 31.01.2012 / **e)** 1941-2011 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

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

Keywords of the alphabetical index:

Public servant / Administrative transparency.

Headnotes:

The application of a law establishing unjustified differences between non-professional public servants and public service employees in terms of taking public office, conflicts with the Constitution.

The principle of administrative honesty is not breached where the public servant is also a city council member. His or her candidacy and subsequent election to public office should not be impeded otherwise this would violate the rights to access public office under equal conditions and to participate in elections.

Summary:

I. Two city council members of the Municipality of Quemchi of Los Lagos region asked the Regional Election Court to declare that another member of the city council was not eligible for public office as he worked as a paramedic for the same municipality.

Article 75 of the Municipalities Law deems it incompatible for somebody to carry out duties simultaneously as a non-professional worker and as an elected city council member within the same municipality. Professional workers with non-directive duties in the municipality's public service are, however, excluded from the rule.

II. The Constitutional Tribunal declared Article 75 to be inapplicable, on the basis that the distinction between non-professional and professional civil servants was discriminatory, and there had been no transgression to the principle of administrative honesty established in the Constitution to justify such differentiation. If a conflict of interest were to arise between a decision of the city council and the public service the paramedic was fulfilling, an abstention would suffice. Barring him from public office would be unnecessary and disproportionate.

The Tribunal emphasised the constitutional right to participate equally in elections and to access public office under equal conditions. Removing a city council member from public office constitutes an impingement on that right.

Languages:

Spanish.



Croatia Constitutional Court

Important decisions

Identification: CRO-2011-3-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 06.07.2011 / **e)** U-I-3558/2006, U-I-65212/2009 / **f)** / **g)** *Narodne novine* (Official Gazette), 85/11 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

3.21 General Principles – **Equality.**

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

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

Keywords of the alphabetical index:

Audit, performance, authorised auditor.

Headnotes:

The auditing of the financial accounts of large companies, financial, banking and investment companies and funds and other legal entities engaging in financial services is extremely complex work, requiring input from several auditors rather than just one. Legal provision to the effect that an independent auditor or an audit firm that only employs one statutory auditor cannot audit particular audit entities is not unlawful; it does not run counter to the principle of equality or introduce discrimination.

Summary:

The Constitutional Court rejected proposals to review the constitutionality of Article 26 of the Audit Act.

According to the applicants, Article 26 violated Articles 3, 5.1, 14, 49.1, 49.2, 50.2 and 54.1 of the Constitution. They argued it breached the principle of equality among persons authorised to provide audit services and introduced a kind of discrimination against independent auditors and audit firms that

employ only one statutory auditor in terms of their exercise of the right to work.

The auditing of the financial accounts of large companies, financial, banking and investment companies and funds and other legal entities engaging in financial services is extremely complex work, requiring input from several auditors rather than just one. Under the disputed provision, an independent auditor or an audit firm that only employs one statutory auditor could not audit particular entities.

In the Constitutional Court's view, this mechanism introduced by the legislator fell within its margin of appreciation and could not be deemed unlawful. The restriction under Article 26 did not encroach on the essence of the right to provide audit services of independent auditors and audit firms that employ only one statutory auditor and was not of a nature that made it impermissible under constitutional law.

The restriction under the above provision did not, in the Court's opinion, impair the balance between the private interests of independent auditors and audit firms employing only one statutory auditor, as entities that make a living from the provision of auditing services, and the public interest that the legislator emphasised in regulating auditing as an independent, autonomous and objective procedure carried out in accordance with the Standards of Revision translated and published by the Chamber, the rules of the audit profession and other rules and regulations, and respect for the Auditors Code of Professional Conduct.

Audits on a large scale of financial accounts, as described in Article 26 of the Act, and the obligation to control and supervise audit services stemming from the International Standards on Auditing 220, in the view of the Constitutional Court, would indicate that the prescription of special conditions (in terms of the number of auditors employed) for auditors of financial accounts in large companies may be considered proportional to the legitimate aim sought by that restriction.

In terms of the claim that Article 26 had discriminatory effects, the Constitutional Court noted that the legislator was seeking to protect the public interests that undoubtedly appear in the audit of the financial accounts of large companies, financial, banking, investment companies and funds, and other legal entities that provide financial services and which are statutorily subject to the additional audit of consolidated financial accounts.

The restriction under Article 26 did not deprive independent auditors and audit firms that employ only one statutory auditor of the right to provide audit

services except in one part. To safeguard the public interest in the audit of particular legal entities, it prescribed the conditions under which such financial accounts may be audited (in cases where auditing is very complex because of their size or activity).

The Constitutional Court accordingly found that the restriction under Article 26 of the Act did not lead to discriminatory effects among the above/mentioned groups of addressees of the Act.

Languages:

Croatian, English.



Identification: CRO-2011-3-011

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 04.10.2011 / **e)** U-I-4445/2008, U-I-2231/2009 / **f)** / **g)** *Narodne novine* (Official Gazette), 123/11 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Land register, proceedings, participation, restriction / Ownership, protection.

Headnotes:

Under the provisions of the Maritime Demesne and Seaports Act, the State Attorney can initiate a procedure to cancel the registered owner's right of ownership from the land-registry (on land and buildings on the maritime demesne). During the proceedings, the registered owner's right of ownership is deleted, with the factual effects of expropriation, without first giving him the possibility to participate in (litigious/

contradictory) court proceedings that would enable the protection of his rights. Such provisions contravene the constitutionally of the guaranteed right to a fair trial and the guaranteed right of ownership in its procedural meaning.

Summary:

I. By the request of two companies, the Constitutional Court reviewed the constitutionality of the Maritime Demesne and Seaports Act (hereinafter, the "Act"). They also requested that the Court review the repealed Article 118.2 and 118.3, particularly the part: "and the State Attorney's Office shall act in accordance with paragraph 2 of this Article". The Court did not accept their request to review the constitutionality of Articles 17 and 34 of the Act because they were not well founded.

Article 118.1 of the Act presumes the legal invalidity of (all) the entries of the right of ownership or any other real right on land and facilities on the maritime demesne when a legally valid manner of acquisition cannot be proved.

The impugned paragraph 2 of that article stipulates that the State Attorney shall submit a proposal to the Land Register Court to delete the registration of the right of ownership or another real right on the maritime demesne in paragraph 1 of the article and register maritime demesne. Paragraph 3 states that the limit of the maritime demesne established under the Maritime Code shall remain in force and that the State Attorney's Office shall act in accordance with paragraph 2 of that article.

One of the proponents deemed *inter alia*, that the impugned paragraphs 2 and 3 of Article 118 of the Act give the State Attorney's Office unfounded and unconstitutional powers to delete the right of ownership on the maritime demesne. That is, the lawfully acquired right of ownership of third persons on the maritime demesne based on the impugned provisions is unconstitutionally deleted.

II. The Constitutional Court examined whether the impugned paragraphs of Article 118 of the Act interferes with the right of ownership in a manner that contravenes the constitutionally guaranteed protection of the right of ownership.

The Constitutional Court also stressed that in this case the State Attorney's Office is a party in the proceedings and is bound, as are all the other parties in land registration proceedings, by the rules of land registration law on the registration or deletion of the right of ownership or another real right in the land register.

Starting from the above, the Constitutional Court reiterates that the land registers are public registers that enjoy public confidence. The public puts faith in land registers, excerpts, printouts and copies from them because they are upheld by the public government (courts). This ensures that entries in land registers are made impartially and legally through court procedure, allowing for valid and complete registration in the land register. Land registration is a strictly formal procedure conducted under the rules of non-contentious procedure, which includes examining whether all the prerequisites for a particular land register entry have been fulfilled (principle of legality). One of the basic prerequisites is the existence of (valid) legal grounds for registration (title deed). Without it, the Land Registry Court may not make the entry (the only exception is acquisition on the grounds of the law). Moreover, that kind of entry would mean the illegal proceeding of the competent body (the court) with all the resulting consequences.

Accordingly, one of the main principles of the land-registry law is the principle of confidence that the land registers are complete and truthful. This principle, however, differs in its legal effects.

Confidence in the truthfulness of the register decreases when the status in the land register differs from reality. This occurs when a person has been entered in the land register as the holder of the registrable right but is in fact not the right holder because the registration made to the holder's benefit is invalid and untrue.

Proceedings on the cancellation claim are not, however, conducted by the land registry courts (under the rules of non-contentious procedure) but by (regular) courts under the rules of contentious (litigious) procedure. The party claiming that the entry is untrue must prove it, and the other party (the registered owner) may declare himself on the claim by refuting it.

Therefore the Constitutional Court had to establish whether the cancellation of the right of ownership and the registration of maritime demesne is in accordance with the right to a fair trial enshrined in Article 29 of the Constitution.

It follows from Article 118.2 of the Act that the Land Registry Court, following the State Attorney's proposal, deletes the registered owner of maritime demesne. Under Article 118.1 of the Act, the presumption is that entries are deemed legally invalid if it cannot be proved that they were acquired legally and validly.

The Constitutional Court reiterates that these are entries in a public register (which enjoys public confidence), ordered (approved) by a body of public government (Land Register Court) after finding that all the registration prerequisites were fulfilled, including the existence of a (valid) deed. Therefore the general principle that holds for them is the presumption that the entry is valid and truthful until someone can successfully, through proper procedure and evidence, dispute this.

Under Article 118.2 of the Act, however, the presumption is that all such entries are invalid. As such, when the State Attorney submits a proposal for registration, he has no duty to prove that the entries are legally invalid.

Furthermore, the stipulation in paragraph 118.1 of the Act is that the registered owner has to prove the opposite, i.e. that he acquired his right of ownership in a legally valid manner.

However, the owner is unaware that the proceedings to delete his right of ownership are underway because the Land Register Court under the rules of non-contentious procedure conducts the deletion proceedings. The owner has not been given the chance to dispute the statutory presumption during the deletion procedure because the impugned Article 118 of the Act did not provide procedural rules differing from the general rules in the Land Register Act, which provide for a written procedure, without a trial and without submitting subsequent evidence or showing new facts in an appeal proceeding.

As such, the registered owner's right of ownership is deleted, with the factual effects of expropriation, without first giving him the possibility of participating in (litigious/contradictory) court proceedings that would enable the protection of his rights.

Pursuant to all the above, the Constitutional Court found that Article 118.2 and 118.3 in the part reading: "and the State Attorney's Office shall act in accordance with paragraph 2 of this Article." contravene Article 29.1 of the Constitution taken with Article 48.1 of the Constitution in its procedural meaning.

Languages:

Croatian, English.



Identification: CRO-2011-3-012

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 12.11.2011 / **e)** U-VII-5293/20 / **f)** / **g)** *Narodne novine* (Official Gazette), 133/11 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.

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

4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates**.

Keywords of the alphabetical index:

Constitutional Court, interpretation, preventive / Election, electoral law, interpretation / Election, candidate list, holder, status / Election, holder of a candidate list, eligibility / Election, parliamentary.

Headnotes:

The "participants in the electoral process" certainly include the holders of lists of candidates within the meaning of the Election of Representatives to the Parliament Act. Although the "list holder" need not be a candidate on the list, his or her participation in the electoral process is direct and immediate: his or her name is the only one that appears on the ballot paper on election day. Therefore, regarding the influence on voters and on the entire electoral process, there is no doubt the list holder's position on election day is legally and factually stronger than that of the candidates themselves because their names – unlike the name of the list holder – do not appear on the ballot papers.

Decisions taken in the electoral process must be aligned with the fundamental values of the constitutional state.

Summary:

The Constitutional Court examined the principles of the approach adopted by the National Electoral Commission (hereinafter, the "NEC") in addressing particular issues of electoral law at the request of the Croatian Democratic Alliance of Slavonia and Baranja – CDASB, which are contained in its declaration of 9 November 2011. In this declaration, the NEC, *inter alia*, considered the question: "May Mr Branimir Glavaš, under the positive legislation and the Constitution, exercise the right to stand at the imminent parliamentary elections as the holder of the CDASB's electoral lists?"

The Constitutional Court reiterated that the principle of the Constitution's supremacy requests that the application of the individual legal rules be grounded on the interpretation of the constitutional legal order as a whole.

It stated that electoral disputes are always the most important test of commitment to true political democracy enshrined in the Constitution. It is an integrated system to protect human dignity, hinging on democracy and the rule of law. The logic of an electoral process must coincide with this constitutional logic, guiding all the competent bodies the search for particular solutions in each specific case.

It must, at the same time, guide also all the participants in the electoral process in delivering their autonomous decisions related to particular electoral activities.

The Constitutional Court timely warned all bodies of the elections conduct and all the participants of the electoral process about their immediate responsibility for decisions they make. For example, it emphasised the fact that the "Elections Act does not contain any prerequisites or restrictions or prohibitions with respect to determining the list holder but that this is the free right of political parties" (NEC) does not automatically mean that "prerequisites", "restrictions" or "prohibitions" may not be inherent in the objective order of values laid down in the Constitution.

The Constitutional Court has thereby fulfilled its constitutional task of issuing a timely reminder of the course to be followed by all the bodies for conducting the elections and all the participants in the electoral process. Decisions in the electoral process must be harmonised with the fundamental values of the constitutional state. It found that the NEC declaration with reference to the CDASB question does not ensure the protection of these values. The reason is that under the special circumstances of this specific case, it allows Mr Branimir Glavaš to be a holder of lists of candidates at the parliamentary elections of 4 December 2011, which is constitutionally unacceptable.

Supplementary information:

The Supreme Court of the Republic of Croatia, in its judgment no. I Kž 84/10-8 of 2 June 2010, found Mr Branimir Glavaš guilty of committing a criminal offence of war crime against the civilian population in Article 120.1 of the Basic Penal Code of the Republic of Croatia, and sentenced him to eight years imprisonment.

Languages:

Croatian, English.



Identification: CRO-2011-3-013

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 22.11.2011 / **e)** U-VIIA-5426/2011 / **f)** / **g)** *Narodne novine* (Official Gazette), 135/11 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates.**

Keywords of the alphabetical index:

Election, candidacy, withdrawal / Election, candidate list, replacement of a candidate / Election, electoral law, interpretation / Election, parliamentary.

Headnotes:

The Parliamentary Elections Act does not contain an explicit rule about whether the place on the nominated but not yet accepted list of candidates, which has become vacant after the timely withdrawal of a person from the list, may be filled by another person. Accordingly, this rule must be established through electoral-administrative practice and constitutional-court case law based on an interpretation that respects the legislator's intent and complies with the purpose and aim of the law.

It is allowed to replace the person who withdrew from the proposed but as yet not accepted list of candidates, which has become vacant after the timely withdrawal of a person from the list, by another person. In the period of 48 hours (counting from the submission of the constituency lists for the election of representatives to the Croatian Parliament to the acceptance and publication of the lists), the NEC can accept the proposed new person instead of the person who withdrew and then assess the validity of the proposed list as a whole.

Summary:

I. The Croatian Democratic Union – CDU (hereinafter, the “appellant”) submitted an appeal against the decision of the National Electoral Commission (hereinafter, the “NEC”) of 18 November 2011. The NEC had refused the CDU’s appeal regarding its complaint of irregularity in the nomination procedures for the election of Parliament representatives in the 3rd constituency, conducted by the proponents: Social Democratic Party of Croatia – SDP, Croatian People’s Party – Liberal Democrats – CPP, Istrian Democratic Alliance – IDA and Croatian Party of Pensioners – CPoFP (hereinafter, “SDP, CPP, IDA and CPoFP”).

The appellant disputed the NEC’s ruling because the NEC allowed the place of candidate no. 9 on the SDP, CPP, IDA and CPoFP list of candidates in the 3rd constituency – who withdrew his candidacy in a timely manner and in accordance with the law – to be filled by another candidate. It deemed that the Election of Representatives to the Croatian Parliament Act (hereinafter, the “Act”) does not provide for the possibility of replacing a candidate who withdrew his candidacy by a new candidate, after the expiry of the term for nomination. In the appellant’s opinion, providing only one party in the election proceedings with an additional time limit for nomination means favouring one participant in the process. This infringes upon the equality of the other election participants, making all the other participants unequal.

Article 25 of the Act provides that political parties proposing the accepted lists of candidates for the election of Parliament representatives may, in a manner provided for by statute or a special decision adopted on the basis of the statute, withdraw the list not later than 48 hours after the accepted list has been published by the electoral commission of the constituency (§1); that a written notice on withdrawal must arrive at the electoral commission of the constituency (§ 2); and that the withdrawal of one or more candidates from the list shall not be allowed after the list on which they are stated has been accepted; the withdrawal of a candidate shall not be taken into consideration and such a list shall remain legally valid with the names of all the announced candidates (§ 3).

II. The Constitutional Court found that the proposed SDP, CPP, IDA and CPoFP list for the election of representatives to the Croatian Parliament in the 3rd constituency was submitted to the NEC on 14 November 2011, within the statutory term. The proposed candidate no. 9 was Goran Habuš from Varaždin, and his declaration to accept the

nomination was included. After that, on 16 November 2011 (in the morning hours), Goran Habuš submitted a written statement to the NEC withdrawing his candidacy. At the same time, the above proponents submitted a written notification (written application) about replacing the “candidate” on the SDP, CPP, IDA and CPoFP list in the 3rd constituency with the “candidate” Natalija Martinčević.

The NEC accepted this application, published it on its web-page and on television on 16 November 2011, and in all the daily newspapers on 18 November 2011, all the valid lists for the constituencies and the collective lists, including the list proposed by the SDP, CPP, IDA and CPoFP in the 3rd constituency, with Natalija Martinčević as candidate no. 9.

The Constitutional Court stressed that Article 25 of the Act refers only to the time after the NEC accepted the proposed lists of candidates and that the legislator does not allow candidates to withdraw from accepted, valid lists. The legislator permits “individual withdrawals” from the lists only before the NEC has accepted the proposed lists of candidates as valid.

The Court reiterated that the “replacement” of one person by another in the period after the proposed list has been submitted but before it has been accepted by the NEC refers to a legal situation when these persons are not yet legally “candidates”. The persons stated on the proposed lists obtain the legal capacity of “candidates” at the moment when the NEC accepts the proposed lists of candidates as valid.

The following three provisions of the Act can help in properly determining the rule about the number of persons on a list after the timely withdrawal of one or more persons from the proposed but as yet unaccepted list:

- First, the proposed list of a constituency for the election of Parliament representatives must contain the name of the list and the candidates must be ordered from number 1 to the final number 14 (Article 22.2 of the Act);
- Second, if one or more candidates withdraw from the already accepted and valid list after the expiry of the statutory time limit (i.e., after the list has been accepted by the NEC), the list of candidates will still have 14 candidates because the name of the candidate who withdrew from the list is still included (Article 25.3 of the Act);
- Third, if any candidate on the already accepted and valid list dies during the period of 10 days before the elections, the list of candidates will still have 14 candidates because the list will still include the name of the deceased candidate (Article 27.2 of the Act).

The Constitutional Court noted the difference in language of “withdrawal of the list”, “withdrawal of one or more candidates from the list” and “withdrawal of a person from the proposed list” in the 10 general constituencies within the meaning of Article 25 of the Act (hereinafter, “withdrawal”) from the meaning of the “right to propose party lists for the election of representatives to the Croatian Parliament” within the meaning of Articles 20 to 23 of the Act, i.e. “nomination”. Namely, in the ten general constituencies, “nomination proceedings” are carried out exclusively by the “proposing party lists”. Submitting the lists outside the time limit set in Article 22 of the Act is not without legal consequences: the list is legally invalid. Therefore, in the ten general constituencies, the use of “withdrawal” within the meaning of Article 25 of the Act cannot in any way and under any conditions affect that time limit because it comes after the expiry of that preclusive deadline in Article 22 of the Act and has nothing to do with it. Therefore actions connected to the “replacement” of individuals (potential candidates) on the lists within the terms defined by the Act (i.e., up until the moment when the lists of candidates have been accepted) and for the reasons determined by the Act (i.e., withdrawal) cannot be deemed “new nomination proceedings”, and allow for “additional time limit for nomination”, as the appellant claims.

The Constitutional Court disagreed with the appellant’s complaint about “favouring one participant in the process” because it is a rule on “replacement” that the NEC would have honoured regarding every proposed list of candidates from which there had been a withdrawal after it had been submitted but before it had been accepted.

Languages:

Croatian, English.



Czech Republic Constitutional Court

Statistical data

1 September 2011 – 31 December 2011

- Plenary decisions on merits: 8
- Senate decisions on merits: 60
- Other plenary decisions: 3
- Other Senate decisions: 1 084
- Other procedural decisions: 90
- Total: 1 245

Important decisions

Identification: CZE-2011-3-010

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 20.10.2011 / **e)** IV. ÚS 3597/10 / **f)** Enforceability of decision on the unlawfulness of termination by a church of a Minister’s service period / **g)** www.nalus.usoud.cz / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Church, internal regulation / Church, self-administration / Priest, salary.

Headnotes:

Ordinary courts have no authority to hear and decide disputes over the legality of termination of service of a church minister by the church. Such a decision would represent impermissible interference with the church’s internal autonomy and individual and independent decision-making authority as guaranteed by the Charter of Fundamental Rights and Freedoms.

Summary:

I. In response to a petition by the applicant (the Czechoslovak Hussite Church), the Fourth Chamber of the Constitutional Court, by a judgment dated 20 October 2011, set aside the Decision of the Supreme Court File no. 28 Cdo 2082/2010-271 dated 8 September 2010 and the Decision of the Municipal Court in Prague File no. 62 Co 302/2009-248 dated 11 November 2009 for violation of Article 16.2 of the Charter.

The applicant had identified a possible violation of its right to self-government in religious matters, and sought to have the above decisions set aside. The Circuit Court dismissed the action submitted by interested parties seeking judicial declaration that their term of service with the applicant be continued. When the interested parties appealed, the Municipal Court modified the Circuit Court's decision and stated that the term of service would continue. The Supreme Court dismissed the application submitted by the applicant referring to the Constitutional Court Judgment file no. I. ÚS 211/96 and to the Resolution of the Supreme Court file no. 20 Cdo 1487/2003. The Supreme Court stated that under certain circumstances it is permissible to seek a judicial declaration to the effect that the service of clergy with the church can continue, without interfering with the church's independent self-governing authority (which would be a void act in violation of the church's internal regulations). The applicant contended that only church bodies and institutions possess the authority to appoint and dismiss clergy.

II. The Constitutional Court has dealt repeatedly with the question of decision-making by internal church bodies (i.e. Judgment file no. I. ÚS 211/96, Resolution file no. III. ÚS 136/2000, Judgment file no. Pl. ÚS 6/02 or Resolution file no. I.ÚS 1244/07). It has stressed in these decisions the principle of the autonomy of church and religious societies, which enjoy maximum protection from state interference; as a rule, the internal activities and affairs of such bodies are not subject to judicial review. In its Judgment file no. I. ÚS 211/96 the Constitutional Court concluded that to issue a decision on the duration of service of clergy for the church would represent an impermissible interference with the church's internal autonomy.

The core issue in this particular case was whether ordinary courts possessed the authority to decide on the question of duration of service of clergy. The Constitutional Court found that ordinary courts do not have the authority to hear and decide a dispute on wrongful termination of service of the clergy, which would also represent an inadmissible interference

with the church's independent and separate decision-making authority. The Constitutional Court did not identify with the opinion expressed by the Supreme Court regarding the different nature of void and wrongful (or unlawful) acts of termination of service; from the perspective of the right to self-government in religious matters, such differentiation is indecisive. With respect to the arguments interested parties had raised over the duration of service issue, the Constitutional Court emphasised that the parties concerned should initiate proceedings before the relevant church body.

The Constitutional Court concluded that by hearing the matter the ordinary courts had breached Article 16.2 of the Charter. It therefore granted the complaint and overturned the contested decisions.

The judge rapporteur was Vlasta Formánková.

III. None of the judges issued a dissenting opinion.

Languages:

Czech.

*Identification: CZE-2011-3-011*

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 25.10.2011 / **e)** Pl. ÚS 14/09 / **f)** Fines and other sanctions for violation of Traffic Regulations; criminal and administrative sanctions / **g)** www.nalus.usoud.cz / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.6.6.2 Constitutional Justice – Effects – Execution – **Penalty payment.**
 3.13 General Principles – **Legality.**
 3.14 General Principles – **Nullum crimen, nulla poena sine lege.**
 3.16 General Principles – **Proportionality.**

Keywords of the alphabetical index:

Traffic offence / Fine, administrative sanction.

Headnotes:

Provisions governing sanctions for criminal offences and administrative misdemeanours and the determination of boundaries between the systems of criminal and administrative punishment fall within the sole remit of the legislature. When the proportionality between the nature of the wrongful act and the extent of the sanction is adhered to, such limitations of constitutional law are not breached, provided the lower limit of sanction is not imposed for a specific misdemeanour.

Summary:

I. The Plenum of the Constitutional Court dismissed, by its judgment dated 25 October 2011, a petition by the Regional Court in Ostrava regarding § 22.4 of Law no. 200/1990 Coll. on misdemeanours in its wording applicable until 31 July 2011.

The case arose from an administrative action against a decision where the plaintiff in the proceedings was convicted of committing a misdemeanour against the safety and free flow of road traffic on thoroughfares. He was fined 25,000 Czech crowns and banned from driving a motor vehicle for a period of 12 months. It was noted in the petition that this particular provision stipulates the imposition of an obligatory fine for certain misdemeanours, ranging from 25,000 to 50,000 Czech crowns, together with a ban on driving for a period of one to two years. The point was made that sanctions determined in this manner are in violation of principle of the rule of law; they breach the doctrine of proportionality and are also at variance with the prohibition of extensive interference with fundamental rights and freedoms. The argument was put forward too that such sanctions represent a breach of the constitutional principle of equality of citizens, in that the provisions under dispute result in the imposition of harsher sanctions on entities that have committed misdemeanours than on those that have committed criminal offences analogous in subject matter to misdemeanour. Because the contested legislation allows for a ban on certain conduct, it may result in conflict with Article 26.1 of the Charter (free choice of occupation and process of preparation for such occupation, and the right to engage in entrepreneurial activities and to undertake other industry-related activities). A large financial penalty may represent an intensive interference in the financial affairs of an individual to the extent of breach of constitutional protection of ownership guaranteed by Article 11.1 of the Charter. Such a sanction may have a "devastating" effect on the perpetrator and members of his household.

II. The Constitutional Court is entitled and obliged to review the compliance of law with the constitutional order, even in situations such as the case in point, where the law has ceased to be valid prior to the termination of proceedings about the regulation of legal norms governing matters to which the proceedings commenced on the court's petition will apply in proceedings still pending before ordinary courts. Assessment of the compliance of the contested legal provisions with the constitutional order is desirable since the legal provisions contained in the new wording of §125c Section 4.a and 5 of Law no. 361/2000 Coll., on traffic in the wording effective as of 1 August 2011, are identical to the previous legal provisions. Their application could give rise to doubts identical to those regarding the previous provisions.

The Constitutional Court then rejected the relevance, from the constitutional law perspective, of the objections raised in the petition, noting that this question lies exclusively within the legislature's scope of authority and is contained in "sub-constitutional" laws. The criminalisation and decriminalisation of certain activities and the classification of misdemeanours have been affected by several factors over the years. The Constitutional Court acknowledged the constitutional principle of checks and balances but observed that it has no authority to assess the suitability or efficiency of individual types of sanctions, the sanction rates stipulated by the law or the potential for imposing alternative or cumulative sanctions. It can only deal with such matters if the legislature has exceeded the limitations set out in constitutional law.

No conflict between the contested legal provisions and the constitutional order was detected in this case. The Constitutional Court noted the relationship between the systems of prosecution and administrative penalties, observing that they are, to a great extent, independent of each other and they protect different types of social relationships. In terms of assessing the severity of sanctions, it is not sufficient merely to focus on quantitative comparison of sanction rates. Regard must also be paid to the qualitative distinctions in criminal and administrative sanctions. Criminal sanction differs from administrative sanction in terms of social and ethical condemnation of the perpetrator and the potential for defamatory effect.

The sanctions in question did not, in the Constitutional Court's view, have a devastating effect on current income and expenditure. The extent of these sanctions is not comparable to those the Constitutional Court examined in the judgments referred to in the petition (file numbers Pl. ÚS 3/02 and Pl. ÚS 12/03). Objections were raised regarding

the lower limits of the relevant sanctions; the Constitutional Court noted that constitutional regulations do not require the legislature to refrain from determination of the lower limits of sanctions at all times. A certain type of wrongful conduct may have such a harmful effect that it may not allow for determination of a “zero” value of sanction rate, even in individual cases. Assessment of the lower limits is fundamentally within the scope of authority of the legislature, provided the principle of proportionality between the nature of the wrongful act and the extent of the sanction is respected.

The Constitutional Court found no grounds to set the contested provisions aside. It therefore arrived at the conclusion described above in terms of the petition. The *obiter dicta* focused on critical analysis of the legal provisions (which had already been repealed) regarding driving a motor vehicle without a licence under §180d of the Criminal Act (no. 140/1961 of Coll.) and the unsatisfactory state of the legal provisions governing administrative misdemeanours and administrative sanctions.

Jan Musil was the judge rapporteur in this case.

III. Judges Eliška Wágnerová and Ivana Janů; issued dissenting opinions regarding both the verdict and the reasoning of the judgment. Judge Eliška Wágnerová emphasised (using the European Court of Human Rights case-law to illustrate the point) that the administrative sanction regime under dispute is draconian and the sanctions imposed, in terms of their severity, would appear more appropriate to criminal acts than administrative misdemeanours. Judge Eliška Wágnerová also drew upon comparisons with legislation in the Federal Republic of Germany, finding the absence of a lower limit of sanction and the lack of opportunity to impose zero sanctions to be disproportionate. Judge Ivana Janů; (*inter alia* with reference to Judgments of the Constitutional Court files nos. Pl. ÚS 3/02 and Pl. ÚS 12/03) observed that the judgment paid insufficient heed to the requirements of proportionality in the interference with the ownership rights of entities that were sanctioned and the proportionality of the individualisation of punishment.

Languages:

Czech.



Identification: CZE-2011-3-012

a) Czech Republic / b) Constitutional Court / c) Second Chamber / d) 01.11.2011 / e) II. ÚS 2164/10 / f) Requirements on arbitration clauses in consumer contracts from a constitutional law perspective / g) www.nalus.usoud.cz / h) CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Arbitration / Consumer, agreement.

Headnotes:

With regard to arbitration clauses within consumer contracts, the parties must be guaranteed equal treatment and agreed procedural rules in terms of the appointment of an arbiter, along with a fair hearing including the opportunity for the arbitration decision to be reviewed by other arbiters in accordance with the applicable legislation on arbitration. Failure to comply with such requirements will result in a breach of the right to due process under the Charter of Fundamental Rights and Freedoms.

Summary:

The Second Chamber of the Constitutional Court set aside, by a judgment dated 1 November 2011, the resolution of the Municipal Court in Prague dated 15 June 2010 (file no. 22 Co 565/2009-20) and the resolution of the Circuit Court of Prague 10, dated 19 October 2009, (file no. 16 C 295/2009-9) for breach of Articles 36.1 and 2.3 of the Charter of Fundamental Rights and Freedoms.

The applicant (the plaintiff in the dispute before the ordinary courts) concluded a Loan Agreement and Securing Transfer of Right Agreement (consumer contract) and an arbitration clause which mentioned a specifically assigned arbiter and, in general terms, the Association of Arbiters. During the resolution of a dispute, the arbiter appointed referred the applicant to court. The applicant, as plaintiff, filed an action with an ordinary court seeking to have the contracts declared void. The defendant objected, contesting the

court's jurisdiction. Both the Circuit Court and the Appellate Court (the Municipal Court) terminated the proceedings with reference to the existence of the arbitration cause based on the argument of lack of judicial authority under Paragraph 106.1 of the Civil Procedural Code. The applicant argued that the arbitration clause was invalid, as it referred to a non-specific arbiter to be appointed on an *ad hoc* basis.

The Constitutional Court referred to previous jurisprudence on arbitration clauses and stated that parties may waive their right to have the matter heard and tested by an independent and impartial judge, but the protection of freedom of contract and free will cannot be absolute (see Judgment file no. II. ÚS 3/06). It also noted that arbitration proceedings do not represent the establishment of justice through law; rather, they highlight the obligations of parties to a contract in the sense of settlement and clarification of mutual rights (see for instance Resolution file no. Pl. ÚS 37/08).

The Constitutional Court emphasised that this particular arbitration clause represented a consumer contract, to be viewed with consumer protection in mind (§ 51, 52 and subsequent of the Civil Code). The clause is not listed in § 56.3 of the Civil Code as one of the instances of abuse of a clause rendering it impermissible. It should therefore be assessed in the light of all the circumstances of the tested case and be interpreted in conformity with European legislation (Council Directive 93/13/ES of 5 April 1993 on Unfair Terms of Consumer Contracts). The Constitutional Court stated that the valid inclusion of an arbitration clause within a consumer contract pre-supposes transparent and unambiguous rules on the appointment of the arbiter. This condition was not satisfied where the choice of arbiter was left to the plaintiff's discretion, stipulating only that he or she would be chosen from the list maintained by the Association of Arbiters. Autonomy of contract in arbitration clauses is not totally unlimited; the right to choose an arbiter is restricted by fundamental procedural rules and principles and by a limit of autonomy of will expressed in Article 2.3 of the Charter.

It therefore found that the ordinary courts had denied the petitioner judicial protection in violation of Articles 36.1 and 2.3 of the Charter, and set the contested resolutions aside.

The Judge Rapporteur in these proceedings was Jiří Nykodým.

None of the judges issued a dissenting opinion.

Languages:

Czech.



Identification: CZE-2011-3-013

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 08.11.2011 / **e)** IV. ÚS 1642/11 / **f)** Provision of Information on Membership of Judges in former Communist Party of Czechoslovakia and Binding Nature of Constitutional Court Decisions / **g)** www.nalus.usoud.cz / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.3.4.13 Constitutional Justice – Jurisdiction – Types of litigation – **Universally binding interpretation of laws.**

5.3.25.1 Fundamental Rights – Civil and political rights – Right to administrative transparency – **Right of access to administrative documents.**

Keywords of the alphabetical index:

Judges, communist past / Constitutional Court, decision, disregard.

Headnotes:

There is no scope, in proceedings following a cassation judgment, for ordinary courts to question the correctness or completeness of the Constitutional Court's legal opinion. This rule stems from the need to avoid violations to the rights of parties to proceedings by disproportionately prolonging the case.

Summary:

I. The Supreme Administrative Court had, in its decision of 24 April 2011 (file no. 3 As 10/2009-148), identified a breach of the right to free access to information under Article 17.5 of the Charter of Fundamental Rights and Freedoms, by failure to comply with Article 89.2 of the Constitution. This decision was overturned by the Fourth Chamber of the Constitutional Court, by Judgment of 8 November 2011, upon a petition by the applicant.

The applicant asked to be provided with a list of judges of the High Court in Olomouc who had been members or had applied for membership of the Communist Party of Czechoslovakia (KSC) before 17 November 1989. When the High Court denied this request, the applicant appealed against its decision, but the Ministry of Justice subsequently dismissed the appeal. The applicant's action contesting the Ministry's decision was dismissed by decision of the Municipal Court in Prague. The Supreme Administrative Court then dismissed the cassation complaint. The applicant filed a constitutional complaint alleging that the Supreme Administrative Court, in dismissing his cassation complaint, acted in clear conflict with the legal opinion contained in the Judgment of the Constitutional Court of 15 November 2010, file no. I. ÚS 517/10, where it was held that that information on membership of judges in Communist Party of Czechoslovakia before 17 November 1989 does not constitute data on political convictions under § 4.b of the Act on Protection of Personal Data. It does not, therefore, represent a piece of sensitive data as defined by the above provision, which may not be processed or to which access cannot be given without consent from the entity concerned.

II. The Constitutional Court proceeded to assess whether, when the Supreme Administrative Court issued its decision, it did so in violation of the Constitutional Court Judgment of 15 November 2010 file no. I. ÚS 517/10 which had set aside a decision by the Supreme Administrative Court in a previous identical matter, and whether, as a result, the Supreme Administrative Court violated the "cassation obligation" of the Constitutional Court's judgments. There is a line of authority from the Constitutional Court (including Judgment files nos. III. ÚS 425/97 and Pl. ÚS 4/06), to the effect that an enforceable and final judgment of the Constitutional Court is binding on all bodies and entities and it establishes a procedural bar *res judicata* ruling out any further review or assessment of the matter from the substantive law perspective. The Constitutional Court noted the possibility in certain circumstances (what is known as continuity of precedent) for ordinary courts to present competing opinions to those of the Constitutional Court, thus opening up a dialogue on matters of constitutionality and law. The consequence of the binding cassation-based nature of Constitutional Court judgments (in unvaried factual circumstances only) leads to such a decision being unconditionally binding.

The Supreme Administrative Court failed to comply with these requirements in this case, although it commented that it had merely availed itself of the leeway offered by the reasoning of the judgment mentioned above. The course of action the Supreme Administrative Court took must be perceived as impermissible failure to reflect upon, or deliberate circumvention of, the Constitutional Court's cassation judgment. Judgment file no. I. ÚS 517/10 clearly sets out the legal opinion of the Constitutional Court, pursuant to which the applicant should have been given the information requested. Failure to do so cannot be based on the notion that the entity which should have supplied the information did not have it at its disposal. In such a case, as the Constitutional Court noted, the entity concerned should have concentrated its efforts on the acquisition of the information required. The repeated argument of the Supreme Administrative Court over whether the information requested fell within the jurisdiction of the High Court in Olomouc was equally impermissible. The Constitutional Court drew particular attention in this judgment to the existence of an obligation on the part of a public body (in this case the High Court in Olomouc) to provide the applicant with the information required.

The Constitutional Court concluded that the Supreme Administrative Court failed to perform its obligation to respect, in an identical legal matter, an opinion contained in a cassation judgment of the Constitutional Court, resulting in a breach not only of Article 89.2 of the Constitution but also to a repeated breach of Article 17.5 of the Charter of Fundamental Rights and Freedoms. It therefore upheld the constitutional complaint and set aside the contested decisions of the Supreme Administrative Court.

Miloslav Výborný undertook the role of judge *rapporteur*.

III. None of the judges issued a dissenting opinion.

Languages:

Czech.



Identification: CZE-2011-3-014

a) Czech Republic / b) Constitutional Court / c) Plenary / d) 08.11.2011 / e) Pl. ÚS-st. 33/11 / f) Permissibility of random tax inspections / g) www.nalus.usoud.cz / h) CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

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

5.3.25 Fundamental Rights – Civil and political rights – **Right to administrative transparency.**

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

Keywords of the alphabetical index:

Tax, inspection / Tax, tax authorities, powers.

Headnotes:

Where a tax administrator launches a random tax inspection, with no facts available to support the probability that the taxpayer has not met his or her tax liabilities, this does not conflict with the prohibition of arbitrariness under the Charter of Fundamental Rights and Freedoms. Tax inspections play a vital role for the fiscal authorities, in limiting tax evasion, allowing “on the spot” verification of facts which are crucial to the correct determination of tax liability.

Summary:

I. On 8 November 2011, on the initiative of the Second Chamber of the Court, the Plenum of the Constitutional Court adopted a unified opinion pursuant to Section 23 of Act no. 182/1993 Coll. on the Constitutional Court, in which it overruled the previous opinion based on Judgment file no. I. ÚS 1835/07 dated 18 November 2008. In this judgment, the First Chamber of the Constitutional Court expressed the view that, under the principle of a democratic state under the rule of law, restrictions of or interference in an individual’s autonomous sphere by means of a tax inspection must have legitimate cause; specific facts should be available to establish the suspicion that a taxpayer has evaded his tax liabilities. If the tax administrator could undertake inspections at any time, looking into the affairs of taxpayers chosen at random, this would constitute arbitrary conduct. Following its deliberations on file no. II. ÚS 431/11 the Second Chamber of the Constitutional Court arrived at a different conclusion.

It therefore filed a proposal with the Plenum, seeking the adoption of a unified opinion.

II. The majority of the Plenum of the Constitutional Court did not concur with the First Chamber’s conclusion. It noted the need to strike a balance between the public interest in the correct reckoning and calculation of tax on the one hand, and the protection of the autonomous sphere of an individual on the other. The tax administrator must always proceed in line with the principle of proportionality, in a manner which, as far as possible, respects the right to informational autonomy. However, this does not preclude the launching of a tax inspection in the absence of specific suspicion of tax evasion. The Plenum noted that the theory of administrative law defines inspection as a course of action adopted by a public body aimed at securing and possibly assessing the performance of obligations of an entity addressed by public administration, which also entails the opportunity to initiate inspection both on an incentive or *ex officio*. The initiation of inspection must be governed by statute, there must be regulation of the rights and obligations of both the inspecting officers and those subject to inspection, sanctions must be determined for cases where the above obligations are not met, and those subject to inspection are entitled to raise objections. An important factor in an inspection is the opportunity to carry it out at random, for example in cases where the person conducting the inspection does not initially harbour a suspicion about the performance of the tax obligations of the entity under investigation.

The Constitutional Court Plenum concluded that inspection is a tool which is preventive in nature, an inseparable part of tax administration and it plays a vital role in limiting tax evasion, allowing “on the spot” verification of facts which are crucial to the correct determination of tax liability.

Dagmar Lastovecká was the judge *rapporteur* in the matter from which the unified opinion followed. Judges Eliška Wagnerová, Frantisek Duchon and Pavel Holländer issued dissenting opinions.

III. Judge Eliška Wagnerová argued that the matter failed to provide procedural space for opinion, as the judgment of the First Chamber related to a situation which was different both in law and in substance. In this particular case, the tax administrator had suspicions representing legitimate grounds for tax inspection. Moreover, the unified opinion failed altogether to address the issue from the perspective of constitutional law, tackling it instead from the perspective of the theory of administrative law. The point was also made that notions supporting the opportunity to undertake random inspections are in

breach of the prohibition of arbitrariness; only an inspection undertaken in line with certain rules, set out in advance, represents due and appropriate enforcement of government powers and only activity regulated in such manner may legitimately restrict the right to informational self-determination. Judge Pavel Holländer noted that Constitutional Court case-law on the question of permissibility of tax inspections includes a three fold test of constitutionality. Firstly, such inspections are generally perceived as permissible for taxation-related purposes. The second part of the test seeks to identify and rule out any inspection which could be classified as arbitrary or as an abuse of power contrary to the doctrine of *bonos mores* (i.e. repeated tax inspections over the same financial period or those undertaken at holiday times such as Christmas and Easter). Under the third part of the test, an inspection can be deemed permissible, even if it shows signs of abuse of power, if it can be justified by a suspicion based on specific probable cause. Judge Pavel Holländer concluded that the conclusions reached by the First Chamber in its judgment were, from this perspective, identical to the opinion which the Plenum had adopted, in rebuttal of the First Chamber's conclusions.

Languages:

Czech.



Estonia Supreme Court

Important decisions

Identification: EST-2011-3-001

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 08.03.2011 / **e)** 3-4-1-11-10 / **f)** / **g)** *Riigi Teataja I* (Official Gazette), 14.04.2011, 6 / **h)** www.nc.ee/?id=11&tekst=222532591 (in Estonian), www.riigikohus.ee/?id=1270 (in English); CODICES (Estonian, English).

Keywords of the systematic thesaurus:

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

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.**

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

Keywords of the alphabetical index:

Allowance, amount, right / Local authority / Legitimate aim / Residence, welfare benefit.

Headnotes:

Although the local government has an obligation to consider the equal treatment requirement in Article 12 of the Constitution, it has more freedom in decision making where allowances or services for needy persons or allowances or services which a person could demand from the local government due to its obligatory duties are not at issue.

While the local government does not provide services directly as compensation for the persons' contribution, including receipt of income tax, it can be considered justified that the relationship between the local government and persons is mutual. An imbalance exists if a person refuses to assume obligations before the local government but still gets the right to demand benefits.

If there are many possibilities of interpretation, the interpretation which is in conformity with the Constitution should be preferred to those interpretations that are not in conformity with the Constitution.

Summary:

I. The Tallinn City Council had adopted a regulation "Procedure for payment of social benefits not depending on family income" which provides for, *inter alia*, the childbirth allowance as follows:

The first sentence of Article 3.1 states: "Childbirth allowance is granted to the child's parent on the condition that both of the child's parents are, based on the population register data, residents of Tallinn before the birth of the child and at least one parent has, based on the population register data, resided in Tallinn for at least one year prior to the birth of the child."

The first sentence of Article 3.5 stipulates the same as regards multiple births (3 children or more).

The second sentence of Article 3.2 states: "The allowance shall be paid in two parts: 50% is paid after the birth of the child and 50% when the child reaches the age of one on the condition that the child and the parents have, based on the population register data, continuously been residents of Tallinn from the birth of the child until the child reaches the age of one."

The Chancellor of Justice requested the Supreme Court to declare the referred provisions invalid as being contrary to the equality clause of the Constitution.

II. The Court first addressed the situations where there are the child and his or her two parents, identified the comparable groups and if there is a breach of equal treatment.

Identifying the appropriate groups for comparison depends on what to consider as the objective of the payment of childbirth allowance. The comparable groups are only children. Based on Article 27 of the Constitution, both parents have the right and the duty to raise and care for their children. It means, *inter alia*, that a parent needs to use a part of his or her assets to support the child. The objective of the childbirth allowance is to ensure that the child and his or her parents are better able to cope with the expenses accompanying the birth of the child. Therefore, comparable groups are children and their parents who are registered as residents of Tallinn, and children and their parents, one of who is not registered as a resident of Tallinn. Based on

Article 3.2 of the Procedure, comparable groups are formed the same way.

Different treatment has to be justified by a legitimate objective. The objective to ensure receipt of income tax for the Tallinn city budget and to favour only local residents is legitimate. 11.4 % of the taxable income of a resident natural person is received by the local government of the taxpayer's residence, which is considered to be the one in the population register. Thus, the local government funding system has been formed in a way that one source of income of local governments is a part of the income tax of their residents. The income enables the local government to provide services for the residents. The fact that a local government takes measures for persons actually living on its territory to register themselves as residents of that local government has to be considered a legitimate objective.

The local government's right of self-management and financial guarantee (Articles 154.1 and 157 of the Constitution) are related to the local government's financial issues. It also gives rise to the right of the local government to decide on how to ensure receipt of funds for the budget. The childbirth allowance in question in the current matter is a benefit provided by the local government, irrespective of the family's income. Neither the Constitution nor any other law stipulates local government's obligation to pay the childbirth allowance but it is a local obligation assumed by the local government itself.

Although the local government has an obligation to consider the equal treatment requirement in Article 12 of the Constitution, it has more freedom in decision making where allowances or services for needy persons or allowances or services which a person could demand from the local government due to its obligatory duties are not at issue.

The Constitution does not prescribe an absolute prohibition on treating persons differently; persons may be treated differently if there is a legitimate objective and it is proportionate.

Due to the nature of the local government it operates only on the local level, meaning on its territory or relating to that territory.

By childbirth allowance, the child and his or her parents are supported jointly. If one of them is not a resident of that local government based on the register, the connection of the child and his or her parents with the local government is weaker than of those who are all registered as residents of that local government.

The relationship of rights and obligations between persons and the local government is different depending on whether the persons are, or are not, registered as residents of that local government according to the register. Although the local government does not provide services directly as compensation for the persons' contribution, including receipt of income tax, it can be considered justified that the relationship between the local government and the persons is mutual. An imbalance exists if a person refuses to assume obligations before the local government but still gets the right to demand benefits. Consequently, the local government does not treat the comparable groups unequally without justification.

Secondly, the Chamber assessed the constitutionality of Article 3.1-3.2 and 3.5 in a situation where the child lacks, legally or in fact, one parent at the time of applying for the allowance. The contested paragraphs refer to the parents in the plural sense. Not every child has two parents. The definition of "both parents" and "the parents" is based on the fact that a child usually has two parents, and to receive the allowance the child's both parents must be registered as residents of the city of Tallinn. It would be absurd to demand that a person who does not exist must be a resident of Tallinn based on the population register data. The provisions should be interpreted in a manner confirming to the Constitution. Accordingly, the Court dismissed the request of the Legal Chancellor.

Concerning the second question, there was one dissenting opinion.

Supplementary information:

Constitutional norms referred to:

- Articles 12, 154.1 and 157.1. In the dissenting opinion also Article 13.2.

Cross-references:

- Decisions nos. 3-4-1-2-09, 3-4-1-8-09, 3-2-1-73-04.

Languages:

Estonian, English.



Identification: EST-2011-3-002

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 22.02.2011 / **e)** 3-4-1-18-10 / **f)** / **g)** / **h)** www.riigikohus.ee/?id=11&tekst=RK/3-4-1-18-10; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

ECHR / Friendly settlement, forced / Final resolution / Judicial protection / Constitutional complaint.

Headnotes:

The Court does not have competence to adjudicate individual complaints. In exceptional cases, the Court is competent to hear an individual request only if the complainant does not have, and has not had, any effective possibilities to request judicial protection against violation of their fundamental rights.

The objective of the friendly settlement reached between the person who filed the application with the European Court of Human Rights and the state, is a final resolution of the case. If the person agrees to the settlement, he or she agrees that the violation is compensated for by the execution of the settlement and that his or her case will not be reviewed again.

Summary:

I. The applicant filed an individual request for a constitutional review concerning issues of penal law and criminal procedure related to his criminal prosecution. One of his arguments was that Article 366.7 of the Code of Criminal Procedure is contrary to Articles 14 and 15 of the Constitution in that it does not provide grounds for his case to be reviewed again in Estonia if the appellant and the Government of Estonia have reached a friendly settlement for the purposes of Article 39 ECHR at the European Court of Human Rights. In addition, the complainant asked the Court to establish that the Estonian legal system does not conform to the

purposes of the first sentence of Article 15 of the Constitution as it does not provide an efficient remedy for the verification of the constitutionality of a legal provision if the person lacks “his or her case”.

II. According to the Court decision, the Constitutional Review Court Procedure Act does not *expressis verbis* establish the possibility to file individual complaints with the Court. In exceptional cases, it is possible to file an individual complaint to the Court only when the person has no other effective recourse to judicial protection, guaranteed by Article 15 of the Constitution, i.e. the state has failed to fulfil the obligation to establish an appropriate procedure for the protection of fundamental rights, a procedure that is fair and guarantees effective protection of a person’s rights. When a person’s right to judicial protection is guaranteed, his or her individual complaint is inadmissible. The Court added that the complaint is inadmissible irrespective of whether the person has availed himself or herself of the possibility of judicial protection by the time of filing the individual complaint or not, or whether he or she has forfeited this possibility, i.e. has failed to avail himself or herself of the possibility in due time.

The Court stated that a person can apply for the initiation of concrete review of the constitutionality of any law, other legislation or procedure within the judicial proceeding in the course of which the contested law, legislation or procedure is applicable. If a person is of the opinion that a legal provision unconstitutionally restricts his or her rights, the person can request the court not to apply the norm contended to be unconstitutional in the hearing of the concrete case. Pursuant to the Constitution, the court must, either at the request of a person or on its own initiative, declare any relevant law, other legislation or procedure, the application of which would result in the violation of the person’s fundamental rights, unconstitutional to the relevant extent. The right and obligation to assess the constitutionality of impugned legal provisions applied in a specific court case extends to the courts of every instance.

In conclusion, the Court was of the opinion that the appellant was provided sufficient opportunity to request for judicial protection against violation of his fundamental rights. For the said reasons, the Court found that it did not have competence to adjudicate such requests and dismissed the appellant’s individual complaint.

In addition, the Court deemed it necessary to note in connection with the appellant’s request concerning Article 366 of the Code of Criminal Procedure, that neither the Constitution nor the European Convention on Human Rights include a fundamental right requiring that a judgment which

has entered into force could be reviewed based on a friendly settlement reached in compliance with the Constitution. The idea of the friendly settlement is that after the final resolution of the case, the appellant would not have any further claims against the state in respect of the case.

Cross-references:

Case-law of the Supreme Court:

- Decision no. 3-4-1-22-09 of 07.12.2009 of the Constitutional Review Chamber;
- Decision no. 3-4-1-1-04 of 25.03.2004 of the Constitutional Review Chamber;
- Decision no. 3-4-1-20-07 of 09.04.2008 of the Constitutional Review Chamber, *Bulletin* 2008/1 [EST-2008-1-005];
- Decision no. 3-1-1-88-07 of 16.05.2008 of the Court en banc, *Bulletin* 2008/2 [EST-2008-2-007];
- Decision no. 3-4-1-19-07 of 02.06.2008 of the Court en banc, *Bulletin* 2008/2 [EST-2008-2-009];
- Decision no. 3-4-1-3-10 of 10.06.2010 of the Constitutional Review Chamber;
- Decision no. 3-4-1-7-08 of 08.06.2009 of the Court en banc, *Bulletin* 2009/2 [EST-2009-2-007].

Case-law of the European Court of Human Rights:

- *M.V. v. Estonia*, Judgment no. 21703/05 of 07.10.2008;
- *Pervushin and Others v. Estonia*, Judgment no. 54091/08 of 02.03.2010;
- *Nõgisto v. Estonia*, Judgment no. 40163/07 of 05.10.2010.

Languages:

Estonian, English.



Identification: EST-2011-3-003

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 22.03.2011 / **e)** 3-3-1-85-09 / **f)** / **g)** *Riigi Teataja I* (Official Gazette), 14.04.2011, 4 / **h)** www.riigikohus.ee/?id=11&tekst=222533025; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

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

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

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

5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**

Keywords of the alphabetical index:

Pre-trial, procedure / Delay, undue, compensation / Damage, non-pecuniary.

Headnotes:

The fundamental right to an effective remedy and to an effective judicial proceeding provided in the Constitution include the person's fundamental right to demand the effectiveness of the proceedings and the state's objective obligation to provide it.

The fundamental right to an effective remedy provided in the Constitution includes the right to demand that proceedings are conducted within reasonable time. Unreasonably extended criminal proceedings infringe a person's fundamental right to a proceeding within reasonable time, which may result in the right to compensation for non-pecuniary damage.

The regulatory framework of the State Liability Act which excludes compensation for non-pecuniary damage caused by unreasonably extended pre-trial criminal proceedings restricts disproportionately the fundamental right to compensation for moral and material damage provided in the Constitution. Where the procedural status of the accused in pre-trial criminal proceedings is inevitably accompanied by suffering and discomforts, the non-pecuniary damage caused does not require separate evidence. Upon determining the amount of the compensation, other fundamental rights that may have been restricted during the pre-trial criminal proceedings and the

appellant's part in causing the damage shall be taken into account.

Summary:

I. The complainant filed a claim requesting compensation for non-pecuniary damage he suffered due to unreasonably extended pre-trial criminal proceedings. The appellant contended that the damage was caused to him from 31 March 1995 to 24 October 2005 when the criminal proceeding was terminated due to expiry. During that period a legal preventive measure prohibiting the complainant's departure from leaving his place of residence was applied.

The Administrative Law Chamber of the Court questioned the constitutionality of the provisions of compensation for damage caused by statements and acts in criminal proceedings or lack thereof, and referred the case for adjudication to the Court *en banc*.

II. The Court found that the pre-trial criminal proceedings in respect of the appellant that lasted from 9 December 1994 until 24 October 2005, exceeded the reasonable time for the conduct of such proceedings. The unreasonably extended pre-trial proceedings had infringed the appellant's fundamental right to a proceeding within a reasonable time arising from Article 14 of the Constitution, and caused him non-pecuniary damage.

The State Liability Act did not provide a basis for compensating non-pecuniary damage caused by unreasonably extended criminal proceedings. The Court found that the regulatory framework of the State Liability Act restricted disproportionately the fundamental rights provided in Articles 14, 15 and 25 of the Constitution in that it did not prescribe the option to compensate non-pecuniary damage caused in pre-trial criminal proceedings by exceeding the reasonable time for the conduct of such proceedings. The Court concluded that the protection of fundamental rights provided in the Constitution required implementation of a specific regulatory framework for compensating damage caused in criminal proceedings.

