

# THE BULLETIN

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

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

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

*The decisions are presented in the following way:*

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

**T. Markert**

*Secretary of the European Commission for Democracy through Law*

# THE VENICE COMMISSION

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

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

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There was no relevant constitutional case-law during the reference period 1 January 2012 – 30 April 2012 for the following countries:

Azerbaijan, Bulgaria, Luxembourg, Japan.

Précis of important decisions of the reference period 1 January 2012 – 30 April 2012 will be published in the next edition, *Bulletin 2012/2*, for the following country:

Turkey.

# Albania

## Constitutional Court

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### Important decisions

*Identification:* ALB-2012-1-001

**a)** Albania / **b)** Constitutional Court / **c)** / **d)** 23.02.2011 / **e)** 4/11 / **f)** Laws and other rules having the force of law / **g)** *Fletore Zyrtare* (Official Gazette) / **h)** CODICES (Albanian, English).

*Keywords of the systematic thesaurus:*

- 3.16 General Principles – **Proportionality.**
- 5.3.13.3.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – **“Natural judge”/Tribunal established by law.**
- 5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Equality of arms.**
- 5.3.13.20 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Adversarial principle.**
- 5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**
- 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**
- 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

*Keywords of the alphabetical index:*

Organised crime / Burden of proof.

*Headnotes:*

The high state authorities listed in Article 134.1a, 134.1b, 134.1c and 134.1ç of the Constitution have the standing to put into motion the procedure of abstract control of the constitutionality of a norm without the necessity to justify their interest. The other subjects set out in Articles 134.1dh, 134.1e, 134.1ë, 134.1f and 134.1g, such as the Albanian Helsinki Committee, must justify their concrete subjective interest in order to initiate such proceedings.

The principle of proportionality requires that the intervention of the lawmaker to restrict a constitutional

right or freedom should respond directly to the purpose that is aimed at being achieved, to the existence of a public interest for such intervention, that the legal means be efficient, appropriate, necessary and in proportion to the situation that have dictated them. Respect for this principle requires differentiated treatment of the individual rights and freedoms that are subject to the restriction.

*Summary:*

I. In December 2009, the Assembly of the Republic of Albania approved Law no. 10192 on preventing and striking at organised crime and trafficking through preventive measures against assets. The Albanian Helsinki Committee (hereinafter, the “AHC”) addressed a complaint to the Constitutional Court seeking the repeal of the Law, on the grounds of its incompatibility with the Constitution. The applicant contended that the Law violated several constitutional rights, including the right to due legal process, the right of property, the right of every individual to be tried by a competent court designated by law, the right of privacy, the presumption of innocence, the principle of adversary court proceedings and the principle of hierarchy of normative acts.

The applicant also argued that the phrase “reasonable suspicion based on indicia,” within the provisions of the law, did not comply with Article 27.2 of the Constitution, Article 5.1 ECHR and the Criminal Procedure Code, as Article 27.2 of the Constitution sets out guarantees for the deprivation of liberty when there is reasonable suspicion that an individual has committed a criminal offence.

II. The Court noted that Article 4 of the Law defines a preventive measure as any measure of a property nature, which is imposed by the judge, at the request of the prosecution, through the sequestration and confiscation of assets or economic activities, where there are “reasonable suspicions based on indicia.” The claim that the guarantees under Article 27.2 of the Constitution had been violated was not related to the object of the Law. The Court therefore concluded that the applicant’s claim was groundless.

The Constitutional Court noted the restriction imposed by the Law, in terms of the sequestration and confiscation measures, on the right of property and economic activity. In the court’s opinion, the legislator’s intention was to serve a public interest, preventing and striking at organised crime and terrorist organisations, which represent a real danger to society. The aim of the Law is to prevent the perpetration of criminal activities; sequestration and confiscation are necessary measures to achieve the ultimate aim. The Court accordingly found that the

restriction imposed by the Law was in proportion to the situation that dictated it and was in pursuit of the public interest. This claim by the applicant was also without merit.

It then examined the applicant's claim that the Law violated Article 42 of the Constitution, which safeguards the right of individuals to court. The applicant argued that the Law did not allow those against whom sequestration measures had been taken to submit their claims and grievances in court. The Court rejected the applicant's claim, noting that Article 27 of the Law sets out the procedure for appealing against decisions on the sequestration of property, concluding that the procedure for imposing sequestration measures did not violate the constitutional standard of effective access to court, or the principle of adversarial proceedings.

The Court then proceeded to determine whether the provisions of the Law regarding the criteria applicable to the confiscation of property and the burden of proof were in breach of the principle of adversarial proceedings. It noted the detailed explanation within the Law of the procedure of confiscation, and held that the Law places the court under an explicit duty to express itself through a reasoned decision, after the holding of a court trial in conformity with the rules of the Criminal Procedure Code. Under these rules, the burden of proof falls upon the person whose property has been confiscated; they must demonstrate that they obtained their assets in a lawful manner.

The Court noted that the ordinary courts cannot achieve this decision-making without performing a full and comprehensive judicial investigation in conformity with the law and permitting a full judicial debate. It concluded that the applicant's claim in this regard was also unfounded.

In terms of the claim that the Law violated the principle of presumption of innocence, the Court explained that Article 30 of the Constitution refers to criminal proceedings; it cannot be applied to proceedings for sequestration and confiscation which are regulated by the Law.

Before taking decisions on sequestration, courts must ensure that due legal proceedings are held, to perform a full and comprehensive investigation. A preventive trial differs from criminal proceedings as it relies on reasonable suspicion based on indicia, assigning the burden of proof to the person under suspicion, who must then justify the origin of their assets. Thus, the burden of proof is separated, between the prosecutor and the person whose assets are to be sequestered or confiscated. The Court drew attention to the necessity to distinguish between

criminal and preventive proceedings, reiterating that the guarantees of criminal proceedings as to the presumption of innocence do not apply in preventive proceedings sanctioned by the Law under challenge.

In the Court's view, the applicant had not put forward supported arguments that the Law violates the principle of separation of civil jurisdiction and criminal jurisdiction and consequently, the element of due process for being adjudicated by a competent court designated by law. It observed that the Law designates the First Instance Court for Serious Crimes and the Court of Appeal for Serious Crimes as the competent organs for imposing preventive measures.

#### *Languages:*

Albanian, English (translation by the Court).



#### *Identification:* ALB-2012-1-002

**a)** Albania / **b)** Constitutional Court / **c)** / **d)** 07.10.2011 / **e)** 44/11 / **f)** / **g)** *Fletore Zyrtare* (Official Gazette), 12 / **h)** CODICES (Albanian, French).

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

4.5.3.4 Institutions – Legislative bodies – Composition – **Term of office of members.**  
4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies.**

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

Parliament, member, incompatibility, other activity.

#### *Headnotes:*

Engagement in gainful activity where payment originates from the State budget is deemed incompatible with the office of deputy (i.e. member of parliament or of the government). A deputy may not discharge any other office than that of member of the parliament or the government.

The starting point of a deputy's mandate is the date on which the results are announced by the electoral commission, whereas exercise of the mandate commences with swearing in.

### *Summary:*

A group of Democratic Party deputies applied to the parliament, then to the Constitutional Court, to have a deputy's mandate declared incompatible with the Constitution because his firm had made the winning bid in a call for tenders to computerise a municipal administration while he was in office.

The Court first responded to the applicants' claim that, due to the public nature of the vote in parliament by which it had been decided to refer the question to the Constitutional Court in order to determine the incompatibility of the deputy's mandate, that vote had been invalid. It was claimed that the parliament should hold a secret ballot given that a specific member was concerned. The Court held that the applicant's request was unfounded and dismissed the request. The Court noted that in the instant case, the members of parliament had not voted on the withdrawal or invalidation of the deputy's mandate, but on the referral of the question to the Constitutional Court in order that it might determine whether such incompatibility pertained. The result of the ballot in parliament had not led to a declaration of incompatibility or to termination of the deputy's mandate, but merely to referral to the Court as prescribed in Article 70.4 of the Constitution. The public method of voting did not render the parliament's decision on this question invalid.

Another argument adduced by the Socialist deputy's representative as to the nullity of the ballot in parliament was that the parliament had failed to attain the majority required in order to refer the question to the Constitutional Court given that, 70 deputies voted in favour whereas 140 were present.

The Court held this argument to be unfounded. The concept of majority of votes refers, in its primary connotation, to the votes, for or against, of half the members of the body voting, plus one vote. This is also known as a simple majority. In the Court's view, the decision of parliament is deemed approved when at least half the members present plus one have voted in favour. The Court held that the parliament's decision to refer the question to it in order to obtain a finding of incompatibility with the deputy's mandate was duly passed and had gained the majority of the votes of the members present who cast their vote.

The Court viewed as legitimate the asserted power of the applicant (parliament) to declare the deputy's mandate incompatible for receipt of income derived from public funds while being a deputy, since it was based on an overall analysis of the relevant constitutional provisions and of the facts and circumstances of the case, and incompatibility was provided for in Article 70.3 of the Constitution.

The Albanian Constitution provides that parliamentary office commences at the time of the declaration by the electoral commission (Article 71.1), but that its exercise commences at the point the deputy is sworn in (Article 72).

In the Court's view, the office of the deputies relates to the parliament's mandate, as their acceptance of office is considered a precondition for the parliament's mandate to commence; parliament is convened for the first time with the participation of the elected representatives, not that of candidates for the office of deputy.

The Court noted that another act taking place during the first session of the new parliament was the swearing in of the deputies. This act served to declare the deputy's will, diligence, conviction and resolve to discharge the office of representative in the new parliament, in accordance with the rules laid down for that purpose. The oath did not serve to validate a deputy's mandate, because this had been done by the electoral commission, which had declared the deputy winner of the ballot. Lack of swearing in was one of the grounds for revocation of parliamentary office.

One of the questions put to the Court was when the effects of parliamentary office began for the deputy: do they begin at the time of the declaration by the electoral commission, or when the deputy swears the oath to parliament? The Court stressed that the deputy's obligation to take all appropriate steps to best represent his or her constituents and exercise his or her mandate in accordance with constitutional and legal obligations must commence before the elections (including the time of the election campaign). A deputy must take every step to avert any situation of incompatibility or conflict of interests that might arise at the time of acceptance (commencement) of parliamentary office and throughout its term. The Court noted that the legal consequences of office began when the electoral commission announced the winning candidates. From that time onwards, a deputy was required to fulfil all the constitutional and legal requirements regarding the prohibition against engaging in other activities or declarations of his/her financial interests, as prescribed by Article 70 of the Constitution and by other relevant laws.

This had not happened in the case under review.

The Court recalled that a deputy, whom the electoral commission declared to represent the will of the people in that capacity, must not associate steps taken to discharge his or her office in conformity to the constitutional or legal framework with momentary

political developments even where they are directly linked with the interests of his or her political group. Deputies bore the individual responsibility to carry out their duty, and could not justify their unconstitutional actions by invoking other unconstitutional situations. The lack of swearing in, without valid reasons, was in itself a violation of Article 72 of the Constitution. Swearing in was an important moment for the formation of parliament, and as such could not be treated as a demarcation point in time between conduct compatible and incompatible with the Constitution. At the time when the final election results were announced, a deputy was under the obligation to act as one, irrespective of the time of swearing in. This had not happened in the case in point.

*Languages:*

Albanian, English (translation by the Court).



## Armenia

### Constitutional Court

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#### Statistical data

1 January 2012 – 30 April 2012

- 70 applications have been filed, including:
  - 12 applications, filed by the President
  - 55 applications, filed by individuals
  - 1 application, filed by the 1/5 of the Deputies of the National Assembly
  - 2 applications, filed by the Human Rights Defender
- 21 cases have been admitted for review, including:
  - 12 applications, concerning the compliance of obligations stipulated in international treaties with the Constitution
  - 6 applications, based on 7 individual complaints concerning the constitutionality of certain provisions of laws
  - 1 case on the basis of the application of the 1/5 of the Deputies of the National Assembly
  - 2 applications, filed by the Human Rights Defender
- 15 cases heard and 15 decisions delivered (including decisions on applications filed before the relevant period) including:
  - 10 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution
  - 4 decisions on cases initiated on individual complaints (including decisions on applications filed before the relevant period)
  - 1 decision, filed by the the Human Rights Defender

## Important decisions

*Identification:* ARM-2012-1-001

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 06.03.2012 / **e)** / **f)** On the conformity with the Constitution of the provisions of the Law on State and Official Secret / **g)** *Tegekagir* (Official Gazette) / **h)**.

*Keywords of the systematic thesaurus:*

4.6 Institutions – **Executive bodies.**

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

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

*Keywords of the alphabetical index:*

Right to information, exception / Secret, state / Secret, state, access to court.

*Headnotes:*

The right to freedom of expression includes, *inter alia*, the right to seek and receive information. The accessibility of public information is a vital prerequisite for democracy and for the transparency of state government accountable before the public. Simultaneously, this constitutional right is not absolute and is subject to restrictions under the Constitution. The correlation of this constitutional value with other constitutional values, particularly with state security, defines the nature of its possible restrictions. Meanwhile, the legal grounds for limitation of the respective freedom must satisfy the requirements of accessibility and preventability.

*Summary:*

I. The applicant stated that the challenged provisions of the Law on State and Official Secrets (hereinafter, the “Law”) permit the definition of information as a state or official secret to be regulated by departmental acts of executive bodies. The challenged provisions authorise the executive bodies to compose and confirm extended departmental lists of the information that is subject to secrecy. The said departmental lists are also secret and may not be published; thus the secret information is defined by a legal act which is also secret. The applicant claimed that as a result of such regulation this sphere of action of the public bodies remains beyond civil supervision, which contradicts the principles of the rule of law and of democratic society.

II. In its consideration of the constitutional debate the Constitutional Court emphasised the importance of the following legal issues:

- a. whether the realisation of the power of the executive bodies to define information as a state or official secret presumes a limitation of the freedom of information and whether the departmental lists of the information subject to secrecy are, *per se*, limitations of this freedom,
- b. whether the secrecy and non-public nature of the extended departmental lists of the information subject to secrecy are legitimate.

Based on a systemic analysis of the relevant legislation, the Constitutional Court held that the challenged Law precisely defines the notion “state secret”. The Law sets down the scope of the information which may be defined as a state secret. The Law also stipulates the principles for defining information as a state secret. All these regulations enable to define the framework of limitation to the freedom of information. Accordingly, the Constitutional Court considered that the realisation of the constitutional principle that rights may be limited solely by law is guaranteed, as for the by-laws their function is to ensure the realisation of the requirements set forth in the law.

The Law enables the government to compose lists of information which is defined as a state secret by certain fields. These lists are ratified by the President and are public. The same Law allows the executive bodies to define the information as a state secret within their powers by means of departmental lists. These are called “extended departmental lists”. The information which is to be included in these lists should be derived from the requirements of the Law. On this basis the Constitutional Court found that the detailed departmental lists of secret information composed in the manner prescribed by the Law, *per se*, may not limit the right to freedom of information. The limitations to the right are stipulated by the Law, and by setting down the power provided by the challenged provisions the legislature has not delegated its exclusive authority to define limitations to rights to the executive bodies, but authorises them to realise the limitations set forth in the Law.

As for the legitimacy of the non-public nature of the extended departmental lists the Constitutional Court held that according to the general logic of the Law the limitations may be executed only as regards the information the dissemination of which may harm state security, whilst the extended departmental lists merely itemise the fields prescribed by the Law.

The Constitutional Court also stated that the secrecy of the departmental lists of the information subject to secrecy may lead to difficulties for people to predict the legal consequences of their actions, taking into account criminal liability for the dissemination of state and official secrets.

In connection with the nature of these lists the Constitutional Court considered just one exception, especially when the name of a particular item of information in the list, *per se*, may inevitably constitute a state secret by the fact of its engagement in the list, it may be defined as information the dissemination of which can lead to harmful consequences for state security and be defined as a state secret.

Based on the legal positions expressed in its decision the Constitutional Court recognised the debated provision which stipulates the secret and non-public nature of the extended departmental lists of the information subject to secrecy to be inconsistent with the Constitution and void, in so far as it does not refer to certain information subject to secrecy.

#### *Languages:*

Armenian.



## Austria Constitutional Court

### Important decisions

*Identification:* AUT-2012-1-001

**a)** Austria / **b)** Constitutional Court / **c)** / **d)** 13.12.2011 / **e)** B 883/10 / **f)** / **g)** / **h)** www.icl-journal.com; CODICES (German).

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

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

5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing**.

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

Hearing, public, request, denied.

#### *Headnotes:*

Regarding an applicant's submission and participation opportunities in administrative proceedings concerning the adoption of an area zoning plan, a requested public hearing before the Constitutional Court that complies with the European Convention on Human Rights may be dispensed with due to the characteristics of the decision review and the decree review procedures.

#### *Summary:*

I. The applicant lodged a complaint with the Constitutional Court after his application for a building permit to designate a plot of land as the "greenland-small gardens" ("*Grünland-Kleingärten*") was rejected. *Inter alia*, he requested a public hearing before the Constitutional Court.

II. The Constitutional Court found the – admissible – complaint unsubstantiated by the alleged pursuance of an unlawful decree, namely the area zoning plan (*Flächenwidmungsplan*), and the alleged violation of the right to equality of all citizens before the law.

However, the complaint was dismissed in a non-public session, which the Court justified as follows:

1. The decision on the application for a building permit does concern a “civil right” within the meaning of Article 6 ECHR. This fundamental right is therefore, in principle, applicable to the relevant administrative procedures and the following procedures before the Courts of Public Law (*Gerichtshöfe des öffentlichen Rechts*).

Pursuant to § 19.1 of the Constitutional Court Act (*Verfassungsgerichtshofgesetz*), the Constitutional Court shall generally decide after holding a public hearing. Yet, according to § 19.4 Constitutional Court Act, the Court may dispense with a public hearing if the parties’ pleadings and the files submitted to the Court indicate that an oral debate does not give reason to expect further clarification of the case.

2. Referring to the European Court of Human Rights case-law, the Constitutional Court pointed out that the right to a public hearing under Article 6 ECHR entails an entitlement to an “oral hearing” unless there are exceptional circumstances that justify dispensing with it. In this respect, regarding procedures before Constitutional Courts, this Court alluded to the European Court of Human Rights case-law. Especially when dealing with the length of proceedings, the case-law accepts certain modifications in the application of Article 6 ECHR. Even if the case-law adhered to the requirement of a public hearing before the Constitutional Court, the European Court of Human Rights nevertheless indicated that dispensing with a requested public hearing could be justified if adequate reasons were given (European Court of Human Rights 14.10.2010, *Kugler*, (application no. 65.631/01, paragraph 52).

3. Additionally, the Constitutional Court referred to the facts that precede any decision review procedure before the Constitutional Court (*Bescheidbeschwerdeverfahren*) and the planning procedures (*Planungsverfahren*) before the administrative authorities, which underlie certain procedural guarantees (including participation opportunities of land owners concerned and neighbours). Also, the Constitutional Court noted that after dismissing or declining to deal with a complaint, the Administrative Court obtains jurisdiction upon the applicant’s request and subsequently has to request a review of the decree’s lawfulness under the same conditions as an official decree review by the Constitutional Court.

According to the Lower Austrian Regional Development Planning Act 1976 (*Niederösterreichisches Raumordnungsgesetz 1976*), the draft regional development programme (*örtliches Raumordnungsprogramm*) shall be displayed for

public inspection for six weeks at the town hall before issuing the decree. Not only shall there be a public announcement, information shall also be given to the individuals concerned. Within this time limit, any individual may submit a written comment to the draft regional development programme, which has to be taken into account by the municipal council in its decision-making procedure.

4. Against the backdrop of Article 6.1 ECHR, the Court held that it was necessary to determine whether the concerns against the area zoning plan related to factual or legal issues. Whereas mere legal issues do not require a public hearing before the Constitutional Court, the situation is different with regard to factual issues. If it involved participation opportunities (right to submit a comment), a public hearing may be dispensed with if the relevant factual aspects were known to the individuals concerned in the adoption proceedings of the regional development programme or the area zoning plan, but remained unclaimed before the local authorities. In case factual issues were, however, unsuccessfully contested during the decree issuance proceedings (*Verordnungserlassungsverfahren*) or became known subsequently, a public hearing before the Constitutional Court according to Article 6.1 ECHR is considered if the applicant’s questions cannot be solved with the administrative file.

Regarding the “public hearing” requirement in the appeal procedures, the relevance and necessity of a public hearing for the taking and consideration of evidence, and the solution of legal issues is essential. Besides the applicant’s submission in the administrative proceedings, the submission in the complaint must be taken into account.

5. If a decree’s lawfulness is challenged in a complaint against a decision according to Article 144 of the Constitution (*Bundesverfassungsgesetz*), it is possible to apply for the complaint to be assigned to the Administrative Court (*Verwaltungsgerichtshof*) in case the Constitutional Court dismisses or declines it. Within decision review proceedings under Article 131 of the Constitution concerning the violation of the applicant’s rights, the Administrative Court is obliged to review the applicable decree’s (i.e. the area zoning plan’s) lawfulness *ex officio* (Article 135.4 of the Constitution and Article 89.2 of the Constitution) irrespective of a former declination by the Constitutional Court. If concerns regarding the lawfulness of the area zoning plan arise, the Administrative Court is not only entitled to but also obliged to challenge it before the Constitutional Court.

In its judgment of 14.10.2010, *Kugler*, (application no. 65.631/01), the European Court of Human Rights held that regarding the specific circumstances of the case, a hearing would not have served any useful purpose. The reason is that the Administrative Court has no jurisdiction concerning the lawfulness of an area zoning plan. Rather, it could only suggest to the Constitutional Court to review the lawfulness of the decree. This, however, does not correspond to the Constitution: Austrian law does not only provide for a “right of proposal” of the Administrative Court; its application initiates decree review proceedings and the Constitutional Court is – in case of its admissibility – obliged to decide on the merits. Likewise, the Constitutional Court is obliged to initiate decree review proceedings on the occasion of a pending complaint if it has concerns regarding the decree’s lawfulness.

6. Due to the characteristics of the decision review and decree review procedures before the Constitutional Court, the applicant’s submission and participation opportunities in the administrative proceedings concerning the adoption of an area zoning plan may render it possible to refrain from a public hearing.

#### Cross-references:

- Violation of Article 6.1 ECHR on account of the lack of a public hearing, European Court of Human Rights, *Kugler v. Austria*, Application no. 65631/01, 14.10.2010.

#### Languages:

German.



#### Identification: AUT-2012-1-002

**a)** Austria / **b)** Constitutional Court / **c)** / **d)** 13.12.2011 / **e)** B V 85/11 / **f)** / **g)** / **h)** www.icl-journal.com; CODICES (German).

#### Keywords of the systematic thesaurus:

4.9.9.6 Institutions – Elections and instruments of direct democracy – Voting procedures – **Casting of votes.**

#### Keywords of the alphabetical index:

Election, E-voting, regulation, insufficient.

#### Headnotes:

Provisions regulating “E-Voting” that do not sufficiently determine the action of the election commission and lack the possibility to control are unlawful, as they do not observe election principles applied to voting procedures.

#### Summary:

I. During the Students’ Union elections in May 2009, voters had the option of casting their vote electronically via Internet for the first time. The so-called “E-Voting” did not replace the paper ballot, but offered an additional voting channel in the week prior to the regular ballot. Students could register on an official website, confirm their identity via the Citizen Card and vote for one of the political groups running for the Students’ Union’s representation on university level (*Universitätsvertretung*) as well as for three candidates for the representatives for each field of study (*Studienrichtungsvertretung*).

Following the elections, several political groups running for the Students’ Union representation at their universities (hereinafter, “student groups”) appealed the election results. They argued that E-Voting as applied during these elections was unconstitutional, violating the right to free, secret and personal elections and the right to data protection. They particularly claimed that the characteristics of E-Voting made it impossible to ensure the correct counting of electronic votes, to verify the results by a second count, or to guarantee the election secrecy for electronic voters. After the dismissal of the applicants’ appeals, they filed complaints with the Constitutional Court pursuant to Article 144 of the Constitution (*Bundesverfassungsgesetz*), claiming that the provisions concerning E-Voting in the Union of Students Act 1998 (*Hochschülerinnen – und Hochschülerschaftsgesetz* 1998, hereinafter, “HSG”) were unconstitutional. They also alleged that the relevant provisions in the Students’ Union’s Election Regulation 2005 (*Hochschülerinnen – und Hochschülerschaftswahlordnung* 2005, hereinafter, “HSWO”), as amended by Federal Law Gazette II 351/2008, were unlawful.

II. After considering the complaints, the Court reviewed the constitutionality of the E-Voting provisions in the HSWO and initiated *ex officio* constitutional review proceedings according to Article 139.1 of the Constitution.

Regarding the admissibility of the student groups' complaints, the Court states that the student groups' legitimation to file complaints does not expire with the end of the election period in 2011, as the new elections do not resolve the cause for their complaints.

Also, regarding the applicants' claims on the HSG's unconstitutionality, in accordance with considerations laid down in its decision to initiate *ex officio* review proceedings, the Court reiterates that the relevant HSG provisions are not unconstitutional. There is no requirement that the constitutional standards of federal or municipal elections must apply to elections for organs of non-territorial bodies entitled to self-administration. There are only some minimum standards for compliance, such as self-governed, periodical elections, and the members' opportunity to take part in decision-making processes. These are, however, met by the HSG. Furthermore, Article 3 Protocol 1 ECHR is only applicable to legislative bodies and thus not to the Students' Union. The Court also states that the HSG contains a specific and precise parameter to configure E-voting and that the law guarantees voter anonymity. Considering the HSG provisions on the use and protection of personal data for electronic voting in combination with the general principles of the Data Protection Act, the Court alleges that the election commission's competences regarding data protection are sufficiently precise and thus constitutional. Eventually, adequate measures to ensure the verifiability of E-Voting are guaranteed by law, enabling an examination based on certain technical expertise.

Yet, the Court's doubts regarding the HSWO as set in its decision to initiate an *ex officio* review could not be dispersed in the course of the proceedings. The Court points out that through an appropriate procedure, the election secrecy, the authenticity of the filled out ballot, the privacy of the voting data during transmission as well as the election commission's ability to fulfil their tasks as prescribed by law also in regard of electronic voting must be guaranteed during the execution of E-Voting. The principles of general, equal, secret and personal voting established in the HSG are to be ensured at least to the same extent as in postal voting. Compared to regular paper ballots, a failure or manipulation (such as programming errors or election fraud by manipulation) is more difficult to detect and might have a higher impact on the results. Thus, the election commission's actions have to be determined by the election regulation, such that the E-Voting procedure is comprehensible for everyone and verifiable for the commission.

The Court concludes that the election commission's practice was not sufficiently predetermined by the

HSWO. Moreover, the regulation does not define in which way, by which means and according to which criteria the election commission may fulfil its tasks, especially in which way the commission itself – without further assistance of qualified experts – may ensure the error-free functionality of the system used. Even though the applicants did not assert a successful attack on E-Voting by hackers, precautionary measures to prevent programming errors or election fraud have to be taken. A summarising print-out of the election results does, however, not meet these requirements.

Contrary to conventional elections, voters need a certain level of technical expertise, which cannot be taken for granted with the majority of the voters, to assure themselves of the electronic voting procedure's compliance with the general principles of voting. Moreover, the regulation does not even stipulate an opportunity for transparent results, publicly accessible control of the technical system or the source code used for E-Voting. This leaves the voter at a loss on whether the electronic voting complied with the general principles of voting or not, and whether the vote was counted in the right way.

Therefore, the regulation itself must contain norms clarifying how the principles of voting shall be assured during E-Voting, which procedure and which technical system shall be used for E-Voting to assure the verifiability of the election results. The certification by technical experts cannot substitute the state's responsibility to guarantee the election commission's control on the compliance with the general voting principles.

The provisions of the HSWO relevant for E-Voting were thus considered to be contrary to the HSG. The Court repealed these norms, except for § 61, which had already been amended by Federal Law Gazette II 20/2011. Based on the illegality of the HSWO, the Court consequently followed the political groups' complaints, rescinding the election results of the Student Union's representative bodies at seven universities as well as a decree of the Austrian Data Protection Commission (Austrian Constitutional Court, B1149/10 *et al*, B898/10, B1214/10, 13 December 2011).

#### *Languages:*

German.



# Belarus

## Constitutional Court

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### Important decisions

*Identification:* BLR-2012-1-001

**a)** Belarus / **b)** Constitutional Court / **c)** / **d)** 16.02.2012 / **e)** D-681/2012 / **f)** On legal regulation of relief from criminal punishment or mitigation of punishment in case of disease / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 1/2012 / **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.**  
 3.12 General Principles – **Clarity and precision of legal provisions.**  
 3.21 General Principles – **Equality.**  
 3.23 General Principles – **Equity.**  
 5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees.**  
 5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability.**  
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**  
 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health.**

*Keywords of the alphabetical index:*

Detention, after conviction / Sentence, remission, loss / Sentence, serving / Punishment / Illness, serious.

*Headnotes:*

The principles of justice and humanity are core principles of the criminal law and of criminal liability and apply to both a system of penalties under the Criminal Code and to the ordering of their execution. The legislator is required to set out the possibility for the relief of a person from serving a sentence of imprisonment or for reduction of a sentence of imprisonment due to a serious disease that prevents the person from serving the sentence, regardless of the time of the occurrence of such disease.

*Summary:*

The Constitutional Court considered in court session the appeal of an applicant on the gap in the criminal legislation concerning regulation of the relief of a convicted person from serving a sentence of imprisonment due to a disease.

In evaluating the approaches of the legislator to the regulation of relieving or reducing a punishment on the grounds of a serious disease suffered by the detained person, the Constitutional Court noted that the implementation of the principles of justice and humanity, which are two core principles of the criminal law and of criminal liability, applies to a system of penalties under the Criminal Code, and to the ordering of their execution.

Article 92.2 of the Criminal Code provides for a court to relieve a detainee from serving a sentence of imprisonment or to reduce that sentence where after the verdict the detainee falls ill with a serious disease (except a psychiatric illness) that prevents the person from serving the sentence, that is, if the convict develops a disease of such severity that physical relief from the suffering associated with the manifestation of the disease is impossible while serving a sentence. In this case the severity of the offense, the personality of the detainee, the nature of disease and other circumstances are taken into account.

According to the Constitutional Court, analysis of the constitutional-legal content of Article 92 of the Criminal Code reveals that the intention of the legislator was to express humanitarianism from the State to a person with a serious disease that prevents the further serving of a sentence, and therefore provided the possibility for a court to relieve the person from serving a sentence or to reduce the sentence. Article 92 sets down a time condition in relation to the occurrence of a serious disease, i.e. the medical criteria under which a person may be relieved from serving a sentence or according to which it may be reduced, if that person developed a disease after the verdict. The presence of legal uncertainty derives from the fact that, in some cases, it will not be possible to establish the time of occurrence of the disease.

The Constitutional Court considered that the uncertainty of the content of the legal rule implies the possibility of ambiguity in the understanding and application of the rule in practice, as pointed out by the applicant's appeal to the Constitutional Court, which could lead to a violation of the constitutional principles of equality before the law and the rule of law.

Based on the constitutional principle of equality before the law, persons suffering from serious diseases that prevent the further serving of a sentence must be guaranteed consideration by the courts of the possibility of their relief from serving their sentence or reduction of the sentence, considering the gravity of the offense, the personality of the detainee, the nature of the disease and other circumstances, regardless of the time of occurrence of the disease; that is, regardless of whether the disease occurred before or after the person was sentenced.

Equality before the law can be ensured only if legal rules are interpreted and applied uniformly in practice. This implies the requirement of clarity and certainty in the legal regulation of social relations in a particular area.

According to the Constitutional Court, the removal of a legal uncertainty in the regulation of relief from serving a sentence of imprisonment or reduction of a sentence due to a disease that prevents the serving of a sentence, will ensure realisation of the constitutional principles of the rule of law, equality before the law, justice and humanity.

The Constitutional Court considered it necessary to introduce changes to Article 92 of the Criminal Code to allow for the relief of a person from serving a sentence or the reduction of a sentence due to a serious disease that prevents the serving of a sentence, regardless of the time of the occurrence of such disease.

#### *Languages:*

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



#### *Identification:* BLR-2012-1-002

**a)** Belarus / **b)** Constitutional Court / **c)** / **d)** 25.04.2012 / **e)** D-683/2012 / **f)** On the conformity of the Law “On Making Alterations and Addendum to the Law “On Consumer Rights Protection” to the Constitution / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/2012 / **h)** CODICES (English, Belarusian, Russian).

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

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

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

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

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

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

Consumer, protection, constitutional value / Judicial protection of rights, right.

#### *Headnotes:*

Public associations of consumers shall be reimbursed with all expenses incurred in court actions taken to protect and vindicate consumer’s rights, including court costs, as well as other costs arising prior to going to court and related to necessary proceedings, including examination of the case. The consumer rights protection mechanism involving the participation of public associations of consumers should be clarified by the legislator.

#### *Summary:*

The Constitutional Court in an open court session in the exercise of obligatory preliminary review considered the constitutionality of the Law “On Making Alterations and Addendum to the Law “On Consumer Rights Protection” (hereinafter, the “Law”).

The Constitutional Court began its constitutionality review by recognising that one of the measures in the Constitution to ensure the full realisation of rights and legitimate interests by citizens is a guarantee of protection for every individual’s rights by a competent, independent and impartial court within the terms defined by law (Article 60.1 of the Constitution); Article 62 of the Constitution declares the right of every citizen to legal assistance, including the right to use at any time the assistance of lawyers and one’s other representatives in court.

Article 1.9 of the Law is aimed at the adjustment of the legislative regulation of certain relations, arising from the activities of public associations in the protection of consumer rights, according to which the pre-existing Law “On Consumer Rights Protection” is supplemented by Article 48 of the Law. This Article defines, in particular, a consumer rights protection mechanism, carried out free of charge on

behalf of the consumer by public associations of consumers, as well as conditions for the compensation of expenses incurred by public associations of consumers in such activities.

Thus, Article 48.1.2 of the Law states that a manufacturer (seller, supplier, representative, executor, repair organisation) should indemnify the expenses of a public association of consumers that are related to the filing of an application on behalf of a consumer seeking to eliminate violations of consumer rights by the manufacturer and to recover losses caused by these violations; appealing to court with a complaint to protect consumer rights; and representing and protecting in court the rights and lawful interests of a consumer. Article 48.1.2 of the Law also states that the compensation of the said expenses is possible at the written request of a public association of consumers after the satisfaction of a claim by a manufacturer to which the public association of consumers has addressed the rights violation on behalf of the consumer or after a court decision in favour of that consumer, if a public association of consumers has not demanded so at the time of its application to the court for protection of a consumer's rights. The public association of consumers can immediately receive compensation of expenses in court with a general order.

The Constitutional Court, noting the established mechanism for the recovery of public associations' costs, drew the attention of the legislator to certain omissions in the regulation of the amount of expenses, associated with consumer rights protection, levied by a public association of consumers.

Proceeding from the identified constitutional and legal meaning of the provisions of the Law about the free nature of the services provided to the consumer by public associations of consumers, and the need for the compensation of expenses incurred by the said associations, the Constitutional Court was of the view that, where a consumer's claim is successful, in order to avoid ambiguous approaches in determining the amount of expenses to be compensated, all expenses incurred in the case, including court costs, as well as other necessary expenses, arising prior to going to court and related with the hearing of a case by a court, including the costs of examination, are to be compensated.

Article 48.3 of the Law states that the realisation by the public association of consumers of its rights to give advice to a consumer on the protection of his rights, to file an application on behalf of the consumer with a claim to the manufacturer on the elimination of violations of consumer rights and on compensation to the consumer of losses caused by these violations, to

address a court with a complaint for the protection of consumer's rights, and to represent and protect in court the rights and lawful interests of a consumer (i.e. an indefinite number of consumers) is available only if an employee of the public association of consumers, who exercises the mentioned rights of this public association, possesses a certificate of qualification.

The Constitutional Court considered that establishing on the legislative level such a requirement of certification for employees of a public association of consumers cannot be considered as a provision limiting the rights and lawful interests of a public association of consumers and its employees, in particular the constitutional right to work as a right to choose one's profession, type of occupation and work in accordance with one's vocation, capabilities, education and vocational training, and having regard to social needs (Article 41.1 of the Constitution). Establishing requirements for certification of such employees, which is carried out to test their knowledge of the legislation on consumer protection, is directed both at protecting the rights and legitimate interests of consumers by improving the quality of advice for consumers, receiving quality services under the contract of gratuitous services by them, and at protecting the legitimate rights and interests of the public association of consumers. The high qualification of employees of a public association of consumers will contribute to a more qualitative assessment of the circumstances for consumer protection in order to obtain maximum compensation of incurred expenses and to prevent abuses by consumers of their rights.

The Constitutional Court recognised the Law "On Making Alterations and Addendum to the Law "On Consumer Rights Protection" to be in conformity with the Constitution.

#### *Languages:*

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



# Belgium

## Constitutional Court

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### Important decisions

*Identification:* BEL-2012-1-001

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 11.01.2012 / **e)** 1/2012 / **f)** / **g)** *Moniteur belge* (Official Gazette), 04.05.2012 / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

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

5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status**.

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

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

*Keywords of the alphabetical index:*

Stateless person, right of residence / Stateless person, family benefits / Refugee, recognised, right of residence / Refugee, recognised, family benefits / Refugee, Convention relating to the Status of Refugees / Statelessness, Convention relating to the Status of Stateless Persons / Law, lacuna / Court, legislative lacuna, filling / Legislative omission / Family benefit, conditions, legal residence.

*Headnotes:*

Recognised stateless persons and recognised refugees are in substantially comparable situations, having regard not only to the provisions of the New York Convention of 28 September 1954 relating to the Status of Stateless Persons and of the Geneva Convention of 28 July 1951 relating to the Status of Refugees, but also to the fact that by granting them recognition as stateless or refugee as the case may be, the authority acknowledges duties towards those concerned.

When it is established that a stateless person has been granted this status because of involuntary loss of nationality and proven inability to obtain a legal long-term residence permit in another State with which he may have ties, the situation in which he is placed is such as to cause discriminatory interference with his fundamental rights. Consequently, the difference in treatment between a stateless person in such a situation in Belgian territory and a recognised refugee has no reasonable justification.

*Summary:*

The Constitutional Court was asked by the Liège labour court whether it was compatible with the rules of equality and non-discrimination (Articles 10 and 11 of the Constitution), combined as appropriate with Articles 2.2 and 26.1 of the International Convention of 20 November 1989 on the Rights of the Child, for a provision of the law instituting guaranteed family benefits to treat recognised stateless persons in the same way as the other categories of foreigners by requiring them, in order to qualify for guaranteed family benefits, to be permitted or authorised to reside in Belgium in accordance with the law of 15 December 1980 on access to the territory, residence, settlement and expulsion of aliens.