The Court based its award of compensation for damage caused to the appellant on Article 25 of the Constitution. The Court found that in cases where proceedings have been terminated or the person has been acquitted only after the end of the reasonable time for the conduct of such proceedings, and on considerations other than expiry of the reasonable time of proceedings (e.g. due to insufficient guilt or inability to provide evidence), the only fair measure upon compensation for non-pecuniary damage caused to a person is fair financial compensation.

Upon determining the amount of the compensation, the Court assessed the degree of violation of the appellant's rights and his part in causing the damage. The Court took into account that, in addition to the fundamental right arising from Article 14 of the Constitution, other fundamental rights of the appellant were also infringed for a very long time. The Court found that the criminal proceedings also infringed the appellant's right to move freely and to choose a place of residence (Article 34 of the Constitution), the right to leave the country (Article 35 of the Constitution), the right to honour and good name (Article 17 of the Constitution), the right to freely choose an area of activity (Article 29 of the Constitution) and the right to the inviolability of private life (Article 26 of the Constitution). Accordingly, the Court ordered the Republic of Estonia to pay the appellant 1,250 Euros in compensation.

III. Two justices of the Court issued dissenting opinions. Three justices of the Court concurred partly with the dissenting opinion. Five justices did not agree with paragraph 3 of the decision of the judgment that declared the State Liability Act to be in conflict with the Constitution in that it does not prescribe compensation for non-pecuniary damage caused by unreasonably extended pre-trial criminal proceedings. Two justices did not agree in addition with paragraph 4 of the judgment and were of the opinion that the judgments of the lower courts should have been annulled and the case should have been referred to the administrative court for a new hearing.

Cross-references:

Case-law of the Supreme Court:

- Decision no. 3-4-1-12-08 of 30.12.2008 of the Constitutional Review Chamber, *Bulletin* 2008/3 [EST-2008-3-015];
- Decision no. 3-1-1-3-04 of 27.02.2004 of the Criminal Chamber;
- Decision no. 3-1-1-43-10 of 18.06.2010 of the Criminal Chamber;
- Decision no. 3-1-1-3-04 of 27.02.2004 of the Criminal Chamber;
- Decision no. 3-3-1-27-02 of 03.06.2002 of the Administrative Law Chamber.

Case-law of the European Court of Human Rights:

- *Kudla v. Poland*, Judgment no. 30210/96 of 26.10.2000;
- *Pélissier and Sassi v. France*, Judgment no. 25444/94 of 25.03.1999;
- *König v. Germany*, Judgment no. 6232/73 of 28.06.1978;

- *Konashevskaya and Others v. Russia*, Judgment no. 3009/07 of 03.06.2010;
- *Kangasluoma v. Finland*, Judgment no. 48339/99 of 20.01.2004;
- *Scordino v. Italy*, Judgment no. 36813/97 of 29.03.2006;
- *Ommer v. Germany*, Judgment no. 10597/03 of 13.11.2008.

Languages:

Estonian, English.



Identification: EST-2011-3-004

a) Estonia / **b)** Supreme Court / **c)** Supreme Court *en banc* / **d)** 31.05.2011 / **e)** 3-3-1-85-10 / **f)** / **g)** *Riigi Teataja I* (Official Gazette), 10.06.2011, 3 / **h)** www.nc.ee/?id=11&tekst=222535028 (in English); www.riigikohus.ee/?id=1269; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.3.5.14 Constitutional Justice – Jurisdiction – The subject of review – **Government acts**.
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
 5.3.25 Fundamental Rights – Civil and political rights – **Right to administrative transparency**.
 5.3.39 Fundamental Rights - Civil and political rights - **Right to property**.

Keywords of the alphabetical index:

Act, application, general / Act, application, specific / Authority, administrative, power / Administrative decision / Property, right / Administrative, transparency.

Headnotes:

The regulatory framework of an Act which prescribes the issuance of legislation of general application which gives direct rise to the infringement of the subjective rights and freedoms of persons is not necessarily unconstitutional. Rather, the decisive issue is whether, by imposing an infringement of the subjective rights of a certain person by legislation

of general application, the fundamental right to organisation and procedure arising from Article 14 of the Constitution has been guaranteed to the person sufficiently, and also whether the person has been guaranteed the right arising from Article 15 of the Constitution to contest in court the restrictions imposed on him or her.

Summary:

The Government adopted a regulation placing limited-conservation areas under protection. The appellant, an enterprise, filed an action for annulment of the part of the regulation which stipulates that the limited-conservation area placed under protection includes the immovable properties belonging to the appellant.

The regulation in question was imposed under Article 10.1 of the Nature Conservation Act (hereinafter, the "NCA"): "An area shall be placed under protection as a protected area or a limited-conservation area by a regulation of the Government of the Republic." The act placing limited-conservation areas under protection is a decision determining the areas to be placed under protection and the objective of the protection. Therefore the restrictions provided for in the NCA are applied to the area placed under protection (and to the immovable properties located in the limited-conservation area). Consequently, the basis for an infringement of a person's right to property is a decision on placing limited-conservation areas under protection.

Laws of general application of the Government of the Republic are regulations and laws of specific application are orders. According to Article 51.1 of the Administrative Procedure Act (hereinafter, the "APA"), an administrative act is an order, resolution, precept, directive or other legal act which is issued by an administrative authority upon performance of administrative functions in order to regulate individual cases in public law relationships and which is directed at the creation, alteration or extinguishment of the rights and obligations of persons. Pursuant to Article 51.2 of the APA, a general order is an administrative act which is directed at persons determined on the basis of general characteristics or at changing the public law status of things. A regulation which is issued under Article 10.1 of the NCA and which has a direct effect, due to the establishment of a limited-conservation area, on the rights and obligations of the possessor of a specific immovable property has the characteristics of an administrative act in the material sense. The Administrative Law Chamber found in its ruling of 7 May 2003 in matter no. 3-3-1-31-03, *inter alia*, that where an act does not only regulate the actions performed on an immovable property, but where the regulated actions

are directly related to a specific immovable property, that act is a general order (paragraph 21).

Although the decision made on the basis of Article 10.1 of the NCA can be deemed an administrative act in the material sense, it cannot be denied that the said act resembles legislation of general application in terms of its specificity. Not only are the owners of the immovable properties concerned, though the infringement of their rights is significantly more intensive, but also all persons who happen to be on the immovable property. As a result of the establishment of a limited-conservation area by a regulation, the rights and obligations of an abstract group of persons change. In a limited-conservation area, every person is obligated to observe the restrictions provided by law. Consequently, a general regulatory framework arising from the law shall enter into force with respect to that area by imposing the act.

The regulatory framework of an act which prescribes the issue of such legislation of general application which gives direct rise to the infringement of the subjective rights and freedoms of persons is not necessarily unconstitutional. The decisive issue is whether, by imposing an infringement of the subjective rights of a certain person by legislation of general application, the fundamental right to organisation and procedure arising from Article 14 of the Constitution has been guaranteed to the person sufficiently, and also whether the person has been guaranteed the right arising from Article 15 of the Constitution to contest in court the restrictions imposed on him or her.

The issuance, formal legality and challenging of a regulation as legislation of general application and an administrative act differ because the nature of the acts and the needs for the protection of the rights of persons differ.

As the legislator has, by imposing Article 10.1 of the NCA, prescribed the placing of limited-conservation areas under protection by a regulation, the provisions of the issuance of a regulation provided for in the APA shall be applied to the issuance of acts. There is a special procedure provided for in Article 9 of the NCA for imposing the regulation under Article 10.1 of the NCA, too. However, the rights of an owner of an immovable property upon the issue of the contested regulation are accorded lesser protection than they would be in the proceedings for the issue of an administrative act under the APA. Article 10.1 of the NCA restricts intensively the persons' right to organisation and procedure. There is no justification for such an extensive restriction, i.e. the restriction is disproportionate.

The Supreme Court declared the part “a regulation of” of Article 10.1 of the NCA unconstitutional and invalid. Accordingly, the provisions concerning legislation of general application, including the rules for challenge, no longer apply to acts issued on the basis of the provision. Consequently, an act issued based on Article 10.1 of the NCA is subject to the regulatory framework of legislation of specific application.

The Supreme Court *en banc* also decided the case in the administrative law proceedings.

There was one separate opinion to the judgment.

Supplementary information:

Norms of the Constitution referred to:

- Articles 14 and 15.1.

Cross-references:

- Administrative Law Chamber of the Supreme Court ruling of 07.05.2003 in matter no. 3-3-1-31-03.

Languages:

Estonian, English.



Finland

Supreme Administrative Court

Important decisions

Identification: FIN-2011-3-003

a) Finland / **b)** Supreme Administrative Court / **c)** First Chamber / **d)** 24.01.2011 / **e)** 139 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Foreigner, protection, subsidiary, requirements / Residence permit, cancellation / Foreigner, passport, cancellation.

Headnotes:

The residence permits and alien’s passports of a national of the Democratic Republic of the Congo, who had earlier been granted a residence permit under Section 31 of the Aliens Act (378/1991) on the basis of a need for protection, and of his family members could not be cancelled by virtue of Section 58 of the Aliens Act in consequence of emigration from Finland. The existence of the requirements for withdrawal of subsidiary protection status under Section 107.2 of the Aliens Act (301/2005) should have been determined before the residence permits and alien’s passports were cancelled.

Supplementary information:

- Aliens Act, Section 88.1 (323/2009), Section 58.1 (358/2007); Section 107.2 and 107.4 (323/2009); and Section 138.1;
- Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Languages:

Finnish and Swedish.

*Identification:* FIN-2011-3-004

a) Finland / **b)** Supreme Administrative Court / **c)** First Chamber / **d)** 24.01.2011 / **e)** 140 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Foreigner, residence permit, temporary, rejection / Foreigner, criminal offence, residence, rejection / Foreigner, removal, failure.

Headnotes:

Attempts to return alien A to the country notified by him to be his country of origin had been made and had failed. When at the time of consideration of A's residence permit, the removal of A from the country was actually not possible, the application filed by A for a temporary residence permit could not be rejected solely on the grounds that owing to criminal offences committed by him, A was not deemed to meet the general requirements for granting a residence permit. Regard in the consideration was to be had to the fact that were the permit refused, the person might have to stay in Finland possibly for an extended period of time absent any of the grounds under the Aliens Act.

Supplementary information:

- Aliens Act (301/2004), Sections 36.1 and 51.1.

Languages:

Finnish and Swedish.

Identification: FIN-2011-3-005

a) Finland / **b)** Supreme Administrative Court / **c)** First Chamber / **d)** 18.03.2011 / **e)** 684 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Foreign, asylum, residence permit / Foreign, return to country of origin, partially safe / Foreigner, humanitarian protection.

Headnotes:

A person who sought international protection hailed from a district of Afghanistan where according to up-to-date country data there were also areas that were regarded as safe. In considering the subsidiary forms of international protection, however, regard also had to be had to the fact that upon return, a person must in practice be able to safely gain access to that area. Road access could not be deemed safe, nor could the other travel options put forward be deemed feasible for the asylum seeker. Since the person in question had no opportunities for internal protection in another location, the person was to be granted a residence permit on the basis of the humanitarian protection referred to in Section 88a of the Aliens Act.

Supplementary information:

- Constitution of Finland (731/1999), Section 9.4;
- European Human Rights Convention, Article 3;
- Charter of Fundamental Rights of the European Union, Articles 2, 18 and 19;
- Aliens Act (301/2004), Section 3.13; Sections 87, 88, 88a and 88e.

Languages:

Finnish and Swedish.



Identification: FIN-2011-3-006

a) Finland / **b)** Supreme Administrative Court / **c)** Third Chamber / **d)** 26.09.2011 / **e)** 2710 / **f)** **g)** / **h)**.

Keywords of the systematic thesaurus:

4.9.7.1 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Electoral rolls.**

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

Keywords of the alphabetical index:

Minority, membership, criteria / Minority, membership, self-identification / Indigenous people, membership / Minority, electoral rights.

Headnotes:

A person who considered himself to be Sámi and who according to a certificate issued by the records authorities was the descendant of a person who had been entered in the 1825 land and taxation register as a mountain Lapp, and who provided information on his grandparents learning the Sámi language, was not on these grounds alone a Sámi within the meaning of the definition contained in Section 3 of the Act on the Sámi Parliament. However, when further taking into account the identification as a whole of this person resident in Inari with the Sámi people and the Sámi way of life, the person was to be considered Sámi and he was to be entered into the electoral roll for the Sámi Parliament election.

Supplementary information:

- Constitution of Finland (731/1999), Sections 17.3 and 121.4;
- Act on the Sámi Parliament (974/1995), Sections 1 and 3;
- Administrative Procedure Act (434/2003), Section 31.1;
- Ministry of Justice Decree on the procedure to be observed in Sámi Parliament elections, Section 2.1;
- International Covenant on Civil and Political Rights, Article 27;
- European Convention on Human Rights, Protocol no. 12;
- International Convention on the Elimination of All Forms of Racial Discrimination;
- See and cf. Supreme Administrative Court decisions KHO 1999:55 and KHO 2003:61.

Languages:

Finnish, Swedish and two Sámi languages.



France

Constitutional Council

Important decisions

Identification: FRA-2011-3-022

a) France / **b)** Constitutional Council / **c)** / **d)** 10.03.2011 / **e)** 2011-625 DC / **f)** Internal Security Policy and Programming Act / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 15.03.2011, 4630 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

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

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

5.3.12 Fundamental Rights – Civil and political rights – **Security of the person.**

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

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

Keywords of the alphabetical index:

Internal security / Public order, protection / Child pornography, website / Criminal record, file / Video protection / Minimum penalty / Sentence, irreducible / Penalty, necessity / Penalty, individualisation / Minor, curfew / Sport, supporter / Travellers / Criminal investigation police, officer.

Headnotes:

The possibility for the administrative authority to block public access to online communication services disseminating pornographic images of children reconciles the protection of public order with freedom of communication in a manner that is not disproportionate.

The provisions making it possible to entrust private individuals with general surveillance of the public highway and hence to delegate to them general administrative policing powers inherent to the exercise of law enforcement are unconstitutional.

The application of minimum sentences to first-time offenders who are minors conflicts with the constitutional requirements relating to criminal justice for minors.

The authorisation granted to the public prosecutor to have a minor summoned directly by a senior criminal investigation officer to appear before the Juvenile Court without a preparatory examination by the children's judge and without any distinction according to the child's age or criminal record or the seriousness of the offences prosecuted fails to meet the constitutional requirements relating to criminal justice for minors because it fails to guarantee that the court will have access to recent information concerning the minor's personality.

The imposition of a fine on the statutory representative of a minor for failing to ensure the latter's compliance with a collective or individual curfew is unconstitutional because it allows the statutory representative to be punished for an offence committed by the minor.

The prohibition of the resale via the Internet of entry tickets to cultural, sporting or trade events without the organisers' prior agreement contravenes the principle that offences must have been defined and penalties prescribed, in that it is based on a criterion that is manifestly inappropriate to the pursued aim of preventing certain supporters from attending sporting competitions.

The possibility for the prefect to carry out urgent compulsory evacuations of sites occupied illegally by disadvantaged persons other than their owners lacking decent housing, at any time of the year, without consideration of their personal or family situation, results in a manifest imbalance in the way in which the protection of public order is reconciled with the safeguarding of other rights and freedoms.

The possibility for municipal police officers, who are answerable to the municipal authorities and are not under the control of senior criminal investigation police officers, who themselves are under the direct and effective control of the judicial authority, to carry out identity checks is in breach of Article 66 of the Constitution, whereby criminal investigation police must be placed under the direction and control of the judicial authority.

The possibility of setting up courtrooms within administrative detention centres is inappropriate in view of the need, referred to in legislation, to “rule in public”.

The manner in which the criminal investigation police carry out their duties cannot be subject to the wishes of insurers.

The creation of judicial co-operation software making it possible to process personal data collected during judicial investigations of all types of offence irrespective of their seriousness must be subject to statutory guarantees to ensure that the protection of public order is reconciled with respect for private life.

When establishing rules on the authorisation of private economic intelligence activities, infringements of which may be punished by fines and custodial sentences, a lack of precision, particularly in the definition of activities pertaining to economic intelligence, violates the principle that offences and penalties must be defined by law.

Granting the status of criminal investigation police officer to certain municipal police officers without, at the same time, placing them under the control of senior criminal investigation police officers is unconstitutional.

Summary:

In Decision no. 2011-625 DC of 10 March 2011, the Constitutional Council ruled on the constitutionality of the Internal Security Policy and Programming Act (the LOPPSI), which had been referred to it by over sixty members of parliament and over sixty senators. The Constitutional Council rejected the applicants' complaints against Articles 1, 4, 11, 37-I, 38, 58, 60 and 61 (I). It upheld their complaints against Articles 18, 37-II, 41, 43, 53, 90, 92 and 101, which it censured (II). Lastly (III), it examined of its own motion – and censured – Articles 10, 14, 32, 91 and 123-II.

I. The Constitutional Council rejected the applicants' complaints against Articles 1, 4, 11, 37-I, 38, 58, 60 and 61 of the Act.

Article I approves the report – appended to the Act – on internal security objectives and means until the year 2013. It complies with Article 34 of the Constitution on programming acts.

Article 4 allows the administrative authority to block access to public online communication services disseminating pornographic images of children. Such

decisions, which are intended to protect Internet users, may be challenged at any time in the appropriate court, including through urgent summary proceedings. Article 4 reconciles the protection of public order with freedom of communication in a manner that is not disproportionate.

Article 11 deals with criminal record files, the conditions for the constitutionality of which had been specified by the Constitutional Council in a decision of 13 March 2003. Article 11 enhances the guarantees in relation to such files. It complies with the Constitution in the manner already specified in 2003.

Article 37-I lays down minimum sentences of at least eighteen months for certain offences involving intentional violence with aggravating circumstances. Upholding its prior decision of 9 August 2007, the Council found these provisions for punishing particularly serious offences to be compatible with the Constitution.

Article 38 extends to the perpetrators of the manslaughter or murder of any person exercising public authority the provisions on sentencing by the Assize Court to terms of unconditional imprisonment of thirty years or to life sentences. Upholding its decision of 10 January 1994, the Council found these provisions to be compatible with the Constitution, having regard to the powers of the court responsible for the enforcement of sentences.

Article 58 relates to the policing of public transport. It co-ordinates, in a constitutionally compliant fashion, the activities of the staff responsible for policing public transport and police officers responsible for criminal investigation.

Articles 60 and 61 relate to individual or collective travel bans on supporters during sporting events. Ministerial or prefectural decisions are subject to review by the administrative courts, must be justified by the need to protect public order and must not restrict freedom of movement disproportionately. These provisions comply with the Constitution.

II. The Constitutional Council censured the provisions of Articles 18, 37-II, 41, 43, 53, 90, 92 and 101 of the Act referred to it by the applicants.

Article 18 adds to the list of cases in which a video protection system may be deployed on the public highway by the authorities. It also relaxes the arrangements for the deployment of such devices by private-law corporations and permits the operation of video protection and the viewing of its images to be delegated to private persons. The Constitutional Council censured the latter provisions. It found that

they made it possible for private individuals to be entrusted with general surveillance of the public highway and hence for them to be delegated with general administrative policing powers that are inherent to the exercise of law enforcement.

Article 37-II extends the application of minimum sentences to minors. These sentences are applicable to first-time offenders. The Constitutional Council found these provisions to be incompatible with the constitutional requirements relating to criminal justice for minors.

Article 41 authorises the public prosecutor to have a minor summoned directly by a senior criminal investigation officer to appear before the Juvenile Court without a preparatory examination by the children's judge. Article 41 makes no distinction according to the child's age or criminal record or the seriousness of the offences prosecuted. It fails to ensure that the Court has access to recent information concerning the minor's personality. It therefore fails to meet the constitutional requirements relating to criminal justice for minors.

Article 43 makes it possible for prefects to impose a curfew on minors (from 11 p.m. to 6 a.m.). The Juvenile Court may impose the same measure on a minor. These provisions comply with the Constitution. Article 43.III, however, was censured. It imposes a fine on the statutory representative of a minor for failing to ensure that the minor in question complies with a collective or individual curfew. This provision therefore makes it possible for a statutory representative to be punished for an offence committed by a minor.

Article 53 prohibits the resale for profit via the internet of entry tickets to cultural, sporting or trade events without the organisers' prior agreement. This measure is based on a criterion that is manifestly inappropriate to the pursued aim of preventing certain supporters from attending sporting competitions. Consequently, it infringes the principle that offences must have been defined and penalties prescribed.

Article 90 allows prefects to carry out compulsory evacuations of sites occupied illegally by persons other than their owners. Provision is made for urgent evacuation of disadvantaged persons lacking decent housing, at any time of the year, without consideration of their personal or family situation. These rules result in a manifest imbalance in the way in which the protection of public order is reconciled with the safeguarding of other rights and freedoms.

Article 92 extends the authorisation to carry out identity checks to municipal police officers. Yet these officers are answerable to the municipal authorities

and are not under the control of senior criminal investigation police officers, who themselves are under the direct and effective control of the judicial authority. Accordingly, Article 92 was held to be in breach of Article 66 of the Constitution, whereby the criminal investigation police must be placed under the direction and control of the judicial authority.

Article 101 allows courtrooms to be set up within administrative detention centres. This measure is inappropriate in view of the need, referred to in legislation, to "rule in public", hence it is unconstitutional.

III. The Constitutional Council examined of its own motion – and censured – Articles 10, 14, 32, 91 and 123-II of the Act.

Article 10 created a fund to support the technical and scientific departments of the police force, financed by insurers. Under Article 17 of the Institutional Act on Finance Legislation (LOLF), the use of such funds has to "comply with the intention of the party making the payment". Yet the manner in which the criminal investigation police carry out their duties cannot be subject to the wishes of insurers, so Article 10 was found to be unconstitutional.

Article 14 authorises judicial co-operation software. This software makes it possible to process personal data collected during judicial investigations. Processing of this type will not be confined to serious offences. The Council checked that the legislator had introduced guarantees to ensure that the protection of public order was reconciled with respect for private life.

On the one hand, Article 14 is clearly not intended to authorise widespread processing of data collected during investigations. Such processing will be authorised by the judicial authority on a case-by-case basis in the context of a specific investigation. On the other hand, the data collected may not be kept for more than three years after being recorded. To this end the Council partly censured Article 230-23 of the Code of Criminal Procedure. Given these circumstances, Article 14 complies with the Constitution in all other respects.

Article 32 establishes rules on the authorisation of private economic intelligence activities, infringements of which may be punished by fines and imprisonment. Its lack of precision, particularly in the definition of activities pertaining to economic intelligence, violates the principle that offences and penalties must be defined by law. The Constitutional Council consequently found Article 32 to be unconstitutional.

Article 91 grants the status of criminal investigation police officer to certain municipal police officers. However, they were not placed at the same time under the control of senior criminal police investigation officers. Accordingly, for the same reasons which had resulted in the censure of Article 92, the Constitutional Council found Article 91 to be unconstitutional.

Article 90.III defines the penalty for illegal occupation of another person's home. Article 123.II adds to Article 362 of the Code of Criminal Procedure. These two provisions had been adopted on second reading in breach of the "funnel" rule laid down in Article 45 of the Constitution. Having been adopted according to an unconstitutional procedure, they were censured.

Cross-references:

- Decision no. 2003-467 DC of 13.03.2003, Internal Security Act;
- Decision no. 2004-496 DC of 10.06.2004, Act to promote confidence in the digital economy;
- Decision no. 2007-554 DC of 09.08.2007, Act reinforcing the action against reoffending among adult and young offenders;
- Decision no. 2009-580 DC of 10.06.2009, Act to promote the dissemination and protection of creation on the internet.

Languages:

French.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2011-3-015

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 19.07.2011 / **e)** 1 BvR 1916/09 / **f)** Designer furniture copyright decision / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis* 2011, 180; *Wertpapier-Mitteilungen* 2011, 1874; *Neue Juristische Wochenschrift* 2011, 3428; *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* 2011, 95; *Juristenzeitung* 2011, 1112; *Neue Zeitschrift für Gesellschaftsrecht* 2011, 1262; *Recht der Internationalen Wirtschaft* 2011, 857; *Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht* 2011, 495; *Verwaltungsrundschau* 2011, 428; *Europäische Grundrechte-Zeitschrift* 2011, 63; *Zeitschrift für Urheber- und Medienrecht* 2011, 82; *Gewerblicher Rechtsschutz und Urheberrecht* 2012, 53; www.bundesverfassungsgericht.de; CODICES (German).

Keywords of the systematic thesaurus:

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

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

5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status.**

5.1.1.5.1 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Private law.**

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

Keywords of the alphabetical index:

Copyright / Fundamental rights, entitlement / Fundamental rights, holder / Judge, lawful, right to / Preliminary ruling, Court of Justice of the European Communities.

Headnotes:

1. The extension of the entitlement to fundamental rights to cover legal entities from Member States of the European Union constitutes an expansion of the application of the protection of fundamental rights under German law as a result of the European Treaties because of the priority of application of the fundamental freedoms in the Single Market (Article 26.2 TFEU) and because of the general ban on discrimination on grounds of nationality (Article 18 TFEU).

2. An ordinary (non-constitutional) court may misjudge the significance and gravity of the fundamental rights of the Basic Law by virtue of the presumption that the law of the European Union does not permit any flexibility in the implementation of European Union law.

Summary:

I. According to the German Copyright Act (*Urheberrechtsgesetz*), the author of a work has the exclusive right to distribution of that work. § 17.1 of the Copyright Act defines the distribution right as the right to offer to the public or to put into circulation the original work or copies thereof. The provision serves, *inter alia*, to implement Article 4 of European Copyright Directive 2001/29/EC in German domestic law. In the general view to date, the term “distribution” encompassed any act offering the work to the general public, for which any assignment of ownership was sufficient. Additionally, § 96 of the Copyright Act contains a prohibition of exploitation for unlawfully made copies.

The applicant, a limited liability company under Italian law, headquartered in Italy, manufactures furniture according to plans of the architect and designer Le Corbusier, who died in 1965, and exercises his copyright under license. The plaintiff of the original proceedings, a cigar manufacturer, furnished a cigar lounge in an art and exhibition hall in which it placed imitations of Le Corbusier furniture. Upon the applicant’s request, the Regional Court (*Landgericht*) issued a judgement to cease and desist, which was subsequently upheld by the Higher Regional Court (*Oberlandesgericht*).

The Federal Court of Justice (*Bundesgerichtshof*), by contrast, rejected the action on the ground that the placing of the furniture violated neither the right to distribution nor the prohibition of exploitation. It based its ruling on a judgment of the Court of Justice of the European Union (CJEU), which had ruled in a parallel case referred by the Federal Court of Justice that “distribution”, within the meaning of Article 4.1 of the Copyright Directive, applied only in cases of transfer

of ownership. The Federal Court of Justice held that according to this judgment of the CJEU, the distribution right was not violated if imitations of copyrighted furniture were merely made available for use by the public. The Copyright Directive was found to constitute a binding provision, also within the meaning of the maximum level of protection that a Member State could not surpass.

II. The Federal Constitutional Court rejected the constitutional complaint as unfounded. As a foreign legal entity incorporated in the European Union, the applicant is a holder of fundamental rights under the Basic Law. However, in the case at issue its constitutional rights have not been violated.

The Federal Constitutional Court decided that foreign legal entities incorporated in the European Union may be holders of substantive fundamental rights under the Basic Law.

According to Article 19.3 of the Basic Law, fundamental rights under the Basic Law also apply to domestic legal entities to the extent that the nature of such rights permits. Even if legal entities from Member States of the EU are not “domestic” within the meaning of the Basic Law, an expansion of the application of the protection of fundamental rights to such legal entities corresponds to the obligations assumed by Member States under the European Treaties, which in particular are expressed in the fundamental freedoms and the general ban on discrimination on grounds of nationality enshrined in EU law. These oblige the Member States and all their bodies and agencies to also place legal entities from another EU Member State on the same footing as domestic entities with regard to the legal protection that can be obtained. The provisions of European Union law do not suppress Article 19.3 of the Basic Law, but only prompt an extension of the protection of fundamental rights to cover further legal subjects of the European Single Market. The extension is contingent on the legal entity having an adequate domestic connection. This will generally be the case if the foreign legal entity operates in Germany and is able to file lawsuits and be sued before the ordinary (non-constitutional) courts in this country.

Furthermore, the Federal Constitutional Court had to clarify whether and to what degree the ordinary courts have to test the German law which they are to apply, be it fully or partly harmonised by Union law, by the standard of the German Basic Law and of the law of the European Union, and to what degree the Federal Constitutional Court in turn has the power to review the ordinary courts’ interpretation of the European Directive in terms of the Basic Law. When interpreting domestic copyright law, the civil courts have to take

the protection of property rights under the Basic Law into account, insofar as European law accords discretion with regard to national implementation. If the courts consider full harmonisation by Union law to be evident without referring the case to the CJEU for a preliminary ruling, this is subject to review by the Federal Constitutional Court. If such a case arises, the latter is not restricted to a mere review of arbitrariness. If the Member States have no discretion in the implementation of European Union law, the courts must review the applicable EU law where appropriate as to whether and how it may be reconciled with the fundamental rights of Union law and, where necessary, refer the matter to the CJEU.

According to these standards, the applicant's copyright protected by Article 14.1 of the Basic Law to control the distribution of copies of the furniture was not violated by the impugned judgment. The presumption by the Federal Court of Justice that the Copyright Directive, as interpreted by the CJEU, did not leave any latitude to domestic law with regard to protecting the mere offering of imitated furniture for use as copyright, is constitutionally unobjectionable. In the parallel case, the CJEU did not mention any leeway in implementation, and explicitly reserved any expansion of the term "distribution" to the Union legislator. The Federal Court of Justice was able to presume that regarding the interpretation of § 17 of the Copyright Act, the CJEU judgment did not leave it any latitude.

The impugned judgment does not deprive the applicant of its guarantee of a lawful judge (sentence 2 of Article 101.1 of the Basic Law). According to the case-law of the CJEU, a national court of final instance must comply with its obligation of reference if a question of Union law arises in proceedings pending before it, unless the court has found that the question is not material to the ruling, that it has already been the subject of interpretation by the CJEU, or that the correct application of Community law is so obvious as to leave no room for any reasonable doubt. The Federal Constitutional Court only reviews whether the application of these rules is manifestly untenable.

Having submitted the questions it considered relevant for the ruling to the CJEU in the parallel case, the Federal Court of Justice has not fundamentally misjudged its obligation to refer to the CJEU in the case at hand. From the impugned judgment, one can deduce the reasonable conviction of the Federal Court of Justice that Article 4.1 of the Copyright Directive constitutes a fully harmonised provision of the distribution right and that the CJEU has finally and comprehensively clarified the interpretation of the definition of distribution contained in the directive.

Languages:

German.



Identification: GER-2011-3-016

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 19.08.2011 / **e)** 1 BvL 15/11 / **f)** Parental benefit "partner months" decision / **g)** / **h)** *Zeitschrift für das Gesamte Familienrecht* 2011, 1645; www.bundesverfassungsgericht.de; CODICES (German).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Equality / Legislator, discretionary power / Legitimate aim / Parental benefit, "partner month" / Legislator, assessment and prognosis, latitude / Specific statute, review, admissibility, procedural requirements.

Headnotes:

The provision on the "partner months" is intended to encourage the partners' sharing of work and family responsibilities and in this way to break down the one-sided allocation of the work of upbringing to women, with its detrimental consequences in the job market. In this way, the legislator wished to comply with the constitutional duty to promote gender equality.

Summary:

I. The Federal Act on Parental Benefit and Parental Leave of December 2006 (hereinafter, the "Act") introduced the payment of parental benefit. This is a government allowance paid to parents who, because they are caring for a child, are either not gainfully employed or not gainfully employed in full, or who interrupt their gainful employment in order to care for their child. Parental benefit may be drawn from the

date of the child's birth until the end of the fourteenth month of its life. However, under sentence 1 of § 4.3 of the Act, the period in which one parent draws parental benefit may, in principle, not be longer than twelve months. At least two months' parental benefit must be claimed by the other parent (known as "partner months" or "father months"). There are exceptions, for example for single parents.

In the original proceedings, the married plaintiff was granted parental benefit for the first twelve months of her child's life. In addition to this, she also claimed parental benefit for the thirteenth and fourteenth months. This claim was rejected. Her objection and her civil action against this were unsuccessful. The plaintiff then appealed to the Higher Social Court (*Landessozialgericht*). The Court regards the provision of sentence 1 of § 4.3 of the Act as unconstitutional and therefore submitted it to the Federal Constitutional Court for review. In the opinion of the Higher Social Court, the provision encroaches without justification upon the freedom of spouses and parents to decide on their own terms on the allocation of responsibilities in the family, which is protected by Article 6.1 and 6.2 of the Basic Law, for it makes the grant of parental benefit dependent on a particular allocation of responsibilities in the family, at least for two months.

II. The Federal Constitutional Court held that the judicial referral of the Higher Social Court was inadmissible.

A court may only obtain the decision of the Federal Constitutional Court on the constitutionality of a legislative provision if it has first carefully examined this constitutionality itself. In doing this, it must in particular consider the relevant case-law of the Federal Constitutional Court. Taking into account the legal opinions developed in case-law and literature, it must also critically consider the grounds which were crucial to the legislator's decision in the legislative process. The Higher Social Court's referral did not satisfy these requirements.

The provision on the "partner months" is intended to encourage the partners' sharing of work and family responsibilities and in this way to break down the one-sided allocation of the work of upbringing to women, with its detrimental consequences in the job market. In this way, the legislator wished to comply with the constitutional duty to promote gender equality under Article 3.2 of the Basic Law. Under the case-law of the Federal Constitutional Court, this constitutional directive has the purpose of enforcing gender equality in social reality and overcoming traditional role allocation. This also imposes on the legislator a duty to counteract a traditional allocation of roles which would mean that the child was one-

sidedly and permanently allocated to the mother's "area of responsibility". The submitting Higher Social Court did not sufficiently consider this case-law. Thus, for example, it should have been considered whether the "partner month" provision, which is above all directed at fathers, reduces social prejudices, in particular in the working world, and whether, as a result, it may encourage fathers to claim parental leave. The same applies to the consideration as to whether the lower promotion prospects of women could not be improved to some extent if men increasingly used their claim to parental leave, because in this way the concern of employers might be countered that women are not continuously available for work because of childcare.

The Federal Constitutional Court held that, insofar as the Higher Social Court regarded the provision on the "partner months" as disproportionate because it deemed it unsuitable to contribute to an allocation of roles on a partnership basis, it failed to give the necessary critical consideration of the scope of the legislator's latitude of assessment and prognosis. A means chosen by the legislator is suitable in constitutional terms if it is capable of furthering the desired result. The mere possibility of attaining the goal is sufficient here. According to the Federal Statistical Office, the proportion of children whose fathers received parental benefit rose from 15.4% to 23.9% in the years 2007 to 2009. These data suggest that the acceptance of fathers taking family responsibility may be expected to increase. It thus appears that it is at least possible that the goal pursued by the legislator, i.e. promoting the allocation of work and family responsibilities on a partnership basis, can be attained.

Languages:

German.



Identification: GER-2011-3-017

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 07.09.2011 / **e)** 2 BvR 987/10, 1485/10, 1099/10 / **f)** Euro rescue package decision / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Neue Juristische Wochenschrift* 2011, 2946; *Europäische Grundrechte-Zeitschrift* 2011, 525; *Neue Zeitschrift für*

Gesellschaftsrecht 2011, 1107; *Europäisches Wirtschafts- & Steuerrecht* 2011, 420; *Juristenzeitung* 2011, 1004; *Deutsches Verwaltungsblatt* 2011, 1288; *Recht der Internationalen Wirtschaft* 2011, 719; *Verwaltungsrundschau* 2011, 394; *Europäische Zeitschrift für Wirtschaftsrecht* 2011, 920; *Entscheidungssammlung zum Wirtschafts – und Bankrecht* I L 3 Article 38 GG 1.11; www.bundesverfassungsgericht.de; CODICES (German).

Keywords of the systematic thesaurus:

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

4.10 Institutions – **Public finances.**

4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states.**

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

Keywords of the alphabetical index:

Bundestag, budget, autonomy / Parliament, control by the people / Parliament, powers, nature / Power, delegation / Greece, aid / Euro rescue package / EU, financial and sovereign debt crisis.

Headnotes:

1. Article 38 of the Basic Law protects the citizens with a right to elect the *Bundestag* (national parliament) from a loss of substance of their power to rule, which is fundamental to the structure of a constitutional state, by far-reaching or even comprehensive transfers of duties and powers of the *Bundestag*, above all to supranational institutions. The defensive dimension of Article 38.1 of the Basic Law takes effect in configurations in which the danger clearly exists that the competences of the present or future *Bundestag* will be eroded in a manner that legally or *de facto* makes parliamentary representation of the popular will, which is intended to realise the political will of the citizens, impossible.

2.a. The decision on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself. The *Bundestag* must make decisions on revenue and expenditure with responsibility to the people. In this connection, the right to decide on the budget is a central element of the democratic development of informed opinion.

b. As representatives of the people, the elected Members of the *Bundestag* must retain control of fundamental budgetary decisions even in a system of intergovernmental administration.

3.a. The *Bundestag* may not transfer its budgetary responsibility to other actors by means of imprecise budgetary authorisations. In particular it may not, even by statute, deliver itself up to any mechanisms with financial effect which – whether by reason of their overall conception or by reason of an overall evaluation of the individual measures – may result in incalculable burdens with budgetary implications without [the] prior mandatory consent [of the *Bundestag*].

b. No permanent mechanisms may be created under international treaties which are tantamount to accepting liability for decisions by the free will of other states, above all if they entail consequences which are hard to calculate. Every large-scale measure of aid of the Federal Government taken in a spirit of solidarity and involving public expenditure on the international or European Union level must be specifically approved by the *Bundestag*.

c. In addition it must be ensured that there is sufficient parliamentary influence over the manner in which the funds made available are dealt with.

4. The provisions of the European treaties do not conflict with the understanding of national budget autonomy as an essential competence, which cannot be relinquished, of the parliaments of the Member States, which enjoy direct democratic legitimation; rather, they presuppose it. Strict compliance with [national budget autonomy] guarantees that the acts of the bodies of the European Union in and for Germany have sufficient democratic legitimation. The treaty conception of the monetary union as a stability community is the basis and subject of the German Consent Act.

5. With regard to the probability of having to pay out on guarantees, the legislator has a latitude of assessment which the Federal Constitutional Court must respect. The same applies to the assessment of the future soundness of the federal budget and the economic performance capacity of the Federal Republic of Germany.

Summary:

I. The constitutional complaints challenge German and European legal instruments related to attempts to solve the financial and sovereign debt crisis in the area of the European monetary union. They deal with the following subjects:

Aid to Greece: In May 2010, the states of the Eurogroup made available considerable financial aids for Greece and promised support through bilateral loans. In order to take the necessary measures on a national level, on 7 May 2010 the *Bundestag* passed the challenged Act (Act on the assumption of guarantees to preserve the solvency of the Hellenic Republic necessary for financial stability within the Monetary Union). The Act authorises the Federal Ministry of Finance to give guarantees up to the total amount of 22.4 billion euros for loans to Greece. By its order of 7 May 2010, the Federal Constitutional Court denied an application for the issuing of a temporary injunction directed against such action.

Euro rescue package: On 7 May 2010, the heads of state and government of the Eurogroup agreed that the EU Commission should propose a European stabilisation mechanism to preserve stability in the European financial markets. The Economic and Financial Affairs Council thereupon decided to establish a European stabilisation mechanism. It consists of the European Financial Stabilisation Mechanism (EFSM) on the basis of an EU Regulation and of the European Financial Stability Facility (EFSF). The European Central Bank (ECB) decided to establish a Securities Markets Programme. *Inter alia*, the ECB Governing Council in this connection authorised the national central banks of the Eurosystem to purchase on the secondary market debt instruments issued by central governments or public entities of the Member States. In order to create the conditions on a national level to give financial support through the EFSF, on 21 May 2010 the *Bundestag* passed the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism. The Act authorises the Federal Ministry of Finance to give guarantees up to a total amount of 147.6 billion euros to secure loans raised by the EFSF. By its order of 9 June 2010, the Federal Constitutional Court denied an application for the issuing of a temporary injunction directed against such action.

II. The Federal Constitutional Court rejected the constitutional complaints as unfounded. It held that the challenged Acts do not violate the right to elect the *Bundestag* under Article 38.1 of the Basic Law. By adopting these Acts, the *Bundestag* did not impair in a constitutionally impermissible manner its right to

adopt the budget and control its implementation by the government or the budget autonomy of future Parliaments.

Article 38.1 of the Basic Law protects competences of the present or future *Bundestag* from being eroded in a manner which would legally or *de facto* make the realisation of the political will of the citizens impossible. In principle, there is a threat of the act of voting being devalued in such a way if authorisations to give guarantees are granted in order to implement obligations which the Federal Republic of Germany incurs under international agreements concluded in order to maintain the liquidity of currency union member states.

Article 38 of the Basic Law demands, in connection with the tenets of the principle of democracy (Articles 20.1, 20.2 and 79.3 of the Basic Law), that the decision on revenue and expenditure of the public sector remain within the remit of the *Bundestag* as a fundamental part of the ability of a constitutional state to democratically shape itself. As elected representatives of the people, the Members of Parliament must also remain in control of fundamental budget policy decisions in a system of intergovernmental governance. The *Bundestag* is prohibited from establishing mechanisms with financial effect which may result in incalculable burdens with a budgetary implication without the prior mandatory consent of the *Bundestag*. The *Bundestag* is also prohibited from creating permanent mechanisms under international treaties which are tantamount to accepting liability for decisions by the free will of other states, above all if they entail consequences which are hard to calculate. Every large-scale measure of aid of the Federal Government taken in a spirit of solidarity and involving public expenditure on the international or European Union level must be specifically approved by the *Bundestag*. Sufficient parliamentary influence over the manner in which the funds made available are dealt with must also be ensured.

In establishing that there is a prohibited relinquishment of budget autonomy, the Federal Constitutional Court asserted that it may not with its own expertise usurp the decisions of the legislator. With regard to the extent of the guarantee given, the Federal Constitutional Court must restrict its review to the evident overstepping of extreme limits. With regard to the probability of having to pay out on guarantees, the legislator has a latitude of assessment which the Federal Constitutional Court must respect. The same applies to the assessment of the future soundness of the federal budget and of economic performance. Taking this legislative priority of appreciation into account, and measured against the constitutional standards, the Federal Constitutional Court held both the Act on Financial Stability within the

Monetary Union and the Euro Stabilisation Mechanism Act to be compatible with the Basic Law. The Court held that the *Bundestag* had not eroded its right to decide on the budget in a constitutionally impermissible manner and had not disregarded the material content of the principle of democracy.

The Court held that it cannot be established that the amount of the guarantees given exceeds the limit to budgetary burdens to such an extent that budget autonomy effectively failed. The legislator's assessment that the guarantee authorisations are within the capacity of the federal budget does not overstep its margin of appreciation and is therefore constitutionally unobjectionable. The same applies to the legislator's expectation that even in the case that the guarantee risk were realised in full, the losses could be refinanced by way of increases of revenue, reductions of expenses and long-term government bonds.

At present there is also no occasion to assume that there is an irreversible process with adverse consequences for the *Bundestag's* budget autonomy. The German Consent Act to the Treaty of Maastricht, now as amended by the Treaty of Lisbon, continues to guarantee with sufficient constitutional detail that the Federal Republic of Germany does not submit to the automatic creation of a liability community which is complex and whose course can no longer be controlled.

None of the challenged statutes creates or consolidates an automatic effect as a result of which the *Bundestag* would relinquish its right to decide on the budget.

However, § 1.4 of the Act merely obliges the Federal Government to endeavour, before giving guarantees, to reach agreement with the *Bundestag's* budget committee. This is not sufficient. Instead, guaranteeing parliamentary budget autonomy requires an interpretation of this provision in conformity with the Basic Law to the effect that the Federal Government is, in principle, obliged to obtain the prior consent of the budget committee before giving guarantees.

Cross-references:

- Order of 07.05.2010, 2 BvR 987/10, *BVerfGE* 125, 385 (Official Digest);
- Order of 09.06.2010, 2 BvR 1099/10, *BVerfGE* 126, 158 (Official Digest).

Languages:

German.



Identification: GER-2011-3-018

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 04.10.2011 / **e)** 1 BvI 3/08 / **f)** Investment Allowance Act decision / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Deutsches Steuerrecht* 2011, 2141; *Europäisches Wirtschafts- und Steuerrecht* 2011, 468; *Recht der Internationalen Wirtschaft* 2011, 864; *Europäische Grundrechte-Zeitschrift* 2011, 658; www.bundesverfassungsgericht.de; CODICES (German).

Keywords of the systematic thesaurus:

4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states.**

Keywords of the alphabetical index:

State aid / European Commission decision, review / Constitution, judicial review / Judicial protection of rights / Preliminary ruling, Court of Justice of the European Communities.

Headnotes:

1. The submission of an Act transposing European Union Law to the Federal Constitutional Court according to sentence 1 of Article 100.1 of the Basic Law is inadmissible if the submitting court has not adequately clarified whether the Act which it judges to be unconstitutional has been adopted implementing a latitude left to the national legislator by Union law.

2. In order to do so, the submitting court must, if necessary, initiate preliminary ruling proceedings before the European Court of Justice according to Article 267.1 of the Treaty on the Functioning of the European Union, regardless of whether it is a court of final instance or not.

Summary:

I. The Investment Allowance Act (hereinafter, the "Act") regulates the payment of State aid (investment allowances) for specific business investments in Berlin and the new federal *Länder* (states). The European Commission decided in May 1998 that national State aid schemes which ran counter to the specific Community guidelines which the Commission had previously established and the appropriate

measures for State aid in connection with investments in the processing and marketing of agricultural products which it had simultaneously established were incompatible with the common market. According to the decision, specific investments in farms, including mills, are excluded from receiving subsidies. Germany was instructed in the decision, which was served on 2 July 1998, to accordingly amend, or where necessary abolish, existing aid schemes within two months. The requirement was transposed by the new provision, which came into force on 24 December 1998, contained in sentence 2 of § 2 no. 4 of the Act. Accordingly, certain commodities were not eligible in the processing and marketing of agricultural products which had been acquired or produced after 2 September 1998.

The plaintiff of the original proceedings runs a mill in the new federal *Länder*. On the basis of the new provision, the tax office refused to grant to the plaintiff an investment allowance for investments of DM 3.9 million on grounds that the investments in question had not been carried out until after 2 September 1998. With its action lodged against this, the plaintiff essentially claims a violation of the constitutional ban on retroactivity, arguing that the investment decisions in question had already been taken prior to 3 September 1998, and hence indeed prior to the proclamation of the new provision.

The Finance Court seized of the action invoked the Federal Constitutional Court's jurisdiction in proceedings for the concrete judicial review of a statute in order to have the constitutionality of sentence 2 of § 2 no. 4 of the Act reviewed. It submitted the following question: "Is the provision contained in sentence 2 of § 2 no. 4 of the Act compatible with the rule-of-law ban on retroactivity in that it also covers investments with regard to which the investor had taken a binding investment decision prior to 28 September 1998 – the date on which the letter was published with which the Federal Government announced that it would be amending the Investment Allowance Act?"

In the Finance Court's view, an investor enjoys from the time of his or her binding investment decision protection of legitimate expectations against statutes retroactively restricting or rescinding the fiscal promotion of the investment. This confidence eligible for protection only ceased to exist when the Federal Government's letter was published. The Court further argued that the retroactive effect linked with the new provision was constitutionally not justified and also not necessary according to the Commission's decision. According to the decision, an obligation existed with effect for the future only, but not to refuse

to grant State aid for investments which had already been embarked on in the shape of binding investment decisions. Since the breach of the law was founded on national law, a submission to the CJEU could not be considered.

According to Article 100.1 of the Basic Law, the admissibility of a submission in proceedings for the concrete review of a statute requires the compatibility of the provision to be reviewed with the Basic Law being material to the ruling in the proceedings pending before the submitting court.

II. The First Panel of the Federal Constitutional Court ruled that the submission is inadmissible because the submitting Finance Court had not adequately clarified whether the legal provision which it judged to be unconstitutional is based on a requirement of European Community law that is binding on the German legislator, or whether latitude has been granted to the latter. The materiality of the submission for the decision had therefore not been adequately set forth.

An Act which transposes Union law can only be submitted to the Federal Constitutional Court for a ruling on its constitutionality if it is subject to review by the Federal Constitutional Court. As long as the European Union generally ensures effective protection of fundamental rights as against the sovereign powers of the Union which, in essence, is to be regarded as being substantially similar to the protection of fundamental rights provided by the Basic Law, the Federal Constitutional Court no longer exercises its jurisdiction to decide on the applicability of Union law in Germany cited as the legal basis for any acts on the part of German courts or authorities. It therefore no longer reviews such legislation by the standard of fundamental rights. Also, a domestic legal provision which transposes a directive or a decision into German law is not examined for compatibility with the fundamental rights of the Basic Law if Union law fails to leave to the German legislator any latitude in such transposition, but rather makes binding stipulations. In this case, the submission of a statute transposing Union law to the Federal Constitutional Court is inadmissible because the question as to its compatibility with the Basic Law is not material to the decision.

A court therefore has to clarify, prior to submitting the statute to the Federal Constitutional Court, whether the German legislator was left with latitude in transposing Union law. In order to do so, if there is a lack of clarity regarding the implications of Union law, it must initiate preliminary ruling proceedings before the CJEU, regardless of whether it is a court of final instance or not. There is an obligation under Union law to submit to the CJEU exclusively for courts of final instance whose rulings themselves cannot be

challenged with appeals of national law. However, if it is unclear whether and to what degree Union law leaves latitude to the Member States, even instance courts are obliged, prior to making a submission to the Federal Constitutional Court, to initiate preliminary ruling proceedings to the CJEU. This is a matter of ascertaining the power to review of the Federal Constitutional Court, and hence a preliminary question which absolutely must be clarified in order to render the review of statutes admissible.

Furthermore, in its reasoning for the submission, the submitting court must address the question of the latitude for transposition left to the national legislator. It must present sufficiently clearly the reasons for the materiality of its submission to the ruling.

The submission made by the Finance Court does not satisfy these prerequisites. It has not even dealt with the possibility of a restricted constitutional review by the Federal Constitutional Court. Furthermore, there is no adequate information regarding the extent of the binding effect of the Commission's decision. The statement that the Commission had only created a regulation for the future does not force one to conclude that it was to remain permissible to grant investment allowances on expiry of the two-month transposition period if a binding investment decision had already been taken prior to the expiry of the deadline. According to its wording, the Commission's decision, rather, stipulated that no more investment allowances were to be granted on expiry of the period, regardless of whether an investor had already made a binding investment decision or not. In view of this, the Finance Court already did not adequately portray the materiality of the submission to the ruling.

Moreover, it should have submitted the interpretation question that is relevant here for the existence of national latitude for transposition to the CJEU in proceedings for a preliminary ruling because this cannot be answered beyond a doubt based on the case-law of the CJEU.

Languages:

German.



Identification: GER-2011-3-019

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 09.11.2011 / **e)** 2 BvC 4/10, 6/10, 8/10 / **f)** / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Europäische Grundrechte-Zeitschrift* 2011, 621; *Deutsches Verwaltungsblatt* 2011, 1540; www.bundesverfassungsgericht.de; CODICES (German).

Keywords of the systematic thesaurus:

4.5.10 Institutions – Legislative bodies – **Political parties.**

4.17.1.1 Institutions – European Union – Institutional structure – **European Parliament.**

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

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

Keywords of the alphabetical index:

Election, European Parliament / Election, electoral threshold / Election, list of candidates / Election, voters, equality / Political party, equal treatment.

Headnotes:

The serious encroachment on the principles of equal suffrage and of equal opportunities of the political parties that results from the five per cent barrier clause in § 2.7 of the Act on the Election of the Members of the European Parliament from the Federal Republic of Germany cannot be justified under the present legal and factual circumstances.

Summary:

I. According to the Act on the Election of the Members of the European Parliament from the Federal Republic of Germany (hereinafter, the "Act"), election to the European Parliament shall not only be general and direct, but also free, equal and secret. Furthermore, the legislator has opted in favour of the election being held according to the principles of proportional representation with election proposals in the form of lists of candidates. Furthermore, the legislator has decided that the seats obtained by an election proposal shall be allocated according to the sequence of candidates as they appear on the list ("rigid" list) and that this applies *mutatis mutandis* to combinations of lists. Thus, the voter can only vote in favour of the list as such but has no influence on the sequence of the candidates when it comes to allocating the seats.

Finally, § 2.7 of the Act provides a five per cent barrier clause related to the valid votes cast in the electoral area. Thus, in the allocation of the seats in Parliament only parties and political associations which reach the quorum of 5 % of the votes cast in the territory of the Federal Republic of Germany are taken into account.

II. The Federal Constitutional Court had to render judgment on three complaints, requesting the scrutiny of an election, which were directed against the five per cent barrier clause. The election on the basis of “rigid” lists was also challenged.

The Second Panel of the Federal Constitutional Court ruled by five to three votes that under the present circumstances, the five per cent barrier clause in force at the 2009 election to the European Parliament violates the principles of equal suffrage and of equal opportunities of the political parties.

As German federal law, the Act must be measured against the standards of equal suffrage and of equal opportunities of the political parties, which are anchored in the Basic Law. In proportional representation, which also applies to the election of the Members of the European Parliament, the principle of equal suffrage requires that every voter’s vote must have the same influence on the composition of the representative body to be elected. The principle of equal opportunities of the parties requires every party to be accorded, in principle, the same opportunities in the entire electoral procedure, and thus equal opportunities with regard to the allocation of seats.

The five per cent barrier clause results in an unequal weighting of votes with regard to their chance to contribute to success. This is because the votes which were cast for parties that failed to overcome the barrier are unsuccessful. At the same time, the five per cent barrier clause impairs the political parties’ claim to equal opportunities.

Provisions which differentiate with regard to equal suffrage and to equal opportunities of the parties always require a special, factually legitimised, “compelling” reason. They must be suitable and necessary for pursuing their objectives.

The legislator must review a provision of electoral law that affects equal suffrage and equal opportunities and, if necessary, amend it if the constitutional justification of the provision is called into question by new developments.

The legislator only has narrow latitude for differentiation. The elaboration of the law governing the European elections is subject to strict constitutional review. This is because there is a risk that the German legislator

drafting the electoral law might secure, by a majority of its Members of Parliament, the election of its own parties at European level by means of a barrier clause and by the exclusion of small parties affected by this clause. The general and abstract assertion that the abolition of the five per cent barrier clause would make it easier for small parties and voters’ groups to win seats in the representative bodies, which would make opinion-forming in these bodies more difficult, cannot justify the encroachment on the principles of equal suffrage and of equal opportunities. What is required instead to justify the five per cent barrier clause is that an impairment of the representative bodies’ ability to function can be expected with some degree of probability.

According to these standards, it was not permissible to retain the five per cent barrier clause. The factual and legal circumstances existing at the 2009 European elections, which continue in existence, do not provide sufficient reasons for justifying the serious encroachment on the principles of equal suffrage and of equal opportunities of the political parties that results from the barrier clause.

The legislator’s assessment that the European Parliament’s ability to function would be impaired by the abolition of the five per cent barrier clause cannot rely on a sufficient factual basis. It does not adequately take account of the European Parliament’s specific working conditions and duties. Admittedly, it can be expected that without a barrier clause in Germany, the number of parties which are represented in the European Parliament merely by one or two Members will increase; moreover, it can be expected that this will not be a negligible quantity. However, it is not apparent that this would with the required probability impair the European Parliament’s ability to function. The groups, which have a considerable power of integration, are the central working units of the European Parliament. Over the years, they have been able to integrate the parties which acceded particularly in the course of the enlargements of the European Union, despite the broad spectrum of different political views. According to this experience, it can be expected, fundamentally at any rate, that other small parties can join the existing groups.

The same applies to the groups’ ability to reach majority decisions by agreements within a reasonable time. In parliamentary practice, the “established” groups in the European Parliament have shown their willingness to cooperate, and they are able to organise the necessary voting majorities. It is not apparent that with the abolition of the five per cent barrier clause, Members of Parliament from small parties would have to be expected in a quantity which would make it impossible for the existing political

groups in the European Parliament to reach decisions in a properly conducted parliamentary process. Finally, the European Parliament's development shows that adaptations of parliamentary business to changed circumstances, such as for instance to an increase in the number of independent Members of Parliament, can be expected.

Furthermore, the European Parliament's duties have been formulated by the European treaties in such a way that there are no compelling reasons for encroaching on equal suffrage and on equal opportunities. The European Parliament does not elect a Union government which would depend on Parliament's continuous support. Nor is the Union's legislation dependent on a steady majority in the European Parliament which would be made up of a stable coalition of specific groups and which would face an opposition. Furthermore, according to primary law, Union legislation is organised in such a way that it does not depend on specific majority situations in the European Parliament.

However, the complaint lodged against the election according to "rigid" lists did not succeed. According to European Union law, the Member States are free to decide to organise the election with bound lists or with open lists. With regard to national elections, the Federal Constitutional Court has repeatedly held that the election according to "rigid" lists is constitutionally unobjectionable. New arguments that might give rise to a different assessment with regard to the European elections had not been put forward.

Having found the five per cent barrier clause to be unconstitutional, the Federal Constitutional Court declared the nullity of § 2.7 of the Act. However, the electoral error did not lead to the 2009 election to the European Parliament being declared invalid in Germany and to a new election being called. For in the context of the required weighing, the Federal Constitutional Court held that the interest in maintenance of the *status quo* of the representation of the people composed in confidence in the constitutionality of the Act was to be accorded priority over the enforcement of the consequences of the electoral error found. New elections in Germany would have a disruptive impact with incalculable consequences on the current work of the European Parliament. In contrast, the electoral error could not be deemed "intolerable". It only concerned a small share of the German Members of Parliament and did not call into question the legitimacy of the German Members of the European Parliament in its entirety.

III. Two justices filed a dissenting opinion. They do not concur with the ruling with regard to its result and its reasoning. In their view, the five per cent barrier clause is factually justified to prevent, concerning the

German Members of Parliament, excessive fragmentation of the political parties represented in the European Parliament.

Languages:

German.



Identification: GER-2011-3-020

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 07.12.2011 / **e)** 2 BvR 2500/09, 1857/10 / **f)** Admission of evidence decision / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** www.bundesverfassungsgericht.de; CODICES (German).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 3.16 General Principles – **Proportionality**.
 5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.
 5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home**.

Keywords of the alphabetical index:

Evidence, admissibility / Police, surveillance, limits / Fraud / Punishment / Proportionality, offence, penalty.

Headnotes:

Decision regarding the permissibility of admitting personal information in criminal proceedings that has been collected unlawfully.
 [Official headnotes]

A ban on the admission of evidence may be required in particular after serious, deliberate or objectively arbitrary breaches of the law in which fundamental law-related safeguards have been intentionally or systematically disregarded.

Where the constitutionally required, economically comprehensible finding and explanation of property damage is missing, the punishability for fraud through the conclusion of or the application for life insurance policies is not compatible with the principle of legal certainty of Article 103.2 of the Basic Law,

Summary:

The Federal Constitutional Court was required to consider whether personal information obtained from preventive police monitoring of dwellings was permitted to be admitted in a judgment, and whether the presumption of punishability as fraud through the conclusion of life insurance policies is compatible with the principle of legal certainty of Article 103.2 of the Basic Law.

The three complainants were each sentenced in 2007 at first instance to several years' imprisonment because of membership of or support for a foreign terrorist organisation in conjunction with attempted gang-based fraud in 28 combined cases. According to the findings of the criminal court, the complainants were planning to conclude life insurance policies. By feigning that one of the complainants had had a fatal accident by presenting incorrect official documents which were yet to be obtained in Egypt, they then intended to have the respective insurance company disburse the insured sum. In this manner, they planned to obtain funds for the Al-Qaeda organisation. The complainants applied for the conclusion of a life insurance policy in 28 cases. Nine insurance policies were ultimately concluded. The complainants were apprehended before they were able to further enact their planned offence. The conviction was based, amongst other things, on information collected from preventive police monitoring of dwellings. The monitoring had been carried out for a period of several months in 2004, prior to the initiation of the criminal investigation proceedings against the complainants because of suspicion of planning terrorist attacks. The judicial ordering of these surveillance activities was issued on the basis of § 29 of the Rhineland-Palatinate Police and Regulatory Authorities Act (*Rheinland-Pfälzisches Polizei- und Ordnungsbehördengesetz*, hereinafter, the "Act"). According to the Act, monitoring of dwellings as a preventive police measure may be carried out to prevent an imminent risk to public security, in particular to avert serious criminal offences. The version of § 29 of the Act which was valid in 2004 did not contain any provisions for the protection of the core area of private life.

The Federal Constitutional Court found in its judgment of 3 March 2004 in another set of proceedings that provisions contained in the Code of Criminal Procedure

(*Strafprozessordnung*) regarding acoustic monitoring of dwellings were incompatible with the Basic Law because they did not contain any precautions to protect the core area of private life. At the same time, the Court ordered that the provisions in question should continue to apply for a limited period of time until June 2005, taking into account the protection of human dignity and the principle of proportionality.

The requirements issued by the Federal Constitutional Court on protection of the core area of private life were implemented in 2005 by virtue of the introduction of corresponding supplementary provisions in § 29 of the Act.

The Federal Court of Justice (*Bundesgerichtshof*) confirmed that the information obtained by preventive police monitoring of dwellings could be admitted. The Federal Court of Justice amended the guilty verdict such that the complainants were guilty of completed fraud in those cases in which the life insurance policies had been concluded and of attempted fraud in the other cases.

The Federal Constitutional Court quashed the judgment of the Federal Court of Justice and remitted the case to it on the basis that the guilty verdict for completed or attempted fraud violates the principle of legal certainty from Article 103.2 of the Basic Law. The admission of information from the monitoring of dwellings, by contrast, does not violate the complainants' fundamental rights or rights equivalent to fundamental rights.

The Court held that the admission of information from preventive police monitoring of dwellings is constitutionally unobjectionable.

The Court held that the admission of such evidence does not violate the complainants' right to a fair trial. There is no ban on the admission of evidence. Constitutionally, such a ban constitutes an exception requiring grounds to be given. This is because it restricts the possibilities open to the criminal prosecution authorities to gather evidence, and hence impairs the ascertainment of a substantively correct, fair ruling. From a constitutional point of view, a ban on the admission of evidence is required if the impact of the breach of the law leads to the accused not having adequate possibilities to exert an influence on the course and the outcome of the proceedings, the minimum requirements as to reliable investigation of the truth are no longer met, or the admission of the information would lead to a disproportionate encroachment on the general right of personality. Moreover, the admissibility of information obtained by violating legal provisions may not be affirmed where this would lead to favouring the unlawful taking of evidence. A ban on the admission of evidence may hence be required in

particular after serious, deliberate or objectively arbitrary breaches of the law in which fundamental law-related safeguards have been intentionally or systematically disregarded.

According to these standards, it is constitutionally unobjectionable that according to the established case-law of the Federal Court of Justice a breach of the law in taking evidence does not necessarily entail the inadmissibility of the information obtained thereby, but in each individual case there is a need for a weighing of the points of view speaking for and against admission, weighting the state's interest in investigation and the seriousness of the breach of the law. Also the weighing carried out by the Federal Court of Justice in the original proceedings and the rejection of a ban on the admission of evidence based on this are not constitutionally objectionable. It is decisive here that preventive police monitoring of dwellings is not a measure that is inadmissible across the board according to the Basic Law and that its actual implementation complied with the constitutional requirements for the protection of the core area of private life.

In so far as personal information was admitted from the monitoring of dwellings, the complainants' general right of personality was also not violated. The legal foundation for the admission of personal information in the judgment handed down by a criminal court is constituted by § 261 of the Code of Criminal Procedure. According to this provision, the court rules on the outcome of the taking of evidence on the basis of a freely reached conviction. This provision is constitutional. In particular, it corresponds to the principle of proportionality when interpreted in conformity with the constitution, acknowledging a ban on admission in exceptional cases. The admission of personal information in judgments handed down by criminal courts serves purposes which have constitutional status. It executes the constitutional obligation incumbent on the state to guarantee functioning administration of criminal law. The admission of information is hence also proportional, in principle, if – as in the instant original proceedings – the information was originally collected for another purpose, and hence its further utilisation in criminal proceedings was preceded by an alteration of the purpose. The established case-law of the Federal Court of Justice that, according to § 261 of the Code of Criminal Procedure, unlawfully obtained personal information may, in principle, be admitted is also constitutionally unobjectionable. The provision is sufficiently defined since the admission of information is restricted to the investigation and finding of facts in the context of the offence of which a person is accused in the proceedings.

By contrast, the Federal Constitutional Court held that the presumption by the Federal Court of Justice that the complainants committed a criminal offence by concluding life insurance policies because of completed fraud and by applying for life insurance policies because of attempted fraud, was not compatible with the principle of legal certainty of Article 103.2 of the Basic Law. This was because the constitutionally required, economically comprehensible finding and explanation of property damage was missing.

In order to prevent overstretching of the offence of fraud, however, it is necessary for the amount of the property damage to be estimated and for this to be presented in the reasoning for the judgment in an economically comprehensible manner.

The judgment of the Federal Court of Justice did not do justice to these constitutional requirements because it had not concentrated on the finding of concrete damage, but had permitted (abstract) risks to suffice for the finding of property damage which are entailed by the conclusion of any contract with a dishonest contracting partner. There was no adequate description and estimate of the property damage that was caused by the conclusion of the life insurance policies, or which would have been caused in the instances of attempt. What is more, there were no considerations regarding the degree to which it was possible to tenably estimate how high the probability was at the time of the (intended) conclusions of contracts that the complainants would have successfully carried out their planned offence, i.e. that the insurance payments would indeed have been subsequently disbursed to them.

Cross-references:

- Judgment of 03.03.2004, *Bulletin* 2004/1 [GER-2004-1-002].

Languages:

German.



Hungary

Constitutional Court

Important decisions

Identification: HUN-2011-3-006

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 20.12.2011 / **e)** 164/2011 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2011/155 / **h)** CODICES (Hungarian).

Keywords of the systematic thesaurus:

4.5.6.4 Institutions – Legislative bodies – Law-making procedure – **Right of amendment.**

5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion.**

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

Keywords of the alphabetical index:

Church, recognition / Parliament, debate, final vote.

Headnotes:

Where legislators have rewritten key parts of legislation which is about to be submitted to the final parliamentary vote, this leaves no time for proper parliamentary debate and is therefore unconstitutional.

Summary:

I. Shortly after Parliament passed ‘Act C of 2011 on the Right to Freedom of Conscience and Religion, and on Churches, Religions and Religious Communities’ (hereinafter, the “Act on C”), on 12 July 2011, the Constitutional Court received several petitions requesting that the Act should be declared null and void in its entirety on formal grounds and due to its unconstitutional content. The applicants argued that Act C discriminated against smaller churches and that the “inferior religious status” of “de-registered” religious organisations violated the right to religious freedom.

The original bill submitted to Parliament acknowledged three levels of legal status, with thirteen “recognised” churches at the top, enjoying full privileges, and two other categories with lesser rights. The list was to be closed with no potential for new churches to be added to the original list. However, some hours before the final vote a practically new bill was submitted to Parliament.

There were crucial differences between the bills. In the earlier version, the legal status of a church was to be decided by the courts. In the final reading that right was entrusted to the two-thirds majority of Parliament.

In the original bill a church had to operate in Hungary for at least twenty years and needed a minimum membership of one thousand. The time limit remained under the new bill, but the size of membership was not specified in the final bill. Instead of thirteen recognised churches the final bill listed fourteen accepted religious organisations as churches. (Over 300 other churches, including Methodists, Buddhists and followers of Islam were divested of their church status and could no longer use the name “church”). There was, however, scope under the new bill for future registration of religious organisations as churches. The new bill was adopted by Parliament on 12 July 2011 and was meant to enter into force on 1 January 2012.

II. The Constitutional Court annulled the Act C for procedural reasons, pointing specifically to the legislative process itself, where several major amendments were put forward prior to the final vote, against House Rules. Under Standing Order no. 107.1 of Resolution 46/1994 on the Standing Orders of the Parliament “before the beginning of the final vote a proposed amendment may be introduced in writing to any provision voted on in the debate in detail for such reason that the provision voted on is not in compliance with the Constitution or any other Act, with a provision of the bill already voted on or with any provision of the bill not affected by amendments”. Standing Order no. 107 restricts last-minute amendments to the bills. In the present case, the legislators rewrote key parts of the Act C just before the final vote, leaving no time for due parliamentary debate. The Constitutional Court found that this violated legal guarantees of democratic exercise of power.

III. Justice András Bragyova and Justice András Holló attached concurring opinions to the judgment. Chief Justice Péter Paczolay, Justice Egon Dienes-Oehm, Justice Béla Pokol, Justice Péter Szalay and Justice Mária Szívós attached separate opinions to the judgment.

Supplementary information:

On 30 December 2011, a proviso was inserted into the First Amendment to the Fundamental Law to the effect that Parliament, in a cardinal Act, determines “recognised churches” and the normative conditions for recognising further religious organisations. Under this provision, a cardinal Act may require a religious organisation to operate for a certain period of time before being acknowledged as a church. The cardinal Act may also specify a certain membership, and require that historical traditions be taken into account, as well as the acceptance of the religious organisation within society. Then, on 30 December 2011 Parliament passed the Act on Churches, with virtually the same content as before. The Act entered into force on 1 January 2012.

In December 2011 the parliamentary majority also introduced a modification to the House Rules allowing the lifting of restrictions on last-minute amendments in order to accelerate legislation in certain cases.

Languages:

Hungarian.



Identification: HUN-2011-3-007

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 20.12.2011 / **e)** 165/2011 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2011/155 / **h)** CODICES (Hungarian).

Keywords of the systematic thesaurus:

5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press.**

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

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

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

Keywords of the alphabetical index:

Media, print, on-line, regulation / Journalist, information, source / Media commissioner.

Headnotes:

It is against the principle of free press to limit the protection of journalists’ sources to stories serving the public interest. Editors must, moreover, not be obliged to supply data in the absence of pending proceedings. The institution of the ‘Media Commissioner’ constitutes an unnecessary restriction on the freedom of press.

Summary:

I. During the second half of 2010, Parliament adopted a series of amendments to existing media-related provisions, including a new Article 61 of the Constitution, and Act LXXXII of 2010 on the amendment of certain acts on media and telecommunications. It also passed important new legislation in the form of Act CIV of 2010 on the freedom of the press and the fundamental rules regarding media content (Press and Media Act) and Act CLXXXV of 2010 on media services and mass media (Mass Media Act). Several applicants asked the Constitutional Court for a constitutional review of almost all the provisions. In this particular case, the Constitutional Court only examined part of this media “package”, namely the provisions concerning the print and online media. It did not deal with other issues arising from the package, such as registration requirements, public service broadcasting, the media regulatory bodies (Media Authority, Media Council) and the sanctions regime.

II. The Constitutional Court ruled the Press and Media Act to be unconstitutional in four significant areas.

Firstly, print media should to an extent be removed from the scope of the Press and Media Act. The Media Authority should not, in future, be entitled to scrutinize print and online content against aspects of human rights, human dignity and privacy. The Media Authority’s right of scrutiny is not unconstitutional with regard to audiovisual media, so the Court annulled that part of the Press and Media Act which provides for the application of the Act to the printed and online press with effect from 30 May 2012.

The Court then resolved to abolish, with immediate effect, the limitation on the protection of confidential sources of information. Article 6.2 of the Act provides that the media content provider and any person employed by or engaged, in any other legal relationship

intended for the performance of work, with the media content provider is entitled to keep the identity of their sources of information confidential even in judicial or other official proceedings, provided the information thereby supplied was disclosed in the public interest. Based on the case-law of the European Court of Human Rights, the Court annulled the last sentence limiting the protection of sources to stories serving the public interest. As a result, authorities (rather than journalists) will now have to define the scope of public interest.

The Court also put forward new rules under which journalists may only be forced to divulge their sources under a procedure strictly controlled by the courts; even where issues of national security or crime prevention have arisen, court approval is needed to force journalists to disclose sources.

The Court resolved with immediate effect to annul the Media Authority's right to compel editors to divulge editorial material and other data in the absence of pending proceedings and in order to initiate future proceedings without prior court approval.

As a result of this decision, the institution of the Media Commissioner will be eliminated as of 31 May 2012. Under the Press and Media Act the Commissioner, appointed and employed by the Head of the Media Authority, handles legal complaints and consumer protection issues. If the activities of the media market violate the lawful rights or interests of a user or subscriber, the Media Commissioner may proceed against the protagonist within the media market, and request any data, information and explanation, although the Commissioner has no right to sanction. The Court found this institution superfluous and an unnecessary restriction on the freedom of press.

III. Justice István Balsai, Justice Barnabás Lenkovics and Justice Béla Pokol attached separate opinions to the judgment.

Languages:

Hungarian.



Identification: HUN-2011-3-008

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 20.12.2011 / **e)** 166/2011 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2011/155 / **h)** CODICES (Hungarian).

Keywords of the systematic thesaurus:

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

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

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

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

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

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

Keywords of the alphabetical index:

Witness, data, handling / Judge, choice, right / Criminal proceedings, initiation.

Headnotes:

Amendments made to the Criminal Procedure Code introduced a rule that certain cases are heard at the Court where the prosecutor presses charges and the manner in which witness data is handled limits the freedom of information and the introduction of a 120-hour detention rule, resulting in the defendant having no access to an attorney for the first 48 hours have raised concern on whether they respected the Constitution and international treaty obligations.

Summary:

I. A recent amendment to the Criminal Procedure Code allowed the Prosecutor General to bring a criminal case in a different court from the court which would normally have jurisdiction over it, provided the new court could try the matter within a reasonable time. The right only applies to specific crimes such as organised or economic crime.

It was suggested that the whole “package” amending the Criminal Procedure Code (or some of its elements) were unconstitutional and could infringe

international treaties such as the European Convention on Human Rights. Several applicants, including the President of the Supreme Court, accordingly challenged the modification to the Criminal Procedure Code before the Constitutional Court.

Amongst the modifications to the Criminal Procedure Code was a rule which would have permitted the Prosecutor General to hand-pick a particular court to try certain crimes such as organised or economic crime, pressing charges before a court other than the legally designated one if this was deemed necessary in terms of the speed of the proceedings. The rationale behind the modification was to equip the prosecution service with stronger and more efficient tools, in order to provide more successful criminal investigations and trials in a timely manner, especially in economic and special criminal cases such as corruption or abuse of official power.

II. However, the Court found the above rule to be unconstitutional. Based on jurisprudence from the European Court of Human Rights, the Court held that it infringed the European Convention on Human Rights by impairing the right to an impartial court and violating the principle of fair trial. Pressing charges before a court other than the legally designated court would only be constitutional and in accordance with the Convention if the decision was made within the independent judiciary and if the rules concerning the initiation of criminal proceedings before a judge other than the natural judge were clear and predictable, containing normative conditions with no room for manoeuvre.

The Court had held in an earlier case (Decision no. 104/2010) that there was no constitutional reason or objective on the basis of which the investigating authority, the prosecutor or the court could be entitled to refuse a request for the closed handling of a witness's personal data. Granting a possibility of judicial discretion in the course of the criminal proceedings was an unnecessary restriction of the witness's right of informational self-determination. In the instant case the Court also held that handling of witness data in a way that limits the right of informational self-determination was against the Constitution.

The Court also held that the 120-hour pre-trial detention rule in certain special crimes (organised and economic, for example), were unconstitutional. Under Article 55.2 of the Constitution any individual suspected of having committed a criminal offence and held in detention must either be released or brought before a judge in the shortest possible time span. 120 hours cannot be perceived as the "shortest

period of time". The Court took into account the judgment delivered by the European Court of Human Rights in the case of *Brogan and Others v. the United Kingdom*, when the Court concluded that the periods of 102 hours did not satisfy the requirement of promptness required by Article 5.3 ECHR.

Finally, the Court held that the provision according to which the defendant would have no access to an attorney during the first 48 hours pre-trial detention infringed the Constitution by impairing the rights of the defence and violating the right to an effective remedy.

III. Justice Balogh, Justice Bragyova, Justice Dienes-Oehm, Justice Holló and Justice Lenkovics attached concurring opinions; Justice Dienes-Oehm, Justice Holló, Justice Kiss, Justice Lévy and Justice Szívós attached separate opinions to the judgment.

Supplementary information:

Shortly after the Court annulled the provision on changing the venue of the trial, Parliament inserted the rule into the Amendment to the Fundamental Law; as a result, the Court will no longer be able to decide on the constitutionality of it.

Cross-references:

- *Brogan and Others v. the United Kingdom* (Series A, no. 145-B, *Special Bulletin ECHR* [ECH-1988-S-007]).

Languages:

Hungarian.



Italy

Constitutional Court

Important decisions

Identification: ITA-2011-3-001

a) Italy / b) Constitutional Court / c) / d) 16.12.2011 / e) 329/2011 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 21.12.2011 / h).

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.**

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

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

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

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

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

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

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

Keywords of the alphabetical index:

Permit / Residence / Handicapped, juvenile, allowance.

Headnotes:

The fact that, in the case of non-EU juveniles, an award of the so-called “*di frequenza*” allowance for juveniles suffering from a disability requires applicants to have a residence permit, which can be issued only after the juvenile has been a permanent resident for five years, results in discrimination against foreign juveniles. The condition breaches Article 14 ECHR, as interpreted by the European Court of Human Rights. Violation of Article 14 ECHR

automatically entails violation of Article 117.1 of the Constitution, which, as interpreted by the Constitutional Court in Judgments nos. 348 and 349 of 2007, requires legislation to comply with international obligations.

The less favourable treatment of such juveniles also entails breaches of Article 3 of the Constitution (equality of treatment), Article 32 of the Constitution (right to health), Article 33 of the Constitution (right to education) and Article 38 of the Constitution (right to assistance).

Summary:

The Genoa Court of Appeal raised the question of the constitutionality of Article 80.19 of Law no. 388 of 23 December 2000, a measure that provides financial assistance to non-EU juveniles who suffer from a disability. This is known as the “*indennità di frequenza*”, and is conditioned on their holding of a residence permit, which requires five years’ permanent residence in Italy.

The Court noted that the measure aims to benefit juveniles who, on account of their disability, encounter difficulties in performing tasks specific to their age and given their family’s low income, need social assistance to allow them not only to receive essential medical care linked to their state of health but also to attend schools and vocational training establishments so as to ensure their future employability. This measure is based on articles of the Constitution that safeguard fundamental rights, such as the right to health and the right to acceptable living conditions within the family. It also constitutes a response to the need to integrate the juvenile concerned within the working environment and society.

In a similar case about disability allowance (“*assegno di invalidità*”) intended to provide a means of livelihood for those unfit to work, the Constitutional Court had held that since it was a question of securing an inalienable right, the measure in question concerned all individuals lawfully residing in Italy. There is no distinction between nationals and foreigners, which is in accordance with the doctrine of the European Court of Human Rights and its interpretation of Article 14 ECHR (Judgment no. 187 of 2010).

In the present case concerning juveniles with health problems and from poor backgrounds, in view of the rights in question, which closely concern “basic needs”, the principles relied on at the time by the Court apply in the same way such that no form of

discrimination can be tolerated. The impugned legislation indeed breaches the principle of equality and fundamental rights such as the rights to health, education and assistance.

Cross-references:

- See Judgments no. 306 of 29.07.2008 (*Bulletin* 2008/2 [ITA-2008-2-002]) and no. 187 of 26.05.2010 (*Bulletin* 2010/2 [ITA-2010-2-001]).

Languages:

Italian.



Japan Supreme Court

Important decisions

Identification: JPN-2011-3-002

a) Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 23.03.2011 / **e)** / **f)** (Gyo-Tsu), 207/2010 / **g)** *Minshu*, 65-2 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**
 4.9.4 Institutions – Elections and instruments of direct democracy – **Constituencies.**
 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:

Votes, weighing, value.

Headnotes:

Determination as to the constitutionality of an election system is to be achieved by examining whether the system is justifiable as a reasonable exercise of the discretion vested in the *Diet* which is required to strike a balance between the proper reflection of the will of the people and the requirement of securing equality in the value of votes.

Summary:

The applicants, who are voters in Tokyo, filed proceedings concerning the potential invalidation of the general election of members of the House of Representatives held on 30 August 2009 (hereinafter, the “Election”). The provisions of the Public Offices Election Act concerning the demarcation of constituencies of members of the House of Representatives to be elected from single-seat constituencies were, in their view, in contravention of Article 14 of the Constitution (which requires equality in the value of votes) and invalid. They contended that the elections held in the said constituencies as part of the Election pursuant to these provisions were also invalid.

The Public Offices Election Act was revised in January 1994. Under the election system based on the revised Act, at the time when the Election was held, the number of members of the House of Representatives was 480, of which 300 were to be elected from single-seat constituencies and 180 by proportional representation. In terms of an election based on single-seat constituencies, the whole area of the country was divided into 300 constituencies, with each constituency electing one member. The number of constituencies to be established within the area of each prefecture was to be the sum of one apportioned to every prefecture (described here as “the rule of reserving one seat per prefecture”), plus the number calculated by deducting the number of prefectures from 300, then apportioning the result to the prefectures in proportion to the population.

The maximum disparity between constituencies in terms of the value of votes that existed at the time of the Election, based on the demarcation of constituencies reached 1:2.304 and the number of constituencies with the ratio being 1:2 or larger, had increased. The rule of reserving one seat per prefecture has been a major factor in causing such a disparity between constituencies in terms of the value of votes.

Under the election system for members of the House of Representatives, prefectures have been the primary basis for the apportionment of seats. Municipalities or other administrative districts created by sub-dividing prefectures are viewed as specific constituencies, taking into account various factors including size, population density, composition of residents, transportation conditions, and geographical locations of the respective areas. The *Diet* is required, whilst taking these various factors into consideration, to ensure that the will of the people is reflected properly in order to carry out national politics, balancing this requirement at the same time with the requirement to secure equality in the value of votes. Determination as to the constitutionality of an election system is to be made by examining whether, when all of these circumstances are fully considered, the election system is justifiable as a reasonable exercise of the discretion vested in the *Diet*.

The rationale behind the rule of reserving one seat per prefecture was explained as allowing for the apportioning of more seats to relatively less – populated prefectures, allowing the will of those living there to be fully reflected in national politics. However, members to be elected under this election system are, irrespective of the regions in which their constituencies are located, required to take part in national politics as representatives of all the people. Consideration for relatively less-populated regions is

a factor these members should take into account when making laws and performing other duties from a nationwide perspective in the course of carrying out political activities. It can hardly be justified as being reasonable to cause inequality in the value of votes between voters in particular regions (prefectures) and those in other regions (prefectures) simply in order to deal with problems arising from regional factors.

It would appear that the significance of the rule of reserving one seat per prefecture was explained at the time the legislation was passed; the point was made that if, when a new electoral system was introduced, seats for *Diet* members were apportioned to each prefecture exclusively in proportion to population, the number of seats to be apportioned to less populated prefectures would be reduced suddenly and considerably. The rule was necessary in order to secure stability and continuity in national politics, and was adopted under circumstances where, leaving aside the need to ensure stability and continuity, the reform of the election system was itself difficult to achieve.

In view of the above, the rule of reserving one seat per prefecture was only reasonable for a limited time span; it is no longer reasonable now that a new election system has been established and put into stable operation.

Moreover, the demarcation of constituencies which was established based on the criteria for demarcation (including the rule of reserving one seat per prefecture) at the time of the election was no longer reasonable as it had been at the time of legislation but incompatible with equality in the value of votes. By that time, the demarcation of constituencies had become contrary to the constitutional requirement of equality in the value of votes.

However, the Grand Bench of the Supreme Court of 13 June 2007 found that neither the criteria for demarcation, including the rule of reserving one seat per prefecture, nor the demarcation of constituencies, by the time of the general election held in 2005, had become contrary to the constitutional requirement of equality in the value of votes. It was not now possible to hold that no correction had been made within a reasonable period of time as required by the Constitution only because, by the time the Election was held, the rule of reserving one seat per prefecture, which is included in the criteria for demarcation, had not been abolished, nor had the provisions on demarcation, premised on this rule, been corrected. The provisions on criteria for demarcation and the provisions on demarcation could not be held to be in violation of Article 14 of the Constitution.

Two justices expressed dissenting opinions, two justices expressed concurring opinions and one justice expressed an opinion concurring with the majority conclusion but not with the reason.

Languages:

Japanese, English (translation by the Court).



Kazakhstan Constitutional Council

Important decisions

Identification: KAZ-2011-3-002

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 07.12.2011 / **e)** 5 / **f)** On examining constitutionality of Article 44.1 of the Law of the Republic of Kazakhstan of 26 July 2007 no. 310-III “On a state registration of the rights to real estate” / **g)** *Kazakhstanskaya pravda* (Official Gazette), 13.12.2011 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.7.3 Institutions – Judicial bodies – **Decisions**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

Property, private, right / Property, protection / Protection, judicial, effective, right.

Headnotes:

On 16 November 2011 one of the district courts of the Karaganda oblast (province) appealed to the Constitutional Council requesting the Council’s recognition that Article 44.1 of the Law of 26 July 2007 no. 310-III “On state registration of the rights to real estate” (hereinafter, the “Law”) was unconstitutional.

The court’s application indicated that O. had been refused state registration of his right, established by a judgment of the court, to a share in a flat. The refusal was due to the presence of charges on the said flat.

According to the Law, state registration of real estate can be refused in cases where there are any charges which exclude state registration of the rights (Article 31.1.4). The right (charges) to the real estate established by the court judgment is subject to registration in accordance with the applicable general rules (Article 44.1).

The applicant Court in its application to the Constitutional Council specified that application of

Article 44 of the Law prejudices the finality, authority and binding nature of judgments as a basic form of the protection of constitutional human rights because it allows registering bodies not to register rights to property which are established by court judgments.

Summary:

The Constitutional Council made the following decision:

The Constitution provides that citizens of the Republic of Kazakhstan may privately own any legally acquired property (Article 26.1 of the Constitution).

Principles and norms of the Constitution proclaim and fix guarantees of the right to property at all stages of its origin, change and termination, which extends to all procedures for adopting the corresponding decisions by state bodies and officials, providing for the stable and progressive development of society and the state, and for the strong protection of human rights and freedoms (decree of the Constitutional Council no. 4 of 23 April 2008).

In its decision of 3 November 1999 no. 19/2 the Constitutional Council had specified that the right to property can be limited by law. The bases and limits of restriction of the right to property and also their character are established by Article 39.1 of the Constitution, according to which "rights and freedoms of an individual and citizen may be limited only by law and only to the extent necessary for protection of the constitutional system, defence of the public order, human rights and freedoms, and the health and morality of the population".

Recognising and guaranteeing a constitutional right to property (Articles 6.1 and 26.2 of the Constitution), the legislator defines a legal regime governing property, the volume and limits of realisation by the proprietors of their powers, and guarantees their protection (Article 61.3.2 of the Constitution). State registration is one means of acknowledging the rights to real estate and guaranteeing protection of the rights to property. The rights (charges) to real estate and also transactions therewith, which require state registration, arise from the moment of their state registration (Article 155.1 of the Civil Code, Article 7.1 of the Law). Obligatory state registration of the right to real estate and transactions concerning such real estate, as the publicly-legal component of property-legal relations, assumes the admissibility of legislative regulation of certain conditions of registration to which the object of real estate should correspond. The absence of charges, which are one means of protecting the interests of other persons concerning the relevant real estate, can constitute one of the conditions of registration.

2. The Constitution provides that everyone shall have the right to judicial defence of his rights and freedoms (Article 13.2 of the Constitution); justice shall be exercised only by the courts (Article 75.1 of the Constitution); judicial power shall be exercised on behalf of the Republic of Kazakhstan and shall be intended to protect the rights, freedoms, and legal interests of the citizens and organisations for ensuring the observance of the Constitution, laws, other regulatory legal acts, and shall ensure international treaties of the Republic (Article 76.1 of the Constitution); decisions, sentences and other judgments of courts shall have binding force on the entire territory of the Republic (Article 76.3 of the Constitution).

Considering a question on the binding force of judgments, the Constitutional Council had explained earlier that this constitutional principle means an obligation concerning the circumstances established by a court, their legal estimation and the instructions specified in judgments, and also the obligatory execution of legal acts of courts by all state bodies and their officials, persons and organisations (decree of the Constitutional Council no. 5 of 5 August 2002).

The Constitutional Council was of the view that state registration, as a way of maintaining rights to real estate, has the aim of certifying, on behalf of the state, the results of legally significant actions (decisions). Therefore, the act of the registering body, which takes place after the establishment by a court of the legal facts connected with the possession, use and order of real estate, has the effect of implementing the court decision. Accordingly, the registering body does not have the right to review a judgment. The judgment, which comes into force and which contains a conclusion about an accessory of real estate to the concrete person, is the basis for registration of the right to real estate.

On the basis of the above, the Constitutional Council recognised that Article 44.1 of the Law of 26 July 2007 no. 310-III "On a state registration of the rights to real estate" is in conformity with the Constitution. At the same time, the Constitutional Council recommended that the Government consider the issue on initiation of amendments to the Law, and to the Supreme Court to adopt the normative resolution which explains the questions of application of the Law.

Languages:

Kazakh, Russian.



Korea

Constitutional Court

Important decisions

Identification: KOR-2011-3-001

a) Korea / **b)** Constitutional Court / **c)** / **d)** 25.02.2010 / **e)** 2008Hun-Ka23 / **f)** Capital Punishment / **g)** 22-1(A) KCCR, *Korean Constitutional Court Report* (Official Digest), 36 / **h)**.

Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality.**
- 3.17 General Principles – **Weighing of interests.**
- 5.2 Fundamental Rights – **Equality.**
- 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:

Basic right, absolute / Life sentence, absolute, without parole / Recidivism, death penalty as a means / Death penalty, constitutionality / Life, legal assessment / Retribution, heinous crime, perpetrator / Society, protection.

Headnotes:

The Constitution prohibits single-trial system even in the declaration of a military trial (Article 110.4 of the Constitution). It can be arguable whether this Article 110.4 is based upon a premise that a death sentence as a criminal punishment can be enacted by the legislature and imposed by the court. In this regard, it can also contestable whether the Constitution indirectly allows capital punishment in its interpretation.

The Constitution does not textually recognise absolute basic rights and Article 37.2 of the Constitution prescribes that “the people’s freedom and rights may be restricted only when necessary for national security, the maintenance of law and order or the public welfare. Even when such restriction is imposed, no essential part of the freedom or right shall be violated.” Therefore, whether the right to life, which does not seem to be divided into essential and

non-essential part, should be subject to be restricted by Article 37.2 of the Constitution is arguable. Even a person’s life in an ideal sense is deemed to have an absolute value, there might be disputable whether the legal assessment on a person’s life can be permissible and the right to life may be subject to the general statutory reservation in accordance with Article 37.2 of the Constitution.

Restriction on constitutional rights is unconstitutional unless it is prescribed by law; it pursued a legitimate aim set out in law; and the means adopted is least restrictive to be proportionate or necessary to achieve such legitimate aim.

Summary:

I. The petitioner of the underlying case was sentenced to death penalty by the court of first instance for murdering four people including three women sexually abused by himself, and then appealed to Gwangju High Court. Gwangju High Court requested the constitutional review of Article 41.1 of Criminal Act prescribing death penalty as a type of punishment and other relate statutory provisions (when these provisions and aforementioned Item are combined, hereinafter, ‘Instant Provisions’) stipulating death penalty as a statutory sentence, granting the aforementioned movant’s motion to request to the constitutional review on the Instant Provisions.

The contested provisions are Criminal Act enacted on 18 September 1953 by Act no. 293), Article 41.1, each part of ‘life imprisonment’ of Article 41.2 and Article 42, the part of ‘life imprisonment’ of Article 72.1, the part stating “shall be punished by death, or imprisonment for life” of Article 250.1, and Former Act on the Punishment of Sexual Crimes and Protection of Victims Thereof (revised on 22 August 1997 by Act no. 5343, before revised on 13 June 2008 by Act no. 9110), the part stating “shall be punished by death, or imprisonment for life” of Article 10.1.

II. In a 5 (constitutional): 3 (unconstitutional): 1 (partially unconstitutional) decision, the Constitutional Court held the provisions of Criminal Act and related Act that stipulate death penalty or life sentence are constitutional.

1. Capital punishment is aimed to prevent further crimes by making a psychological warning to the people, to realise a justice through a fair retribution against the perpetrator committing heinous crime, and to protect society through permanent blocking recidivism of a perpetrator. These legislative purposes are legitimate and death penalty, the heaviest punishment, is an appropriate means to achieve such purposes.

2. Capital punishment is not in violation of the principle of least restrictive means. Capital punishment deprives the offender of his or her legal interest more than any other penalty such as life imprisonment or life sentence without parole. Therefore, death penalty can be regarded as a punishment having the strongest efficacy of deterrence on crimes, considering people's instinct for survival and fear of death. In the case of the most atrocious crime, just imposing life sentence is not proportionate to the responsibility of such offender. Likely, imposing such life sentence may not accord with the sense of justice of the victim's family or the public. In this regard, it cannot be ascertained that there, rather than death sentence, exists any other penalty which has the same efficacy in its accomplishing such legislative purpose as capital punishment has.

On the other hand, courts' wrong decision on death sentence should not be considered to be a problem inherent in capital punishment itself, but only one of the possible problems which can come out of the process of adjudication and be alleviated through the judicial tier system or appealing process. Accordingly, the possibility of courts' misjudgment in capital punishment cases should not be the basis on the contention that imposing of death penalty itself is totally impermissible under the Constitution.

3. Article 10 of the Constitution, a provision on human dignity and value, is not to be automatically violated only because a criminal penalty is to take a penetrator's life, taking into account that capital punishment is implicitly recognised by the Constitution and is not considered to be beyond the constitutional restraint set out in Article 37.2 of the Constitution in restricting right to life. Further, death penalty is sentenced to the offender who ignored warning posed by a criminal penalty and committed a cruel and heinous crime, in a way that reflects the gravity of illegality of the crime and the offender's proper responsibility, and the result of such offender's committing of heinous crime according to his or her own decision. It cannot be acknowledged that a sentence of death infringes offender's human dignity and value by treating the offender as only an instrument for social security of public interest. Meanwhile, it cannot be found that capital punishment is unconstitutional by infringing the human dignity and worth of a judge or a prison officer just because judges or prison officers can feel guilty when they impose or execute such penalty respectively.

III. Dissenting Opinion of 3 Justices

1. Considering its background of introduction and language itself, Article 110.4 of the Constitution was drafted to suppress the sentence of death set forth by

statutes to respect the minimum of human rights. Therefore, aforementioned Section should not be interpreted that it can be a ground for constitutional recognition of capital punishment even in indirect way.

2. The latter part of Article 37.2 of the Constitution is a provision for restriction on fundamental rights and composed of a layered structure with essential and nonessential parts. However, it cannot be applicable to the right to life because the right to life in its nature does not have those two separate parts. The right to life is to be a kind of absolute, fundamental right which cannot be constitutionally restricted because the right to life, conceptually or actually, could not be divided into its essential and nonessential part. Since a deprivation of life includes a deprivation of a person's body, capital punishment infringes the essential aspects of the right to life and bodily freedom. Furthermore, capital punishment is in violation of Article 37.2 of the Constitution articulating the rule of prohibition of excessive restriction of basic rights and in violation of Article 10 of the Constitution by infringing the human dignity and worth of people who are to participate in imposing or executing such death penalty and death-row convict.

Supplementary information:

Note by the Secretariat: The Council of Europe abolished the death penalty in peacetime via the 6th Additional Protocol to the European Convention on Human Rights, opened for signature in 1983. It has been signed by all 47 member states, and ratified by all but one (Russia, which upholds a moratorium on executions). Protocol 13 to the European Convention on Human Rights abolishes the death penalty in all circumstances (including wartime). It was opened for signature in 2002, has been signed by all member states except Azerbaijan and Russia, and has been ratified by 43 member states (the ratifications of Armenia and Poland are still pending).

Cross-references:

Former decision concerning similar issues:

- Decision of 28.11.1996, 95Hun-Ba1, 8-2KCCR *Korean Constitutional Court Report* (Official Digest), 537, 544.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2011-3-002

a) Korea / **b)** Constitutional Court / **c)** / **d)** 25.02.2010 / **e)** 2008Hun-Ma324, 2009Hun-Ba31 (consolidated) / **f)** Real Name Verification of Internet News Site / **g)** 21-1(A) KCCR, *Korean Constitutional Court Report* (Official Digest), 347 / **h)**.

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

4.9.8 Institutions – Elections and instruments of direct democracy – **Electoral campaign and campaign material.**

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

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

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

Keywords of the alphabetical index:

Censorship, internet, anonymous messages / Internet, user, identity, verification, obligation / Internet, provider, identity of users, verification, obligation / Election, internet message board, anonymity, defamation.

Headnotes:

Article 82-6.1, 6.6, and 6.7 of the former Public Official Election Act imposes the duty on the Internet News Site to implement technical measures to identify the real name of internet user and to delete the messages posted without that verification of real name in the instance where his or her message supporting for or opposing to political parties or candidates is posted on the message board or chat room of the Site's homepage during the election campaign period.

Only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the criminal law must accurately construe elements of crime and an offence must be defined so clearly that an individual can know and reasonably foresee from the wording of the relevant provision and, if need be,

with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

Summary:

I. The complainant in 2008Hun-Ma324 case was refused to post her comment of support for or opposition to a political party or candidate on message board of an Internet News Site during the election campaign period for the election of members for 18th National Assembly held on 9 April 2008 due to the failure to follow the verification process of real name. The complainant filed this constitutional complaint on 8 April 2008, arguing her freedom of expression guaranteed by Article 21 of the Constitution was infringed by Article 82-6.1, 6.6 and 6.7 ("Instant Provisions") of the former Public Official Election Act (hereinafter, the "POEA") that hinder her from posting comments on the message board of the Internet News Site during the campaign period without the verification of real names.

The petitioner in 2009Hun-Ba31, a corporation running an Internet News Site, was ordered to implement the technical measure to verify real names of message users on its homepage in accordance with Article 82-6.1 of POEA by the Chair of the competent Election Commission with regard to the 17th Presidential Election held on 19 December 2007. The petitioner did not follow the order, and was charged the administrative penalty of ten million won due to her disobedience to the order. The petitioner filed an objection with ordinary court and during the objection case was pending filed a motion to request for the constitutional review of Article 82-6.1, 6.3 through 7, and Article 261.1 of POEA. After the motion was denied, on 26 February 2009, the petitioner filed this constitutional complaint pursuant to Article 68.2 of the Constitutional Court Act.

II. The Constitutional Court, in a 6 to 2 opinion (One Justice did not participate in this case), found the Instant Provisions constitutional.

Majority Opinion of 6 Justices

The specific scope of Internet News Sites is defined in the related provisions and decided and published by the Deliberative Commission of the Internet Election News established and run by the National Election Commission, which is the independent organ based on the Constitution. In this regard, it cannot be assumed that Internet News Site has doubt whether it is obliged to verify real name or not and that anyone with sound common sense and general legal awareness cannot know whether her message falls into the category of 'the support or opposition

message' or not. Therefore, the rule of clarity is not violated. In addition, it does not violate the principle against prior censorship because Internet users, at least, can post their messages according to their own will without the process of the real name verification.

The Instant Provisions satisfy the legitimacy of purpose and the appropriateness of means because it prevents the social loss and side effects, which arise out of the distortion of public opinion by a small group, and promotes the fairness of the election. The principle of the least restrictive means is also satisfied on the grounds that the fast circulation of malicious propaganda or false facts may distort information due to the nature of the Internet, that the distorted information may not be rectified during the short election campaign period, and that the sign of 'real name verification' only will be appeared on the Internet without indicating real names of Internet users. Therefore, the contested provisions do not violate due process of law, and does not infringe the freedom of expression by violating the principle against excessive restriction and the freedom to perform the occupation.

Further, the freedom of conscience or privacy would not protect the act of posting of messages supporting for or opposing to a political party or candidate on the public message board or chat room of Internet News Sites if the message is voluntarily posted. The obligation to keep and submit real name verification sources stipulated in the Instant Provisions does not intend to collect personal identity information, accordingly the contested provisions do not restrict the right to self-determination on personal information.

II. Dissenting Opinion of 2 Justices

Far from achieving the legislative purpose of the fairness of the election, the Instant Provisions hinder the fairness of the election through their interrupting free forming of public opinion that founds democracy and regulate anonymous expression including valuable one in advance in a comprehensive way.

The scope of 'Internet News Site' may be expanded to infinity, and the scope of restriction is too broad that any supporting or opposing messages can be regulated solely because of the possibility of posting. In particular, despite supporting messages are not generally relevant to slander or defamation, the imposition of duty to the Internet News Site to conduct verification of real name of those who post 'supporting messages' for candidates as opposing messages does not conform with the legislative purpose that intends to prevent the election related crimes such as slander or defamation and therefore excessively restricts the freedom of expression as well. Moreover,

the Instant Provisions violate the principle of least restrictive methods because they restrict anonymous expression itself based on regarding the people as potential criminals by the prior and preventing regulation, placing too much weight on the technical expediency such as investigation convenience or efficient election management, even though there are less restrictive methods as follows: the message board on the Internet can be divided into the real name part and the anonymous part and then a warning message can be put up on the anonymous part; there are existing sanctions such as towards defamation or slander against candidates; and the person posting messages can be identified *ex post*. Further, it cannot be found that the balance between legal interests would be achieved, because the disadvantages from the restriction of freedom of anonymous expression would weigh over the public interest of the fairness of the election, considering that election campaign period is important for the freedom of expression on politics and guaranteeing the freedom of expression is the significant constitutional value founding democracy. Therefore, the contested provisions violate the Constitution by infringing the freedom of expression violating the principle against excessive restriction.

Supplementary information:

Note by the Secretariat: The Council of Europe abolished the death penalty in peacetime via the 6th Additional Protocol to the European Convention on Human Rights, opened for signature in 1983. It has been signed by all 47 member states, and ratified by all but one (Russia, which upholds a moratorium on executions). Protocol 13 to the European Convention on Human Rights abolishes the death penalty in all circumstances (including wartime). It was opened for signature in 2002, has been signed by all member states except Azerbaijan and Russia, and has been ratified by 43 member states (the ratifications of Armenia and Poland are still pending).

Cross-references:

Former decisions concerning similar issues:

- Decision of 29.07.1994, 1993Hun-Ka4, 6-2 KCCR *Korean Constitutional Court Report* (Official Digest), 15, 33;
- Decision of 30.08.2001, 2000Hun-Ma121, 13-2 KCCR *Korean Constitutional Court Report* (Official Digest), 263, 274;
- Decision of 26.05.2005, 1999Hun-Ma513, 13-2 KCCG *Korean Constitutional Court Gazette* (Official Gazette), 105, 666, 672.

Languages:

Korean, English (translation by the Court).

*Identification:* KOR-2011-3-003

a) Korea / **b)** Constitutional Court / **c)** / **d)** 25.03.2010 / **e)** 2008Hun-Ma439 / **f)** Compulsory Attorney Representation in Constitutional Complaint Procedure / **g)** 21-1(A) KCCR, *Korean Constitutional Court Report* (Official Digest), 524 / **h)**.

Keywords of the systematic thesaurus:

1.4.9.3.1 Constitutional Justice – Procedure – Parties – Representation – **The Bar**.

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

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

5.3.13.27.1 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:

Constitutional Court, lawyer, representation, obligatory / Constitutional Court, lawyer, court-appointed.

Headnotes:

The Constitutional Court Act mandates that the complainant shall retain an attorney as a representative for the process of his or her constitutional complaint (Article 25.3 of the Constitutional Court Act).

The court-appointed attorney paid by the nation would be provided when a party is not financially capable to pay attorney fees or when the public interests demand (Article 70 of the Act).

Constitutional complaint is the final procedure to remedy the infringements on the basic rights of the Citizens by the public authority and to protect and maintain the general constitutional orders.

Summary:

I. The complainant, who majored in law at Korean National Open University, filed a constitutional complaint to seek unconstitutionality of Article 148.1 of the Public Official Election Act without designating an attorney at law. The complainant filed another constitutional complaint, presented in this case, on 5 June 2008, alleging that Article 25.3 (“Instant Provision”) mandating the retainment of an attorney infringes on the right to equality of the complainant who is not licensed as an attorney at law; and, by requiring appointment of attorneys without any exceptions even against the complainant who is majoring in law, it violates the right to trial, freedom of learning, and the right of self-determination and general freedom of action implied by the right to pursue happiness.

II. The Constitutional Court held that the Instant Provision does not violate the Constitution when it mandates the representation by an attorney in constitutional complaint procedure, in an opinion of 7 (constitutional) to 2 (unconstitutional).

Majority Opinion of 7 Justices

1. The compulsory attorney representation provides the remedy for the infringement on the basic rights by deleting or reducing the risk of failing to rescue the infringed basic rights in circumstances where the complainant has insufficient legal knowledge and does not fulfil procedural requirements of constitutional proceedings or to present professional opinions and documents.

Public interests gained from the compulsion of attorneys are greater than the limited private of interests of individuals, especially in constitutional complaint cases amongst different types of constitutional adjudications under the following considerations. The court-appointed attorney paid by the nation would be provided when a party is not financially capable to pay attorney fees or when the public interests demand (Article 70 of the Act); a party can present his or her own opinion and documents, exercising his or her right to trial, even he or she is represented by an attorney; and an attorney is designated to assist the exercise of the right to trial of the complainant in nature, not limiting the right to trial; a party can present his or her own opinion and documents, exercising his or her right to trial, even he or she is represented by an attorney, not limiting the right to access to the court. In addition, it is unclear whether allowing exceptions to compulsory attorney representation would curtail attorney fees or improve the efficiency of court proceedings.

III. Dissenting Opinion of 2 Justices

Constitutional complaint is the final procedure to remedy the infringements on the basic rights of the Citizens by the public authority and to protect and maintain the general constitutional orders. However, constitutional complaint proceedings, unlike other proceedings, adopt document-based review in principle, allows oral arguments when their necessities are admitted, and employs *sua sponte* examinations. In other words, strict prerequisite of compulsory attorney representation of the Instant Provision is not appropriate in consideration of the nature and character of the constitutional complaint procedure, and the legitimacy of purpose and the appropriateness of the means of the provision because that pre-requisite may limit the constitutional complainant's right to trial.

Instead of that compulsory attorney representation, the Court can mandate to retain an attorney for the exceptional cases in consideration of the capability of the complainant and the character of the case; the Court also may admit the representative without attorney license for the complainant, if the constitutional court process at issue is not obviously interrupted. Furthermore, the possibility of abuse of constitutional complaints may be prevented by other alternatives, such as the reinforcement of Council of Justices, activation of deposit, or grants for attorney fees; and the complainant's lack of representation may be remedied by a correction of request for adjudication (Article 28 of the Constitutional Court Act) or an order of proof (Article 137 of the Civil Procedure Act). Thus, it would violate the principle of the least restrictiveness to mandate the strict prerequisite of uniform compulsory attorney representation, despite there are other alternatives which are less restrictive to the basic rights as stated above. Besides, the current court-appointed attorney system does not contribute effectively to the protection of the basic rights of the Citizens; thereby it does not justify the compulsory attorney representation. Therefore, the compulsory attorney representation violates the Constitution, not conforming to the nature of constitutional adjudications.

Cross-references:

Former decisions concerning similar issues:

- Decision of 03.09.1990, 89Hun-Ma120, 2 KCCR *Korean Constitutional Court Report* (Official Digest), 288, 293-296;
- Decision of 29.06.2000, 98Hun-Ma10, 12-1 KCCR *Korean Constitutional Court Report* (Official Digest), 741, 748;

- Decision of 27.09.2001, 2001Hun-Ma152, 13-2 KCCG *Korean Constitutional Court Gazette* (Official Gazette), 447, 452-453.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2011-3-004

a) Korea / **b)** Constitutional Court / **c)** / **d)** 28.03.2010 / **e)** 2009Hun-Ma170 / **f)** Deprivation of National Assembly Membership due to Imposition of Fine on his Accounting Officer for Election Campaign Crime / **g)** 21-1(A) KCCR, *Korean Constitutional Court Report* (Official Digest), 535 / **h)**.

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
 5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service**.

Keywords of the alphabetical index:

Election, campaign, crime, committed by accounting officer / Duty to supervise / Liability, joint / Responsibility, individual, principle / Guilt by association, principle / Right to hold public office / Liability, strict / Liability, for other person's acts.

Headnotes:

The Constitution prohibits unfavourable treatment on account of an act not of one's own doing but committed by a relative (Article 13.3 of the Constitution).

An elected candidate can be deprived of his or her position if his or her accounting officer who was in charge of election campaign office has committed a crime related to a contribution act (Article 256 of the former Public Officials Election Act).

Citizens' right to hold public office including the right to be a public officer from election such as National Assembly member is guaranteed by Article 25 of the Constitution stating that "all citizens shall have the right to hold public office under the conditions as prescribed by statutes." The right to run for election and the right to take a public office can be included to the right to hold public office. In addition, the right not to be deprived of the right to take a public office by an arbitrary decision/procedure shall be included into the right to hold public office.

Summary:

I. The complainant, recommended by the Grand National Party as a party candidate, was elected as a member of the 18th National Assembly at Yangsan City, Kyongnam on 9 April 2008. But, the complainant's accounting officer Kim XX, who was in charge of his election campaign office, was indicted for offering illegal compensation to election campaigners who made phone calls to voters asking for support of the complainant in violation of Article 230.1.4 and 135.3 of the former Public Officials Election Act (hereinafter, the "POEA"). On 4 November 2009 the Ulsan District Court sentenced him one year imprisonment and suspension of the sentence for two years and also ordered 160 hours community service (2008KoHap264). Upon this decision, Kim XX appealed but the Busan High Court denied the appeal (2008, no. 856). Consequently, this case was brought to the Supreme Court on 11 February 2009, but the appeal was also denied on 23 June 2009. As a result, the complainant was stripped of his parliamentary membership under Article 265 of POEA ("Instant Provision").

The complainant filed this constitutional complaint on 20 March 2009, arguing that the part of "accounting officer in charge of an election campaign office" in the main sentence of the Instant Provision infringes his right to hold public office and right to trial as it violates the principle of due process under Article 12.1 of the Constitution, the principle against guilt by association, the principle of self responsibility under Article 13.3 of the Constitution and the rule against excessive restriction under Article 37.2 of the Constitution. The subject matter of this constitutional complaint is constitutionality of the part of "accounting officer in charge of an election campaign office" in the main sentence of the Instant Provision (Amended by Act no. 7681, 4 August 2005 but before amended by Act no. 9974, 25 January 2010).

II. In an opinion of 5 (constitutional): 4 (unconstitutional), the Constitutional Court denied the constitutional complaint on the grounds that the Instant Provision neither violates Article 13.3 of the Constitution

mentioned above nor goes against the principle of self responsibility, the principle of due process and the rule against excessive restriction under the Constitution.

Court Opinion of 5 Justices

As Article 13.3 of the Constitution simply applies to the case where a person suffers unfavourable treatment only due to "the reason that he/she is a relative of the one who commits wrongdoing," unless the accountant in charge of an election campaign office is, in principle, a relative to the candidate, the Instant Provision is not against the actual norm of Article 13.3 of the Constitution.