The Court considered firstly that although the preliminary question concerned a likeness of treatment between stateless persons and other categories of foreigners, it emerged from the wording of the question and from the grounds for the referral decision that the question concerned the difference in treatment between stateless persons and refugees in that the first category of foreigners, unlike the second, did not fulfil the condition of lawful residence laid down by the impugned provision.

As it had already held in its judgment no. 198/2009 of 17 December 2009 *Bulletin* 2009/3 [BEL-2009-3-013], the Court considered that refugees and stateless persons had in common the fact of being in Belgian territory, where they had been granted a status on the basis of international conventions intended to protect them.

When a stateless person was certified to have been granted this status on the ground of involuntary loss of nationality, and demonstrated his inability to obtain a legal long-term residence permit in another State with which he might have ties, his situation was such as to cause discriminatory interference with his fundamental rights. Consequently, the difference in treatment between a stateless person present in Belgian territory placed in such a situation and a recognised refugee had no reasonable justification.

The Court again came to the conclusion that the discrimination did not originate in the existing legislative provisions but in the absence of a legislative provision under which recognised stateless persons in Belgium, certified to have lost their nationality involuntarily and substantiating their inability to obtain a legal long-term residence permit in another State with which they might have ties, would be granted a right of residence comparable to that enjoyed by refugees. It was for the legislator to act in the matter.

The Court considered, however, that pending this legislative action which related to the law of 15 December 1980, it was for the court below to put an end to the consequences, where the provision on guaranteed family benefits was concerned, of the unconstitutionality found, as this finding was expressed in sufficiently precise and comprehensive terms. Consequently, it was for the labour courts ruling on a refusal of guaranteed family benefits in respect of a dependent child of a recognised stateless person, found by them to have involuntarily lost his nationality and to have demonstrated his inability to obtain a legal long-term residence permit in another State with which he might have ties, to grant the child entitlement to the family benefits at issue notwithstanding that the stateless person on whom the child was dependent was not yet permitted or authorised to reside in Belgian territory.

#### *Cross-references:*

- Judgment no. 198/2009 of 17.12.2009, *Bulletin* 2009/3 [BEL-2009-3-013];
- Judgment no. 48/2010 of 29.04.2010, *Bulletin* 2010/1 [BEL-2010-1-005].

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2012-1-002

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 09.02.2012 / **e)** 18/2012 / **f)** / **g)** *Moniteur belge* (Official Gazette) 11.04.2012 / **h)** CODICES (French, Dutch, German).

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

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

3.13 General Principles – **Legality.**

5.2 Fundamental Rights – **Equality.**

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

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

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

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

Administrative Court, judgment setting aside, effects, continuation / Right to a court, legal certainty / Court, illegal act, refusal to apply.

#### *Headnotes:*

When verifying the legislator's compliance with the principle of equality and non-discrimination and with Article 13 of the Constitution, the Court should also take into account the rights secured to litigants by Article 6.1 ECHR.

The right of access to a court constitutes an element inherent in the right to a fair trial. Albeit fundamental in a law-based state, this right is not absolute.

#### *Summary:*

The Constitutional Court was questioned by the Brussels court of first instance about the compatibility of Section 14<sup>ter</sup> of the co-ordinated laws on the Council of State with the rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) and with Article 13 of the Constitution, in conjunction with Article 159 of the Constitution. This provision enables the Council, which is empowered to set aside administrative acts, to indicate by means of general provisions which effects of regulatory acts set aside are to be considered definitive or provisionally continued for such time as it may determine.

According to the court below, this provision was problematic in not permitting a litigant to have the courts and tribunals set aside, in pursuance of Article 159 of the Constitution, the application of a regulatory order where the Council of State had set aside the order while continuing its effects.

The Constitutional Court ruled that it was for the ordinary and administrative courts to interpret the legislative provisions which they applied, whereas it was for the Constitutional Court to interpret the provisions in respect of which it was invited to carry out its scrutiny, in this case Article 159 of the Constitution. This article provides that the courts and tribunals shall apply general orders and regulations, whether provincial or local, only in so far as they are in accordance with the laws. It should be coupled with the other guiding rules indicated in the preliminary question.

Next, the Constitutional Court considered that the difference in treatment subjected to its scrutiny was founded on an objective criterion, namely the existence or non-existence of a Council of State decision setting aside a regulatory act while continuing its effects, and pursued the legitimate aim of safeguarding legal certainty.

It had also to determine the propriety and the proportionality of the difference in treatment between litigants.

The Court observed in this connection that while incidental judicial review of the legality of administrative acts, guaranteed by Article 159 of the Constitution, might originally have been conceived as absolute, today it was appropriate to take account of other constitutional and international provisions: Article 160 of the Constitution instituting the Council of State, and the principle of legal certainty inherent in the domestic legal system, and in the European Union legal system and the European Court of Human Rights.

It followed that while Article 159 of the Constitution did not explicitly provide for any restriction on the method of review of legality it established, such restriction was nevertheless justified if needed to ensure compliance with other constitutional provisions or fundamental rights. Being required to safeguard, in particular, the principle of legal certainty, it was the legislator's duty to settle the method of review of administrative action, which might call for restrictions on incidental judicial review of the legality of regulatory acts, in so far as these restrictions were proportionate to the legitimate aim pursued.

The Court also took into account, in its review, of Articles 10, 11 and 13 of the Constitution, Article 6.1 ECHR and the relevant case-law of the European Court of Human Rights. It concluded that the legislator had struck a proper balance between the importance of remedying every unlawful situation and the concern no longer to jeopardise, after a certain

time, existing situations and the expectations raised. The balance between the principle of legality of regulatory acts and the principle of legal certainty was adequate since the legislator had entrusted to a judicial body, the Council of State, the responsibility of determining whether exceptional reasons justified continuing the effects of an unlawful regulatory act while stipulating that they be continued only by means of a general provision. Should it see the need, depending on the circumstances of the case, the Council of State could nonetheless, in compliance with the principle of equality and non-discrimination, make an exception to the continued effects of an overturned regulation for the litigants who had brought an application in due time to set aside this contentious regulation.

The Court concluded that the provision at issue was therefore not incompatible with Articles 10, 11 and 13 of the Constitution.

*Languages:*

French, Dutch, German.



*Identification:* BEL-2012-1-003

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 01.03.2012 / **e)** 26/2012 / **f)** / **g)** / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

3.19 General Principles – **Margin of appreciation**.  
 5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.  
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.  
 5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent**.

*Keywords of the alphabetical index:*

Child, born out of wedlock, family name / Adoption, plenary, name, change.

*Headnotes:*

Assignment of a family name is mainly based on considerations of social necessity. Unlike the assignment of a forename, it is determined by law, which is geared firstly to determining the family name in a simple, standard manner, and secondly to attributing some degree of permanence to such family name.

Unlike the right to bear a name, the right to give one's family name to one's child cannot be considered a fundamental right. In regulating name assignment, therefore, the legislature has extensive discretionary powers.

*Summary:*

I. The Termonde Youth Court asks the Constitutional Court about the compatibility of Article 356-2 §1 of the Civil Code with the constitutional rules on equality and non-discrimination (Articles 10 and 11 of the Constitution), possibly in conjunction with Articles 8 and 14 ECHR, given that it prevents a cohabiting different-sex couple comprising one parent and one adoptive parent, from declaring in court, by mutual consent, which of the two will give his or her name to the adopted child, whereas paragraph 2 of the same provision grants this possibility to a cohabiting same-sex couple comprising one parent and one adoptive parent.

Article 356-2 § 1 of the Civil Code lays down that plenary adoption confers on the child the name of the adoptive parent, replacing his or her own name. It transpires from the facts and the previous proceedings that the adoptive applicant and the adopted child's mother, having submitted a declaration of legal cohabitation, do not wish the child to change family name so that he or she can retain the mother's family name, which is also borne by a second child who is common to both and cannot be the subject of plenary adoption.

The Council of Ministers contends before the Court that the preliminary question is irrelevant in adjudicating on the case submitted to the court in question because the aim of giving the same name to two under-age children can be achieved by submitting a request for a name change on the basis of the 15 May 1987 Law on family names and forenames.

II. The Constitutional Court recalls its established case-law to the effect that the lower court is responsible for deciding whether a reply to a preliminary question is necessary to settle a case on which it must adjudicate. Only where this is manifestly not the case can the Court decide that the question does not require a reply.

In the instant case, the fact that the aim pursued by the person applying for adoption can be achieved by a different procedure does not enable one to conclude that the preliminary question is manifestly irrelevant in adjudicating on the case before the lower court.

On the substance of the case, the Constitutional Court considers that the situations of a same-sex couple and a different-sex couple are not so different as to be incompatible, in connection with the consequences of plenary adoption of an under-age child for his or her family name. It therefore rejects an objection raised by the Council of Ministers.

The Court goes on to note that the legislature has generally established the rules on name assignment, which is considered as an effect of the legal parent-child relationship, in such a way as to determine the family name in a simple, standard manner and to confer some degree of permanence on such family name. It has also attempted to assimilate adoption to the ordinary parent-child relationship and to guarantee the stability of the adopted child's family ties and entourage.

Where the comparison with adoption by same-sex couples is concerned, the Constitutional Court notes that the legislature has been unable to apply to same-sex couples the regulations applicable to different-sex couples, since in a same-sex couple the child is adopted either by two men or by two women, or by a man or woman who adopts child of his or her partner of the same sex. It has therefore drafted separate regulations on the subject. As regards its broad discretionary powers in this field, it cannot be accused of having provided freedom of choice only for same-sex couples and not for different-sex couples, where the adopted child's family name is concerned.

The Court concludes that examination of the challenged provision in the light of the constitutional rules on equality and non-discrimination, in conjunction with Articles 8 and 14 ECHR, supposing that these latter provisions are applicable to the instant case, cannot but support this conclusion.

*Cross-references:*

- Judgment no. 161/2002 of 06.11.2002, *Bulletin* 2002/3 [BEL-2002-3-011].

*Languages:*

French, Dutch, German.



*Identification:* BEL-2012-1-004

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 01.03.2012 / **e)** 31/2012 / **f)** / **g)** / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

1.4.2 Constitutional Justice – Procedure – **Summary procedure.**

1.4.8.4 Constitutional Justice – Procedure – Preparation of the case for trial – **Preliminary proceedings.**

1.5.6.2 Constitutional Justice – Decisions – Delivery and publication – **Time limit.**

5.2 Fundamental Rights – **Equality.**

*Keywords of the alphabetical index:*

Constitutional Court, preliminary procedure / Constitutional Court, summary procedure / Medicine, not marketed in Belgium, recourse to a pharmacist.

*Headnotes:*

No consideration can justify, in terms of the goals of public health and the interests of patients, the fact that a patient seeking to have a prescription dispensed can prevail on a person authorised to dispense medicines to the public for the purpose of importing a medicine which has not received approval for marketing or registration in Belgium, but cannot prevail on that person to import a medicine whose marketing in Belgium has been approved but which is not yet marketed in Belgium.

*Summary:*

The Constitutional Court had before it a preliminary question referred by the labour court of Marche-en-Famenne concerning a provision of the law on medicines. This court was hearing an appeal against an administrative decision which awarded financial assistance for pharmaceutical costs on behalf of a child afflicted with a serious illness, but made this assistance subject to the condition that the medicine must be purchased in accordance with the legislation on imports. That law did not allow the beneficiary to prevail upon a pharmacist to import this medicine, unavailable in Belgium, thus compelling him to go abroad himself to procure it. The labour court

questioned the Constitutional Court about the consistency with the constitutional rules of equality and non-discrimination of this law permitting a person authorised to dispense medicines to the public to import a medicine not approved for marketing or registration in Belgium, but not permitting that person to import a medicine with approval for marketing but not yet marketed in Belgium.

Pursuant to the provisions of the special law on the Constitutional Court relating to the preliminary procedure, a fast track procedure, the two reporting judges had informed the Court that they might be disposed to hand down a judgment in immediate response. In their conclusions they observed that, there being no reasonable justification for the difference in treatment complained of in the preliminary question, the Court might need to answer the question asked forthwith, in the affirmative. These conclusions were notified to the parties in the proceedings, and to the authorities designated by law. These include the Council of Ministers whose role is to defend the legislative provision. All these parties may lodge a statement in support within a short deadline. Only the applicants before the labour court had lodged such a statement to assert the unconstitutionality of the law. Neither the administrative authority, nor the respondent before the court below had lodged a supporting statement; neither had the Council of Ministers.

At the end of a fast-track procedure, which did not provide for a public hearing, the Court duly delivered a judgment finding a violation within less than four months counting from the receipt of the preliminary question.

*Supplementary information:*

The legislator endeavoured to rectify the unconstitutionality very quickly as Section 44 of the law of 29 March 2012, introducing various provisions, amends the provision declared unconstitutional.

*Languages:*

French, Dutch, German.



*Identification:* BEL-2012-1-005

a) Belgium / b) Constitutional Court / c) / d) 01.03.2012 / e) 32/2012 / f) / g) / h) CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

1.2.1.2 Constitutional Justice – Types of claim – Claim by a public body – **Legislative bodies.**

1.4.2 Constitutional Justice – Procedure – **Summary procedure.**

1.4.8.4 Constitutional Justice – Procedure – Preparation of the case for trial – **Preliminary proceedings.**

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

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

*Keywords of the alphabetical index:*

Interest in taking action, functional interest, member of a parliamentary assembly / Interest in taking action, personal interest, member of a parliamentary assembly / Constitutional Court, preliminary procedure / Constitutional Court, summary procedure.

*Headnotes:*

The wording of Article 2.3 of the Special Law of 6 January 1989 on the Constitutional Court shows that the intention was to limit the ability of members of legislative assemblies to take legal action by reserving *locus standi* for their presidents, imposing the condition that two thirds of the members must request the action. Therefore, an individual parliamentarian lacks the requisite interest in requesting annulment of a legal provision delegating specific competences to the Crown.

The Court may discontinue examination of manifestly inadmissible appeals under summary procedure in a restricted Chamber of three judges.

*Summary:*

I. A parliamentarian asked the Court to annul Article 3 of the Law of 29 April 2009 setting up “112 centres” and the “112 agency”. This article provides that all emergency calls answered by “112 centres” must be answered in the three national languages (Dutch, French and German) and in English, in accordance with the conditions, quality criteria and arrangements established by the Crown, under a decree issued by the Council of Ministers. The Crown is also empowered to establish requirements in matters of language knowledge.

The appellant contends that the challenged provision confers excessive powers on the Crown in regulating language use in the field in question. In support of his interest in annulment he adduces a personal interest and a functional interest.

II. The Court, under summary procedure before a bench of three judges, declared the appeal inadmissible for lack of interest on the appellant’s part.

In connection with the functional interest, the appellant contends that delegating competences to the Crown infringes his parliamentary prerogatives. The Court replies that it has already stated in its previous judgments that a member of a legislative assembly does not, on the basis of this capacity alone, possess the interest required to take action before it. It emerges from Article 2.3 of the Special Law of 6 January 1989 on the Constitutional Court that the intention was to limit the ability of members of legislative assemblies to take action by reserving *locus standi* for their presidents, imposing the condition that two thirds of the members must request the action.

In connection with the appellant’s personal interest as a member of the Chamber of Representatives, the Court replies that this interest is not fundamentally different from the aforementioned functional interest. According to the Court, the challenged provision does not affect the prerogatives specific to individual exercise of a parliamentary mandate. In the instant case, it does not prevent the appellant from campaigning for an amendment to the challenged provision or from exercising his right of parliamentary review vis-à-vis the enforcement of the challenged provision.

*Cross-references:*

See, along similar lines, *Bulletin* 2002/3 [BEL-2003-3-011].

*Languages:*

French, Dutch, German.



*Identification:* BEL-2012-1-006

a) Belgium / b) Constitutional Court / c) / d) 08.03.2012 / e) 35/2012 / f) / g) / h) CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

5.2 Fundamental Rights – Equality.

*Keywords of the alphabetical index:*

Traffic accident, responsibility, trains / Insurance, compulsory, cars, trains / Law, omission, unconstitutionality.

*Headnotes:*

It is discriminatory and therefore contrary to Articles 10 and 11 of the Constitution to require train owners (in the instant case the *Société nationale des chemins de fer belges*) to compensate for damage in the event of accidents, even where a pedestrian has been injured, at a place which is completely isolated from traffic, whereas under the terms of the Law of 21 November 1989 on compulsory insurance for responsibility in matters of automobile vehicles, the insurers of the owners of other automobile vehicles are only required to provide compensation if a traffic accident occurs on the public highway.

*Summary:*

1. A person dies after having been hit by a goods train in a place inaccessible to the public. The *Société nationale des chemins de fer belges* (hereafter SNCB) is called upon to pay damages, given that Article 29bis paragraph 1 of the Law of 21 November 1989 on compulsory insurance for responsibility in matters of automobile vehicles provides that in the event of a traffic accident involving an automobile vehicle linked to a railway, the owner of the vehicle is required to pay compensation.

The SNCB contends that this legal provision is contrary to the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), and requests the submission to the Court of a preliminary question on this subject.

Before the Court the SNCB disputes the fact that as owner it can be held responsible for any accident involving a train, even if it occurs at a place where the railway is completely isolated from roads open to traffic, whereas for other traffic accidents, the responsibility of the insurer of the automobile vehicle

owner, which is governed by the Law of 21 November 1989, is restricted to accidents occurring in the places mentioned in Article 2.1, namely the public highway, areas open to the public and areas which are only open to a specific groups of individuals entitled to enter them.

Before the Law of 19 January 2001, vehicles used on railways were not considered as “automobile vehicles” within the meaning of the Law of 21 November 1989. Trains and trams were therefore excluded from the scope of this Law, so that compensation for any damage went through different channels. In its Judgment no. 92/1998 of 15 July 1998 the Court ruled that this situation was discriminatory. It considered that the risk run by rail vehicles where they use the public highway or entirely or partly cross the public highway (trams or trains) was not of a sufficiently less serious nature to justify a radically different mode of compensation.

In endeavouring to remedy this discrimination in the Law of 19 January 2001, the legislature first of all extended the automatic compensation system to traffic accidents in which a rail vehicle is involved and secondly restricted entitlement to this system for vehicles other than those using railway lines to accidents occurring on the public highway. The legislature considered that there was a risk of abuse and fraud vis-à-vis accidents occurring on private land. The Court considered this exclusion from compensation for accidents occurring on private land compatible with Articles 10 and 11 of the Constitution (cf. Judgment no. 158/2006 of 7 June 2006).

II. In its reply to the first preliminary question, the Court first of all notes that the legislature was justified in considering that rail vehicles can generate a risk comparable to that of other vehicles. According to the Court, this applies even where the public highway is temporarily closed to traffic by the lowering of security barriers or traffic lights enabling the train to pass (cf. Judgment no. 93/2006 of 7 June 2006).

However, where, as in the instant case, the train is operating on a railway line which is completely isolated from traffic in the places mentioned in Article 2.1, the risk created by this vehicle for a vulnerable road user must, according to the Court, be deemed fundamentally different from that created for the same type of user by vehicles operating in the places mentioned in Article 2.1.

The Court concludes that Article 29bis paragraph 1.2 of the Law of 21 November 1989, which requires the owners of the train to compensate for damage resulting from an accident occurring under these circumstances, is not reasonably justified and that the

provision in question is contrary to Articles 10 and 11 of the Constitution in that it does not exclude from the automatic compensation system for traffic accidents involving a train operating on a railway line which is completely isolated from traffic in the places mentioned in Article 2.1 of this Law.

*Languages:*

French, Dutch, German.



*Identification:* BEL-2012-1-007

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 22.03.2012 / **e)** 49/2012 / **f)** / **g)** / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

5.2 Fundamental Rights – **Equality**.

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

*Keywords of the alphabetical index:*

Education, status of staff, temporary appointment, end / Education system, municipal / Education, free / Education system, official.

*Headnotes:*

The principle of equality in the educational field (Article 24.4 of the Constitution) does not preclude differences between the official and the free education systems concerning the status of staff, and more precisely the manner in which a temporary appointment can be terminated.

*Summary:*

I. A nursery school teacher at a municipal school belonging to the official subsidised education system is appointed to the post of director on a temporary basis, the permanent post-holder being absent on sick leave. After some time, the municipality decides to terminate this temporary appointment, even though the post-holder has since taken early retirement.

The teacher challenges this decision before the Council of State, contending that she was discriminated against by being summarily dismissed from this post, whereas for staff employed in the subsidised free education system, a dismissal procedure is required with notice and specific guarantees, such as an opportunity for the staff member to have his or her opinion heard. The Council of State decides to put a preliminary question to the Court on this matter.

II. The Court bases its reply on equality in the educational field as guaranteed by Article 24.4 of the Constitution. This provision permits different treatment provided it is based on the characteristics of each organising authority.

The Court observes that one of these characteristics is, precisely, the legal nature of the organising authorities, which are legal persons or private-law establishments in the free subsidised education system and legal persons or public-law establishments in the official subsidised education system. This may determine the different nature of the legal relationship between staff and their employers in the two respective systems.

The Court also observes that public-law status has the specificity (which also applies to the subsidised official education system) of being established unilaterally, whereas private-law labour relations (as also applicable to private education) are established by bilateral contracts.

According to the Court, the equality principle in the educational field cannot be treated separately from the other safeguards set out in the Constitution, such as freedom of education (Article 24.1 of the Constitution), which involves, on the organising authority's part, the freedom to select staff responsible for pursuing specific educational goals. Freedom of choice therefore has repercussions on the contractual relationship between such organising authority and its staff. It justifies appointing teaching staff under the subsidised free education system by contract and the possibility of terminating the contract by means of dismissal.

On the other hand, public authorities which organise an education system do so on the basis of public service requirements, and therefore have the corresponding public authority prerogatives. According to the Court, the author of the decree was therefore justified in stipulating that a temporary appointment to a post representing a promotion could be terminated on a straightforward decision from the organising authority rather than by dismissal accompanied by a period of notice, as the staff member appointed was not bound by contract.

The Court concludes that the differential treatment complained of could be justified by the legal situation of the teaching staff.

The Court adds that the differential treatment does not have a disproportionate effect as the teacher in question enjoyed the guarantees laid down in the Law on formal motivation of administrative acts or the general principles of administrative law, including the *audi alteram partem* principle.

*Languages:*

French, Dutch, German.



## Bosnia and Herzegovina Constitutional Court

### Important decisions

*Identification:* BIH-2012-1-001

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 19.11.2011 / **e)** AP 291/08 / **f)** / **g)** / **h)** CODICES (Bosnian, English).

*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.**

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

*Keywords of the alphabetical index:*

Criminal proceedings / Evidence, obtained unlawfully / Law, application, incorrect / Search and seizure / Search warrant.

*Headnotes:*

There has been a violation of the right to a fair trial under Article 6.1 ECHR in a criminal trial where the regular court grounded its decisions on evidence obtained by arbitrary application of the Criminal Procedure Code and which was in fact the only direct evidence that constituted incriminating evidence against the appellant.

*Summary:*

I. The present case concerned criminal proceedings in which the appellant was pronounced guilty of the criminal offense as stipulated by the law and received a prison sentence. The appellant was sentenced based on evidence, namely, that 16 kilograms and 373 grams of narcotics marijuana had been found when the vehicle he was driving was searched. The appellant contended that the search in question was conducted in a manner inconsistent with a number of provisions of the Criminal Procedure Code of the *Republika Srpska* (hereinafter, the “Criminal Procedure Code”) as he was not allowed to call an

attorney to be present at the search of the vehicle and as the search warrant was not carried out in accordance with the provisions of the Criminal Procedure Code, since the preliminary proceedings judge, when issuing the search warrant based on an oral request, failed to take minutes of the conversation with the requesting official concerning the oral request and to submit them to the Court.

II. The Constitutional Court noted that Article 120.3 of the Criminal Procedure Code provides that, where a search warrant is being issued on foot of an oral request, the preliminary proceedings judge shall record the course of the conversation regarding the request and submit the signed copy of the minutes to the court within 24 hours of issuing the warrant. In the opinion of the Constitutional Court, this provision is undisputedly of imperative character and clearly and unambiguously imposes an obligation on the preliminary proceedings judge to take minutes when issuing a search warrant based on the oral request and to give those minutes to the Court within 24 hours. The Constitutional Court found that this obligation is imposed due to the guarantee in the Criminal Procedure Code that a search warrant issued on foot of an oral request is to be issued exclusively based on the approval of the preliminary proceedings judge.

In the Constitutional Court's view, it was indisputable that the search warrant concerning the appellant's vehicle based on an oral request was not issued in accordance with the provisions of Article 120.3 of the Criminal Procedure Code as the Criminal Procedure Code provides strict conditions for the issuing of such a warrant and the failure to comply cannot be validated by subsequent actions. Therefore, the Constitutional Court found that the regular courts had applied the provisions of Article 120.3 of the Criminal Procedure Code arbitrarily as the courts had believed that the statement of a preliminary proceedings judge could justify his obvious failures, namely, his failure to record the course of the conversation with the official concerning the oral request for a search warrant as well as his failure to submit a verified copy of the minutes to the court concerning the issued oral search warrant.

Further, the Constitutional Court found that the question was raised whether the arbitrary application of Article 120.3 of the Criminal Procedure Code, in the instant case, had as a consequence the adoption of arbitrary decisions that led to violation of the appellant's right to a fair trial under Article 6.1 ECHR.

Bearing in mind that the search of the appellant's vehicle had been carried out illegally, that the regular courts had used the narcotics discovered as a result

of that search as evidence in the criminal proceedings, and more precisely that it was *de facto* the only direct incriminating evidence presented against the appellant, that it was therefore the only evidence upon which the court had found the appellant guilty for the criminal offense of unauthorised production and sale of narcotics under Article 224 of the Criminal Procedure Code, and that the said evidence had been obtained by arbitrary application of Article 120.3 of the Criminal Procedure Code, the Constitutional Court held that the evidence (narcotics) did not have the necessary quality for the courts to ground their decisions on it, as they had done in the instant case. In such a manner arbitrary decisions had been taken that violated the appellant's right to a fair trial under Article 6.1 ECHR.

In addition, pursuant to the consistent case-law to have the fairness of the proceedings "as a whole" examined, the Constitutional Court was required to examine the appellant's objection that, as understood by the Constitutional Court, raised a question as to the identity of the temporarily seized items; in other words, it raised an issue regarding the use of the temporarily seized items as evidence against the appellant. As already stated, the appellant emphasised that during the procedure of opening and inspecting the seized items, there was no preliminary proceedings judge present. In addition, neither he personally nor his defence counsel were present as provided for by Article 135 of the Criminal Procedure Code. The appellant contended that this failure led to a situation in which the seized items represented legally invalid evidence, especially as certain witnesses identified the items as 16 packages of green herbal substance in yellow packaging, while some referred to brown packaging, on which no fingerprints of the appellant were found.

The Constitutional Court noted that the reasoning of the regular court was primarily focused on provisions of Article 135.3 of the Criminal Procedure Code, which provide that when opening and inspecting seized items care must be taken that their contents do not become known to any unauthorised person. From the referenced reasoning it could be concluded that the regular court considered that in the instant case there were no reasons for safeguarding the secrecy or confidentiality of the information or protection of privacy and that the opening and inspection of items seized from the appellant was carried out in accordance with the provisions of Article 135 of the Criminal Procedure Code.

However, the Constitutional Court emphasised that this reasoning fully disregarded the imperative provisions of Article 135.1 and 135.2 of the Criminal Procedure Code, which provide that the opening and

inspection of temporary seized items and documentation shall be done by a prosecutor and that the prosecutor shall be bound to notify the person or the business enterprise from whom or from which the objects were seized, the preliminary proceedings judge and the defence attorney of the opening of the seized objects or documentation.

It was undisputed that the competent prosecutor in the instant case had failed to carry out the opening and inspection of the temporarily seized items in accordance with the imperative provisions of Article 135.1 and 135.2 of the Criminal Procedure Code. In addition, it was undisputed that, in terms of non-compliance with the said provisions, the regular courts had failed to give any reasoning except, in the opinion of the Constitutional Court, redundant reference to the lack of reasons under provision Article 135.3 of the Criminal Procedure Code. It should also be added that interrogated witnesses gave different statements in terms of the colour of scotch tape that was used to tape the items allegedly seized from the appellant and that there were no traces of the appellant's fingerprints on the seized items. Taking all of these matters into consideration, the Constitutional Court found that the regular courts in the instant case did not eliminate reasonable doubt as to the identity of the items seized from the appellant and considering that the challenged judgments were exclusively based on that evidence, the Constitutional Court held that the proceedings in question, seen as a whole, did not meet the standards of the right to a fair trial under Article 6.1 ECHR.

#### *Languages:*

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



## Brazil

### Federal Supreme Court

#### Important decisions

*Identification:* BRA-2012-1-001

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 19.10.1995 / **e)** 978 / **f)** Direct Claim of Unconstitutionality / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 117; *Diário da Justiça* (Justice Gazette), 17.11.1995 / **h)**.

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

4.4.6.1.1.1 Institutions – Head of State – Status – Liability – Legal liability – **Immunity**.  
 4.4.6.1.1.3 Institutions – Head of State – Status – Liability – Legal liability – **Criminal liability**.  
 4.6.10.1.1 Institutions – Executive bodies – Liability – Legal liability – **Immunity**.  
 4.6.10.1.3 Institutions – Executive bodies – Liability – Legal liability – **Criminal liability**.  
 4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy**.  
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.

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

Constitution, federal and regional / Head of state, guarantor of the Constitution / President, criminal proceedings / President, immunity.

#### *Headnotes:*

The President enjoys the privilege of immunity from liability for acts not related to the office during his term as well as the privilege of not being held in custody for ordinary criminal offences before the sentence. Because the privileges derive from his status as Head of State, they cannot be extended to Governors of member-states.

*Summary:*

I. The claimant contends that Article 88.3 and 88.4 of the State of Paraíba's Constitution are unconstitutional. The aforementioned Article modelled after the Presidential privileges set forth in Article 86.3 and 86.4 of the Constitution – established that a state governor could not be held in custody for ordinary criminal offences before the sentence and that during his term, he could not be liable for acts unrelated to the office.

II. The Supreme Court, by majority vote, granted the claim, ruling that Article 88.3 and 88.4 of the Constitution of the State of Paraíba are unconstitutional. The Court considered that a ruler's liability directly follows from the republican principle. However, the Constitution carved out an exception to this norm, specifically granting the President immunity from criminal liability for acts not related to the office until the end of the term. The President enjoys the privilege because he is not only the Head of Government but is also the Head of State. Such feature prevents the extension of this privilege to Governors of States or of the Federal District.

The Court also stated that it is unlawful to prohibit the detention in *flagrante delicto*, the provisional detention or the temporary detention of the Governor established in State Constitutions. Only the Federal Government can legislate on procedural law, in particular as regards the different types of provisional detention (Article 22.1 of the Constitution).

III. In a dissenting opinion, Justice argued that the prohibition of the Governor's criminal liability for acts not related to the office does not breach the liability of rulers, because this liability is related to the exercise of the office. Such norm aims at preserving the harmony and independence of the Branches of the State because it prevents the Executive Branch from being affected by crimes that are not related to this Branch. Accordingly, he argued that the privilege of not being held in custody before the sentence is also a specification of the principle of separation of powers and it ensures the application of the principle of the presumption of innocence (Article 5.57 of the Constitution) to the Governor. At last, he defended that the competence of the Federal Government was not derogated, because the Federal Government, the States and the Federal District have power to legislate concurrently about criminal procedures (Article 24.11 of the Constitution).

*Supplementary information:*

- Articles 5.57, 22.1, 24.11, 86.3 and 86.4 of the Constitution;
- Article 88.3 and 88.4 of the Constitution of the State of Paraíba.

*Languages:*

Portuguese.

*Identification:* BRA-2012-1-002

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 13.11.2002 / **e)** 678 / **f)** Direct Claim of Unconstitutionality / **g)** *Diário da Justiça* (Justice Gazette), 19.12.2002 / **h)**.

*Keywords of the systematic thesaurus:*

1.3.4.2 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities.**  
 3.4 General Principles – **Separation of powers.**  
 4.4.3.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**

*Keywords of the alphabetical index:*

Constitution, federal and regional / Constitution, federal, prevalence / Travel, right / Limitation period / Legislative power / Approval / Symmetry principle.

*Headnotes:*

A state constitutional provision that requires the governor to request permission from the State Assembly whenever he wants to leave the country is unconstitutional because it breaches the federation symmetry principle. The Federal Constitution sets forth that the President can leave the country up to fifteen days without permission of the National Congress. The need to reproduce the federal framework is analysed considering the principles on the matter. In this case, the freedom of movement prevails over the separation of powers, which permits the Legislative Branch to check the Executive Branch.

*Summary:*

I. A direct claim of unconstitutionality was filed against Articles 99.4 and 143.1 of the Constitution of the State of Rio de Janeiro, which establish that the governor cannot leave the national territory for any term without obtaining the Legislative Assembly's permission; otherwise, he loses the office. The claimant stated that these Articles violate the federal symmetry principle, which sets that some norms of the federal framework must be reproduced in state constitutions. He added that Article 49.3 of the Constitution establishes that the President must only request permission of the National Congress when he leaves the country for more than fifteen days.

II. The Supreme Court, unanimously, granted the claim. The Court understood that Article 49.3 of the Constitution is mandatory for member-states.

The Court stated that the federal symmetry principle is analysed in each specific case. The Court explained that some constitutional principles prevail over others and that they establish the mandatory reproduction of the norm in the state level. In this case, the principles of the freedom of movement and the separation of powers, which permit the Legislative Branch to check the Executive Branch, are under analysis. The Court considered that officials, no matter how high their offices, are common citizens to whom the Constitution guarantees freedom of movement (Article 5.15 of the Constitution). The principle prevails in this case; hence, the state Constitution did not follow the parameters established by the Federal Constitution.

*Supplementary information:*

- Articles 49.3 and 5.15 of the Constitution;
- Articles 99.4 and 143.1 of the Constitution of the State of Rio de Janeiro.

*Languages:*

Portuguese, English (translation by the Court).

*Identification:* BRA-2012-1-003

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 08.02.2006 / **e)** 407.688 / **f)** Extraordinary Appeal / **g)** *Diário da Justiça* (Justice Gazette), 06.10.2006 / **h)**.

*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 / Housing, lease / Housing, market regulation / Surety.

*Headnotes:*

The possibility to levy execution upon the house of the guarantor of a lease does not violate the social right to housing, as established in Article 6 of the Constitution.

*Summary:*

I. This case refers to an extraordinary appeal filed against a decision that denied a request to withdraw a levy of execution upon the appellant's house. His house was levied upon because he was the guarantor of a lease. The appellant alleged that the house is an exempt property and that Article 3.7 of Law 8.009/1990, which allows the levy upon the house of the guarantor of a lease, breaches the social right to housing established in the Article 6 of the Constitution.

II. The Supreme Court, by majority, denied the extraordinary appeal. The Court decided that the possibility to levy execution upon the guarantor's house serves as a collateral that boosts the lease market. Accordingly, collateral helps enforce the social right to housing, even for people who do not own real property and lease one. The collateral favours the offer of real property to lease because it hinders the expansion of this market from the lack or insufficient collaterals. Another reason is that it prevents possible fraud, such as an offer, as a collateral, of an asset that the tenant could not freely negotiate. Considering that social rights depend upon the implementation of state policies and that the landlord has no other means to guarantee the rent payment, the Court stated that the right to housing is protected by the Article 3.7 of Law 8.009/1990.

Furthermore, the Court stated that a balance between two fundamental rights (right to housing and right to freedom to contract) was not necessary in this case. When a citizen exercises his freedom to contract, he risks, by his free and spontaneous will, his fundamental right to housing.

III. In dissenting opinions, Justices argued that the exception to the rule that the house is an exempt property breaches the isonomy principle, because tenants and guarantors duties would have diverse consequences, despite having the same legal source: the lease contract. Such exception would permit the levy of execution upon the house of the guarantor. At the same time, however, it would forbid the levy of execution upon the tenant property, which was actually the main debtor.

#### *Supplementary information:*

- Article 6 of the Constitution;
- Article 3.7 of Law no. 8.009/1990.

#### *Languages:*

Portuguese.



#### *Identification:* BRA-2012-1-004

**a)** Brazil / **b)** Federal Supreme Court / **c)** Second Panel / **d)** 15.04.2008 / **e)** 495.740 / **f)** Extraordinary Appeal / **g)** *Diário da Justiça Eletrônico* (Justice Gazette), 152, 14.08.2009 / **h)**.

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

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

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

Liability, strict / Offence, public health / Health system, direct assistance / Health, protection / Health, risk / Employee, compensation for occupational disease.

#### *Headnotes:*

The theory of objective liability is applied to the State, which includes cases when civil servants suffer damage resulting from carrying out their regular work and in cases of omission in the provision of medical services at public hospitals.

#### *Summary:*

I. This case refers to an interlocutory appeal in extraordinary appeal filed by the Government of the Federal District against a decision that recognised the right to damages, for personal and property harm, to a child with cerebral palsy, blindness and brain malformation. The child contracted these pathologies because his mother was infected during gestation at the nursery of a public hospital of the Federal District where she was working. Besides the fact that she contaminated the diseases because of inappropriate working conditions, the mother did not receive adequate medical monitoring during pregnancy to prevent the transmission of the diseases to the foetus, especially during childbirth. The appellant alleged the lack of any causal relationship because no evidence exists that the diseases resulted from conduct made by its public agents.

II. The Second Panel of the Supreme Court unanimously denied the interlocutory appeal. Pursuant to Article 37.6 of the Constitution, the theory of objective liability is applied to the State, which includes the case when civil servants suffer damage in the course of carrying out their regular work activities. In accordance with this precept, governmental bodies are liable if the following requirements are showed:

1. damage;
2. causal relationship
3. conduct of a public agent (an act or an omission), and
4. lack of a justification.

Therefore, it is not required to provide actual evidence that the public agent had caused the damage. Furthermore, the unlawful conduct may be either an action or an omission, including the provision of medical services.

In this case, there was a causal relationship due to the omission of the Government of the Federal District. The mother of the appellee was not released from her activities in the nursery, being exposed to possible infection. She neither was subjected to an appropriate treatment after contamination, even at the moment of childbirth, which increased the physical limitations of the unborn.

*Supplementary information:*

- Article 37.6 of the Constitution.

*Languages:*

Portuguese.

*Identification:* BRA-2012-1-005

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 29.05.2008 / **e)** 3.510 / **f)** Direct Claim of Unconstitutionality / **g)** *Diário da Justiça Eletrônico* 96 (Justice Gazette), 28.05.2010 / **h)**.

*Keywords of the systematic thesaurus:*

5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability.**

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

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

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

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:*

*In vitro* fertilisation, consent, withdrawal / Embryo and foetus, human, donation and use / Embryo, frozen, legal status / Embryonal fresh cell therapy.