The Instant Provision does not make a candidate jointly responsible for the criminal wrongdoing committed by his accounting officer in charge of his/her election campaign office but simply corrects the result of election based on the objective fact that is detrimental to fairness of election (the crime committed by the accountant). Also, a candidate, who has a duty to ensure fair competition observing POEA, should be responsible for not only his/her own crime but also directing and supervising his/her personnel, at least including his accounting officer, etc., in order to prevent them from committing an election crime. The Instant Provision, however, simply imposes responsibility on the 'act done by the candidate himself/herself,' and therefore, does not violate the principle of self responsibility stipulated in the Constitution.

Unavailability of a separate procedure for candidates to defend him/herself does not amount to violation of the principle of due process or infringement of the right to trial in consideration of the following facts. First, the accounting officer in charge of an election campaign is guaranteed to have trials in the court procedure. Secondly, whether a separate procedure such as an administrative litigation should be provided for candidates is a matter of legislative policy. And, finally, if a separate procedure is provided it becomes difficult to settle election-related matters and raises concerns regarding inefficiency of the court procedure and abuse of the process by the candidate.

The legislative decision that treats the act done by the accounting officer in charge of election campaign office as done by the candidate, viewing the accountant and candidate as one entity that cannot be separated, thereby preventing corruption in election, cannot be considered as being distinctively wrong or unreasonable. Therefore, the system that imposes a joint responsibility on the candidate without recognising any cause of exemption from the responsibility, which is execution of the duty of care under supervision, cannot be regarded as infringing on the candidate's right to

hold public office by imposing excessive restriction and harsh responsibility on the candidate.



III. Dissenting Opinion of 4 Justices

The Instant Provision stipulates strict liability of administrative sanctions depriving a candidate's right to hold public office, which is totally different from civil sanctions that simply impose financial sanctions, and the candidate's right to hold public office, who is a mere third party, is deprived based on the sentence in which the subjective sentencing conditions for the defendant, or the accounting officer in charge of election campaign office, are also reflected, without exception.

The criminal trial of an accounting officer in charge of a candidate's election campaign office is not to decide as to whether the candidate should be deprived of his/her parliamentary membership, but simply to make a judgment on the accountant's criminal act. Moreover, in the case where an accounting officer and a candidate do not share common interests, such as when the accounting officer betrayed the candidate and committed an election offense as stipulated in the Instant Provision, practically, no chance can be provided for the candidate to provide excuse or defence himself/herself.

The Instant Provision, which conclusively deprives a candidate of his/her parliamentary membership without allowing him/her to be possibly exempt from the responsibility by proving that he/she is not responsible for managing or supervising, runs afoul of the Constitution, as it infringes on the candidate's right to hold public office, violating the rule of self responsibility.

Cross-references:

Former decisions concerning similar issues:

- Decision of 12.12.2005, 2005Hun-Ma19, 17-2 KCCR *Korean Constitutional Court Report* (Official Digest), 785, 792;
- Decision of 24.07.2003, 2001Hun-Ka25, 15-2(A) KCCR *Korean Constitutional Court Report* (Official Digest), 1, 22;
- Decision of 24.06.2004, 2002Hun-Ma27, 16-1 KCCG *Korean Constitutional Court Gazette* (Official Gazette), 706, 714.

Languages:

Korean, English (translation by the Court).

Identification: KOR-2011-3-005

a) Korea / **b)** Constitutional Court / **c)** / **d)** 29.04.2010 / **e)** 2007Hun-Ma910 / **f)** Implementation of Qualifying Examinations for Licensed Administrative Agents / **g)** 22-1(B) KCCR, *Korean Constitutional Court Report* (Official Digest), 97 / **h)**.

Keywords of the systematic thesaurus:

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

3.13 General Principles – **Legality.**

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

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

Keywords of the alphabetical index:

Statutory reservation, principle / Administrative agent, licensed, qualifying exam, non-conduct / Exam, conduct, discretion.

Headnotes:

Restriction on constitutional rights is unconstitutional unless it is prescribed by law; it pursued a legitimate aim set out in law; and the means adopted is least restrictive to be proportionate or necessary to achieve such legitimate aim.

A decree which makes public exams dependent on demand to be assessed by mayors or provincial governors restricts the fundamental rights without legal grounds and violates the principle of statutory reservation, and, for this reason, it infringes on the complainant's freedom of occupation.

Summary:

I. The complainant, who had been preparing for the qualifying examination to be licensed administrative agents, inquired about the exam with the relevant ministry, which replied, "the license for administrative agents has been given to experienced public officials, and qualifying examinations have not been, and will not be conducted in the future." In response,

the complainant filed a constitutional complaint challenging the constitutionality of the provision in this case, arguing that Article 4.3 of the Enforcement Decree of the Licensed Administrative Act (“Instant Provision”), which limits the condition for conducting the qualifying exam only to when there is a need in consideration of the supply level of licensed administrative agents, in fact blocks the route to becoming a licensed administrative agent by passing the qualifying exam and thus infringes on the complainant’s occupational freedom.

II. The Constitutional Court unanimously held that the Instant Provision violates the principle of statutory reservation and thus infringes on the freedom of occupation.

The purpose of Article 4 of the Licensed Administrative Agent Act, which states that a licensed administrative agent shall be a person who passes the qualifying examination, is to realise the freedom of occupation in Article 15 of the Constitution through the means of:

1. preventing monopoly of a profession or a line of profession by an individual or a group,
2. providing citizens with better means to define themselves through free competition in the job market by providing the public with a fair opportunity to become a licensed administrative agent and allow those who pass the accredited exam to execute administrative business unless unqualified.

In this sense, granting license for a licensed administrative agent to those who pass the qualifying examination pursuant to Article 4 of the Licensed Administrative Agent Act requires that the test be carried out in a reasonable manner. In this regard, “the subjects and methods of a qualifying examination for licensed administrative agents and other matters necessary therefore” to be prescribed by the Presidential Decree according to Article 5.2 of the Act simply refers to specific methods and procedures related to tests, including their subjects, acceptance criteria, method, period and frequency, but it does not imply that whether to hold the examination itself should also be designated by the Presidential Decree.

The instant provision, nevertheless, stipulates that whether to hold the licensed administrative agent examination is subject to the discretion of Mayor and/or Province Governor and that they can set plans to hold the examination in case there is the need following a necessity review based on the supply status of licensed administrative agents in the competent region, such as the number of fully

exempted persons and those who reported on their administrative business. And this means the test should not necessarily be held when deemed unnecessary by the Mayor and/or Governor. Consequently, the inferior law deprives the public including the complainant of their opportunities to obtain an administrative agent license originally granted by Article 4 of the Act, a superior law, and gives exclusive right to administrative agent business to public officials with a certain level of experience or those experienced and majoring in foreign language.

In other words, the instant provision sets forth the conditions for restriction on fundamental rights of occupational freedom, making an inferior regulation to designate matters not mandated by its parent law. Therefore, the instant provision restricts the fundamental rights without legal grounds and violates the principle of statutory reservation, and, for this reason, it infringes on the complainant’s freedom of occupation.

Supplementary information:

As a consequence of this decision, Article 4.3 of the Enforcement Decree of the Licensed Administrative Act has been repealed on 30 November 2011 and substituted by a provision which requires the Minister of the Public Administration and Security to conduct the qualifying test for licensed administrative agents annually (Article 8.3 of the Enforcement Decree of the Licensed Administrative Act). This revised Decree is supposed to be enforced on 1 January 2013.

Cross-references:

Former decisions concerning similar issues:

- Decision of 15.10.1990, 89Hun-Ba178, 2 KCCR *Korean Constitutional Court Report* (Official Digest), 365, 371-373;
- Decision of 24.04.1997, 95Hun-Ba273, 9-1 KCCR *Korean Constitutional Court Report* (Official Digest), 487, 494-495;
- Decision of 25.04.2002, 2001Hun-Ma614, 14-1 KCCR *Korean Constitutional Court Report* (Official Digest) 410, 431-432;
- Decision of 25.05.2006, 2003Hun-Ma715, 18-1(B) KCCR *Korean Constitutional Court Report* (Official Digest) 112, 121-122;
- Decision of 28.06.2007, 2004Hun-Ma644, 19-1 KCCR *Korean Constitutional Court Report* (Official Digest) 859, 867.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2011-3-006

a) Korea / **b)** Constitutional Court / **c)** / **d)** 27.05.2010 / **e)** 2007Hun-Ba53 / **f)** Landowners' Responsibility for Disposal of Neglected Wastes / **g)** 22-1(B) KCCR, *Korean Constitutional Court Report* (Official Digest), 184 / **h)**.

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

Land, waste, landowner, duty of disposal / Landowner, responsibility for acts of tenant.

Headnotes:

All citizens shall have the right to a healthy and pleasant environment and the State and all citizens shall endeavour to protect the environment (Article 35 of the Constitution).

Article 23 of the Constitution guarantees citizens' rights of property. It also prescribes that "the content and limitation of such property right shall be determined by statutes" and "the exercise of that right shall be in conformity with the public welfare." In addition, Section 3 of that Article allows expropriation, use or restriction of private property for public need if those are prescribed by statute.

Korean citizens may be restricted or obliged in exercise of their property right if necessary for the "efficient and balanced utilisation, development and preservation of land within State's territory" under Article 122 of the Constitution.

The competent authority can order the landowner who had leased his/her land to another person to dispose of the neglected waste on his/her land (Article 45.1 of the Construction Waste Recycling Promotion Act ("Instant Provision") Enacted as Act no. 7043, 31 December 2003; later revised by Act no. 9769 and effective from 10 June 2010) in cases where the landowner has allowed another person to

use his/her own land (Article 44.1 and part of Article 45.3 of the Wastes Control Act).

Summary:

I. Inc., which had leased the land at issue from the petitioners of this case to engage in construction waste disposal business, neglected waste on the site. The competent authority, Mayor of Hwaseong, issued an order to Inc. to take appropriate measures to dispose of the neglected waste, but, as Inc. did not take any action, ordered the petitioners, who are the landowners, to duly dispose of the waste based on the instant provisions.

The petitioners filed a suit against the Mayor of Hwaseong seeking cancellation of the aforementioned order with the ordinary court, and, with the case pending, filed a motion to request for the constitutional review, contesting that the Instant Provision infringed on their property rights. When the motion was denied, along with their claim in the pending case, the petitioners filed this constitutional complaint.

II. The Constitutional Court unanimously decided that the instant provisions of the Construction Waste Recycling Promotion Act and Wastes Control Act which empower the competent authority to order the landowner to appropriately dispose of neglected wastes in case the landowner has allowed another person to use his/her land do not contradict the Constitution.

The legislative purpose of the instant provision is to control the generation of wastes and adequately dispose of them, thereby promoting environmental protection and quality improvement in people's lives. The legitimate purpose is served by the Instant Provision, and it is an effective means to achieve the said legislative purpose to extend the duty of waste disposal to the owners of the land with neglected wastes as well as the primary polluter.

Pursuant to the instant provisions, the landowner assumes the responsibility to dispose of neglected wastes in certain cases, not always, where the landowner wilfully leases the land or permitted land use to others and thereafter the tenant actually fails to fulfil his/her responsibility to manage the neglected waste. Even when the landowner him/herself shoulders the cost of disposal, he/she can claim repayment from the tenant who caused the generation of wastes. Therefore, the restriction on fundamental rights by the instant provisions is hardly an excessive measure given the social accountability inherent in the exercise of property rights.

The State's imposition of certain responsibility on the landowner will make it difficult for him/her to sign lease agreements with tenants lacking waste disposal abilities and thus contribute to the protection of environment. At the same time, it is also necessary for the landowner him/herself to take care of the neglected waste on his/her own land.

If the responsibility for neglected wastes is confined to the primary polluter (tenant) and if, otherwise, the State and local governments are held responsible, wastes can easily be neglected and their disposal may not be carried out in a timely manner. Eventually, this can result in an unreasonable consequence in which the public which is not responsible for the neglect takes over the enormous cost of disposal. Above all, the relevant statutory provisions stipulate a performance guarantee system for neglected wastes and impose the duty of primary disposal of wastes on the waste disposal operator.

Finally, considering that the anticipated public interest in environmental protection far outweighs the disadvantages that landowners suffer due to the Instant Provision, it shall not be deemed that the instant provision excessively violated the constitutional property rights by imposing the responsibility of neglected waste disposal on landowners who have leased their land to other persons.

Cross-references:

Former decisions concerning similar issues:

- Decision of 24.12.1998, 89Hun-Ba214, 10-2KCCR *Korean Constitutional Court Report* (Official Digest), 927, 944-945;
- Decision of 21.10.1999, 97Hun-Ba26, 11-2 KCCR *Korean Constitutional Court Report* (Official Digest) 383, 406-407;
- Decision of 29.08.2002, 2000Hun-Ma556, 14-2 KCCR *Korean Constitutional Court Report* (Official Digest) 185, 198;
- Decision of 30.07.2009, 2007Hun-Ba110, 21-2(A) KCCR *Korean Constitutional Court Report* (Official Digest) 197, 211.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2011-3-007

a) Korea / **b)** Constitutional Court / **c)** / **d)** 27.05.2010 / **e)** 2008Hun-Ma663 / **f)** Perusal or Duplication of Defaulters' List / **g)** 21-1 (B) KCCR, *Korean Constitutional Court Report* (Official Digest), 323 / **h)**.

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

Keywords of the alphabetical index:

Defaulters' list, perusal and duplication / Right to self-determination, information, personal.

Headnotes:

The privacy of no citizen shall be infringed (Article 17 of the Constitution).

Article 72.4 of the Civil Execution Act that stipulates any person can request for perusal or reproduction of the defaulters' list.

Restriction on constitutional rights is unconstitutional unless it is prescribed by law; it pursued a legitimate aim set out in law; and the means adopted is least restrictive to be proportionate or necessary to achieve such legitimate aim.

Summary:

I. The names of complainants remain on the defaulters' list due to their failures of payment even after the court's final judgment of such payment. Against that listing, the complainants filed this constitutional complaint, alleging that Article 72.4 of the Civil Execution Act ("Instant Provision") that allows any person, despite she may not have any interest with the debtors, to peruse or reproduce the defaulters' list violates the Constitution because it infringes on the right to privacy of Article 17 of the Constitution.

II. The Constitutional Court, in an opinion of 4 (constitutional): 5 (unconstitutional), held that the Instant Provision does not infringe the right to self-determination on personal information of complainants who are on the defaulters' list, not violating the principle of excessive restriction and rejected the complaint.

Court Opinion of 4 Justices

The indirect compulsory performance of obligation and the safety of transaction, intended by the Instant Provision, are legitimate legislative purposes. The perusal or reproduction of the defaulters' list by the public is also a reasonable means to pursue such purposes because it may indirectly enforce those unfaithful debtors to voluntarily fulfil their obligations by making them in fear of taking disadvantages including damages on their reputation or credibility from being on the defaulters' list; and the instant provision may contribute to the safety of transaction because the perusal of the defaulters' list can be a means of credit check of the transaction party.

The instant provision, not limiting the qualification for the perusal or reproduction of the defaulters' list, intends the efficacy of indirect compulsory payment of debts through the mental pressure upon debtors. Even if the provision allows the perusal or reproduction of the defaulters' list only to a person who can make a proof of his or her financial relationship with those defaulters, such proof would be merely the confirmation of the potential possibility of the formation of transactions because a person who is willing to peruse the defaulters' list is generally not the one who has already established transactions such as conclusion of contracts with debtors, but the one who would create transactions after checking the credits of debtors: As a result, such restrictions on availability of that list would not cause any substantial differences, compared to the instant provision that does not limit the qualification for the perusal or reproduction of the defaulters' list. Besides, the risk of the infringement on the right to self-determination on personal information through the perusal or reproduction of debtors by an irrelevant person would be not significant in that the instant provision does not disclose the defaulters' list to the public aggressively, but allows the perusal or reproduction of the defaulters' list to a person who wants to peruse or reproduce the defaulters' list; the perusal or reproduction of the defaulters' list requires the specific information on the debtors, such as names and social resident registration number; and the practice requires an applicant to write down his or her qualification at the time of perusal or reproduction request.

The risk of abusing the duplicated list would not be substantial because: the nature of the defaulters' list system itself requires a disclosure to the public; the reproduction is merely accompanied by the perusal, which does not newly infringe the right to self-determination on personal information of those listed debtors; Article 72.5 of the Civil Execution Act stipulates that the defaulters' list shall not be

published by means of printed copies, etc; and defamation, slander, or business disturbance would be punished under criminal law. Therefore, the means used by the instant provision does not excessive to achieve the legislative purpose, thereby confirming to the principle of least restrictiveness.

The instances where debtors are listed on the defaulters' list are limited to the cases when those debtors' reputation and credit should be harmed due to their own unfaithfulness. Thus, the public interests of the indirect compulsory performance of obligation and transaction safety intended by the instant provision overweigh the private interests of the protection of personal information of debtors listed in the defaulters' list, suggesting the instant provision does not violate the principle of balance of interests.

II. Dissenting Opinion of 5 Justices

The disclosure of default of debtors to the irrelevant third party through the perusal of the defaulters' list is rarely effective in indirect compulsory performance of obligation because its probability is significantly low and it is a merely conceptual or abstract defamation. Rather, the indirect compulsory enforcement by the disclosure of the default of the debtor would be effective when the debtor faces the formation of economic activities or transactions. Because the transaction party of the debtor is specified at this stage, the legislative purpose would be sufficiently achieved by allowing the perusal or reproduction of the defaulters' list only to such specified person.

Even from the perspective of the perusing or reproducing person, it would be hardly considered that an irrelevant person wants to peruse or reproduce the defaulters' list; and even if there is such a case, the necessity to allow such disclosure would be rarely admitted. Because the credits of the debtor are generally matter only after the economic activities or transactions with the debtor are matured, the legislative purpose, the safety of transactions, would be achieved even when the perusal or reproduction of the defaulters' list is only allowed to the person who has been proven to be related to the defaulter. Therefore, the instant provision violates the principle of least restrictiveness in that it permits the perusal or reproduction of the defaulters' list to the public without any restrictions of qualifications for the perusal and reproduction of those list; and violates the principle of balance of interests in that the risk of the infringement of the right to self-determination on personal information of debtors is more significant than the pursued public interest.

Cross-references:

Former decisions concerning similar issues:

- Decision of 26.05.2005, 99Hun-Ma513, 17-1 KCCR *Korean Constitutional Court Report* (Official Digest) 668, 682-683;
- Decision of 29.10.2009, 2008Hun-Ma257, 21-2(B) KCCR *Korean Constitutional Court Report* (Official Digest) 372, 400-401.

Languages:

Korean, English (translation by the Court).



Mexico

Electoral Court

Important decisions

Identification: MEX-2011-3-007

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 02.11.2011 / **e)** SUP-JDC-9167/2011 / **f)** The Cherán Case / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

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

4.9.3.1 Institutions – Elections and instruments of direct democracy – Electoral system – **Method of voting.**

5.2 Fundamental Rights – **Equality.**

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

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

Keywords of the alphabetical index:

Election, electoral right, protection / Election, local / Minority, ethnic, indigenous / Minority, electoral privilege / Minority, representation.

Headnotes:

Article 2 of the Federal Constitution recognises that an indigenous community constitutes a cultural, economic and social unit, settled in a territory and that recognises its own authorities, according to their own uses and customs.

Additionally, Article 2.A.III of the Constitution recognises and protects indigenous peoples' right to self-determination and, consequently, the right to autonomy so that they can "[E]lect, in accordance with their traditional rules, procedures and customs, their authorities or representatives to exercise their

own form of government, guaranteeing women's participation under equitable conditions before men, and respecting the federal pact and the sovereignty of the States and the Federal District.”

Summary:

I. On 6 June 2011, 2,312 *Purépecha* indigenous inhabitants of the community of San Francisco Cherán – located in the state of Michoacán, Mexico – presented a claim to the Electoral Institute of Michoacán to request that their municipal (local) elections be held under the system of uses and customs instead of the electoral system of political parties established in the local Constitution of that federal entity. However, the Electoral Institute of Michoacán determined that it lacked the competence to solve this case and denied admission of the petition submitted by the people of San Francisco Cherán.

Therefore, the claimants initiated a *per saltum* action and presented a Proceeding for the Protection of the Political and Electoral Rights of Citizens to the Electoral Court of the Federal Judiciary.

II. The High Chamber of the Electoral Court revoked the statement of the Electoral Institute of Michoacán and favoured the petitions of the claimants. The argument of the Court considered that both the Federal Constitution and the C169 Indigenous and Tribal Peoples Convention of the International Labour Organisation (ILO) guarantee indigenous collectivities complete access to justice considering their traditional rules, procedures and customs if these duly respect constitutional principles.

With this determination of autonomy, the necessity to eliminate any technical or factual obstacle that could impede or inhibit the exercise of indigenous communities to complete access to justice was recognised. The Electoral Court also established that no federal entity can remain indifferent regarding the obligations derived from the recently reformed Article 1 of the Constitution, which states that all individuals shall be entitled to the human rights granted by the Constitution and the international treaties signed by Mexico, as well as to the guarantees for the protection of these rights. Thus, every federal entity has to abide by national and international instruments that are binding on the Mexican state and that require recognition and protection of the ethnic and cultural diversity of indigenous peoples.

These issues regarding the relevance of compliance with international treaties of human rights are in line with paragraph 239 of the decision of the European Court of Human Rights in *Ireland v. The United Kingdom* (judgment of 18 January 1978) which specifies that “[u]nlike international treaties of the classic kind, the [European] Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which [...] benefit from a ‘collective enforcement’”.

Consequently, the Electoral Court determined by majority that the people of the community of San Francisco Cherán had the right to request the election of their own authorities following their rules, procedures and traditional practices.

III. Electoral Justice Flavio Galván, in a dissenting opinion, considered that neither the General Council of the Electoral Institute of Michoacán nor the Electoral Court were competent to solve the claims presented by the people of San Francisco Cherán. The body that, in his opinion, should have solved this question was the Congress of Michoacán, inasmuch as it has the attributions to modify the electoral system from a political party model to one governed by the uses, traditions and customs of the indigenous population.

Opinion presented by: Chief Electoral Justice José Alejandro Luna Ramos.

Cross-references:

European Court of Human Rights:

- *Ireland v. The United Kingdom*, 18.01.1978, Series A, no. 25; *Special Bulletin Leading Cases – ECHR* [ECH-1978-S-001].

Languages:

Spanish.



Identification: MEX-2011-3-008

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 23.11.2011 / **e)** SUP-RAP-451/2011 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969.**

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

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

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

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

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

Keywords of the alphabetical index:

Reply, right / Legislative omission / Media, right to reply.

Headnotes:

The Federal Electoral Institute can issue regulations in order to remedy the failure of the legislative power to regulate the right of reply in electoral matters, which is guaranteed in Article 6 of the Constitution.

Summary:

I. In 2007, a reform added the right of reply in electoral matters to Article 6 of the Constitution and stated that it was to be exercised in accordance with the law. However, at the time of the decision, the legislature had failed to establish a regulatory framework. On 23 June 2011 the Federal Electoral Institute (hereinafter, the “Institute”) approved its Rules of Denunciation and Complaint (hereinafter, the “Rules”) which included provisions (Transitory Article 4) that regulated the right of reply in electoral matters. On 6 July 2011, a TV broadcasting station named ‘*Televisión Azteca*’ (hereinafter, the “TV station”) challenged the Rules arguing that the

Institute had surpassed its authority and usurped legislative powers. The TV station also adduced that, considering that the right of reply is a limitation of the freedom of expression, it should be codified by the legislator so as to avoid arbitrary measures.

II. The Electoral Court analysed the content and legal scope of the right of reply by analysing Article 6.1 of the Constitution, Articles 11 and 14 ACHR and Article 17 of the International Covenant on Civil and Political Rights; and studied the implications of the right of reply in electoral matters for the media and mass communications. The Electoral Court took into account the Advisory Opinion OC-7/85 of the Inter-American Court of Human Rights and stated that it is compulsory to adopt legislative measures necessary to give effect to the right of reply. Therefore, considering that the legislative power failed to regulate the right of reply, the Electoral Court determined that the Institute did not usurp powers and confirmed the validity of the Rules.

III. Electoral Justice Maria del Carmen Alanis, in a partly dissenting opinion, considered that the right of reply in electoral matters should not be regulated and sanctioned in the same manner as the right of reply in other matters where it constitutes a remedy. Therefore, it should not be regulated within the Rules.

Opinion presented by: Electoral Justice Salvador O. Nava Gomar.

Languages:

Spanish.

**Identification:** MEX-2011-3-009

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 12.12.2011 / **e)** SUP-RAP-535/2011, SUP-RAP-536/2011, SUP-RAP-538/2011, SUP-RAP-543/2011, SUP-RAP-544/2011 and SUP-JDC-12633/2011 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

- 3.10 General Principles – **Certainty of the law.**
- 3.13 General Principles – **Legality.**
- 3.21 General Principles – **Equality.**
- 4.9.8.3 Institutions – Elections and instruments of direct democracy – Electoral campaign and campaign material – **Access to media.**
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
- 5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication.**
- 5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**

Keywords of the alphabetical index:

Legislation, regulation, scope / Media, legislation, election period / Regulation, compatibility, assessment / Regulation, law, conformity.

Headnotes:

After several challenges to the amended Rules of Access to Radio and Television in Electoral Matters, these were modified to preserve general principles of certainty of the law, legality, and equality.

Summary:

I. On 27 October 2011, the General Council of the Federal Electoral Institute approved a reform of several precepts of the Rules of Access to Radio and Television in Electoral Matters (hereinafter, the “Rules”) through Agreement number CG 353/2011.

In disagreement with several of these amendments, on 4 November 2011 the three main parties in Mexico (the Revolutionary Institutional Party (PRI), the National Action Party (PAN) and the Party of the Democratic Revolution (PRD)), the concessionaries of two radio stations (XEXM-AM and XEPOR-AM), and Mr Javier González Rodríguez presented, respectively, Appeal Resources and a Proceeding for the Protection of the Political and Electoral Rights of Citizens (in the case of Mr González) to challenge the reform of some of the aforementioned precepts.

The main issues they disagreed on referred to questions of:

- a. Certainty of the law – i.e. the PAN argued that the terminology which defines the usage of “days” in Article 5.1.c.V of the Rules was not clear considering that there should be an addition that reads “during the federal electoral

processes, all hours and days are business days and hours”. PAN argued that the fact that the term “days” was defined as “calendar days, unless there is an express disposition that states that these should be considered as business days” was unclear, incomplete and violated the principle of equality regarding the periods for parties to define terms for emitting notifications.

- b. Legality – i.e. the PRI argued that restricting the content of media access of parties that will not hold pre-campaigns to generic party messages was unlawful since neither the Constitution nor the Election Code provides for this limitation, because the Rules would thereby impose further restrictions which transcend its scope.
- c. Equality – i.e. the PRI argued that Article 15.5 of the Rules could allow that, by any cause, the authority could deny pre-candidates their right to realise pre-campaigns.

II. The Electoral Court of the Federal Judiciary, by a unanimous decision, decided the following:

- Even though it did not consider it necessary to make further clarifications in Article 5, established that Article 40 should specify that “all days and hours are to be considered business days”;
- Article 15 was modified inasmuch as the Rules should not include a limitation to restrict the content of media access of parties in case they were not holding a pre-campaign contest;
- Dismissed the argument that the equality amongst parties would be affected by the denial to realise pre-campaigns, since the restriction is consistent with the provision of the Election Code that at least two pre-candidates are needed to hold a pre-campaign contest.

Opinion presented by: Electoral Justice Pedro Esteban Penagos López.

Languages:

Spanish.



Moldova

Constitutional Court

Important decisions

Identification: MDA-2011-3-004

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 18.10.2011 / **e)** 19 / **f)** Constitutionality review of some provisions of the Law no. 48 dated 26 March 2010 on amending and supplementing certain legislative acts / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution.**

2.1.1.4.2 Sources – Categories – Written rules – International instruments – **Universal Declaration of Human Rights of 1948.**

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

2.1.1.4.9 Sources – Categories – Written rules – International instruments – **International Covenant on Economic, Social and Cultural Rights of 1966.**

3.21 General Principles – **Equality.**

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

Keywords of the alphabetical index:

Subvention (allowance) / Referral, competence / Budget, allocation / Constitutional Court, decision, execution / Protection, social, state / State, duty to protect / Social security, system.

Headnotes:

According to Article 47 of the Constitution, the State shall take actions to ensure that every person and his/her family are provided a decent standard of living, health protection and welfare. The social assistance includes food, clothing, shelter, medical care, and necessary social services. A system of social security shall be in place to protect a person's right to be socially secured in case of unemployment, illness, disability, widowhood, old age, or other

vulnerable situations when he/she is unable to earn a living due to certain circumstances beyond his/her control.

As guaranteed by the State, every citizen possesses the right to social insurance. This right is based upon principles of uniqueness, equality, social solidarity, obligation, contributiveness, distribution, and autonomy, as enshrined in Article 3 of the Law on the System of Public Social Security.

Article 46 of the Constitution stipulates the guaranteed right to private property. The right to death indemnity or single allowance for dismissal, as required by law, constitutes a property right under Article 1 Protocol 1 ECHR and, implicitly, under the terms of Article 46 of the Constitution. Practice denotes that states enjoy a certain margin of appreciation in protecting these rights.

Summary:

I. The Constitutional Court was requested by MPs Messrs Vladimir Voronin, Serghei Sirbu, Iurie Muntean, Igor Dodon and Artur Reșetnicov to review the constitutionality of some provisions of the Law no. 48 of 26 March 2011 on amending and supplementing certain legislative acts. The contested provisions of Articles V, VII, X, XIX and XXX of the Law no. 48 of 26 March 2011 on amending and supplementing certain legislative acts (M.O. no. 53/114, 2011) include the following:

1. The amount of certain unique social benefits was modified:

- a. Death grants for militaries and persons from army corps command and internal affairs bodies, judges and security and intelligence officers; and
- b. Unique redundancy indemnities for customs employees.

2. The status of Superior Council of Magistracy staff was changed.

The applicants claimed that the contested legislative amendments had significantly and unreasonably decreased the protection and social guarantees of the persons concerned. Moreover, the amendments are incompatible with the provisions of Articles 1.3, 7, 15, 16, 18, 43, 46, 47, 54 and 126 of the Constitution. The applicants also alleged that the amendments are also in contravention to Article 7 of the Universal Declaration of Human Rights, Article 2.2 of the International Covenant on Economic, Social and Cultural Rights, and Article 1 ECHR.

II. Having heard the parties' arguments, the Court acknowledged that the State enforces a legislation that provides for automatic payment of social benefits. Regardless if the provision of these benefits depends on prior contribution payments, the legislation should be considered as a patrimonial interest, which is assimilated to a propriety right.

Yet, the Court emphasised that states have broader discretion in this area. Therefore, state authorities are entitled to assess some situations and may adopt measures that would limit the guaranteed rights as long as states respect the principles of legality, proportionality and legitimacy of the pursued aim. In this context, the Court mentioned that economic crisis or financial hardships would be inadmissible if they were invoked to restrict fundamental rights and freedoms.

In this case, the Court accepted the Government's argument that interference with a property right, which resulted from the reduction of the social benefits amount, serves the general interest by ensuring the consistency of the social protection system.

In this context, the Court held that although persons covered by the challenged norms will receive less of the disputed social benefits, they were not fully deprived of the benefits. Hence, the Court concluded that the contested norms do not give rise to the suppression of some rights and under circumstances of the case, this reduction does not affect the livelihood of people and does not impose an excessive and disproportionate burden in relation to the legitimate interests of the community, as invoked by authorities. Hence, the reduction is compatible with the protection of property.

The Court also noted that regardless of the funding source – state budget or state social insurance budget – all social benefits provided by law are part of the social protection system. Thus, the Court concluded that by the contested norms, the Parliament ensured observance of the principles of equality and uniqueness stated in the Law on the Public System of Social Insurance. Following the changes, the amount of death grants for the respective categories of persons shall be established annually by the Law on the Public System of Social Insurance and the unique redundancy indemnities shall be based on the rules applicable to all public servants.

At the same time, the Court ruled that regarding people who receive death grants and unique redundancy indemnities, the right to work is already exhausted because, by definition, they had already

been guaranteed the right to work, free choice of labour, just and favourable conditions of work, as well as protection against unemployment.

Regarding the status change of the Superior Council of Magistracy staff, the Court held that the contested amendments are of technical and legal nature, since they exclude collisions between competing norms governing the same legal relations of remuneration. Consequently, the judges assigned to the Superior Council of Magistracy staff retain their quality of magistrate, with all guarantees inherent to this status and other people have the status of public servants. Concurrently, the Court found that individuals of the Superior Council of Magistracy staff who enjoy the status of public servants shall benefit from the guarantee to keep the amount of salary payments after the enforcement of the Law no. 355-XVI of 23 December 2005 on payroll system in the budgetary sector for the period of activity in a respective budgetary institution in the same function or in a more advanced one. Thus, the contested rules do not affect the previously acquired rights. In this context, the Court concluded that the contested norms ensure observance of the principle of equity between the categories of employees in public service.

Based on the arguments invoked above, the Constitutional Court recognised the constitutionality of the provisions of Articles V, VII, X, XIX and XXX of the Law no. 48 of 26 March 2011 on amending and supplementing certain legislative acts. The judgment of the Constitutional Court is final, cannot be subject to any appeal, shall enter into force upon adoption, and be published in the Official Gazette (*Monitorul Oficial*) of the Republic of Moldova.

Languages:

Romanian, Russian.



Identification: MDA-2011-3-005

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 20.10.2011 / **e)** 21 / **f)** On interpretation of Article 46.3 of the Constitution / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution.**

3.21 General Principles – **Equality.**

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

Keywords of the alphabetical index:

Ownership right / Civil servant.

Headnotes:

Article 46 of the Constitution guarantees everyone the right to private property. No assets legally acquired may be confiscated, and the legal nature of the assets' acquirement shall be presumed.

The principle of equality presupposes that all people are equal before the law, in that they are and should be just as legally and socially responsible. This means there must be no discrimination before moral, social and legal responsibility neither for any person nor for state bodies or any public or private servants.

Summary:

I. The complaint was lodged at the Constitutional Court on 5 April 2011 under Articles 25.1.c of the Law on the Constitutional Court and 38.1.c of the Constitutional Jurisdiction Code by the Minister of Justice Mr. Oleg Efrim. The Court was requested to clarify whether the presumption of legal acquirement of assets set out in Article 46.3 of the Constitution equally protects the property of public servants and other persons remunerated from the state budget.

The applicants asserted that the Constitution neither provides that the assets acquired shall enjoy a presumption of legality nor represent an absolute right. The applicants referred particularly to Articles 46.3, 54.2, 55, 56.2, 127.1 and 127.2 of the Constitution.

II. From the complaint, the Court stated that the issue was whether the burden of proof can be reversed in the case that public servants and other persons remunerated from the state budget cannot prove that their assets were legally acquired and hence may be subject to confiscation. In such case, the assets should not enjoy the presumption that it was legally acquired until contrary proof of its holder, thus relieving the state represented by state prosecutor from the burden of proving the illegality of obtained revenues.

In this regard, the Court held that the complaint referred to a set of elements and principles of interconnected constitutional values, such as protection of property, presumption of innocence, security of legal relations in the context of the fight against institutional corruption and organised crime.

The Court asserted that the state has a dominant position in relation to individual and possesses the necessary means to look into the illegal nature of acquired assets. The state also has other established mechanisms to verify whether the assets belonged to public servants and officials through the system of income statements.

The Court recognised that state instruments to combat corruption and organised crime were not always perfect. The Court's assertion was made irrespective of other articles invoked in the complaint, which were offered to raise the issue of interference in property rights in Article 46.3 of the Constitution, which provides that the acquired assets should enjoy a presumption of legality. In this context, the Court claimed that there was no reason to exclude public servants or other persons paid from the state budget from the rule.

The Court emphasised that according to Article 1.3 of the Constitution, the Republic of Moldova is a state governed by the rule of law, democracy in which human dignity, its rights and freedoms represent supreme values that shall be guaranteed.

In this context, the Court mentioned that according to Article 54.1 of the Constitution, laws shall not be adopted that suppress or diminish fundamental human and citizens' rights. In the same sense, Article 142.2 of the Constitution provides that no revision shall be allowed if it results in the suppression of the fundamental rights and freedoms of citizens. Therefore, the Court noted that it could not suppress a guarantee of a constitutional right.

The Court held that by trying to revise Article 46 of the Constitution, the legislators clearly intended to apply that constitutional guarantee to civil servants and other persons paid from the state budget, too. Therefore, the Court concluded that the complaint's underlying request dealt with a veiled attempt to complete the Constitution, which was legally inadmissible.

The Court underlined that the principle of presumption of legal nature of property acquirement was a norm of substance, which could not be touched and changed through interpretation. In this context, the Court stated that neither the textual interpretation nor the functional interpretation filled a purportedly missing element in the Constitution and therefore the

complaint was not only lacking constitutional foundation but was contrary to the text and spirit of the Constitution.

Based on the arguments invoked above, the Constitutional Court decided that in terms of Article 46.3 from the Constitution, the constitutional principle of presumption of legal acquirement of assets establishes a general protection applying to all persons, including public servants and other persons remunerated from the state budget. The judgment of the Court is final and cannot be subjected to any remedies.

Languages:

Romanian, Russian.



Identification: MDA-2011-3-006

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 25.10.2011 / **e)** 22 / **f)** Constitutionality review of Article IX.2, IX.3, IX.5 and IX.7 of the Law no. 48 of 26 March 2011 on amending and supplementing some legislative acts and of Article 20.a, 20.b, 20.d, 20.f and 20.l from the Law no. 52 of 31 March 2011 on the State Budget for the year 2011 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

2.2.2.2 Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law.**

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

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

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

4.10.2 Institutions – Public finances – **Budget.**

Keywords of the alphabetical index:

Budget, control / Budget, law / Authority, delegation / Law, authority, source / Principle, legislative process, application / Responsibility, authorities.

Headnotes:

One of the Parliament's basic functions is approving and exercising control over the state budget. This includes exercising control over the granting of state loans and economic aid domestically and to some foreign states, as well as making agreements on loans and state loans from foreign sources.

According to Article 130.1 of the Constitution, the law specifies the formation, administration, utilisation and control of the state's financial resources, of the administrative/territorial units and of public institutions.

The Government shall annually draft the state budget and the state social insurance budget, which shall be separately passed to Parliament for approval. In the event of formation of extra-budgetary fund, it shall be also submitted to Parliament for approval (Article 131.2 of the Constitution).

The Law on Budgetary System and Budgetary Process provides for the increase of budget deficit relating to entries and use over provisions approved in the budget of loans for projects financed from external sources (ratified by Parliament). Also, the Law also allows for the use of balances from previous years of the loans financed from external sources (ratified by Parliament) and from grants, donations, sponsorships entered into possession of public institutions, which shall be done separately without changing the annual budgetary law.

By adopting the Law on the State Budget for the year 2011, Parliament authorised the Ministry of Finance to carry out a series of actions using financial resources of the state budget.

Summary:

I. The complaint was lodged by a group of Members of Parliament, requesting the Constitutional Court to review the constitutionality of the provisions of Articles 9.2, 11.5.b, 36.5 and 43.2¹ of the Law on Budgetary System and Budgetary Process, as well as the provisions of Article 20.a, 20.b, 20.d, 20.f and 20.l of the Law on the State Budget for the year 2011.

According to the challenged provisions of the Law on Budgetary System and Budgetary Process, public authorities may make additional expenditures unforeseen in the annual budgetary law. This can be carried out through loans for projects financed from external sources, grants, donations and sponsorships. The loans are made to the public institutions, not included in the approved budget, and not amended in the Parliament's annual state budget.

These provisions allow for the budget deficit to increase as a result of entries and loans approved for projects financed from external sources (ratified by Parliament).

By Article 20 of the Law on the State Budget for the year 2011, Parliament authorised the Ministry of Finance to perform a series of actions to use financial resources of the state budget.

From the complaint, the challenged provisions effect the powers of Parliament and violate the constitutional procedures for managing the budgetary deficit. By these rules, the Government and the Ministry of Finance were granted the right to rectify the state budget, without the approval of Parliament. Thus, the challenged provisions authorising the use of public financial resources without Parliament approval run counter to the competence and procedures of formation, administration, utilization and control of financial resources of the state.

II. The Court held that the contested norms cover in essence two aspects:

- a. Possibility of public authorities to make expenditures not included in the budget approved by Parliament; and
- b. Competence of Parliament and the Ministry of Finance on the use of financial resources of the state budget.

Regarding the alleged violation of Parliament's competence and constitutional management procedures of budgetary deficit (Articles 130 and 131 of the Constitution), the Court found that the destination and the use of loans, grants, donations or sponsorships from external financial sources not included in the approved annual state budget have been made through financial agreements. These agreements constitute a category of international treaties and therefore have been ratified by organic laws respecting the requirements foreseen by Article 130.1 of the Constitution.

The Court addressed the duties conferred upon the Ministry of Finance by Article 20 of the Law on the State Budget for the year of 2011 and the applicant's allegation of breach of Articles 60, 66, 72, 130 and 131 of the Constitution. The Court held that the functions delegated by the legislator to one of the executive components are not related to the regulation of administration process and not related to the use of state financial resources but only related to their administration under the law. Because the annual budget law covers the contested provisions, the Court determined that the constitutional stipulations were met. That is, the regulation of those

processes had been carried out only by law and the budgetary expenditure should be approved only after establishing the source of funding. In the same context, the Court found that powers delegated to the Ministry of Finance did not authorise it to make financial expenses without establishing the respective financial resources nor to admit increase of approved budgetary deficit.

After analysing the disputed provisions, the Court concluded that the powers conferred on the Ministry of Finance through the annual budgetary law were not aimed at increasing the annual budgetary deficit but at increasing the efficient management of savings realised in the process of budgetary execution. Hence, the Court stated that by Article 20 of the Law on the State Budget for the year of 2011, the Parliament did not transfer its competencies to approve and control the execution of the state budget because the Ministry of Finance could not change the balance of payments or the state budget deficit.

The Court also noted that by adopting the contested budgetary financial amendments, the essence of budgetary control performed by the Parliament was not affected.

According to legislative history of the Law on Budgetary System and Budgetary Process and the Law on Annual Budget, representatives of the Parliament and Government intended to simplify tax administration, strengthen and improve utilization of public financial resources and encourage internal and external donors to invest in the economy of the Republic of Moldova.

The Court noted that the increasing complexity of modern societies in light of the economic crises has given rise to the need for governments to consider flexible institutional mechanisms to manage the economy. In this context, the Court mentioned that Parliament's role was to focus on policy that addresses main problems of society rather than technical ones.

Based on the above, the Court considered that the legal provisions by which the Parliament delegated certain powers to the Ministry of Finance did not violate the principle of separation and collaboration between powers in the state and hence, consistent with the articles of the Constitution raised by the applicants.

III. Dissenting opinion:

Judge Elena Safaleru: A judge disagreed with the Court's judgment and in a dissenting opinion said that Parliament admitted increase of budgetary deficit in connection with entries and use of over budget

approved provisions on loans for projects financed from external sources (ratified by Parliament), entered into possession of public institutions without modifying separately the annual budget law, thus violating the provisions of Article 131.5 of the Constitution.

The dissenting opinion emphasises that ratification laws of credit agreements (international treaties) cannot be considered as laws governing administration, use and control of the financial resources of the state, public institutions, which are overriding under Article 130.1 of the Constitution.

Following the amendments to the Law on Budgetary System and Budgetary Process, the Ministry of Finance, which has the role to synthesise and coordinate the budgetary process, has become an institution of lawmaking processes and budgetary policies. This task belongs to the Parliament, and hence this practice infringes upon the principle of separation of powers and their collaboration in a state.

However, these changes, claimed by the author in her dissenting opinion, are contrary to the principles of universality and unity of budget.

Languages:

Romanian, Russian.



Identification: MDA-2011-3-007

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 09.11.2011 / **e)** 23 / **f)** On interpretation of Article 116.4 of the Constitution / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution.**
 3.4 General Principles – **Separation of powers.**
 4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment.**
 4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**

Keywords of the alphabetical index:

Supreme Judicial Council, appointment process, role / Separation of powers, checks and balances.

Headnotes:

A fundamental principle of the rule of law is the separation of powers, which refers to distinct and unique duties distributed to and exercised by different and independent branches of government to avoid the concentration of all power in the hands of a single authority. Article 6 of the Constitution provides that the Legislative, Executive and Judicial Powers are separate and shall cooperate to carry out assigned prerogatives pursuant to the provisions of the Constitution.

Under the powers conferred upon them, each power of government exercises a number of tasks without any interference from the other powers. According to the principle of separation of powers, none of the three powers shall prevail over the others, be subordinated to each other and assume the specific prerogatives of the other.

Summary:

I. The case originated in the complaint lodged at the Constitutional Court on 10 October 2011 by the Member of Parliament (MP) Mrs Raisa Apolschii on the interpretation of Article 116.4 of the Constitution, which provides that “The President, Vice-Presidents and judges of the Supreme Court of Justice shall be appointed by Parliament following a proposal submitted by the Superior Council of Magistracy”.

The applicant underscored that the Constitution and the law stipulate that judges, the President and Vice-Presidents of the Supreme Court of Justice shall be appointed by Parliament only following a proposal submitted by the Superior Council of Magistracy. An appointment by Parliament without such proposal would compromise the role of the Superior Council of Magistracy as a constitutional organ of judicial self-administration and guarantor of judiciary independence. It would also compromise the Superior Council of Magistracy’s competence under Article 123 of the Constitution to ensure the appointment of judges, the President and Vice-Presidents of the Supreme Court of Justice, as well as the right of these persons to be appointed.

II. The Court acknowledged that the separation of powers is neither rigid nor absolute, reasoning it would lead to bottlenecks and institutional imbalances. Therefore, the principle of separation of powers takes

the form of limitations placed on independent public authorities, each authority assigned distinct duties and expected to cooperate with the other powers while being subjected to peer review in carrying out their functions.

The principle of institutional balance, known today as “checks and balances,” is based on democracy. The range of each power is checked and limited by the other powers, which prevents the abuse of power by one authority. This counterbalance system represents a *sine qua non* condition of modern democracy, preventing omnipotence of the legislative on the executive or the judiciary.

Thus, the appointment and dismissal of judges require participation of at least two authorities. Upon the appointment of judges, each authority participate through the following ways:

- a. The Superior Council of Magistracy ensures appointment of judges to office by selecting candidates and submitting nominations to the President and the Parliament, as appropriate; and
- b. The President and the Parliament, based on their duties, shall proceed by appointing judges proposed by the Superior Council of Magistracy.

Because the Parliament and the Superior Council of Magistracy must act jointly to fulfil the mission of appointing judges, the Court noted that it makes sense that their cooperation led to the creation of the Parliamentary Commission on Appointments and Immunities. Thus, the system is conceived based on a common constitutional task of the Superior Council of Magistracy and the Parliament.

Selection of judges, the President and Vice-Presidents of the Supreme Court of Justice is an internal and exclusive activity of the Superior Council of Magistracy. It is an intrinsic element of the principle of the judiciary’s independence.

Therefore, the constitutional provisions refer to the organising and functioning of the Superior Council of Magistracy and the Supreme Court of Justice. They were based on the favourable report drawn up by the Parliamentary Commission on Appointments and Immunities, which considered all the legal dispositions in force regarding whether the proceedings were followed. As such, the Parliament has a constitutional duty to vote for candidates proposed by the Superior Council of Magistracy to serve as judges.

Article 116.4 of the Constitution specifies that Parliament is responsible for nominating judges, a duty that complies with the constitutional principle of separation and collaboration of powers in a state. If Parliament did

not comply with its obligation, its intervention in the process of appointing would undermine the values, rules and constitutional principles on separation of powers and judicial independence.

If a candidate does not qualify for a judge appointment, the Court stated that the provisions of Article 116.4 of the Constitution shall apply by means of law; that is, a President or Vice-Presidents of the Supreme Court of Justice shall be promoted through legal ordinances.

The Court reiterated the principle value that the proposals of the Superior Council of Magistracy cannot be binding on a collegial body such as Parliament because each MP is free to vote according to his/her own conviction.

Taking into account the principle of separation and collaboration of powers in a state and the independence of the judiciary, the Parliament shall follow the legal provisions in case it will not proceed with the appointment of a candidate at the respective proposal of the Superior Council of Magistracy.

The Parliament and the Superior Council of Magistracy share the common constitutional task of appointing candidates to office and during their collaboration, they must comply with legal provisions.

The provisions of Article 116.4 of the Constitution were developed by legal provisions, in which lawmakers had a 30-day deadline to appoint judges, the President and Vice-Presidents of the Supreme Court of Justice.

This term may be extended only by 15 days or until the beginning of the session, only in the event of circumstances that require further examination or in case of parliamentary recess upon notification of the Superior Council of Magistracy. Hence, the deadline of 30 days established by law for appointment by Parliament is restrictive and not extensive.

Given the constitutional principle of legality in a state of law, the Parliament is constitutionally obligated to meet the deadline set by law and expected to act quickly upon examination of the Superior Council of Magistracy because the functionality of the judiciary depends upon it.

Regarding dismissal mechanism, the Court reiterated that in case of constitutional or legal regulation of appointment procedure, it is not absolutely necessary to settle the procedure of dismissal. It is presumed, such that the removal presupposes a more complicated procedure than appointment or at least an equivalent one.

Based on the above arguments, the Constitutional Court decided that under Article 116.4 of the Constitution, the Parliament's decision is an indispensable act for the accession of candidates proposed by the Superior Council of Magistracy to the offices of judge, President and Vice-Presidents of the Supreme Court of Justice, the acts of those two authorities – Superior Council of Magistracy and the Parliament – being interdependent.

The Court ruled that the term in which the Parliament should decide on the appointment of judges, the President and Vice-Presidents of the Supreme Court of Justice after submission of the respective proposal by the Superior Council of Magistracy is fixed by law and hence restrictive. Parliament has the constitutional obligation to observe it and violation of this term represents the legislative power's obstruction of the judiciary's function.

The Court also held that dismissal of judges, the President and Vice-Presidents of the Supreme Court of Justice for whatever reason should be examined by Parliament under conditions and terms foreseen for their appointment.

Languages:

Romanian, Russian.



Identification: MDA-2011-3-008

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 15.11.2011 / **e)** 24 / **f)** On exception of unconstitutionality of Article 38.3, 38.6, 38.7 and 38¹².2 of the Law no. 550-XIII dated 21 July 1995 on Financial Institutions with subsequent amendments and completions / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution.**

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

5.1.1.5.1 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Private law.**

Keywords of the alphabetical index:

Licence, revocation / Bank / Ownership right / Legal person, liquidation / Insolvency.

Headnotes:

Legislative rules limiting the right to property is allowable, provided they serve a public interest and are proportionate to the pursued interest. Regulations set on bankruptcy procedures do not constitute a deprivation of goods but rather a reflection of the general interest.

Summary:

I. The complaint was lodged at the Constitutional Court on 18 May 2011 by the Supreme Court of Justice on the exception of unconstitutionality of Article 38.3, 38.6, 38.7 and 38¹².2 of the Law no. 550-XIII of 21 July 1995 on Financial Institutions, raised in the dossier 3r-932/10 pending before the Supreme Court of Justice.

The case pending before the Supreme Court of Justice refers to the license withdrawal on 19 June 2009 by the National Bank of Moldova of the license to conduct financial activities of the Commercial Bank (hereinafter, "CB") "Investprivatbank" JSC in connection with the insolvency of the bank. On 17 July 2009, the companies Tabor Projects Limited, Brendelco Limited, Karaka Holdings Limited, Karo Holdings Limited, Kauri Holdings Limited, SC PSV Company JSC representing 55% of the shares of CB "Investprivatbank" JSC filed the lawsuit against the National Bank of Moldova (accessories interveners of the CB "*Banca de Economii*" JSC and the Government of the Republic of Moldova) concerning the appeal of the administrative act and compensation for material damage.

The author of the referral underscored that withdrawal of a bank license by the National Bank of Moldova rather than a court violates the ownership right and the right of access to justice. Such action is incompatible with Articles 1, 6, 16, 20, 46, 53, 54 and 127 of the Constitution.

II. After hearing the parties' arguments, the Court held that it would exercise its prerogative to resolve exceptional cases involving constitutional issues raised by the Supreme Court. The Court will examine the constitutionality of the challenged legal norms, focusing on the specific circumstances of the main dispute. The Court will also take into account the principles enshrined both in the Constitution and domestic law, as well as international law and case-law of the European Court of Human Rights.

Upon considering the constitutional provisions and the European Convention of Human Rights, the Court asserted that property right is not absolute. The legislature may establish rules on the use of property as long as they serve a public interest and are proportionate to the pursued interest. In this context, the Court stated that bankruptcy procedure regulation is not a deprivation of goods but rather an organising of their valuing in general interest.

For some issues of great social importance, such as the stability of the banking system, the Court asserted that the state enjoys a wider margin of discretion. The state's discretionary authority includes the right to establish regulations. In this context, the Court acknowledged that the National Bank has been vested with the power to withdraw licenses and initiate liquidation of a bank under default aimed to avoid panic and potential exodus of depositors from the financial system, to protect depositors' interests, to ensure the secrecy of deposits and to reduce the negative impact on the entire financial system.

The Court pointed out that national legislation did not grant exclusive right to the judiciary on matters of liquidation or insolvency of legal entities. Current legislation allows for dissolution with liquidation proceedings outside of judicial proceedings, too. In this context, the Court noted that within the framework of insolvency proceedings, an involvement of the court does not necessarily imply the intervention of a judicial authority. The court must be understood broadly and includes a person or an organ empowered by national legislation to open insolvency proceedings or to take decisions during this procedure.

The Court concluded that the administrative nature of a bank's liquidation procedure does not violate the guarantees of property right because the decisions delivered in that proceeding can be appealed.

Regarding the shareholders' right to initiate legal action on behalf of the company, the Court held that under specific circumstances of the case, it followed that CB "Investprivatbank" JSC was a legal entity distinct from its shareholders. Holding that distinct identity, CB "Investprivatbank" JSC concluded private transactions with its customers. Consequently, the bank has the responsibility for its obligations, namely, and not for its shareholders, regardless of whether bank's shareholders are or not part of its management bodies.

In this context, the Court held that company shareholders, including majority shareholders, cannot claim to be victims of alleged violations of the commercial company. The commercial company may

claim possible violations only in its own name through organs set up in accordance with its constituent documents. Shareholders' right of access to justice, on behalf of the company's legal entity, shall be justified only in exceptional circumstances, when it is clearly impossible for the company to seek justice through its statutory bodies. Accordingly, in case of liquidation procedures, the companies subjected to this procedure have access to justice through their liquidators.

The Court also held that the exception of unconstitutionality of the legal norm, which established a total quota of 25% of shares to sue, was raised by the Supreme Court at the request of a group of shareholders of the CB "Investprivatbank" JSC who held a total of over 55% of shares. For this reason, the Court concluded that this rule had no relevance for the dispute pending before the Supreme Court of Justice.

The Court found that the right to request a cancellation by a judicial act might be subject to formal conditions as if they had pursued a legitimate aim. The requirements are necessary in a democratic society and proportionate to the pursued aim. In this regard, the Court stated that the liquidation of a bank as a result of insolvency provided by law is intended to compensate its creditors promptly and safely, as well as avoid the possible repercussions of insolvency for the entire banking system of the country.

In this situation, the law expressly provides that if it was found that the National Bank illegally ordered the liquidation of a bank, it has already become an irreversible process. Instead, the National Bank must fully compensate the material damage, including of the lost profit for the whole period during which this bank would have existed.

In that order, the Court held that the challenged provisions are not disproportionate in relation to legitimate aims of protecting the rights of creditors and ensuring proper management of the bank under liquidation.