*Headnotes:*

Scientific research involving embryonic stem cells for therapeutic objectives violates neither the right to life nor the dignity of the human person.

*Summary:*

I. This case refers to a direct claim of unconstitutionality against Article 5 of Law no.11.105/2005 (Biosafety Law) that allows embryonic stem cells, obtained from human embryos produced through “in vitro” fertilisation and not used in the proceeding, to be used for research for therapeutic objectives. The claimant alleged that human life begins at fertilisation and the zygote (embryo in the beginning stage) is an embryonic human being. Hence, the use of stem cells breaches the inviolability of the right to life and the dignity of the human person. He argued, also, that research with adult stem cells is more promising than those with embryonic stem cells.

II. The Supreme Court, by majority, denied the direct claim of unconstitutionality on the ground that human life is only possible after the implantation of the embryo in the womb and the consequent live birth. The Court understood that the zygote is not the same as the foetus and the natural person. The ordinary law protects with diverse regimes each stage of gestational development but only as a good to be protected, not as a person. The Constitution, in the chapter that provides about individual rights and safeguards, refers to the individual, as a natural person. Hence, the inviolability of the right to life is an exclusive prerogative of a personalised being, born alive. Furthermore, the Court stated that the Law 9.434/1997 (Transplantation of Organs Law) establishes that there is no life after brain death. Thus, if brain activity is a pre-condition of life, the embryo, which does not have a complete brain, cannot be considered human life.

The Court explained that the couple’s decision to have children, as well as the option to do an “in vitro” fertilisation, is a constitutional right. Such option does not oblige the couple to use all embryos because, besides the lack of a legal norm setting this obligation, such obligation would violate the free will and the autonomy of family planning, which is a right that derives from the principle of the dignity of a human person and the principle of responsible paternity (Article 226.7 of the Constitution). The Court emphasised that the Biosafety Law sets norm about an artificial fertilisation, which was not the result of a sexual intercourse; thus, the use of embryonic stem cells is not an abortion.

The Court stated, further, that research made with embryonic stem cells – cells that are pluripotent or in other words, can generate any human tissue because they can differentiate into other cells – cannot be replaced by other research programs, like those made with adult stem cells, as they have low degree of differentiation. The Court explained, at last, that

research with stem cells is in accordance with the Constitution. The State must promote and encourage the scientific development, the technological research (Article 218 of the Constitution) and must ensure the right to health (Article 196 of the Constitution), and such research is an instrument to implement this right.

III. In separate opinions, partially granting the direct claim without a reduction of the text, dissenting Justices argued that embryos are human life. They also contended that research can be made if there is control over the activity of fertility clinics, mainly the “in vitro” fertilisation procedures and since they adopt methods that do not destroy or dispose human embryos. The dissenting Justices stated that the fertility clinic, in which the embryos were produced, must preserve the exceeding embryos until they are unviable to implantation. Besides, they stated that measures to limit the fertilisation and implantation of four embryos and to prohibit the artificial selection must be taken. They argued that, once the expression “unviable embryos”, written in the law, has an undetermined meaning, only the embryos that had their development stopped because of a spontaneous lack of cleavage after 24 hours since fertilisation could be considered unviable. Thus, if they had potential for life, even if they were frozen, they could not be destroyed. The dissenting Justices also argued that the use of embryos in researches could only be done under the permission of the parents.

In other partially dissenting opinions, Justices that denied the direct claim stated that there is no human life in the embryos before their implantation in the womb and that a central committee under the Health Ministry should be created to control researches. They stated, lastly, that members of committees and ethics commissions must be criminally liable, whenever they fail to act in accordance with their controlling duties, and that such conducts must be enacted as autonomous criminal offences.

#### *Supplementary information:*

- Articles 196, 218 and 226.7 of the Constitution;
- Law no. 9.434/1997;
- Law no. 11.105/2005.

#### *Languages:*

Portuguese, English (translation by the Court).



## Canada Supreme Court

### Important decisions

*Identification:* CAN-2012-1-001

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 17.02.2012 / **e)** 33678 / **f)** S.L. v. Commission scolaire des Chênes / **g)** *Canada Supreme Court Reports* (Official Digest), [2012] 1 S.C.R. 235 / **h)** <http://scc.lexum.org/en/index.html>; (2012) 341 *Dominion Law Reports* (4th) 577; 426 *National Reporter* 352; [2012] S.C.J. no. 7 (*Quicklaw*); CODICES (English, French).

*Keywords of the systematic thesaurus:*

3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**  
5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

*Keywords of the alphabetical index:*

Religion, school, ethics and religious culture course, exemption, request / Freedom of religion, infringement, proof / Religion, education, neutrality of the State / Religion, secularism, principle.

*Headnotes:*

Although the sincerity of a person’s belief that a religious practice must be observed is relevant to whether the person’s right to freedom of religion protected by Section 2.a of the Charter of Rights and Freedoms is at issue, an infringement of this right cannot be established without objective proof of an interference with the observance of that practice. It is not enough for a person to say that his or her rights have been infringed. The person must prove the infringement on a balance of probabilities. The appellants have not proven that the Ethics and Religious Culture (hereinafter, “ERC”) Program, now mandatory in Quebec schools, infringed their freedom of religion, or consequently, that the school board’s refusal to exempt their children from the ERC course violated their constitutional right.

### Summary:

I. In 2008, the ERC Program replaced Catholic and Protestant programs of religious and moral instruction. The appellants requested that the school board exempt their children from the ERC course putting forward the existence of serious harm to the children within the meaning of Section 222 of the Education Act. The school board denied the exemptions. The appellants then turned to the Superior Court seeking a declaration that the ERC Program infringed their and their children's right to freedom of conscience and religion. The Superior Court dismissed the motion for declaratory judgment. Upon motions being brought by the school board and the Attorney General of Quebec to dismiss the appeal, the Court of Appeal refused to hear the appellants' appeal as of right and also dismissed their motion for leave to appeal. The Supreme Court dismissed the appellants' appeal.

II. Seven judges held that the sincerity of the appellants' belief that they have an obligation to pass on the precepts of the Catholic religion to their children is not challenged. However, to discharge their burden at the stage of proving an infringement of their freedom of religion, the appellants had to show that, from an objective standpoint, the ERC Program interfered with their ability to pass their faith on to their children. In this regard, they claim that the ERC Program is not in fact neutral and that students following the ERC course would be exposed to a form of relativism which would interfere with their ability to pass their faith on to their children. They also maintain that exposing children to various religious facts is confusing for them. The evidence demonstrates, firstly, that the *ministère de l'Éducation's* formal purpose does not appear to have been to transmit a philosophy based on relativism or to influence young people's specific beliefs. Exposing children to a comprehensive presentation of various religions without forcing the children to join them does not constitute an indoctrination of students that would infringe the freedom of religion of the appellants. Furthermore, the early exposure of children to realities that differ from those in their immediate family environment is a fact of life in society. The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores the Quebec government's obligations with regard to public education.

In a concurring opinion, two judges held that the appellants' evidence concerning the violation of their freedom of religion consisted of a statement of their faith and of their conviction that the ERC Program interfered with their obligation to teach and pass on

that faith to their children. In addition, they filed the ERC Program as well as a textbook used to teach the program. In its current form, the program says little about the actual content of the teaching and the approach that teachers will actually take in dealing with their students. It determines neither the content of the textbooks or educational materials to be used, nor their approach to religious facts or to the relationship between religious values and the ethical choices open to students. The program is made up of general statements, diagrams, descriptions of objectives and competencies to be developed as well as various recommendations for the program's implementation. It is not really possible to assess what the program's implementation will actually mean. Despite the filing of a textbook, the evidence concerning the teaching methods and content and the spirit in which the program is taught has remained sketchy. Based on the rules of civil evidence, therefore, the documentary evidence does not make it possible to find a violation of the Charter. The judges emphasised, however, that the state of the record does not make it possible to conclude that the ERC Program and its implementation could not, in the future, possibly infringe the rights granted to the appellants and persons in the same situation.

### Languages:

English, French (translation by the Court).



### Identification: CAN-2012-1-002

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 13.04.2012 / **e)** 33751 / **f)** R. v. Tse / **g)** *Canada Supreme Court Reports* (Official Digest), 2012 SCC 16, [2012] x S.C.R. xxx / **h)** <http://scc.lexum.org/en/index.html>; [2012] S.C.J. no. 16 (*Quicklaw*); CODICES (English, French).

### Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.  
 3.17 General Principles – **Weighing of interests**.  
 4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces**.  
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

5.3.36.2 Fundamental Rights – Civil and political rights – Inviolability of communications – **Telephonic communications.**

*Keywords of the alphabetical index:*

Search and seizure / Communication, eavesdropping, electronic.

*Headnotes:*

Section 8 of the Charter of Rights and Freedoms provides that everyone has the right to be secure against unreasonable search or seizure. Section 184.4 of the Criminal Code (hereinafter, the “Code”) that is the emergency wiretap provision fails to meet the minimum constitutional standards of Section 8 of the Charter. Section 184.4 permits a peace officer to intercept certain private communications, without prior judicial authorisation, if the officer believes on reasonable grounds that the interception is immediately necessary to prevent an unlawful act that would cause serious harm, provided judicial authorisation could not be obtained with reasonable diligence. However, Section 184.4 of the Code does not provide a mechanism for oversight, and more particularly, notice to persons whose private communications have been intercepted.

*Summary:*

I. The police used Section 184.4 of the Code to carry out unauthorised warrantless interceptions of private communications when the daughter of an alleged kidnapping victim began receiving calls from her father stating that he was being held for ransom. Approximately 24 hours later, the police obtained a judicial authorisation for continued interceptions. The trial judge found that Section 184.4 contravened the right to be free from unreasonable search or seizure under Section 8 of the Charter and that it was not a reasonable limit under Section 1. The Crown has appealed the declaration of unconstitutionality directly to this Court.

II. In a unanimous decision, the Supreme Court dismissed the appeal. The Court noted that the stringent conditions Parliament has imposed to ensure that Section 184.4 of the Code is only used in exigent circumstances, effect an appropriate balance between an individual’s reasonable expectation of privacy and society’s interest in preventing serious harm. To that extent, the Court determined that Section 184.4 passes constitutional muster.

In its present form however, Section 184.4 contains no accountability measures to permit oversight of the police use of the power. It does not require that “after the fact” notice be given to persons whose private communications have been intercepted. Unless a criminal prosecution results, the targets of the wiretapping may never learn of the interceptions and will be unable to challenge police use of this power. There is no other measure in the Code to ensure specific oversight of the use of Section 184.4. The Court therefore held that in its present form, the provision fails to meet the minimum constitutional standards of Section 8 of the Charter. The Court found that an accountability mechanism is necessary to protect the important privacy interests at stake and that a notice provision would adequately meet that need, although the Court left it to Parliament to choose an alternative measure for providing accountability. The lack of notice requirement or some other satisfactory substitute renders Section 184.4 of the Code constitutionally infirm.

The objective of preventing serious harm to persons or property in exigent circumstances is pressing and substantial and rationally connected to the power provided under Section 184.4. It is at the proportionality analysis of *R. v. Oakes*, [1986] 1 S.C.R. 103, that the provision fails. The obligation to give notice to intercepted parties would not impact in any way the ability of the police to act in emergencies. It would, however, enhance the ability of targeted individuals to identify and challenge invasions to their privacy and seek meaningful remedies. Section 184.4 of the Code is constitutionally invalid legislation. This declaration of invalidity is suspended for 12 months to allow Parliament to redraft a constitutionally compliant provision.

*Languages:*

English, French (translation by the Court).



# Chile

## Constitutional Court

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### Important decisions

*Identification:* CHI-2012-1-001

**a)** Chile / **b)** Constitutional Court / **c)** / **d)** 02.05.2012 / **e)** 1856-2010 / **f)** / **g)** / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

3.5 General Principles – **Social State**.  
 3.16 General Principles – **Proportionality**.  
 3.20 General Principles – **Reasonableness**.  
 5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.  
 5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

*Keywords of the alphabetical index:*

Health care, right / Contract, public law.

*Headnotes:*

The rules establishing the mechanism for adjustments to premiums in healthcare contracts could be considered as reasonable restrictions on the powers of the healthcare institutions, with adequate safeguards. However, they could also be perceived them as allowing for one-sided modification and a permanent imbalance of power, information and proof, and an absence of rationality and proportionality in the determination of premiums.

*Summary:*

The case concerned rules which established the mechanism for adjustments to premiums in health care contracts and their constitutional compliance. There was a tied vote and therefore the Constitutional Tribunal did not have the requisite quorum. The petition was, however, rejected.

According to the judges who voted to reject the petition, the rules under challenge should be understood as meaning that revision of the health care contract must be based on real and verifiable changes to the prices of the services it covers. The

legislator has placed reasonable restrictions on the powers of the healthcare institutions to adjust the contract premium. There are prohibitions on discrimination, and on increases to the premium based on the personal health condition of the affiliate. Moreover, the enforcement of these rules is supervised by the Health Care Agency. They are subject to judicial review. In this particular case, if the rules were found inapplicable, the pre-2005 legislation would become applicable, leaving the subject to the free determination of the parties. This would make the affiliate's situation even worse and would be in breach of the Constitution.

Those judges in favour of declaring the rules inapplicable, however, noted the specific features of the health care contract; namely, that it is one of continuous fulfilment, it differs from an ordinary private law insurance contract and must not contravene public policy. In their view, the legislator should have established a regulation that would not only prevent a confiscatory effect but which would also exert control over the premium, allowing the right to healthcare to be realised. The rules gave healthcare institutions the discretionary power to make annual adjustments to their premiums, violating the general principles of contracts. They allow for one-sided modification and a permanent imbalance of power, information and proof, which strikes at the heart of the equality principle, as well as an absence of rationality and proportionality in the determination of premiums. Finally, the judges noted that the Health Care Agency simply confirms the delivery of information to the affiliate; it can only stop increases in premiums if they are unlawful.

*Languages:*

Spanish.



*Identification:* CHI-2012-1-002

**a)** Chile / **b)** Constitutional Court / **c)** / **d)** 17.05.2012 / **e)** 2180-2012 / **f)** / **g)** / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

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

4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment.**

4.7.12 Institutions – Judicial bodies – **Special courts.**

5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law.**

*Keywords of the alphabetical index:*

Court, independence / Judge, impartiality / Judge, aptitude, requirement.

*Headnotes:*

The Supreme Court plays an important role in the process of recruiting judges of the Environmental Courts in terms of equality before the law and the safeguarding of judicial independence. Norms encroaching on that role are unconstitutional.

*Summary:*

Prior to its promulgation and publication, the legislation creating the Environmental Courts was submitted to preventive and obligatory constitutional review by the Constitutional Tribunal. The rules examined included those related to the profile of the judges of the Environmental Courts and the system for selecting them.

The norm that defines the profile of the judges of the Environmental Courts was declared constitutional, provided it was understood to mean that the Supreme Court, when initiating the selection process, may inform the Commission about the specific skills required for proper execution of the work of an environmental judge, despite the powers of role definition held by the High Public Management Council.

However, the Constitutional Tribunal held that the rule preventing those who currently work or who have previously worked as attorney members of the Appeal Court or the Supreme Court from taking part in the process of selecting Environmental Court judges was unconstitutional. Such prohibition established a lasting and total inability to apply for a public function without reasonable motivation, which infringed the constitutional right to equality under the law in relation to admission to all public functions and job and ran counter to the requirements established by the Constitution and laws.

The Tribunal also pronounced unconstitutional the norm that provided that a motivated resolution by the Supreme Court was needed to reject applicants proposed by the High Public Management Council. This rule, in the Tribunal's opinion, constituted a

major limitation on the Supreme Court's role in the selection process. Leaving this type of power with this type of administrative organ would not ensure the independence and impartiality. Environmental judges need to enforce the due process of law provisions; power to propose should lie with the Supreme Court.

*Languages:*

Spanish.



*Identification:* CHI-2012-1-003

a) Chile / b) Constitutional Court / c) / d) 05.06.2012 / e) 1990-2011 / f) / g) / h) CODICES (Spanish).

*Keywords of the systematic thesaurus:*

4.6.9 Institutions – Executive bodies – **The civil service.**

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.**

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

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

*Keywords of the alphabetical index:*

Data, personal, treatment / Informational self-determination, right.

*Headnotes:*

The psychological evaluation of candidates applying for public office cannot be made public. It falls within the category of exceptions under the Constitution to the rules on transparency of public information; its disclosure would encroach on the individual's right to private life, personal dignity and psychological integrity.

*Summary:*

I. Questions had arisen over the rules that establish transparency in public information and their exceptions and notably whether information gathered in the process of selection of candidates for the position of National Director of the Foundation of Solidarity and Social Investment could be published; this would include psychological evaluations which could have the potential to affect the candidate's right to private life.

II. It was found that the Constitution determines the publicity of acts and resolutions of state bodies. Exceptions are permitted, for example where there is potential for the infraction of individual rights.

The Constitution guarantees respect and protection of private life, which is at the core of the free development of the individual's personality. It guarantees a minimum quality of life and personal honour and dignity.

Restrictions on the right to private life are acceptable only if this encroachment is precise and determined way, without excessive burdens on the victim, and if it fulfils the legislature's agenda.

Personal evaluations and medical history are part of an individual's private life. A psychological report compiled in the process of recruitment for a public position is sensitive data that cannot be disclosed. It refers to an individual's physical and moral features and to facts and circumstances of his or her private life. The evaluation forms part of the individual's psychological health and cannot be manipulated, unless this is authorised by the law or by the individual him or herself.

*Languages:*

Spanish.



*Identification:* CHI-2012-1-004

**a)** Chile / **b)** Constitutional Court / **c)** / **d)** 05.06.2012 / **e)** 2067-2011 / **f)** / **g)** / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

2.2.2.2 Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law.**

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

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

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

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

*Keywords of the alphabetical index:*

Parliament, member, immunity.

*Headnotes:*

Where a constitutional norm specifically regulates the lifting of parliamentary immunity, an ordinary law cannot be interpreted in a manner that is inconsistent with it.

*Summary:*

I. The Public Criminal Prosecution Office asked the Court of Appeal to lift the parliamentary immunity of a National Congress member, in order to commence criminal proceedings against him.

Under Article 61 of the Constitution, an Appeal Court judgment that concedes the lifting of immunity is subject to appeal to the Supreme Court. The Appeal Court had determined that the immunity of the member of Congress concerned would not be lifted. The Public Prosecutor appealed to the Supreme Court, arguing that Article 418 of Penal Procedure Code establishes that the Appeal Court's judgment could be appealed to the Supreme Court.

The member of Congress filed an action of inapplicability, arguing that Article 418 of the Penal Procedure Code was unconstitutional. He suggested there was a conflict with Article 61 of the Constitution, as the fundamental rule would only allow the possibility of appealing against judgments that lift parliamentary immunity, but not in cases where the Appeal Court has declared that there is insufficient merit to declare the immunity lifted.

II. The Constitutional Tribunal declared Article 418 of Penal Procedure Code to be inapplicable. When the new Criminal Procedure rules were introduced,

several constitutional amendments were made, to bring it into line with the Constitution. This was not the case with Article 61 of the Constitution.

Article 61 is a specific regulation on parliamentary immunity, and must be interpreted restrictively. It gives a particular competence to the Supreme Court to deal with appeals against resolutions by the Appeal Court and cannot, therefore, be extended to other resolutions that are not expressed in the constitutional text.

*Languages:*

Spanish.



*Identification:* CHI-2012-1-005

**a)** Chile / **b)** Constitutional Court / **c)** / **d)** 10.07.2012 / **e)** 2042-2011 / **f)** / **g)** / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

3.21 General Principles – **Equality**.

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:*

Mediation, mandatory.

*Headnotes:*

Provisions requiring mandatory mediation prior to the commencement of a lawsuit for medical negligence do not encroach on the right to equality or the right to equal access to judicial protection; the restrictions they place on access to tribunals are reasonable. They do not violate the right to property either, as the applicant can still commence proceedings, even if mediation is unsuccessful.

*Summary:*

I. The applicant asked the Constitutional Tribunal to declare unconstitutional a norm establishing a requirement for mandatory mediation prior to

commencing proceedings for medical negligence, arguing that it encroached on her rights to equality, effective judicial protection and property. The central tenet of the applicant's argument was that the requirement for mandatory mediation was discriminatory since most of the lawsuits, which seek reparation for damages, were not conditioned to it. This represented an unreasonable restriction on the right to equal access to judicial protection. She also contended that the right to exercise a judicial claim formed part of her property rights.

II. The Constitutional Tribunal found that the requirement of mandatory mediation before the launching of proceedings did not encroach on the right to equality; many procedures established under the Chilean legal system also require prior mediation. The establishment of mandatory mediation was reasonable in this case, as, from the perspective of the proportionality principle, there is a need to curb the increase in lawsuits as this may affect the judicial system. It could also be described as adequate, as it promotes extra judicial solutions. The Tribunal was also of the opinion that prior mandatory mediation is proportional; the right to access judicial protection was not affected as that right was not denied. If mediation is unsuccessful, the lawsuit can still be issued and therefore the right to property is not jeopardised. Moreover, the goal of mediation is the resolution of judicial conflict; a victim may find a resolution to their claim in tort at this stage.

*Languages:*

Spanish.



# Croatia

## Constitutional Court

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### Important decisions

*Identification:* CRO-2012-1-001

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 30.01.2012 / **e)** U-VIIR-474/2012 / **f)** / **g)** *Narodne novine* (Official Gazette), 15/12 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

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

4.9.2.1 Institutions – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – **Admissibility.**

*Keywords of the alphabetical index:*

European Union, accession, referendum / Legislature, amendment, failure.

*Headnotes:*

The fact that the Parliament has omitted to bring the Referendum Act into line with the 2010 amendments to the Constitution does not mean that the national referendum which recently took place was in breach of the Constitution. Moreover, the fact that certain rules in the Referendum Act differ from those provided for in the Constitution is not relevant in constitutional law, as the Constitution was directly applied to the specific case.

*Summary:*

I. The applicant, the Croatian Pure Party of Rights from Zagreb, asked the Constitutional Court to review the constitutional compliance and lawfulness of the national referendum, through a request entitled “Request for Withdrawing the Decision on the Validity of the Referendum”.

The applicant contended that the referendum was unlawful as under the current Act on the Referendum and other Forms of Individual Participation in the Functioning of State Authority and Local and

Regional Self-Government (*Narodne novine*, nos. 33/96, 92/01, 44/06, 58/06, 69/07 and 38/09, hereinafter, “Referendum Act”), in order for the referendum to be legal more than 50% of the registered voters must vote for the referendum. The applicant pointed out that Croatia passed an unlawful decision on accessing the European Union, as only 43% of voters voted, and argued that the Referendum Act was out of line with the Constitution.

II. The Constitutional Court found the following provisions of relevance: Article 141.4 of the Constitution (*Narodne novine*, nos. 56/90, 135/97, 113/00, 28/01 and 76/10); Articles 28, 30 and 31 of the Amendment to the Constitution of the Republic of Croatia, which in accordance with Article 31 entered into force on 16 June 2010 (*Narodne novine*, no. 76/10, hereinafter, “Amendment to the Constitution 2010”); Article 7 of the Constitutional Act for the Implementation of the Constitution of the Republic of Croatia, which in accordance with Article 9 entered into force on 22 October 2010 (*Narodne novine*, no. 151/11); and Article 6.2 of the Referendum Act.

Under Article 141.4 of the Constitution, any decision on the accession of the Republic of Croatia is to be made by referendum by a majority vote of the total number of voters in the state.

Under Article 6.2 of the Referendum Act, at the national referendum the decision is to be made by majority vote, provided that a majority of the total number of voters registered on the national electoral register vote at the referendum, unless the Constitution contains different regulation for specific issues.

Having considered the content of and the reasons put forward in the applicant’s request with respect to the relevant constitutional and legislative provisions, and bearing in mind the preliminary results of the national referendum on the accession of the Republic of Croatia to the European Union, held on 22 January 2012, the Constitutional Court noted firstly that, under the results which the National Electoral Commission published on 27 January 2012, 1,960,231 voters voted at the referendum, (43.51% of the total number of registered voters), and 1,299,008 voters voted for the accession of the Republic of Croatia to the European Union (66.27% of voters).

Under Article 28 of the Amendments to the Constitution/2010, for decisions in national referenda to be valid, they must be taken by a majority vote.

It follows from the above that the relevant provision of the Amendments to the Constitution/2010 was directly applied at the national referendum on the Republic of Croatia’s accession to the European Union.

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Under the Constitutional Act for the Implementation of the Constitution, the Referendum Act should have been brought into line with the Amendments to the Constitution/2010 within a certain deadline. Parliament clearly omitted to do so, but this does not mean that the national referendum was in breach of the Constitution from any relevant aspect of constitutional law. The fact that some rules in the Referendum Act differ from those provided for in the Constitution is not relevant in constitutional law; the Constitution was directly applied to the specific case.

The Constitutional Court found that the applicant's request was not well founded.

#### *Languages:*

Croatian, English.



#### *Identification:* CRO-2012-1-002

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 15.02.2012 / **e)** U-X-838/2012 / **f)** / **g)** *Narodne novine* (Official Gazette), 20/11 / **h)** CODICES (Croatian, English).

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

3.9 General Principles – **Rule of law**.  
3.10 General Principles – **Certainty of the law**.  
4.5.2 Institutions – Legislative bodies – **Powers**.

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

Constitutional law, for implementation of the Constitution, legal force / Legislative act, nature.

#### *Headnotes:*

The Constitutional Court was competent to review the constitutionality of all the former constitutional acts for the implementation of the Constitution because, despite being called “constitutional”, none of them possessed constitutional force; Parliament had not enacted any of them in accordance with the procedure for amending the Constitution.

#### *Summary:*

Under its authority to monitor the execution of constitutionality and legality, set out in Article 128.5 of the Constitution and Article 104 of the Constitutional Act on the Constitutional Court, the Constitutional Court notified Parliament of the legal force, nature and effects of the constitutional acts for the implementation of the Constitution.

At its session of 15 February 2012 the Constitutional Court decided on the request of the PROJEKT Association (Association for the Promotion and Development of Education, Equality, Ecology, Culture and Technology from Zagreb), to review the constitutionality and legality of the national referendum on the Republic of Croatia's accession to the European Union, which was called by decision of the Croatian Parliament of 23 December 2011 and held on 22 January 2012. The case before the Constitutional Court was conducted as no. U-VIIR-601/2012.

In terms of the provisions of Articles 2, 4 and 7 of the Constitutional Act for the Implementation of the Constitution of the Republic of Croatia (hereinafter, “Constitution Implementation Act/2010”), the applicant was of the view that holding the national referendum on the accession of the Republic of Croatia to the European Union was not constitutional as compliance had not first been ensured with the provisions of the Constitution Implementation Act/2010, the legal force of which was of the same rank as that of the Constitution.

In decision no. U-VIIR-601/2012 the Constitutional Court rejected the applicant's complaint, explaining that the Constitution Implementation Act/2010 does not have the same legal force as the Constitution because it was not enacted under the procedure for amending the Constitution. It did, however, find that the allegations the applicant had made as to the legal force of the Constitution Implementation Act/2010 indicated a serious legal problem in the constitutional and legal order; that of the legal force, nature and effects of constitutional acts for the implementation of the Constitution.

The Constitutional Court found it necessary to notify Parliament of issues surrounding the enactment of constitutional acts for the implementation of the Constitution in parliamentary practice.

The Constitutional Court examined the development of the institute of the constitutional act for the implementation of the Constitution between 1990 and 2010. It noted that those charged with framing the Constitution have tended not to regard constitutional acts for the implementation of the Constitution as a

permanent constitutional institution; instead, they decide on their legal status within the legal order on a case by case basis (i.e. from one amendment of the Constitution to the other). The drafters of the Constitution have always and exclusively linked these acts to specific amendments to the Constitution; they consequently lose their force as soon as all the obligations they deal with are implemented in practice or upon the enactment of fresh amendments to the Constitution.

So far, no constitutional act for the implementation of the Constitution has had constitutional force, as Parliament did not enact any of them under the procedure for amending the Constitution. However, Parliament has promulgated all the constitutional acts for the implementation of the Constitution and enacted them with a majority vote of all the representatives (sometimes even with a 2/3 majority of all the representatives, as was the case with the Constitution Implementation Act/2001 and the Constitution Implementation Act/2010), and linked their entry into force with the date of their promulgation, as opposed to that of their publication in the Official Gazette, with the exception of the Constitutional Act on the Amendments to the 1997 Constitution). These elements (promulgation and coming into force on the date of promulgation), which are inherent exclusively to the procedure of adopting the Constitution and constitutional acts with the force of the Constitution, point to an unacceptable departure from application of Article 90.1 of the Constitution, which provides that before they enter into force acts must be published in the Official Gazette. Although the framers of the Constitution introduced the special category of the “constitutional act enacted under the procedure for enacting organic laws” in the 2000 Amendments to the Constitution, in relation to national minorities, they did not include acts for the implementation of the Constitution within that category of laws.

The Constitutional Court found it necessary to notify Parliament that the principle of the rule of law generates clear requirements over future practice in terms of the enactment of constitutional acts for the implementation of the Constitution. Because of the principle of the legal certainty and its importance to the national legal order, when future amendments are made to the Constitution, clear and precise regulation of the legal force, nature and effects of such acts will be needed.

The Constitutional Court noted the options open to those framing the Constitution. If they decide to accord acts for the implementation of the Constitution the force of the Constitution, then they must be passed under the procedure for amending the

Constitution, inherent to which is promulgation in Parliament and entry into force on the date of promulgation. If they decide to give such acts the force of any type of organic act in Article 83 of the Constitution, this must be noted in the text of the Constitution and the act must be passed under the procedure for enacting organic acts with clear designation of the majority necessary for its adoption. However, should they resolve to give the acts the force of an “ordinary” act, the text of the Constitution need not include special provision to this effect. The promulgation of such an act would be within the exclusive competence of the President of the Republic. It could not enter into force before its publication in the Official Gazette and could not be termed as a “constitutional act”. The Constitutional Court would have the competence to review its conformity with the Constitution. Its effects could not prevent the direct application of the relevant provisions of the Constitution, even if it explicitly so provided.

In conclusion, the Constitutional Court found that only one constitutional act presently in force in the national constitutional order has the force of the Constitution, namely the Constitutional Act on the Constitutional Court.

The Constitution Implementation 2010 Act does not have the force of the Constitution. As it has legislative, not constitutional force, it can be perceived as *falsa nominatio*.

The Constitutional Court noted that it would be necessary to bring the existing legislative practice regarding constitutional acts for the implementation of the Constitution into line with the principles of legal consistency, the rule of law and the stability of the objective legal order. In all future cases this practice should be standardised in a manner acceptable in constitutional law.

#### *Cross-references:*

- Decision no. U-VIIR-474/2012 of 30.01.2012, *Bulletin* 2012/1 [CRO-2012-1-001];
- Decision no. U-VIIR-601/2012 of 15.01.2012;
- Ruling no. U-I-3760/2007 *et al* of 08.12.2010;
- Decision no. U-I-774/2000 of 20.12.2000.

#### *Languages:*

Croatian, English.



*Identification:* CRO-2012-1-003

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 15.02.2012 / **e)** U-I-5654/2011 / **f)** / **g)** *Narodne novine* (Official Gazette), 20/12 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Law, not yet entered into force, review / Organic law, adoption, vote / Organic law, definition.

*Headnotes:*

Under the Constitution, the Constitutional Court is competent to decide on the constitutionality of a law passed by Parliament which has been published in the Official Gazette but which has yet to enter into force.

*Summary:*

I. The Constitutional Court was asked by a natural person to review the constitutionality of the Ombudsman Act. The applicant contended that as this Act is an organic law, it was not passed in accordance with the procedure laid down in Article 83.2 of the Constitution, and could only enter into force if it was passed by a majority vote of all the representatives in accordance with the above provision.

II. At the time when the proposal was filed and decided on, the Ombudsman Act had been published in the Official Gazette but had yet to enter into force. The Constitutional Court had to decide whether it was competent to review the constitutionality of acts and other regulations which had been published but had yet to enter into force.

Article 125.1 of the Constitution stipulates that the Constitutional Court decides on the conformity of “laws” with the Constitution, while Article 90.1 of the

Constitution stipulates the obligation for “laws” to be published before they enter into force. The same applies to other regulations.

The Constitutional Court found that, for purpose of the proceedings of reviewing the constitutionality of laws, and reviewing the constitutionality and legality of other regulations, the notions “laws” and “other regulations” in Article 125.1 and 125.2 of the Constitution are identical to the notions “laws” and “other regulations” in Article 90.1 of the Constitution.

In Article 90.1 the framers of the Constitution refer to “laws” and “other regulations” before their entry into force. In Article 125.1 and 125.2 the framers of the Constitution do not make the review of the constitutionality of laws and the constitutionality and legality of other regulations contingent on their entry into force. The Constitutional Court found that there were no constitutional obstacles preventing it from deciding in accordance with Article 125.1 and 125.2 even before the laws and other regulations have entered into force within the meaning of Article 90.1 of the Constitution.

The above conclusion is also confirmed in the explicit authority of the Constitutional Court to review “the constitutionality of laws and constitutionality and legality of other regulations even though they are no longer in legal force” (Article 125.3 of the Constitution, and Article 56.1 and 56.2 of the Constitutional Act on the Constitutional Court of the Republic of Croatia; hereinafter, the “Constitutional Act”). If the Constitutional Court is vested with explicit constitutional authority to review the constitutionality of “laws” and “other regulations” which are no longer in legal force, then it is by *argumentum a contrario* to be interpreted that, within the meaning of Article 125.1 and 125.2 in connection with Article 90.1 of the Constitution, it is also vested with the constitutional authority to review “laws” and “other regulations” which are not yet in legal force. In both cases the framers of the Constitution refer to them as “laws” and “other regulations”. This interpretation is in accordance with the case law of the Constitutional Court. It has so far conducted the abstract control of published laws and other regulations which were not “applied” during the constitutional court proceedings, i.e. they did not have legal effect.

The Constitutional Court therefore concluded that it was competent to review the constitutionality of the Ombudsman Act.

It then noted that the Ombudsman is a state body established by the Constitution, and that the Ombudsman Act was passed after the 2010 Amendments to the Constitution which essentially

changed the constitutional competences of the Ombudsman and explicitly provided him or her with autonomy and independence. It also found that the above Act elaborates the organisation, jurisdiction and operation of this governmental body in a manner that essentially changes the present position of the institution of the Ombudsman.

The Constitutional Court accordingly found that the Ombudsman Act should be perceived as an “organic” law; one that elaborates the organisation, jurisdiction and operation of a state body within the meaning of Article 83.2 of the Constitution. A “majority vote of all the representatives” was needed for the Ombudsman Act to be passed in a valid procedure within the meaning of Article 83.2. Seventy-six representatives voted to pass the Ombudsman Act. The majority vote of all the representatives in Parliament was 77 representatives. The Act was not, therefore, passed with the requisite majority vote within the meaning of Article 83.2.

#### *Cross-references:*

- Report of the Constitutional Court no. U-X-80/2005 of 01.06.2006;
- Decision of the Constitutional Court nos. U-I-2566/2003, U-I-2892/2003 of 27.11.2003.

#### *Languages:*

Croatian, English.



#### *Identification: CRO-2012-1-004*

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 05.03.2012 / **e)** U-II-5157/2005 *et al* / **f)** / **g)** *Narodne novine* (Official Gazette), 41/12 / **h)** CODICES (Croatian, English).

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

4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**  
 4.7.9 Institutions – Judicial bodies – **Administrative courts.**  
 4.8.8.3 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Supervision.**

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

Administrative Court, attribution of jurisdiction / Constitutional Court, Constitution, interpretation, competence, exclusive / Local self government, act, legality, review / Act, public authority, legality, review.

#### *Headnotes:*

The term “other regulation” within the meaning of Article 125.2 of the Constitution shall not be deemed to include external and internal acts passed by units of local and regional government, other legal persons vested with public powers and legal persons carrying out public service within the meaning of Article 3.2 of the Administrative Disputes Act. The High Administrative Court is competent to review the legality of such acts, whilst the Constitutional Court safeguards their constitutionality.

#### *Summary:*

Under Article 125.2 of the Constitution, the Constitutional Court is competent to review the conformity of “other regulations” with the Constitution.

Until the Administrative Disputes Act (hereinafter, the “ADA”) came into force on 1 January 2012, there was no judicial authority in the Republic of Croatia competent to review the legality of general acts passed by units of local and regional self-government and other legal persons vested with public powers. Such acts were perceived as “other regulations” within the meaning of Article 125.2.

Articles 3.2 and 12.3 of the ADA gave the High Administrative Court the power to review this category of general act.

The Constitutional Court had to bring the present definition of “another regulation” within the meaning of Article 125.2 of the Constitution into line with the circumstances that occurred in the legal system after the ADA’s entry into force. The ADA defines a general act pursuant to its enactor (hereinafter, the “competence norm”).

The Constitutional Court took into consideration the legal definition of general acts in Article 3.2 of the ADA and resolved that “another regulation” within the meaning of Article 125.2 should be viewed as an external, general-normative and legally binding act passed by a government body aimed at the regulation of separate issues, the execution and/or implementation of laws, or the implementation of another regulation of higher legal force, regulating relations in a general manner and of relevance to all persons to

whom the above act applies. Accordingly, the fundamental substantive characteristic of “another regulation” within the meaning of Article 125.2 of the Constitution is its abstract and general nature.

It is also open to the Constitutional Court, under Article 125.2, to review the constitutionality and legality of a general act of a government authority which has only one substantive characteristic of “another regulation” (abstract or general nature), where this is necessary for the protection of the human rights and fundamental freedoms guaranteed in the Constitution and other highest values of the national constitutional order enshrined in Article 3 of the Constitution.

The term “other regulation” within the meaning of Article 125.2 does not cover external and internal general acts passed by units of local and regional government, other legal persons vested with public powers and legal persons carrying out public service within the meaning of Article 3.2 of the ADA. The High Administrative Court is competent to review their legality.

The constitutionality of these acts is guaranteed before the Constitutional Court by the corresponding application of Article 37 of the Constitutional Act on the Constitutional Court. Thus, the High Administrative Court would be competent to stay the proceedings for the review of the legality of a general act if it were to find that a law or its relevant provision, on which the general act in Article 3.2 of the ADA is grounded, is not in conformity with the Constitution. It would then have to ask the Constitutional Court to review the constitutionality of that law, or some of its provisions. The same applies to other regulations; the High Administrative Court would be competent to stay the proceedings for the review of the legality of a general act if it finds that another regulation on which the general act in Article 3.2 of the ADA, or its relevant provision, is grounded, contravenes the Constitution and law. It would need to ask the Constitutional Court to review the constitutionality and legality of this other regulation, or its relevant provision.

Statutes of local and regional government units are exceptions to the rule that external and internal general acts passed by such bodies are not considered “other regulations” within the meaning of Article 125.2. Their importance in terms of the constitutionally guaranteed right of citizens to local and regional self-government (Article 4.1 and Chapter VI of the Constitution) means that the review of their lawfulness must be exempted from the jurisdiction of the High Administrative Court within the meaning of Article 3.2 of the ADA and carried out directly within the review of constitutionality and legality in Article 125.2.

As of 1 January 2012, the High Administrative Court is competent to review the legality of general acts of units of local and regional government, legal persons vested with public powers and legal persons carrying out public service. As a result, the Constitutional Court has relinquished all filed but undecided cases, as well as all proposals for the review of the constitutionality and legality of general acts (which are in force) of units of local and regional government, legal persons vested with public power and legal persons carrying out public service, to the competent High Administrative Court.

#### *Cross-references:*

- Ruling no. U-II-3224/2006 of 19.06.2009.

#### *Languages:*

Croatian, English.



#### *Identification: CRO-2012-1-005*

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 06.03.2012 / **e)** U-I-4633/2010 / **f)** / **g)** *Narodne novine* (Official Gazette), 35/12 / **h)** CODICES (Croatian, English).

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

2.1.1.4.14 Sources – Categories – Written rules – International instruments – **European Charter of Local Self-Government of 1985**.  
 3.10 General Principles – **Certainty of the law**.  
 4.8.7.1 Institutions – Federalism, regionalism and local self-government – Budgetary and financial aspects – **Finance**.  
 4.8.8.2 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Implementation**.  
 4.10.8 Institutions – Public finances – **Public assets**.  
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

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

Health system / Health, institution / Law, health / Local self-government, property.

### Headnotes:

Despite the higher margin of appreciation in terms of the regulation of the state healthcare system, units of local and regional government must be allowed to play an active role in the passing and revising of the public healthcare service network, otherwise they cannot properly perform their constitutional obligations regarding affairs of regional significance in the field of healthcare, which they have a duty to partially or fully fund. If they cannot take part, units of local and regional government will remain as mere executors of the public healthcare network, and the Minister for Health, together with competent chambers and bureaus, will enjoy *carte blanche* to determine which healthcare institutions will be founded, closed down or merged, leaving the citizens in those areas with no influence over the healthcare network through their local government representatives.

### Summary:

I. The City of Zagreb City Council, the applicant in this matter, asked the Constitutional Court to review the constitutionality of Article 37.2 of the Health Protection Act.

The applicant contended that Article 37.2 of the Health Protection Act has placed an unconstitutional fetter on the right to perform activities at a local level and, as a consequence of this provision, it had been prevented from conducting its constitutional competencies. It also pointed out that the competent minister, under Article 37.2, adopted the Public Healthcare Network and the Amendments to the Public Healthcare Network, "...which excluded hospitals founded by the City of Zagreb without allowing any proposal, approval or suggestion from the units of local (regional) self-government." It observed that there are no legal grounds for reducing the number of hospital healthcare institutions founded by the City of Zagreb. It asked the Constitutional Court repeal Article 37.2.

The applicant, as a public-law person and a subject of public law, was challenging the constitutionality of a legal provision prescribed in relation to it by the State (the Parliament), which encapsulated the applicant's lack of influence over the network of healthcare protection adopted by the Minister for Health. The network determines the operation and foundation of healthcare institutions founded by the City of Zagreb and the counties. Any revisions, or the adoption of a new network of healthcare protection, have a direct impact on the ownership of the City of Zagreb and counties, which in turn has a special objective in public law.

II. The Constitutional Court found Articles 1, 3, 4, 58 and 129.a of the Constitution, and Articles 4.1, 4.3 and 9.2 of the European Charter on Local Government to be of relevance.

It made reference to the views it had expressed in ruling no. U-I-3117/2003, U-I-2348/2005 of 28 June 2006, to the effect that the Republic of Croatia and units of local and regional self-government have the competence to implement social healthcare for the population and to ensure conditions for health protection. Healthcare is funded from both national and from local government budgets.

The basic healthcare network is proposed by the Minister of Health after securing the opinions of the Health Insurance Bureau, the Public Health Bureau, the competent chambers and representative bodies of regional self-government. It is then passed by central government (Article 38 of the Act).

The views expressed in the above ruling were, in the Constitutional Court's view, applicable to the case in point, despite the fact that Article 37.2 of the Health Protection Act was passed after the old Health Protection Act had lost its legal force. Under Article 38 of the old Health Protection Act, local and regional government units had the right to voice their opinions on the proposals for the healthcare network put forward by the Minister of Health.

The Constitutional Court noted that "network of the public healthcare service" defines "the planning and development of the network of healthcare institutions" as prescribed in Article 129.a.2 of the Constitution. Article 129.a.2 provides units of local and regional self-government (including the City of Zagreb) with the right to participate in decisions on the network of healthcare institutions on their territory. This right stems from Article 129.a.3 of the Constitution. As local and regional government units are closest to the citizens on their territory, they are entitled to participate in decisions on setting up, merging and closing down the healthcare institutions on their territory. This is particularly important in situations where the local government units are also the founders of these healthcare institutions. Article 9.3 of the Health Protection Act therefore provides that counties and towns shall ensure funds for capital investment and the day to day upkeep of healthcare institutions (premises, medical and non-medical equipment and transport vehicles and IT), in accordance with the plan and programme of health protection and the public healthcare network, and in order to cover losses of the healthcare institutions they have founded.

The City of Zagreb and counties, as the legally authorised founders of healthcare institutions, enjoy the rights that stem from their status. The founders' rights over the healthcare institutions set up by the City of Zagreb are also connected to the material resources of healthcare institutions, including the income they make. In principle, therefore, they are perceived as the property of the City of Zagreb, which is protected by the constitutional guarantee of ownership.

The Constitutional Court noted that this type of ownership cannot be completely covered by the concept of ownership in the sense of the rules in private law. The founders' rights the City of Zagreb enjoys over the healthcare institutions which it founded fall within the category of ownership with a special purpose and a specific public-law function, namely the safeguarding of the permanent, unhindered and orderly functioning of healthcare activities as a public service. As long as it serves this purpose, it is subject to special public-law regulation.

The Constitutional Court concluded that although this is ownership of a specific public-law nature, connected to a specific public-law owner, in principle it falls under the constitutional guarantee of ownership. In examining potential violation of these rights, however, account must be taken of various factors that do not exist in cases of protection of the constitutionally guaranteed ownership of private persons under private law.

Account must also be taken of the fact that the state is empowered to pass economic and social policy measures to create conditions for implementing health care, conditions for the care, preservation and improvement of the health of the population, and to harmonise activities and development in all fields of health so as to ensure the health care of the population. In this field the state enjoys a certain margin of appreciation in the measures it applies, just as it does in the measures it applies in other fields connected with national social, financial or economic policy.

Despite the higher margin of appreciation in terms of the regulation of the state healthcare system, units of local and regional government must be allowed to play an active role in the passing and revising of the public healthcare service network. This is the only way of ensuring the optimal fulfilment of their constitutional obligations regarding affairs of regional significance in the field of healthcare, which they have a duty to partially or fully fund. If they cannot take part, units of local and regional government will remain as mere executors of the public healthcare network, and the Minister for health, together with competent chambers and bureaus, will enjoy virtual

*carte blanche* to determine which healthcare institutions will be founded, closed down or merged, leaving the citizens in those areas with no influence over the healthcare network through their local government representatives.

This also means that the competences of the City of Zagreb and other local and regional government units will be proportional to their obligations under Article 9.3 of the Health Protection Act and it will also allow for the realisation of the principles in Articles 4 and 9 of the European Charter on Local Self-government.

The Constitutional Court was also concerned to note that by enacting this provision, the legislature had undermined the basic postulate of the legal state. The legislature's encroachment in the constitutional competences of local and regional government units disturbed the jurisdiction between local government units and the state in the field of healthcare protection and healthcare policy, and also led to an unconstitutional restriction of the right to local and regional self-government in Article 128.1 of the Constitution.

It therefore repealed Article 37.2 with effect from 15 July 2012.

#### *Cross-references:*

- Ruling no. U-I-3117/2003, U-I-2348/2005 of 28.06.2006;
- Ruling no. U-I-2643/2007 of 22.12.2009, *Bulletin* 2010/1 [CRO-2010-1-001].

#### *Languages:*

Croatian, English.



# Czech Republic

## Constitutional Court

### Statistical data

1 January 2012 – 30 April 2012

- Judgments of the Plenary Court: 5
- Judgments of panels: 81
- Other decisions of the Plenary Court: 7
- Other decisions of panels: 1 356
- Other procedural decisions: 92
- Total: 1 541

### Important decisions

*Identification:* CZE-2012-1-001

**a)** Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 27.12.2011 / **e)** II. ÚS 1969/10 / **f)** Judicial Review of Internal Decisions of Political Parties / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

4.5.10.3 Institutions – Legislative bodies – Political parties – **Role**.  
 4.7.1 Institutions – Judicial bodies – **Jurisdiction**.  
 4.7.8.1 Institutions – Judicial bodies – Ordinary courts – **Civil courts**.

*Keywords of the alphabetical index:*

Political party, intra party democracy / Political party, internal decision / Political party, members.

*Headnotes:*

The Constitution and the Charter of Fundamental Rights and Freedoms place courts under an obligation to undertake judicial review of the internal decisions of political parties not only from the perspective of compliance of the decisions with the statutes of those parties or compliance with the law but also from the perspective of potential interference with the fundamental rights of members of political parties through the actions of the party. This scope of

authority is needed for the protection and development of the minimum standard of the principles and rules of intra-party democracy.

*Summary:*

I. In its judgment of 27 December 2011, the Constitutional Court set aside earlier decisions by the Supreme Court and the Municipal Court in Prague and, in part, the award of the decision of the Circuit Court in Prague as being contrary to Articles 20.2 and 2.36 of the Charter of Fundamental Rights and Freedoms.

A group of plaintiffs, including the applicants, sought to have the Resolution of the Regional Assembly of the Civic Democratic Party declared null and void with reference to Articles 16a and 9 of the Law on Political Parties and in reliance on emergent state interest pursuant to Article 7 of the Civil Procedure Code. The Resolution suspended the Regional Council and representatives and delegates of the Regional Assembly. The Circuit Court, in its sentence I, terminated that part of the proceedings which sought a declaration of invalidity, stating that such a declaration could not be sought under the above provisions. In sentence II, it held the Resolution to be non-compliant with the statutes of the Civic Democratic Party and that it affected areas and facts listed in the Register of Parties and Movements set out in Article 9.3.b of the Law on Political Parties.

On appeal, the Municipal Court upheld the decision of the Circuit Court in sentence I and quashed sentence II while dismissing the action on the grounds of the applicants' lack of *locus standi* as the facts concerned were not set out in the Register of Parties and Movements. The Supreme Court dismissed the extraordinary appeal. The applicants lodged a constitutional complaint, alleging a restrictive interpretation of legal action and sought a judicial declaration.

II. The Constitutional Court emphasised the irreplaceable role of free competition of political parties and political forces in a properly functioning democracy, which entails a constitutional requirement on political parties to respect and conform to the principles of intra-party democracy.

Any potential derogation from the principle of the autonomy of political parties must be interpreted in a restrictive manner. The principles outlined above are boldly demonstrated in the concept of membership of political parties. Voluntary and free association of citizens in political parties is reflected both in a defensive dimension (obligation to refrain from interference) and in a protective dimension (positive

obligation to protect fundamental rights from interference by private persons). Judicial review defined in such a manner should be considered constitutionally admissible and even desirable in situations where the intra-party mechanisms of inspection and enforcement of the principles and rules of intra-party democracy are ineffective or non-functional.

The Constitutional Court noted on a general level that in the Czech Republic the constitutional requirement of respect of intra-party democracy is insufficiently addressed in the existing legal provision and its importance within a democratic state governed by the rule of law is not properly reflected. This was borne out in the case in point, where the wording of Article 16a.1 of the Law on Political Parties only allowed a member of a political party to seek judicial review of a decision with reference to facts set out in the Register of Parties and Movements. Such delimitation of the scope of authority of courts and such a narrowly-defined framework of judicial review is insufficient in terms of the necessary guarantee and protection of the constitutional requirement of respect of and compliance with a minimum standard of principles and rules of intra-party democracy. The Constitutional Court added that the ordinary courts dealing with this case should have recognised the unconstitutional nature of the existing juridical *lacuna* and attempted to complete it in a constitutionally compliant fashion.

The Constitutional Court therefore concluded that the ordinary courts, contrary to Article 22 of the Charter, failed to meet their constitutional obligation to protect the fundamental rights of the applicants (Article 4 of the Constitution), thus breaching their fundamental right to associate in political parties pursuant to Article 20.2 of the Charter.

III. Judge Eliška Wágnerová was the judge rapporteur in the concerned matter. None of the judges expressed a dissenting opinion.

#### *Languages:*

Czech.



#### *Identification:* CZE-2012-1-002

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 31.01.2012 / **e)** Pl. ÚS 5/12 / **f)** Czechoslovak pensions – application of the Agreement on Social Security between the Czech Republic and the Slovak Republic and obligations deriving from European Union law / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

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

2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Communities.**  
 4.17.1.4 Institutions – European Union – Institutional structure – **Court of Justice of the EU.**  
 4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states.**  
 5.2 Fundamental Rights – **Equality.**  
 5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension.**

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

Pension, amount / Court of Justice of the EU, *ultra vires.*

#### *Headnotes:*

Nationals of the Czech Republic employed until 31 December 1992 by an employer with a seat in the territory of the present Slovak Republic are entitled to an equalisation allowance in addition to their partial retirement pension awarded by the Czech and the Slovak insurance authorities to the extent of the anticipated retirement pension they would have been awarded in the event that all periods of insurance from the period of existence of a common state would be calculated as having been acquired in the Czech Republic. Any other treatment could pave the way for violation of the rights of such persons to material security in their old age, guaranteed by the Charter of Fundamental Rights and Freedoms, and could be discriminatory in nature.

#### *Summary:*

I. The Plenum of the Constitutional Court set aside previous decisions of the Supreme Administrative Court, of the Regional Court in Hradec Králové (the Pardubice branch) and the decision of the Czech Social Security Office as they violated the applicant's fundamental right to material security in old age guaranteed by Article 30.1 of the Charter of Fundamental Rights and Freedoms.

The applicant was a national and a permanent resident of the Czech Republic, and an employee from 1964 to 1993 of the Czechoslovak railways registered under its branch in Bratislava (Slovakia). The Czech Social Security Office awarded him a retirement pension in the sum of 3 537 Czech Crowns as entitlement to such a pension would only arise with regard to the periods of insurance acquired within the Slovak pension system. Under Article 46.2 of Council Regulation (EEC) 1408/71 the basic and percentage related assessment of the pension are determined in the amount proportionate to the ratio of the periods of insurance acquired pursuant to Czech legal regulations and the overall period of insurance in all Member States.

The Regional Court dismissed the case arising from the above decision, stating that the fact that the branches of corporations and companies pursuant to the legislation applicable at the material time acted on behalf of the company and had no legal personality did not mean that their seat could not be deemed to represent the seat of the employer pursuant to Article 20.1 of the Agreement on Social Security between the Czech Republic and the Slovak Republic (no. 228/1993 Coll., hereinafter, the "Agreement"). The Supreme Administrative Court subsequently dismissed the applicant's cassation complaint, concluding that with reference to the decision of the European Court of Justice C-399/09 *Landtova v. ČSSZ* (in the given situation the assessment of the entitlement to the benefit in old age and determination of such benefit above the framework set forth by Article 20.1 of the Agreement), the periods of employment accounted for until the dissolution of the federation would only be feasible if such a rule were to apply not only to Czech nationals permanently resident in the Czech Republic but also to Czech nationals permanently residing outside the territory of the Czech Republic (otherwise further discrimination would occur).

The applicant confirmed that he met all conditions for being paid an equalisation allowance within the retirement pension.

II. The Constitutional Court stated in its judgment that the period of employment for an employer with a seat within the territory of the present Slovak Republic at the time of the existence of Czechoslovakia could not be considered a period of employment abroad. All nationals of the Czech Republic are entitled to equal treatment in the sphere of social security with respect to periods of employment up to 31 December 1992 regardless of the place of employment and the seat of the employer in the former Czechoslovakia. Neither the place of employment nor the seat of the employer within the territory of the later Slovak Republic can for

this purpose be deemed to be located within a foreign territory. Moreover, for the entire duration of the federation, the area of social security fell under federal authority while the Constitutional Act no. 4/1993 Coll. codified the continuity of the Czech and Czechoslovak legal order. The social security system and entitlements following from it do not contain a foreign element by which the application of the Regulation (on the application of social security schemes to employees, self-employed persons and members of their families moving within the Community) is conditioned.

Nationals of the Czech Republic employed until 31 December 1992 by an employer with a seat in the territory of the current Slovak Republic are therefore entitled to an equalisation allowance paid in addition to their retirement pension awarded by both the Czech and the Slovak insurance authority to the extent of the anticipated retirement pension that would be awarded to them in the event that all periods of insurance from the period of existence of the common state were calculated as acquired in the Czech Republic.

The given solution is a result of the Agreement governing the division of costs of the social security between the successor states regarding entitlements conferred by employment periods until 31 December 1992.

This matter is not comparable to the assessment of social security entitlement and the accountability of periods acquired in a variety of states as it concerns a matter arising as a consequence of the dissolution of Czechoslovakia and the assessment of entitlements of the nationals of the Czech Republic with regard to the division of costs of social security between the successor states. Should Article 2.1 of the Regulation stipulate that it is applicable to persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States then, by virtue of the case law of the Constitutional Court in cases of nationals of the Czech Republic, the factors following from their social security until 12 December 1992 must be assessed as subject to the legal regulations of the same state of which they are nationals. Thus the entitlements of nationals of the Czech Republic to social security until 31 December 1992 cannot be governed by European law.

On the basis of the principle expressed in judgment Pl. ÚS 18/09, the Court could only state that, in relation to the effect of ECJ C-399/09 decision on analogous cases, that in that case an excess of a European Union body occurred in that situation, where the EU body exceeded its scope of authority,

as transferred by the Czech Republic to the European Union pursuant to Article 10a of the Constitution, as well as the scope of competences awarded to the European Union body. It also acted *ultra vires*.

The Constitutional Court therefore granted the constitutional complaint and set aside the contested decisions.

III. The Judge rapporteur in these proceedings was Pavel Holländer. Judge Jiří Nykodým expressed a dissenting opinion both on the reasoning and the sentence of the judgment.

#### *Languages:*

Czech.



#### *Identification:* CZE-2012-1-003

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 21.02.2012 / **e)** Pl. ÚS 29/11 / **f)** Constitutionality of the extraordinary appeal pursuant to Section 237.1.c of the Civil Procedure Code / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

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

3.10 General Principles – **Certainty of the law**.  
 3.22 General Principles – **Prohibition of arbitrariness**.  
 4.7.7 Institutions – Judicial bodies – **Supreme court**.  
 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

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

Appeal, extraordinary, Supreme Court.

#### *Headnotes:*

Within the constitutional order, the legislature is free to take decisions on the type of procedural remedies in civil-law cases it will incorporate in its legislation, the purposes it intends to pursue through them and their detailed regulation. Account must nonetheless

be taken of the imperative according to which the rules on access to higher court instances must be formulated as precisely as possible, to avoid any ambiguities for parties to the proceedings, and so that a remedy is sufficiently foreseeable for them.

#### *Summary:*

I. By its judgment issued on 21 February 2012, in proceedings on setting aside laws and other legal regulations, the Plenum of the Constitutional Court struck out the provision of Section 237.1c of Act no. 99/1963 Coll., Civil Procedure Code, with effect from 1 January 2013. Under this provision, an extraordinary appeal, as an extraordinary means of remedy, is admissible against decisions by an appellate court and against a resolution of the appellate court upholding the decision of the first instance court, where the court of extraordinary appeal has concluded that the contested decision in the case itself is of crucial importance from a legal standpoint.

In related proceedings on a constitutional complaint pursuant to Article 87.1.d, kept under file reference II. ÚS 2371/11, the Constitutional Court dealt with a situation where the Supreme Court had ruled on the admissibility of the extraordinary appeal pursuant to the contested provision. The decision in question did not make it clear which of the alternatives included in Section 237.3 of the Civil Procedure Code provided reasoning, in the given case, for the conclusion that the decision of the appellate court subject to review was of crucial importance from a legal perspective. The Second Chamber of the Constitutional Court lodged a petition to have this provision set aside; in its view, the provision was so vague that it allowed for unforeseeable decision-making by the Supreme Court, which was inconsistent with the requirements for statutes under the principle of a democratic state under the rule of law. It was also out of line with the requirements as to the quality of statutes restricting fundamental rights; the provision in point had to be considered as a formal statute restricting the fundamental right of access to courts pursuant to Article 36.1 of the Charter.

II. The Constitutional Court began by defining the conditions which may allow for derogations from the general rule that a constitutional complaint against a cassation decision of the Supreme Court is inadmissible. Such a case could include, for instance, a situation in which the Supreme Court adjudicates on the admissibility of the extraordinary appeal in an arbitrary manner. The Constitutional Court reached this conclusion because cassation decisions of the highest court instances cannot lie beyond the framework of the constitutional review.

The Constitutional Court emphasised that under Article 1.1 of the Constitution, the Czech Republic is a state governed by the rule of law, founded on respect for the rights and freedoms of human beings and of citizens, which in turn implies the principle of the foreseeability of a statute, its comprehensibility and inner consistency, and perhaps the principle of legal certainty and the prohibition of arbitrariness. This applies both to the contents of legal regulations and their interpretation and application. At the same time, the Constitutional Court noted the requirement of the lawful basis for restricting the fundamental right pursuant to Article 4.2 of the Charter, which provided continuity with the provisions of relevant international treaties.

During its adjudication on the constitutionality of the above regulation, the Constitutional Court analysed what is known as a “non-entitlement extraordinary appeal”, and its meaning and context within the national legal order. The question of the admissibility of an extraordinary appeal where the issues subject to the appeal are of crucial legal importance was considered in the context of the right to due process under Article 36.1 of the Charter. Having assessed the number of extraordinary appeals dismissed, according to the statistics, as inadmissible by the Supreme Court (since the Supreme Court did not establish any properly formulated issue of crucial legal importance in them), the Constitutional Court held that the provision in question was formulated or even decided on in such an unforeseeable manner that it did not allow the applicant, although represented by an attorney, to establish a qualified “estimate” of any potential material admissibility for consideration applicable to this means of remedy.

The Constitutional Court held that within the constitutional order, the legislature is free to take decisions on the type of procedural remedies in civil-law cases it will incorporate in its legislation, the purposes it intends to pursue through them and their detailed regulation. Account must nonetheless be taken of the imperative according to which the rules on access to higher court instances must be formulated as precisely as possible, to avoid any ambiguities for parties to the proceedings, and so that a means of remedy is sufficiently foreseeable for them. These rules determine the limitations on the right and the way it is exercised.

The Constitutional Court demonstrated the principles referred to above in the analysis of the selected decisions of the Supreme Court pursuant to Section 237.1.c of the Civil Procedure Code. The implication is that its decision-making activity does not properly serve the purpose of consolidating case law; it is often out of line with Constitutional Court

judgments and leaves parties to the proceedings with substantial legal uncertainty. The Constitutional Court accordingly resolved to strike out the contested provision. It postponed the enforceability of its derogation verdict, so as to allow the legislature sufficient time to enact constitutionally compliant legal regulation. Finally, it stressed that the legislature must now enact legal regulation which is foreseeable to such an extent that it renders the admissibility of the extraordinary appeal obvious to any potential appellant even before such a remedy is applied.

III. In the instant case, Eliška Wagnerová served as Judge Rapporteur. A dissenting opinion on the verdict and the reasoning was submitted by Judges Jiří Mucha, Jiří Nykodým, Ivana Janů, Vladimír Kůrka, and Miloslav Výborný.

#### *Languages:*

Czech.



#### *Identification: CZE-2012-1-004*

**a)** Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 03.03.2012 / **e)** I. ÚS 1586/09 / **f)** Violation of the right to protection of human dignity and right to respect for private life by awarding insufficient monetary compensation for immaterial damage / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

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

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

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

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

Damage, compensation, non-economic loss / Media, defamation.

*Headnotes:*

The right to adequate satisfaction for immaterial harm suffered as a result of the publication of defamatory and untrue information which does not enjoy constitutional protection represents an integral part of the right to protection of human dignity, personal honour, good reputation and name and the right to protection of private and family life. The satisfaction awarded must sufficiently reflect the intensity of the interference with the above rights to avoid a breach of the rights guaranteed by the Charter of Fundamental Rights and Freedoms and the European Convention on Human Rights.

*Summary:*

I. Upon the application submitted by the applicant (M.V.), the First Chamber of the Constitutional Court, by a judgment dated 3 March 2012, set aside the Resolution of the Supreme Court file no. 30 Cdo 2311/2007-139 dated 26 March 2009, the Decision of the High Court in Prague file no. 1 Co 233/2006-118 dated 21 November 2006 and the Decision of the Municipal Court in Prague file no. 34 C 32/2005-93 dated 16 February 2006 as being contrary to Article 10.1 and 10.2 of the Charter of Fundamental Rights and Freedoms and Article 8 ECHR.

The applicant sought in his action against the legal successor of the interested party an amount of 5 000 000 Czech Crowns as compensation for immaterial damage. The immaterial damage concerned was that the plaintiff had published in a publication issued by him photographs of the applicant along with articles alleging that the applicant was involved in a love affair at the time of pregnancy of his wife, thus causing interference with his dignity and honour as well as interference with his private and family life. The Municipal Court granted the action in its decision up to the amount of 50 000 Czech Crowns; the remaining amount was not awarded as the Court stated in its reasoning that the plaintiff had issued a written apology to the petitioner and the plaintiff had had the opportunity to respond to the publication of the concerned articles and address them. Furthermore, the applicant, as a renowned writer, was a person of public interest. On appeal by the applicant, the High Court partially overturned the decision and awarded him an additional 150 000 Czech Crowns while affirming the decision in the remaining part.

The Supreme Court submission lodged by the plaintiff was dismissed as inadmissible as, in the Supreme Court's view, the decision of the High Court in this matter was not of substantial legal importance.

II. The Constitutional Court noted that the right to private life is mainly expressed as a negative right, preventing the public authority from interference with the personal private affairs of individuals. Nonetheless, a positive obligation of the state may be deduced from this right, placing the public authority under an obligation to create conditions for the undisturbed exercise of fundamental rights, mainly consisting of the adoption of legal provisions to prevent interference in personal private matters by third parties (including private persons).

The Constitutional Court also admitted that "personal" fundamental rights (such as the right to human dignity, personal honour, good reputation and name) frequently collide with the freedom of expression pursuant to Article 17.1 of the Charter. It noted, referring to its Judgment file no. I. ÚS 453/03, that within the ambit of the constitutional protection of freedom of speech only statements of opinions of an evaluating nature are protected unconditionally and not statements of facts that must be supported by evidence in order to rely on protection. Therefore, the communication of deliberately untrue information cannot be protected. The Court noted in the above regard that "should anyone publish information of a defamatory nature on another individual such conduct cannot be regarded as reasonable or legitimate as long as the person fails to establish that they had reasonable grounds to rely on the true nature of the defamatory information that they disseminated and should the person establish that they took the due steps available to them to verify the credibility of such information to the extent and intensity in which such verification was available to them and as long as they themselves had no reason not to trust that the defamatory information was untrue. Publishing such information cannot be considered reasonable *inter alia* if the disseminator of the information fails to verify through an inquiry the true nature of the information with the person with whom the information is concerned and if they fail to publish the view point of the entity concerned with the exemption of such procedure not being at all possible or whenever clearly not necessary."

In the instant matter, the legal predecessor of the interested party disseminated defamatory information about the applicant without due justification for such dissemination. Such conduct cannot, in the light of the above, be subject to protection. The Constitutional Court noted as positive the manner in which the Municipal Court and High Court classified the nature of the information published on the applicant although it did not identify with the other views expressed by those courts. In the Constitutional Court's opinion, the ordinary courts interfered with the right to protection of human dignity, honour and good

name and with the right to protection of private and family life by ordering the plaintiff to pay a fraction of the compensation for immaterial damage sought by the applicant, thereby sending an indirect signal to subjects in a similar position to that of the interested party and its legal predecessor regarding the enforceability of the private rights of the injured person and the threat of sanctions for their violation. At the same time the extent of the compensation awarded to the applicant failed to reflect the intensity of the interference with his fundamental rights. As the ordinary courts failed to meet their constitutional obligation to provide protection of the applicant's fundamental rights by virtue of Article 4 of the Constitution, the Constitutional Court set aside their decisions.

III. Judge Eliška Wagnerová acted as Judge Rapporteur in these proceedings. Judge Ivana Janů issued a dissenting opinion on both the award and the reasoning of the Judgment, expressing the view that the ordinary courts correctly noted a violation of the applicant's right to privacy and their decision on the extent of the satisfaction awarded did not amount to interference with his fundamental rights. The dissenting Judge noted that satisfaction for immaterial harm is not to be aimed at penalising the liable subject or at substitution of other legal concepts (such as unjustified enrichment, damages). The Constitutional Court should not therefore have overturned the decisions of the ordinary courts regarding the extent of the compensation for immaterial harm.

#### *Languages:*

Czech.



## Estonia Supreme Court

### Important decisions

*Identification:* EST-2012-1-001

**a)** Estonia / **b)** Supreme Court / **c)** en banc / **d)** 30.08.2011 / **e)** 3-3-1-15-10 / **f)** / **g)** [www.riigiteataja.ee/akt/113092011008](http://www.riigiteataja.ee/akt/113092011008) / **h)** [www.nc.ee/?id=11&tekst=RK/3-3-1-15-10](http://www.nc.ee/?id=11&tekst=RK/3-3-1-15-10); CODICES (Estonian, English).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Compensation, for damage / Compensation, determination / Obligation to legislate.

*Headnotes:*

Article 32 of the Constitution, which guarantees the right to property, gives rise to an obligation on the state to establish a legal framework for regulating the provision of compensation, to a fair extent, for proprietary damage caused to an individual by a lawful act or measure which in an extraordinary manner restricts the individual's right to property.

*Summary:*

I. The applicant, M., was employed as a specialist in the Tax and Customs Board (hereinafter, the "TCB"). On 2 November 2007 the prosecutor sought a court order for the exclusion of the applicant from office for the attempted acceptance of gratuities. The Court, having examined the request, excluded the applicant from office. The Court was of the opinion that it was justified to suspect that since the applicant was an official and was suspected of the commission of an offence related to his official position, he might, by remaining in his office, continue to commit criminal offences. The TCB suspended the applicant's I

employment for the duration of the preliminary investigation of the criminal matter as of 6 November 2007.

On 29 October 2008, the applicant submitted a request to the prosecutor for termination of the criminal proceedings. He contended that his conduct lacked the elements of a criminal offence because he was not an official for the purposes of Article 228 of the Penal Code (hereinafter, the "PC"). By a regulation of 4 November 2008 the prosecutor terminated the criminal proceedings, on the basis that the applicant's conduct lacked the necessary elements of the criminal offence prescribed in Article 293.1 of the PC. In the regulation the Prosecutor's Office waived the applicant's exclusion from office. The TCB terminated the suspension of the applicant's employment from 5 November 2008. The applicant filed an action with the Supreme Court for compensation for proprietary damage caused by pre-trial criminal proceedings.

II. The main question for the Supreme Court was, whether Article 32 of the Constitution, which protects the right to property, gives rise to an obligation on the state to provide fair and equitable compensation for proprietary damage caused by the state's lawful actions.

The Court found that the applicant had suffered proprietary damage by his exclusion from office in the pre-trial criminal proceedings, as he was unable to work or receive wages for approximately for one year. The Court affirmed that exclusion of a person from office in order to pursue criminal proceedings infringes the fundamental right of the individual to freely choose one's area of activity, profession and place of work, guaranteed by the first sentence of Article 29.1 of the Constitution. The Court also considered that, as work is generally the main way to obtain an income, exclusion from office and infringement of Article 29 of the Constitution may be accompanied by an infringement of the fundamental right to property guaranteed by Article 32 of the Constitution.

The Court noted that, pursuant to the third sentence of Article 32.1 of the Constitution, everyone whose property has been expropriated without his or her consent has the right of recourse to the courts and the right to contest the expropriation of the property, and the nature and amount of compensation. The Court held that Article 32 of the Constitution gives rise to an obligation on the state to establish a legal framework which regulates the provision of compensation, to a fair extent, for proprietary damage caused by a lawful act or measure which in an extraordinary manner restricts the right to property. It was noted that in many cases of restriction of the

fundamental right to property it is possible to find a reasonable balance between the public interest and the protection of the fundamental rights of individuals. Yet, there might be situations where the state needs to restrict the fundamental right to property of individuals in the public interest to the extent that it would be unjustified to leave all the damages to be borne by the individual. In the case of an extraordinary restriction of the fundamental right to property it is not possible, without the payment of compensation, to find a balance between the public interest and the fundamental rights of the individual.

The Court held that the failure to establish an Act regulating the grounds and procedure for the payment of fair compensation in cases of lawful restriction in an extraordinary manner of the fundamental right to property, or a regulatory framework excluding the payment of fair compensation, infringes the fundamental right to property protected by Article 32 of the Constitution and the right to effective judicial proceedings arising from Articles 14 and 15 of the Constitution, taken together. In such case there are no proceedings which would enable a person whose fundamental right to property has been restricted in an extraordinary manner in pre-trial criminal proceedings to have recourse to the courts claiming compensation for damage caused.

The grounds and procedure for the protection and restoration of rights violated upon application of the powers of public authority and performance of other public law functions, and for compensation for damage caused is provided for in the State Liability Act (hereinafter, the "SLA"). Pursuant to Article 16.1 of the SLA, a person may claim compensation, to a fair extent, for proprietary damage caused by a lawful administrative act or measure which in an extraordinary manner restricts the fundamental rights or freedoms of the person. Acts issued and measures taken in pre-trial criminal proceedings are not administrative acts and administrative measures. A court ruling, made in pre-trial criminal proceedings, which decides upon a person's exclusion from office, is also not an administrative act because the court does not perform administrative functions in such proceedings. The applicable law lacked a regulatory framework which would have provided for compensation, to a fair extent, for lawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings.

The court had no information before it regarding any reasons or justifications the legislator may have had for the failure to establish such a regulatory framework, but found that the need to protect the state's financial interests was not of sufficient importance to justify such infringement of fundamental rights.

The Constitutional Court held that the lack of a regulatory framework which would prescribe an option to provide compensation, to a fair extent, to a person for lawful proprietary damage caused by that person's exclusion from office in pre-trial criminal proceedings constitutes a disproportionate infringement of the fundamental rights provided for in Articles 32, 14 and 15 of the Constitution. Pursuant to Article 15.1.21 of the Constitutional Review Court Procedure Act (hereinafter, the "CRCPA"), the Supreme Court may, in constitutional review proceedings, declare the refusal to issue an instrument of legislation of general application to be in conflict with the Constitution. Based on Article 15.1.21 of the CRCPA, the Supreme Court *en banc* declared the lack of a regulatory framework for the provision of compensation, to a fair extent, for lawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings to be in conflict with Articles 11, 14, 15 and 32 of the Constitution.

III. There was one dissenting opinion.

#### *Cross-references:*

- Decision no. 3-3-1-69-09, 31.03.2011, Supreme Court, *en banc*;
- Decision no. 3-3-1-10-01, 17.04.2001, Supreme Court;
- Decision no. 3-3-1-85-09, 22.03.2011, Supreme Court, *en banc*.

#### *Languages:*

Estonian, English.



#### *Identification:* EST-2012-1-002

**a)** Estonia / **b)** Supreme Court / **c)** *en banc* / **d)** 31.08.2012 / **e)** 3-3-1-35-10 / **f)** / **g)** [www.riigiteataja.ee/akt/113092011009](http://www.riigiteataja.ee/akt/113092011009) / **h)** [www.nc.ee/?id=11&tekst=RK/3-3-1-35-10](http://www.nc.ee/?id=11&tekst=RK/3-3-1-35-10); CODICES (Estonian, English).

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

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

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

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

Compensation, for damage / Compensation, determination / Obligation to legislate.

#### *Headnotes:*

The lack of a regulatory framework to govern the possibility of providing compensation for unlawful proprietary damage caused to an individual by his or her exclusion from office in pre-trial criminal proceedings constitutes a disproportionate infringement of the right to compensation for moral and material damage caused by the unlawful action of any person, and the right to an effective judicial remedy, guaranteed by Articles 25, 14 and 15 of the Constitution.

Article 32 of the Constitution gives rise to an obligation on the state to provide compensation, to a fair extent, for proprietary damage caused by the state's lawful actions if the fundamental right to property has been infringed intensively in an extraordinary manner.

#### *Summary:*

I. The applicant, K., was employed as a junior police inspector of the Pärnu Police Prefecture. On 2 August 2002 the Police Board commenced a criminal investigation due to a suspicion that the applicant had prepared a report, when performing his duties on 16 June 2002, on the establishment of the state of intoxication of a driver who was pulled over for exceeding the speed limit. The applicant introduced the prepared document to the driver as an administrative offence report and demanded the payment on the spot of a fine in the amount of 25 euros for an administrative offence. The applicant failed to prepare a proper administrative offence report and illegally appropriated the 25 euros received as a payment of the fine.

The Police Board suspended the applicant from the office, sanctioned by a prosecutor, for the duration of the criminal investigation. By a directive of 26 November 2002 the Pärnu Police Prefect suspended the applicant's employment for the duration of the criminal investigation. On 12 December 2002 the prosecutor confirmed the summary of the charges and sent the criminal matter to court. By a ruling of 2 May 2003 the Tallinn City Court forwarded the criminal matter for an additional pre-trial investigation. The court found that the

applicant should have been charged with misuse of an official position, not with fraud.

The Prosecutor's Office terminated the criminal proceedings with regard to the applicant on 11 September 2007. On 15 March 2007 an Act had entered into force which repealed the provision of misuse of an official position and therefore there were no grounds for pursuing criminal proceedings against the applicant. The Prosecutor's Office found that the conduct of the applicant included also the elements of fraud, but the applicant's conduct should have been qualified as a misdemeanour. At the time the ruling was made the limitation period of the misdemeanour had passed. On 25 September 2007 the prosecutor, following his ruling on the termination of the criminal proceedings, annulled the applicant's exclusion from office.

The applicant filed an action with the Supreme Court for compensation for damage caused by his exclusion from office.

II. The Supreme Court held that exclusion from office infringes a person's fundamental right to freely choose his or her area of activity, profession and place of work, guaranteed by the first sentence of Article 29.1 of the Constitution. Work is generally the main way to obtain an income and therefore exclusion from office and infringement of Article 29 of the Constitution may be accompanied by an infringement of the fundamental right to property guaranteed by Article 32 of the Constitution. The applicant had suffered pecuniary loss as a result of his exclusion from office.