The Constitutional Court rejected the exception of unconstitutionality raised by the Supreme Court of Justice and recognised the constitutionality of Article 38.3, 38.7 and 38.2 of the Law no. 550-XIII of 21 July 1995 on Financial Institutions. At the same time, the Court ceased the process of constitutionality review of Article 38.6 of the same Law. The Judgment of the Constitutional Court is final, cannot be subjected to any remedies, shall enter into force upon adoption and be published in the Official Gazette (*Monitorul Oficial*) of the Republic of Moldova.

Languages:

Romanian, Russian.

*Identification:* MDA-2011-3-009

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 08.12.2011 / **e)** 25 / **f)** Constitutionality review of Articles 25.1, 26 and 27 items 1 and 7 of the Law no. 64-XII, 31 May 1990 on Government in the wording of the Law no. 5, 12 January 2011 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

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

4.6.2 Institutions – Executive bodies – **Powers.**

Keywords of the alphabetical index:

Government, policy programme / Legislative power / Prime Minister, authority, scope / Principle, pluralism.

Headnotes:

The Constitution's principle of supremacy is based on the controlling position of the Fundamental Law within the hierarchy of the legal system. This generates constitutional supra legality, applicable to the entire system. As such, the law expresses the general will only by observing the constitutional norm.

The provisions of Articles 72.3.d and 97 of the Fundamental Law enshrine the principle of regulatory parliamentary autonomy, applicable to the Government's organising and functioning. Parliament develops constitutional norms by organic law on its organising and functioning under these provisions.

The Prime Minister's co-ordination of the Government members' activities under Article 101.1 of the Constitution refers to the political dimension of their implementation of governance programs. This is correlated with the solidary political responsibility enshrined in Article 101.3 that allows the Government to leave office *in corpore* in the event the Prime Minister resigns.

The Prime Minister's competence to issue dispositions for the Government's internal organisation is established in Article 102.5 of the Constitution.

Summary:

On 8 December 2011, the Constitutional Court ruled on the constitutionality of provisions in Articles 25.1, 26, 27 items 1 and 7 of the Law no. 64-XII, 31 May 1990 on Government regulating the formation and activity of the Government Presidium (complaint no. 26a/2011).

The Liberal Democratic Party lodged the complaint at the Constitutional Court on 1 August 2011. The applicants included Tudor Deliu, Valeriu Streleț, Gheorghe Mocanu, Grigore Cobzac, Nae-Simion Pleșca, Elena Frumosu, Maria Nasu and Lilia Zaporozjan, under Article 135.1.a of the Constitution, Article 25.1.g of the Law on the Constitutional Court and Article 38.1.g of the Constitutional Jurisdiction Code. They sought the Court to review the constitutionality of Article 26 of the Law no. 64-XII, 31 May 1990 on Government regulating the formation and activity of the Government Presidium.

The applicants claimed that the Government Presidium has no constitutional basis and is fully an instrument to subvert and/or substitute the Prime Minister and the Government's decision-making tasks. As such, the contested provisions are contrary to Articles 1.3, 96.1, 97, 101.1 and 102.5 of the Constitution.

In this context, the Court held that the Fundamental Law enshrined the principle of parliamentary autonomy regulations, which apply to government organising and functioning. Under this principle, the Parliament develops constitutional norms by organic law for it to organise and function.

Thus, the Court set aside political issues regarding the appropriateness of the measures and their effects. The Court concluded that although the formation of the Presidium is not based on a constitutional norm, that does not by itself render it unconstitutional. The possibility that Parliament – as primary legislative authority – can legalise the Government Presidium means the measure is legislative in nature.

As to the competences of the Government Presidium, the Court noted that the criticised rules referred to:

- a. proposal of draft agenda for Government's meetings;

- b. coordination of internal activities of the Government; and
- c. examination of the Prime Minister's proposals to stimulate or apply some disciplinary sanctions against a Government Member.

Regarding the Government's agenda, the Court concluded that based on the analysis of the disputed text:

- the draft agenda approved by the Presidium has a proposal value; and
- the final decision lies with the Government.

Consequently, although the Presidium's draft agenda can only be formed by a small circle of Government members, their right to decide on the appropriateness and contents of the agenda is discretionary. During its meetings, the Cabinet of Ministers can rule on proposals to amend or supplement the agenda.

The Court addressed the rules establishing the Presidium's approval by consensus of the draft agenda for Government meetings. The Court noted that they substitute the previous rules, which the Prime Minister had unilaterally approved. This rule is more likely than the current one to cast doubts on political partisanship in promoting certain initiatives.

The Court also held that the Government Presidium was set up following negotiations between leaders of parliamentary groups to form the Government, which in principle respects the Parliament's political configuration. Thus, in natural connection with the Government formation, the Presidium, by the composition of its structure, offers policy options within Parliament that ensure political support to the Government. Therefore, the Prime Minister has leverage to influence the composition of the governmental team and implicitly, the composition of the Presidium. The reason is that Article 98.2 of the Constitution states that the candidate for the office of Prime Minister shall request within 15 days following its designation a vote of confidence by Parliament over the activity program and the entire list of Government, including the Vice Prime Ministers, who are part of the Presidium.

The Court noted that a coalition governance under political pluralism and multiparty system need permanent cooperation between exponents of its various components. As such, it is important for the components to collaborate and engage in activities to "temper" their dominance tendencies that could lead to replacing constitutional democracy with dictatorship.

The Court rejected the applicants' argument that the challenged norm would be contrary to Article 101.1 of the Constitution, which states that the Prime Minister shall exercise the leadership of the Government and shall coordinate the activity of its members, while abiding by the powers delegated to them.

In the Court's view, it is obvious that the challenged legal rule and the invoked constitutional norm refer to different subjects. The constitutional norm concerning the Prime Minister's competence aims at "(Government) members" as individual exponents whereas the legal rule on the Presidium's competencies concerns "the Government" as a peer entity.

In this regard, the Court noted that the Prime Minister coordinates the Government members' activity under Article 101.1 of the Constitution, which constitutes the political dimension of their activities to implement government programs. This is carried out in conjunction with the joint political responsibility enshrined in paragraph 3 thereof, which provides for resignation *in corpore* of the Government in the event that the Prime Minister resigns.

In terms of stimulating or applying some disciplinary sanctions against a government member, the Court analysed the text of the challenged legal norm, concluding that it establishes a discretionary competence and an alternative to the Prime Minister to submit proposals to the Government Presidium or the President of the Republic of Moldova.

For these reasons, the Court concluded that this mechanism could not be classified as a procedure to ignore the constitutional competences of the Prime Minister or to block the Government's activity, formation and competences of the Government Presidium. This is worded in Law no. 5, 12 January 2011, which remains within constitutional limits and corresponds to the institutional system provided by the Constitution.

During the examination of the referral subject, the Court noted the existence of contradictions in the legal rules regarding an absent Government member who delegates a representative at the Presidium and Government meetings. Thus, pursuant to Article 26 of the Law on Government, in the absence of Presidium member, another Government member shall be delegated to fully participate in the Presidium meeting. This is permissible, provided it is in accordance with Article 21 of the Act, and the Minister and implicitly the Deputy Prime Minister are assisted by one or more vice Ministers who shall replace him /her in case of impossibility to perform duties.

In this context, under Article 79 of the Constitutional Jurisdiction Code, the Court determined that the legislature must address these issues.

Languages:

Romanian, Russian.



Identification: MDA-2011-3-010

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 20.12.2011 / **e)** 27 / **f)** Constitutionality review of some laws on amending conditions of securing pensions and other social payments insurance for certain categories of employees / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State.**

3.11 General Principles – **Vested and/or acquired rights.**

3.21 General Principles – **Equality.**

3.23 General Principles – **Equity.**

Keywords of the alphabetical index:

Allocation, social, state / Pension, insurance, principle / Judge, retirement, allowance.

Headnotes:

The State has wide discretion in the field of social rights. The Constitution does not guarantee people a specific level of social insurance. The amount of social insurance that a person can receive over a minimum necessary level, including pensions granted under special conditions, may be exceptionally modified depending on the means of the state social insurance budget and state budget. Article 47 of the Constitution guarantees a minimum of social security provided to all persons to balance the social strata of the population. State-offered social facilities to certain categories of people, with whom it has special working relationships, do not constitute the object of the norm in question. They are mostly imposed in the sphere of additional liabilities assumed by the state.

Summary:

The Constitutional Court reviewed the constitutionality of some provisions that would tighten early or beneficial retirement conditions by successively modifying pensions insurance conditions and social payments for certain categories of employees. The provisions would apply to the President of the Republic of Moldova, Members of Parliament, Members of Government, judges, prosecutors, civil servants, local elected officials, military, and people in the army command body and interior troops organs.

In particular, the provisional changes focused on: gradually increasing the general or special term of contribution for early acquisition or general conditions of entitlement, increasing the retirement age, and lowering the pension amount and single or lifelong allowance.

The applicants claimed that by changing the retirement conditions, the social rights of certain categories of public employees would be restricted, violating principles of the Constitution. Specifically, they allege that the provisions are contrary to the right to assistance and social protection, guarantees to exercise the right of ownership and other principles enshrined in Articles 1, 6, 7, 15, 16, 18, 22, 46, 47, 54, 116, 121 and 126 of the Constitution.

The Court noted principles that define the state's social character, particularly the principle of legal certainty, but added that these principles are not absolute. The state cannot protect a person from being disappointed by retirement conditions or other social payments because the state cannot reliably maintain them in some situations. In this respect, the Court held that any added value to the minimum of state social guarantees could be created by a person on his/her own. Compliance with the challenged laws' restrictive measures would lead to special retirement conditions, where employees covered by pension laws will continue to benefit from more favorable retirement conditions compared with other categories of employees.

It was mentioned in the judgment that amendments made by the challenged legal norms did not diminish the minimum means of subsistence necessary for a person to live in dignity. These rules have reduced an added value (in relation to general ones) of social guarantees granted to certain categories of employees. The facilities are mostly related to administrative-contractual labour relationships between special categories of employees and the state, where a part of the contractual terms are regulated by law. In this case, these are retirement conditions included in the contract with social safeguards clauses. In this view, the decrease of special retirement conditions does not

represent the object of social safeguards protection provided by Article 47 of the Constitution.

The Court also addressed the provision that increased the general length of women's service contribution from 30 to 35 years upon reaching the retirement age of 57 years. For women who started working after the age of 22 years, they will not be able to accumulate the general length of service contribution of 35 years. As a result, they will not acquire the full right to a pension ($57-35 = 22$). The Court regarded the contribution length of 35 years for women as disproportionate because it was not correlated with the general retirement age of 57 years. The Court ascertained that because it is impossible for women with a higher education to accumulate the general length of service contribution of 35 years by the age of 57 years old, the legal norm did not offer women by retirement a minimum of social security guaranteed by Article 47 of the Constitution.

The Court held that only the right to a pension in payment for a determined economic value, as opposed to a simple hope to maintain retirement conditions in the future, constituted a person's right to property. Thus, the Court found that the challenged rules did not raise issues of compatibility with the protection of property under Article 46 of the Constitution.

Taking into account the principle of judicial independence, the Court separately examined the issue of changing conditions for granting early pensions and other social payments to judges and prosecutors.

At the same time, the Court held that a prosecutor's status is distinct from that of a judge. Because prosecutors do not have the same volume of inherent guarantees of judicial independence under the status of magistrate, the tightening of the prosecutors' retirement conditions does not contradict constitutional norms. A judge's independence is based on the quality of the magistrate and not on his/her title. Appointment of the Prosecutor General by Parliament, subordination of prosecutors to the Prosecutor General and their nomination by him/her without consent of the Superior Council of Magistracy constitute factors that do not allow prosecutors' employment among magistrates. Prosecutors do not become automatically judges when the Superior Council of Prosecutors participate in their appointment procedure. Yet, just as there cannot be two independencies at the level of older institutions, there cannot be two institutions that guard the independence of magistrates. Thus, placement of the Public Prosecutor institution in Chapter IX of the Constitution

"Judicial Authority" does not enable prosecutors to automatically acquire the status of magistrate. This fact does not allow the status of prosecutors to be viewed in terms of the principle of independence of justice and the judge, as stipulated by Article 116 of the Constitution.

Both rulers and people should recognise that the judge who should ultimately decide over life, liberty and human rights must have a material independence and a sense of security about his /her future, besides high professionalism and impeccable reputation. Remuneration of judges is one of the guarantees of a judge's independence. Certain restrictions on material and social insurance for judges, both previous ones as well as those contested without equivalent compensations, are interpreted by the Court as interference in the independence of judges.

The statistical data and the country's ranking as the third in Europe according to economic growth rate do not support the idea that the state is in a deep economic crisis. As such, the situation did not justify imposing austere economic measures of a scale that would interfere with the basic link of the rule of law – the independence of judges.

Thus, the Court concluded that out of the contested norms, the establishment of the general length of service contribution for retirement at the age of 35 years for women and of norms changing the way of retirement and other social guarantees of judges are contrary to the Constitution. In other aspects, the challenged norms were recognised as constitutional.

Languages:

Romanian, Russian.



Netherlands

Council of State

Important decisions

Identification: NED-2011-3-008

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 30.11.2011 / **e)** 201010838/1/T1/H3 / **f)** X v. the Minister for the Interior / **g)** *Landelijk Jurisprudentienummer*, LJN: BU6382 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

1.4.7.2 Constitutional Justice – Procedure – Documents lodged by the parties – **Decision to lodge the document.**

4.11.3 Institutions – Armed forces, police forces and secret services – **Secret services.**

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:

Administrative procedural law / Cognisance, restriction.

Headnotes:

The right to adversarial proceedings is not only applicable to criminal law disputes, but also to cases on the determination of civil rights.

Summary:

I. X (a citizen) had successfully applied for a confidential function at an airport. However, his contract ended once it became clear that X would not be granted a certificate of no objection by the Minister for the Interior. X lodged objections, which were dismissed. X then appealed to the District Court, which found for the Minister. Finally, X appealed to the Administrative Jurisdiction Division of the Council of State, arguing *inter alia* that his right to access to court under Article 6 ECHR had been violated.

II. Under the General Administrative Law Act, parties who are obliged to provide information or submit documents may, if there are compelling reasons,

refuse to provide such information or submit such documents or inform the court that it alone may take cognizance of the information or documents concerned. It is for the court to decide whether the refusal or restriction on the cognizance is justified. However, the Intelligence and Services Act 2002 provides that where cases were covered by that Act, as the present case was, only the intelligence service and not the court could decide on that justification.

The Administrative Jurisdiction Division of the Council of State cited case-law from the European Court of Human Rights, holding that this case-law relating to the right to adversarial proceedings in criminal law disputes is also relevant to cases concerning the determination of civil rights, such as the present case. Should national security be at stake, refusals to provide information or to submit documents are only justified if the court has jurisdiction to adjudicate upon their necessity and justification, taking into account the nature of the matter concerned and the residual options available for parties to obtain the information required. In the light of recent case-law from the European Court of Human Rights, the Administrative Jurisdiction Division of the Council of State did not follow its own previous case-law, but held that it could not give judgment on the basis of evidence without first reviewing the necessity and justification for the Minister's refusal to provide the information requested by X.

Under Article 94 of the Constitution the courts may not apply provisions of Acts of Parliaments in cases brought before them, if these provisions are not in conformity with self-executing provisions of treaties and of decisions of international organisations. The Administrative Jurisdiction Division of the Council of State therefore held that in this case the relevant provision of the Intelligence and Services Act 2002 could not be applied, since it was not in conformity with Article 6 ECHR and that the regular provisions of the General Administrative Law Act should instead be applied. It reopened the examination of the case in order to decide on the justification of the restriction on cognizance.

Cross-references:

- Administrative Jurisdiction Division of the Council of State, 13.06.2007, no. 200606586/1.

European Court of Human Rights:

- *Güner Çorum v. Turkey*, no. 59739/00 of 31.10.1996;
- *Steel and Morris v. United Kingdom*, no. 68416/01 of 15.02.2005;

- *A v. United Kingdom*, no. 3455/05 of 19.02.2009;
- *Mirilashvili v. Russia*, no. 6293/04 of 05.06.2009.

Languages:

Dutch.



Peru Constitutional Court

Important decisions

Identification: PER-2011-3-002

a) Peru / **b)** Constitutional Court / **c)** Plenary / **d)** 19.07.2011 / **e)** 00032-2010-PI/TC / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

2.2.1.3 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and other domestic legal instruments.**

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

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:

Health protection / Health, protection, workplace / Health, public / Tobacco, product / Freedom of enterprise, restriction / Personality, free development.

Headnotes:

Article 3 of Law no. 28705 – General Act for the prevention and control of the risks of tobacco consumption (hereinafter, the “General Act”) – prohibits the consumption of tobacco in all enclosed public places, thus forbidding the existence of exclusive establishments for smokers and the consumption of tobacco in the open areas of adult education establishments. The provision affects the right of smokers to the free development of personality, the rights of free private initiative and freedom of enterprise.

After ratification of the World Health Organization (WHO) Framework Convention on Tobacco Control, all States parties are required to adopt a series of measures to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.

Consequently, this regulation is not only a constitutionally valid regulation, but is required by an instrument of international law and the obligation to protect the right to health.

Summary:

I. The plaintiffs brought a constitutional claim against certain aspects of the prohibitions in Article 3.1. of the General Act on the basis that they constitute a violation of the fundamental right to free development of personality, free private initiative and freedom of enterprise.

They did not seek to annul the contested provision, but rather sought a declaration by the Court that the prohibition in the provision on smoking “in enclosed public places” does not include those establishments exclusive for smokers and that the prohibition on smoking “in establishments devoted (...) to education” does not include the open areas of these establishments that are for adults.

The plaintiffs also alleged that the disputed provision “manifestly affects the rights of free private initiative and freedom of enterprise, because it establishes an absolute prohibition on having exclusive establishments for smokers, with no objective reason”.

The prohibition on creating public places exclusively for smokers and on smoking in open areas of all institutions devoted to adult education, by reducing the consumption of tobacco, is also intended to reduce the high costs generated for the State care of the diseases that consumption causes to the smoker and the savings may be viewed as connected to the primary duty of the State to “ensure full respect for human rights” (Article 44 of the Constitution).

Four organisations were accepted as amici curiae: the Public Interest Law Clinic of the Law School of the Pontificia Universidad Católica del Perú; the O’Neill Institute for National and Global Health Law of the Law School of the University of Georgetown; Campaign for Tobacco Free Kids; and Alliance for the Framework Convention.

They argued that persons can smoke, but that such activity cannot affect the rights of those who work in public places. Considering that all institutions dedicated to education serve as centres for the awareness and sensitisation of the population, they contended that the absolute prohibition on smoking in these establishments is in harmonisation with the WHO Framework Convention on Tobacco Control. It was also argued that the adopted measure supports the protection of young people against tobacco.

II. By Legislative Resolution no. 28280, published on 17 July 2004, Congress approved the WHO Framework Convention on Tobacco Control.

The Constitutional Court has held, on more than one occasion, that “international treaties on human rights not only make our laws, but also hold a constitutional value (SSTC 0025-2005-PI, 0005-2007-PI).

The Court was fully satisfied that the WHO Framework Convention on Tobacco Control is a human rights treaty and that the technical criteria on which the plaintiffs relied to sustain the contrary simply confirmed this thesis rather than invalidating it.

The WHO Framework Convention on Tobacco Control requires States parties to adopt a series of measures “to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.” (Article 3). The obligations imposed by the Convention are only a bare minimum, since nothing prevents the state from adopting more stringent measures in order to protect as much as possible the fundamental right to health.

Consequently, restricting smoking with the objective of protecting the consumer’s own health is a constitutionally valid purpose.

So far, it has been established that the prohibitions on creating public places solely for smokers, and smoking in open areas of all institutions devoted to adult education:

- a. limit the content of constitutionally protected fundamental rights to the free development of personality, free private initiative and freedom of enterprise;
- b. are intended to immediately reduce the consumption of tobacco and as mediated purposes, to protect the health of smokers themselves and reduce the institutional costs generated by health care for serious illnesses caused by tobacco consumption;
- c. such purposes are not only constitutionally valid, but there is also an obligation on the State to reduce continually and substantially the consumption of tobacco.

The argument that absolute prohibitions on smoking in enclosed public places, and in all institutions devoted to education, contribute to reduce the consumption of tobacco in society, was not contradicted by the plaintiffs.

For these reasons, the Constitutional Court dismissed the claim as unfounded.

III. In a separate opinion, Judge Beaumont Callirgos and Judge Eto Cruz stated that the freedom of enterprise and free private initiative, like the right of property, are fundamental rights that are affected in this case. Some enclosed public places (i.e. restaurants, malls, discotheques) will reduce their incomes and their expectations caused by the reduction of consumers (smokers). Therefore, rather than the constitutionality of the challenged provisions, the municipalities and parliament should be encouraged, setting in their respective fields, compensation measures (reduction of some taxes, benefits, for example) that can compensate business owners to some extent for their expectation of profit when they began such businesses legitimately authorised by the State.

In a separate opinion, Judge Alvarez Miranda was of the view that it is possible to harmonise the fundamental rights of those involved (smokers, non-smokers and businesses that provide recreational services to smokers) because there are alternative measures that would enable such harmonisation.

So long as the neighbour who does not smoke is not harmed, there is not a constitutionally valid justification to restrict the right to free development of personality of smokers, or the right to free private initiative and freedom of enterprise of those who invest in satisfying consumers who demand public places of entertainment where you can smoke, especially if they contribute to the growth of the country paying taxes and creating jobs.

For this reason, the claim must be declared unfounded.

Languages:

Spanish.



Poland

Constitutional Tribunal

Statistical data

1 September 2011 – 31 December 2011

Number of decisions taken:

Judgments (decisions on the merits): 18

- Rulings:
 - in 7 judgments the Tribunal found some or all of the challenged provisions to be contrary to the Constitution (or other act of higher rank)
 - in 11 judgments the Tribunal did not find the challenged provisions to be contrary to the Constitution (or other act of higher rank)
- Initiators of proceedings:
 - 2 judgments were issued upon the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
 - 1 judgment was issued upon the request of Members of Parliament
 - 1 judgment was issued upon the request of the National Chamber of Notaries
 - 5 judgments were issued upon the request of courts – the question of legal procedure
 - 8 judgments were issued upon the request of individuals (natural persons) – the constitutional complaint procedure
 - 1 judgment was issued upon the request of a legal person – the constitutional complaint procedure
- Other:
 - 3 judgments were issued by the Tribunal in plenary session
 - 1 judgment was issued with a dissenting opinion

Important decisions

Identification: POL-2011-3-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 16.03.2011 / **e)** K 35/08 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2011, no. 64, item 342; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2011, no. 2A, item 11 / **h)** CODICES (English, Polish).

Keywords of the systematic thesaurus:

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

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

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

3.15 General Principles – **Publication of laws.**

4.5.4.3 Institutions – Legislative bodies – Organisation – **Sessions.**

4.6.2 Institutions – Executive bodies – **Powers.**

4.7.4.1.1 Institutions – Judicial bodies – Organisation – Members – **Qualifications.**

4.7.11 Institutions – Judicial bodies – **Military courts.**

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

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

5.1.5 Fundamental Rights – General questions – **Emergency situations.**

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

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

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

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

Keywords of the alphabetical index:

Communist regime / Martial law, decree.

Headnotes:

Each instance of interference with rights guaranteed in the regulations which were in force prior to 17 October 1997 constitutes interference with the

same rights being subject to constitutional guarantees which have been binding since that date.

The Council of the State, which under Article 30.1.3 of the Constitution of the People's Republic of Poland was an organ of public authority obliged to "ensure conformity of the law with the Constitution", issued the Decrees contrary to Article 31.1 of the Constitution.

The Decree on Martial Law and the Decree on Special Proceedings impinged on the principle of non-retroactivity of law, expressed in Article 15.1 of the International Covenant on Civil and Political Rights.

During the period between 13 December 1981 and the date of enactment, the Decrees under examination were not part of the Polish legal system; they had not been enacted and were therefore not binding.

The principle of dignity of the person implies the widest and most effective protection of constitutional rights and freedoms. This refers not only to the infringement of rights which occurred after the enactment of the present Constitution, but also to the infringement of constitutional rights which took place before its entry into force.

Summary:

I. The Ombudsman, the applicant in this matter, challenged the constitutionality of the entirety of five legal acts issued in 1981 and 1982. These were the Decree on Martial Law of 12 December 1981, referring to martial law in Poland and referred to here as "the Decree"; the Decree on special proceedings relating to offences and misdemeanours committed during the period of martial law of 12 December 1981 (hereinafter, the "Decree on Special Proceedings"), the Decree on the inclusion of certain offences within the scope of military courts and changes to the organisation of military courts and military organisational units in the Public Prosecutor's Office during the period of martial law of 12 December 1981, the Act on special legal regulation during the period of martial law of 25 January 1982 and the Resolution of the Council of State on the introduction of martial law for reasons of state security of 12 December 1981.

The applicant argued that the legislator had issued the above acts without legal basis, and had accordingly infringed the principle of legalism and that the Decrees of 12 December 1981, directly applicable within the domain of penal law, were issued in violation of the principle of non-retroactivity of law.

II. Although the acts under dispute no longer had legal force, Article 39.3 of the Constitutional Tribunal Act, which provided for adjudicating on a normative act which is no longer valid, could be applied to abstract review. The Tribunal therefore had to determine whether a ruling should be issued, in order to protect constitutional rights and freedoms.

Issuing a ruling in the case under examination was necessary; both from the perspective of rights guaranteed in the Constitution in force at the time the above Decrees were enacted, and in terms of the rights guaranteed in the Constitution at the time of adjudication, with regard to the Decree and the Decree on Special Proceedings. The necessity to issue a ruling does not depend on the length of the period during which a normative act under examination was actually applied, but is contingent upon the occurrence of at least one instance of interference with constitutional rights. In such a situation, issuing a ruling on the unconstitutionality of the normative act under examination may help to eradicate the impact of such interference.

The proceedings as to the remainder were discontinued.

When normative acts which are no longer in force are under constitutional review, a higher-level norm for review should be the legal act which is not binding but which proclaimed the principle of legalism. In the case under examination, such a legal act is the Constitution of the People's Republic of Poland. Compelling axiological justification for the above conclusion can be found in the principles of transitional justice, which do not defend the unlawful acts of former authorities.

The Decree revoked or restricted personal inviolability, the inviolability of the home and the privacy of correspondence, the right of association, the freedom of speech, publication and assembly and the freedom to organise marches, rallies and demonstrations. It contained numerous new penal norms, and was applied retroactively, even before its official publication in the Journal of Laws.

Both the Decree and the Decree on Special Proceedings were issued on 12 December 1981, during the third session of the 8th term of Parliament. This legislative action was carried out without legal basis in breach of the constitutional provisions concerning the legislative process and the principles regarding the functioning of the organs of public authority.

The Decree on Martial Law and the Decree on Special Proceedings were regarded by the organs of public authority as binding normative acts and were

applied by them. The judgment of the Constitutional Tribunal declaring the unconstitutionality of the Decrees does not retroactively undermine their validity during the period when they were binding and applied. It does, however, allow for the possibility of applying Article 190.4 of the Constitution and of reopening proceedings where they were applied, also in the context of criminal law.

The Tribunal issued this judgment *en banc*.

Cross-references:

Decisions of the Constitutional Tribunal:

- Decision U 1/86 of 28.05.1986, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1986, item 2;
- Decision Uw 6/88 of 20.09.1988, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1988, item 3;
- Decision K 3/88 of 04.10.1989, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1989, item 2;
- Decision U 2/89 of 24.10.1989, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1989, item 20;
- Decision K 7/90 of 22.08.1990, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1990, item 5;
- Procedural decision W 3/90 of 13.02.1991, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1991, item 27;
- Decision U 9/90 of 09.04.1991, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1991, item 9;
- Decision K 3/91 of 25.02.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 1;
- Decision K 14/92 of 19.10.1993, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1993, item 35;
- Decision K 18/92 of 30.11.1993, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1993, item 41, *Bulletin* 1993/3 [POL-1993-3-019];
- Decision K 7/93 of 07.12.1993, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1993, item 42;
- Decision P 1/94 of 08.11.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, item 37, *Bulletin* 1994/3 [POL-1994-3-018];
- Decision U 5/95 of 27.11.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 36;
- Decision K 18/95 of 09.01.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, no. 1, item 1, *Bulletin* 1996/1 [POL-1996-1-001];

-
- Judgment U 6/97 of 25.11.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, nos. 5-6, item 65;
 - Judgment K 22/96 of 17.12.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, nos. 5-6, item 71, *Bulletin* 1998/1 [POL-1998-1-001];
 - Judgment P 2/97 of 05.01.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 1, item 1, *Bulletin* 1998/1 [POL-1998-1-003];
 - Procedural decision SK 3/98 of 13.10.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 5, item 69;
 - Procedural decision SK 1/98 of 18.11.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 7, item 120;
 - Procedural decision K 4/99 of 21.03.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 2, item 65, *Bulletin* 2000/1 [POL-2000-1-003];
 - Judgment P 8/00 of 04.10.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 6, item 189;
 - Judgment SK 9/00 of 12.12.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 8, item 297;
 - Judgment SK 15/00 of 21.05.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 4, item 85;
 - Judgment K 27/01 of 03.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 209;
 - Procedural decision K 4/01 of 23.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 223;
 - Judgment SK 16/00 of 11.12.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 8, item 257;
 - Judgment SK 41/01 of 08.07.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 4A, item 51;
 - Judgment SK 39/01 of 22.10.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 5A, item 66, *Bulletin* 2003/1 [POL-2003-1-004];
 - Judgment P 19/01 of 29.10.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 5A, item 67;
 - Judgment P 27/02 of 02.07.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 6A, item 59;
 - Judgment SK 38/01 of 07.07.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 6A, item 61;
 - Procedural decision SK 12/02 of 03.02.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 2A, item 11;
 - Judgment SK 21/03 of 14.06.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 6A, item 56;
 - Procedural decision SK 55/03 of 08.09.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 8A, item 86;
 - Procedural decision SK 42/03 of 11.10.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 9A, item 99;
 - Judgment SK 31/04 of 30.11.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 10A, item 110;
 - Procedural decision K 36/04 of 09.03.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 3A, item 30;
 - Judgment K 19/02 of 30.03.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 3A, item 28;
 - Judgment P 11/03 of 12.07.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 7A, item 80;
 - Judgment SK 20/03 of 19.07.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 7A, item 82;
 - Judgment P 11/05 of 09.11.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 10A, item 113;
 - Procedural decision K 14/05 of 16.11.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 10A, item 125;
 - Judgment SK 20/04 of 12.12.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 11A, item 133;
 - Judgment K 4/06 of 23.03.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 3A, item 32, *Bulletin* 2006/1 [POL-2006-1-006];
 - Judgment SK 54/04 of 13.06.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 6A, item 64;
 - Judgment SK 14/05 of 01.09.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 8A, item 97;
 - Judgment SK 15/05 of 18.09.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 8A, item 106;
 - Judgment U 4/06 of 22.09.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 8A, item 109;
 - Procedural decision SK 64/05 of 23.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 138;
 - Judgment SK 49/05 of 24.04.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 4A, item 39;
 - Judgment SK 36/06 of 22.05.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 6A, item 50;
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- Procedural decision SK 3/06 of 30.05.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 6A, item 62;
- Procedural decision P 34/05 of 07.11.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 10A, item 133;
- Judgment P 42/06 of 13.11.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 10A, item 123;
- Procedural decision K 13/06 of 04.03.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 2A, item 32;
- Judgment SK 51/04 of 21.10.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 8A, item 140;
- Procedural decision P 5/07 of 06.11.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 9A, item 163;
- Judgment K 12/08 of 11.12.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 10A, item 176;
- Procedural decision K 28/07 of 30.03.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 3A, item 42;
- Judgment SK 42/08 of 16.06.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 6A, item 85;
- Procedural decision SK 22/09 of 01.03.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 3A, item 28;
- Procedural decision Ts 301/10 of 02.02.2011, www.trybunal.gov.pl;
- Judgment P 21/09 of 01.03.2011, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2011, no. 2A, item 7.

Languages:

Polish, English (translation by the Tribunal).



Identification: POL-2011-3-006

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 16.11.2011 / **e)** SK 45/09 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2011, no. 254, item 254; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2011, no. 9A, item 93 / **h)** CODICES (English, Polish).

Keywords of the systematic thesaurus:

2.2.1.6.3 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Secondary Community legislation and constitutions.**
 4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states.**
 5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings.**
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

Keywords of the alphabetical index:

Secondary EU legislation, constitutionality, conflict / Judgment, foreign country.

Headnotes:

EU regulations, as normative acts, may be subject to constitutional review in the course of review proceedings commenced by way of constitutional complaint.

The presumption of constitutionality of legal acts of EU institutions may only be ruled out after determining that the given legal act and the Constitution cannot be interpreted in such a way as to allow the conformity of the provisions of the legal act with the Constitution to be stated.

The scope of the powers of an international organisation to which the Republic of Poland belongs should be delineated in such a way as to guarantee the protection of human rights to an extent comparable with the Polish Constitution. Comparability concerns the catalogue of rights, on the one hand, and the scope of admissible interference with them on the other. The requirement of appropriate protection of human rights pertains to their general standard; it does not imply the necessity to guarantee identical protection of each of the rights analysed separately.

Summary:

I. The applicant challenged the constitutionality of Articles 36, 40, 41 and 42 of the Council Regulation (EC) no. 44/2001 (hereinafter, the “Regulation”). She claimed that these provisions did not apply in her case, as the foreign judgment had been issued in criminal proceedings and the enforceability of that judgment was manifestly contrary to the public policy of the Republic of Poland.

She argued that the challenged provisions of the Regulation did not conform to Article 45 of the Constitution, as the Regulation did not provide for any submissions to be made in first instance proceedings concerning the enforceability of the foreign judgment by the party against whom the judgment had been issued. She also contended that it encroached on Articles 78 and 176 of the Constitution, as the principle of two stages of court proceedings implies the right to actively participate in court proceedings before a court of any instance. Article 32 of the Constitution was, in her view also infringed, as only one of the parties was entitled to present arguments and statements to the court of first instance. Article 8 of the Constitution supposedly sets out the absolute primacy of the Constitution in the system of sources of law, and accordingly Article 91.3 of the Constitution only applies to a collision between ordinary statutes and secondary EU law.

II. The Tribunal first considered the question of whether an EU regulation is “another normative act” under Article 79.1 of the Constitution. Having answered this question in the affirmative, the Tribunal accepted the possibility of controlling the constitutionality of an EU regulation in proceedings initiated by the lodging of a constitutional complaint. Nevertheless, the fact that EU regulations are acts of EU law, also forming part of the Polish legal order, results in a special character of the review conducted in such cases by the Constitutional Tribunal.

A degree of caution and restraint is needed when controlling the constitutionality of EU regulations; the principle of sincere cooperation is one of the systemic principles of EU law. A ruling on the inconsistency of the norms of an EU regulation with the Constitution might only result in suspending the unconstitutional norms on Polish territory but such a consequence would be difficult to reconcile with the obligations of a Member State and with the principle mentioned above.

Furthermore, as indicated in the reasoning, when indicating the nature of the infringement, an applicant should be required to show a probability that the challenged act of EU secondary legislation would cause a considerable decline in the standard of protection of rights and freedoms, by comparison with that offered by the Constitution.

Due to the withdrawal of the complaint with regard to Articles 36, 40 and 42 of the Regulation, and with regard to Articles 8, 32.2, 45.2 and 176.2 of the Constitution, the Tribunal decided to discontinue proceedings in that regard.

In the context of the present case, there were no grounds to conclude that the adopted model of proceedings for the issue of a declaration of enforceability concerning a judgment of a foreign court, with the existing restrictions imposed on a party against whom enforcement is sought in first instance proceedings, infringes the right to a fair trial, guaranteed by the Constitution. Also, since the creditor was not excessively and unjustly privileged by comparison with the applicant, the challenged norm did not infringe the constitutional principle of equality.

The Tribunal issued this judgment *en banc*.

Cross-references:

Decisions of the Constitutional Tribunal:

- Decision U 15/88 of 07.06.1989, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1989, item 10;
- Judgment SK 11/99 of 16.11.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 158, *Bulletin* 1999/3 [POL-1999-3-029];
- 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];
- Procedural decision Ts 139/00 of 06.02.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 2, item 40;
- 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 SK 6/02 of 15.10.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 5A, item 65, *Bulletin* 2003/1 [POL-2003-1-003];
- Procedural decision SK 42/02 of 06.10.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 9A, item 97;
- Judgment K 18/04 of 11.05.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 5A, item 49, *Bulletin* 2005/1 [POL-2005-1-006];
- Judgment SK 38/03 of 18.05.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 5A, item 45;
- Judgment P 2/04 of 28.07.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 7A, item 72;

- 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 P 37/05 of 19.12.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 11A, item 177;
- Judgment SK 42/04 of 23.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 125;
- 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 SK 54/05 of 18.12.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 11A, item 158;
- Judgment SK 6/07 of 14.10.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 8A, item 137;
- Judgment Kp 3/08 of 18.02.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 2A, item 9, *Bulletin* 2009/2 [POL-2009-2-002];
- Judgment SK 19/08 of 31.03.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 3A, item 29;
- Procedural decision SK 26/07 of 08.06.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 6A, item 92;
- Judgment SK 46/08 of 13.07.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 7A, item 109;
- Procedural decision SK 61/08 of 21.07.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 7A, item 120;
- Procedural decision U 6/08 of 17.12.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 11A, item 178;
- Judgment SK 26/08 of 05.10.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 8A, item 73;
- Judgment K 19/06 of 04.11.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 9A, item 96;
- Judgment K 32/09 of 24.11.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 9A, item 108, *Bulletin* 2010/3 [POL-2010-3-006].

Decisions of the Federal Constitutional Court of Germany:

- Decision (*Beschluss*) 2 BvR 197/83 of 22.10.1986, *Solange II*, *Special Bulletin Inter Court Relations* [GER-1986-C-001];
- Decision (*Beschluss*) 2 BvL 1/97 of 07.06.2000, *Bananenmarktordnung*;

- Decision (*Beschluss*) 2 BvR 2661/06 of 06.07.2010, *Honeywell*.

Decisions of the European Court of Human Rights:

- Judgment 45036/98 of 30.06.2005, *Bosphorus*, *Bulletin* 2005/2 [ECH-2005-2-002];
- Judgment 16931/04 of 10.10.2006, *Coopérative des Agriculteurs de la Mayenne*;
- Judgment 13762/04 of 09.12.2008, *Société Etablissements Biret*;
- Judgment 30696/09 of 21.01.2010, *M.S.S.*

Decisions of the European Court of Justice:

- Judgment 34/73 of 10.10.1973, *Variola*;
- Judgment 9/73 of 24.10.1973, *Schlüter*;
- Judgment 101/76 of 05.05.1977, *Koninklijke Scholten Honig*;
- Judgment 242/81 of 30.09.1982, *Roquette Frères*;
- Judgment 222/84 of 15.05.1986, *Johnston*;
- Judgment 222/86 of 15.10.1987, *Heylens*;
- Judgment C-314/85 of 22.10.1987, *Foto-Frost, Special Bulletin Inter Court Relations* [ECJ-1987-C-002];
- Judgment C-340/89 of 07.05.1991, *Vlassopoulou*;
- Judgment C-97/91 of 03.12.1992, *Borelli*;
- Judgment C-7/98 of 28.03.2000, *Krombach*;
- Judgment C-38/98 of 11.05.2000, *Régie Nationale des Usines Renault*;
- Judgment C-50/00 of 25.07.2002, *Unión de Pequeños Agricultores*;
- Judgment C-253/00 of 17.09.2002, *Muñoz*;
- Judgment C-3/05 of 16.02.2006, *Verdoliva*;
- Judgment C-432/05 of 13.03.2007, *Unibet, Bulletin* 2009/2 [ECJ-2009-2-006];
- Judgment C-208/09 of 22.12.2010, *Sayn-Wittgenstein*;
- Judgment C-391/09 of 12.05.2011, *Runevič-Vardyn*.

Languages:

Polish, English (translation by the Tribunal).



Portugal

Constitutional Court

Statistical data

1 January 2011 – 31 December 2011

Total: 1 341 judgments, of which:

- Abstract reviews
 - Prior: 1
 - Ex Post Facto*: 14
 - Omission: -
- Referenda
 - National: -
 - Local: 2
- Concrete reviews
 - Summary decisions: 681
 - Appeals: 510
 - Challenges: 86
- President of the Republic: -
- Mandates of Members of the Assembly of the Republic: -
- Electoral Matters: 19
- Political Parties: 14
- Declarations of Assets and Income: 6
- Incompatibilities: -
- Funding of Political Parties and Election Campaigns: 8

Important decisions

Identification: POR-2011-3-014

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 22.09.2011 / **e)** 398/11 / **f)** / **g)** *Diário da República* (Official Gazette), 119 (Series II), 17.10.2011, 41107 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality**.
- 3.17 General Principles – **Weighing of interests**.
- 3.22 General Principles – **Prohibition of arbitrariness**.
- 5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors**.

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

Keywords of the alphabetical index:

Law, transitional / Responsibility, parental, exercise.

Headnotes:

A transitional legal norm that changed the regime governing parental responsibilities does not apply to pending cases where the minor's parents have never been married, and are not living or have never lived in circumstances analogous to those of spouses. The different legal treatment resulting from the new norm is based on the need to safeguard the parties' expectations of the applicable law at the time the Court intervened.

Although a legislative change can change the normative treatment of a given category of situations, thereby implying that substantially similar realities can lead to different solutions, the divergence is not necessarily incompatible with the Constitution because it stems from policy reasons warranting a new legal regime. The resulting unequal situation is an inherent part of the state's democratic mandate to legislate, which includes altering current law. Hence, the different application of law is neither arbitrary nor unconstitutional.

Summary:

I. The issue in the present case was whether a legal norm that changed the regime governing parental responsibilities should be applied to pending cases. The court *a quo* refused to apply this law, claiming that it was materially unconstitutional. As such, the Public Prosecutors' Office brought a mandatory appeal before the Constitutional Court, asking it to review the constitutionality of the disputed norm.

The original case involved a minor whose parents were not married, did not live together in a *de facto* union and did not agree as to how parental authority should be exercised. The minor lived with the mother.

Under the previous regime governing parental responsibilities, if the biological parents were neither married to nor lived together in a *de facto* union with each other, they would agree to exercise joint parental authority. In the absence of such agreement, the authority was granted to the custodial parent. The presumption *juris tantum* was that the mother would have custody of the child. If the real situation proved otherwise, the Court can overturn the presumption.

A biological parent without the right to exercise parental authority possessed the power to monitor his or her child's education and living conditions. The basis for this solution was an eminently practical one. In such situations, the idea was to imbue the representation of the minor's interests with certainty and efficacy by awarding parental authority solely to the person with custody of him or her, with the statistically justified presumption that that person was the mother.

II. The Court noted that the regime introduced by the new law says that when filiation is established regarding both biological parents who do not live in circumstances analogous to spouses, the exercise of parental responsibilities is subject to the same regime that applies in cases of divorce, judicial separation from bed and board, or the declaration of the nullity or annulment of the marriage. In essence, this regime requires that both biological parents share responsibilities on deciding matters important to the child's life, under the same terms that would apply during an effective marriage. The exceptions include cases of manifest urgency when either parent can act alone, but he or she must promptly inform the other parent. If a court rules that the shared parental responsibilities on especially important matters of the child is contrary to his or her interests, the Court must issue a duly justified decision ordering that the decision-making authority be given to one of the parents. Regarding every day decisions, the biological parent with whom the child habitually lives can make them.

When the present regime imposed joint exercise of parental responsibilities, the goal was to address problems concerning the distancing of fathers from their children and the weakening of the emotional bond between them. At the same time, the regime aimed to promote gender equality and ensure the rights of children to establish loving bonds with both biological parents.

The transitional norm raises the issue whether it is constitutionally acceptable that biological parents' rights or duties for their children depend on a circumstance as random as that of the date on which a legal action is brought.

In placing great importance on the minor's interest, parental responsibilities can be regulated through a voluntary jurisdiction procedure. As a rule, carrying out the regulation presents a conflict between the biological parents and the Public Prosecutors' Office. According to pre-established substantive rules, each party to the proceedings pursues a procedural strategy designed to convince the court that it is exercising its parental responsibilities in the best

interest of the minor child. Within the scope of its investigative powers and in accordance with pre-established rules, the court also seeks to determine the regime that best serves the minor's superior interest. If these rules unexpectedly change during the course of the proceedings, problems may ensue. They include the frustration of the procedural strategy adopted by the parties, and the insufficiency of the factual framework established before the court to allow the application of new rules to protect the minor's interests.

By voluntary jurisdiction, the court possesses broad powers to make procedural steps more flexible and to reopen the phase so parties can allege facts and present evidence. This also means that the court can adapt the established factual framework to the new contents of the substantive law. The downside is that this procedural repetition may render the previous procedural steps useless, delay resolutions on parental authority matters, and harm both the normal, effective operation of the judicial instance and the pursuit of the minor's best interests.

The Court asserted that regardless if the constitutional principles of legal security and trust, and of the right to fair process require that the protection of interests at stake, the legislator's solution does offer legitimate, understandable and reasonable grounds for the normative criterion chosen by the legislator.

Supplementary information:

The Constitutional Court's position on this subject had not been uniform. Earlier, one chamber of the Court decided that the norm was constitutional; however, another chamber decided it was unconstitutional. The divergent rulings on the norm justify the appeal to the Court's Plenary. The Public Prosecutors' Office therefore fulfilled its mandatory obligation by bringing the case either as the appellant or the respondent, and had brought the present appeal before the Plenary.

The ruling was the object of two dissenting opinions.

Cross-references:

- Rulings nos. 153/2010 (14.04.2010) and 407/10 (09.11.2010). The latter is included in the selection of jurisprudence sent to the Venice Commission in September-December 2010.

Languages:

Portuguese.



Identification: POR-2011-3-015

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 22.09.2011 / **e)** 400/11 / **f)** / **g)** *Diário da República* (Official Gazette), 211 (Series II), 03.11.2011, 43591 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

Keywords of the alphabetical index:

Fund for Guaranteeing the Maintenance Due to Minors, public authority / Minors, maintenance, obligation, parents.

Headnotes:

The Constitution does not expect the State to take on the role of legal guarantor to maintain parental obligations that parents owe to their minor children. Public authorities' duties regarding the children's right to protection require them to adopt legislative and administrative measures, including social security benefits, aimed to enable children to attain their full development. This objective is based on the assumption that human dignity must be guaranteed, and that a child is a person in training, whose development requires that all its qualities and abilities be furthered.

When the State intervenes as the provider of maintenance, it is not because the party whom a court has ordered to pay maintenance has failed, but because the failure contributed to the situation of hardship. This is why the social benefit in question is only awarded if resorting to it is indispensable.

Summary:

I. On three previous occasions, the Constitutional Court held that application of the Fund for Guaranteeing the Maintenance Due to Minors (hereinafter, the "Fund") was unconstitutional. The Fund

provides judicially ordered maintenance payments to a minor in place of the person who ought to have made them and can only be applied by the court that determines the amount of payment to be made by the Fund. The Fund is not required to make payments for periods preceding that decision. The Organic Law governing the Constitutional Court provides for the possibility of an *ex post facto* review of the constitutionality of any norm that the Court has deemed unconstitutional in at least three concrete cases. The Public Prosecutors' Office asked the Court to subject the norm in the present case to such a review.

From the review of the norm's constitutionality, what was at stake was the time when the State became obligated to make a monthly payment guaranteeing the person with custody of the minor sufficient resources to ensure the latter's development.

II. The only relevant issue regarding the normative interpretation before the Constitutional Court was the norm's constitutionality or its determination of the date when the court hearing the maintenance claim notifies the Fund of its decision, and that the latter has no retroactive effects.

The Constitutional Court noted that the "right and duty to educate and maintain their children" pertains first and foremost to parents. The duty to maintain includes the duty to provide children with their sustenance within the parents' economic capabilities until the children are in a position, or become subject to the duty, to seek their own means of subsistence in their own right. This is one of the few constitutional duties expressly enshrined in the Constitution.

As the Court clearly stated in earlier jurisprudence, the fact that the Constitution requires the State to ensure real economic and social democracy means that the State must protect children. As such, society and the State not only protect the right of children but also parents. Children have a right to their full development, and the State is under a duty to support parents to look after the former. However, this does not mean that the State must legally position itself as a guarantor of the maintenance payments owed by parents.

The vicarious provision of maintenance by the State represents the implementation of a social right in an area where there are overlapping types of responsibilities or duties to protect, each of which obeys its own philosophy.

The Constitutional Court recognised that the degree of constitutional protection of childhood is intensified due to the characteristics of the holder of the rights,

and that the minimum content of the correlative State duty to provide protection can be more precisely determined.

However, the Court did not agree that, at minimum, the disputed social right could only be achieved through a public pecuniary payment imposed by the norm. Also, it did not agree that that payment must be owed from the moment when the request for it is made.

As positive rights, when social rights are implemented, the rule is that the legislator has space to shape the legislation. Because this is not a content that is directly determined by the Constitution, it is important to determine whether, within the overall regime instituted by the legislator, there are other mechanisms capable of protecting situations of hardship brought about by the failure to fulfil the obligation to pay maintenance.

The Constitutional Court determined that obliging the Fund to make payments retroactively for the period between the moment when the request was made and the final decision would not ensure fulfilment of the minor's maintenance needs. Payments by the Fund for a period that has already passed could only serve as a compensatory legal mechanism, not as an effective means of providing for the minor's needs during the relevant period, satisfaction of which is a requirement of the principle of human dignity. If the minor suffered deprivations as a consequence of either parent's failure to fulfil their duty, the Fund's retroactive payments cannot remedy the situation. The retroactive payment is not necessarily a reliable way to prevent the minor from being placed in a situation that is incompatible with human dignity or the only way to ensure this social right. The Court's decision reflects that it can criticise legislation intended to fulfil the multiple dimension of social rights when it is certain that the legislation would or had failed to meet its objectives.

The Court decided that the law already provides for the possible provisional determination of a public payment and is one of the appropriate means of providing a real-time response to imperative needs. Imposing provisional measures at the time when the need for sustenance exists is better to quickly respond to urgent situations than measures that cover *a posteriori* to the entire period when hardship existed.

III. Five dissenting opinions were made, including those of the rapporteur of Ruling no. 54/11 and two other justices who subscribed to the latter – a Ruling in which this same norm was deemed unconstitutional.

The dissenting justices emphasised that the majority ignored the specificity of the legal asset protected by the Fund. They said that this asset represents the maintenance due to a category of citizens incapable of providing for themselves, in a situation when persons subject to the duty to maintain them fail to do so. What is at stake is the fulfilment of vital needs that form the object of the right to a minimally dignified existence, a right that enjoys a special status within social rights. The right is of such a fundamental nature as to be practically equivalent to that of personal rights.

Cross-references:

- Ruling no. 54/11 (01.02.2011).

Languages:

Portuguese.



Identification: POR-2011-3-016

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 22.09.2011 / **e)** 401/11 / **f)** / **g)** *Diário da República* (Official Gazette), 211 (Series II), 03.11.2011, 43596 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality**.
- 3.17 General Principles – **Weighing of interests**.
- 3.22 General Principles – **Prohibition of arbitrariness**.
- 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.
- 5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent**.

Keywords of the alphabetical index:

Parents, biological, right to know, right to establish legal bond / Time limit, lapse, paternity investigation.

Headnotes:

The right to know one's biological parents and to establish the respective legal bond is covered by the fundamental rights to personal identity and to a family. This right, however, is not absolute and may conflict with other values. When this happens, the court's task is to harmonise or even restrict the opposing interests. No obstacle exists that would prevent the legislator from limiting the exercise of this right in light of other interests or values that also enjoy constitutional protection.

The absence of any time limit to bring a paternity investigation action for whatever reason shows that the right to personal identity is given a maximum level of protection. This optimised protection is not a constitutional requirement, however. The legislator can impose time limits, provided that the restriction does not reduce the protection. Such a limitation would not prevent the right holder from exercising it, but would merely impose a deadline on him or her to do so.

Beginning on the date of a party's coming of age or emancipation, the ten-year time limit to investigate does not operate on its own but is integrated with other deadlines. The right to bring the action does not lapse until all of them have been reached. If the ten-year time limit had passed, the action could still be brought in certain situations, if a law allows a new time limit. This is particularly the case when the investigating party becomes aware of facts or circumstances unknown to him or her that justify an investigation despite the exhaustion of other time limits.

Decisive scientific progress made in determining biological filiation and the evolution in the dominant values held on filiation, have significantly reduced the interests that used to be the main reason for imposing time limits for bringing paternity investigation actions. The constitution and complete determination of the filial bond of both biological parents is in the public interest and an important principle of law and society. The act of giving legal efficacy to the genetic bond of filiation not only has repercussions for the parent or child relationship, but also impacts other situations, including impediments to marriage.

Promptly establishing a match between biological paternity and legal paternity is a public interest, operationalising the legal status of filiation with all the ensuing effects in a way that is stable and accompanies the life of its subjects for as long as possible.

Summary:

I. The issue in this case is the constitutionality of a Civil Code article that sets a time limit of ten years, starting on the date an adult investigates the party's coming of age or emancipation, to bring a paternity (and maternity) investigation action. The defendant *a quo*, who was named as the heir in the investigated party's will, asserted that the investigating party's right to bring the action had lapsed. The Court refused to apply this norm on the grounds that it was unconstitutional. As such, the Public Prosecutors' Office brought the present mandatory appeal before the Constitutional Court, which it asked to review the norm's constitutionality.

In the original version of this Civil Code article, the time limit was substantially shorter: two years. The Constitutional Court was called on a number of times to consider the constitutionality of time limits on the right to bring maternity and paternity investigation actions. Initially, it held that the disputed time limit was compatible with the principles enshrined in the Constitution. It saw the deadlines as mere conditions on the exercise of the right to investigate paternity, which is an inherent right to personal identity and not a true restriction on the latter fundamental right.

In essence, the Court invariably held that the legal filiation regime ensured an appropriate balance between the child's right to recognition of his or her filiation and the interest of the supposed biological parent to not prolong a situation of uncertainty, which was exacerbated by the random nature and degradation of evidence over time. The Court also considered the interest of the peace of the investigated party's conjugal family and his right to privacy of his personal life.

The consolidation and successful implementation of new laboratory techniques for scientifically determining paternity were decisive factors in changing the direction of Portuguese constitutional jurisprudence. The concern that evidence was random and its value might decrease with time was no longer an issue due to scientific advances of DNA testing that produce valid and reliable results that come close to certainty. The evolution of constitutional jurisprudence also stemmed from the rapid changes in the dominant values of filiation: the interests of the supposed biological parent's legal security, the prevention of "fortune hunting", the peace of the investigated party's conjugal family and the right to the privacy of personal life lost in importance. These values were outweighed by the investigating party's superior interest to know the origins of his or her existence and see them legally recognised.

The means par excellence to protect and reconcile legally valuable public and private interests linked to legal security is the imposition of time limits on the exercise of the right in question. Such limits serve to motivate the holder of the right to exercise it promptly. This precludes the unjustified prolonging of uncertainty, which is why it possesses a compulsory function. The interests that exist in the filial relationship make themselves felt in the various relationships with a personal content, but very often also have important effects on material assets.

II. In this case, the Court found that the norm is neither disproportionate nor unconstitutional. The right to know one's biological parents and to establish the respective legal bond, which falls within the scope of the fundamental rights to personal identity and the right to form a family, has not been violated.

III. The ruling was the object of six dissenting opinions, including the original rapporteur, based on the view that the protection of assets pertaining to the investigating party is not compatible with any limitation. If it were possible to limit the investigating party's interests in the present case, this would not be justified when one came to weigh up the proportionality of the various conflicting interests.