The Court observed that, pursuant to Article 25 of the Constitution, everyone has the right to compensation for moral and material damage caused by the unlawful action of any person and that the legislature alone has the constitutional power to restrict a person's fundamental right to compensation arising from Article 25 of the Constitution. However, the Court noted that the legislature is under an obligation to provide for effective proceedings for the exercise and protection of fundamental rights. Failing to establish an Act regulating the grounds and procedure for the provision of compensation for unlawful damage, or a regulatory framework excluding compensation for damage, infringes the fundamental right provided for in Article 25 of the Constitution and the right to effective judicial proceedings arising from Articles 14 and 15 of the Constitution in conjunction. The State Liability Act (hereinafter, the "SLA") is a general Act regulating the liability of public authorities which regulates compensation for damage caused by a public authority insofar as not otherwise regulated by a

specific law. There was no regulation of the SLA providing for compensation for damage caused in pre-trial criminal proceedings or in any other Act.

The Court had no information before it regarding any reasons or justifications the legislator may have had for the failure to establish such a regulatory framework, but held that the need to protect the state's financial interests is not of sufficient importance to justify such infringement of fundamental rights. The Court declared the lack of a regulatory framework of compensation for unlawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings to be in conflict with Articles 11, 14, 15 and 25 of the Constitution.

The applicant contended in his action that his exclusion from office was lawful until 15 March 2007 and that compensation for the lawful proprietary damage should be awarded. The Court found (as in the case no. 3-3-1-15-10) that Article 32 of the Constitution gives rise to an obligation on the state to pay fair compensation in cases of lawful restriction in an extraordinary manner of an individual's fundamental right to property by that individual's exclusion from office due to criminal proceedings. Exclusion from office in pre-trial criminal proceedings is in the public interest. Establishing the truth in criminal proceedings is a significant public interest and a person is obliged to submit to lawful criminal proceedings which necessarily entail the restriction of his or her fundamental rights.

The Court held that the applicant's exclusion from office restricted his right to property in an extraordinary manner. The restriction was extraordinary, above all, due to the applicant's prolonged exclusion from office. The Court had found in another case (see EST-2012-1-001 above) that the applicable law lacks a regulatory framework which would enable the provision of compensation, to a fair extent, for lawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings, and had declared the lack of the regulatory framework unconstitutional.

III. There was one dissenting opinion.

#### *Cross-references:*

- Decision no. 3-3-1-15-10, 30.08.2011, Supreme Court, *en banc*;
- Decision no. 3-3-1-85-09, 22.03.2011, Supreme Court, *en banc*;
- Decision no. 3-3-1-69-09, 31.03.2011, Supreme Court, *en banc*;

- Decision no. 3-3-1-47-08, 20.11.2011, Administrative Law Chamber of the Supreme Court.

*Languages:*

Estonian, English.



## France

### Constitutional Council

#### Important decisions

*Identification:* FRA-2012-1-001

**a)** France / **b)** Constitutional Council / **c)** / **d)** 17.02.2012 / **e)** 2011-222 QPC / **f)** Mr Bruno L. (Definition of the offence of incestuous sexual assault) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 18.02.2012, 2846 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

1.6.5 Constitutional Justice – Effects – **Temporal effect.**

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

*Keywords of the alphabetical index:*

Incest, definition.

*Headnotes:*

The provisions of the Penal Code on incestuous sexual acts are contrary to the Constitution because they are at variance with the principle that penalties must have a proper legal basis. Although the legislature can introduce a specific penal category for such acts, it must also specify which individuals should be regarded as family members within the meaning of such classification.

*Summary:*

I. On 16 December 2011, the Court of Cassation submitted to the Constitutional Council, under the conditions set out in Article 61-1 of the Constitution, an application for a priority preliminary ruling on constitutionality (QPC) concerning the conformity of Article 227-27-2 of the Penal Code with the rights and freedoms secured by the Constitution.

Article 227-27-2 of the Penal Code defines some of the forms of sexual assault classified by the Penal Code as “incestuous”.

II. In its Decision no. 2011-163 QPC of 16 September 2011, the Constitutional Council declared unconstitutional the definition set out in Article 222-31-1 of the Penal Code of rape and incestuous sexual assault. The Constitutional Council had deemed that while the legislature was entitled to establish a specific penal classification covering incestuous sexual acts, it could not, without flouting the principle that penalties must have a proper legal basis, refrain from also specifying which persons should be regarded as family members within the meaning of such classification.

II. The definition adopted by Article 227-27-2 is identical to that set out in Article 223-31-1, and the Council therefore ruled Article 227-27-2 unconstitutional on the same grounds.

Article 227-27-2 of the Penal Code was revoked with effect from the date of publication of the Constitutional Council's decision. From that date onwards, no sentence can be based on the classification of "incestuous" offence set out in this Article. Where the case was already *res judicata* on that date, such classification can no longer appear in the person's criminal records.

#### *Cross-references:*

- Decision no. 2011-163 QPC of 16.09.2011, Mr Claude N. (Definition of incestuous offences and crimes), Official Gazette of 17.09.2011, 15600. (@74) (Total non-conformity).

#### *Languages:*

French.



#### *Identification:* FRA-2012-1-002

**a)** France / **b)** Constitutional Council / **c)** / **d)** 17.02.2012 / **e)** 2011-223 QPC / **f)** Bastia Bar Association (police custody in matters of terrorism: appointment of counsel) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 18.02.2012, 2846 / **h)** CODICES (French, English).

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

- 5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees.**
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
- 5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest.**
- 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**
- 5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel.**

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

Terrorism, police custody, legal assistance, restriction.

#### *Headnotes:*

The legislature must reconcile the prevention of breaches of the peace and searches for perpetrators of offences, on the one hand, with the exercise of constitutionally secured freedoms, including respect for the rights of the defence, on the other.

The lack of regulation of the court's power to deprive a person detained by police for a terrorism offence of the freedom to choose a lawyer, and in particular the lack of a requirement to provide reasons for its decision and the fact that the specific circumstances of the investigation have not been defined and no valid reasons have been given for such a restriction, infringe the rights of the defence. These provisions of the Code of Criminal Procedure are therefore contrary to the Constitution.

#### *Summary:*

I. On 23 December 2011, the Court of Cassation submitted to the Constitutional Council, under the conditions set out in Article 61-1 of the Constitution, an application for a priority preliminary ruling on constitutionality (QPC) concerning the conformity with the rights and freedoms secured by the Constitution of Article 706-88-2 of the Code of Criminal Procedure, as worded in pursuance of Law no. 2011-362 of 14 April 2011 on police custody.

This Article 706-88-2 CCP applies to persons detained by the police for an offence constituting an act of terrorism. The magistrate for custody and release, who is notified by the State Prosecutor at the police officer's request, or the investigating judge

where the custody takes place during investigatory proceedings, can then order that the person be assisted by a lawyer appointed by the Chairman of the Bar Association from a list of approved lawyers drawn up by the Bureau of the National Council of Bar Associations, on nominations from the various Bar Councils.

For some offences, the person's freedom to select a defence lawyer may be postponed under these provisions for the duration of police custody. This restriction was intended to allow the legislature to cater for the complexity and gravity of terrorist offences and the need for special safeguards on the secrecy of the investigations.

II. The Constitutional Council has held that while a suspect's freedom to select a lawyer may exceptionally be postponed during police custody in order to avoid jeopardising the search for perpetrators of terrorist crimes and offences or to guarantee individuals' safety, it is incumbent on the legislature to define the specific conditions and arrangements for implementing such an infringement of the conditions for exercise of the rights of the defence.

However, the challenged provisions simply state that the court can order the lawyer assisting the detainee to be appointed by the Chairman of the Bar Association from a list of approved lawyers drawn up by the Bureau of the National Council of Bar Associations, on nominations from the various Bar Councils. These provisions do not require the court to provide reasons for such orders or define the specific circumstances of the investigation and the reasons for imposing such a restriction on the rights of the defence. The Constitutional Council therefore found that in the absence of regulations on the power of the court to deprive the detainee of a free choice of lawyer, the challenged provisions are contrary to the Constitution.

Article 706-88-2 of the Penal Code is revoked with effect from the date of publication of the present decision. The revocation is applicable to all police detentions occurring from that date onwards.

#### *Languages:*

French.



#### *Identification: FRA-2012-1-003*

**a)** France / **b)** Constitutional Council / **c)** / **d)** 28.02.2012 / **e)** 2012-647 DC / **f)** Law punishing denial of genocides recognised by law / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 02.03.2012, 3988 / **h)** CODICES (French, English).

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

1.6.1 Constitutional Justice – Effects – **Scope**.  
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.  
 5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion**.  
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

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

Genocide, recognition / Law, normative content / Genocide, denial, crime.

#### *Headnotes:*

The provision penalising the denial of the existence and legal classification of recognised crimes classified as genocides is unconstitutional because it infringes freedom of expression and communication. It must therefore be declared contrary to the Constitution.

#### *Summary:*

In its Decision no. 2012-647 DC of 28 February 2012, the Constitutional Council pronounced on the constitutionality of the Law penalising denial of genocides recognised by law. Over sixty Deputies and over sixty Senators had submitted this Law to the Council for appraisal in pursuance of Article 61 of the Constitution. The Council ruled the Law unconstitutional.

The Constitutional Council began by taking stock of the applicable constitutional rules. First of all, in pursuance of Article 6 of the 1789 Declaration, the law is geared to setting out regulations and must consequently have normative content. Secondly, Article 11 of the 1789 Declaration establishes the principle of free communication of ideas and opinion. The legislature may criminalise abuses of the exercise of freedom of expression and communication which infringe public order and the rights of third persons. However, restrictions of the exercise of this freedom, which is a precondition for democracy and one of the safeguards on respect for the other rights and freedoms, must be necessary, appropriate and proportionate to the aim pursued.

In pursuance of these principles, a legal provision geared to “recognising” a crime of genocide cannot per se have the normative scope pertaining to the Law itself. In the instant case, however, the purpose of Article 1 of the Law complained of was to punish challenges to or extreme denials of the existence of one or more crimes of genocide “recognised as such by French law”. The Council considered that by penalising challenges to the existence and the legal classification of crimes which it had itself recognised and classified as such, the legislature had violated the Constitution by infringing the exercise of freedom of expression and communication.

Accordingly, the Constitutional Council declared unconstitutional Article 1 of the Law brought before it, and consequently also Article 2, the two articles being inseparable.

In this decision, therefore, the Constitutional Council did not pronounce on the 29 January 2001 Law on the recognition of the Armenian genocide. It had not been requested to examine this Law and, a fortiori, it made no observations on the facts at issue. Nor was the Council called upon to adjudicate on the 13 July 1990 Law penalising all racist, anti-Semitic and xenophobic acts, which does not punish challenges to crimes “recognised by law”.

#### *Languages:*

French.



#### *Identification:* FRA-2012-1-004

**a)** France / **b)** Constitutional Council / **c)** / **d)** 22.03.2012 / **e)** 2012-652 DC / **f)** Law on the protection of identity / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 28.03.2012, 5607 / **h)** CODICES (French, English).

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

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

3.16 General Principles – **Proportionality.**

3.18 General Principles – **General interest.**

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

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

Identity, file, access, conditions / Passport, biometric, private life, infringement / Identity card, functionality, precision / Identity file, access, conditions.

#### *Headnotes:*

The creation of a biometric identity file designed to collect data on virtually the whole French population, owing to the nature of the data recorded, the scope of their processing, the technical characteristics and the conditions for consulting the file, infringes respect for private life in a manner which cannot be considered proportionate to the aim pursued.

Given that the provision conferring new features on the national identity card fails to specify the arrangements for implementation and the safeguards on these new functions, it must be declared contrary to the Constitution.

#### *Summary:*

In its Decision no. 2012-652 DC of 22 March 2012, the Constitutional Council pronounced on the Law on the protection of identity, which had been submitted to it for examination by over sixty Deputies and over sixty Senators.

Article 5 of this Law provided for introducing a system for processing personal data facilitating the collection and storage of the data required for issuing French passports and national identity cards. Such data included not only the cardholder's civil status and address, but also his/her height, eye colour, two fingerprints and a photograph. Article 10 gave the national police and gendarmerie services access to this system of personal data processing for the purposes of preventing and punishing various offences, including acts of terrorism.

On the one hand, the Constitutional Council considered that the creation of a system of personal data processing geared to preserving all the data required for issuing identity and travel documents helped to secure the issue of such documents and to improve the efficiency of action against fraud. It was therefore justified by reasons of general interest.

On the other hand, the Constitutional Council considered all the characteristics of the file. Firstly, the file is designed to collect data relating to virtually the whole French population. Secondly, of all the data recorded in this file, the biometric data, notably the fingerprints, are particularly sensitive. Thirdly, the technical characteristics of this file mean that it can be consulted for purposes other than ascertaining an individual's identity. Fourthly, the Law under consideration authorises consultation and searching in this file not only for the purposes of issuing or renewing identity and travel documents and verifying the identity of the holder of such document, but also for other police or judicial purposes.

Given the nature of the data recorded, the scope of the processing, its technical characteristics and the conditions for consulting it, the Constitutional Council ruled that Article 5 of the Law infringed the right to respect for private life in a manner which cannot be deemed proportionate to the aim pursued. It accordingly censured Articles 5 and 10 of the Law and consequently also Article 6.3, Article 7 and the second sentence of Article 8.

Moreover, the Constitutional Council examined Article 3 of the Law giving the national identity card an unprecedented new feature. Under this article, "data" could be stored in the identity card enabling the holder to execute electronic signatures, effectively making the card a facility for commercial transactions. The Council noted that the Law in question specified neither the nature of the "data" used for implementing these functions nor the safeguards on the integrity and confidentiality of the data. Nor did the Law specify the conditions for authenticating the persons implementing the functions, particularly in the case of minors. The Council consequently concluded that since the Law lacked these necessary safeguards it had overstepped its remit. The Council censured Article 3 of the Law.

#### *Languages:*

French.



#### *Identification: FRA-2012-1-005*

**a)** France / **b)** Constitutional Council / **c)** / **d)** 06.04.2012 / **e)** 2012-228/229 QPC / **f)** Mr Kiril Z. (Audiovisual recording of examinations and confrontations of persons implicated in criminal cases) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 07.04.2012, 6414 / **h)** CODICES (French, English).

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

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

5.2 Fundamental Rights – **Equality.**

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

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

Examination, recording.

#### *Headnotes:*

The challenged rules on exemption from audiovisual recording of hearings conducted under investigations in matters of organised crime and infringement of fundamental national interests are contrary to the Constitution. Even though there is no constitutional obligation to record hearings or examinations of persons suspected of having committed a crime, the differential treatment between persons suspected of having committed one of the crimes covered by the challenged provisions and those interviewed or questioned on suspicion of perpetration of other crimes entails unjustified discrimination which is at variance with the equality principle.

Moreover, the restriction of constitutionally guaranteed rights arising from these special investigatory measures can be justified neither by the difficulty of apprehending criminals acting as an organisation nor by the aim of protecting the secrecy of the inquiries or investigations.

#### *Summary:*

I. On 18 January 2012, the Court of Cassation submitted to the Constitutional Council, under the conditions set out in Article 61-1 of the Constitution, two applications for priority preliminary rulings on constitutionality (QPCs) concerning Article 116-1 (vii) and Article 64-1 (vii) of the Code of Criminal Procedure respectively.

Articles 64-1 and 116-1 of the Code of Criminal Procedure provide for recording, in criminal cases, hearings of persons held in police custody and examinations of persons under caution. However, these articles preclude such recordings in the case of inquiries and investigations into offences in the field of organised crime and infringement of fundamental national interests, unless so ordered by the State Prosecutor or the investigating judge.

II. Firstly, the Constitutional Council noted that these exceptions can be justified neither by the difficulty of apprehending criminals acting as an organisation nor by the goal of protecting the secrecy of the inquiries or investigations.

Secondly, there is no constitutional obligation to record hearings or examinations of persons suspected of having committed a crime. Nevertheless, the legislature's intention in permitting such recordings was to facilitate, via their consultation, verification of the statements set out in records of hearings or examinations of persons suspected of having committed a crime.

In the light of the goal thus pursued, the Constitutional Council considered that the differential treatment between persons suspected of having committed one of the crimes covered by the challenged provisions and those interviewed or questioned on suspicion of perpetration of other crimes entails unjustified discrimination. It consequently concluded that Articles 116-1 (vii) and 64-1 (vii) of the Code of Criminal Procedure violated the equality principle and ruled them unconstitutional.

Articles 64-1 (vii) and 116-1 (vii) of the Code of Criminal Procedure were revoked with effect from the date of publication of the Constitutional Council's decision. From that date onwards, this revocation is applicable to hearings of persons held in police custody and examinations of persons under caution.

#### *Languages:*

French.



#### *Identification:* FRA-2012-1-006

**a)** France / **b)** Constitutional Council / **c)** / **d)** 04.05.2012 / **e)** 2012-240 QPC / **f)** Mr Gérard D. (Definition of the offence of sexual harassment) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 05.05.2012, 8015 / **h)** CODICES (French, English).

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

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

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

Sexual harassment, definition.

#### *Headnotes:*

The provisions of the Penal Code on the offence of sexual harassment, which is punishable without an adequate definition of the constituent elements of the offence, infringe the principle that penalties must have a proper legal basis and are therefore contrary to the Constitution.

#### *Summary:*

I. On 29 February 2012, the Court of Cassation referred to the Constitutional Council, under the conditions set out in Article 61-1 of the Constitution, an application for a priority preliminary ruling on constitutionality (QPC) concerning the conformity of Article 222-33 of the Penal Code with the rights and freedoms secured by the Constitution.

The offence of sexual harassment was introduced into the Criminal Code in 1992, when it was defined as the fact of harassing another person by means of orders, threats and/or coercion, with a view to obtaining favours of a sexual nature, committed by persons abusing the authority conferred on them by their office. The Law of 17 July 1998 added heavy pressure to the list of acts by means of which harassment can be committed. However, the Law of 17 January 2002 on social modernisation amended this definition in order to extend the scope of the offence by deleting all the details on acts possibly constituting harassment, as well as the reference to abuse of authority. Following these successive laws, the version of Article 222-33 of the Penal Code as submitted to the Constitutional Council stated that the fact of harassing another person with a view to obtaining favour of a sexual nature shall be punished by one year's imprisonment and a fine of € 15 000.

The Constitutional Council had recourse to its established case-law on the principle that penalties must have a proper legal basis. This principle, which is based on Article 8 of the 1789 Declaration of the Rights of Man and the Citizen, requires the legislature to define crimes and offences sufficiently clearly and precisely. In the instant case, Article 222-33 of the Penal Code enables the offence of sexual harassment to be punishable without an adequate definition of the constituent elements of the offence. Consequently, these provisions violate the principle that penalties must have a proper legal basis. The Constitutional Council therefore declared them contrary to the Constitution. Article 222-33 of the Penal Code was revoked with effect from the date of publication of the Constitutional Council's decision, this revocation being applicable to all cases which had not yet become *res judicata* at such date.

*Languages:*

French.



## Germany

### Federal Constitutional Court

#### Important decisions

*Identification:* GER-2012-1-001

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 09.11.2011 / **e)** 1 BvR 461/08 / **f)** Holocaust denial / **g)** / **h)** [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de); CODICES (German).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Hate speech / Hatred, incitement / Holocaust, denial.

*Headnotes:*

The passing on of National Socialist written material to an individual, specific, third party with no indications of further dissemination does not constitute punishable “dissemination” within the meaning of the element of the offence in the criminal provisions on incitement to hatred.

*Summary:*

I. The applicant, who was born in 1924, is an advocate of National Socialist ideology. He passed written material to a landlord in the latter’s public house after having a discussion with him on the Second World War. The written material claimed in connection with the Holocaust that it was scientifically proven that there were no gas chambers for killing people, and that the Holocaust committed against the Jews was a “convenient lie” that made it possible to attribute guilt for the Second World War to Germany. The applicant had handed the written material to the pub landlord to enable him to inform himself about the allegedly factual historical events. No third parties had been present when this occurred.

The applicant was convicted for incitement to hatred on the basis of these facts in accordance with §130.2 no. 1a, §130.3 and §130.5 of the Criminal Code (*Strafgesetzbuch*), which reads as follows:

“(1)...

(2) Whosoever,

1. with respect to written materials (...) which incite hatred against a previously indicated group, segments of the population or against an individual because of his/her affiliation to a previously indicated group or to a segment of the population, which call for violent or arbitrary measures against them, or which assault their human dignity by insulting, maliciously maligning or defaming them

a) disseminates such written materials;  
b) (...)

shall be liable to imprisonment of up to three years or a fine.

(3) Whosoever publicly or in a meeting approves of, denies or plays down an act committed under the rule of National Socialism of the kind indicated in § 6.1 of the Code of International Criminal Law (*Völkerstrafgesetzbuch*), in a manner capable of disturbing the public peace shall be liable to imprisonment of up to five years or a fine.

(4) (...)

(5) §130.2 shall also apply to written materials (...) of a content such as is indicated in §130.3 and §130.4.

(6) (...)”

The appeals on points of fact and law and on points of law only against the judgment of the Local Court (*Amtsgericht*) were unsuccessful in the outcome.

II. The Federal Constitutional Court found that the criminal conviction violated the applicant's freedom of opinion guaranteed by sentence 1 of Article 5.1 of the Basic Law.

The Court stated its reasoning as follows:

Opinions are always covered by the guarantee of freedom of expression protected by sentence 1 of Article 5.1 of the Basic Law. This is not a matter of whether they prove to be true or untrue, whether they are well-founded or unfounded, emotional or rational, or are assessed as being valuable or valueless, dangerous or harmless. Accordingly, even

the dissemination of National Socialist ideas does not fall outside the area protected by freedom of opinion *per se*.

Sentence 1 of Article 5.1 of the Basic Law also protects statements of fact since, and to the degree that, they are or can be a prerequisite for the formation of opinions. Deliberately or provenly untrue factual statements, by contrast, are not protected. The requirements made of the duty of truth may however not be overstretched. If it is not possible to separate the actual and the evaluative elements in an individual case without this falsifying the meaning of the statement, the statement as a whole must be regarded as an expression of opinion in the interest of the effective protection of fundamental rights.

However, the fundamental right of freedom of opinion is not protected without reservation. In accordance with Article 5.2 of the Basic Law, it is in particular subject to the restrictions emerging from the general laws. Provisions which aim to prevent the propagandistic affirmation of the National Socialist rule of arbitrary force are excepted from the requirement of the generality of opinion-restricting laws.

When interpreting and applying the provisions restricting freedom of opinion, in turn, justice must be done to the restricted fundamental right. Solely the lack of value attaching to or the dangerous nature of opinions as such is not a reason to restrict them. It is not permissible to ban the content of an opinion as such, but only the manner of communication which already tangibly gives rise to overstepping the line to violating legal interests, and hence crosses the threshold to an immanent violation of legal interests.

In shaping incitement to hatred crimes, the legislator has taken the significance of sentence 1 of Article 5.1 of the Basic Law in defining values into account in that not all types of statement are made punishable in § 130.2 no. 1a, § 130.3 and § 130.5 of the Criminal Code. Punishment is imposed only on the dissemination which takes place if written material is made available to a larger group of individuals which can no longer be controlled.

According to the case-law of the Federal Constitutional Court, the passing on of written material to individual specific third parties by itself does not satisfy the element of the offence of dissemination if it is not ascertained that the third party for his/her part will pass on the written material to further individuals.

In the case at hand, the protected area of freedom of opinion is accessible. The denial of the Holocaust expressed by the applicant, as a provenly untrue statement of fact, is not *per se* covered by this protection. This allegation is however inseparably linked in the instant case to hypotheses which, as evaluative statements, are covered by the area protected by freedom of opinion.

The Federal Constitutional Court held that, because of this, the impugned rulings should have taken into account the significance of sentence 1 of Article 5.1 of the Basic Law in defining values. However, the ordinary courts overstretched the element of the offence of dissemination by already subsuming the mere exchange of written material between two individuals under the element of the offence of § 130.2 no. 1a, § 130.3 and § 130.5 of the Criminal Code although there were no indication that the recipient would continue to disseminate the written material that had been passed on. Accordingly, the Federal Constitutional Court remitted the case to the ordinary court for re-hearing.

#### Languages:

German.



#### Identification: GER-2012-1-002

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 28.11.2011 / **e)** 1 BvR 917/09 / **f)** Defamation of the State / **g)** / **h)** www.bundesverfassungsgericht.de; *Zeitschrift für Urheber – und Medienrecht* 2012, 322-324; *Neue Juristische Wochenschrift* 2012, 1273-1275; CODICES (German).

#### Keywords of the systematic thesaurus:

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

#### Keywords of the alphabetical index:

Defamation / Defamation of the State / State, protection of honour.

#### Headnotes:

In the case of the element of the offence of defamation of the State, the threshold to a violation of legal interests is not overstepped until, because of the concrete nature and manner of the expression of opinion, the State is defamed to a degree that appears to be, at least indirectly, likely to endanger the existence, the functioning of state institutions or the peaceful life in the Federal Republic of Germany.

#### Summary:

I. In her constitutional complaint, the applicant objected to the criminal court's sentencing her to a fine for being an accessory to defamation of the State. This element of the offence is regulated as follows in the Criminal Code (*Strafgesetzbuch*):

#### “§ 90a

Defamation of the state and its symbols

(1) Whosoever publicly, in a meeting or through the dissemination of written materials (...)

- insults or maliciously expresses contempt for the Federal Republic of Germany or one of its states or its constitutional order; or
- defames the colours, flag, coat of arms or the anthem of the Federal Republic of Germany or one of its *Länder*,

shall be liable to up to three years' imprisonment or a fine.

(2)...

(3)..."

The subject-matter of the criminal proceedings was a flyer. As a member of the board of a district association of the (right-wing extremist) NPD party (National Democratic Party - *Nationaldemokratische Partei Deutschlands*), the applicant had taken on external responsibility for the flyer under the Law on the press. It had been distributed by persons who remained unknown following the premiere of the play entitled “Georg Elser – *allein gegen Hitler*” (“Georg Elser – alone against Hitler”). Entitled “Georg Elser – a hero or a murderer?”, the first two paragraphs of the text concerned the “militant Communist” Georg Elser and his attempted to assassinate Hitler in the Munich *Bürgerbräukeller* in 1939, accusing him of having “caused the deaths of eight innocent people”. The text went on to state:

“How degenerate has this FRG [Federal Republic of Germany] system become to need such a model for its frantic fight against what is right-wing (and therefore against everything that is German!)? It acclaims him in films and plays and forces school pupils to worship him ... ? How long

will it be until the Communist RAF terrorists are honoured in the same way and their victims are ridiculed? Murderers of innocent people cannot be role models!"

II. The Federal Constitutional Court quashed the criminal court rulings because they violated the applicant's freedom of opinion as guaranteed by fundamental rights, and remitted the case to the Local Court for a renewed ruling.

In essence, the Court based its decision on the following considerations:

The Court held that the constitutional complaint was well founded. The text of the flyer forming the subject-matter of the dispute, which largely contained expressions of opinion, was covered by the protective area of freedom of opinion, guaranteed by Article 5.1 of the Basic Law. Freedom of opinion is not granted without reservation, but finds its limits *inter alia* in the general laws. However, in application of the criminal provision that is material here, the impugned rulings did not do justice to the significance of freedom of opinion because they neglected the fact that the threshold to a violation of the legal interest protected by § 90a of the Criminal Code had not yet been overstepped by the distribution of the flyer.

The Court clarified that, when interpreting and applying a provision restricting freedom of opinion in an individual case, in order to do justice to the significance of the fundamental right in defining values, the content of an opinion as such may not be prohibited. It is only the nature and manner of the communication that may be prohibited if it oversteps the threshold for an imminent violation of legal interests. Unlike the individual citizen, no protection of honour accrues to the State that is guaranteed by fundamental rights. Hence, in a case under § 90a of the Criminal Code, the threshold for a violation of fundamental rights is not overstepped until, because of the concrete nature and manner of the expression of opinion, the State is defamed to a degree that appears to be, at least indirectly, likely to endanger the existence, the functioning of state institutions or the peaceful life in the Federal Republic of Germany.

The Court held that this was not so in the case at hand. On the occasion of the premiere of the play, the flyer forming the subject-matter of the dispute dealt with the underlying historical events concerning Georg Elser, and in the context of the public political clash of opinions, put forward its own evaluation in contrast to the play's valuation of the "FRG [Federal Republic of Germany] system", presumed to be different. In a context-related objectifying view, the core statement of the flyer is the sentence "Murderers

of innocent people cannot be role models!". The portrayal of the degeneration of the "FRG system", by contrast, was not the topical focus of the flyer with regard to either its content or its scope. It also did not relate, for instance, to the constitutional order, but only to one individual political aspect thereof, namely, the "frantic fight against what is right-wing". The Court accordingly held that the statements here remained within the arena of mere polemics, so that even an indirect likelihood of the flyer endangering the existence of the State and its institutions or the peaceful life in the Federal Republic of Germany appeared to be ruled out.

#### *Languages:*

German.



#### *Identification: GER-2012-1-003*

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 18.01.2012 / **e)** 2 BvR 133/10 / **f)** Measures of correction and prevention, execution, privatisation / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Der Strafverteidiger* 2012, 294-301; *Verwaltungs-rundschau* 2012, 170-174; CODICES (German).

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

4.15 Institutions – **Exercise of public functions by private bodies.**  
5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures.**

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

Fundamental rights, limitation / Public enterprise, privatisation / Public function, person discharging / Patient, psychiatric hospital, rights / Health, public health, institution.

#### *Headnotes:*

1. Article 33.4 of the Basic Law also applies to the exercise of public functions by private agencies. [Article 33.4 states that the "exercise of public authority as a permanent function shall, as a

rule, be entrusted to members of the public service whose status, service and loyalty are governed by public law.”].

2. Derogations from the principle that public functions are reserved to civil servants must be justified by a specific reason that is commensurate to the meaning of the possible exception.
3. The conferral of duties connected with measures of correction and prevention to formally privatised entities can be compatible with Article 33.4 of the Basic Law, with the principle of democracy and with the fundamental rights of the persons committed to an institution.

### Summary:

I. A patient committed to a psychiatric hospital as a measure of correction and prevention lodged a constitutional complaint. He objected to a special security measure (locking in) being ordered and carried out by coercive means by staff of the hospital, a company organised under private law which has been entrusted with measures of correction and prevention.

The institution to which the complainant has been committed had been transformed into a GmbH, i.e., a non-profit limited liability company (hereinafter, the “company”) in the year 2007 on the basis of sentences 3 to 6 of § 2 of the Act on the Execution of Measures of Correction and Prevention (*Maßregelvollzugsgesetz*) of the German *Land* (state of) Hesse (hereinafter, the “Act”). Part of the company’s shares is owned by the welfare association of the *Land* Hesse (*Landeswohlfahrts-verband*), part by another limited liability company which is wholly owned by the *Landeswohlfahrts-verband*. The *Land* Hesse has contractually entrusted the company with the task to execute, in its own name on behalf of the *Land* Hesse, the committals ordered as measures of correction and prevention according to nos. 1 and 2 of § 61 of the Criminal Code (*Strafgesetzbuch – StGB*). At the same time, the company was conferred the sovereign authority required for this task, including the authority to perform the concomitant encroachments on fundamental rights permissible according to the Act.

After an aggressive outburst, the complainant was locked in by violent means by staff of the company without the hospital management having been previously informed of the measure. He unsuccessfully applied before the non-constitutional courts for a declaration that the measure had been unlawful because only civil servants are allowed to order and carry out such an encroachment on a fundamental right.

II. The Federal Constitutional Court rejected the constitutional complaint as unfounded. The Court held that the basis for the encroachment under § 5.3 of the Act, which, in cases of imminent danger, authorises the staff of privatised institutions for the execution of measures of correction and prevention to provisionally order special security measures against persons committed to the institution, is compatible with the Basic Law. The Court provided two principal grounds for its decision:

First, by entrusting the staff of institutions owned by private agencies with duties connected with the execution of measures of correction and prevention, the provision of § 5.3 of the Act does not infringe the reservation of functions contained in Article 33.4 of the Basic Law, which requires that the exercise of public authority on a regular basis shall, “as a rule”, be reserved to members of the civil service who stand in a relationship of service and loyalty defined by public law, i.e. to civil servants.

Admittedly, Article 33.4 of the Basic Law also applies where private individuals or entities are entrusted to carry out public functions. However, the authority, provided in § 5.3 of the Act, to provisionally order special security measures is a permissible exception from the principle of the reservation of public functions to civil servants.

Derogations from this principle must be justified by a specific reason that is commensurate to the meaning of the possible exception. They cannot be justified by merely arguing that the exercise of duties by persons who are not civil servants would reduce the burden on the public budget. However, it can be taken into account whether a function has special characteristics due to which in the specific case, the relationship between the cost and the security advantage provided by having permanent civil servants carry out the task is different, i.e. considerably less advantageous, than can be presumed as a general rule according to Article 33.4 of the Basic Law.

Measured against this standard, an infringement of Article 33.4 of the Basic Law cannot be established. The privatisation approach that has been chosen seeks to maintain the organisational co-operation between the institutions for the execution of measures of correction and prevention and the other psychiatric institutions under the management of the respective agencies. Maintaining this co-operation is intended to have a beneficial effect on the quality of the measures of correction and prevention through synergy effects and improved possibilities of training and further training and of recruiting staff.

The assessment that the advantages of integrating the measures of correction and prevention into the privatised co-operation have not been bought at the price of noticeable disadvantages with regard to securing the qualified and law-abiding exercise of duties, which is essential in particular in the core area of the public functions of the state, is covered by the margin of appreciation of the legislator and of the government responsible for laying down the contractual framework. The assessment applies in view of the experience made concerning the use of the possible exception offered by Article 33.4 of the Basic Law in institutions of correction and prevention, and in view of the institutional organisation of the privatisation.

The privatisation of the institutions for the execution of measures of correction and prevention in Hesse is purely formal. A public agency, the *Landeswohlfahrtsverband*, retains full ownership of private hospitals for the execution of measures of correction and prevention; the hospitals are thus exempt from motives and constraints connected with gainful objectives. The task of executing measures of correction and prevention is not ceded to forces and interests of private-sector competition that might be systemically contrary to the statutory objectives of the measures of correction and prevention and to the safeguarding of the rights of the persons committed to the institution. The public-sector obligation to ensure that the equipment of the institutions competent for the execution of measures of correction and prevention is commensurate with their duties is not affected in any way. The human and material resources on which the possibility of an execution that is in conformity with the law, and especially with fundamental rights, essentially depends are ensured in the same way with institutions operated by private agencies as would be the case with an institution formally operated under public law. For the case of a strike, which cannot be ruled out if the persons in charge of executing the measures of correction and prevention are not civil servants, emergency services can and must ensure that, as required, third parties are not disproportionately impaired. Furthermore, the legal obligations of the private institutions and their staff that concern the execution of measures of correction and prevention are safeguarded by extensive controlling authorities of the public agency (i.e. the *Landeswohlfahrtsverband*) in a way that is similar to the situation in an institution formally organised under public law.

Second, § 5.3 of the Act does not infringe the requirements placed by constitutional law on the democratic legitimisation of sovereign action.

Democratic legitimisation must attain an overall level that is sufficient with regard to staff, materially and with regard to content. Conferring public authority on private entities must not result in the state abdicating its responsibility. The legislator's assessment that sufficient account has been taken of this responsibility under the framework conditions that have been established must prove true in reality. The state's responsibility for the proper fulfilment of the duties therefore includes a corresponding obligation of observation, also for Parliament. This requires *inter alia* that the possibilities of Parliament examining whether the duties are fulfilled will not be impaired.

With regard to the decisions encroaching on fundamental rights that have to be taken in the course of the execution of measures of correction and prevention in Hesse, the level of legitimisation that is required according to these preconditions is sufficiently ensured. The head of the respective institution and the other doctors with leadership functions derive their personal legitimisation from the fact that they, as employees of the *Landeswohlfahrtsverband*, are appointed by a corporation under public law. The employment of the staff of the private institution is placed in a context of legitimisation by the fact that according to the contract in which public authority is conferred, the head of the institution, who in turn is personally legitimised, has a right of proposal when a vacancy is filled, and by the fact that the management of the private institution is bound by his or her professional assessment.

Factually and on the level of content, the performance of duties by the privatised agencies operating the institutions and by the persons working there is legitimised by their being bound by the law, together with comprehensive authority to give instructions on the part of the responsible agencies under public law, while at the same time instructions by the management of the private agency in the area of responsibility of the head of the institution are excluded. The technical supervision provided is not insufficient.

The competent supervisory authorities are not only authorised but also obliged to effectively supervise the private entities on which they have conferred public functions; for its part, the manner in which the authorities perform their duties is situated in the necessary context of democratic legitimisation. The context of democratic legitimisation is not interrupted or impaired by submitting contractual arrangements concerning the performance of duties to secrecy or by other restrictions on the possibilities of parliamentary review.

Furthermore, it must be taken into account that according to sentence 6 of § 2 of the Act, the members of staff of the private psychiatric hospital may carry out activities that encroach on fundamental rights only to the extent that such activities are programmed by instructions of the managing staff in such a way that no margins of discretion are left or that margins of discretion remaining in individual cases will be filled by management-level staff. To the extent that § 5.3 of the Act authorises members of staff of the private institution to take provisional security measures, there is only a narrow margin of discretion, if any. Furthermore, the staff's legal obligation to inform the head of the institution without delay subjects the filling of the margin of appreciation to a feedback to the head of the institution's authority to give instructions; the feedback has a preventive effect.

#### *Languages:*

German, press release in English on the Court's website.



#### *Identification:* GER-2012-1-004

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 24.01.2012 / **e)** 1 BvR 1299/05 / **f)** Storage of subscriber data / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Wertpapiermitteilungen* 2012, 562-573; *Kommunikation und Recht* 2012, 274-278; *Computer und Recht* 2012, 245-253; CODICES (German).

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

5.3.36.2 Fundamental Rights – Civil and political rights – Inviolability of communications – **Telephonic communications.**

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

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

Informational self-determination, right / Telecommunication / Internet, anonymity, right / IP address / Subscriber data, storage.

#### *Headnotes:*

1. The attribution of telecommunications numbers to their subscribers is an encroachment upon the right to informational self-determination. In contrast, the attribution of dynamic IP addresses is an encroachment upon Article 10.1 of the Basic Law.
2. When creating an information procedure, the legislator must create a legal basis both for the transmission and for the retrieval of data.
3. The automated information procedure under §§ 112, 111 of the Telecommunications Act is compatible with the Constitution. In this connection, § 112 of the Act requires independent enabling legislation for the retrieval.
4. The manual information procedure of sentence 1 of § 113.1, §§ 111, 95.1 of the Telecommunications Act is compatible with the Basic Law when interpreted in conformity with the Constitution. Firstly, an appropriate legal basis is necessary for the retrieval of the data, and this legislation must itself have clear definitions creating a duty of information of the telecommunications enterprises. Secondly, the provision may not be used to attribute dynamic IP addresses.
5. The security authorities may only require information on access codes (sentence 2 of § 113.1 of the Telecommunications Act) if the statutory requirements for their use are satisfied.