Supplementary information:

The ruling compares the Portuguese legislation on this subject with foreign legal systems close to that of ours. It also cites case-law of the European Court of Human Rights, which held that the existence of a time limit on the right to bring an action for the judicial recognition of paternity does not constitute a breach of the European Convention on Human Rights. Some case-law also noted that it is important to determine whether the nature, duration and characteristics of the limit fairly balance the following with each other: the investigating party's interest in the clarification of an important aspect of his or her personal identity, the interest of the investigated party and his or her close family in the protection of facts that pertain to his or her intimate private life and occurred a long time ago, and the public interest in the stability of legal relations. The European Court of Human Rights has emphasised that the right to respect for private and family life does not pertain solely to the person who wants to know who his or her parents are and to establish the respective legal bond but also protects investigated parties and their families.

Cross-references:

- See Rulings nos. 486/2004 (07.07.2004) and 23/06 (10.01.2006).

Languages:

Portuguese.



Identification: POR-2011-3-017

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 11.10.2011 / **e)** 460/11 / **f)** / **g)** *Diário da República* (Official Gazette), 231 (Series II), 02.12.2011, 47261 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

4.7.4.1 Institutions – Judicial bodies – Organisation – **Members.**

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

5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial by jury.**

Keywords of the alphabetical index:

Local authority body, elected, member, serious crimes / Trial by jury, limitation.

Headnotes:

Trial by jury may be prohibited in cases involving elected local authority who allegedly committed serious crimes, including economic participation in business dealings, passive corruption involving an unlawful act, and abuse of power. These types of crimes entail legal assets especially significant to the functional autonomy, credibility and efficacy of the state's activities.

The legislator has discretion to determine which crime constitutes a serious crime that can be brought before a jury. The fact that the ordinary legislator has decided that juries cannot intervene in some cases involving an elected local authority does not contradict the applicable constitutional criterion. The legislator's limitations on jury trial of serious crimes can neither be seen as a restriction on the right of the accused to be tried nor the right of a citizen to participate in the administration of justice, which is associated with the fundamental right to participate in public life.

Summary:

I. The present case involved the constitutionality of a legal norm that defined crimes committed by political officeholders and accorded with special responsibility. These crimes were carried out in the scope of or through the misuse of their functions, which may constitute autonomous crimes whereby sanctions and their effects apply. The rendering of these crimes as autonomous crimes reflects the added duty of zeal incumbent on political officeholders to act in the public interest.

The disputed norm states that a jury cannot try the crimes. The accused appealed to the Constitutional Court against a decision, which the Lisbon Court of Appeal referred to the norm in order to deny his application for a jury trial.

II. The ruling gives a brief history of trial by jury in Portuguese law. Although it was abolished altogether in 1927, it was reinstated following the Revolution of 25 April 1974. The regime governing the availability of trial by jury has been amended a number of times since the original version of the current Constitution was published in 1976, but it has always been limited to cases involving serious crimes. However, the Constitution set an open criterion for the competence of courts with a jury – “the judgment of serious crimes” – and has given the legislator broad discretion to decide exactly which crimes are serious enough to warrant the possibility of being brought before a jury. Later revisions of the original text have considered cases of terrorism and most recently, of highly organised crime, to be exceptions to this rule. A jury can never hear these cases. In this regard, the text was most recently amended in the 1997 constitutional revision.

In the most recent version of the Constitution, the Court noted that the legislature added highly organised crime among cases prohibiting jury trials. The new constitutional text also introduced the delimiting expression: “In the cases and with the composition laid down by law”. The previous permission of juries: “when the prosecution or the defence so requests”, was replaced by: “particularly when the prosecution or the defence so requests”. As such, the ordinary legislator can now freely determine the jury composition, it can also make jury trials mandatory in certain cases and, using criteria of reasonability, can choose which serious crimes give the prosecution or the defence the ability to opt for a jury. The only cases that the ordinary legislator cannot allow jury trials are thus less serious crimes on the one hand, and terrorist and highly organised crimes on the other hand.

One of the reasons that led to the preclusion of jury trials for crimes covered by the law before the Court is to clarify the distinction between political office holders’ criminal liability and their accountability.

While there can be no doubt that jury trials are a privileged way for citizens to participate in the administration of justice, the legislator felt that when specific interests are at stake, the advantages of participation are outweighed by certain risks and inconveniences.

To begin, besides criminal liability for their actions and omissions, political officeholders are accountable for their decisions, acts and omissions when carrying out their duties and responsibilities as well as for the results thereof. Political accountability cannot be mistaken for criminal liability. The danger of confusing one with the other exists, especially when those who are responsible for politically scrutinising public officeholders – voters – are also in the position of judging criminal liability. It is thus understandable and justifiable for the legislator to exclude these people for bearing both burdens.

When crimes entail special responsibility because political officeholders committed them, there is a clear danger of “contamination” between the plane of political accountability and that of criminal liability. While the danger is not completely absent in the case of professional judges who also possess pre-existing political views, their legal training, professional experience and specific statutory duties mean that they are not in the same situation as other citizens. This helps to ensure the judges’ impartiality and lack of bias.

Moreover, when it comes to judging crimes allegedly committed by political officeholders, it is possible that jurors may feel pressured, given the nature of the crimes in question and the political or social importance of the alleged perpetrators. Allowing a trial by jury in such cases would make ensuring justice difficult because the jurors, as ordinary citizens, might find harder to escape. Hence, this prohibition also serves to protect citizens who, if obliged to serve on a jury hearing of this type of crime, may find their essential personal and family assets at risk as a result from pressures or other forms of danger to their freedom, security and peace – rights that falls upon the state to safeguard.

Languages:

Portuguese.



Identification: POR-2011-3-018

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 11.10.2011 / **e)** 461/11 / **f)** / **g)** *Diário da República* (Official Gazette), 243 (Series II), 21.12.2011, 49522 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

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

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

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

5.3.13.25 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the charges.**

Keywords of the alphabetical index:

Administrative offense / Competition authority, collaboration, evidence, disclosure, self-incrimination / Human person, dignity.

Headnotes:

Competition violations constitute administrative offences, which may be less severe than penalties resulting from a criminal violation. The defence may also be less demanding in criminal violations.

When the law charges entities over which the Competition Authority exercises sanctionary and supervisory powers with duties to collaborate with the Authority, the law is subjecting the entities to a compensation provision for the right to exercise economic activities subject to regulation. To effectively uphold the constitutionally protected interests of competition and the balanced operation of

the markets, the law provides duties to collaborate in order to compress the maximum potential content of the right not to incriminate oneself within the scope of the administrative offences. However, they do not affect that right's essential, useful content when it comes to the right to abstain from making statements regarding facts of which the person concerned is accused, given the self-incriminatory potential of such statements.

Summary:

I. The issue before the Court was the constitutionality of legal norms that define the legal regime governing competition. One norm specifies that an accused person is required to truthfully and completely disclose certain information and documents to the Competition Authority or be subject to a fine. The other norm allows the accused person to go through administrative offence proceedings, but not be notified of the Competition Authority's counter-allegations and precluded them from responding thereto.

II. The Constitutional Court emphasised the Competition Authority's importance to the legal regulation of the economy. As an attempt to balance the operation of the economy, the regulation can be seen as a set of legal procedures that indirectly plays a part in productive economic activities and require cooperation.

Recognising the importance of defending competition and of enabling the Competition Authority to constitutionally ensure that markets function efficiently, the legislator equipped the Authority with public regulatory, supervisory and sanctionary powers. These powers are functionally linked to its competences. The supervisory and sanctionary powers are designed to deal with actions that infringe on the applicable law or regulations. These powers also aim to repress and sanction infractions, particularly by organising proceedings against unlawful acts that constitute administrative offences and informing the Public Prosecutors' Office of conducts that can apparently be identified as crimes.

Because the sanctionary competence entrusted to the Competition Authority serves as a condition for the efficacy of the latter's supervisory function, the legislator opted to establish a close link between the two areas of activity. While the confluence of powers leads to efficiency, it also creates tension or conflict. This occurred in the object of the present ruling. As part of an administrative offence proceeding, the appellant in the present constitutional case was called on to truthfully and completely provide the Competition Authority with information – namely documentation. Failure to do so would subject the appellant to a fine. This information could have been

used as evidence to incriminate the present appellant and contribute to an administrative offence conviction.

The right to no self-incrimination encompasses the right to silence and the right not to furnish evidence, namely documents. The immediate constitutional-law grounds for it lie in the procedural guarantees applicable to an accused person's defence. The defence itself is intended to ensure a fair process and in doing so, uphold the fundamental rights of human dignity, the right to fair process and the presumption of innocence.

The primary playing field for this right not to incriminate oneself, particularly the right to remain silent, is that of criminal law, but it also extends to any public-law sanctionary proceedings.

However, its exact content varies depending on the applicable punitive law. Among administrative offences, the difference exists between the nature of an unlawful act that constitutes an administrative offence and its lesser ethical implications on one hand and those of an unlawful act that constitutes a crime on the other. This means that the weight of the regime governing guarantees in proceedings with regard to the former is less.

The obligation to provide information and hand over documents to Competition Authority acting as a regulatory entity is an obligation punishable by fine if unsatisfied. It is also required to ensure the efficacy of competition where the collaboration of economic agents is fundamental to the ability to control, verify and sanction the existence of behaviours that constitute infractions.

During an initial phase, when a supervisory administrative procedure is still underway, there can be no doubt that items the Competition Authority gathers within the scope of its supervisory powers can be used in subsequent administrative-offence proceedings.

From the moment those proceedings begin and the accused is confronted with the presumed infraction, the paradigm for the relationship changes. The right not to incriminate oneself makes its presence felt, as a reflection of the new status of accused person. However, in the administrative-offence field, this right can only contain the aspect of the right to silence that entails the possibility of not making statements or answering questions about the facts of which the person is accused. The right to silence does not entitle an accused person in proceedings for an administrative offence constituted by anticompetitive practices to refuse to provide information and hand over documents in its possession and requested by the Competition Authority. This does presuppose the

objective dimension of the items in question, namely they cannot possess a conclusive content or definitive judgemental value in a self-incriminatory sense.

The compression of the right not to incriminate oneself that existed in the present case is balanced and proportional, and represents an appropriate weighing-up of the relative value of each of the opposing concrete constitutional-law assets that are in play.

The complaint contends that the legal regime is unconstitutional because it does not specify that an accused person must be notified of allegations made against it by the Competition Authority. The Constitutional Court held that even in criminal proceedings, the express constitutional requirement that the adversarial principle must be met refers to the trial hearing. This is when the principle must be observed to the utmost. In other procedural phases, the legislator possesses sufficient discretion to shape the adversarial process. When we gauge whether the guarantees of the defence have been respected, we must look at the proceedings as a whole, not in terms of each of their individual phases.

Cross-references:

- See Rulings nos. 695/95 (05.12.1995), 278/99 (05.05.1999), 339/2005 (22.06.2005) and 659/06 (28.11.2006).

Languages:

Portuguese.



Identification: POR-2011-3-019

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 13.12.2011 / **e)** 612/11 / **f)** / **g)** *Diário da República* (Official Gazette), 17 (Series II), 24.01.2012, 483 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality.**
- 3.18 General Principles – **General interest.**
- 3.21 General Principles – **Equality.**

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

Keywords of the alphabetical index:

Not-for-profit entities, charity objective, requisites / Company, commercial, access / Fiscal equality, market, competition.

Headnotes:

A pharmacy business owned by not-for-profit entities linked to charitable objectives helps to promote the entities' goals, which are in the public interest. The entities are required to form a commercial company to gain access to the right to own pharmacies. The legislator justified that all market operators must respect the rules of free competition when the business activity occurs in the marketplace. The Constitution protects the social sector of ownership of the means of production, in an area of business open to the market and to competition. The Constitution does not prevent the legislator from submitting the social sector to requisites imposed on other operators, in the name of balanced competition between economic agents.

Requiring social entities to artificially form commercial companies in order to gain access to the pharmacy business disable them from engaging in that business as not-for-profit entities. The obligation also applies to social entities that want to engage in the pharmacy business outside the market. This requirement violates the principle of the prohibition on excess. Not only is the burden of artificially forming commercial companies excessive, it adds to the entities' organisational structures and costs.

Summary:

I. This case involved a request by the Ombudsman for an *ex post facto* review of constitutionality.

At stake were Executive-Law norms that precluded entities in the social sector from owning pharmacies. The legislative act in question specifies that natural persons and commercial companies can own pharmacies. This includes entities in the social sector of the economy, provided that they form a commercial company and put the pharmacy in that company's name. The reason for this provision is to ensure fiscal equality between such pharmacies and all others. The regime neither excludes the social sector from the pharmacy business nor reserves that business to the private sector.

Despite the condition set on the social sector to own pharmacies, no sector of the economy is excluded from owning such establishments and the coexistence of the various sectors in the pharmacy market is not in question.

II. The Constitutional Court asserted that by excluding social sector entities from owning pharmacies in their own right, the principle of equality is violated. The law cannot deny charitable institutions the right to own pharmacies by obliging them to "transvert" themselves "into commercial companies if they want to pursue an activity in the health field with social goals." This obligation to form commercial companies does not pass the proportionality test applied between the desire to exercise a close administrative control over the ownership of pharmacies (a legal person cannot own more than four such establishments) and the wish to safeguard fiscal equality between the entities that own them.

The Constitutional Court recognised that by forcing would-be owners to form commercial companies, the legislator avoided the need to change all the different norms that distinguish social sector entities (and not just from the fiscal point of view). The obligation makes it possible to impose a blanket regime on all the agents in the pharmacy market.

However, the solution is unbalanced. When the ownership of a pharmacy and the corresponding pursuit of its business are undertaken in favour of the beneficiaries of a social entity and no competition with market operators exists, the objective of guaranteeing equal competition loses its *raison d'être*.

If the social entities act outside the market to achieve goals that their articles of association require, and the guarantee of free competition is therefore not applicable, the public interest that those entities fulfil reacquires its full weight in the scales of decision. In the absence of powerful reasons justifying the precondition of the formation of a commercial company, the law must not deprive social entities of a favourable treatment derived from the state's constitutional obligation to support the social sector.

The institutional guarantee of the coexistence of the various sectors of production (private, public and social) must be seen as ensuring each one of them the ability to act in all the different areas of activity. Yet it would be excessive to require the social sector to act in its normal space – outside the marketplace – without the ability to present itself to the world with its natural identity.

The Constitutional Court therefore declared the unconstitutionality of the norms before it, with generally binding force.

III. The ruling was the object of two dissenting opinions, one of which was appended to it by the President of the Court. The signatories believed that the majority did not go far enough in declaring that the legislative act was unconstitutional. They preferred a declaration with broader effects, including the unconstitutionality of the obligation to form a commercial company when a social sector pharmacy is open to the public, rather than just when its users are restricted. The dissenting justices took this position on the grounds that social entities are also acting inside their natural area of activity in such cases.

The two justices considered the part of the norm that subjects legal persons, which the same Executive Law says must obligatorily be formed by social sector entities active in the pharmacy area, to the same fiscal regime as that applicable to commercial companies in general. The justices also found this obligation unconstitutional. They argued that the unacceptability of the requirement renders it unacceptable for the law to impose the corresponding regime, including the fiscal regime. The precepts in question automatically led to the decharacterisation of the social sector entities. That is, when they are wearing the pharmacy-owner hat, they are thereby prevented from pursuing their charitable objectives by selling medicines to the public. Without sufficient material grounds, this precludes the recognition that is due to social sector entities under the principle of coexisting sectors of ownership of the means of production, which is enshrined in the Constitution.

Languages:

Portuguese.



Identification: POR-2011-3-020

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 21.12.2011 / **e)** 654/11 / **f)** / **g)** *Diário da República* (Official Gazette), 17 (Series II), 24.01.2012, 483 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

5.3.43 Fundamental Rights – Civil and political rights – **Right to self fulfilment.**

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

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

Keywords of the alphabetical index:

Sexual procurement, pimping / Prostitution.

Headnotes:

A norm that criminalises the conduct of anyone who, professionally or with intent to profit, fosters, favours or facilitates prostitution by another person, does not protect assets that are alien to the rights and legal assets to which the Constitution affords its protection. Under the Constitution, the ordinary law does not protect the former type of asset. The criminalisation of a “professional activity”, whose object is the specific negation of values involving the protection of freedom and of autonomy necessary for human dignity, does not violate the Constitution.

Summary:

I. Consistent with its prior decisions – particularly Ruling no.144/2004 – the Constitutional Court accepted that the criminalisation of conduct that use the prostitution of others as a professional or profit-making activity is rooted in history and culture. The Court added that the view also stems from society, which generally finds that when a third party economically benefits from prostituting others, the activity entails exploitation of the prostitute. The Court did not consider this perspective to result from moral preconceptions. Instead, it examined a legal system guided by values of justice and founded on human dignity. The system does not guarantee situations and activities when a person can, in any dimension (intellectual, physical, sexual), be used as a pure instrument or means for serving another, even if justified as an expression of the freedom of action. Article 1 of the Constitution affirms the state's commitment to ensuring human dignity, does not recognise such justification.

The Constitutional Court recalled that this is the guideline set out in both the Convention on the Elimination of All Forms of Discrimination against

Women and the Convention for the Suppression of Trafficking in Persons and of the Exploitation of the Prostitution of Others. Both of Conventions have been ratified by Portugal.

The fact that prostitution is not prohibited in Portugal is irrelevant. One might even say that prostitution can be an expression of the freedom to dispose of one's individual sexuality. However, if third parties take economic advantage of it, it interferes with the autonomy and freedom of the agent who prostitutes him/herself because a specifically intimate dimension of the agent is being used not for his/her own purposes but for those of the third parties. Taking advantage of a person in this way entails intolerable risks, given the social contexts of prostitution.

There are also other cases in the legal system when the actual pursuit of a form of conduct is not criminalised, but third parties who also participate in it are. Examples include assisting with suicide, and the criminalisation of the dissemination of child pornography. The grounds for this criminalisation are always based on the perspective that neither a person's autonomy nor their consent to certain acts justifies the behaviour of a third party who assists in, instigates or facilitates the behaviour in question.

II. In this case, the Court was of the view that the freedom to exercise a profession or economic activity is subject to the limits and framework posed by values and rights directly linked to the protection of autonomy and dignity of other human persons. As such, the Constitution imposes conditions on activities affecting citizens' life, health and integrity, when engaged in for work or as an enterprise. Violation of the constitutional right to choose one's profession freely is thus not at stake here. The same conclusion could not be prevented if one were to accept perspectives like that touched on by the Court of Justice of the European Communities in its Sentence of 20 November 2001, Case no. C-268/99, opining that prostitution can be seen as an economic activity pursued in a self-employed capacity; the Court in this sentence only held that the permission for people to engage in the activity of prostitution in Community Member States precludes any discrimination against their authorisation to remain in an EU state. This finding had no consequences that would have proclaimed the lawfulness of activities favouring prostitution.

The Constitutional Court noted that there is clearly no constitutional duty to criminalise the forms of conduct provided for in the article. This criminalisation is a criminal policy option primarily justified by the close link between the conduct known as sexual procurement or pimping, and the exploitation of the economic

and social need of persons who make a living by prostituting themselves. Although the legal provision before the court does not expressly require the existence of a concrete exploitative relationship as an element for the crime in question, it does not mean that the desire to prevent such a relationship is not a fundamental reason for its criminalisation. The purpose of this legal option is to avoid the risk – considered high and unacceptable – that such exploitative situations will occur; the option is justified by the need to prevent such situations. This legislative option is therefore not inappropriate or disproportional to the goal of protecting personal legal assets related to autonomy and freedom.

III. The ruling's original rapporteur dissented. He opined that, according to a Constitutional Court guideline, criminalising certain forms of conduct that imply a restriction on the fundamental rights to freedom and/or property must be justified in the light of the principle of proportionality and must be respected by laws that restrict fundamental rights, freedoms and guarantees. Penalisation must thus be limited to what is needed to safeguard other constitutionally protected rights or interests. The principle that penalties must be necessary is thus a constitutional requirement that cannot be eliminated. It postulates not only a minimum intervention by the criminal law, but first and foremost that the protected legal asset must be worthy enough of protection to justify imposing the punishment. The criminal-law treatment of crimes in the sexual field has greatly evolved in recent decades as a result of the significant changes in ethical/social standards of conduct and conceptions. The polarising element in this evolution has been the clear acceptance in the same field of a view that particularly values individual autonomy and the free development of personality. This change is reflected on the one hand in a retreat from the criminalisation of forms of conduct that are freely undertaken by persons with the maturity and autonomy to take decisions. On the other hand, it broadens criminalisation as a result of a more clear-cut awareness of the duties of respect for the moral integrity and self-determination of others.

In the view of the dissenting Justice, what is criminalised in the crime of sexual procurement is the professional or profit-seeking activity of pimping under any circumstances. There is no requirement that it led to prostitution, in a way attributed to taking advantage of situational conditions that typically generate a lack of autonomous will, as was the case with previous versions of the norm before the Court.

Legal theorists have generally been highly critical of this new legislative option. When the legislator did away with the link between the behaviour and the

legal asset of freedom and sexual self-determination, it disrespected the criminal-law principle of the legal asset and criminalised forms of conduct solely based on situations the legislator deemed immoral.

Constitutional jurisprudence has favoured an eclectic position that seeks to combine the general interest of society and the protection of a personal asset as a reason for criminalisation.

Regarding the scope of the criminalisation, the legislator failed to exclude cases where no proof existed that advantage has been taken of a special situation of weakness. This would negate conditions needed for a real decision-making autonomy by someone who could then be deemed as a “victim” of that conduct. As such, the legislator has criminalised forms of behaviour that fall short of those that damage the legal asset of sexual freedom. This option deserves criticism from a constitutional standpoint.

The dissenting justice also raise the question whether it can be inferred from the principle of human dignity that private persons should be subject to rules of conduct, which result in criminal sanctions when not respected, regardless if there were no damage to any specific asset. In other words, whether the Constitution imposes an objective standard of dignity not linked to the freedom and the integrity of another person’s personality, in such a way as to legitimise the criminalisation of a damaging form of conduct that falls within the bounds of interpersonal relations.

In the norm under review, the issue is not just one of denying any legal guarantee to the activity of sexual procurement, such that that activity is excluded from the scope of the protection. The Constitution affords the freedom of profession and the freedom of private economic initiative. What is also at stake is whether that activity complies with the material concept of crime, with the ensuing restrictions on the agent’s fundamental rights. The question is not whether that activity deserves constitutional protection, but rather whether it is a cause that legitimates affecting protected assets by means of the state’s punitive action.

Cross-references:

- See Rulings nos. 144/04 (10.03.2004) and 396/07 (10.07.2007).

Languages:

Portuguese.



Russia

Constitutional Court

Important decisions

Identification: RUS-2011-3-006

a) Russia / **b)** Constitutional Court / **c)** / **d)** 07.07.2011 / **e)** 15 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 156, 20.07.2011 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

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

5.2.1 Fundamental Rights – Equality – **Scope of application.**

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:

Voting, proportional representation system / Municipal elections / Local authority.

Headnotes:

Provisions of the law establishing proportional representation voting in municipal elections in small municipalities are unconstitutional.

Summary:

Before the courts of first instance, the applicants had challenged the provisions of the Federal law on the general principles of local government organisation and the provisions of the Federation entity law on municipal elections. The courts in question had ruled that the aforementioned laws did not violate the electoral rights of citizens who were not members of a political party.

The applicants claimed that the exclusive application of proportional representation voting violates the right of candidates who do not belong to any political party to stand as candidates in those elections because only citizens who are members of a political party can exercise that right.

After considering the implicated issues, the Constitutional Court determined that the disputed provision establishing proportional representation voting in municipal elections violates the principle of equality, freedom of expression, and the right to elect and be elected in the organs of local government.

The Court noted that the legislature of the Federation entity has the right to establish the types of electoral system at the local level. The local authority chooses its system, which it sets out in its statutes.

Political parties form the key component of the representative system underlying contemporary democracies, ensuring the participation of citizens in the life of society. The multi-party system enables all interests of society to be expressed at both federal and local level. However, where the proportional representation system is applied at the local level, the federal political parties become the sole subject of the electoral process.

The law provides that independent candidates may approach a party and ask to be registered on a list. However, under the law, parties are not under any obligation to accede to such requests.

For this reason, the application of this type of voting system creates a contradiction between citizens' individual rights and the rights of political parties in elections.

Using the proportional representation system at the municipal level to elect a representative body consisting of a minimal number of members would misrepresent the will of the electors. This raises doubts about the legitimacy of the elected body.

Consequently, these elections violate the equality of electoral rights. In order to avoid such consequences, the federal parliament must set out and define criteria for the use of the proportional representation system.

Accordingly, certain of the impugned provisions of the law are unconstitutional.

The decisions of the courts of first instance to which this matter had been referred must be reviewed.

Languages:

Russian.

*Identification:* RUS-2011-3-007

a) Russia / **b)** Constitutional Court / **c)** / **d)** 14.07.2011 / **e)** 16 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 165, 29.07.2011 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

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

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

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

Keywords of the alphabetical index:

Accused / Criminal procedure / Competent court.

Headnotes:

Where family members oppose the decision to terminate proceedings on account of the death of the suspect (the accused), the prosecuting authority must continue the proceedings and forward the file to the Court. The Court must examine the entire file on the merits.

Summary:

The Constitutional Court considered two applications relating to compliance with constitutional rights and freedoms of Articles 24.4.1 and 254.1 of the Code of Criminal Procedure. They concern the termination of proceedings on account of the decease of the accused without the express consent of the family.

On 14 July 2011, the Court ruled that these articles were unconstitutional.

The first application arose from a road accident in February 2010, in Moscow, when two individuals were killed: the driver of one of the vehicles involved in a head-on collision and her passenger. Criminal proceedings were initiated against the driver (under Article 264 of the Criminal Code (breach of the Code on the driving and operating of vehicles). In August 2010, the investigating authority dropped the criminal proceedings against the person under investigation on account of her death (See Article 24.4.1 of the Code of Criminal Procedure).

Her father applied to the courts to have this decision taken by the investigating authorities annulled. He requested the reopening of the criminal proceedings and asked for the matter to be examined by the Court. He argued that this was the only way to determine the innocence of his daughter and thus restore her reputation. The Court found that the investigating authorities were entitled by law to terminate the proceedings. The Court did not grant the application and rejected the complaint.

The second applicant was the father of a deceased police officer against whom charges had been brought. Proceedings had been initiated against the latter and his colleague for abuse of power. In January 2008, the City Court terminated the proceedings against him, on account of his death. The Court held no hearing and did not seek the opinion of family members.

The father of the deceased accused asked the Court to annul this decision as his son's guilt had not been proven and asserted his right to rehabilitation. His request was dismissed.

Both applicants claimed a violation of the right to the presumption of innocence and the right to be defended in court. They argued that the fact that it was impossible for the accused's family to appeal against the decision to terminate proceedings, taken by the investigating authorities, was unconstitutional. Moreover, the impugned regulations did not provide for any involvement by family members in the judicial proceedings or for the need to take their consent into account where authorities decided to terminate proceedings because of the accused's death. They were not entitled to request continuation of the proceedings and examination of the case by a court.

The order of the investigating authorities impacts the interests of third parties (family members of the deceased persons who were accused or suspects). Consideration has to be given, for example, to the

possibility of damages. At present, the family members are unable to restore the good reputation of the deceased and are not entitled to any damages occasioned by the criminal proceedings.

The Court reiterated the principle of the presumption of innocence, the principle of equality and the principle of the guarantee of judicial protection, which apply even to the deceased.

The question is whether the family of the deceased who was accused or a suspect has the right to challenge the decision of the investigating authority to terminate proceedings on account of the death of the suspect (or the accused) and to ask for the criminal investigation to be resumed and the case to be examined by a court.

The Court referred to public international law texts, such as the Universal Declaration of Human Rights and the European Convention on Human Rights (Article 6) and its already established case-law (decisions of 24 March 1999 and 27 June 2000).

The Court found that the right to be defended in court and the principle of the presumption of innocence were fundamental rights and freedoms. The Court considered Article 21.1 of the Constitution (on the dignity of the individual), Article 23.1 of the Constitution (on everyone's right to defend his or her honour and reputation), Article 46.1-46.2 of the Constitution (on everyone's right to the guarantee of judicial protection of his or rights and freedoms and on the right of appeal to a court) and Article 49 of the Constitution (on the presumption of innocence). Based on the above Articles, it determined that the possibility to take legal action, to re-establish one's rights and to confirm one's innocence must be guaranteed to all. The examination of a case without the presence of the persons concerned limited the constitutional right to judicial protection and adversely affected the nature of justice.

Moreover, the termination of the proceedings initiated against the deceased persons puts an end to verification of their guilt. In contrast, these individuals were declared guilty without judgment by the decision taken by certain bodies. The Court held that the decision to terminate the proceedings on account of the death of the suspect (the accused) was no substitute for a judgment and could not constitute an act establishing the guilt of the accused.

The fact that the family members of a deceased person could not object to the termination of criminal proceedings excessively limited the rights of the deceased to rehabilitation, dignity and good reputation. The legislature had deprived those family

members of the opportunity to defend their rights, honour and reputation, and of the opportunity to request damages in connection with the criminal proceedings that had been initiated.

These restrictions on rights were not justified, violating the guarantees set out in the Constitution. Accordingly, where the family members objected to the decision to terminate proceedings on account of the death of the suspect (the accused), the prosecuting authority must continue the proceedings and forward the file to the Court. The Court must examine the whole file on the merits.

The Court declared Articles 24.4.1 and 254.1 of the Code of Criminal Procedure, which enabled proceedings to be terminated in the event of the death of the person being prosecuted without the consent of his or her family, to be unconstitutional.

It added that parliament should specify the interested parties (other than relatives), their status and the procedural forms of their participation in the proceedings.

Parliament must also provide for the forms of preliminary and judicial proceedings in the event of the death of the suspect (the accused).

Languages:

Russian.



Identification: RUS-2011-3-008

a) Russia / **b)** Constitutional Court / **c)** / **d)** 18.10.2011 / **e)** 23 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 246, 02.11.2011 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.7.3 Institutions – Judicial bodies – **Decisions**.
 4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status**.
 4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body**.
 4.7.16.2 Institutions – Judicial bodies – Liability – **Liability of judges**.

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

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

Keywords of the alphabetical index:

Judge / Criminal proceedings / Erroneous decision.

Headnotes:

Criminal proceedings against a judge who has delivered a manifestly erroneous decision that has not been set aside or annulled are unconstitutional.

Summary:

In this case, the Constitutional Court considered whether provisions of the Code of Criminal Procedure enabling criminal proceedings to be initiated against a judge who has delivered an erroneous decision that has not been set aside or annulled are unconstitutional.

The investigating authority referred a matter to the Qualifying Collegium of Judges, which gave its authorisation for the initiation of criminal proceedings against a retired judge. The investigating authority claimed that the judge had delivered a manifestly erroneous decision in favour of a party. The trial had taken place in 2004. The parties had not appealed and the decision had become final. The State had paid a substantial sum to the plaintiffs.

The applicant initiated court proceedings to request the annulment of the Qualifying Collegium's decision, but without success.

The applicant claimed that the criminal proceedings against a judge who had delivered a manifestly erroneous decision that had not been set aside, was a form of review of judgments by an extrajudicial body. This could be direct intervention by the investigating authorities and the prosecution service. The provisions in question violated the constitutional principle whereby justice is delivered exclusively by a court and the principles of the independence and immunity of judges.

The Court noted that the principles of the security of office and immunity of judges ensure the autonomy and independence of the judiciary and serve as a guarantee of the interests of justice. The Constitution gives the legislature the right to establish a special procedure for criminal proceedings against a judge. The judge incurs liability only once this decision has

been recognised as erroneous or arbitrary. If this is not the case, the proceedings against the judge deny the definitive and mandatory nature of the final judgment delivered on behalf of the state. Proceedings against a judge constitute interference by the organs of the executive. This violates the principles of independence and justice guaranteed by Article 10 of the Constitution.

The provisions of the law on the status of judges and of the Criminal Code, which authorise criminal proceedings against a judge who has delivered a manifestly erroneous decision which has not been set aside, are contrary to Articles 10, 118 and 120 of the Constitution.

Languages:

Russian.



Slovenia

Constitutional Court

Statistical data

1 September 2011 – 31 December 2011

In this period, the Constitutional Court held 21 sessions – 12 plenary and 9 in panels: 2 each in the civil and criminal panel and 5 in the administrative panel. It received 153 new requests and petitions for the review of constitutionality/legality (U-I cases) and 360 constitutional complaints (Up cases). In addition, it received 1 case for review of admissibility of a referendum.

In the same period, the Constitutional Court decided 103 cases in the field of the protection of constitutionality and legality, as well as 619 cases in the field of the protection of human rights and fundamental freedoms. It also decided 1 case on the review of the admissibility of a referendum.

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas the orders of the Constitutional Court are not generally published in an official bulletin, but are notified to the participants in the proceedings.

However, the judgments and decisions are published and submitted to users:

- In an official annual collection (Slovene full text versions, including dissenting/concurring opinions, and English abstracts);
- In the *Pravna Praksa* (Legal Practice Journal) (Slovene abstracts of decisions issued in the field of the protection of constitutionality and legality, with the full-text version of the dissenting/concurring opinions);
- On the website of the Constitutional Court (full text in Slovene, English abstracts and a selection of full texts): <http://www.us-rs.si>;
- In the IUS-INFO legal information system on the Internet, full text in Slovene, available through <http://www.ius-software.si>;

- In the CODICES database of the Venice Commission (a selection of cases in Slovene and English).

Important decisions

Identification: SLO-2011-3-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.04.2011 / **e)** U-I-223/09, Up-140/02 / **f)** / **g)** *Uradni list RS* (Official Gazette), 37/2010 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Constitutional Court, re-opening of proceedings / Injustice, redress.

Headnotes:

A statutory regulation which does not allow for the re-opening of constitutional complaint proceedings on the basis of a decision from the European Court of Human Rights establishing a violation of human rights is not inconsistent with the right to obtain redress for the violation of human rights under the Constitution or with the right to an effective remedy under the European Convention on Human Rights. These requirements are met if parties to such proceedings are ensured just satisfaction in the form of financial compensation or, in certain cases, merely by establishing the violation.

Summary:

The applicant did not show that the statutory regulation, which does not allow for the reopening of constitutional complaint proceedings on the basis of a decision from the European Court of Human Rights establishing a violation of human rights in these particular proceedings, was inconsistent with the right to obtain redress for the violation of human rights determined in Article 15.4 of the Constitution and with the right to an effective remedy determined in

Article 13 ECHR. These requirements under the Constitution and European Convention on Human Rights are met if the party in such a case is ensured just satisfaction in the form of financial compensation or, in certain cases, merely by establishing the violation. The Constitutional Court dismissed the petitioner's application for the reopening of the constitutional complaint proceedings on the basis of the European Court of Human Rights judgment because the Constitutional Court Act does not allow the reopening of proceedings on such grounds and because the petitioner did not demonstrate the existence of a requirement under the Constitution and European Convention on Human Rights for such statutory regulation.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2011-3-004

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 12.05.2011 / **e)** U-I-302/09, Up-1472/09, U-I-139/10, Up-748/10 / **f)** / **g)** *Uradni list RS* (Official Gazette), 43/2010 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Decision, merits, reasoning, requirement.

Headnotes:

It does not follow from the right to make statements and the right to a fair trial, determined under the Constitution, that the Supreme Court must provide a statement of reasons on the merits as to whether, based on the criterion of public interest, it will grant a legal remedy that human rights do not demand.

Summary:

The purpose of the human right to the equal protection of rights determined by the Constitution, which also includes the requirement to ensure appropriate reasoning of decisions, is to protect individuals in proceedings in terms of their rights, obligations, and legal interests. Assessment of the extent to which the proceedings refer to the individual position of the party is an important factor which determines the scope of the protection of the right to appropriate reasoning ensured by the Constitution.

Deciding on granting leave to appeal is a *sui generis* preliminary procedure in which the Supreme Court reviews whether the case involves legal issues relevant to the legal order as a whole which go beyond the specific case and interests of the parties to the specific proceedings. Therefore, it does not follow from the right to make statements and the right to a fair trial determined by Article 22 of the Constitution that the Supreme Court must provide a statement of reasons on the merits as to whether, based on the criterion of public interest, it will grant a legal remedy that human rights do not demand. From the standpoint of this procedural guarantee, it suffices that in its order, the Supreme Court makes general reference to the legal reasons for dismissing the leave to appeal. The requirement to provide reasoning on the merits of orders dismissing leave to appeal cases would undermine the purpose of the regulation of the appeal to the Supreme Court and consequently the significance of that court would be weakened, which is important to the development of the law, the protection of the human right to equality before the law, and, in a broader sense, to the foundations of constitutional democracy.

Languages:

Slovenian, English (translation by the Court).



South Africa Constitutional Court

Important decisions

Identification: RSA-2011-3-016

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 17.11.2011 / **e)** CCT 105/11; [2011] ZACC 30 / **f)** Everfresh Market Virginia (Pty) Limited v. Hoprite Checkers (Pty) Limited / **g)** www.constitutionalcourt.org.za/Archimages/17874.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.4.4 Constitutional Justice – Procedure – **Exhaustion of remedies.**

1.5.4.1 Constitutional Justice – Decisions – Types – **Procedural decisions.**

2.1.3.1 Sources – Categories – Case-law – **Domestic case-law.**

5.1.2 Fundamental Rights – General questions – **Horizontal effects.**

Keywords of the alphabetical index:

Appeal, new pleas in law, introduction, admissibility / Leave to appeal, refusal / Common law, development, infusion of constitutional values / Contract, obligation to negotiate / Lease, contract, extension.

Headnotes:

In determining whether it would be in the interests of justice to grant leave to appeal to the Constitutional Court in a claim for the development of the common law, the Court must consider whether the court of first instance and Supreme Court of Appeal had an opportunity to consider the issue and whether the claim has prospects of success.

A High Court need not investigate the development of the common law on its own volition in the absence of a violation of fundamental rights and without clear prospects that the claimant would succeed if the development was made.

Summary:

I. The applicant (tenant) and respondent (lessor) were parties to a commercial lease agreement. The agreement included a term that the tenant had a right to renew the lease for a further period provided that the parties had reached agreement on rent. The tenant purported to exercise that right. In response the lessor denied that the term was enforceable and stated that in any event it wished to renovate the premises and was thus unable to negotiate an extension. The lessor initiated ejectment proceedings in the High Court after the lease period expired.

At the hearing in the High Court the tenant raised as a defence to ejectment that the landlord was under an obligation to negotiate in good faith. The High Court held that there was no obligation to negotiate and that an obligation to negotiate in good faith was too vague to be enforced absent an objectively ascertainable standard of good faith.

The Supreme Court of Appeal refused leave to appeal. The tenant applied for leave to appeal to the Constitutional Court. The Constitutional Court called for submissions on whether the common law of contract should be developed so that a contractually agreed obligation to negotiate must be performed reasonably and in good faith.

The tenant submitted that the High Court's holding was incorrect and that in any event the common law needed to be developed.

II. The majority judgment, written by Moseneke DCJ with whom six judges concurred, acknowledged the importance of developing and infusing the common law of contract with constitutional values as mandated by Section 39.2 of the Constitution. The applicant's claim raised a constitutional issue. However, the majority found that the interests of justice had not to favour entertaining the appeal.

Four factors had to be weighed to determine this. First, the tenant's case had changed over time. Second, the tenant was raising the need to develop the common law for the first time. Ordinarily litigants who seek to develop the common law must plead this in the court of first instance because to do otherwise prejudices the other party and denies the Constitutional Court the views of lower courts. Third, it may be that the tenant's case has prospects of success. The values of the Constitution would probably require that, when there was a contractual clause to negotiate, the negotiation would have to be done reasonably, with a view to reaching an agreement and in good faith. However, the Court found it unnecessary to decide the merits of this question because there had not

been full argument on it and neither the High Court nor Supreme Court of Appeal had expressed their views on it. Fourth, there was no reason to remit the case to the High Court because the case did not warrant the High Court, when the case first came before it, embarking on an adaptation of the common law of its own volition. This was because the Court was not faced with an egregious invasion of vital fundamental rights.

It was thus not in the interests of justice to grant leave to appeal and the application was dismissed with costs.

III. The minority judgment, written by Yacoob J with whom three judges concurred, found that the case raised a constitutional issue, that it was in the interests of justice to grant leave to appeal and that the matter should be remitted to the High Court since it had failed to investigate of its own accord when the case first came before it whether the common law required development.

Supplementary information:

Legal norms referred to:

- Section 39.2 of the Constitution of the Republic of South Africa, 1996.

Cross-references:

- *Lane and Fey NNO v. Dabelstein and Others* [2001] ZACC 14; 2001 (2) *South African Law Reports* 1187 (CC); 2001 (4) *Butterworths Constitutional Law Reports* 312 (CC);
- *Carmichele v. Minister of Safety and Security and Another*, *Bulletin* 2001/2 [RSA-2001-2-010];
- *Prince v. The President of the Law Society of the Cape of Good Hope and Others*, *Bulletin* 2002/1 [RSA-2002-1-001].

Languages:

English.



Identification: RSA-2011-3-017

a) South Africa / b) Constitutional Court / c) / d) 24.11.2011 / e) CCT 08/11; [2011] ZACC 31 / f) Aviation Union of South Africa and Another v. South African Airways (Pty) Ltd and Another / g) www.constitutionalcourt.org.za/Archimages/17884.pdf / h) CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Employment, contract, continuity under new owner of business / Business, transfer, going concern, criteria / Employee, conditions, labour, economic and social / Employment, termination, conditions / Employment, transfer of business, transfer of employees.

Headnotes:

Section 197 of the Labour Relations Act 66 of 1995 provides that where a business is transferred as a going concern by an “old employer” to a “new employer”, the workers follow the business. This section applies regardless of what “generation” of outsourcing is involved. The terms old employer and new employer are dynamic. A transferee who was originally a “new employer”, may later, if it transfers the business as a going concern, be considered an “old employer” under the section. The fundamental question is whether there has been, or will inevitably be, a transfer of a business as a going concern between one employer and another within the meaning of Section 197. A transfer need not have taken place for an applicant to successfully apply for appropriate relief in terms of Section 197.

Summary:

I. Employees of South African Airways (Pty) Ltd (hereinafter, “SAA”) were transferred to LGM South Africa Facility Managers and Engineers (Pty) Ltd (hereinafter, “LGM”), in terms of a contract, as part of a transfer of SAA’s facilities management under a fixed-term contract. SAA later cancelled the agreement and notified LGM that it had to prepare a hand-over plan. The contract stated that, upon cancellation, SAA had the right to repurchase all assets and inventory and reacquire the use of all property that had been transferred to LGM.

Section 197 of the Labour Relations Act 66 of 1995 (hereinafter, "LRA") provides that where a business is "transferred" from an "old employer" to a "new employer" "as a going concern" the workers will follow the business and by operation of law take up employment with the new employer. Aviation Union, fearing that its members would lose their jobs, approached SAA for an assurance that upon cancellation its members would continue to be employed by SAA or whichever other entity the facilities management business was transferred to by SAA. SAA denied that it had any legal obligation to take back the employees. Aviation Union then approached the Labour Court for various remedies including a declaration of its members' rights.

The question thus presented was whether a statutory transfer was triggered when a fixed-term transfer of part of a business came to an end.

The Labour Court found against the employees, as did a majority of the Supreme Court of Appeal, after the Labour Appeal Court found in the employees' favour.

II. In a majority judgment, per Yacoob J, the Court held that the so-called "generation" of outsourcing is not determinative of whether Section 197 was applicable. It held that regardless of which entity the business was transferred to, the question was whether the transfer amounted to one that was of a business as a going concern. Furthermore, a transfer does not have to have occurred before relief can be granted. It did not matter, therefore, that Aviation Union had approached the Labour Court before SAA's cancellation of the outsourcing agreement had taken effect. The Court found that the transfer was made inevitable by the cancellation. This amounted to the transfer of a business as a going concern. The workers therefore fell within the scope of Section 197 and should have followed the business. The Court made a declaratory order to this effect.

III. Jafta J, in a minority judgment, adopted different reasoning but agreed that the correct interpretation of Section 197 of the LRA was that it may be applicable regardless of the generation of outsourcing. He found that on the scant evidence available to the Court, Aviation Union had failed to establish that the cancellation of the agreement between SAA and LGM had resulted in a transfer of business as a going concern. He therefore concluded that the matter should be referred back to the Labour Court, for reconsideration in light of the judgment of the Constitutional Court, for evidence to be led.

Supplementary information:

Legal norms referred to:

- Section 23 of the Constitution of the Republic of South Africa, 1996;
- Sections 187, 189 and 197 of the Labour Relations Act, 66 of 1995.

Cross-references:

- *National Education Health and Allied Workers Union v. University of Cape Town and Others*, *Bulletin* 2002/3 [RSA-2002-3-019];
- *COSAWU v. Zikhethale Trade (Pty) Ltd and Another* (2005) 26 ILJ 1056 (LC).

Languages:

English.



Identification: RSA-2011-3-018

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 29.11.2011 / **e)** CCT 03/11; [2011] ZACC 32 / **f)** President of the Republic of South Africa and Others v. M & G Media Ltd / **g)** www.constitutional.court.org.za/Archimages/17894.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Freedom of information, burden of proof / Information, access, hearing, *in camera* / Information, access, limits / Information, right to withhold.

Headnotes:

The burden the party holding the information in an access to information case bears of establishing that the information requested is covered by a legislated exemption is not discharged by the mere say-so (*ipse*

dixit) of officials or by recitation of the provisions of the exemption.

In determining whether to exercise its discretion to look at a disputed record, a court must consider whether it would be in the interests of justice to do so. Relevant to this is whether the state's hands were tied in presenting evidence, the applicant's ability to challenge the state's evidence and the severability of the record.

Summary:

I. Before the 2002 presidential election in Zimbabwe, the President of South Africa appointed two Judges to visit that country to assess the constitutional and legal issues relating to the election. On their return, the Judges submitted a report to the President. M & G Media Limited (hereinafter, "M & G"), the publisher of a weekly newspaper, requested access to the report pursuant to Section 11 of the Promotion of Access to Information Act (hereinafter, the "PAIA").

The request was refused on two grounds of exemption. First, that disclosure of the report would reveal information supplied in confidence by or on behalf of another state or international organisation as contemplated by Section 41.1.b.i of PAIA. Second, that the report had been prepared for the purpose of assisting the President to formulate policy on Zimbabwe, as contemplated in Section 44.1.a of PAIA.

M & G challenged the refusal to make the report available to it. The High Court, as well as the Supreme Court of Appeal on appeal, held that the refusal to grant access to the report was not justified by either Section 41.1.b.i or 44.1.a and ordered the state to release the report.

II. The main judgment, written by Ngcobo CJ with whom three judges concurred, and a further judge agreed in part and with the outcome, reasoned that Section 11 of PAIA gives effect to the constitutionally entrenched right to access to information (Section 32 of the Constitution). Disclosure of information is now the norm and exemption from disclosure is the exception. Access to information gives effect to the founding values of the country's democracy, namely accountability, responsiveness, and openness, as well as being crucial to the realisation of other rights in the Bill of Rights. However, PAIA places limits on the right of access to information. The constitutionality of these limitations was not in question. Instead the case turned on the constitutional and statutory framework within which claims for exemption from disclosure were to be assessed.

The Court held that the burden of proof of establishing that a record is exempt from disclosure, which rests on the holder of the information, has to be discharged on a balance of probabilities. Exemptions must be construed narrowly and neither the mere say-so (*ipse dixit*) of the information officer nor recitation of the words of the statute would be sufficient to discharge the burden.

The Court found that the state's deponents who had set out the grounds for the refusal had made claims of personal knowledge of the facts in question. However, these claims were of little value without an indication of how the alleged knowledge was acquired. Nevertheless, citing the doubt expressed by the Supreme Court of Appeal as to whether the exemptions applied despite not being established by acceptable evidence, the Court found that there was sufficient doubt as to whether the report should be disclosed.

Consequently, the Court found that this is a case where it would be proper for a court to exercise its discretion under Section 80 of PAIA to call for additional *in camera* evidence in the form of the requested report. It found that this section should be used sparingly when it is impossible for the Court to make a responsible decision on the material supplied by the parties. Section 80 was a legislative recognition of the fact that both parties to an access to information case might be constrained in their abilities to present and refute evidence.

The Court held that the standard for assessing whether to invoke Section 80 is whether it would be in the interests of justice for the court to do so. The state's plea that its hands were tied, M & G's inability to plead any evidence, as well as the concession by the state that parts of the record were severable, were in the circumstances sufficient to justify invoking Section 80. The High Court should have invoked the provisions of Section 80.

The Court set aside the orders of the High Court and the Supreme Court of Appeal and remitted the case to the High Court for it to examine the report and make an order that is just and equitable.

III. In a concurring judgment, Yacoob J agreed with the main judgment save to find that it would ordinarily be impossible for any judge to come to any conclusion about a record without having regard to the contents of the record concerned.

Froneman J too concurred with the main judgment but found that the interests of justice would only ever call for additional evidence in the form of the contested record when either party was constrained

in presenting evidence in relation to the dispute or where severability of the record was at issue. To the extent that the main judgment goes beyond this, he did not agree with it.

In a dissenting judgment, Cameron J, with whom three judges concurred, found that the Presidency had failed to justify its refusal to release the report and had failed to provide a plausible basis for the plea that the statute made it impossible for it to provide adequate reasons for its refusal. A court should exercise its powers to examine the disputed record only when the state has laid a plausible foundation for the claim that its hands are tied or where it has laid the basis for claiming an exemption but the court considers that doubt exists about its validity. That had not been done here. Cameron J would have affirmed the decisions of the previous courts and ordered release of the report.

Supplementary information:

Legal norms referred to:

- Section 32 of the Constitution of the Constitution of the Republic of South Africa, 1996;
- Promotion of Access to Information Act 2 of 2000.

Cross-references:

- *Brümmer v. Minister for Social Development and Others* 2009 (6) *South African Law Report* 323 (CC); 2009 (11) *Butterworths Constitutional Law Reports* 1075 (CC).

Languages:

English.



Identification: RSA-2011-3-019

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 01.12.2011 / **e)** CCT 37/11; [2011] ZACC 33 / **f)** City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another / **g)** www.constitutionalcourt.org.za/Archimages/17951.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Housing, access / Housing, eviction, depending on alternative housing / Housing, occupation, unlawful, eviction / Housing, policy / Housing, resources / Housing, unlawful occupation / Land, illegal occupation / Land, ownership, right / Municipality, obligation to provide alternative housing / Property, illegally occupied, eviction.

Headnotes:

Government policy that differentiates between those evicted by a local authority and those evicted by private landowners, by excluding the latter from consideration for temporary emergency accommodation, is unconstitutional. Furthermore, local governments are empowered and obliged to self-fund the provision of emergency temporary accommodation under Chapter 12 of the National Housing Code. In determining whether an eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 is just and equitable, a court may – where eviction threatens to leave occupiers homeless – link the date of the eviction to the provision of temporary accommodation by the local authority.

Summary:

I. Blue Moonlight Properties 39 (Pty) Ltd (hereinafter, “Blue Moonlight”) sought to evict a number of occupiers from property owned by it, under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereinafter, “PIE”). The occupiers, poor people who had lived on the property for many years, claimed that the eviction would render them homeless. The occupiers joined the City of Johannesburg (City) as a party to the case, claiming the City was obliged to provide them with emergency housing and that its housing policy was unconstitutional insofar as it made provision for emergency housing only for those evicted by the City itself.

The High Court granted eviction, held the City’s housing policy to be unconstitutional, and ordered the City to provide the occupiers with temporary accommodation. The Supreme Court of Appeal dismissed the City’s appeal, but granted an eviction date not tied

to any date on which the City was obliged to provide the occupiers with temporary accommodation.

The City then sought leave to appeal to the Constitutional Court, contending that it was not obliged to provide emergency accommodation, that its housing policy was constitutional, and that in any event it did not have sufficient resources to provide the housing. The occupiers cross-appealed arguing that they should not be evicted before the City had provided them with housing.

II. In a unanimous judgment, per Van der Westhuizen J, the Court held that since Blue Moonlight is the owner of the property and the occupation is unlawful, it is entitled to an eviction order. All relevant circumstances must, however, be taken into account to determine when an eviction is just and equitable under PIE. In making this determination, the Court took several factors into account: the occupiers had lived on the land for a long time; their occupation was once lawful; Blue Moonlight was aware of their presence when it purchased the property; and the occupiers would be rendered homeless.

Where the unlawful occupation has lasted for more than six months, Section 4.7 of PIE enjoins a court to consider whether the City has taken reasonable steps to obtain alternative accommodation for the unlawful occupier(s). The Court held that the City was obliged to provide temporary emergency accommodation to the occupiers and rejected the City's argument that Chapter 12 of the National Housing Code did not empower or oblige it to self-fund this accommodation. The Court further held the City's housing policy inconsistent with its housing obligations. It was not reasonable for the City to provide temporary accommodation to people evicted by it and not to people who would be rendered homeless as a result of an eviction by a private owner. The Court was not persuaded that the City did not have sufficient resources to provide accommodation for the occupiers, and found that it had budgeted based on its incorrect understanding of its housing obligations.

While Blue Moonlight could not be expected indefinitely to provide free housing to the occupiers, its rights as property owner had to be interpreted within the context of the requirement that the eviction must be just and equitable. Eviction of the occupiers would be just and equitable, in this case, if it were linked to the provision of temporary accommodation by the City. The Court therefore upheld the eviction order of the Supreme Court of Appeal but ordered that the eviction of the occupiers take place 14 days after the City was ordered to provide those occupiers who were in need with temporary accommodation.

This was to ensure that they would not be rendered homeless.

Supplementary information:

Legal norms referred to:

- Sections 25 and 26 of the Constitution of the Republic of South Africa, 1996;
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998;
- National housing Programme: housing assistance in emergency circumstances (April 2004 Final Version).

Cross-references:

- *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];
- *Government of the Republic of South Africa and Others v. Grootboom and Others*, Bulletin 2000/3 [RSA-2000-3-015];
- *Gundwana v. Steko Development CC and Others*, Bulletin 2011/1 [RSA-2011-1-006];
- *Jaftha v. Schoeman and Others; Van Rooyen v. Stoltz and Others*, Bulletin 2004/2 [RSA-2004-2-010];
- *Leon Joseph and Others v. City of Johannesburg and Others*, Bulletin 2009/3 [RSA-2009-3-017];
- *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v. City of Johannesburg and Others with the Centre on Housing Rights and Evictions and Another as amici curiae*, Bulletin 2008/1 [RSA-2008-1-002];
- *Port Elizabeth Municipality v. Various Occupiers* [2004] ZACC 7; 2005 (1) *South African Law Reports* 217 (CC); 2004 (12) *Butterworths Constitutional Law Reports* 1268 (CC);
- *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others*, Bulletin 2009/2 [RSA-2009-2-007].

Languages:

English.



Identification: RSA-2011-3-020

a) South Africa / b) Constitutional Court / c) / d) 06.12.2011 / e) CCT 19/11; 2011 ZACC 34 / f) Nthabiseng Pheko and Others v. Ekurhuleni Metropolitan Municipality / g) www.constitutional.court.org.za/Archimages/17961.pdf / h) CODICES (English).

Keywords of the systematic thesaurus:

5.1.5 Fundamental Rights – General questions – **Emergency situations.**

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

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

Keywords of the alphabetical index:

Eviction, urgency / Housing, access / Housing, eviction, arbitrariness, protection / Housing, occupier, unlawful, eviction, obligation to evict / Construction, unlawful, demolition / Eviction, court order, absence in case of urgency.

Headnotes:

The relocation of a community and the demolition of their homes without an order of court under the Disaster Management Act 57 of 2002, where the circumstances do not warrant a sudden evacuation, amounts to an infringement of the right not to be evicted from one's home or have one's home demolished without an order of court under Section 26.3 of the Constitution. Furthermore, the state acts beyond the authority conferred by the disaster management legislation when it forces the removal of residents in such circumstances.

Summary:

I. This case concerns the lawfulness of the relocation of a community and the demolition of their homes. After receiving complaints about the formation of sinkholes in the area, the Municipality had commissioned an investigation into land on which an informal settlement was situated. The reports concluded that the residents of the settlement should be relocated as the land was dolomitic. The municipality subsequently declared the area a "disaster" under the Disaster Management Act 57 of 2002 (DMA) and commenced relocating the residents. When the residents resisted, they were forcibly removed and their homes demolished.

On the day of the demolition, the applicants sought an urgent interdict in the High Court to restrain the Municipality from demolishing their homes. The High Court held that the relocation of the residents was lawful and that an evacuation under the DMA was necessary to save their lives.

The applicants applied for leave to appeal directly to the Constitutional Court to set aside the High Court order, submitting that their relocation and the demolition of their homes violated their rights under Sections 26.3 and 10 of the Constitution. Section 26.3 precludes eviction from, or the demolition of, a home without an order of court made after considering all the relevant circumstances, and Section 10 provides that everyone has inherent dignity and the right to have this respected and protected. The Municipality contended that the residents were evacuated in terms of the DMA and therefore that a court order was unnecessary.

II. In a unanimous judgment, per Nkabinde J, the Constitutional Court found that the facts did not suggest any need for an urgent evacuation. The area was recognised as hazardous as early as 1986 with the first sinkhole being identified in 2004. Three reports were commissioned by the Municipality between 2005 and 2009 but it was not until 2010 that the Municipality began taking action to relocate the residents of the informal settlement. The Court held that in evicting the residents and demolishing their homes without the required court order, by claiming to be carrying out an emergency evacuation, the state acted outside the authority conferred on it by the disaster management legislation and contrary to Section 26.3 of the Constitution.

The Court declared the relocation and demolition to be unlawful and ordered the Municipality to identify land for the development of housing for the applicants and to report back to it.

Supplementary information:

Legal norms referred to:

- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998;
- Disaster Management Act 57 of 2002;
- Section 10 of the Constitution of the Republic of South Africa, 1996.

Cross-references:

- *Abahlali Basemjondolo Movement SA and Another v. Premier of the Province of KwaZulu-Natal and Others*, *Bulletin* 2009/3 [RSA-2009-3-019];
- *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Others*, *Bulletin* 2004/1 [RSA-2004-1-004];
- *Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others*, *Bulletin* 1999/1 [RSA-1999-1-001];
- *JT Publishing (Pty) Ltd and Another v. Minister of Safety and Security and Others*, *Bulletin* 1996/3 [RSA-1996-3-019];
- *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Others*, *Bulletin* 2001/1 [RSA-2001-1-006];
- *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others*, *Bulletin* 2000/1 [RSA-2000-1-001].

Languages:

English.

*Identification: RSA-2011-3-021*

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 07.12.2011 / **e)** CCT 25/11; 2011 ZACC 35 / **f)** Occupiers of Portion R25 of the Farm Mooiplaats 355JR v. Golden Thread Limited and Another / **g)** www.constitutionalcourt.org.za/Archimages/17970.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**
 5.4.13 Fundamental Rights – Economic, social and cultural rights – **Right to housing.**

Keywords of the alphabetical index:

Housing, eviction, court order, consideration of all circumstances / Eviction, housing, alternative, availability / Land, occupation, alternative use.

Headnotes:

Section 4.6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 requires courts to consider all relevant circumstances when granting an order evicting unlawful occupiers of privately owned land who have been in occupation for less than six months. This inevitably requires courts to consider whether the Municipality seeking an eviction order is reasonably capable of providing occupiers with alternative land or housing.

Summary:

I. The question was whether the eviction of about 170 families from privately owned land was just and equitable in terms of Section 4.6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereinafter, “PIE”). The occupiers had been in occupation of the land for less than 6 months when the Municipality obtained an eviction order from the High Court.

The High Court found that the eviction of the occupiers was just and equitable. The High Court considered: that there did not appear to be any elderly persons, children, disabled persons or households headed by women amongst the occupiers; that there was little information about the conditions in which the applicants had been living before they moved onto the property; that most of the applicants were occupying the land “in contempt of a court order”; and that continued occupation would allow the occupiers to establish stronger rights, which would make the owner’s property rights more difficult to vindicate in future.

II. The Constitutional Court unanimously held, per Yacoob J, that the High Court’s decision to grant an eviction order without considering whether the Municipality could provide alternative land or housing was not just and equitable in terms of PIE. This was because there was a threat that a large number of people might be rendered homeless by the eviction order, if it were granted. The Court held that despite the fact that, unlike Section 4.7 of PIE, Section 4.6 does not explicitly require a court to investigate whether a municipality can reasonably make land available for people who might be evicted, Section 4.6 does require courts to consider all the relevant circumstances in determining whether an eviction will be just and equitable. In this case, it was impossible for the High Court to conclude that the eviction was just and equitable without investigating this aspect. The Court also noted that there was little prejudice to the owner of the land, as it had not put the land to any use, nor was there any evidence that it intended to do so in the near future.

The Court upheld the appeal and referred the matter back to the High Court to give it an opportunity to consider the matter afresh. Further, the Court ordered the Municipality to file a report in the High Court detailing the living circumstances of the occupiers and its ability to accommodate them in the event that an eviction order is granted against them.

Supplementary information:

Legal norms referred to:

- Sections 25 and 26 of the Constitution of the Republic of South Africa, 1996;
- Prevention of Illegal Eviction from and the Unlawful Occupation of Land Act 19 of 1998.

Cross-references:

- *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another (Lawyers for Human Rights as Amicus Curiae)* [2011] ZACC 33;
- *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v. Daisy Dear Investments (Pty) Ltd and Others* 2010 (4) *Butterworths Constitutional Law Reports* 354 (SCA).

Languages:

English.



Identification: RSA-2011-3-022

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 07.12.2011 / **e)** CCT 26/11; [2011] ZACC 36 / **f)** Occupiers of Skurweplaas 353JR v. PPC Aggregate Quarries (Pty) Limited and Others / **g)** www.constitutionalcourt.org.za/Archimages/17973.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**
5.4.13 Fundamental Rights – Economic, social and cultural rights – **Right to housing.**

Keywords of the alphabetical index:

Housing, eviction, alternative housing, availability.

Headnotes:

In determining whether an eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 is just and equitable, a court may, if the evicted persons would otherwise be rendered homeless, link the date of eviction to a date on which the Municipality is ordered to provide the evicted persons with alternative accommodation.

Summary:

I. The question was whether the eviction of about 50 families from privately owned land was just and equitable in terms of Section 4.6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereinafter, “PIE”) and, if so, on what terms the eviction order should be granted. The occupiers had been in occupation of the land for less than six months at the time the Municipality obtained an eviction order from the High Court.

The High Court found that the eviction was just and equitable. It ordered the Municipality to conduct an evaluation of the residents on the land and to provide the occupiers with alternative land before a specified date. The High Court expressly ordered that the eviction could take place regardless of whether the Municipality had in fact provided the occupiers with land in terms of its order.

On appeal to the Constitutional Court, the occupiers indicated in oral argument that they would be content with an order linking the date of their eviction to an order that the occupiers be provided with alternative land by the Municipality. The owner of the land, PPC Quarries, emphasised the importance of property rights and the rule of law. It said it would allow the occupiers to stay in occupation for a further four months after the date of any eviction order the Court made.

II. The Court found that when assessing whether the granting of an eviction order is just and equitable, the owner’s right to property is not unqualified. It noted that there was no evidence that the owner of the land intended to make use of the property in the foreseeable future. Furthermore, it could not be assumed that the Municipality would not abide by an order of court directing it to provide the occupiers with alternative accommodation. The Court found, however, that in the circumstances it would not be

just and equitable for the occupiers to be rendered homeless during an intervening period between their eviction and the date on which they are provided with alternative accommodation.

The Court therefore granted an order that required the Municipality to provide those occupiers that would otherwise be rendered homeless with alternative accommodation by a specified date and permitted the owner to evict the occupiers one month thereafter.

Supplementary information:

Legal norms referred to:

- Sections 25 and 26 of the Constitution of the Republic of South Africa, 1996;
- Prevention of Illegal Eviction from and the Unlawful Occupation of Land Act 19 of 1998.

Cross-references:

- *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another (Lawyers for Human Rights as Amicus Curiae)* [2011] ZACC 33.

Languages:

English.



Identification: RSA-2011-3-023

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 15.12.2011 / **e)** CCT 30/11; [2011] ZACC 37 / **f)** F v. Minister of Safety and Security and Another / **g)** www.constitutionalcourt.org.za/Archimages/17991.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.6.10.1.2 Institutions – Executive bodies – Liability – Legal liability – **Civil liability**.
 4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces**.
 5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors**.
 5.3.12 Fundamental Rights – Civil and political rights – **Security of the person**.

5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime**.

5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State**.

Keywords of the alphabetical index:

Abuse of power / Child, rape, gravity / Child, rape, pervasiveness / Common law, constitutional application / Constitution, application to common law / Police, duty of office, violation / Employee, damages, liability / Employee, police force / Employer, vicarious liability / Liability, employer, employee / Liability, vicarious / Minor, sexual crime, victim / Obligation, positive, duty to protect fundamental rights and freedoms / Police force, duty / Police, duty to protect / Police, officer, deviation from duty / Police, officer, liability / Rape, compensation, civil claim / State, duty to protect fundamental rights and freedoms / Vicarious liability of employers / Victim, crime, compensation by state.

Headnotes:

If a sufficiently close link exists between the delictual conduct of a police official, committed whilst on standby duty, and the official's employment, then the Minister of Safety and Security is vicariously liable.

Summary:

I. This case holds the Minister of Safety and Security (Minister) vicariously liable for the damages flowing from the delictual conduct of a policeman. The applicant was assaulted and raped by a policeman when she was 13 years old. She instituted a claim in the High Court against the Minister for damages. At the time of the assault and rape, the policeman was on standby duty. The Minister's liability depended on whether a sufficiently close link could be established between the policeman's wrongful conduct and his employment. The High Court found that a link had been established and that the Minister was vicariously liable. This decision was set aside by the majority of the Supreme Court of Appeal.

II. The Constitutional Court, in a majority judgment per Mogoeng J, found that the facts created a sufficiently close link between the policeman's employment and the assault and rape. This link was established by the following: that the vehicle driven by the policeman was a police vehicle and had facilitated the commission of the rape; that the applicant had placed her trust in the policeman because he was a police official; and that the state has a constitutional

obligation to protect the public against crime. Consequently, the Minister was vicariously liable.

III. Froneman J, in a separate concurring judgment, agreed. He found, however, that the Minister should be held directly, rather than vicariously, liable on the grounds that the actions of state officials are, in effect, the state's own actions, and that the normative considerations for determining liability may be appropriately assessed under the wrongfulness inquiry in a direct delictual action.

In a minority judgment, Yacoob J applied the same test as the majority but concluded that there was not a sufficient link between the delict and the employment. The policeman's unlawful conduct was too far removed in space and time from his employment to render the use of the police car sufficient to establish vicarious liability.

Supplementary information:

Legal norms referred to:

- Sections 10, 12 and 205 of the Constitution of the Republic of South Africa, 1996;
- Section 5 of the South African Police Service Act, 68 of 1995.

Cross-references:

- *K v. The Minister of Safety and Security*, *Bulletin* 2005/2 [RSA-2005-2-006];
- *Carmichele v. The Minister of Safety and Security and Another*, *Bulletin* 2001/2 [RSA-2001-2-010].

Languages:

English.



Spain Constitutional Court

Important decisions

Identification: ESP-2011-3-011

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 20.06.2011 / **e)** STC 106/2011 / **f)** Estatuto de Cataluña / **g)** *Boletín oficial del Estado* (Official Gazette), 172, 19.07.2011 www.boe.es/boe/dias/2011/07/19/pdfs/BOE-A-2011-12496.pdf / **h)** www.tribunalconstitucional.es/es/jurisprudencia/Pagin as/Sentencia.aspx?cod=10172; CODICES (Spanish).

Keywords of the systematic thesaurus:

5.1.1.4.4 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Military personnel.**

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.**

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

Keywords of the alphabetical index:

Military personnel, special status.

Headnotes:

Where harassment is alleged to have taken place in the context of a relationship of special subjection, effective investigation by the judiciary must be assured, particularly in terms of the investigation and prosecution of the crime, so as to avoid resistance or delay in the provision of evidence.

Summary:

I. A female soldier complained of degrading treatment and psychological harassment by her commanders following various disciplinary measures. She had been arrested, transferred from her workplace and

forced to take a clinical drugs test. As a result, she fell ill and suffered psychological disturbances. Criminal proceedings were shelved when the Military Court determined that there was no crime involved and that the disciplinary measures taken by the commanders were adopted within their competences and the normal functioning of the military service. The soldier, the applicant in these proceedings, alleged a breach of her right to an effective remedy in connection with the right not to be subjected to inhuman or degrading punishment or treatment.

II. The Constitutional Court identified a problem inherent in the scope of the right to physical and moral integrity and observed that the special submission of the applicant to the Army must be compensated by particular rigour in judicial procedures for the investigation and prosecution of the crime alleged to have been committed. Any resistance or delay in the provision of evidence must be challenged. Military Courts must conduct investigations effectively, using all available mechanisms to vindicate or refute the claim.

It agreed that the applicant's right to an effective remedy was violated. The Military Courts shelved the criminal proceedings when effective mechanisms to investigate the crime and to confirm or deny the victim's allegations still existed. The Military Courts also failed to gather various relevant pieces of evidence, such as testimony from a soldier working in the same military compound, a drugs test, or a psychological test to establish the applicant's state of health. In addition, the affidavit of the text messages which the applicant had been sent by her commander was not put forward.

Languages:

Spanish.



Identification: ESP-2011-3-012

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 04.07.2011 / **e)** STC 111/2011 / **f)** Estatuto de Cataluña / **g)** *Boletín oficial del Estado* (Official Gazette), 184, 02.08.2011 www.boe.es/diario_boe/txt.php?id=BOE-A-2011-13301 / **h)** www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10177; CODICES (Spanish).

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.**

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

Keywords of the alphabetical index:

Evidence, value.

Headnotes:

Anybody charged with a criminal offence is entitled to the benefit of the presumption of innocence. Convictions based on testimony given by somebody previously convicted for the same facts in a different trial should not be handed down unless there is other evidence to corroborate it.

Summary:

I. The applicant had been convicted of embezzlement of public funds; a conviction based, *inter alia*, on the testimony of somebody previously convicted for the same facts in a different trial. He claimed that his right to the presumption of innocence was breached, as there was no incriminating evidence to prove the facts and his guilt. The testimony was not conclusive, due to hostility directed towards him by the person convicted for the same facts in a different trial.

II. The Constitutional Court emphasised that anyone charged with a criminal offence is entitled to be presumed innocent. One type of evidence that can be used to prove the criminal facts and the participation of the accused is testimony by another person accused of the same facts. However, according to Constitutional Court jurisprudence (including Judgments STC 34/2006, 13 February 2006, and STC 102/2008, 28 July 2008), testimony from a co-accused must be corroborated by other evidence, as this person is not obliged to tell the truth.

The Court applied this jurisprudence to testimony given by somebody previously convicted for the same facts in a different trial. Statements by persons in this position are not wholly reliable, given their direct interest in the trial. Judges should only hand down a conviction based on such testimony if they are in possession of other evidence to corroborate it.

Languages:

Spanish.



Identification: ESP-2011-3-013

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 20.07.2011 / **e)** STC 134/2011 / **f)** Parliament of Catalonia, Estatuto de Cataluña / **g)** *Boletín oficial del Estado* (Official Gazette), 197, 17.08.2011, www.boe.es/boe/dias/2011/08/17/pdfs/BOE-A-2011-13955.pdf / **h)** www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10200; CODICES (Spanish).

Keywords of the systematic thesaurus:

4.8.2 Institutions – Federalism, regionalism and local self-government – **Regions and provinces.**

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.**

4.8.7.2 Institutions – Federalism, regionalism and local self-government – Budgetary and financial aspects – **Arrangements for distributing the financial resources of the State.**

4.8.7.3 Institutions – Federalism, regionalism and local self-government – Budgetary and financial aspects – **Budget.**

Keywords of the alphabetical index:

Budget, control.

Headnotes:

The Central State has the competence to supervise the budget of Autonomous Communities and Local Entities and to take appropriate measures to limit an eventual deficit.

Summary:

The Parliament of Catalonia challenged the Central State's acts of 2001 related to budgetary stability. The Constitutional Court rejected the challenge.

The definition of budgetary stability as a situation of equilibrium or surplus and the obligation of the Autonomous Communities to respect it, as established by the regulations under challenge, do not encroach on Catalonia's financial autonomy. State law is based on the national competence to define general economic

activity and implements the principle of coordination between the Autonomous Communities and the national Treasury.

National competence to guarantee the economic equilibrium and to take the necessary measures to obtain budgetary stability does not infringe Catalonia's political and financial autonomy. Likewise, the supervisory authority of the Joint Financial and Tax Policy Board (*Consejo de Política Fiscal y Financiera de las Comunidades Autónomas*) over the establishment and implementation by the Parliament of Catalonia of budgetary stability objectives does not pose a problem. Due to their nature and extent, such decisions must be adopted in a general and homogeneous fashion at national level.

The regulation to the effect that loan transactions by Autonomous Communities undertaken abroad are subject to authorisation from national government in case of non-compliance with budgetary stability objectives is compatible with the principle of coordination between the Autonomous Communities and the national Treasury. Also, the condition that local entities are only entitled to credit transactions and bond issues if they are not in budgetary deficit is a legitimate prescription of financial regulation with ramifications for the economy as a whole.

The obligation for the Parliament of Catalonia to approve a compensation plan, corresponding approval from the Joint Financial and Tax Policy Board on its suitability and the ability to demand a new plan from the Autonomous Community if the first one is not suitable represents a control of legality compatible with the autonomy principle, provided it is necessary in order to accomplish the legal aim of safeguarding budgetary stability. Without such mechanisms, the budgetary stability policy would have no effect.

The adaptation of the Local Entities' budgets to the budgetary stability objectives does not violate their political autonomy, because it does not affect their competence to establish their own policies, or their financial viability.

Cross-references:

- *Gesetz zur Änderung des Grundgesetzes*, Articles 91c, 91d, 104b, 109, 109a, 115, 143d, BGBl. I 2248;
- BT-Drs. 16/12410 (for the German constitutional amendment) and BT-Drs. 16/12400 (for the accompanying laws).

Languages:

Spanish.

*Identification:* ESP-2011-3-014

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 29.09.2011 / **e)** STC 150/2011 / **f)** / **g)** *Boletín oficial del Estado* (Official Gazette), 258, 26.10.2011 www.boe.es/boe/dias/2011/10/26/pdfs/BOE-A-2011-16812.pdf / **h)** www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10216; CODICES (Spanish).

Keywords of the systematic thesaurus:

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**

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

5.5.1 Fundamental Rights – Collective rights – **Right to the environment.**

Keywords of the alphabetical index:

Noise, damage, causation.

Headnotes:

The violation of the right to physical and moral integrity and of the right to private life cannot be directly and exclusively inferred from the fact that an area has been declared an “acoustically saturated zone”. Applicants claiming to be affected by the noise must provide evidence of the state of their health and living conditions in order to prove the impact of the damage.

Summary:

I. A neighbourhood of Valencia had been designated an “acoustically saturated zone” (an area in which the large number of establishments, the activity of those frequenting them and passing traffic expose local residents to high noise levels, causing them serious disturbance). A resident of this neighbourhood lodged a preliminary claim for the damage he had allegedly sustained at his home due to the noise. Having

exhausted the administrative recourses, his application was dismissed by the Valencia High Court of Justice because he had not proved the impact of the damage.

He then lodged a claim with the Constitutional Court, alleging a breach of his right to physical and moral integrity and to private life, connected to the right to dignity and the free development of personality.

II. The Constitutional Court noted its previous doctrine (STC 119/2001), and stated that a certain kind of noise is required to cause a violation of the fundamental right to physical and moral integrity and to private life. The noise must reach an objectively avoidable and unbearable level and be directly dangerous to health. It must also be attributable to the acts or omissions of the public authorities.

It emphasised the necessity for applicants to provide evidence of their living conditions and state of health, to demonstrate the damage caused by the noise. Acknowledgement of the injuries cannot be based exclusively on the fact that the area in which the applicant lives has been designated an “acoustically saturated zone”.

The applicant in this case provided no evidence to demonstrate his state of health and living conditions. Neither did he demonstrate the causal link between the alleged injuries and the acts or omissions of the public authorities. He based his complaint exclusively on the fact that his home was located in an acoustically saturated area. The Constitutional Court therefore dismissed the claim.

Cross-references:

European Court of Human Rights:

- *Moreno Gómez v. Spain*, 16.11.2004, *Reports of Judgments and Decisions* 2004-X.

Constitutional Court of Spain:

- Plenary Judgment, 119/2001, 24.05.2001.

Languages:

Spanish.



Identification: ESP-2011-3-015

a) Spain / b) Constitutional Court / c) Second Chamber / d) 07.11.2011 / e) STC 173/2011 / f) Parliament of Catalonia, Estatuto de Cataluña / g) *Boletín oficial del Estado* (Official Gazette), 294, 07.12.2011, www.boe.es/boe/dias/2011/12/07/pdfs/BOE-A-2011-19231.pdf / h) www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10245; CODICES (Spanish).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Pornography, child, possession / Computer file.

Headnotes:

The right to private life encompasses personal data and information about private and professional life contained in a personal computer. If a computer is handed over for repair without a password, its owner is presumed to have consented to access by the technical expert to the files it contains. Where there is an urgent need for the prosecution of a particularly serious crime, in order to avoid the destruction of evidence, access to the information contained in a personal computer without judicial authorisation is justified.

Summary:

I. A Spanish citizen was convicted for a crime of distribution of child pornography due to the possession of paedophile material, contained in certain files on his personal computer. These documents were found by a technical expert who was mending the computer and reported the matter to the police and handed the computer to them. The police proceeded to conduct an investigation and subjected the contents of the personal computer to examination, in the absence of judicial authorisation.

The applicant lodged a claim with the Constitutional Court, contending that his right to privacy and effective protection had been breached. He pointed out that, during the proceedings, not only the technical expert who had been mending his personal computer, but also the police officers carrying out the investigation, had opened files on his laptop without judicial authorisation.

II. The Constitutional Court noted that the right to respect for private and family life protects the life, home and correspondence of a person or group of persons from interference by others. Information on an individual's personal and professional life, when contained in an agenda or on a personal computer, fall within the remit of the constitutionally protected sphere of privacy. Such information is confidential; it can be revealed selectively.

The Constitutional Court found that in this case the interferences complained of were justified; there had been no violation of the applicant's right to privacy.

The conduct of the technical expert who reported the matter and handed the computer over to the police did not constitute a violation of the right to privacy. This person had the applicant's presumed consent to switch on the computer and to open the files on it. The fact that the computer was handed over for repair without a password means that the applicant had no intention to preserve any of the files for private or personal use, including those with paedophile content.

Moreover, police access to the information contained in the personal laptop was justified despite the lack of judicial authorisation. It was a case of urgent necessity; the ultimate aim of the police was to prosecute a crime of distribution of child pornography and to prevent valuable evidence from being destroyed by deletion of the illicit files from the computer.

The Constitutional Court also rejected the claim of a breach of the right to due process of law and to be presumed innocent, and stated the validity of the evidence collected in the course of the criminal proceedings.

Cross-references:

Court of Justice of the European Union:

- *Promusicae v. Telefónica de España*, 29.01.2008.

European Court of Human Rights:

- *Amann v. Switzerland*, 16.02.2000, *Reports of Judgments and Decisions* 2000-II;
- *Copland v. United Kingdom*, 03.04.2007, *Reports of Judgments and Decisions* 2007-I;
- *Iliya Stefanov v. Bulgaria*, 22.05.2008.

Constitutional Court of Spain:

- First Chamber, 230/2007, 05.11.2007;
- Second Chamber, 3472009, 09.02.2009.

Languages:

Spanish.

*Identification:* ESP-2011-3-016

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 07.11.2011 / **e)** STC 174/2011 / **f)** / **g)** *Boletín oficial del Estado* (Official Gazette), 294, 07.12.2011 www.boe.es/boe/dias/2011/12/07/pfds/BOE-A-2011-19232.pdf / **h)** www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10246; CODICES (Spanish).

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.**

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

5.3.13.28 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to examine witnesses.**

5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime.**

Keywords of the alphabetical index:

Minor, protection, examination.

Headnotes:

The special protection required for the examination of a minor claiming to have been the victim of sexual abuse must be balanced against the right of the accused to a fair trial. This balance can be achieved by the use of mechanisms set out in the law, which avoid the presence of the minor at the hearing and his or her confrontation with the accused, allowing for the countering of the incriminating statement, in accordance with the adversarial principle.

Summary:

I. The applicant had been convicted of sexual abuse against a minor. The sentence was based exclusively on the statement given by the victim (a nine years old girl) to the police and the examining magistrate. The Public prosecutor did not attend the testimony; neither did counsel for the defendant (the applicant in this matter).

Repeated requests by the defendant during the trial to be allowed to examine the minor were turned down. Examination was replaced by the reproduction, in the hearing, of the testimony given by the minor and recorded by the police.

The applicant claimed that his right to a fair trial was breached, noting in particular that during the proceedings he was not allowed to examine the victim and counter her testimony.

II. The Constitutional Court observed that examination is an important part of the right to due process and is a means for the defendant to refute incriminating statements. It should, in general, be carried out in a public hearing, in front of the defendant and the Judge, in accordance with the adversarial principle. This principle allows for exceptions, when interests of constitutional relevance, such as the protection of childhood, are at stake.

The Court cited various decisions of the European Court of Human Rights on the special protection required when a minor is alleged to have been the victim of sexual abuse. This can lead to special precautions being taken in terms of the examination of the minor and the avoidance of his or her presence at the hearing. It cannot, however, imply a breach of the right of the accused to a defence. The right to a defence of the applicant in these proceedings, and the adversarial principle, would have been better served had he been able to avail himself of one of the mechanisms set out in the law. This would have given him the chance to counter the victim's statement,

without her having to be present at the hearing or having to confront the accused.

Since the applicant was repeatedly refused the opportunity, during the criminal proceedings, to examine the victim and exercise his right of defence, the Constitutional Court concluded that his right to a fair trial had been breached. The hearing would therefore have to be repeated, to allow him the opportunity to defend himself. All necessary steps to safeguard the minor would have to be taken during these proceedings.

Cross-references:

European Court of Human Rights:

- *P.S. v. Germany*, 20.12.2001;
- *A.S. v. Finland*, 28.09.2010, *inter alia*.

Languages:

Spanish.



Switzerland

Federal Court

Important decisions

Identification: SUI-2011-3-004

a) Switzerland / **b)** Federal Court / **c)** Criminal Law Court / **d)** 14.04.2011 / **e)** 6B_849/2010 / **f)** X. v. Public Prosecutor's Office of Aargau Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 137 I 218 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
 3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.

Keywords of the alphabetical index:

Evidence inadmissibility / Evidence obtained by chance / Evidence, use.

Headnotes:

Prohibiting the use of evidence implicates Article 29.1 of the Federal Constitution (right to a fair trial) and Article 6.1 ECHR.

Viewing a film from a lost video camera, in the absence of an investigation into an offence, to identify the camera owner opens a question as to whether the circumstantial evidence of a punishable offence obtained from a “fishing expedition” is prohibited from being used as evidence (recital 2.3.2).

The public interest in discovering the truth is weighed against the private interest of the prosecuted person in preventing the evidence from being used (recitals 2.3.3 – 2.3.5).

The scope of the illegally obtained piece of evidence (recital 2.4) is also taken into account.

Summary:

The Court considered questions concerning the prohibition of the use of evidence and the scope of the prohibition in a case about X., who was driving his car along a motorway. He committed several, serious traffic violations. He exceeded the speed limit as displayed, crossed security lines, drove on road sections prohibited to traffic, overtook cars on the wrong side, and failed to observe the requisite distance between vehicles. One of X's friends filmed these events with his video camera. The camera was lost at a public fair but found weeks later and handed to the police. In order to identify the camera owner, the police viewed the images it contained. It found two films of X's "car race". Criminal proceedings were initiated against X, who was shown the films. In the light of this evidence, the Criminal Court of First Instance of Aargau Canton sentenced X to 18 months of mandatory imprisonment. The Cantonal Court rejected an appeal submitted by X and confirmed the first-instance sentence.

X then lodged a criminal appeal with the Federal Court against his conviction for serious traffic offences. He contended that the films should not have been admitted into evidence, that no criminal investigations had been under way at the time of receipt of this evidence, and that the films had been discovered purely by chance. Furthermore, he argued that taking account of the films infringed his friend's privacy.

The Federal Court considered whether to uphold the appeal, set aside the contested judgment and determine whether the films in question and the evidence derived from them could be used.

The first question is whether it was lawful for the Cantonal Court to take into account information derived from viewing the films in the recovered camera. Coercive measures adopted by the judicial authorities may infringe the fundamental rights of the accused or third parties. Restrictions on a fundamental right must be justified within the meaning of Article 36 of the Federal Constitution. All restrictions must have a legal basis, be justified by a public or private interest, and be proportionate to the aim pursued.

The disputed films were not discovered under any criminal investigation. When the police received the lost film camera, there were no suspicions against X or any other person. Hence, the discovery cannot be described as fortuitous in the strict sense. The police had no legal basis for analysing the data and images contained in the camera. These activities, therefore, constituted a "fishing expedition", a vague search for

evidence not permitted under criminal procedure or investigations. The evidence used by the Cantonal Court is therefore illegal.

According to Federal Court case-law, the use of illegally gathered evidence is not proscribed in absolute terms. Various interests at stake must be weighed up, taking into account the public interest in discovering the precise circumstances of the case, and also the defendant's private interest in the dismissal of the evidence. The decisive factors are the seriousness of the offence in question and the possibility of securing such information legally. In this case, the charges against the defendant are not overly important, which means that no major crime has been committed. Therefore, there is no legal basis justifying police action.

The case raised another question regarding the scope of the prohibition of using unlawful evidence. The Court considered in particular whether only the original unlawful evidence is unusable or whether other information gathered subsequently on the basis of unlawful evidence is usable or not. The issue here is the induced effect of prohibiting the use of unlawful evidence. According to Federal Court case-law, the prohibition of using unlawful evidence also covers indirectly obtained evidence where the latter would not have been accessible without the original unlawfully obtained evidence.

At the first hearing, the appellant disputed the traffic violations and charges. After seeing the recorded films, he made a partial confession. During the proceedings at first instance, he confessed all the facts. This means that the confessions were a consequence of the illegally obtained films. The appellant would not have confessed without the illegal evidence. The police would not have known of the traffic offences in question.

Under these circumstances, the Court determined that both the films used unlawfully in evidence and the appellant's subsequent confessions are unusable. The conviction for violation of the traffic regulations is therefore contrary to Federal law.

Languages:

German.



Identification: SUI-2011-3-005

a) Switzerland / **b)** Federal Court / **c)** First Court of Public Law / **d)** 14.07.2011 / **e)** 1B_134/2011 / **f)** X v. Cantonal Court of Zurich Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 137 I 209 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

- 3.13 General Principles – **Legality.**
- 3.16 General Principles – **Proportionality.**
- 5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
- 5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press.**
- 5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication.**

Keywords of the alphabetical index:

Public hearing / Court reporter / Journalist, rights and duties / Party, anonymity.

Headnotes:

The use of a judicial record of a non-public criminal hearing implicates Article 17 of the Federal Constitution (freedom of the media) and Article 36 of the Federal Constitution (restriction of fundamental rights).

A court reporter who refuses, before commencement of the proceedings, to submit to conditions set out by the judge (the duty to preserve the anonymity of the parties) may be excluded from the hearing (recitals 4 and 5).

Summary:

The Court considered whether a reporter must submit to limitations set by the judge. The question had arisen under a case that concerns an individual, who had been charged by the Zurich-Sihl prosecutor for domestic violence against his partner. The couple had met in a therapeutic establishment and had been living together ever since. Both individuals suffered from serious psychological problems. The man, who had attempted to strangle his partner, was charged with endangering another person's life.

The procedure at first instance took place in Zurich District Court. To protect the identities of the defendant and the victim, and in view of the defendant's age, the President of the Court had excluded the public from the hearing. However, he admitted accredited journalists. At the beginning of the hearing, he informed them that the exclusion of the public meant that no personal information on the parties should be disclosed in the media; this information included names, addresses and photographs. He asked journalist "X", of the "Blick" newspaper, if he could rely on his compliance with these instructions. The journalist refused to promise to comply on the grounds that his editor-in-chief decides on the details of reporting procedure. The President of the Court consequently excluded the journalist from the hearing.

X applied in vain to the Cantonal Court of Zurich Canton. He then lodged a criminal-law appeal with the Federal Court for a ruling that his exclusion had been illegal. The Federal Court rejected his appeal.

In this case, the Court considered Article 16 of the Federal Constitution, which guarantees freedom of opinion and freedom of information in general terms. Article 17 of the Federal Constitution guarantees freedom of the media, including freedom of the press, radio, television and other forms of dissemination of features and information. Freedom of the media is crucial in any law-based State. It ensures free circulation of information and the independent exchange of opinions. The media thus provides a means of monitoring public activities. In order to do so, they must be able to obtain the requisite information, whether or not the latter are accessible to the public.

Freedom of the media is not unlimited and may be restricted under Article 36 of the Federal Constitution. All restrictions must have a legal basis. In the case of Zurich Canton, the legal basis is the Law on the organisation of the judiciary of 13 June 1976. Similar provisions are set out in the new Swiss Code of Criminal Procedure, which has replaced the old cantonal codes of criminal procedure. It provides for partial exclusion of the public from hearings and also proceedings held in camera. In some cases, the court may permit court reporters to attend proceedings in camera, but journalists who fail to observe the conditions imposed may be excluded.

The measures taken by the court are also in line with the principle of proportionality within the meaning of Article 36 of the Federal Constitution. They were geared to protect both the defendant and the victim, who both suffered from serious psychological problems. The disclosure of personal data in the

media could potentially exacerbate their condition. They too were entitled to protection of their personal freedom, privacy and psychological integrity. The provisions of the Code of Criminal Procedure therefore help protect the parties to proceedings. They could not be expected to assert their rights through private-law provisions on the protection of personality.

Consideration of the European Convention on Human Rights leads to the same conclusions. Freedom of expression as set out in Article 10 ECHR is not unlimited. Exercise of such freedom entails duties and responsibilities. Restrictions are particularly important in matters affecting the reputation and rights of others. This does not perceptibly restrict freedom of the press. Moreover, Article 6.1 ECHR lays down that the press and the public may be excluded from trials where the protection of the private life of the parties so requires.

Languages:

German.



Identification: SUI-2011-3-006

a) Switzerland / **b)** Federal Court / **c)** First Court of Public Law / **d)** 31.08.2011 / **e)** 1B_273/2011 / **f)** Public Prosecutor's Office of Basle Rural Canton v. X and Basle Rural Cantonal Court for Coercive Measures / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 137 IV 237 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

3.13 General Principles – **Legality.**

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

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:

Detention on remand, conditions / Detention on remand, duration / Detention on remand, lawfulness / Appeal, suspensory effect.

Headnotes:

Detention on remand, appeal by the Public Prosecutor's Office against an order for release issued by the Court for Coercive Measures, suspensory effect. Article 81 of the Law on the Federal Court (capacity to appeal); Articles 222, 226.5 and 387 ff of the Swiss Code of Criminal Procedure.

Appeal by the Public Prosecutor's Office against denial of suspensory effect vis-à-vis an appeal against the lifting of detention on remand (recital 1).

Effective exercise of the right of appeal by the Public Prosecutor's Office presupposes holding the defendant in custody until the appeal body can reach a decision (a temporary restraining order) on continuation of the detention (recital 2.4). During this limited period the suspensory effect of the appeal forms part of the Public Prosecutor's Office's right of appeal (recital 2.5).

Summary:

The Public Prosecutor's Office of Basle Rural Canton conducted criminal investigations against X for drug trafficking. Further to an application from the Public Prosecutor's Office, the Court for Coercive Measures ordered, under decisions issued on 26 March and 19 April 2011, his detention on remand at the latest until 20 April 2011 and 6 May 2011, respectively. On 28 April 2011, the Court for Coercive Measures concluded that the conditions for the suspect's detention on remand, particularly the risk of collusion, has lapsed. It therefore rejected the request to extend the detention on remand and ordered X's release by 6.30 pm at the latest, regardless if the Public Prosecutor's Office appealed.

The Public Prosecutor's Office appealed on the same day to the Basle-Rural Cantonal Court, requesting to extend X's detention on remand and confirm the suspensory effect of the appeal. On 29 April 2011, the President of the Court invited X to submit his observations. He also noted that the Public Prosecutor's Office's appeal was without suspensory effect and could not prevent X's release.

On 30 May 2011, the Public Prosecutor's Office submitted a criminal-law appeal to the Federal Court. It asked the Federal Court to set aside the Cantonal Court's decision, to confer suspensory effect on its appeal and, on a subsidiary basis, to declare that the Cantonal Court should have acknowledged such suspensory effect. The Federal Court admitted the appeal within the meaning of the various recitals.

The appeal lodged by the Public Prosecutor's Office was admissible in the instant case. The Public Prosecutor's Office contends that it was deprived of an effective appeal. The cantonal decision could have been prejudicial, releasing the suspect who might then have colluded with others in acts of collusion, which would then have become irreparable.

In this case, the Court noted that persons remanded in custody are entitled to immediate release where the Court for Coercive Measures has concluded that the conditions for detention on remand have lapsed. This right is based on the safeguard *vis-à-vis* personal liberty and the rules on the deprivation of liberty set out in Articles 10.2 and 31 of the Federal Constitution. Applying the rules on detention for security reasons to the system of detention on remand, to the detriment of the suspect, is incompatible with the legality principle. Moreover, the Public Prosecutor's Office has a right of appeal, which must be effective to guarantee an appropriate inquiry. One of the main aims here is to prevent a released detainee from absconding, committing acts of collusion or seriously jeopardising the safety of other persons. It is therefore necessary for the suspect to remain in custody at the beginning of the appeal proceedings. As soon as the Public Prosecutor's Office is apprised of the Court for Coercive Measures' decision, it must appeal to the relevant court for both an extension of the period of detention and suspensory effect *vis-à-vis* the appeal proceedings. This enables the appeal court to order the requisite precautionary measures under a temporary restraining order. The detention is then extended until such times as the appeal authorities reach a decision. Suspensory effect is therefore part of the right of appeal of the Public Prosecutor's Office. Such extension of the period of custody by a few hours does not infringe on the defendant's rights.

Languages:

German.



"The former Yugoslav Republic of Macedonia" Constitutional Court

Important decisions

Identification: MKD-2011-3-005

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 21.09.2011 / e) U.br.77/2011 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 132/2011, 29.09.2011 / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Public officer, definition / Healthcare, public office.

Headnotes:

Employees in the healthcare sector (healthcare workers) cannot have the status of public servants because they do not perform any public authorisations on behalf of the state. Granting such status to this category of employees under the Law on Public Servants violates the constitutional principles of the rule of law and legal certainty.

Summary:

I. The Independent Union of the University Clinical Centre from Skopje and a few other medical institutions requested the Court to review the constitutionality of several articles of the Law on Public Servants (Official Gazette of the Republic of Macedonia, nos. 52/2010 and 36/2011), *inter alia*, Article 3, which defines the scope of the Law and grants health sector employees the status of public servants.

Under Article 3 of the Law on Public Servants, certain expressions used in this Law have the following meaning:

1. Public servants are employees who carry out tasks of public interest in the fields of education, *healthcare*, culture, science, labour and social works, social care and protection of children, institutions, funds, agencies, public enterprises founded by the Republic of Macedonia, the municipalities, the municipalities in the City of Skopje, that is the City of Skopje, and are not included in the Law on Civil Servants;
2. A public service includes institutions in the fields of education, *healthcare*, culture, science, labour and social works, social and child care, funds, agencies, public enterprises founded by the Republic of Macedonia, the municipalities, the municipalities in the City of Skopje, that is, the City of Skopje, and are not included in the Law on Civil Servants.

Petitioners challenged the constitutionality of the above Article (to the extent it is applied to healthcare workers) in the light of the current status of healthcare employees defined by the Law on Healthcare. They claimed that the health sector is a specific segment of society, assigned specific tasks and obligations; therefore, its employees cannot be considered as public servants. The petitioners argued that due to the new regime introduced by the disputed Articles of the Law, the health sector will not be able to fulfil its role of providing medical care. As such, citizens will be deprived of their basic human rights – right to healthcare, as guaranteed by Article 39 of the Constitution.

II. The Court based its legal opinion on Articles 8.1.3.4, 32.5, 39 and 51 of the Constitution. It also considered the analysis and comparison of relevant provisions of both the Law on the Public Servants and the Law on Healthcare. The Court noted that under the latter, healthcare is an activity of particular social interest, developed primarily to provide medical and healthcare and to protect citizens. It also noted that the Law on Healthcare already regulates the status of employees in the health sector, conditions required for healthcare workers to provide medical care services (e.g. licenses), the professional associations of health and medical personnel, their obligations and ethic rules.

The Court found that health workers providing medical and healthcare, an activity of special social interest, cannot have the status of public servants. It reasoned that health workers do not perform public mandates in the name of the state. Instead, they have one aim: protect the health of citizens and provide

health services according to the rules and standards of the profession. Essentially, healthcare by its nature does not belong in public mandates implied in the Law. Therefore, a distinction must be made with public servants’ powers because health workers do not perform such an office in the narrower sense of the word. For these reasons, identifying health workers as public servants and the consequences arising from that in terms of their status in the Law will adversely affect both citizens who need the provision of healthcare and the status of health workers whose basic task and aim is to provide health services.

The Court concluded that “healthcare” in Article 3.1.2 was not in accordance with the rule of law as a fundamental value of the constitutional order, and the legal certainty as an integral part of this fundamental value. The Court annulled, in part, the above provisions of the Law on Public Servants.

Languages:

Macedonian, English.



Turkey

Constitutional Court

Important decisions

Identification: TUR-2011-3-007

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 10.03.2011 / **e)** E.2009/85, K.2011/49 / **f)** Concrete Review of the Article 187 of the Turkish Civil Code (Law no. 4721) / **g)** *Resmi Gazete* (Official Gazette), 21.10.2011, 28091 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Surname / Discrimination, justification.

Headnotes:

The fact that a married woman is prevented from using her maiden name solely as a surname after marriage does not contravene the right to equality.

Summary:

I. Several Civil Courts asked the Constitutional Court to assess the compliance with the Constitution of Article 187 of the Turkish Civil Code (Law no. 4721). Under Article 187, married women shall bear their husband's name. However, they can make a written declaration to the Registrar of Births, Marriages and Deaths on signing the marriage deed, or at the Registry of Births, Marriages and Deaths after the marriage, if they wish to keep their maiden name in front of their surname.

The applicants argued that this provision prevented married women from using their maiden names solely as their surnames, forcing them to use their husbands' surnames either solely or together with their maiden name. They claimed that Article 187 was discriminatory on the basis of gender as it subordinated women to men in marriage in terms of

surname. The applicants also emphasised that the European Court of Human Rights found the application of the above provision to be in breach of Article 8 ECHR in *Ünal Tekeli v. Turkey* (Application no. 29865/96).

II. The Constitutional Court noted that bearing a surname is a legal obligation for Turkish citizens under Law no. 2525. The function of a surname is to identify a person's family. It noted the significant role surnames play in the continuity of the family and the transition of family culture between generations; it observed that the Constitution describes family as the basis of society; protection of the family is the duty of the state. The Court found that the contested provision was not contrary to the Constitution; the legislator enjoys discretion to determine rules relating to the family name. Priority was given in this case to the man's surname as a family name, in view of national cultural traditions. Requests for the repeal of the provision were turned down.

III. Judges Mr Osman Alifeyyaz Paksüt, Mrs Fulya Kantarcioğlu, Mr Fettah Oto, Mr Serdar Özgüldür, Mr Serruh Kaleli, Mrs Zehra Ayla Perkaş, Mr Recep Kömürcü and Mr Engin Yıldırım put forward dissenting opinions. Dissenting Judges argued that the contested provision of the Turkish Civil Code is discriminatory on the basis of gender in terms of the right to free development of personality and contrary to Articles 10 and 17 of the Turkish Constitution. Some dissenting Judges raised also some other articles of the Constitution (Articles 12, 20 and 41).

Languages:

Turkish.



Identification: TUR-2011-3-008

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 28.04.2011 / **e)** E.2008/111, K.2010/22 / **f)** Concrete Review of Law no. 657 (The Law on Civil Servants) / **g)** *Resmi Gazete* (Official Gazette), 10.12.2011, 28138 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Civil servants / Disciplinary sanction.

Headnotes:

A collective petition of civil servants may not be subjected to disciplinary sanction.

Summary:

I. The First Administrative Court of Bursa asked the Constitutional Court to assess the compliance with the Constitution of Article 125.C.h of Law no. 657. Article 125.C sets out the disciplinary offences that attract the sanction of deduction from salary. In subsection (h), the submission of a collective petition (a petition signed by several civil servants) was made subject to that sanction. The applicant argued that the right to petition is a constitutional right recognised by Article 74 of the Constitution, from which civil servants have not been excluded. The above provision was accordingly in breach of the Constitution.

II. The Constitutional Court ruled that Article 74 of the Constitution guarantees a right to petition. Under Article 13 of the Constitution, fundamental rights can only be restricted for reasons stipulated in the Constitution. There is no reason to restrict the right to petition in Article 74; civil servants were not excluded from this right. The Court accordingly found Article 125 of Law no. 657 to be unconstitutional and annulled it.

III. President Mr Haşim Kılıç put forward a dissenting opinion.

Languages:

Turkish.

*Identification:* TUR-2011-3-009

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 30.06.2011 / **e)** E.2010/52, K.2011/113 / **f)** Concrete Review of Article 278 of the Turkish Penal Code (Law no. 5237) / **g)** *Resmi Gazete* (Official Gazette), 15.10.2011, 28085 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect.**

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.**

5.3.13.23.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to testify against spouse/close family.**

Keywords of the alphabetical index:

Criminal offence, failure to report.

Headnotes:

A criminal provision may not compel somebody to make statements incriminating his or her next of kin.

Summary:

I. The Genç Criminal Court asked the Constitutional Court to assess the compliance with the Constitution of Article 278 of the Turkish Criminal Code (Law no. 5237), under which failure to notify the authorities straightaway of an offence is punishable by imprisonment of up to one year. Failure to inform the authorities that a crime has been committed, at a point when its consequences could still be limited, is also punishable by a prison sentence. If the victim happens to be under fifteen years old or somebody who cannot protect themselves due to physical or mental disability or pregnancy, the punishment to be imposed is increased by one half.

The applicant explained that this particular case involved a mother failing to notify the authorities of a crime perpetrated by her sons, the victim of which was her daughter. It suggested that punishment of the mother under such circumstances would contravene Article 38 of the Constitution, which stipulates that nobody is to be compelled to make a statement that would incriminate himself/herself or his/her legal next of kin, or to present such incriminating evidence.

II. The Constitutional Court held that although it is within the legislative discretion to decide which acts should be considered as criminal offences, criminal laws cannot be contrary to the Constitution. It stated that the prohibition of compelling someone to make statements incriminating themselves or their next of kin is a universal legal principle and a constitutional rule; compulsion of this kind violates human dignity. The provision under dispute identifies failure to notify the authorities of an offence as a punishable criminal act. It is a general provision with no exemptions for family members or next of kin. The Constitutional Court found Article 278 of the Criminal Code to be in breach of Article 38 of the Constitution in terms of legal next of kin. It repealed the provision, but resolved to postpone the entry into effect of the annulment decision for six months from the publication of the judgment in the Official Gazette, to allow the legislature sufficient time to enact new legislation.

Languages:

Turkish.



Ukraine Constitutional Court

Important decisions

Identification: UKR-2011-3-010

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.10.2011 / **e)** 10-rp/2011 / **f)** On conformity with the Constitution of certain provisions of Article 263 of the Code of Administrative Offences and Article 11.1.5 of the Law on Militia (case on terms of the administrative arrest) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 84/2011 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures.**

Keywords of the alphabetical index:

Detention, administrative, maximum duration.

Headnotes:

Individuals who have committed or are suspected of having committed administrative offences may be placed in administrative detention under certain circumstances and for specified periods. However, there is a degree of uncertainty in the current legislation over the period for which such persons may be detained, when they have to attend an office for the drawing up of a protocol or when officials are waiting for them to regain their sobriety, which could give rise to a breach of the individual's right to freedom.

Summary:

Article 263.2 and 263.3 of the Code of Administrative Offences allow for the possibility of the administrative arrest of individuals who do not have documents to prove their identity for a period of up to 10 days, upon the sanction of the prosecutor. It was suggested that these provisions were out of line with the Constitution, along with Article 263.4 and 263.5 of the Code of Administrative Offences as well as Article 11.1.5.6 of the Law on Militia of 20 December 1990 no. 565-XII as amended, which allows the militia to take into custody and detain for up to twenty-four hours

individuals who have obstructed the lawful demands of a militia officer, pending consideration of the case by a court.

Other provisions were examined in terms of constitutional compliance. Article 263.1 of the Code of Administrative Offences allows for the establishment by law of other terms of administrative arrest, in exceptional cases. Under Article 263.2, an individual may be detained for a maximum of three days, if this is necessary in order to verify his or her identity and to clarify the conditions of the offence, upon written notification by a prosecutor within 24 hours of the detention. Under Article 263.3, an individual can be detained also in order to verify his or her identity, to conduct a medical examination, to clarify the conditions of purchase of drugs and psychotropic substances and to examine them for a maximum period of three days upon written notification by a prosecutor within 24 hours of detention. Article 11.1.5.4 of the Law on Militia dated 20 December 1990 no. 565-XII as amended allows the militia to take into custody and to detain in specialised places individuals who have committed an administrative offence for a maximum period of three days, upon written notification by a prosecutor within 24 hours of the detention.

There is a universal right under Article 29.1 of the Constitution to freedom and personal inviolability.

Under Article 64.1 of the Fundamental Law constitutional human and citizens' rights and freedoms must not be restricted, except in cases envisaged by the Constitution.

Article 29.2 of the Fundamental Law provides that nobody is to be arrested or held in custody unless this is pursuant to a substantiated court decision and only on the grounds and in accordance with the procedure established by law.

Administrative detention, a measure provided for in cases of administrative offence, is a means of restriction of an individual's right to freedom and personal inviolability (Chapter 20 of the Code of Administrative Offences (hereinafter, the "Code").

The concept of "detention" as an administrative procedural means is not developed at legislative level. Analysis of the provisions of Article 11.1.5 of the Law on Militia would indicate a perception by the legislator of detention not only as a restriction on the freedom of somebody who is accused of having committed a crime or suspected of having done so who is taken into custody as a precautionary measure, but also as an administrative procedural measure against the perpetrator of an administrative offence, a short-term deprivation of the freedom of an

individual in the form of administrative detention (as envisaged by Article 29 of the Constitution).

Article 29.3 of the Constitution sets out the maximum permissible period for which somebody can be detained in the absence of a substantiated court decision. If it is necessary to stop or prevent a crime as a matter of urgency, the bodies authorised by law may hold a person in custody as a temporary preventive measure, reasonable grounds for which must be verified by a court within 72 hours. Detainees who are not provided with a substantiated court decision within 72 hours must be released straightaway.

Systematic analysis of the provisions of Article 29 of the Constitution, in conjunction with Article 8 of the Constitution, would indicate that the constitutional requirements as to the maximum detention period without validation from a court of someone involved or possibly involved in criminal proceedings, as set out in Article 29.3, should also be taken into account when determining the maximum possible detention period for those involved in administrative proceedings, so that, in the absence of validation from a court, administrative detention must not exceed 72 hours.

In accordance with Article 254 of the Code, a protocol has been drafted on the commission of offences outlined in Article 263.4 of the Code. However, the legislator did not regulate the issue of the drawing up of a protocol on administrative offences or its submission to bodies or officials authorised to consider such cases and to adopt the relevant resolution. As a result, the legislator has allowed such bodies and officials to determine such terms of detention at their own discretion. This could pave the way for abuse on their part.

Under Article 263.5 of the Code, the term of administrative detention is calculated starting from the moment the offender is delivered to an office for the drawing up a protocol, and, where the person concerned was in a state of alcohol intoxication, from the point when he or she became sober again.

The Constitutional Court noted the difference between delivery (where the offender attends for a protocol to be drawn up) and administrative detention; a compulsory measure related to the constitutional rights of freedom and personal inviolability.

Uncertainty over the issue of the point of delivery of an offender may give rise to abuse on the part of the bodies concerned, in terms of the potential for the individual's right to liberty to be restricted for a longer period than that provided for by law.

There is also uncertainty regarding the point at which an individual in a state of alcoholic intoxication sobers up, leading to inconsistency in the overall period of detention for such individuals, which could give rise to abuse on the part of the bodies involved.

Judge M. Markush expressed a dissenting opinion.

Languages:

Ukrainian.



Identification: UKR-2011-3-011

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 20.10.2011 / **e)** 12-rp/2011 / **f)** Official interpretation of the provisions of Article 62.3 of the Constitution / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 84/2011 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

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:

Accusation / Evidence, unlawfully obtained / Investigation, authorised persons.

Headnotes:

Accusations of committing a crime cannot be based on facts discovered in violation of a person's constitutional rights, in violation of procedures prescribed by law, or by an unauthorised individual. Only evidence obtained in accordance with the requirements of criminal procedural legislation is admissible. Investigative activities cannot be conducted by public or private organisations or by individuals other than those defined by the Code of Criminal Procedure.

Summary:

The applicant, the Security Service, asked the Constitutional Court for an official interpretation of Article 62.3 of the Constitution which states that accusations must not be based on unlawfully obtained evidence, in conjunction with Article 65.2 of the Criminal Procedural Code (hereinafter, the "Code") and Articles 2, 5.2, 8 of Law no. 2135-XII on Operative and Investigation Activity dated 18 February 1992 (hereinafter, the "Law").

In terms of Article 62.3, the Constitutional Court started from the premise that the accusation of a person having committed a crime must not be based on evidence obtained as a result of a violation or restriction of constitutional rights and freedoms, except in cases provided for by the Fundamental Law.

Operative and investigation activities may be exercised only by bodies of state power or their officials. They in turn must act only on the grounds, within the limits of authority and in the manner envisaged by the Constitution and the laws (Article 19.2 of the Fundamental Law).

Systematic analysis of the provisions of the Code and the Law indicates that the execution of operative and investigation measures or the use of any means to obtain actual information should be only be deployed provided human rights and freedoms are observed, in cases envisaged by law and following appropriate procedure by persons or divisions authorised to exercise such activity. If, in the course of obtaining information, such persons disregard the Constitution and the provisions of the Code and other legislation, evidence obtained in this way will be rendered inadmissible.

Operative and investigation activity is only to be undertaken by the divisions of operative bodies stated in Article 5.1 of the Law. Article 5.2 precludes the execution of operative and investigation activity by non-governmental or private organisations, persons, other bodies or their divisions, except those mentioned in the first paragraph of this Article.

The rationale behind this prohibition is that execution by unauthorised individuals or legal entities of any operative and investigative-related activity is in breach of constitutional human and citizen's rights and freedoms as well as legislative provisions.

The Constitutional Court noted that actual information on the commission of a crime (or the preparations for it) may also be obtained by unauthorised persons (i.e. it can be accidentally recorded by individuals taking

their own pictures or video or audio-recordings or by surveillance cameras).

When evidence containing information on the commission of a crime (or preparations for it), submitted as prescribed in Article 66.2 of the Code, is being assessed in terms of admissibility in a criminal case, the pro-active or random nature of actions by individuals or legal entities, and the reason for the gathering of the data mentioned above, should be taken into consideration.

The Constitutional Court emphasised that evidence (such as items or documentation) submitted by an individual or a legal entity in accordance with Article 66.2 of the Code will not meet the criteria of admissibility of evidence if it is obtained in violation of human rights and fundamental freedoms enshrined in the Constitution.