#### *Summary:*

I. The constitutional complaint challenged §§ 111 to 113 of the Telecommunications Act (hereinafter, the "Act").

§ 111 of the Act imposes a duty on commercial providers of telecommunications services to collect and store the telecommunications numbers (telephone numbers, line identification numbers, mobile end device numbers and identifiers of email accounts) which they allocate or provide and the related personal data such as names, addresses and dates of birth.

§§ 112 and 113 of the Act create the basis for two different procedures to supply information from the data stored under § 111 of the Act.

In the automated procedure governed by § 112 of the Act, the providers of telecommunications services must supply the data in such a way that they can be accessed by the Federal Network Agency (*Bundesnetzagentur*) without the providers having notice of this. The Federal Network Agency must retrieve the data on the application of specifically designated authorities, including in particular the criminal prosecution and law enforcement authorities, using the automated procedure, and communicate it to them. The information may always be given if it is necessary to comply with statutory obligations.

The manual procedure governed by sentence 1 of § 113.1 of the Act, in contrast, imposes on the telecommunications enterprises themselves a duty to supply information. It is not only the suppliers who offer telecommunications services to the public (e.g. telephone companies and providers) who have a duty to provide information, but also all those who provide telecommunications services on a commercial basis (including, for example, hospitals, or if applicable, hotels). Under this provision, all authorities are in principle entitled to receive information. It is a requirement that in the individual case the information is needed to prosecute criminal offences and regulatory offences, to avert dangers or for intelligence activities.

Sentence 2 of § 113.1 of the Act creates a special duty to provide information with regard to access codes such as passwords or personal identification numbers (PINs). In this connection, those entitled to receive information include the criminal prosecution authorities and the security and intelligence services.

In the interpretation of § 113 of the Act, there is a widespread but controversial practice of giving information in addition on the holder of what is known as a dynamic Internet Protocol address (dynamic IP address). These are the telecommunications numbers under which above all private persons surf the internet.

The retrieval of the data by the authorities entitled to receive information is governed by their own legal basis; in practice, a legal basis which gives the authorities a general power to collect data has been regarded as sufficient.

The applicants use prepaid mobile phone cards and internet access services and assert that their fundamental rights are violated by the storage of their data and the potential communication of these in the information procedures.

II. The Federal Constitutional Court held that the collection and storage of telecommunications data

under § 111 of the Act and their use in the automated information procedure governed by § 112 of the Act are constitutional. The encroachment upon the right to informational self-determination effected by the Act is of only limited weight, and is justified in view of the aim of improving the state's performance of its duties. In this connection, the general data retrieval regulations of the authorities entitled to retrieve are also sufficient.

The constitutional complaint was also unsuccessful insofar as it challenged the provisions contained in sentence 1 of § 113.1 of the Act for the telecommunications service providers to give general information in the manual information procedure. However, the Court held that the provision must be interpreted in conformity with the Basic Law to the effect that special enabling legislation is required for data retrieval. In addition, sentence 1 of § 113.1 of the Act does not permit dynamic IP addresses to be attributed to persons. The Court held that for a transitional period, until 30 June 2013 at the latest, the provision may be applied without these conditions.

However, the Court found that sentence 2 of § 113.1 of the Act is not compatible with the right to informational self-determination. But the provision is to continue in effect on an interim basis, until 30 June 2013 at the latest, provided that the access codes may be collected only subject to the conditions which, under the applicable provisions in each case (for example the provisions of criminal law), govern their use.

#### *Languages:*

German, English (translation by the Court, available on the Court's website).



#### *Identification:* GER-2012-1-005

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 24.01.2012 / **e)** 1 BvL 21/11 / **f)** Ban on smoking / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport* 2012, 257-261; *Gewerbemiete und Teileigentum* 2012, 17-23; CODICES (German).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Profession, freedom to exercise, regulation / Smoking, ban / Smoking, passive / Smoking room.

*Headnotes:*

It is a violation of the principle of equality if the law allows, by way of exception to the statutory ban on smoking in eating and drinking establishments, separate smoking rooms in drinking establishments, but excludes eating establishments from this privilege.

*Summary:*

I. An Administrative Court brought proceedings for the review of a specific statute before the Federal Constitutional Court. The proceedings are based on the following facts:

According to the Act on the Protection from Passive Smoking of the German *Land* (federal state) of Hamburg (hereinafter, the "Act"), smoking in eating and drinking establishments is prohibited in principle. The only exceptions to the ban on smoking are single-room establishments with a space for guests of less than 75 square metres which are exclusively operated as drinking establishments. This means that they do not offer prepared meals and do not have a license to do so under the regulations applicable to restaurants, pubs and bars.

§ 2.4 of the Act permits all other (mere) drinking establishments, but not eating establishments, to provide separate smoking rooms.

The plaintiff in the original proceedings operates an eating and drinking establishment that consists of a pub and a "club room". The plaintiff has a license to operate an eating and drinking establishment on the premises. The competent administrative authority denied her application for an exemption from the ban on smoking to establish a smoking room in the club room. The action brought against the denial resulted in the submission made to the Federal Constitutional Court by the Administrative Court, which regards the exemption provision of § 2.4 of the Act as unconstitutional. It held the view that the provision infringed the free exercise of

an occupation in conjunction with the general principle of equality because the provision, without a justifying reason, denied eating establishments, unlike drinking establishments, the opportunity to provide separate smoking rooms.

II. The Federal Constitutional Court found that § 2.4 of the Act is incompatible with the free exercise of an occupation, which is guaranteed by Article 12.1 of the Basic Law, in conjunction with the general principle of equality in Article 3.1 of the Basic Law, to the extent that the provision denies operators of eating establishments, unlike operators of drinking establishments, the opportunity to permit smoking in separate rooms of their establishments. Until a new statutory provision is enacted, the provision continues to apply with the proviso that separate smoking rooms may be set aside also in eating establishments.

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

As the Senate fundamentally held in its judgment of 30 July 2008, the ban on smoking in eating and drinking establishments encroaches on publicans' free exercise of their profession. The consequence of the distinction made between eating and drinking establishments in sentence 1 of § 2.4 of the Act is that operators of eating establishments cannot, freely exercising their occupation, create an environment in their establishments that is attractive to guests who smoke as well. This can involve considerable economic disadvantages especially for eating establishments which primarily serve alcoholic beverages. The unequal treatment is not objectively justified because there is no sufficiently weighty reason for the differentiation.

First, the fact that the distinction made between eating and drinking establishments in the provision was the result of a political compromise of the parliamentary groups supporting the government in the Hamburg state parliament at the time of the enactment of the statute is by itself not a sufficient reason for differentiation.

Second, the unequal treatment cannot be justified by reasons of health protection. With a view to protecting the health of the catering staff, the required connection between this legislative objective and the differentiation between eating and drinking establishments opted for by the legislator does not exist. For not only in eating establishments but also in drinking establishments the staff, when serving the guests in the smoking rooms permitted there, is exposed to the dangers of passive smoking.

Nor can the unequal treatment be justified by the protection of the non-smoking guests' health. No scientific findings have been submitted according to which the combination of eating and passive smoking results in particularly high pollution levels for non-smoking guests. But even this assumption would not provide a justification for denying the operators of eating establishments the possibility, existing for other establishments, of providing smoking rooms. The guests can have their meals in non-smoking areas; according to the legal regulations, the smoking areas have to be separated from the non-smoking areas in a manner that excludes a hazard caused by passive smoking.

In addition, the consideration that by not permitting smoking rooms in eating establishments, a larger number of people are protected from the dangers of passive smoking would not be able to provide an objectively justifiable reason for the differentiation. For the objective of the provision to reduce the opportunities for smoking would not have an intrinsic connection to the differentiation between eating and drinking establishments.

Third, it would also not be possible to justify the unequal treatment of eating and drinking establishments by putting forward that the respective economic impact of a ban on smoking is possibly different. This argument already lacks a sufficient factual basis.

The assumption as a reason for differentiation that the economic burden on the drinking establishments is generally heavier than that on the eating establishments also cannot be based on the Federal Constitutional Court's judgment of 30 July 2008 in which the Court found that provisions on bans on smoking in eating and drinking establishments were incompatible with the free exercise of a profession because the bans disproportionately burdened smaller establishments which primarily serve alcoholic beverages. The decisive criterion of differentiation was explicitly not the fact that such corner pubs, or single-room pubs, are drinking establishments. What was decisive was the special type of establishment, which is characterised in particular by regulars who smoke, and for which a decrease in turnover resulting in a threat to its existence would have to be feared as a consequence of a ban on smoking. Only in this connection was the different range of catering used as one of several characteristics of differentiation, and was cited again in the description of the legislator's possibilities when drafting the legislation.

#### Cross-references:

- Decision of 30.07.2008, *Bulletin* 2008/2 [GER-2008-2-014].

#### Languages:

German, English (translation by the Court, available on its website).



#### Identification: GER-2012-1-006

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 25.01.2012 / **e)** 1 BvR 2499/09, 1 BvR 2503/09 / **f)** Written reporting on famous persons / **g)** / **h)** www.bundesverfassungsgericht.de; *Juristische Arbeitsblätter* 2012, 399-400; *Zeitschrift für die Anwaltspraxis* EN-no. 160/2012; CODICES (German).

#### Keywords of the systematic thesaurus:

- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
- 5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press.**
- 5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation.**

#### Keywords of the alphabetical index:

Public figure, honour and reputation / Personality, right, general, encroachment.

#### Headnotes:

There is no standard assumption for priority being afforded to the general right of personality *vis-à-vis* freedom of opinion in the case of vulnerable interests of juveniles or young adults.

#### Summary:

I. The applicant is a subsidiary of the publisher of the "Sächsische Zeitung" daily newspaper, which disseminates reports, including through its Internet site. Its two constitutional complaints relate to reports

on an incident from 2008 which involved two persons, both sons of Uwe Ochsenknecht (a famous actor in Germany), who are themselves also actors and singers, and are relatively well known in Germany.

The Ochsenknecht brothers had been observed at night together with a group of friends interfering with bicycles, tearing flowers out of a flowerbed and ripping out the receiver from a telephone box. The brothers were released after their details had been taken at the police station. No investigation proceedings were initiated against either of the two. The applicant disseminated a report on its Internet site on this incident headlined "Police take Ochsenknecht's sons in", reporting "both young actors and singers questioned by the police after wild vandalism in the centre of Munich".

The brothers were subsequently successful at two instances of the ordinary (non-constitutional) courts with requests for injunctions regarding reporting on the incident as physical damage, as well as individual comments regarding the events. The applicant objected to these rulings of the ordinary courts.

II. The Federal Constitutional Court quashed the impugned rulings on the basis that they violated the applicant's fundamental right to freedom of opinion, and remitted the cases to the Regional Court (*Landgericht*) for a renewed ruling.

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

The Court held that the constitutional complaints were well-founded. The impugned report on the incident, which was uncontentious in itself, falls within the area protected by freedom of opinion. The latter is not granted without reservation, but finds its limits *inter alia* in the general statutes. In applying the material provisions of civil law, the ordinary courts had however disregarded the significance and scope of freedom of opinion. They had not dealt adequately with the special circumstances within the scope of the plaintiffs' general right of personality and thus granted priority to it in the context of the necessary weighing.

The general right of personality particularly provides protection against impairment of privacy and intimacy. In the field of written reporting, it does not offer protection against being named at all in a report individually, but only in specific respects. This is above all a matter of the content of the reporting. For reporting on criminal proceedings it is recognised that, with regard to the presumption of innocence, the naming of any persons or other means of identifying the offender is not always permissible. In particular, with grievous criminal offences, the danger of

stigmatisation of a person who has not yet been convicted with legal force may be increased. This is however different to the reporting at hand on the uncontentious conduct of a group of young people on a public street. Reporting on this conduct was independent of criminal proceedings, and it was of minor relevance at most under criminal law. Moreover, the report only affected the plaintiffs' social sphere. Furthermore, the latter placed themselves in the public eye, maintaining their image as "young wild ones" and exploiting their function as idols for commercial purposes. The ordinary courts failed to adequately include these circumstances in their considerations.

What is more, it should be taken into account in the weighing that the press may not be limited, in carrying out its tasks in principle, to using anonymised reporting. In factual reports, true statements must as a rule be accepted, even if they are disadvantageous to the person concerned. On the other hand, there is no doubt that the young age of the plaintiffs should be included in the considerations. The standard presumption made by the ordinary courts of the fundamental priority afforded to the general right of personality *vis-à-vis* freedom of opinion, as soon as vulnerable interests of young adults or juveniles are concerned, was however constitutionally too narrow and undifferentiated. It ignored the need to assess individual cases. In the case at hand, it furthermore allotted too little consideration to the fact that the significance of the encroachment on privacy was reduced both by the "public image" of the plaintiffs and by the categorisation of their conduct as small-scale crime.

#### Languages:

German.



#### Identification: GER-2012-1-007

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 07.02.2012 / **e)** 1 BvL 14/07 / **f)** Bavarian Land Child care Benefit Act / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Zeitschrift für die Anwaltspraxis* EN-Nr 178/2012; CODICES (German).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Child care benefit, right, citizenship, link.

*Headnotes:*

The legislator is not absolutely prohibited from differentiating by citizenship. However, the principle of equality before the law requires that taking citizenship as a differentiating element must be justified by a sufficient factual reason.

*Summary:*

I. In 1989, the German federal state of Bavaria introduced *Land* (state) child care benefit. This is granted immediately following the drawing of federal child care benefit, which parents receive as a family benefit during the first and the second year of a child's life. The *Land* child care benefit is intended to enable parents to take parental leave for a longer period of time and to care for their children themselves. Under the *Land* Child care Benefit Act (hereinafter, the "Act") in the version of the year 1995, which is the subject of the present proceedings, *Land* child care benefit was in principle granted for a further twelve months of the child's life after the receipt of federal child care benefit, in the amount of 500 German marks per month. Under sentence 1 no. 5 of Article 1.1 of the Act, the only persons entitled to draw it were those who held citizenship of a Member State of the European Union (EU) or of another contracting party to the Agreement on the European Economic Area (EEA).

The plaintiff in the original proceedings is a Polish citizen and petitioned for *Land* child care benefit for her child, who was born in the year 2000. She had lived in Bavaria since 1984 and had repeatedly, although not continuously, worked in gainful employment since 1988. Her application for *Land* child care benefit was rejected because, by reason of her Polish citizenship, she was not entitled to *Land* child care benefit. Poland acceded to the EU in May 2004, i.e. when the third year of the child's life, for which the receipt of *Land* child care benefit is intended, had already elapsed.

The proceedings instituted against the rejection of the application for *Land* child care benefit initially resulted in the matter being referred to the Bavarian Constitutional Court. The Court declared that the provision of sentence 1 no. 5 of Article 1.1 of the Act was compatible with the Bavarian Constitution. The Social Court then referred the provision to the Federal Constitutional Court for constitutional review because it regarded it as incompatible with the principle of equality before the law and the protection of marriage and the family guaranteed by Article 3.1 and Article 6 of the Basic Law.

II. The Federal Constitutional Court held that sentence 1 no. 5 of Article 1.1 of the Act in the version of the year 1995 and also the successive provisions, whose contents are identical, are not compatible with the principle of equality before the law under Article 3.1 of the Basic Law because without a factual reason they exclude from the claim to child care benefit all persons who do not have one of the citizenships required therein. The Court held that the legislator must replace the unconstitutional provisions by 31 August 2012 by reformed provisions; in the event of a failure to do so, the unconstitutional provisions will become void.

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

First, the requirement of citizenship referred for review does not violate the state's duty to protect and encourage the family, which follows from Article 6.1 and 6.2 of the Basic Law. For the general constitutional requirement to support the parents' function of caring and bringing up the child gives rise to no concrete claims to particular state benefits and thus to no constitutional duty of the *Land* of Bavaria to support families by granting child care benefit.

Second, notwithstanding the above, the provision of sentence 1 no. 5 of Article 1.1 of the Act violates the principle of equality before the law (Article 3.1 of the Basic Law), because there is no legitimate statutory purpose which could justify the unequal treatment of the foreign citizens not included in the terms of the Act. The grant of child care benefit is aimed above all to enable parents to care for their children themselves by forgoing or limiting gainful employment and in this way to encourage early childhood development. This statutory purpose does not justify the exclusion of benefits contained in the referred provision, since it applies to foreign citizens and their children in the same way as to Germans. The constitutional protection of the family is not restricted to Germans.

Nor can the unequal treatment be justified by the purpose of restricting a form of advancement to persons who will be living permanently in Bavaria. For the criterion of citizenship is neither directed to this purpose nor suitable to give reliable information on the duration of a person's future residence. Since the referred provision differentiates not by origin from other *Länder* (states), but by citizenship, it can also not be justified under the aspect of assistance of so-called "people of the *Land* (*Landeskinder*)".

The prevention of "bandwagon effects" which might result from persons taking up residence temporarily in Bavaria in order to obtain Bavarian child care benefit also fails to stand up to examination as a statutory purpose. For citizenship alone cannot give reliable information on the duration of residence in Bavaria.

Nor can public-revenue interests justify the discrimination against foreign citizens effected by sentence 1 no. 5 of Article 1.1 of the Act. It is admittedly a legitimate purpose to avoid state expenditure, but this cannot in itself justify the unequal treatment of categories of persons. If there is no factual ground of differentiation beyond this, the legislator must if necessary take account of fiscal-policy concerns by restricting the amount or duration of the benefit for all those entitled.

Finally, differentiation by citizenship cannot be justified by the international-law principle of reciprocity if for no other reason than because the provision governing entitlement to benefit in Article 1.1 sentence 1 no. 5 of the Act does not differentiate on the basis of the reciprocal guarantee of corresponding benefits and thus leaves no room for the review of requirements of reciprocity.

#### *Languages:*

German, English (translation by the Court, available on its website).



#### *Identification:* GER-2012-1-008

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 09.02.2012 / **e)** 2 BvR 1064/10 / **f)** Deportation / **g)** / **h)** CODICES (German).

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

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

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

5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures.**

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

Deportation, detention pending / Right, protection, judicial / Liberty, deprivation / Order, judicial.

#### *Headnotes:*

Where there has been an insufficient examination of whether a person has an enforceable duty to leave the country and yet an order is issued to deprive him or her of his or her liberty in order to ensure that the person can be deported, this can amount to a violation of such person's fundamental rights under sentence 2 of Article 2.2 (freedom of the person) in conjunction with Article 20.3 (principle of the rule of law) of the Basic Law.

#### *Summary:*

I. The applicant is a Georgian national. At the beginning of 2008 he entered the Federal Republic of Germany from the Slovak Republic and made an application for asylum. The Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*) rejected his application on the grounds that it was inadmissible and ordered that he be deported to the Slovak Republic.

After several failed attempts to deport him and after the expiry of the deadline for handing him over, the Federal Office reopened asylum proceedings, rejected his application for asylum as obviously unfounded and threatened to deport him.

In response to an application from the Aliens Authority (*Ausländerbehörde*), the Local Court (*Amtsgericht*) issued an order for the temporary deprivation of the applicant's liberty on 26 November 2009, which order is the subject of the present challenge. The applicant had in the meantime moved to the Netherlands, but was to be handed over to the Federal Republic of Germany on 30 November 2009. The Local Court found that its previous examination showed that the Aliens Authority's application for an order for detention pending deportation, which the temporary deprivation of the applicant's liberty was intended to secure, was patently well-founded. In the Local Court's view, it was at the same time apparent

from the application made that the applicant was obliged to leave the Federal Republic of Germany. Notwithstanding this, he had disappeared and had not fulfilled his duties under residence law. There were reasonable grounds to suspect that he would not voluntarily leave the country, but would seek to avoid deportation. The Local Court otherwise referred to the Aliens Authority's application.

After the applicant had been handed over by the Dutch authorities, the Local Court issued an order, which is not contested by the constitutional complaint, for detention pending deportation of the applicant on 30 November 2009. The objection raised against this order before the Regional Court (*Landgericht*) was unsuccessful. In its order of 22 July 2010 the Federal Court of Justice (*Bundesgerichtshof*) allowed the appeal on the basis that the application for an arrest warrant had not been properly substantiated because it did not indicate the basis for the duty to leave the country.

The applicant justified his objection to the order for temporary deprivation of liberty on the grounds that it was not apparent at the time of the order for his detention that he was obliged to leave the country. He asserted that it was not clear from the files that the notice rejecting his application for asylum and threatening him with deportation had been properly served. He claimed that he had no knowledge of such notice.

In February 2010, the applicant was deported to Georgia.

II. The Federal Constitutional Court held that the constitutional complaint was admissible and patently well-founded, and that the challenged orders violated the applicant's right to freedom of the person under sentence 2 of Article 2.2 of the Basic Law in conjunction with the general principle of the rule of law guaranteed by Article 20.3 of the Basic Law.

The Federal Constitutional Court recalled that, in the case of deprivation of liberty, which is the most serious encroachment on the fundamental right to freedom, Article 104.2 of the Basic Law adds an additional requirement to the requirement of a specific enactment of a statute, namely the requirement of a court order. All state institutions are obliged to ensure that this requirement of a court order is effective in practice to safeguard fundamental rights. The urgency of obtaining a judicial decision can justify simplifying and shortening court proceedings; it may not, however, jeopardise the process of reaching an independent and especially reliable decision.

Decisions in detention proceedings must be based on an adequate investigation of the facts by the courts and

have an appropriate factual basis. In particular, the courts are obliged to examine whether a duty to leave the country exists when deciding to impose or, as the case may be, extend detention pending deportation.

These requirements are in any case applicable to a temporary deprivation of liberty to the extent that an examination of the case on the merits does not jeopardise their purpose.

In principle the same general constitutional requirements which are placed on the courts' duty to investigate the facts also apply in the case of a temporary deprivation of liberty. This applies at any rate where the necessary investigations can be carried out without jeopardising the purpose of the proceedings.

A violation of procedural and formal requirements still remains significant if the substantive requirements for detention were fulfilled. A hypothetical approach would conflict with the requirement of a specific enactment of a statute in Article 104.1.

The documents submitted did not allow the Local Court to make an independent review of the applicant's duty to leave the country. No reasons for any such duty were evident from the application for temporary detention. Neither the notice establishing a duty to leave the country, nor the date or method of its publication was indicated.

The Local Court did not undertake any investigations of its own in relation to the duty to leave the country although it had reason to do so. Furthermore, it would have been possible to verify the existence of such a duty.

The Federal Constitutional Court held that, in addition, the decision of the Regional Court did not satisfy the requirements presented. The Regional Court should not have regarded the notice on which the duty to leave the country was based as valid without further ado. Moreover, it should not have relied on the ambiguous and unsubstantiated notification from the Federal Office for Migration and Refugees.

*Languages:*

German.



*Identification:* GER-2012-1-009

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 28.02.2012 / **e)** 2 BvE 8/11 / **f)** *Sondergremium*, Euro rescue package / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Wertpapiermitteilungen* 2012, 494-502; CODICES (German).

*Keywords of the systematic thesaurus:*

3.3.1 General Principles – Democracy – **Representative democracy.**  
 4.5.1 Institutions – Legislative bodies – **Structure.**  
 4.5.4.4 Institutions – Legislative bodies – Organisation – **Committees.**  
 4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies.**  
 4.10.2 Institutions – Public finances – **Budget.**

*Keywords of the alphabetical index:*

Euro rescue package / Parliament, committee / Parliament, group, parliamentary / Parliament, membership / Parliament, powers.

*Headnotes:*

1. In principle, the *Bundestag* (national parliament) complies with its function as a body of representation in its entirety and through the participation of all its Members, not through individual Members, a group of Members or the parliamentary majority. The *Bundestag's* right to decide on the budget and its overall budgetary responsibility are, in principle, exercised through deliberation and decision-making in the plenary sitting.

2. The principle of representative democracy, which is anchored in sentence 2 of Article 38.1 of the Basic Law, guarantees every Member of Parliament not only freedom in the exercise of his or her mandate, but also equal status as a representative of the entire people. To be justified, differentiations regarding the status of a Member of Parliament therefore require a special reason which is legitimised by the Constitution and which is of a weight that can outbalance the equality of Members of Parliament.

3. To the extent that the transfer of competences to decide to a decision-making committee intends to exclude Members of Parliament from participating in the overall budgetary responsibility, this is only admissible to protect other legal interests of constitutional rank, and if the principle of proportionality is strictly observed.

*Summary:*

I. In *Organstreit* proceedings (relating to a dispute between supreme federal bodies), two Members of the *Bundestag* objected to the new legislation, adopted in connection with the extension of the “euro rescue package”, concerning the *Bundestag's* rights of participation.

As a reaction to the sovereign debt crisis, the Member States of the European Monetary Union (EMU) created the “euro rescue package”. In this connection, they established a special purpose vehicle, the European Financial Stability Facility (EFSF). It is provided with guarantees by the Member States enabling it to borrow money on the capital markets which it makes available to over-indebted Member States. The Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism, or Euro Stabilisation Mechanism Act (*Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus*, or *Stabilisierungsmechanismusgesetz*, hereinafter, the “Act”) of 2010 defined the preconditions for rendering financial assistance at national level.

In May/July 2011, the Member States agreed to make the EFSF's maximum loan capacity of 44 billion Euro fully available and to provide the EFSF with further, more flexible instruments. In Germany, the European agreements were transposed by the Act Amending the Euro Stabilisation Mechanism Act (*Gesetz zur Änderung des Stabilisierungsmechanismusgesetzes*), which entered into force on 14 October 2011. The amending Act provides guarantee facilities on the part of the Federal Republic of Germany that have now been raised to approximately 211 billion Euro; it defines the extended instruments of the EFSF and determines the prerequisites of their use. Furthermore, it redefines the *Bundestag's* responsibilities. According to the amending Act, decisions of the German representative in the EFSF that concern the *Bundestag's* overall budgetary responsibility in principle require the consent of the *Bundestag*. In cases of particular urgency and confidentiality, however, the *Bundestag's* competence shall, according to § 3.3 of the Act, be exercised by a newly created committee (the so-called *Sondergremium*). Its members shall be elected from among the members of the Budget Committee (41 at present). According to the new legislation, emergency measures aimed at preventing risks of contagion shall as a general rule be deemed particularly urgent or confidential. In all other cases, the Federal Government can assert that a situation of urgency or confidentiality exists. The *Sondergremium* has the right to object to this assertion by a majority decision in order to achieve a

decision of the entire *Bundestag* to decide. Apart from that, according to § 5.7 of the Act the rights of the *Bundestag* to be informed can be transferred to the committee in cases of particular confidentiality.

On 26 October 2011, the *Bundestag* elected the members of the *Sondergremium*. Upon the applicants' application of 27 October 2011, the Federal Constitutional Court, by its order of the same day, issued a temporary injunction according to which the *Bundestag's* competences were not allowed to be exercised by the *Sondergremium* until a ruling in the main proceedings would be issued.

II. Reviewed against the standards set out in the Headnotes, the Federal Constitutional Court held that the application made by the Members of Parliament was, for the most part, well-founded.

First, the Court held that § 3.3 of the Act violates the applicants' rights under sentence 2 of Article 38.1 of the Basic Law. The provision completely excludes the Members of Parliament who are not represented in the *Sondergremium* from substantial decisions affecting the *Bundestag's* overall budgetary responsibility. It thus effects unequal treatment with regard to the parliamentary rights of participation that arise from the status of a Member of Parliament.

The establishment of a subsidiary body to exercise duties of the *Bundestag* autonomously and as a substitute of the plenary sitting is covered by Parliament's right to organise its own affairs. In principle, the exclusion of the Members of Parliament who are not represented in such a subsidiary body can be justified by reasons orientated towards Parliament's ability to function, which enjoys constitutional rank. This principle fundamentally justifies that in cases of particular urgency or confidentiality, the *Bundestag* may make provision for speedy action and against planned measures becoming known, if otherwise, internal decision-making in Parliament in a way that is appropriate to the matter would not be not ensured.

However, where the rights of the Members of Parliament arising from their status are restricted, the principle of proportionality must be observed. An appropriate balance must be guaranteed between the rights of the Members of Parliament arising from their status and the *Bundestag's* ability to function that collides with such rights. The establishment of the *Sondergremium* provided in § 3.3 of the Act does not satisfy these requirements under the perspective of particular urgency or under that of confidentiality.

Reasons of particular urgency cannot justify the extensive delegation of competences of the *Bundestag* to the *Sondergremium* with regard to any of the emergency measures indicated in the EFSF's list of measures. No reasons are apparent which would require having a subsidiary body with the "smallest possible number of members" that would be able to meet as quickly as possible. The lower administrative effort involved with having to convene only nine members of the panel is not sufficient. The fact that no deputies are provided for the members of the *Sondergremium*, so that a few members being unable to attend might result in the committee lacking a quorum, also speaks against particular urgency. Moreover, all measures taken by the EFSF require extensive preparative actions and implementing measures by the applying state and the EFSF.

Reasons of particular confidentiality justify the transfer of decision-making competences to the *Sondergremium* only with regard to some of the emergency measures indicated in the EFSF's list of measures.

The transfer is constitutionally unobjectionable to the extent that the purchase of government bonds by the EFSF on the secondary market must be deliberated upon and decided. Even the planning of such an emergency measure becoming known would be likely to prevent the measure's success. It must therefore be assumed that the preparation of such an emergency measure, i.e. also its deliberation and a decision adopting the measure, must be subject to absolute confidentiality.

In contrast, the provision contained in § 3.3 of the Act, according to which emergency measures aimed at preventing risks of contagion shall "as a general rule" be deemed particularly urgent or confidential, is not compatible with the rights resulting from status as a Member of Parliament. The assumption of a general rule fails to consider that the possibility of delegation is restricted to strictly limited exceptions. It does not do justice to the requirements placed on a balance between the interest in the security of classified information, which serves the *Bundestag's* ability to function, and the rights arising from the status of a Member of Parliament that conflict with such interest. The restriction of the rights of the Members of Parliament arising from their status is additionally exacerbated by the fact that the plenary assembly has no effective possibility of examining in advance whether the assumption of a general rule is valid, and of resuming control of the matter.

Second, the Court held that the provision in § 5.7 of the Act, which provides for the possibility of transferring the *Bundestag's* rights to be informed to the *Sondergremium* in cases of particular confidentiality, does not violate the rights of the Members of Parliament arising from their status under sentence 2 of Article 38.1 of the Basic Law. However, the rights of the Members of Parliament to be informed may take a back seat only to the extent that is absolutely necessary in the interest of Parliament's ability to function. The provision is to be interpreted in such a way that Parliament's rights to be informed are suspended only as long as the reasons for particular confidentiality exist. Once these reasons have ceased to exist, the Federal Government must of its own accord inform the *Bundestag* without delay about the involvement of the *Sondergremium* and the reasons justifying such involvement.

#### Languages:

German, press release in English on the Court's website.



#### Identification: GER-2012-1-010

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 05.03.2012 / **e)** 2 BvR 1464/11 / **f)** "Deals" in criminal proceedings / **g)** / **h)** www.bundesverfassungsgericht.de; *Neue Juristische Wochenschrift* 2012, 1136-1137; CODICES (German).

#### Keywords of the systematic thesaurus:

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

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

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

#### Keywords of the alphabetical index:

Appeal, right / Criminal trial / Plea bargaining.

#### Headnotes:

The fundamental procedural right to a fair trial may be violated by a failure to further investigate the facts when examining whether a deal was made during criminal proceedings and whether a waiver of an appeal was therefore invalid.

#### Summary:

In August 2009, the Criminal Code (*Strafprozessordnung* – StPO) was amended through the insertion of § 257c, which makes it possible for the parties to criminal proceedings to agree on the legal consequences of a sentence in what is referred to as a "deal".

The constitutional complaint in the present case was not concerned with the constitutionality of deals in criminal trials or their statutory basis. The real issue was the scope of an appellate courts' duty to investigate the facts when examining whether a deal was made and whether a waiver of appeal was therefore invalid. Sentence 2 of § 302.1 of the Criminal Code prevents the parties to proceedings from validly waiving an appeal against a sentence if sentencing was preceded by a deal.

With regard to the court's duty of documentation, § 273.1a of the Criminal Code provides that the court record of the trial must show the main events leading to a deal and its content. Similarly, if no deal is reached, this must also be recorded.

On the basis of his confession, the applicant was sentenced by the Local Court (*Amtsgericht*) to imprisonment for a total of two years and ten months for committing various crimes. After the court had handed down its sentence and the cancellation of the warrant of arrest, the public prosecutor and the applicant waived their rights of appeal. The applicant later lodged an appeal against the judgment and claimed that his waiver of an appeal had been invalid because his sentence was based on a deal between the parties to the proceedings. Neither the court record nor the judgment contained any indication as to whether a deal was or was not reached. The court record simply contained a note that the trial was interrupted for a "legal discussion" before the accused gave his answer to the charge. The parties to the proceedings, however, gave different accounts of the course of the discussion and its content. According to a written statement from the applicant's defence lawyer, the parties had agreed on a sentence of two years and ten months in return for the cancellation of the arrest warrant. On the other hand, according to an official statement from the public prosecutor's

representative at that hearing, no real discussion about a particular measure of sentence took place. She stated she had been primarily concerned with an extension of pre-trial detention, while the applicant's chief objective was the cancellation of the warrant of arrest. The presiding judge of the criminal court, consisting of a professional judge and two lay judges, stated officially that he could no longer recall the exact course of events.

The Regional Court (*Landgericht*) dismissed the applicant's appeal as inadmissible because it found that it had not been proven that a deal had been made. It held that the waiver of the appeal was, therefore, valid. The objection immediately raised against the decision was unsuccessful before the Higher Regional Court (*Oberlandesgericht*). The Higher Regional Court found that the assumption that the waiver of an appeal was valid was unobjectionable. Since the court record did not contain the information required by § 273.1a of the Criminal Code, it had no probative value. Furthermore, due to the discrepancy in the statements by the defence lawyer and the public prosecutor's representative, the applicant was unable to provide sufficient proof during informal evidentiary proceedings to convince the Senate of the Higher Regional Court that a deal had been made.

The Federal Constitutional Court overturned the order of the Higher Regional Court challenged by way of constitutional complaint because it violated the applicant's fundamental procedural right to a fair criminal trial, guaranteed by sentence 2 of Article 2.2 of the Basic Law, in conjunction with the principle of the rule of law in Article 20.3 of the Basic Law. The matter was referred to the Higher Regional Court for a renewed decision.

The order of the Higher Regional Court deviates from the requirements placed on judges to investigate the facts in a manner which is constitutionally unacceptable. The court should have conducted further investigations into the facts if for no other reason than it was obvious that the official statement of the public prosecutor's representative contained contradictions. She claimed, on the one hand, that her primary objective had been to maintain the applicant's pre-trial detention. On the other hand, she had herself applied to have the arrest warrant cancelled during the trial. In addition, the Higher Regional Court should have obtained statements from the lay judges and the court recorder since, according to the defence lawyer's uncontested statement, discussions had been continued in the court room.

In addition, whatever residual doubt that existed should not have been weighed against the applicant. It is true that it is in principle not constitutionally objectionable if, following an investigation into the facts during informal evidentiary proceedings, failure to eliminate doubt concerning procedural facts is, as a rule, held against the accused. However, this no longer applies if the reason that the facts cannot be determined can be traced back to a violation of a duty of documentation imposed by statute.

*Languages:*

German.



# Hungary

## Constitutional Court

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### Important decisions

*Identification:* HUN-2012-1-001

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 21.04.2012 / **e)** 21/2012 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2012/48 / **h)** CODICES (Hungarian).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Abstract review / Press, freedom, protection, scope / Media, freedom of the media.

*Headnotes:*

Due to express limits, provided by law, on the scope of the Constitutional Court's jurisdiction to conduct abstract review of constitutional norms, the Court rejected the petition of the Government requesting abstract interpretation of two free press provisions of the Fundamental Law.

*Summary:*

In its Decision no. 165/2011, (see Cross-references below) the Court reviewed several provisions of the Press and Media Act (hereinafter, the "Act"), and declared *inter alia*, that print media should to an extent be removed from the scope of the Act and held that the institution of the 'Media Commissioner' constitutes an unnecessary restriction on the freedom of the press.

In both cases the Court set a deadline of 31 May 2012 for the annulment of the relevant provisions. Afterwards, on behalf of the Government, the Minister of Justice asked the Court to give detailed reasons for

its decision in light of which the government could submit the related amendments. In his petition, the Minister of Justice asked the Court to provide an interpretation of Article IX.2 of the Fundamental Law, in which the State is enjoined to "recognise and protect the freedom and pluralism of the press, and ensure the conditions for freedom of information necessary for the formation of democratic public opinion", and that part of Article IX.3 of the Fundamental Law which requires that "the detailed rules relating to...press products...shall be laid down in a cardinal act".

According to Section 38.1 of the Act on the Constitutional Court, on the petition of Parliament or its standing committee, the President of the Republic or the Government, the Constitutional Court shall provide an interpretation of the provisions of the Fundamental Law regarding a certain constitutional issue, provided that the interpretation can be directly deduced from the Fundamental Law. Under the previous Act on the Constitutional Court (Act XXXII of 1989) abstract interpretation of the 1989 Constitution was the duty of the Court. The Constitutional Court case law revealed how abstract the question imposed should be. The Court required a close relation between the statement of facts and the relevant constitutional provision, and provided interpretation of the Constitution only for the solution of a "particular constitutional problem". (Decision no. 31/1990) In addition, the Court adjudged petitions related to abstract interpretation only if interpretation of the constitutional problem could be directly derived, without the inclusion of lower ranking legal regulations, from the Constitution. The Court in the instant case held that these guidelines are valid even under the new 2011 Constitution, called the Fundamental Law.

In the current case the Government submitted two questions:

1. Whether the effect of some provisions of the Press and Media Act should be extended to the print media under Article IX.3 of the Fundamental Law; and
2. Whether the institution of the 'Media Commissioner' can be regulated in the Press and Media Act in harmony with the press freedom guaranteed by Article IX.2 of the Fundamental Law.

The Court held that neither of the two problems could be directly deduced from the Fundamental Law. Concerning the first question the Court stated that "the need to have content regulations with respect to the print media does not follow from interpreting

Article IX.3 of the Fundamental Law”. As per the second question the Court stressed that the institution of the ‘Media Commissioner’ is not explicitly mentioned in the Fundamental Law.

Concerning the constitutional questions submitted in the current case the Court does have the power to decide on the merits of these questions in the context of other review mechanisms, for example, in a preventive review or in an *ex post facto* review procedure. The Court therefore rejected the petition requesting abstract interpretation of Article IX.2 and IX.3 of the Fundamental Law.

*Cross-references:*

- *Bulletin* 2011/3, [HUN-2011-3-008].

*Languages:*

Hungarian.



## Ireland

### Supreme Court

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#### Important decisions

*Identification:* IRL-2012-1-001

**a)** Ireland / **b)** Supreme Court / **c)** / **d)** 15.12.2011 / **e)** SC 26/10 / **f)** Nottinghamshire County Council v. B / **g)** [2011] IESC 48 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**  
 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

*Keywords of the alphabetical index:*

Child, custody and care, decision, courts of habitual residence / Child, care proceedings, pending, removal from jurisdiction wrongful.

*Headnotes:*

The rights of the family expressed in Articles 41 and 42 of the Constitution do not prevent the return of children wrongfully removed from the jurisdiction of their habitual residence in accordance with the Hague Convention on the Civil Aspects of International Child Abduction 1980.

*Summary:*

I. The Supreme Court is the final court of appeal in civil and constitutional matters. It hears appeals from the High Court, which is a superior court of full original jurisdiction in all matters of law in the civil, criminal and constitutional spheres. The decision of the Supreme Court summarised here arose from an appeal from the High Court to the Supreme Court. The appellants were a married couple who had two children, the subject of the proceedings. The family lived in England until early November 2008 and had no prior connection with Ireland. The local authority, Nottinghamshire County Council, had concerns about the welfare of the children and it instituted proceedings which were served on the appellants in early November 2008. The appellants removed the children from England to Ireland. The children were located

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and put into care by the Health Service Executive in Ireland (HSE). The English local authority brought an application under Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 for the return of the children to the jurisdiction of the Courts of England and Wales.

II. The High Court ordered the return of the children to England.

The single issue in appeal was whether the High Court should have refused to order the return of the children pursuant to Article 20 of the Convention, which provides that “the return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms”.

The appellants argued that they, together with their children, constituted a family for the purposes of Articles 41 and 42 of the Constitution. Therefore, return of the children would be in breach of those provisions because the law of the United Kingdom permitted adoption of children of married couples in circumstances which would not be permitted in Ireland. This is by virtue of the constitutional rights afforded to families under the Constitution. Since 2002, adoption legislation in England and Wales allowed for the issue of adoption capable of being addressed as part of the care proceedings so that a court could make an adoption order if it considers appropriate. In contrast, the adoption of children of married parents is only allowed in very specific circumstances according to the Adoption Act 1988 (now re-enacted in the Adoption Act 2010) and the Constitution. The High Court judge rejected these arguments and found that adoption in England was no more than a “possibility” and therefore in the circumstances could not be contrary to any fundamental principles of Irish constitutional law.

These arguments were aired by the appellants in the Supreme Court appeal. The English local authority took issue with the generalisation that the adoption codes of Ireland and England were so divergent. It argued that the approach of the Courts of England and Wales was not so different from that in Ireland. The views of the family were given great weight and adoption was treated as a measure of last resort. The Irish Constitution did not completely bar adoption of children of married parents. The State as a notice party argued that the appellants could not avail of the protection of constitutional rights expressed in Articles 41 and 42 because they had no prior connection to Ireland and they had brought their children to this jurisdiction “wrongfully” within the meaning of the Hague Convention. Since there was

care proceedings pending at the time the appellants brought their children to Ireland, the children had been removed in breach of their right to custody of the English Court.

The Supreme Court identified two issues raised by the appeal. First, in what circumstances does the Constitution have regard to and/or attribute legal significance, to events occurring abroad? In particular when can acts occurring abroad be said to be in breach of the Irish Constitution? Second, when is a non-citizen (or non-resident) entitled to invoke the provisions of the Irish Constitution in an Irish Court?

In addressing these questions, the Court noted that Ireland agreed to adhere to the Hague Convention in accordance with its obligation to conduct external relations of the country under Article 29.4 of the Constitution. The Convention became part of domestic law by the enactment of the Child Abduction and Enforcement of Custody Orders Act 1991. It is designed to provide a speedy return to the jurisdiction of the Irish Courts of children habitually resident in Ireland as well as returning children wrongfully removed to Ireland to their jurisdiction of habitual residence. This is because decisions on the future custody and care of children are best made by the courts of their habitual residence which will normally have an understanding of the culture, conventions, mores and norms of the society in which the children have been resident.

Article 20 is an exception to the general rule of return in the Convention. The Court found that the Constitution would prohibit a return of children under Article 20 when the adoption or other care proceedings in the requesting state are so proximately and immediate a consequence of the Irish court’s order of return, and are so contrary to the scheme and order that the Constitution envisages and guarantees within Ireland, that the order of return would itself be a breach of the court’s duty to uphold the Constitution. In this case, the Court found that the adoption of the children in England is not so proximate and an immediate consequence of an order of return and therefore did not prohibit the court returning the children.

In coming to its decision, the Court noted that few if any countries have constitutional provisions relating to the family which can be said to be identical to those contained in Articles 41 and 42. Thus, if the appellants’ argument was correct then almost any return of any child would not be possible under the Convention. The Court found that this assertion had no basis in Irish constitutional law. The Constitution of Ireland does not contain provisions which suggest that Ireland wished to assert the form of constitutional

splendid isolationism whether relating to the family or more generally which would be involved in determining that there could be no useful co-operation with the legal systems of any other state which had not adopted something approximating to the very specific provisions of the Irish Constitution. Therefore, the Constitution does not demand the imposition of Irish constitutional standards upon other countries or require that those countries adopt Irish standards as a price for interaction with Ireland.

The issue of whether some or all of the constitutional provisions are limited to citizens has been raised in a number of cases before the superior courts of Ireland i.e. the High Court and the Supreme Court but has not been resolved definitively. What has been resolved is that non-citizens have been permitted to invoke some provisions of the Constitution, but the provisions related to voting and representation are properly limited to citizens. The Court noted that it has not been possible to articulate any unifying theory and requires appropriate future cases to draw any further conclusions.

#### *Languages:*

English.



#### *Identification:* IRL-2012-1-002

**a)** Ireland / **b)** Supreme Court / **c)** / **d)** 23.02.2012 / **e)** SC 253/11 / **f)** Damache v. The Director of Public Prosecutions / **g)** [2012] IESC 11 / **h)** CODICES (English).

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

1.3.5.13 Constitutional Justice – Jurisdiction – The subject of review – **Administrative acts**.  
5.3.25 Fundamental Rights – Civil and political rights – **Right to administrative transparency**.

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

Search of home / Search warrant, issuance, by independent and impartial decision maker.

#### *Headnotes:*

A statutory provision which permits a senior member of the police force to issue a search warrant for the purposes of seizing material for a criminal investigation breached the inviolability of the dwelling, a right which is protected by the Constitution and was not issued by an independent person such as a judge.

#### *Summary:*

I. The Supreme Court is the final court of appeal in civil and constitutional matters. It hears appeals from the High Court, which is a superior court of full original jurisdiction in all matters, including civil and criminal and constitutional matters. The decision of the Supreme Court summarised here arose from an appeal from the High Court judicial review proceedings to the Supreme Court. The appellant sought a declaration that Section 29.1 of the Offences against the State Act, 1939 (as inserted by Section 5 of the Criminal Law Act, 1976) is repugnant to the Constitution which was refused by the High Court.

The appellant was the subject of a criminal investigation by *An Garda Síochána* (the police force in Ireland) into an alleged conspiracy to murder a Swedish cartoonist who had depicted the Islamic prophet Mohammad with the body of a dog, thereby provoking serious unrest in several Muslim countries. It was suspected that the appellant was involved in the conspiracy with other individuals resident in Ireland. It was also suspected that the appellant made a threatening phone call to an individual in the United States. The police received intelligence reports from the Federal Bureau of Investigation (hereinafter, "FBI") and phone recordings made in the United States. The criminal investigation was commenced by a senior member of the police force of the rank of Detective Superintendent. During the course of the investigation, the Detective Superintendent granted a search warrant to a lower ranking member of the police force of the rank of Detective Sergeant, a practice which was permitted by Section 29.1 of the Offences against the State Act, 1939. The search warrant was granted in relation to the appellant's dwelling.

At the time of the search, the appellant, his wife and child were present in the dwelling and he was arrested for the offence of conspiracy to murder. Items of property were removed from the appellant's home as evidence including a mobile phone. The appellant was later charged with an offence contrary to Section 13 of the Post Office (Amendment) Act, 1951 as amended, that he sent a message by telephone (allegedly the mobile phone seized during the search) to another person which was of a menacing character.

The appellant alleged that the police officer who issued the search warrant was not an independent and impartial decision maker as he was also directing the investigation and this was a breach of his constitutional rights. Therefore, he sought a declaration that the statutory provision was unconstitutional. The State argued that the legislation was not repugnant to the Constitution, but was a legitimate part of the State's armoury to protect itself from offences against the State and against the justice system therefore any diminution of rights is proportionate and lawful.

II. The Chief Justice noted that the issuing of a search warrant is an administrative act, but that it must be exercised judicially. In most cases, the impartial issuing of a warrant is issued by a District Court Judge or by a Peace Commissioner. In limited and serious investigations, members of the police force have been given statutory powers to issue search warrants arising from urgent situations or if immediate action is needed as a last resort. Such a warrant must be executed within a short time usually 24 hours, but under Section 29.1 of the relevant legislation, it remained valid for a week.

The Chief Justice reviewed cases law of the superior courts i.e. the High Court and the Supreme Court which confirmed the well-established principle that the person issuing a search warrant should be an independent person. The Court also noted that a person issuing a warrant must be satisfied on receiving sworn information that there are reasonable grounds for a search warrant.

The Court noted that the statutory provision in question provided that a search warrant be granted to cover a wide area of search including the home. The home or dwelling is treated as a place of importance in the Constitution. Article 40.5 states: "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law." Also, the common law which is an important aspect of Ireland's legal system staunchly defends the refuge provided by the dwelling home. Irish case law on Article 40.5 demonstrates that it is one of the most important, clear and unqualified protections given by the Constitution to the citizen.

The Court posed the question whether the procedure for obtaining a search warrant in this case is a method which ignores the fundamental norms of the legal order postulated by the Constitution. The Court stated that the procedure for obtaining a search warrant should adhere to fundamental principles encapsulating an independent decision maker, in a process which may be reviewed. The process should achieve the proportionate balance between the

requirements of the common good and the protection of an individual's rights. However, there may be exceptions to these fundamental principles, for example where there is an urgent matter. The Court considered *Camenzind v. Switzerland* [1999] 28 EHRR 458 as well as case law from the Supreme Court of Canada which analysed and applied such fundamental principles.

In reaching its decision, the Court also considered the proportionality test as set out in the High Court case of *Heaney v. Ireland* [1994] 3 IR 593. This means that the *Oireachtas* (Parliament) may interfere with the constitutional rights of a person only if its actions are proportionate. The test provides that the measure which restricts a fundamental right must:

- a. be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- b. impair the right as little as possible;
- c. be such that their effects on rights are proportionate to the objective..."

The Supreme Court decided this case on its own circumstances. It noted that in future best practice is to keep a record of the basis upon which a search warrant is granted. The Court granted a declaration that the statutory provision is repugnant to the Constitution as it permitted a search of the appellant's home contrary to the Constitution on foot of a warrant which was not issued by an independent person.

#### *Languages:*

English.



# Israel

## Supreme Court

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### Important decisions

*Identification:* ISR-2012-1-001

**a)** Israel / **b)** Supreme Court (High Court of Justice) / **c)** Panel / **d)** 05.01.2012 / **e)** HCJ 3429/11 / **f)** Alumni of the Haifa Arab Orthodox High School v. The Minister of Finance / **g)** to be published in the Official Digest / **h)**.

*Keywords of the systematic thesaurus:*

4.6.2 Institutions – Executive bodies – **Powers**.  
 4.10.2 Institutions – Public finances – **Budget**.  
 5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin**.  
 5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion**.  
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.  
 5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities**.

*Keywords of the alphabetical index:*

Constitutionality, factual basis.

*Headnotes:*

A petition challenging the constitutionality of an amendment to the Foundations of Budget Law, which grants the Finance Minister authority to reduce state funds allocated to organisations that make expenditures which essentially go toward ends stated in the amendment, is premature as the amendment had yet to be implemented.

*Summary:*

I. The Foundations of Budget Law (Amendment no. 40) 2011 (hereinafter, the “amendment”) authorises the Finance Minister, subject to a hearing and the consent of the minister responsible for the relevant budgetary provision, to reduce the budget allocated to an organisation where that organisation has made an expenditure that essentially pursued the following purpose: denial of the existence of the state

of Israel as a Jewish and democratic state; marking Israel’s Independence Day as a day of mourning; inciting racism, violence or terrorism; or several other categories enumerated in the amendment. A petition against the constitutionality of the amendment was submitted to the High Court of Justice by eight petitioners: a high school alumni organisation that organises yearly activities addressing identity issues relating to Israeli Arabs; four parents whose children attend a bilingual school, an academic who developed a model according to which the regime in Israel should be considered ethnocratic; Adallah, an organisation for the promotion of the Arab minority legal rights; and the Association for Civil Rights in Israel.

The petitioners claimed that the amendment offends the collective memory of the Arab minority by using the majority’s power in order to suppress the minority’s narrative relating to events, facts, emotions and ideologies. In addition, the petitioners claimed that the amendment infringes several constitutional rights such as the freedom of speech and expression, and the right to equality (since the amendment discriminates based on nationality and social and political views). The petitioners claimed that although the amendment was worded in a neutral manner and applies equally to the activity of Arab and Jewish persons and organisations, it is obvious that it is intended to influence Arab citizens. The petitioners argued that the amendment does not fulfil requirements of the limitation clauses of the Basic Laws regarding human rights, and also has a “chilling effect” on the activity of organisations due to the concern that they will fall within the definitions in the amendment. The respondents, on the other hand, argued that the amendment does fulfil the requirements of the limitations clauses and does not warrant intervention by the High Court of Justice. The Finance Minister claimed that the petition targets an amendment at a time when the fashion in which that amendment will be implemented has not yet even been discussed. It was argued that the petitioners based their petition on extreme situations that may not even present themselves in the future. Thus, according to respondents, a judicial decision in the case would be premature, nonspecific, and theoretical.

II. The Supreme Court opinion, delivered by Justice M. Naor, with President D. Beinisch and Deputy President E. Rivlin concurring, denied the petition, finding that despite the importance and complexity of the questions raised by the petition, the time has not yet come to decide them on their merits. Justice M. Naor held that the circumstances before her necessitated the application of the Ripeness Doctrine (applied in *United Public Workers of America (C.I.O.)*)

*v. Mitchell*, 330 U.S. 75 (1947) by the Supreme Court of the United States). The petition was not ripe for a judicial decision since it lacked a clear and complete concrete factual basis, which is essential for an important judicial decision. The Supreme Court held that the amendment has yet to be implemented by the Finance Minister, and it is not known when, if, and in which circumstances the Minister will employ the powers granted him by the amendment. In addition, the Court held that it appears from the amendment that prior to a monetary sanction, the issue will be examined in several stages, and the Minister's decision will not be implemented without coordination and consultation with various officials. The Court expressed no opinion regarding the amendment's mechanism or regarding the constitutionality of the amendment, and held that, at present, at a time when the financial sanctions have yet to be implemented, one should not speculate about the way the amendment will be implemented.

The Supreme Court held that enlightened judicial decision-making, both in general and also in cases of constitutional issues, must be rooted in a specific factual basis arising from the case before the Court. In the case before it, the Court found that the mechanism created by the amendment has yet to be implemented, and thus its interpretation and implications are not yet known. However, the Court limited the scope of the Ripeness Doctrine and held that not every petition without a factual basis should be denied *in limine*, and that every case should be examined in the context of its own circumstances. In deciding whether to rule on such a question lacking a concrete factual basis the Court should consider various factors, such as the limited resources of the judicial branch.

III. President D. Beinisch stressed in her concurring opinion that the amendment does raise difficult and important questions, but that the constitutionality of a law depends upon the substantive interpretation assigned to that law, and that will only become clear when the law is implemented. In Deputy President E. Rivlin's concurring opinion, he found that in the relevant circumstances the amending law has not yet been implemented. He held that in constitutional judicial review there is an inherent process of selection, whereby a preliminary factual inquiry is made prior to the constitutional examination. At times such an inquiry makes a further constitutional examination superfluous.

#### *Languages:*

Hebrew.



#### *Identification: ISR-2012-1-002*

**a)** Israel / **b)** Supreme Court (High Court of Justice) / **c)** Extended Panel / **d)** 11.01.2012 / **e)** HCJ 466/07 / **f)** Gal-on v. Attorney General / **g)** to be published in the Official Digest / **h)**.

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

3.4 General Principles – **Separation of powers.**  
 3.16 General Principles – **Proportionality.#**  
 3.21 General Principles – **Equality.**  
 4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**  
 5.1.1.1 Fundamental Rights – General questions – Entitlement to rights – **Nationals.**  
 5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality.**  
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**  
 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**  
 5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**

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

Equality, inequality, human rights of others, impact / Security, consideration / Terrorism, combat.

#### *Headnotes:*

The Citizenship and Entry into Israel Law (Temporary Order) of 2003 restricts the Interior Secretary's authority and denies citizenship or other official status in Israel for residents of the Palestinian territories or other enemy states who are married to Israeli citizens, unless certain exceptions apply. In essence, the Law restricts the realisation in the state of Israel of unions between spouses of Israeli, and the above-mentioned nationalities.

#### *Summary:*

I. In this petition, the Supreme Court, sitting as the High Court of Justice, was asked to nullify the law, according to which spouses of Israeli Arab citizens were denied citizenship or other legal status in Israel. The petitioners were a number of human rights organisations and individuals whose spouses were

denied access to Israel. The basis for enacting the Law was a security analysis which found that a number of Israeli citizens' spouses were involved in terrorist activities.

II. The Supreme Court, in a six to five decision, denied a petition requesting the court to nullify the Law. The Justices, from both the majority and the minority, differed on several key questions and especially on whether the constitutional right to family life includes an opportunity to exercise it in the State of Israel and not elsewhere, and on whether the infringement upon the right to equality occasioned by the Law meets the requirements of the limitation clause set forth in the Basic Law: human dignity and liberty. This was not the first time the Court was required to consider the question of the Law's constitutionality. Six years prior to the current decision, the Supreme Court denied another petition (HCJ 7052/03) requesting the Court to declare the Law as unconstitutional. In that prior case, as in the current one, the Supreme Court, in an extended panel of 11 Justices, denied the petition in a 6 to 5 decision. Since that previous decision was given by the Supreme Court the *Knesset* (national parliament) revised the Law in a number of respects in order to deal with the Court's reservations regarding the Law as it was formulated at the time the prior case was considered.

The majority opinion in the current petition consisted of Deputy President E. Rivlin, Justice A. Grunis, Justice M. Naor, Justice E. Rubinstein, Justice H. Melcer and Justice N. Hendel, all of whom believed the petition should be denied. Justice A. Grunis followed his opinion in the previous decision, namely, that the social benefit arising from the Law exceeds the harm, if such even exists, sustained to constitutional rights. Justice A. Grunis quoted President A. Barak who in turn quoted, in another decision, Justice R. Jackson of the Supreme Court of the United States in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) by saying that we should not convert human rights into a national suicide pact. Deputy President E. Rivlin based his opinion on the doctrine by which the Supreme Court should treat the other branches of government with deference while dealing with issues falling within their expertise. He also noted that an issue like the one before the Court should be decided by a branch of government accountable to the public for its decision, unlike the Supreme Court. With these doctrines in mind, and in order to safeguard the resources of the judicial branch, especially public trust, and to allow the courts to protect human rights when needed, he was of the view that the Supreme Court must refrain from deciding on controversies, the nature of which request a non-judicial decision. Justice M. Noar, following her previous decision,

thought that even though it is commendable for a country to allow its citizens and residents, while circumstances permit, to bring their families to their homeland, one should not infer from that a constitutional right to family life in Israel. Justice M. Noar stressed that such a constitutional right was not acknowledged elsewhere in democratic nations around the world. Justice E. Rubinstein thought that the Temporary Order does not infringe upon a constitutional right to family life or a constitutional right to equality, considering that the law deals with Israeli citizens or residents who chose a spouse who is part of a national entity hostile to the state of Israel. Justice H. Melcer based his opinion on "The Precautionary Principle". He found the Law to be the least of evils and thought that, given the continued threat to Israel's existence, one should take a "better safe than sorry" course of action. Justice N. Hendel found the Law to fall within the margins of reasonableness and therefore was of the view that the Court should not intervene.

III. The minority opinion, consisting of five dissenting opinions, stated that the petition should be granted and that the Law should be declared unconstitutional. President D. Beinisch considered, as she did in the previous case, that the Law infringes upon constitutional rights in an unproportional manner. In the President's view the amendments to the Law only worsened its inherent problems. No effort was made to integrate an individual examination of the security risk arising from the person requesting citizenship or his surroundings, and no other means were utilised to soften the harm inflicted upon those people. The President also criticised the ongoing usage of the form of "Temporary Order" in the legislative process, keeping in mind that at first the Law was to be enacted for no longer than a year but was subsequently extended several times to an aggregate of almost ten years in total. Justice E. E. Levy found that the Law does not meet any of the requirements of the limitation clause. First and foremost it does not suit the values of the State of Israel as a Jewish and Democratic state. Justice E. Arbel held that there was no place to use a Temporary Order act of parliament in a way that so deeply infringes upon constitutional rights. Justice E. Arbel also noted that the potential enhancement of the country's security entailed in the Law is not measurable against the definitive harm inflicted upon the right to equality and the right to family life. Justice S. Jubran found the Law to restrict Israel's Arab citizens. He thought that the complete denial of the opportunity to receive official status in Israel for spouses of Arab Israeli citizens entails discriminatory treatment, ethnic profiling, and a grievous assault on human dignity, and should be annulled. Justice E. Hayut found no fault in a presumption of dangerousness for Palestinians, but

held that such a presumption should be rebuttable and that a Palestinian individual should have an opportunity, based on an individual examination, to prove that no danger will come from him or her.

#### *Languages:*

Hebrew.



#### *Identification:* ISR-2012-1-003

**a)** Israel / **b)** Supreme Court (Sitting as the Court of Civil Appeals) / **c)** Panel / **d)** 08.02.2012 / **e)** Civil App 751/10 / **f)** John Doe v. Ilana Dayan-Orbach, PhD / **g)** to be published in the Official Digest / **h)**.

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

5.1.1.4.4 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Military personnel.**

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.**

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

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

Defamation / Defamation, through the press / Media, press, freedom, protection, scope.

#### *Headnotes:*

Under the 1965 Libel Act, a person is not liable if the information published is true and serves public interest. Allowing journalists to report what they reasonably believe to be the truth, so long as they do not act with reckless disregard for the truth, is essential to investigative journalism. However, a proper balance needs to be struck between free speech and the individual's right to be protected against defamation.

#### *Summary:*

I. In the Gaza Strip in 2004, terrorist attacks had become somewhat routine. Captain R. was the commander of an Israeli Defence Forces (IDF) platoon stationed at an army outpost in Rafah (a town located in the Gaza Strip). On the morning of 5 October 2004, a 13 year old Palestinian girl approached the outpost unnoticed. When she came close enough to the gate of the outpost, an alarm went off alerting the troops at the site who began shooting at who they believed to be an intruder. The girl was hit by a bullet as she turned to run away from the outpost. Captain R., who had not received the radioed message which would have informed him that the "intruder" was a young girl, ran towards her to verify that the "intruder" had been killed. As a result of this incident, Captain R. was relieved of his duties and indicted for his actions in a military court.

The event received extensive media coverage which included harsh criticism of Captain R.'s actions. On the day Captain R. was indicted, a well known Israeli journalist, Ilana Dayan, aired a report about the story on her popular television show, "Uvda" (literally translated: "Fact"). The broadcast aired both video and audio recordings from the incident, including one from the internal communication network of the outpost. Captain R. was subsequently acquitted and sued Dayan and Telad, the network which airs "Uvda," for libel.

The district court ruled in favour of Captain R. and granted him relief in the form of monetary compensation from both Dayan and Telad, and ordered Dayan and Telad to air an apology and a retraction of the original broadcast. Both sides appealed the verdict to the Supreme Court. Captain R. argued that he should be entitled to a higher amount of compensation for the damage caused by the report, while the defendants appealed their liability in the case.

II. Under the 1965 Libel Act, a person is not liable for libel if the information published is true and serves the public interest. Deputy President E. Rivlin of the Supreme Court, with Justice Y. Amit concurring, held that because Dayan relied on serious and reliable sources, took reasonable precautions to verify the facts in question and, as far as Dayan could tell at the time, the information was, in fact, true, she was protected against an action for libel. The Court determined that Dayan had presented the information in a manner any reasonable reporter would have understood it at that time, and any information subsequently discovered, even coupled with the fact that Captain R. was eventually acquitted, did not alter Dayan's defence.

Furthermore, the Supreme Court noted that allowing journalists to report what they reasonably believe to be the truth, so long as they do not act with reckless disregard for the truth, is essential to investigative journalism. Also, mere discrepancies in some unimportant details are not enough to deprive a reporter or a publisher the above protection, as a court must examine whether the publication materially alters the truth. Citing Justice William Brennan of the United States Supreme Court in *New York Times Co. v. Sullivan* 376 U.S. 254 (1964), the Court noted that erroneous statements are inevitable in free debate, and must be protected if the freedom of expression is to have the breathing space it needs to survive.

However, unlike Dayan's appeal, Telad's appeal was denied. The Court found that the promotional content for Dayan's broadcast aired by the network demonstrated reckless disregard for the truth, thus exceeding the scope of free speech protection and amounting to libel. Nonetheless, the Court reduced the amount of Telad's liability to Captain R. in line with what it determined to be the proper balance between free speech and the individual's right to be protected from defamation.

Additionally, the Supreme Court unanimously reversed the trial court's order that Dayan and Telad air an apology and retraction of the original broadcast. The Court ruled that when considering such an action, a court must balance the reputation of the individual at stake on one side and freedom of conscience on the other. Deputy President E. Rivlin held that because Captain R. did not prove that the defendants acted recklessly, and considering the fact that the publisher in this case believed the publication to be true, it would not be appropriate to compel Dayan and Telad to convey an opinion they do not agree with.

Finally, although the three-justice panel reversed the district court's decision, the Court criticised Dayan for making editorial errors in her broadcast and took note of several statements she had made during her broadcast that it determined would have been better left unsaid. The Court held that Dayan should have shown more restraint in her report considering the inherent difficulty in clearly seeing the whole picture in such a sensitive case.

#### *Languages:*

Hebrew.



#### *Identification: ISR-2012-1-004*

**a)** Israel / **b)** Supreme Court (High Court of Justice) / **c)** Extended Panel / **d)** 21.02.2012 / **e)** HCJ 6298/07 / **f)** Resler v. The Knesset / **g)** to be published in the Official Digest / **h)**.

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

3.16 General Principles – **Proportionality**.  
4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces**.  
5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens**.

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

Religion, military service, exemption.

#### *Headnotes:*

A law that exempts only ultra-orthodox Jewish citizens from compulsory military service infringes the right to equality, which is an aspect of the constitutional right to human dignity. The law's implementation, throughout the decade it has been in force, failed to show that the means chosen by the legislature has the power to achieve the law's purpose. Hence, the Law does not meet the first proportionality test, which requires a rational connection between the means chosen and the aspired purpose of the law.

#### *Summary:*

The Supreme Court, sitting in an extended panel of nine justices, held, in a majority opinion of six justices led by President D. Beinisch, that the Deferral of Military Service for Yeshiva Students Law of 2002 (hereinafter, the "law") is unconstitutional. The Supreme Court ruled that the *Knesset* (national parliament) would not be able to extend the validity of the Law in its current format further than its expiration date of 1 August 2012.

The law allows students at Yeshiva institutions (i.e. academies which focus on the study of traditional religious texts), whose vocation is the study of the Torah, to defer their obligatory military service until receiving an exemption, or to join either a shortened military service track or a one year civil service track. The Law was enacted after years in which the issue

of exemption from mandatory military service enjoyed by ultra-orthodox Jews was debated in the Israeli courts and in Israeli society at large. Parliament enacted the Law subsequent to a Supreme Court ruling requiring that the exemption from military service must be provided by primary legislation. Soon after the Law was enacted the Supreme Court was petitioned to rule on its constitutionality. In HJC 6427/02 the Supreme Court held that the Law infringes upon the right to equality which is an aspect of the constitutional right to human dignity. Nevertheless, the Court did not strike down the law but ruled that the question of proportionality can be answered only in the future, based on the implementation of the Law.

In the present petitions, the Court was required to consider whether or not the Law's implementation, throughout the decade it has been in force, shows that it fulfils the requirements of the limitation clause set forth in the Basic Law: human dignity and liberty, and thus passes constitutional scrutiny. In a majority opinion, six years after its prior decision in the matter, the Supreme Court found the Law to be disproportionate, since the Law is comprised, *inter alia*, of internal barriers preventing its effectuation.

The Court held that an analysis of data, both of the number of ultra-orthodox Jews who enlisted in the army or joined civil service and of the number of ultra-orthodox Jews who chose to remain in the arrangement of "Torah as their vocation", indicates that the Law is disproportionate since the means chosen has not achieved the purposes of the Law. A central objective of the Law was to encourage ultra-orthodox Jews to enlist in the army or to join the civil service. The Supreme Court held that when the right infringed is of more importance or when the harm inflicted is greater, the state must establish a higher and more significant level of probability that the means chosen has the power to achieve the purpose of the Law, according to the first of three proportionality tests, which requires a rational connection between the means chosen and the stated purpose of the Law. The Court held that, in effect, the Law preserved and gave force to the previous circumstances which it aimed at changing, and the passage of time pointed to an increasing number of ultra-orthodox Jews who chose to join the "Torah as their vocation" arrangement rather than enlisting in the army or joining the civil service.

Justice E. Arbel dissenting, joined by Deputy President E. Rivlin, found that the data analysis points to a positive rather than negative path which makes a judicial ruling on the constitutionality question premature. According to their opinion the Court should wait and observe how the authorities will

further act to achieve the law's objectives. Justice E. Arbel was of the view that the change the law wished to achieve will be an outcome of a gradual process, one that a judicial ruling may nip in the bud.

Justice A. Grunis, in a minority opinion, was of the view that the petitions should be denied since there could be no justification for applying judicial review to a law in which the electoral majority accorded a privilege to the electoral minority. In his view, in cases where the majority acts in a democratic fashion by enacting a law which prioritises the minority, there is no place for the Supreme Court to act as the majority's patron. Justice A. Grunis thought that the Court's ability to influence reality in situations such as this is incremental at best, and that a change can come about only as a result of social-economic developments.

#### *Languages:*

Hebrew.



#### *Identification:* ISR-2012-1-005

**a)** Israel / **b)** Supreme Court (High Court of Justice) / **c)** Extended Panel / **d)** 23.02.2012 / **e)** HCJ 1213/10 / **f)** Eyal Nir v. The Knesset / **g)** to be published in the Official Digest / **h)**.

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

3.9 General Principles – **Rule of law**.  
3.16 General Principles – **Proportionality**.  
5.2.2.9 Fundamental Rights – Equality – Criteria of distinction – **Political opinions or affiliation**.

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

Equality, in criminal procedure / Immunity, criminal.

#### *Headnotes:*

The Discontinuation of Proceedings and Expunction of Record regarding the Disengagement Plan Law of 2010 impinges upon the right to equality, by determining an arrangement of selective enforcement of the criminal law regarding specific groups and specific offences. Nonetheless, it fulfils the require-

ments of the limitations clause set forth in the Basic Law: human dignity and liberty, since it was enacted for an appropriate purpose, as it originated from, and was meant to, deal with the implications of Israel's Disengagement Plan – an event unique and exceptional in scope and magnitude – which was a political, ideological and societal breaking point for a significant part of Israeli society.

### Summary:

On the 25 January 2010 the *Knesset* (national parliament) enacted the Discontinuation of Proceedings and Expunction of Record regarding the Disengagement Plan Law of 2010 (hereinafter, the "Law"). The Law created lenient arrangements to be applied to individuals whose public protest against the Disengagement Plan reached the threshold of criminal offences. These arrangements related to a number of aspects: the serving of sentences or decisions relating to them, expunging criminal records in certain cases, and delaying criminal proceedings. The Law determined two caveats for the application of the above arrangements: it does not apply to criminal offences involving serious violence, specified in a list in the Law; and it does not apply to proceedings taking place in a military tribunal.

The majority's opinion, delivered by President D. Beinisch, held that the Law certainly impinges upon the right to equality, as it creates an arrangement of selective enforcement regarding a particular group and in regard to particular offences. This group, consisting of individuals against whom criminal proceedings were initiated for actions committed in objection to the Disengagement Plan, is a distinct political and ideological group *par excellence*, which enjoys the support of a political majority in the *Knesset*. The Court ruled that in the enforcement of criminal justice, the ideological or political differences between one group and another are not a relevant consideration for distinction, and thus the arrangement in the Law impinges upon the right to equality. Nonetheless, the Court ruled that the Law fulfils the requirements of the limitations clause. First, it was enacted for an appropriate objective. The Court emphasised that the Law was a response for an event unique and exceptional in scope and magnitude, which was a political, ideological and societal breaking point for a significant part of Israeli society. The Law's purpose, so held the Court, directs itself towards dealing with the implications of that event. This purpose, which intended to mend the rift caused by the Disengagement Plan within the nation and to facilitate conciliation, was found to be an appropriate purpose. The Court discussed the importance of giving individuals who opposed the Disengagement Plan – most of whom were law-abiding citizens who,

due to their protest, became involved in criminal acts – the opportunity to leave the past behind, start anew, and to return to society without a criminal record.

In addition, the Court held that the Law passes all three proportionality tests, based on several findings: the Court acknowledged that the legislature is entitled to choose a means out of a wide array of means to achieve the Law's purpose; the legislature determined internal checks and balances for the implementation of the Law; and due to the contribution of the Law's declaratory aspect toward achieving its purpose. Among said balances, the Court noted that the Law does not apply to serious criminal offences which carry a prison sentence (including community service); that the Law does not allow expunction of records of individuals having a previous criminal record; and that the Law does not apply to the armed forces or to law-enforcement personnel. The Court also held that the Law fulfilled the third proportionality test. The Court stressed that beside the significant social benefit in the Law to the rehabilitation of a distinct group of Israeli society that was exposed to a personal, religious and ideological trauma, stands real potential for harm it might inflict upon the rule of law and the principle of equality. The Court expressed a concern that the Law might encourage criminal behaviour, especially among individuals of the relevant group and similar ones in the future. However, in the ultimate weighing of all the considerations, and given the restrictions set in the Law and its confined practical influence, the Court held that the Law brings about a greater social benefit than the harm it might inflict, in light of the restrictions contained in the Law and its limited practical application.

Justice S. Jubran, dissenting, found the Law to be unconstitutional, as it impinges upon the right to equality, but does not fulfil the requirements of the third proportionality test, since the harm it causes to the right to equality exceeds its benefits.

### Languages:

Hebrew.



*Identification: ISR-2012-1-006*

**a)** Israel / **b)** Supreme Court (High Court of Justice) / **c)** Panel / **d)** 28.02.2012 / **e)** HCJ 10662/04 / **f)** Hassan v. The National Insurance Institute of Israel / **g)** to be published in the Official Digest / **h)**.

*Keywords of the systematic thesaurus:*

3.5 General Principles – **Social State.**

3.16 General Principles – **Proportionality.**

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

*Keywords of the alphabetical index:*

Income, minimum, welfare benefits.

*Headnotes:*

The irrebuttable presumption, according to which the amount of income produced from a vehicle equals or exceeds the stipend provided by the Assurance of Income Law to impoverished individuals, deprives the right to minimum standards of living in dignity from those whose income in fact does not suffice to ensure this right, but who do own or use vehicles, since their entitlement to the stipend is revoked based on the presumption.

*Summary:*

I. The question in this case regarded the constitutionality of an arrangement established in Article 9a.b of the Assurance of Income Law (hereinafter, the "Law"), by which a person owning a vehicle or using a vehicle owned by another is to be regarded as earning an income in the amount of the stipend provided by the Law, thus making such a person unqualified to receive the stipend. The question before the Supreme Court was whether such an arrangement infringes upon the constitutional right to minimum standards of living in dignity.

II. In an extended panel of seven Justices, the Supreme Court unanimously held that Article 9a.b of the Law is unconstitutional since it infringes in an disproportionate manner on the right to minimum standards of living in dignity. The Supreme Court held that the right to a minimum standard of living in dignity is not a derivative of the right to human dignity, but, rather, is in itself a right deeply entrenched in the core of the constitutional right to human dignity. The Court stipulated that of all the different meanings one can attribute to the concept "human dignity", especially considering the "human" part of it, the most

fundamental of them is the meaning which focuses on the unique and special dignity of human beings and on the most necessary conditions needed for survival. The Court noted that living in starvation, without shelter, and in a continuous search for a way out of poverty is not a dignified living. Minimum standards of living are essential not only for protecting human dignity, but also for the fulfilment of all other human rights. Without minimal material conditions, a person does not have the capacity to create, to aspire, to make his or her choices and to realise his or her liberties. A person's image, the Court held, is harmed first and foremost if he or she falls to a humiliating level of deepest poverty.

The Supreme Court discussed at length the alleged difference between social-economic rights and political-civil rights and found that such a distinction is unwarranted, unless in regard to a historical sense of dividing them into two generations of rights. Based on this premise the Court held that the same type of judicial review should be applied when dealing with the infringement of "social" rights as with "political" rights. As for Article 9a.b of the Law, the Court held that it creates a fiction which infringes the right to a minimum standard of living. The fiction is rooted in the irrebuttable presumption by which the amount of income produced from a vehicle is considered equal to, or more than, the stipend provided by the Law. This general absolute rule infringes the right to minimum standards of living since it deprives from each and every person who owns or uses a vehicle the entitlement to an assurance of income stipend, without regard to the specific question of whether or not that person has an income in the amount that would guarantee the fulfilment of his or her right to a minimal dignified human existence. For example, one of the petitioners was denied the allowance granted by the Law after it was established that she uses a family vehicle three times a month although she does not contribute any sum to the car's payments; another petitioner was forced to resign since a car, made available to her by an acquaintance, was her only available means of transportation to reach her place of employment. These petitioners and others alike did not have the means to guarantee a minimal dignified human existence.

The Supreme Court ruled that the income assurance stipend plays an integral part in the assurance of minimum standards of living. Although the Court did not deal with what are minimum standards, it did hold that its decision is based on the state's obligation to set conditions for such a minimal existence and to derive the state's welfare system therefrom accordingly. Although the Supreme Court did not contest that a vehicle can be used as an estimate for a person's income, it was held that it cannot be used as

the sole component of establishing such an estimate; especially given the fact that according to the Law all persons requesting the income assurance stipend undergo an individual examination regarding all their assets and incomes.