Languages:

Ukrainian.



Identification: UKR-2011-3-012

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 10.11.2011 / **e)** 15-rp/2011 / **f)** Official interpretation of Articles 1.22, 1.23, 11, 18.8, 22.3 of the Law on the protection of consumers' rights in connection with Article 42.4 of the Constitution (case on the protection of consumer credit rights) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 90/2011 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Consumer credit agreement.

Headnotes:

The Law on the Protection of Consumer Rights and subsequent amendments should be interpreted as being applicable to legal relations between creditors

and consumers (or borrowers) that arise while a consumer credit agreement is being concluded and when it is being executed.

Summary:

Under Article 1054.1 and 1054.3 of the Civil Code, banks or other financial institutions (the creditor) are under an obligation to provide funds (credit) to the borrower in the volumes and on the terms established by the credit agreement, and the borrower is obliged to pay back the funds and interest on them. Specific regulation of relationships under consumer credit agreements is established in legislation.

The Law on the Protection of Consumer Rights no. 1023-XII of 12 May 1991 (hereinafter, the "Law") regulates the relationship between consumers of goods, works and services and the manufacturers and those who sell and provide them; it establishes the rights of consumers and how these are to be implemented, and sets out the fundamentals of realisation of the state policy in the field of protection of consumer rights. Article 19.2 of the "Law on Financial Services and State Regulation of Financial Services Markets" no. 2664-III dated 12 July 2001 (hereinafter, the "Law on Financial Services") encapsulates the state regulation of financial services markets and has as its goal the protection of the interests of consumers of financial services.

Article 1.22 and 1.23 of the Law define a consumer as an individual, who purchases, orders, uses (or intends to purchase or order) products for his or her personal needs, which are not directly connected with entrepreneurial business activities or the execution of the duties of an employee. Consumer credit implies funds provided by a creditor (bank or other financial institution) to a consumer enabling him or her to purchase products.

Under Article 11.1 of the Law a creditor and a consumer conclude an agreement on consumer credit under which a creditor provides funds (consumer credit) or undertakes an obligation to provide them to a consumer for purchasing products in the volume and on the terms established by the agreement. The consumer is under an obligation to pay back the funds and interest on the bank credit.

Article 11.2 of the Law and Article 6.1.16 of the Law on Financial Services regulate the issue on the information a creditor should provide to a consumer before the agreement is concluded. Article 56 of the Law on Banks and Banking no. 2121-III dated 7 December 2000 (hereinafter, the "Law on Banks") deals with the information the bank should provide to the consumer as its client upon his or her request.

Article 11.3 of the Law establishes the rules for the gathering and use of information about consumers at the stage of concluding agreements on consumer credit as well as at the stage of their execution.

The provisions of Article 11.4 – 11.11 of the Law envisage consumer rights which may only be implemented in the execution of a consumer credit agreement. These include the right of a consumer to withdraw from the conclusion of a consumer credit agreement within a certain time span without having to give reasons; the right not to be forced to provide payments established on unlawful grounds during the execution of the consumer credit agreement; the right not to be forced to repay the consumer credit early in case of minor breaches of the agreement and the right to protection from public dissemination of information on non-payment of a debt.

Consumer rights at the stage of execution of the credit agreement are also envisaged by Article 1056¹ of the Code, Article 55.4 of the Law on Banks and Article 6.2 of the Law on Financial Services, as a result of which banks are prohibited from unilaterally changing the terms of agreements concluded with their clients (such as increasing the interest rate) unless this has been provided for by law.

The Constitutional Court held that the provisions of the Law under scrutiny in these proceedings are directed towards the protection of consumers of credit services and the balancing of these rights with other social values that are protected by public authorities.

Languages:

Ukrainian.



Identification: UKR-2011-3-013

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 13.12.2011 / **e)** 17-rp/2011 / **f)** On the conformity with the Constitution of certain provisions of the Law on the Judiciary and the Status of Judges, the Criminal Procedural Code, the Commercial Procedural Code, the Civil Procedural Code, and the Code of Administrative Proceedings / **g)** *Ophitsyynyi Visnyk Ukrayiny* (Official Gazette), 100/2011 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

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

4.7.4.4 Institutions – Judicial bodies – Organisation – **Languages.**

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:

Language, regional or of minority / Right to appeal to court, refusal / Summons, service, address.

Headnotes:

Strengthening of judicial control over the execution of court decisions and vesting courts with the power to impose penal sanctions are measures aimed at ensuring the constitutional right of citizens to judicial protection; they are not intended to encroach on citizens' rights of access to court.

Summary:

The following provisions were examined in terms of constitutional compliance.

Article 12.4, 12.5 of the Law on the Judiciary and the Status of Judges no. 2453-VI dated 7 July 2010 whereby regional or minority languages may be used in court, along with the state language;

Article 400 of the Criminal Procedural Code, Articles 111 and 116 of the Commercial Procedural Code, Article 240 of the Code of Administrative Proceedings and Article 360 of the Civil Procedural Code, envisaging the grounds and the procedure of admissibility of a case for proceedings at the Supreme Court by a higher instance specialised court;

Articles 99.2, 99.4, 186.2, 186.3, 212.2 of the Code of Administrative Proceedings, Articles 43.3, 110 of the Commercial Procedural Code, Articles 151.5, 199.1, 294.1, 294.2, 325.1, 329.2 of the Civil Procedural Code on reducing the procedural terms for appeals by citizen to courts;

Articles 22.4, 22.5, 60.1 of the Commercial Procedural Code, allowing for changes to the subject or ground of appeal by petitioners and terms for filing reciprocal appeals;

Articles 22.1, 24.2 and 30.3 of the Code of Administrative Proceedings, on the transfer of cases. These provisions establish the procedure for filing an appeal on examination of a case by a collegium of judges, and also regulate terms for filing an appeal when a judge, expert, specialist, interpreter or secretary of judicial proceedings withdraws from a case;

Articles 27.2, 131.1 of the Civil Procedural Code concerning the provision of evidence by parties to a case;

Article 6.5 of the Code of Administrative Proceedings to the effect that remission of the right to appeal is ineffective;

Article 267.2, 267.3, 267.6 and 267.8 of the Code of Administrative Proceedings, setting out the right of courts to impose fines on officials (including heads of collegiate bodies) where the state organ in question has not executed the court decision or provided a report on its execution;

Articles 33.3, 33.4, 35.11, 38 of the Code of Administrative Proceedings, Article 64.1 of the Commercial Procedural Code, Article 74.5 of the Civil Procedural Code regarding changes to the procedure of notice to appear for parties to proceedings, on the consideration of appeals and complaints without their personal presence at the hearings.

The provision regarding the use of regional or minority languages should be examined from the perspective of ensuring the implementation of the universal right to recourse to court in cases of breach of rights and freedoms and for the protection of rights by any means not prohibited by law. There is a universal right, under Article 55.1, 55.2 and 55.5 of the Constitution, to challenge in court decisions, actions or omissions on the part of organs of state power, local government bodies and their officials and officers.

The realisation of this right depends in some cases on ensuring the constitutional guarantee of free use of Russian and other languages of national minorities (Article 10.3 of the Constitution). The provisions of Article 12.4 and 12.5 of the Law on the Judiciary and the Status of Judges no. 2453-VI dated 7 July 2010 (hereinafter, the "Law") are aimed at providing free access to court by persons with a command of regional or minority languages. They do not conflict with the common principle of administration of justice in the state language as envisaged by Article 10.1 of the Constitution.

The role of higher instance specialist courts in the process of the admission of a complaint to examination by the highest State judicial body is regulated by the provisions of the Criminal Procedural Code, the Commercial Procedural Code, the Civil Procedural Code and the Code of Administrative Proceedings (hereinafter, the "Procedural Codes"). These Codes also set out the grounds for appeal to the Supreme Court, the rights and liabilities of those taking part in the hearing of a case, and the authorities of the Supreme Court.

Issues regarding the admissibility of a case are decided by a collegium of judges from an appropriate higher instance specialist court, drawn from the ranks of judges who were not involved in the adoption of the decision under appeal. The formation of a collegium is performed by the automated system of record-keeping control of a court (Article 15.3, 15.4, 15.5 of the Law).

The examination of a complaint by higher instance specialist courts does not limit or restrict the authorities of the Supreme Court. Articles 22.3, 55.1, 55.2 and 129.3.4 of the Fundamental Law are not violated by the responsibility the higher instance specialist courts have to examine instances of inconsistent application of the same norm of material law by the courts of cassation, as set out in the Procedural Codes.

The imposition of specific terms of execution of particular procedural actions by individuals participating in a case is performed in the order stipulated by law, on the basis of Article 92.1.14 of the Constitution.

Under Article 3.2 of the Constitution, the main duty of the State is to uphold and protect human rights and freedoms, which requires putting mechanisms in place in legislation so that citizens can properly realise their rights and freedoms (item 3.2.4 of the reasoning part of Decision of the Constitutional Court no. 22-rp/2004 dated 24 December 2004).

The Procedural Codes reduce the terms for the execution of certain procedural steps; they do not restrict the contents and volume of the constitutional right to judicial protection and access to court. All participants in proceedings, not just the State, are under a duty to take all steps necessary to safeguard proceedings.

Article 6.5 of the Code of Administrative Proceedings (hereinafter, the "CAP") envisages that remission of a right to appeal to court is ineffective. This provision, in the Constitutional Court's view, does not restrict an individual's right to recourse to court. Instead, it protects it. Under Article 6.1 of the CAP, anybody

who believes their rights, freedoms or interests have been breached by a decision, act or omission on the part of an organ of state power may appeal to an administrative court in accordance with the procedure established by this Code.

The right to recourse to courts, as part of the right to judicial protection is guaranteed by Article 55 of the Constitution and is linked to an individual's belief that his or her rights, freedoms or interests have been breached, and readiness to seek redress.

Article 267 of the CAP sets out the procedure for judicial control over decisions in administrative cases; these provisions are geared towards ensuring execution of court decisions.

Under Article 267.1 and 267.2, where a court has decided against an organ of state power in an administrative case, it can impose a duty on this entity to provide a report on the execution of the decision. If such a report is not submitted, a judge may make a ruling setting a new term for submitting the report. It can also impose a penalty.

In certain cases, effective judicial protection requires application of the procedure of mandatory execution of the decision of the court.

Strengthening of judicial control over the execution of court decisions and vesting the courts with the right to impose penal sanctions are measures aimed at ensuring the constitutional right of citizens to judicial protection.

Parties to a case should be informed about the time and place of the hearing; an important safeguard of an individual's right to protection in court.

The legislator accordingly made provision for the verification of the data and evidence provided in a claim concerning the place of residence of respondents, to which notifications of court summons are to be sent.

Judges D. Lylak, P. Stetsiuk, V. Kampo and V. Shyshkin expressed a dissenting opinion.

Languages:

Ukrainian.



Identification: UKR-2011-3-014

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 14.12.2011 / **e)** 19-rp/2011 / **f)** Official interpretation of provisions of Article 55.2 of the Constitution, Articles 2.2, 17.3.2 of the Code of Administrative Proceedings, Articles 110.3 and 236.2 of the Criminal Procedural Code and provisions of Articles 97, 110, 234 and 236 of the Criminal Procedural Code, Articles 3, 4 and 17 of the Code of Administrative Proceedings from the perspective of Article 55 of the Constitution (case on challenging omissions by the authorities regarding claims on crimes) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 101/2011 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.7.1 Institutions – Judicial bodies – **Jurisdiction**.
4.7.8.2 Institutions – Judicial bodies – Ordinary courts – **Criminal courts**.
5.3.37 Fundamental Rights – Civil and political rights – **Right of petition**.

Keywords of the alphabetical index:

State official, decisions, acts, omissions.

Headnotes:

There is a universal right, under the Constitution, to challenge in court, where appropriate and in accordance with the law, decisions, actions or omissions on the part of organs of state power, local government authorities, officials and officers.

Appeals by individuals arising from the adoption of decisions, actions or omissions by the authorities concerning crimes which have been or may be committed are to be considered and resolved by the criminal justice system.

Summary:

Under Article 55.1 and 55.2 of the Constitution, decisions taken by authorities, actions committed by them in their performance of their management duties and failure to carry out the obligations the legislation has conferred on them may be challenged in court. A system of administrative courts was set up to facilitate the implementation of this right.

Any decision, action or omission may be challenged in the administrative courts, except where the Constitution or laws prescribe another order of judicial

proceedings (Article 2.2 of the Code of Administrative Proceedings (hereinafter, the "CAP").

The CAP does not regulate the order of consideration of all legal public disputes; only those arising from the performance by the authorities of their management functions, the consideration of which does not fall within the direct remit of other courts.

Provisions of the Criminal Procedural Code (hereinafter, the "CPC") regulate activities of state bodies and their officials within the sphere of legal public relations. Responsibility for criminal acts or attempted crimes is established by criminal law.

Article 97 of the CPC places prosecutors, investigators, judges and those charged with preliminary investigation under a duty to accept applications and reports concerning crimes which have been or may be committed, including cases which do not fall within their jurisdiction (Article 97.1). Within three days, they must either resolve to launch criminal proceedings (or decline to do so) or submit an appropriate application or report (Article 97.2). They must also take all possible and necessary steps concerning such applications and reports (Article 97.3, 97.4 and 97.5).

Articles 110, 234 and 236 of the CPC set out the procedure for challenging in court decisions or actions by prosecutors, investigators and those charged with preliminary investigation committed in the course of proceedings in a criminal case. The subjects mentioned above are the bearers of special procedural authority and thus perform functions specified by the objectives of criminal jurisdiction.

The process of checking applications and reports concerning crimes undertaken by prosecutors, investigators, or persons charged with preliminary investigation last until the launching of criminal proceedings; the methods deployed in performing these tasks are the same as those used in collecting evidence in criminal cases, and the type of legal relations that occur during this process are criminal procedural legal relations. Such activity should therefore be executed in the same procedural order and by the court authorised under the legislation to check and to evaluate evidence in criminal cases (the criminal court). The imperative nature of Article 17.3.2 of the CAP excludes the jurisdiction of administrative courts over such matters.

The Court which should consider appeals regarding adoption of decisions, committing actions or omissions by authorities concerning applications and reports on crimes which have been or which may be committed is, therefore, one that specialises in criminal matters.

Systematic analysis of the CPC provisions would indicate that it is possible to challenge in court not only decisions and actions on the part of prosecutors, investigators and those charged with preliminary investigation, but also their omissions.

Languages:

Ukrainian.



Identification: UKR-2011-3-015

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 26.12.2011 / **e)** 20-rp/2011 / **f)** Constitutional compliance of Chapter VII.4 "Transitional Provisions" of the Law on the State Budget for 2011 / **g)** *Ophitsyynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.10.2 Institutions – Public finances – **Budget**.
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.
5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living**.

Keywords of the alphabetical index:

Social right, minimum standard / Social protection, right / Social benefits, amount.

Headnotes:

The amount of social provision the State can make available under the Budget depends on what is feasible for the State, socially and economically. However, the universal constitutional right to a standard of living sufficient for an individual and his or her family, as provided for in the Constitution, must be safeguarded.

Summary:

A group of 49 People's Deputies, another group of 53 People's Deputies and a further group consisting of 56 People's Deputies applied to the Constitutional Court with a petition suggesting that Chapter VII.4

“Transitional Provisions” of the Law on the State Budget for 2011 (hereinafter, the “Law”) did not comply with Articles 1, 3, 6, 8, 16, 17.5, 19.2, 21, 22, 43.1, 46, 48, 58, 64, 75, 85.1.3, 92.1.1, 92.1.6, 92.2.1, 95.1, 95.2, 95.3, 116 and 117 of the Constitution.

According to the applicants, Parliament, when it enacted the above legislation, gave the Cabinet of Ministers the right to establish the procedure for and amount of social benefits, already envisaged by law, and to change the volume of social benefits depending on the financial resources available under the Budget of the State Pension Fund for 2011. In so doing, Parliament restricted the constitutional right of citizens to social protection.

The applicants also contended that the subject matter of the regulation of a law on the State Budget is an exhaustive list of legal relationships determined by the Constitution and the Budget Code. Decisions on specific features of application of other effective laws are not included therein.

The Constitution determines the guarantees for social protection, in particular, the legal safeguarding of fundamental aspects of social protection, and the forms and types of pension provision (Article 92.1.6) It also determines the sources of state social security (Article 46.2) and control over the use of State Budget funds (Article 98).

The amount of social provision depends on what is feasible for the State, socially and economically. However, the universal constitutional right to a standard of living sufficient for an individual and his or her family, as provided for in Article 48 of the Constitution, should be safeguarded.

The Constitutional Court considered various provisions of international law. Under Article 22 of the Universal Declaration of Human Rights, the amount of social security benefits is established in accordance with the financial resources of each State. The European Court of Human Rights, in its Judgment of 9 October 1979 in *Airey v. Ireland* (*Special Bulletin ECHR* [ECH-1979-S-003], Series A, no. 32), stated that the realisation of human social and economic rights depends on the economic and financial situation within the State. Such provisions also apply to the admissibility of reducing the volume of the social benefits which the European Court of Human Rights mentioned in its Judgment of 12 October 2004 in *Kjartan Ásmundsson v. Iceland*.

The Constitutional Court proceeded from the premise that adherence to the constitutional principles of a social and legal state, and the rule of law (Articles 1 and 8.1 of the Fundamental Law) determines the

implementation of the legislative regulation of public relations on the basis of equity and equality, taking into account the State’s duty to provide decent living conditions for all citizens.

The social and economic rights envisaged in the legislation are not absolute. The State may need to alter the mechanism of realisation of these rights, especially where it is not possible to finance them by proportional redistribution of funds in order to maintain a balance with the interests of society as a whole. Such measures may also be dictated by the need to eliminate or prevent real threats to economic security. At the same time, the content of the fundamental right may not be violated, which is the generally recognised rule, indicated by the Constitutional Court in Decision no. 5-rp/2005 dated 22 September 2005 (case on permanent use of land plots), *Bulletin* 2005/3 [UKR-2005-3-005]. Establishing a legal regulation under which the amount of pensions and other social payments and assistance will be lower than the level set in Article 46.3 of the Constitution is inadmissible, and will not provide adequate living conditions allowing individuals to live in society and maintain their human dignity, in contravention of Article 21 of the Constitution.

The Constitutional Court therefore found that the disputed provisions of the Law do not contradict Articles 8, 21, 22, 46, 48 and 64 of the Constitution.

Under the Constitution, the fundamentals of social protection, forms and types of pension are determined exclusively by law (Article 92.1.6). The Cabinet of Ministers is authorised to take measures to ensure the rights and freedoms of citizens and pursue a policy of social protection (Article 116.2, 116.3).

The Cabinet of Ministers, as the highest executive authority has the constitutional power to direct and coordinate activities of ministries and other executive agencies, including the Pension Fund.

The Cabinet of Ministers is the body which ensures state policy in the social sphere. The Pension Fund is charged with implementing it. This may be at the expense of State Budget funds.

Parliament, by introducing Chapter VII.4 “Transitional Provisions” to the Law on the State Budget for 2011, identified the Cabinet of Ministers as a state body with responsibility to ensure the implementation of the social rights of citizens envisaged by laws. Essentially, it provided the Cabinet with the right to determine the order and volume of social benefits based on the available financial resources of the budget, which is consistent with the functions of the Government, as defined in Article 116.2 and 116.3 of the Constitution.

Chapter VII.4 “Transitional provisions” of the Law does not therefore contradict Articles 92.1.6, 116, 117 of the Constitution.

The specific purpose of the State Budget is to ensure appropriate conditions for the implementation of other laws, which provide state financial obligations to citizens aimed at their social protection, including benefits, compensations and guarantees (paragraph 4 of the reasoning part of Decision of the Constitutional Court no. 6-rp/2007 dated 9 July 2007 in the case on social guarantees of citizens), *Bulletin* 2007/2 [UKR-2007-2-006].

In its Decision no. 26-rp/2008 dated 27 November 2008 in the case on the balancing of the budget (*Bulletin* 2008/3 [UKR-2008-3-028]), the Constitutional Court mentioned that the provisions of Article 95.3 of the Constitution, concerning the State’s aspiration to balance the budget in systemic connection with the provisions of Articles 46, 95.2 of the Constitution, should be understood as the State’s intention to maintain an even balance, when defining by law the State Budget of revenues and expenditures and adopting laws and other regulations that may affect the budget. In its Decision no. 6-rp/2004 dated 16 March 2004, in the case on printed periodicals (*Bulletin* 2004/1 [UKR-2004-1-006]), the Constitutional Court also emphasised that the State’s aspiration to balance the State Budget is realised through identification of sources of government revenue and spending needs.

In the Constitutional Court’s opinion, the principle of a balanced budget is a defining element, along with the principles of equity and proportionality, in the activities of public authorities, particularly in the process of elaboration, adoption and implementation of the State Budget for the current year.

In this regard, the Constitutional Court concluded that Chapter VII.4, “Transitional Provisions” on the implementation of the provisions of legislation on the “Status and Social Protection of Citizens who Suffered from the Chernobyl Disaster”, on the “Social Protection of Children of War”, on the “Pension Provision of Individuals Released from Military Service and Other Individuals” do not contradict Articles 75, 85.1.3 and 95 of the Constitution.

Languages:

Ukrainian.



United States of America Supreme Court

Important decisions

Identification: USA-2011-3-008

a) United States of America / **b)** Supreme Court / **c)** / **d)** 07.11.2011 / **e)** 10-1540 / **f)** Bobby v. Dixon / **g)** 181 *Lawyers’ Edition* 2d 328 (2011) / **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.**

5.3.13.17 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.**

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

Keywords of the alphabetical index:

Confession, admissibility / Evidence, admissibility / Interrogation, custodial, safeguards / Self-incrimination, compelled, safeguards / Statement, self-incrimination, prior warning by police.

Headnotes:

A statement provided by an individual in the course of a custodial interrogation will not be admissible evidence unless the prosecution demonstrates that the authorities used procedural safeguards effective to secure the constitutional privilege against compelled self-incrimination.

Unless other means at least as effective are employed, for a person’s statement to be admissible evidence he or she must have received prior to questioning a set of warnings regarding the right to remain silent, the potential use against him or her of any statements made, and the right to counsel.

Warnings to an individual about the right against compelled self-incrimination are not required if the individual is not in police custody.

The right against compelled self-incrimination does not preclude police from urging a suspect to confess before another suspect does so.

When a suspect has made a statement to police prior to receiving warnings about the right against compelled self-incrimination, and then repeats the statement after receiving such warnings, the second statement will be admissible unless the first was the product of coercion.

Summary:

I. In its 1966 decision in *Miranda v. Arizona*, the U.S. Supreme Court construed the Fifth Amendment to the U.S. Constitution to place limits on the admissibility of confessions obtained by the questioning of individuals in police custody. The Fifth Amendment states in part that no person “shall be compelled in any criminal case to be a witness against himself.” In *Miranda*, the Court ruled that the prosecution at trial may not use statements stemming from a custodial interrogation of the accused unless it demonstrates that the authorities used procedural safeguards effective to secure this privilege against self-incrimination. According to the Court, unless the authorities use other “fully effective means” to inform the accused of his rights, they must present certain warnings prior to any questioning of an individual in custody, including: that the individual has a right to remain silent; that any statement he does make may be used as evidence against him; and that he has a right to the presence of an attorney prior to questioning and to have counsel present during any questioning.

On 9 November 1993, Archie Dixon, while in the custody of police in the State of Ohio, made a detailed statement in which he confessed to the murder of his roommate, Chris Hammer. At trial, the Ohio State Court excluded Dixon’s confession from the evidence, based on its conclusion that the confession was not voluntary under the *Miranda* standards. On an interlocutory appeal, the Ohio Court of Appeals overturned the trial Court and ruled that the confession was admissible. The trial resumed and Dixon was found guilty of murder and sentenced to death. The Ohio Supreme Court affirmed Dixon’s conviction and sentence.

Dixon then filed a petition for a writ of *habeas corpus* in Federal Court, claiming that the Ohio State Court decisions allowing the admission of his murder confession violated clearly established federal law.

The District Court denied the petition, but the U.S. Court of Appeals reversed that decision.

At issue was the fact that Dixon made his confession after several encounters with the police while they were investigating Hammer’s death. In the first of those meetings, on 4 November, Dixon happened to be in a local police station for another reason and a detective sought to talk with him. The detective issued *Miranda* warnings to Dixon and then asked to talk to him about Hammer’s disappearance. Dixon declined to answer questions without his lawyer present and left the station. On 9 November, the police arrested Dixon for forging Hammer’s signature on a check. Police detectives interrogated him, but did not give him the *Miranda* warnings prior to doing so. The police had decided before the questioning not to provide Dixon with *Miranda* warnings because they feared that he again would refuse to speak with them. During this questioning, Dixon did confess to forging the check, but said he was unaware of other circumstances regarding Hammer’s disappearance. Later that same day, after learning that another suspect had led the police to Hammer’s grave, Dixon told the police that he had talked with his attorney and was ready to give the police more information. The police then read Dixon his *Miranda* rights, after which he signed a waiver of those rights. After further discussion with Dixon, the police again advised him of his *Miranda* rights and Dixon made the tape-recorded confession to Hammer’s murder.

When it reviewed the U.S. District Court’s denial of Dixon’s petition, the U.S. Court of Appeals concluded that the Ohio Supreme Court had made three errors. The U.S. Supreme Court then reversed that U.S. Court of Appeals decision.

II. The Supreme Court first addressed the U.S. Court of Appeals determination that the police were precluded from speaking with Dixon on 9 November because he had refused to speak to police without his attorney five days before. This conclusion, the Supreme Court said, was incorrect because Dixon was not in police custody during his chance encounter with the police on 4 November and *Miranda* warnings are required only in the context of a custodial interrogation.

Secondly, the U.S. Court of Appeals had ruled that the police violated the Fifth Amendment by telling Dixon that his co-suspect might make a deal with the police by providing information that would implicate Dixon. The Supreme Court rejected this reasoning, stating that nothing in the Court’s case-law suggests that police may not urge a suspect to confess before another suspect does so.

The third determination by the U.S. Court of Appeals centered on the application of Supreme Court's precedents in *Oregon v. Elstad* (1985) and *Missouri v. Seibert* (2004), both of which addressed the question of a suspect who confessed to a crime without having been given *Miranda* warnings but then repeated the confession after receiving the warnings. In *Elstad*, the Court ruled that the second confession was admissible because the suspect's first statement was voluntary, whereas in *Seibert* it was inadmissible because the police deliberately employed a two-step strategy in which the suspect was questioned exhaustively before making her first, un-warned confession. In Dixon's case, the Supreme Court concluded, his statements were not the product of a deliberate two-step strategy or any other form of actual coercion.

The Court's judgment was adopted by a 9-0 vote.

Cross-references:

- *Miranda v. Arizona*, 384 *United States Reports* 436, 86 *Supreme Court Reporter* 1602, 16 *Lawyers' Edition* 2d 694 (1966);
- *Oregon v. Elstad*, 470 *United States Reports* 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985);
- *Missouri v. Seibert*, 542 *United States Reports* 600, 124 *Supreme Court Reporter* 2601, 159 *Lawyers' Edition* 2d 643 (2004).

Languages:

English.



Identification: USA-2011-3-009

a) United States of America / **b)** Supreme Court / **c)** / **d)** 12.12.2011 / **e)** 11-74 / **f)** Hardy v. Cross / **g)** 181 *Lawyers' Edition* 2d 468 (2011) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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:

Witness, cross-examination / Evidence, admissibility / Testimony, prior, admissibility at trial / Witness, unavailability, search, reasonable effort.

Headnotes:

Accused persons in criminal proceedings have a constitutional right to be confronted with the witnesses against them.

The constitutional right of confrontation precludes the admission into trial evidence of the prior testimony of a witness unless that person is unavailable and the prosecution has made a good-faith effort to obtain her or his presence at the trial.

The nature of the requisite steps that the prosecution must take to produce a witness is a question of reasonableness, to be determined by the Court; the prosecution is not required to exhaust every avenue of inquiry on the question of unavailability, no matter how unpromising.

Summary:

I. Under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution, in all criminal prosecutions “the accused shall enjoy the right to be confronted with the witnesses against him.” The U.S. Supreme Court's case-law has established that the Confrontation Clause precludes the admission into evidence of the prior testimony of a witness unless that person is unavailable and the prosecution has made a good-faith effort to obtain her or his presence at the trial. The nature of the requisite steps that the prosecution must take to produce a witness, the Supreme Court has stated, is a question of reasonableness.

In 1999, Irving Cross was tried in a state of Illinois trial Court for kidnapping and sexually assaulting a woman whose initials are A. S. Although she had expressed fear for her personal safety if she testified at Cross's trial, A. S. did testify at the trial as the State's primary witness and Cross's defence counsel cross-examined her. The jury found Cross not guilty of kidnapping but was unable to reach a verdict on the sexual assault charges, and the trial judge

declared a mistrial. The State decided to retry Cross on the sexual assault charges, and the retrial was scheduled for 29 March 2000.

Although the prosecution expected that A. S. would testify at the second trial, it lost contact with her during the month of March 2000. The State took a number of steps to attempt to locate her, but they were not successful. On 28 March, the prosecutor, after presenting information to the Court about the State's efforts, filed a motion to have A. S. declared unavailable and to introduce her testimony from the first trial as evidence at the second trial. The trial Court judge, concluding that the State's efforts to locate A. S. had been sufficient, granted the State's motion and admitted A. S.'s earlier testimony.

At the second trial, a legal intern from the State's attorney's office read A. S.'s prior, cross-examined testimony to the jury. The jury acquitted Cross of aggravated sexual assault but found him guilty of two counts of criminal sexual assault.

On appeal, the Illinois Court of Appeals agreed that A. S. had been unavailable and concluded that the trial Court had properly allowed the introduction of A. S.'s cross-examined testimony from the first trial. The Court of Appeals therefore affirmed Cross's convictions and sentence.

By means of a petition for a writ of *habeas corpus*, Cross sought a ruling from the federal courts that the Illinois State Court had unreasonably applied the U.S. Supreme Court's precedents on the Confrontation Clause. The U.S. District Court denied his petition, but the U.S. Court of Appeals reversed that decision. The Court of Appeals, stressing the importance of A. S.'s testimony and the manner of her testimony at the first trial, concluded that the Illinois Court of Appeals was unreasonable in holding that the State had made a sufficient effort to secure A. S.'s presence at the second trial.

II. The U.S. Supreme Court accepted review of the U.S. Court of Appeals decision and reversed it. The Supreme Court first determined that the Illinois Court of Appeals applied the correct Confrontation Clause standard. Then, after evaluating the reasons set forth by the U.S. Court of Appeals for finding the State's efforts to locate A. S. to be inadequate, the Court concluded that the Illinois Court applied the standard in a reasonable manner. Reiterating its case-law, the Court stated that the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry on the question of unavailability, no matter how unpromising. In addition, under the applicable statutory standard of review in *habeas corpus* cases, a Federal Court may not overturn a State Court's

decision on the question of unavailability merely because the Federal Court identifies additional steps that might have been taken. Under the statute, if the State Court's decision was reasonable, it cannot be disturbed.

The Court's judgment was adopted by a 9-0 vote.

Cross-references:

The Court's opinion cited decisions in which the Court articulated the standard for assessing unavailability under the Confrontation Clause:

- *Barber v. Page*, 390 *United States Reports* 719, 88 *Supreme Court Reporter* 1318, 20 *Lawyers' Edition* 2d 255 (1968);
- *Ohio v. Roberts*, 448 *United States Reports* 56, 100 *Supreme Court Reporter* 2531, 65 *Lawyers' Edition* 2d 597 (1980).

Languages:

English.



Inter-American Court of Human Rights

Important decisions

Identification: IAC-2011-3-003

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 19.05.2011 / **e)** Series C 226 / **f)** Case of Vera Vera v. Ecuador / **g)** / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

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.**

Keywords of the alphabetical index:

Human rights violation, state, tolerance / Integrity, physical, right / Investigation, effective, requirement / Obligation, positive, State / State, responsibility, international / Treatment or punishment, cruel and unusual / Truth, right to know / Statute of limitations, validity.

Headnotes:

As set out in the United Nations Standard Minimum Rules for the Treatment of Prisoners, every prisoner must be seen and examined by a medical officer as soon as possible after admission and thereafter as needed; this officer must take all measures necessary to discover any physical or mental illnesses.

As set out in the Standard Minimum Rules of the United Nations for the Treatment of Prisoners, inmates who require specialised treatment shall be transferred to specialised institutions or civil hospitals. All institutions with hospital facilities available to prisoners shall have adequate resources and suitably trained staff.

Ill-treatment must attain a minimum level of severity in order to be considered cruel, inhumane, or degrading treatment. The circumstances of the case, such as the duration of the treatment, its purpose and physical and mental effects, and, in some cases, the sex, age, and state of health of the victim must be taken into account. The absence of any purpose does not inevitably lead to a finding that there has been no violation.

With respect to prisoners who are ill, whether a State is responsible for the commission of cruel, inhumane, or degrading treatment will depend, *inter alia*, on factors such as whether appropriate emergency and specialised medical care was provided, whether the prisoner suffered excessive deterioration of his or her physical and mental health, exposure to severe or prolonged pain as a result of the lack of timely and diligent medical care, or excessive security conditions despite his or her obvious serious health condition and with no grounds or evidence that would have required this, as well as public awareness or media communication of these situations.

The State may be responsible for cruel, inhumane, or degrading treatment suffered by a person who has been in the custody of State agents, or who has died in such circumstances if, in addition, authorities have not conducted a serious investigation of the facts followed by the prosecution of those responsible.

The State's duty of care of persons under its custody requires it to provide a satisfactory explanation of the death of such persons.

Statutes of limitations are inadmissible in cases that involve serious human rights violations such as forced disappearance, the extrajudicial killing of persons, and torture. Whether a violation has occurred as part of a context of massive and systematic violations is a factor to be taken into account in determining the admissibility of such a statute.

Rendering the statute of limitations inapplicable in this particular case would imply that such statutes are inapplicable in all cases before the Court, as the latter involve human rights violations which entail a degree of severity in and of themselves. This is not in line with the standards specified by the Court on the inapplicability of statutes of limitations.

The State must satisfy, in some way, the right of the mother and family to know what happened to the victim as a complementary measure of satisfaction.

Summary:

I. On 12 April 1993, Pedro Miguel Vera Vera was chased by a group of people that accused him of robbery and by members of the National Police in Santo Domingo de los Colorados. During the confusion, Mr Vera Vera was shot, but the origin of the shot is unknown. Mr Vera Vera was arrested and died eleven days later, while under State custody, due to lack of adequate medical care for his gunshot wound. No investigations were carried out with respect to the gunshot or with respect to the lack of medical care.

On 24 February 2010, the Inter-American Commission on Human Rights (hereinafter, the "Commission"), filed an application against the Republic of Ecuador (hereinafter, the "State" or "Ecuador") with the Inter-American Court of Human Rights (hereinafter, the "Court") to determinate the State's international responsibility for alleged violations of Article 4.1 ACHR (Right to Life), Article 5.1 and 5.2 ACHR (Right to Personal Integrity), in relation to the general obligations contained in Article 1.1 ACHR, to the detriment of Mr Pedro Miguel Vera Vera, and Article 8.1 ACHR (Judicial Guarantees) and Article 25.1 ACHR (Judicial Protection), in relation to the general obligations contained in Article 1.1 ACHR, to the detriment of his family members. The representative of the victims agreed with the Commission's allegations.

II. In its Judgment, the Court rejected the State's preliminary objection that domestic remedies had not been exhausted because this point was not raised at the correct procedural moment before the Commission. Furthermore, in its prior considerations, the Court held that because they were the only persons indicated as alleged victims in the Commission's Article 50 merits report, only Mr Vera Vera and his mother would be considered alleged victims in this case.

On the merits, the Court found that the State violated Articles 5.1, 5.2 and 4.1 ACHR, in conjunction with Article 1.1 ACHR, to the detriment of Mr Pedro Miguel Vera Vera, as State authorities did not provide him with the necessary medical attention during the ten days he was under their custody, causing him severe physical and psychological harm and ultimately leading to his death, a result that could have been avoided with adequate and opportune medical treatment. Due to his health condition and his deprivation of liberty, it was clear that Mr Vera Vera could not obtain treatment on his own; therefore, it was an obligation of the State to do so. For the Court, these facts amounted to inhumane and degrading treatment.

However, due to a lack of supporting evidence, the Court rejected the Commission's allegation that a generalised situation of inadequate medical care for prisoners existed in Ecuador.

Furthermore, the Court found that the State violated Articles 8.1 and 25.1 ACHR, in relation to Article 1.1 ACHR, to the detriment of Mr Vera Vera, as it did not investigate the origins of his gunshot wound, an obligation that should have been executed *ex officio*. The Court also found violations of these same articles to the detriment of Mr Vera Vera's mother, Francisca Mercedes Valdez Vera, due to the failure to investigate, prosecute, and, where appropriate, punish those responsible for Mr Vera Vera's death while in State custody.

Additionally, the Court found that the State violated Article 5.1 ACHR, in relation to Article 1.1 ACHR, to the detriment of Ms Vera Valdez, because it was clear that she suffered due to the poor treatment afforded to her son while he was detained, to the lack of assistance she received in attempting to secure him proper medical care, and to the State's failure to investigate and determine the cause of his death.

Accordingly, the Court ordered the State to adopt, within a reasonable period, measures necessary to satisfy Ms Vera Valdez's right to know what happened to her son. However, the Court rejected the Commission's request that a statute of limitations on the prosecution of charges related to Mr Vera Vera's death be declared inadmissible. The Court also ordered the State to publish the Judgment in its official gazette, in another newspaper of national readership, and on an official webpage, and to disseminate it among State agents; to pay pecuniary and non-pecuniary damages; and to reimburse the parties' costs and expenses.

Languages:

Spanish, English.



European Court of Human Rights

Important decisions

Identification: ECH-2011-3-002

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 15.03.2012 / **e)** 39692/09, 40713/09, 41008/09 / **f)** Austin and others v. the United Kingdom / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Movement, restriction / Violence, public demonstration / Deprivation of liberty, notion / Police cordon, movement, restriction.

Headnotes:

Article 5.1 ECHR is not concerned with mere restrictions on liberty of movement. In order to determine whether someone has been “deprived of his liberty”, the starting point is the concrete situation, and account has to be taken of a whole range of criteria, such as the type, duration, effects and the manner of implementation of the measure in question.

The purpose behind a measure is not a factor to be taken into account when deciding whether there had been a deprivation of liberty; conversely, the context in which the measure was imposed is an important factor. Commonly occurring temporary restrictions on the freedom of movement of members of the public cannot properly be described as “deprivations of liberty”, so long as they are rendered unavoidable as a result of circumstances beyond the control of the authorities, are necessary to avert a real risk of serious injury or damage, and are kept to the minimum required for that purpose.

Summary:

I. In 2001 a large demonstration against capitalism and globalisation took place in London. The organisers gave

no notice to the police of their intentions and publicity material they distributed beforehand included incitement to looting, violence and multiple protests. The intelligence available to the police indicated that, in addition to peaceful demonstrators, between 500 and 1,000 violent and confrontational individuals were likely to attend. In the early afternoon a large crowd made its way to Oxford Circus, so that by the time of the events in question some 3,000 people were within the Circus and several thousand more were gathered in the streets outside. In order to prevent injury to people and property, the police decided that it was necessary to contain the crowd by forming a cordon blocking all exit routes from the area (a measure known as “kettling”). Because of violence and the risk of violence from individuals inside and outside the cordon, and because of a policy of searching and establishing the identity of those within the cordon suspected of causing trouble, many peaceful demonstrators and passers-by, including the applicants, were not released for several hours.

The first applicant brought a test case in the High Court for damages for false imprisonment and a breach of her Convention rights. Her claim was dismissed and that decision was upheld on appeal.

The applicants complained that their restriction within a police cordon for up to seven hours during the course of a demonstration amounted to a deprivation of their liberty, in breach of Article 5.1 ECHR.

II. The Court identified the following general principles as being of particular relevance to this situation:

- a. The police had to be afforded a degree of discretion in taking operational decisions. Article 5 ECHR could not be interpreted in a way that made it impracticable for them to fulfil their duties of maintaining order and protecting the public, provided they complied with the underlying principle of that provision, which was to protect the individual from arbitrariness.
- b. Article 5.1 ECHR was not concerned with mere restrictions on liberty of movement, which were governed by Article 2 Protocol 4 ECHR (which the United Kingdom had not ratified). In order to determine whether someone had been “deprived of his liberty” within the meaning of Article 5.1 ECHR, the starting point had to be his or her concrete situation and account had to be taken of a whole range of criteria such as the type, duration, effects and the manner of implementation of the measure in question. The difference between deprivation of liberty and restriction upon liberty was one of degree or intensity, not of nature or substance.

- c. The purpose behind the measure in question was not a factor to be taken into account when deciding whether there had been a deprivation of liberty (although it might be relevant to the subsequent inquiry whether the deprivation of liberty was justified under one of the subparagraphs of Article 5.1 ECHR).
- d. Conversely, the context in which the measure in question was imposed was an important factor. Members of the public were often called on to endure temporary restrictions on freedom of movement in certain contexts, such as travel by public transport or on the motorway, or attendance at a football match. Such commonly occurring restrictions could not properly be described as “deprivations of liberty” within the meaning of Article 5.1 ECHR, so long as they were rendered unavoidable as a result of circumstances beyond the control of the authorities, were necessary to avert a real risk of serious injury or damage, and were kept to the minimum required for that purpose.

Turning to the facts of the applicants’ case, the Court noted that following a three-week trial and consideration of a substantial body of evidence, the trial judge had found that the police had expected a “hard core” of 500 to 1,000 violent demonstrators to form at Oxford Circus at around 4 p.m. and that there was a real risk of serious injury, even death, and damage to property if the crowds were not effectively controlled. They were taken by surprise when over 1,500 people gathered there two hours earlier and decided that an absolute cordon had to be imposed if they were to prevent violence and the risk of injury and damage. From 2.20 p.m., when a full cordon was in place, no one in the crowd was free to leave the area without permission. There was space within the cordon for people to walk about and no crushing, but conditions were uncomfortable, with no shelter, food, water or toilet facilities. Although the police tried throughout the afternoon and evening to start releasing people, their attempts were repeatedly suspended because of the violent and uncooperative behaviour of a significant minority both within and outside the cordon and full dispersal was not completed until 9.30 p.m. Approximately 400 individuals who could clearly be identified as not being involved in the demonstration or who had been seriously affected by being confined were, however, permitted to leave beforehand.

On the basis of these findings, the Court considered that the coercive nature of the containment within the cordon, its duration and its effect on the applicants, in terms of physical discomfort and inability to leave Oxford Circus, pointed towards a deprivation of liberty. However, it also had to take into account the “type” and “manner of implementation” of the

measure in question as the context in which the measure was imposed was significant. The cordon had been imposed to isolate and contain a large crowd in dangerous and volatile conditions. It was a measure of containment that had been preferred over more robust methods which might have given rise to a greater risk of injury. The Court had no reason to depart from the judge’s conclusion that in the circumstances an absolute cordon had been the least intrusive and most effective means of averting a real risk of serious injury or damage. In this context, the Court did not consider that the putting in place of the cordon had amounted to a “deprivation of liberty”. Indeed, the applicants had not contended that, when it was first imposed, those within the cordon had been immediately deprived of their liberty and the Court was unable to identify a moment thereafter when the containment could be considered to have changed from what had been, at most, a restriction on freedom of movement, to a deprivation of liberty. It was striking that some five minutes after an absolute cordon had been imposed, the police had been planning to commence a controlled release. They made frequent attempts thereafter and kept the situation under close review throughout. Accordingly, on the specific and exceptional facts of the instant case, there had been no deprivation of liberty within the meaning of Article 5.1 ECHR. In conclusion, since that provision was inapplicable, there had been no violation.

Cross-references:

- *Engel and Others v. the Netherlands*, 08.06.1976, Series A, no. 22;
- *Tyrer v. the United Kingdom*, 25.04.1978, Series A, no. 26;
- *Guzzardi v. Italy*, 06.11.1980, Series A, no. 39;
- *Johnston and Others v. Ireland*, 18.12.1986, Series A, no. 112;
- *Ciulla v. Italy*, 22.02.1989, Series A no. 148;
- *Amuur v. France*, 25.06.1996, *Reports of Judgments and Decisions* 1996-III;
- *Kress v. France* [GC], no. 39594/98, ECHR 2001-VI;
- *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI;
- *Enhorn v. Sweden*, no. 56529/00, ECHR 2005-I;
- *Storck v. Germany*, no. 61603/00, ECHR 2005-V;
- *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, ECHR 2005-X;
- *Saadi v. the United Kingdom* [GC], no. 13229/03, ECHR 2008;
- *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009;
- *M. v. Germany*, no. 19359/04, 17.12.2009;

- *Medvedyev and Others v. France* [GC], no. 3394/03, 29.03.2010;
- *P.F. and E.F. v. the United Kingdom*, (dec.), no. 28326/09, 23.11.2010;
- *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, 24.03.2011;
- *Bayatyan v. Armenia* [GC], no. 23459/03, 07.07.2011;
- *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, 07.07.2011;
- *Stanev v. Bulgaria* [GC], no. 36760/06, 17.01.2012.

Languages:

English, French.



Identification: ECH-2011-3-003

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 22.05.2012 / e) 126/05 / f) *Scoppola v. Italy* (no. 3) / g) *Reports of Judgments and Decisions* / h) CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Prisoner, electoral rights, forfeiture / Right to vote, forfeiture, permanent.

Headnotes:

Disenfranchisement of a group of people (notably prisoners) generally, automatically and indiscriminately, is not compatible with Article 3 Protocol 1 ECHR. However, disenfranchisement will not necessarily be automatic, general and indiscriminate simply because it was not ordered by a judge; it is sufficient for the circumstances to be detailed in the law, making its application conditional on such factors as the nature or the gravity of the offence committed.

Summary:

I. In 2002 an assize court sentenced the applicant to life imprisonment for murder, attempted murder, ill-treatment of members of his family and unauthorised possession of a firearm. Under Italian law his life sentence entailed a lifetime ban from public office, which in turn meant the permanent forfeiture of his right to vote. The applicant's appeals against the ban were unsuccessful. The Court of Cassation dismissed an appeal on points of law in 2006, pointing out that only prison sentences of between five years and life entailed permanent disenfranchisement (where the offence attracted a sentence of less than five years, the disenfranchisement lasted only five years).

The applicant complained that the permanent forfeiture of his right to vote as a result of his life sentence constituted a violation of the right to vote protected by Article 3 Protocol 1 ECHR.

II. The Court found that the measure complained of constituted an interference with the applicant's right to vote, which pursued the legitimate aims of enhancing civic responsibility and respect for the rule of law and ensuring the proper functioning and preservation of the democratic regime. As to the proportionality of the interference, after noting a trend in Europe towards fewer restrictions on convicted prisoners' voting rights the Court reaffirmed the principles set out in the *Hirst* (no. 2) judgment, in particular the fact that when disenfranchisement affected a group of people generally, automatically and indiscriminately it was not compatible with Article 3 Protocol 1 ECHR.

On the question whether the ban on voting should be imposed by a court, the *Hirst* (no. 2) judgment referred to above made no explicit mention of the intervention of a judge among the essential criteria for determining the proportionality of a disenfranchisement measure. While the intervention of a judge was clearly likely to guarantee the proportionality of restrictions on prisoners' voting rights, contrary what was suggested in the *Frod* judgment such restrictions would not necessarily be automatic, general and indiscriminate simply because they were not ordered by a judge. The circumstances in which the right to vote was forfeited might be detailed in the law, making its application conditional on such factors as the nature or the gravity of the offence committed. Arrangements for restricting the voting rights of convicted prisoners varied considerably from one national legal system to another, particularly as to the need for such restrictions to be ordered by a court. The Contracting States were free to decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws

defining the circumstances in which such a measure should be applied. In this latter case, it would be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction. On that basis, removal of the right to vote without any *ad hoc* judicial decision, as in the present case, did not, in itself, give rise to a violation of Article 3 Protocol 1 ECHR.

The impugned measure also had to be found to be disproportionate to the legitimate aims pursued – in terms of the manner in which it was applied and the legal framework surrounding it. In the Italian system the measure was applied to individuals convicted of certain well-defined offences, or to people sentenced to certain terms of imprisonment specified by law. This showed the legislature's concern to adjust the application of the measure to the particular circumstances of the case in hand. The law also adjusted the duration of the measure to the sentence imposed and thus, indirectly, to the gravity of the offence. A large number of convicted prisoners in Italy were not deprived of the right to vote in parliamentary elections. It was also possible for a convicted person who had been permanently deprived of the right to vote to recover that right. This showed that the Italian system was not excessively rigid, and that the margin of appreciation afforded to the respondent Government in this sphere had not been overstepped. In the circumstances the Court could not find that the disenfranchisement provided for in Italian law was of the general, automatic and indiscriminate nature that led it, in its *Hirst* (no. 2) judgment, to find a violation of Article 3 Protocol 1 ECHR.

Cross-references:

- *Mathieu-Mohin and Clerfayt v. Belgium*, 02.03.1987, Series A, no. 113;
- *Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999-I;
- *Labita v. Italy* [GC], no. 26772/95, ECHR 2000-IV;
- *Podkolzina v. Latvia*, no. 46726/99, ECHR 2002-II;
- *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI;
- *Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, ECHR 2005-IX;
- *M.D.U. v. Italy* (dec.), no. 58540/00, 28.01.2003;
- *Frodl v. Austria*, no. 20201/04, 08.04.2010;
- *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, 23.11.2010;
- *Bayatyan v. Armenia* [GC], no. 23459/03, 07.07.2011.

Languages:

English, French.



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* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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¹ This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

² Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

³ For example, rules of procedure.

⁴ For example, age, education, experience, seniority, moral character, citizenship.

⁵ Including the conditions and manner of such appointment (election, nomination, etc.).

⁶ Including the conditions and manner of such appointment (election, nomination, etc.).

⁷ Vice-presidents, presidents of chambers or of sections, etc.

⁸ For example, State Counsel, prosecutors, etc.

⁹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

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¹⁰ For example, assessors, office members.

¹¹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹² Including questions on the interim exercise of the functions of the Head of State.

¹³ Referrals of preliminary questions in particular.

¹⁴ Enactment required by law to be reviewed by the Court.

¹⁵ Review *ultra petita*.

¹⁶ Horizontal distribution of powers.

¹⁷ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁸ Decentralised authorities (municipalities, provinces, etc.).

¹⁹ For questions other than jurisdiction, see 4.9.

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²¹ Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

²² As understood in private international law.

²³ Including constitutional laws.

²⁴ For example, organic laws.

²⁵ Local authorities, municipalities, provinces, departments, etc.

²⁶ Or: functional decentralisation (public bodies exercising delegated powers).

²⁷ Political questions.

²⁸ Unconstitutionality by omission.

²⁹ Including language issues relating to procedure, deliberations, decisions, etc.

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³⁰ For the withdrawal of proceedings, see also 1.4.10.4.

³¹ Pleadings, final submissions, notes, etc.

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³⁴ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

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³⁶ Only for issues concerning applicability and not simple application.

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³⁸ Including its Protocols.

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³⁹ Presumption of constitutionality, double construction rule.

⁴⁰ Including the principle of a multi-party system.

⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

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⁴⁴ Including maintaining confidence and legitimate expectations.

⁴⁵ Principle according to which general sub-statutory acts must be based on and in conformity with the law.

⁴⁶ Prohibition of punishment without proper legal base.

⁴⁷ Including compelling public interest.

⁴⁸ Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

⁴⁹ Including questions of treason/high crimes.

⁵⁰ Including prohibition on monopolies.

⁵¹ For the principle of primacy of Community law, see 2.2.1.6.

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⁵² Including the body responsible for revising or amending the Constitution.

⁵³ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵⁴ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁵ For example, the granting of pardons.

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⁵⁶ For regional and local authorities, see Chapter 4.8.

⁵⁷ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁸ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁹ In particular, commissions of enquiry.

⁶⁰ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁶¹ Obligation on the legislative body to use the full scope of its powers.

⁶² Representative/imperative mandates.

⁶³ Including the convening, duration, publicity and agenda of sessions.

⁶⁴ Including their creation, composition and terms of reference.

⁶⁵ State budgetary contribution, other sources, etc.

⁶⁶ For the publication of laws, see 3.15.

⁶⁷ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁸ For local authorities, see 4.8.

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⁶⁹ Derived directly from the Constitution.

⁷⁰ See also 4.8.

⁷¹ 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.

⁷² Civil servants, administrators, etc.

⁷³ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

⁷⁴ Other than the body delivering the decision summarised here.

⁷⁵ Positive and negative conflicts.

⁷⁶ Notwithstanding the question to which to branch of state power the prosecutor belongs.

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⁷⁷ For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

⁷⁸ Comprises the Court of Auditors in so far as it exercises judicial power.

⁷⁹ See also 3.6.

⁸⁰ And other units of local self-government.

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⁸¹ See also keywords 5.3.41 and 5.2.1.4.

⁸² Organs of control and supervision.

⁸³ Including other consultations.

⁸⁴ For questions of jurisdiction, see keyword 1.3.4.6.

⁸⁵ Proportional, majority, preferential, single-member constituencies, etc.

⁸⁶ For example, *Panachage*, voting for whole list or part of list, blank votes.

⁸⁷ For aspects related to fundamental rights, see 5.3.41.2.

⁸⁸ For the creation of political parties, see 4.5.10.1.

⁸⁹ For example, names of parties, order of presentation, logo, emblem or question in a referendum.

⁹⁰ Tracts, letters, press, radio and television, posters, nominations, etc.

⁹¹ For the access of media to information, see 5.3.23, 5.3.24, in combination with 5.3.41.

⁹² Impartiality of electoral authorities, incidents, disturbances.

⁹³ For example, signatures on electoral rolls, stamps, crossing out of names on list.

⁹⁴ For example, in person, proxy vote, postal vote, electronic vote.

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⁹⁵ This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

⁹⁶ For example, Auditor-General.

⁹⁷ Includes ownership in undertakings by the state, regions or municipalities.

⁹⁸ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁹⁹ For example, Court of Auditors.

¹⁰⁰ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

¹⁰¹ *Staatszielbestimmungen*.

¹⁰² Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

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¹⁰³ Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

¹⁰⁴ Positive and negative aspects.

¹⁰⁵ For rights of the child, see 5.3.44.

¹⁰⁶ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

¹⁰⁷ Includes questions of the suspension of rights. See also 4.18.

¹⁰⁸ Taxes and other duties towards the state.

¹⁰⁹ Universal and equal suffrage.

¹¹⁰ According to the European Convention on Nationality of 1997, ETS no. 166, "nationality" means the legal bond between a person and a state and does not indicate the person's ethnic origin" (Article 2) and "... with regard to the effects of the Convention, the terms 'nationality' and 'citizenship' are synonymous" (paragraph 23, Explanatory Memorandum).

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¹¹¹ For example, discrimination between married and single persons.

¹¹² This keyword also covers “Personal liberty”. It includes for example identity checking, personal search and administrative arrest.

¹¹³ Detention by police.

¹¹⁴ Including questions related to the granting of passports or other travel documents.

¹¹⁵ May include questions of expulsion and extradition.

¹¹⁶ 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.

¹¹⁷ In the meaning of Article 6.1 of the European Convention on Human Rights.

¹¹⁸ This keyword covers the right of appeal to a court.

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¹¹⁹ Including the right to be present at hearing.

¹²⁰ Including challenging of a judge.

¹²¹ Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

¹²² This keyword also includes the right to freely communicate information.

¹²³ Militia, conscientious objection, etc.

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¹²⁴ Aspects of the use of names are included either here or under "Right to private life".

¹²⁵ Including compensation issues.

¹²⁶ This keyword also covers "Freedom of work".

¹²⁷ This should also cover the term freedom of enterprise.

¹²⁸ 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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