Based on the above reasoning the Supreme Court held that the harm inflicted upon the right to minimum standards of living in dignity breaches the requirements of the limitation clause of the Basic Law: human dignity and liberty, and especially the proportionality requirement. The Supreme Court indicated that the Article's appropriate purpose of making sure the state's support is given only to those who need it, could have been achieved with a less intrusive or harmful means. Accordingly, the Supreme Court declared Article 9a.b of the law unconstitutional and thus void, effective within six months of the day the Court's verdict was pronounced.

#### *Languages:*

Hebrew.



#### *Identification:* ISR-2012-1-007

**a)** Israel / **b)** Supreme Court (Court of Criminal Appeals) / **c)** Panel / **d)** 06.03.2012 / **e)** CrimApp 10141/09 / **f)** Ben-Haim v. The State of Israel / **g)** to be published in the Official Digest / **h)**.

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

3.13 General Principles – **Legality**.  
 4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces**.  
 5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty**.  
 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.

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

Search and seizure / Search, police.

#### *Headnotes:*

Police officers are authorised to conduct a search without having reasonable suspicion when the suspect consents. However, for such a search to be legal the consent must be an “informed consent”. Consent is informed when the consenting individual knows he has the right to refuse being searched and that in such a case the refusal will not be used against him during the police investigation or the trial process. In order to ensure informed consent police officers wishing to conduct a search must explicitly inform the suspect that he or she has a right to refuse being searched and that such a refusal will not be used against him or her. If the suspect is not informed properly the search is illegal and any evidence obtained from him or her may be excluded and deemed inadmissible.

#### *Summary:*

The Supreme Court, opinion delivered by President D. Beinisch, exonerated two defendants by reversing two different trial courts' judgments, which convicted the two defendants of different felonies. The first defendant was charged with illegally possessing a knife. He was detained while on the street by police officers who requested that he identify himself. After they learned he had a criminal record they requested him to empty his pockets. He followed their instructions, and in doing so revealed a knife he kept in his pockets. This revelation led to the aforementioned indictment. The second defendant was charged with holding drugs for personal consumption. The drugs were found while searching his room in his mother's house upon receiving the mother's consent, without the defendant being present at the time. On both occurrences the police officers did not inform the first defendant or the second defendant's mother about their right to refuse the search and that such a refusal would not be used against them. Furthermore, on both occurrences there was no doubt that the police did not have a formal source of law authorising it to conduct the searches, and that the only source of authority came from the given consents.

The first question the Supreme Court considered was whether or not the police have authority to conduct a search, without a formal statutory authority, and solely based on receiving consent from the person being searched. This question arose since on both instances there was no reasonable suspicion for holding a weapon or a reason to assume that a crime had been committed. President Beinisch stressed that conducting a search on someone's person, in his or her belongings or in his or her home impinges upon his or her right to privacy which is protected under Article 7 of the Basic Law: human dignity and

liberty. As a general rule, according to the Israeli legal system, for it to be permissible for the state to impinge upon protected human rights there must be an explicit statutory provision authorising such impingement. The degree to which the provision's language needs to be explicit is dependent upon the scope of the harm inflicted to the right in question. As far as the right to privacy is concerned, President Beinisch held that it is connected at its core to the individual's autonomy and to his or her capacity to decide who, or if anyone at all, will have access to information relating to him or her, will be able to examine his or her belongings or to touch his or her person. Nevertheless the principle of individual autonomy, which is the source of the right to privacy, is in itself that which allows the individual to decide to expose himself or herself before a person or a group of persons and to waive, in relation to those persons, certain aspects of his or her right to privacy. President Beinisch accordingly held that when a person consents to a search and when that consent is a true consent, then the scope to which his or her constitutional right to privacy is harmed is minimal. Thus, in those circumstances and based on that consent, the police may conduct a search.

Justice E. Arbel joined President Beinisch on this ruling. Justice Y. Danziger, dissenting, was of the view that the police lacked authority to conduct a consensual search without a specific statutory provision authorising such action.

President Beinisch held that in order to ensure that the consent given to conduct the search is in fact informed the mere request of the police to perform the search is not enough. It is insufficient due to the inherent power differences between the police and the citizen. One can assume, stipulated President Beinisch, that when a person is being asked by a police officer to be searched, that person will postulate that the police officer is acting within his or her authority and will not be inclined to assert his or her rights. Furthermore, in general, when a person is faced with a police officer asking to search his or her person, his or her belongings or is home his or her main concern is to bring an end to the encounter as soon as possible. In these circumstances that person may believe that his or her refusal to consent for the search might lead to his or her detention, arrest or at least arouse suspicion. Consent under those circumstances is not informed consent since it does not express a citizen's true and autonomous choice to waive his rights. Therefore, President Beinisch held that to assure that consent is informed, and not only based on power differences inherent to an encounter between a citizen and the police, a police officer asking to conduct a search is required to clarify, when relevant, to that person that he or she has the right to

refuse to the search and that his or her refusal will not be used against him or her. Since these clarifications were not given in the cases before her, President Beinisch found the two searches to be illegal.

Once President Beinisch concluded that the searches were illegal, the question of the admissibility of evidence obtained by them then arose; since according to Israeli evidence law, after making a finding that evidence was obtained illegally the courts have discretion in deciding the admissibility of such evidence, and the evidence is not automatically excluded from trial. When deciding this question the court should examine whether admitting the evidence will result in an disproportionate harm inflicted on the defendant's constitutional right to due process. In the present circumstances it was held that considering the severe illegality entailed in procuring the knife and drugs, and the relatively mild harm inflicted on the public interest in not admitting the evidence (since the offences were not relatively serious), admitting the knife and drugs to trial would result in disproportionate harm to the defendants' right to due process. Accordingly, both the knife and the drugs were excluded and the two defendants were acquitted.

#### *Languages:*

Hebrew.



# Italy

## Constitutional Court

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### Important decisions

*Identification:* ITA-2012-1-001

**a)** Italy / **b)** Constitutional Court / **c)** / **d)** 02.04.2012 / **e)** 86/2012 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 18.04.2012 / **h)** CODICES (Italian).

*Keywords of the systematic thesaurus:*

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

1.3.5.8 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by federal or regional entities.**

2.2.1.6.2 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Primary Community legislation and domestic non-constitutional legal instruments.**

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

*Keywords of the alphabetical index:*

Regional act / Seal of origin and quality / Quantitative restriction, measure with equivalent effect.

*Headnotes:*

The Italian Government brought an application raising, as the main issue, the question of the constitutionality of two sections of an act passed by the Marche Region. The first section provides that, for certain craft products of the Marche Region, the regional executive (*Giunta Regionale*) lays down production standards (*disciplinari di produzione*) regulating the materials to be used and the production methods to be followed in order to obtain the seal of origin and quality designated “*MEA - Marche Eccellenza Artigiana*”. The second section was subsequently amended by a later regional act and during the time it remained in force was never applied; the Court therefore declared that the contentious matter had lapsed (*cessazione della materia del contendere*).

*Summary:*

The Government claimed that the section on the regional seal was contrary to Article 117.1 of the Constitution because it transgressed the “constraints arising from the Community legal system” by contradicting Articles 34-36 of the Treaty on the functioning of the European Union (hereinafter, “TFEU”) on free movement of goods, forbidding Member States to place quantitative restrictions on import and export, as well as any measure with equivalent effect. Moreover, there was an alleged violation of Article 120.1 of the Constitution forbidding the Regions to adopt measures that would impede the movement of persons and goods between the Regions. Through the introduction of a seal as prescribed and regulated by the Marche regional act, consumers would be attracted by the seal linked with a Region, particularly in relation to products from the other Regions.

The question was admissible. The Court recalled that, as a consequence of Italy’s belonging to the Community legal system, the norms of the European Union overrode those of the nation, the State, the Regions and the Provinces of Trento and Bolzano in the areas of the Union’s competence. The primacy of Community law over domestic regional provisions was demonstrated in two different ways, depending whether the proceedings in which the compliance of the provision with Community law was called into question took place before an ordinary court or before the Constitutional Court in the course of main proceedings. In the first instance, if the Community provision had a “direct effect”, it would prevail over the domestic provision which would not be applied by the court in the case in point. In the second instance, the Court would declare the domestic provision unconstitutional for violating Article 117.1 of the Constitution. In the instant case, the Community provisions had been properly invoked as they formed part of the test of constitutionality via Article 117.1 of the Constitution.

The Court declared the section on the regional seal unconstitutional. Articles 34, 35 and 36 of the TFEU demonstrated that the prohibition of quantitative restrictions on commercial exchanges between the Union countries and of measures with equivalent effect, relating either to exports or to imports, was fundamental for the common market. The case-law of the Court of Justice of the European Union has defined as “measure having an equivalent effect” to quantitative restrictions “all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade” (Court of Justice, Judgment of 11 July 1974, *Dassonville v. Belgium*). Applying this principle, the Court of Justice held that a Member

State's award of a quality label to finished products manufactured in its territory constituted a violation of Article 30 of the EC Treaty, which became Article 28 EC as a result of amendments (Court of Justice, Judgment of 5 November 2002, *Commission v. Federal Republic of Germany*). In that case, the Court held that regulations intended to promote the marketing of agri-food products procured in Germany by means of an advertisement stressing the German origin of those products could have restrictive effects on imports from other Community countries. The Court came to the same conclusion in a case concerning national legal protection granted to certain regional brands (Court of Justice, Judgment of 6 March 2003, *Commission v. French Republic*).

The provision of the Marche Region introduced the seal "of origin and quality" designated "*MEA - Marche Eccellenza Artigiana*" which, by clearly indicating their origin, had the purpose of promoting the Marche craft products whose origin and quality it guaranteed. The measure which, at least potentially, could affect trade in goods between the Member States, undoubtedly constituted a "measure with equivalent effect" to a quantitative restriction on import and export according to the case-law of the Court of Justice of the European Union.

The Marche Region had thus transgressed the "constraints" arising from Community regulations and consequently violated Article 117.1 of the Constitution.

#### *Languages:*

Italian.



## Korea Constitutional Court

### Important decisions

*Identification:* KOR-2012-1-001

**a)** Korea / **b)** Constitutional Court / **c)** / **d)** 24.06.2010 / **e)** 2008Hun-Ba128 / **f)** Denial of Wounded Veterans' Pension to Soldiers Who Becomes Disabled After Retirement / **g)** / **h)**.

*Keywords of the systematic thesaurus:*

1.6 Constitutional Justice – **Effects**.  
3.19 General Principles – **Margin of appreciation**.  
3.20 General Principles – **Reasonableness**.  
5.2.2 Fundamental Rights – Equality – **Criteria of distinction**.

*Keywords of the alphabetical index:*

Soldier, wounded veterans' pension, entitlement / Military pension / Pension, beneficiary, requirements / Soldier, post-traumatic mental disorder / Pension, entitlement.

*Headnotes:*

Koreans shall be equal before the law and there shall be no discrimination in political, economic, social or cultural life on the basis of sex, religion or social status (Article 11.1 of the Constitution).

Defining the scope of soldiers injured while on duty who are entitled to the wounded veterans' pension as prescribed by the Military Pension Act and the pension beneficiary requirements is subject to full legislative discretion that should, in principle, be respected, but the legislature should abide by the constitutional principles such as the principle of equality in exercising its discretionary power.

Different treatment between those who had their disability diagnosed before retirement and those who had it diagnosed after retirement is hardly reasonable.

*Summary:*

I. The complainant, who suffered from post-traumatic mental disorder due to harsh treatment of senior non-commissioned officers during his service in the Korean Marine Corps, filed a claim for wounded veterans' pension benefits to the Minister of Defence as his symptoms turned worse after discharge in January 2003. When the claim was denied, he filed a lawsuit seeking revocation of that denial and, while the appeal was pending, filed a motion to request constitutional review of Article 23.1 of the Military Pension Act (amended by Act no. 6327, 30 December 2000, hereinafter, the "instant provision"). Yet, as the motion was denied, he filed a constitutional complaint with the Constitutional Court.

II. The Constitutional Court unanimously (except one separate opinion) ruled that the instant provision was not compatible with the Constitution.

Article 23.1 of the Military Pension Act does not regulate the benefits of wounded veterans' pension for "soldiers who were inflicted with injury and/or disease while on duty and consequently developed disability after retirement".

The "soldiers subject to the Military Pension Act" and "public officials subject to the Public Officials Pension Act" may differ from each other in the nature of respective professions. However, the two groups should not be treated differently in terms of their need for social welfare or protection because:

1. the legislative purpose of Acts mentioned above and the structure and system of each pension have much in common;
2. the changes in the structure of the public office and social paradigm which require social security benefits to cope with disasters and diseases occurring after retirement of public officials should be applied to military personnel as well as public officials. Although the two groups have no difference in terms of their need for social welfare and protection, the instant provision does not stipulate that soldiers shall receive wounded veterans' pension benefits in case of disability after retirement due to a disease or an injury. By doing so, the instant provision, by not prescribing wounded veterans' pension, discriminates against soldiers when it treats two groups which are similarly situated differently because the soldiers' claimed for disability benefits are denied while the public officials are still beneficiaries of disability benefits even if the disabilities are developed after retirement.

This type of discrimination between soldiers and public officials cannot be justified in light of the following facts:

- a. Soldiers are exposed to much more accidents and risks than other public officials, and the need for a social security system that protects disabled soldiers is greater.
- b. Despite the fact that the public office system and the nation's financial health have changed significantly, the legislative neglect to adopt a provision to offer a wounded veteran's pension to "soldiers who developed disability after retirement" has continued for 47 years since the introduction of the Military Pension Act. This inaction is considered to be in excess of the limit of legislative discretion, as no phased and (or) gradual legislation took place.
- c. It is difficult to judge that "soldiers who developed disability after retirement" are fully protected just because wounded veterans are entitled to compensations as prescribed by the Act on the Honourable Treatment and Support of Persons, etc. of Distinguished Services to the State or because a considerable amount of veteran payments pursuant to the same Act are not deducted from pension benefits prescribed in the Military Pension Act.

In addition, the instant provision specifies that only "soldiers who developed disability before retirement" are to be entitled to the wounded veterans' pension and thus discriminates against soldiers who faced disability after retirement by excluding them from the benefits. However,

- a. it is not easy to detect diseases in an early stage and cure them because of the uniqueness of the military service due to the strict command system and disciplines or shortage of medical facilities and
- b. the determination of whether disability is diagnosed and recognised before or after retirement can be made by incidental circumstances such as distinct characteristics of diseases or the working environment.

Therefore, such different treatment between those who had their disability diagnosed before retirement and those who had it diagnosed after retirement is hardly reasonable.

For this reason, the instant provision violates Article 11.1 of the Constitution that stipulates the principle of equality. However, since the immediate invalidation of the instant provision by a decision that holds it unconstitutional may cause a legal vacuum and side effects, and as the conditions and level of wounded veterans' pension benefits are ultimately determined by

the legislature in consideration of the financial status and supply level of the military pension fund, as well as the economic condition, the provision at issue shall be ordered to be applied provisionally until an appropriate legislative measure takes its place even though the instant provision is incompatible with the Constitution.



### III. Separate opinion of one Justice

It is against the Constitution to exclude soldiers who developed disability after retirement from those entitled to the wounded veterans' pension pursuant to the instant provision, but the unconstitutionality lies with the exclusion of those "who developed disability after retirement," not with the provision itself which stipulates that "Where a soldier retires disabled due to a disease or an injury incurred in the line of his public duties, the person shall be paid a wounded veterans' pension." Therefore, the decision of incompatibility should be limited to the legislative omission of the instant provision: not having provided in law that "soldiers who developed disability after retirement due to a disease or an injury" shall be entitled to the wounded veterans' pension.

#### *Supplementary information:*

As a consequence of this decision, Article 23.1 of the Military Pension Act has been amended on 19 May 2011, providing that the benefit of wounded veterans' pension shall be also paid for "soldiers who were inflicted with injury and/or disease while on duty and consequently developed disability after retirement."

#### *Cross-references:*

Former decisions concerning similar issues:

- Decision of 29.11.2001, 99Hun-Ma494, 13-2 KCCR *Korean Constitutional Court Report* (Official Digest) 714, 727;
- Decision of 28.02.2002, 2000Hun-Ba69, 14-1 KCCR *Korean Constitutional Court Report* (Official Digest) 129, 137;
- Decision of 27.07.2006, 2004Hun-Ba20, 18-2 KCCR *Korean Constitutional Court Report* (Official Digest) 52, 64;
- Decision of 29.03.2007, 2005Hun-Ba33, 19-1 KCCR *Korean Constitutional Court Report* (Official Digest) 211, 220.

#### *Languages:*

Korean, English (translation by the Court).

#### *Identification: KOR-2012-1-002*

**a)** Korea / **b)** Constitutional Court / **c)** / **d)** 24.06.2010 / **e)** 2009Hun-Ma257 / **f)** Prosecutor's Refusal to Allow Inspection or Copying of Case-Related Documents / **g)** 22-1(B) KCCR, *Korean Constitutional Court Report* (Official Digest), 621 / **h)**.

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

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

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

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

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

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

Execution, effect of suspending / File, access, refusal, reasons / Burden of proof / Justiciable interest / Case file, right to inspect and copying.

#### *Headnotes:*

The act of public prosecutor's refusal to allow inspection or copying of case-related documents, despite the Court's order of its permission, infringes the complainant's fundamental rights, regardless of the need for the Court's review of whether or not there is a legitimate reason for the public prosecutor to refuse to allow the inspection or copying of each document.

The defendant's right to a fair and speedy trial and the right to counsel are fundamental rights guaranteed under the Constitution, and the defence counsel's right to inspect or copy case-related documents constitute essential contents or elements of the stated fundamental rights and serve as a concrete means to realise them.

### *Summary:*

I. The complainants are defendants of case 2009Ko-Hab153, 168 (consolidated) at the Seoul Central District Court indicted by the respondent, who is a public prosecutor, on charges of special obstruction of the performance of official duties resulting in death. The defence counsel of the complainants, while preparing for the public hearing of the stated criminal case, filed an application that required inspection or copying of the entire case investigation documents, and the respondent permitted inspection or copying of only some parts of the documents and refused to do so for the remainder of the documents. In response, the defence counsel, citing Article 266-4.1 of the Criminal Procedure Act, filed a motion with the Court requesting the inspection or copying of the remainder of documents, and the Court ordered the respondent to allow inspection or copying of all the documents concerned.

In order to substantially guarantee the right to a fair and prompt trial and the right to counsel of the defendant, the Criminal Procedure Act provides that the public prosecutor shall, in principle, allow the defendant or his/her defence counsel to inspect or copy the case-related documents in case of an application; yet the public prosecutor may exceptionally refuse to allow the inspection or copying of such documents or place a limitation thereon if there is a reasonable ground to do so; and in refusing to allow the inspection or copying, or placing a limitation thereon, the public prosecutor shall notify of the reason in writing immediately (Article 266-3).

When a public prosecutor refuses to allow a defendant or his defence counsel to inspect or copy documents or places a limitation thereon, the defendant or defence counsel may make a motion to the court to allow him to inspect or copy such documents (Article 266-4), lest the defendant's right to inspect or copy documents become merely nominal.

Article 266-4.5 of the Criminal Procedure Act provides that if the public prosecutor does not comply with the court's ruling concerning the inspection or copying without delay, he/she shall not make a motion for admission of relevant witnesses and documents as evidence.

Following the Court's order, the defence counsel requested the respondent to allow inspection or copying of the remainder of documents, but the respondent repeatedly refused to do so (yet, the full bench of the appellate court handling the abovementioned criminal case, while keeping the case-related documents for its decision on application for a ruling, allowed the defence counsel to inspect or copy the

documents, and, consequently, the complainants eventually gained access to all the documents concerned).

II. In a vote of 8 to 1, the Court held that the public prosecutor's refusal to allow inspection or copying of case-related documents despite the Court's order of its permission is in violation of the complainants' fundamental rights and the Constitution.

In this case, the public prosecutor did not follow the Court's order to allow inspection or copying responding to the complaint's motion against the initial denial of public prosecutor, and no constitutional clarification has been made for cases such as this. It is also most likely that similar types of non-compliance acts may recur in the future. In this respect, there still is a protectable interest to benefit from adjudicating on this case although the complainants' individual interest to remedy the infringed right no longer exists.

Furthermore, once the court grants the motion filed by the defendant requesting the public prosecutor to allow inspection or copying of documents, it should be considered that the decision becomes effective upon the announcement of the ruling.

As long as the court ordered that the documents be allowed for inspection and copying, the public prosecutor, in accordance with the rule of law and the principle of separation of powers, should obviously have complied with the court's ruling immediately. Therefore, the public prosecutor's non-compliance with the Court's ruling infringes on the defendant's right to inspection or copying of case-related documents and, moreover, the right to a fair and prompt trial and the right to counsel. The legislative purpose of newly adopting a regulation on inspection or copying of case-related documents is to provide for a prompt and effective remedy.

### III. 1. Concurring Opinion of 1 Justice

The purpose of the regulations of Article 266-3 and Article 266-4 of the Criminal Procedure Act concerning the inspection or copying of investigation records is to prevent the defendant's or the counsel's right to inspection or copying of case-related documents from being rendered nominal and thereby protecting the defendant's right to defence substantially, while at the same time forcing public prosecutors or courts to give prudent judgments to prevent ill effects such as violation of major public interests including national security. Yet, the court's ruling over the issue of inspection or copying of case-related documents may have a significant impact on the parties concerned and public interest, and there should be an opportuni-

ty to correct the court's wrong judgments if there are any. In this respect, for such rulings on the inspection or copying of documents, a legally effective means should be adopted as a special regulation for public prosecutors, defendants and lawyers to file a petition to appeal against that Court's ruling.

Meanwhile, it is appropriate to interpret that the Court's decision on the inspection or copying under the current Criminal Procedure Act that has no written special regulation can be considered as an ordinary courts' judgment as prescribed by Article 402 of the Act and thus can be appealed against in the same manner as other ordinary appeals. For this reason, considering that the public prosecutor is provided with the means to raise objection to the Court's ruling that orders him/her to allow inspection or copying, his/her act of refusal even without going through the process against that Court's order, shall be deemed to infringe on the complainants' fundamental rights and therefore violates the Constitution.

However, given the significance of the decision on whether to allow inspection or copying of case-related documents and the necessity for speedy proceedings, it is well advised from the legislative perspective that a statute for an immediate appeal that has the effect of suspending the execution, instead of a general appeal without the effect of suspension of execution, be set forth, also serving as a means of challenge against the Court's ruling on the inspection or copying of case-related documents.

## 2. Dissenting Opinion of 1 Justice

In case the public prosecutor simply does not follow the court's ruling, he/she shall suffer a disadvantage of not being able to make a motion for admission of relevant witnesses and documents as evidence pursuant to Article 266-4.5 of the Act, and this also substantially affects his/her probative power in the concrete factual relationship related to the documents concerned. Also, such procedural disadvantages likely to be suffered by the public prosecutor, who has the burden of proof in accordance with the principle of presumption of innocence, secures the effectiveness of court rulings on the public prosecutor's refusal to allow inspection or copying and functions as a substantial guarantee of the criminal defendant's right of defence. Therefore, it is hardly the case that the public prosecutor will disobey the Court's ruling made on the basis of the provision of Article 266-4 of the Criminal Procedure Act and continue to commit similar types of non-compliance acts, or that there is a critical need for constitutional clarification in this regard. Therefore, the complainant's purpose of claim in this case has already been served, and it is neither the case that there is likelihood for such non-

compliance of public prosecutors to recur nor that constitutional clarification is critical. According to the dissenting Justice, this case had to be dismissed because there was no justiciable interest to be redressed by the Court's decision.

### Cross-references:

Former decisions concerning similar issues:

- Decision of 28.01.1992, 91Hun-Ma111, 4KCCR *Korean Constitutional Court Report* (Official Digest), 51, 55-56;
- Decision of 27.11.1997, 94Hun-Ma 60, 9-2 KCCR *Korean Constitutional Court Report* (Official Digest), 675, 704;
- Decision of 27. 03. 2003, 2000Hun-Ma474, 15-1 KCCR *Korean Constitutional Court Report* (Official Digest), 292, 297;
- Decision of 28.02.2008, 2005Hun-Ma396, 20-1(A) KCCR *Korean Constitutional Court Report* (Official Digest), 268, 274-277;
- Decision of 29.07.1993, 90Hun-Ba35, 5-2KCCR *Korean Constitutional Court Report* (Official Digest), 29, 33.

### Languages:

Korean, English (translation by the Court).



### Identification: KOR-2012-1-003

**a)** Korea / **b)** Constitutional Court / **c)** / **d)** 29.07.2010 / **e)** 2006Hun-Ba75 / **f)** Constitutional Complaint on Article 18.1.5 of the Health Functional Foods Act / **g)** 22-2(A) KCCR, *Korean Constitutional Court Report* (Official Digest), 232 / **h)**.

### Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality**.
- 3.17 General Principles – **Weighing of interests**.
- 4.15 Institutions – **Exercise of public functions by private bodies**.
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

*Keywords of the alphabetical index:*

Food, labelling, censorship / Food, labelling, prior inspection / Post-remedy, efficacy / Censorship, principle of absolute prohibition.

*Headnotes:*

The prior inspection of labels or advertisements of health functional foods is necessary to achieve the legislative purpose and is not excessive. It balances the public interest pursued with the private interest which may well be affected by it.

*Summary:*

I. The complainant, a corporation engaged in sales of health functional foods, requested the Korea Health Supplement Association (hereinafter, the "KHSA") to inspect the labels and advertisements of functions required by the statute prior to promoting the sales of its health functional foods products, 'Glucosamine' and 'Hong-Gook.'

KHSA notified a conditional pass result to the complainant, requiring partial revision and elimination of certain elements in accordance with the inspection by the Functional Labels or Advertisement Commission (hereinafter, the "Commission"); however, the complainant advertised without any revision despite the Commission's recommendation of revision. Because the complainant's advertisement did not follow the conclusion of the Commission's inspection, the head of Gangnam-gu, Seoul, issued an administrative measure of suspension of business for the period of 3 months under Article 18.1.5 and 32 of the Functional Health Foods Act (hereinafter, the "Instant Provisions").

In its response against that measure, the complainant filed a claim with the Seoul Administrative Court to seek the cancellation of that measure; and while the case was pending, the complainant filed a motion to request the constitutional review of the statute prescribing prior inspection of the labels and advertisements of functions of the health functional foods, contesting that such prior inspection violates the principle of prohibition of censorship under Article 21.2 of the Constitution, thereby infringing the freedom of speech of the complainant. However, the Seoul Administrative Court rejected its claim as well as its motion, the complainant filed this constitutional complaint with the Court.

The Constitution guarantees the freedom of speech and press to the People (Article 21.1 of the Constitution); and the Constitution also stipulates the

prohibition on permission or censorship of speech and press (Article 21.2 of the Constitution).

The health of all citizens shall be protected by the State (Article 36.3 of the Constitution).

The Commissioner of the Korea Food and Drug Administration (hereinafter, the "Commissioner"), which is the public authority, delegates the prior inspection of functional labels or advertisements of functional health foods to KHSA, which is a private organisation, the commissioner regulates the inspection standard, method, and procedure of the inspection of labels and advertisements of functional health foods (Article 16.1 of the Functional Health Foods Act).

II. In a 7 to 2 decision, the Court held, that Article 18.1.5 of the Functional Health Foods Act, which stipulates the inspection of the labels or advertisements of health functional foods prior to their sale, does not violate the Constitution.

Freedom of speech and the press is guaranteed by Article 21 of the Constitution and means that the free expression and dissemination of ideas or opinions is protected by the Constitution. The labels, or advertisements of health functional foods, at issue in the instant case, belong to the freedoms to be protected.

In applying the principle of prohibition of censorship, the Court has narrowly interpreted the scope of the prior inspection within the meaning of the true purpose of Article 21 of the Constitution by absolutely prohibiting only the prior inspection that meets four elements including the existence of the prior inspection proceedings conducted by the public authority.

If false or exaggerated advertisements of health functional foods are not prevented, it would cause extensive damages to the health of many and unspecified individuals; and even if false or exaggerated advertisements are punished after those damages, the physical or health damages of consumers are irreparable and therefore measures taken after those damages are deemed not to be effective. On the other hand, advertisements of health functional foods, which are purely commercial, are rarely related to a political expression of ideas or knowledge; and the censorship of such advertisements would not affect the originality and creativity of artistic activities or freedom of speech, which could limit the freedom of expression to that which satisfies the whim of the person in authority. Therefore the Instant Provisions are not the censorship that is absolutely prohibited by the Constitution when the

need for regulation on labels and advertisement of the functional health foods is high. That procedure does not violate the principle of excessive restriction, and therefore does not infringe the basic rights, including the freedom of speech of the complainant for the following reasons:

The Instant Provisions of this case have a legitimate legislative purpose because the prior inspection of labels or advertisements of health functional foods is to provide the correct information on health functional foods, to prevent false or exaggerated advertisements, and to promote the health of the people. The Instant Provisions are also an appropriate means of providing an individual with the possibility of requesting a prior inspection or censorship of the draft of labels or advertisements where that individual is not satisfied with the Commission's conclusion.

With the consideration of the extensiveness of physical or health damages to the people by false or exaggerated advertisements and the inefficiency of post-remedies, the prior inspection of labels or advertisements of health functional foods is necessary to achieve the legislative purpose and is not excessive. It balances the public interest pursued with the private interest which may well be affected by it.

### III. Concurring Opinion of Two Justices

Despite the Commissioner of the Korea Food and Drug Administration (hereinafter, the "Commissioner"), which is the public authority, delegates the prior inspection of functional labels or advertisements of functional health foods to KHSA, which is the private organisation, the Commissioner regulates the inspection standard, method, and procedure of the deliberation on labels and advertisements of functional health foods (Article 16.1 of the Functional Health Foods Act), thereby the Commissioner can remotely control the deliberation of the KHSA by amending the review standard at any time. The Commissioner can also affect the composition of the Commission because the Commissioner has the power to approve the appointment of members of the Commission of KHSA which inspect functional labels or advertisements of functional health foods in practice (Article 10.3 of the Review Standard). Even from the perspective of the procedure, the Commission is not completely independent from the public authority: the Minister of Health and Welfare or the Commissioner can cover the expenses of private organisations in part or entirely in order to promote the safety of functional health foods within the given budget (Article 39 of the Functional Health Foods Act), implying that the public authority can affect the deliberation procedure at anytime through such assistance.

Therefore, the Commission of KHSA is not independent from the public authority such as the Korea Food and Drug Administration in inspecting the prior review of functional labels or advertisements of functional health foods, thereby admitting the nature of the public authority of KHSA, the reviewing body.

### *Cross-references:*

Former decisions concerning similar issues:

- Decision of 27.01.2001, 99Hun-Ba23, 12-1KCCR *Korean Constitutional Court Report* (Official Digest), 51, 59;
- Decision of 26.06, 2005Hun-Ma506, 20-1(B) KCCR *Korean Constitutional Court Report* (Official Digest), 397, 410-426;
- Decision of 04.10.1996, 93Hun-Ka13, 8-2 KCCR *Korean Constitutional Court Report* (Official Digest), 212, 223;
- Decision of 27.10.2005, 2003Hun-Ka3, 17-2 KCCR *Korean Constitutional Court Report* (Official Digest), 189, 198.

### *Languages:*

Korean, English (translation by the Court).



### *Identification:* KOR-2012-1-004

**a)** Korea / **b)** Constitutional Court / **c)** / **d)** 29.07.2010 / **e)** 2008Hun-Ka4 / **f)** Criminal Compensation Claim / **g)** 22-2(A) KCCR, *Korean Constitutional Court Report* (Official Digest), 1 / **h)**.

### *Keywords of the Systematic Thesaurus:*

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

*Keywords of the alphabetical index:*

Compensation, statute of limitation / Compensation, for detention, acquittal / Public interest, government finances / Indictment, absence, compensation for detention / Detention, liberation, compensation.

*Headnotes:*

In expressly prescribing the right to criminal compensation, Article 28 of the Constitution declares that the State shall provide substantial damages to a person for the infringement of his or her physical freedom due to the inherent dangers of the national judicial system. The legislation on specific proceedings for criminal compensation should thus substantially ensure the effectiveness of such a remedy in order to correspond with its purpose, which is to protect a basic constitutional right.

An exceptionally short statute of limitations or exclusion period should be introduced when the exercise of a right is easy and common in daily life; if the legal status of another party becomes unstable by the exercise of this right; or if the prompt judicial recognition of the legal relations in question could prevent a conflict. However, the Instant Provision limiting the period for bringing a claim for criminal compensation to one year is not in line with the above and prevents the effective protection of the right to criminal compensation, which should be more strongly protected than other legal rights.

In addition, the Instant Provision sets out that the compensation claim period shall run from the day on which the judgment of acquittal becomes final, regardless of whether the accused is aware of this. However, the Criminal Procedure Act provides that if the accused is not aware that the judgment of acquittal is final for reasons beyond the accused's control: for example, the provisions of the Criminal Procedure Act permit that trials may be held exceptionally without the attendance of the accused. Therefore, the Instant Provision can greatly impair the right to criminal compensation of the accused or make it practically impossible to obtain.

Whereas the infringed basic right of the people, caused by the limitation on the right to criminal compensation, is closely linked to the right to physical freedom, the public interests that are restricted because of the exercise of the right to criminal compensation represent an insignificant financial burden taking into account the national budget's scale. Allowing a broad exercise of such a right by the accused will not lead to any legal confusion. The Instant Provision therefore does not balance the interests, since it excessively restricts the

citizens' economic right that is closely linked to the right to physical freedom in order to protect the public interest of the government's finances.

*Summary:*

I. The petitioner, who had been sentenced to life imprisonment following the *Gwangju* pro-democracy rallies, was released for a stay of execution of the sentence and later found not guilty at a retrial of his case. Then, after eight years from the date when the judgment of "not guilty" became final, the petitioner filed a claim for criminal compensation for his late acquittal. The requesting court, on its own discretion, requested the Court to provide a constitutional review of Article 7 of the Criminal Compensation Act (hereinafter, the "Instant Provision"), which sets out that a claim for compensation shall be made within one year from the date on which the judgment of "not guilty" becomes final.

In a case where a criminal suspect or an accused person who has been placed under detention is not indicted, as provided by the Statute or is acquitted by a court, he or she shall be entitled to claim just compensation from the State under the conditions set out in the Statutes (Article 28 of the Constitution).

A claim for compensation shall be made within one year from the date on which the judgment of "not guilty" becomes final (Article 7 of the Criminal Compensation Act).

II. The Constitutional Court (hereinafter, the "Court"), in a vote of eight (including four concurring opinions) to one, hold that the Instant Provision is incompatible with the Constitution.

Although the Instant Provision violates the Constitution, this Court's decision of unconstitutionality in its invalidating the Instant Provision may cause a legal vacuum or confusion. Therefore, the Court held that the Instant Provision was not compatible with the Constitution, respecting the legislative power, with the order of suspending the application of the Instant Provision until it is revised by the legislator.

III. 1. Concurring Opinion of four Justices

Even if the Court in this case were to render a decision of unconstitutionality, the general provisions on the statute of limitations of national debts would apply and the exercise of the right to criminal compensation would not be permanently allowed. Thus, the legal vacuum with regard to the exercise period of that right would not be an issue. We therefore urge that the instant provision be declared unconstitutional.

## 2. Dissenting Opinion of one Justice

Accused persons who have received a judgment of acquittal should know that they have a right to criminal compensation, since a transcript of the judgment and certificate of finality are served on them. As no additional evidence is necessary in order to bring a claim for criminal compensation, the one-year claim period would not seem to interfere in the exercise of the right to criminal compensation. Besides, the instability caused by the unforeseeable rise of the right to criminal compensation requires that the legal relationship be stabilised in a short period of time. It is unlikely that the accused in custody is unaware of the judgment of acquittal and problems may arise from the instability caused to legal relationships by allowing several exceptions to the date from which the period of criminal compensation claim runs. It is not clear whether these exceptions are the less restrictive legislative means or the effects of the Instant Provision.

### *Supplementary information:*

As a result of this decision, Article 7 of the Criminal Compensation Act was revised to become Article 8 of the same Act and extended the one-year period for bringing a criminal compensation claim to three years from the date on which the accused is made aware of the final judgment of his or her acquittal or five years from the date of the final judgment for such an acquittal.

### *Languages:*

Korean, English (translation by the Court).



### *Identification:* KOR-2012-1-005

**a)** Korea / **b)** Constitutional Court / **c)** / **d)** 29.07.2010 / **e)** 2009Hun-Ka8 / **f)** Claimant for Revocation of Bigamy / **g)** 22-2 (A) KCCR, *Korean Constitutional Court Report* (Official Digest), 113 / **h)**.

### *Keywords of the systematic thesaurus:*

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

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

### *Keywords of the alphabetical index:*

Revocation, bigamy, claimant / Patriarchy, ideology / Family, lineal ascendant / Family, lineal descendant / Inheritance, right / Marriage, right to self-determination.

### *Headnotes:*

Restricting constitutional rights is unconstitutional unless prescribed by law, pursues a legitimate aim set out in law and the means adopted are less restrictive, proportionate or necessary to achieve such a legitimate aim.

### *Summary:*

I. In 1933, the petitioner's father (hereinafter, the "Deceased") married the petitioner's biological mother ("A") in a region that is currently in North Korea and the petitioner and his siblings were born of their union. Later in 1959, the Deceased registered A's death in South Korea, although A did not actually die then (A died in 1997). After that, the Deceased married another woman who was his wife ("B") until he died, and registered the marriage and children were also born from this union. The Deceased died in 1987 and on 16 February 2009, the petitioner filed a claim for revocation of bigamy against B, who was still alive then (Seoul Family Court 2009DeDan14527).

While the case was pending, the petitioner filed a motion with the Family Court on 8 June 2009 to request constitutional review of Article 818 of the Civil Act (hereinafter, the "Instant Provision"). Thereupon, that Court granted the motion and requested a constitutional review of the Instant Provision from the Constitutional Court.

Koreans shall be equal before the law and there shall be no discrimination in political, economic, social or cultural life on the basis of sex, religion or social status (Article 11.1 of the Constitution).

No one who has a spouse shall enter into another marriage (Article 810 of the Civil Act).

In the case of marriage in violation of the provisions of Article 810, a claim for revocation of the marriage to the Court may be made by either party, the spouse, the lineal ascendants, the collateral blood relatives within the fourth degree of relationship, or a public prosecutor (Article 818 of the Civil Act).

II. In a majority opinion of seven (incompatible with the Constitution) against one (unconstitutional) and one (constitutional), the Constitutional Court held that the Instant Provision is incompatible with the Constitution.

The Instant Provision provides a list of people who may file a claim for revocation of bigamy, which excludes the lineal descendants but includes the lineal ascendants and the collateral blood relatives within the fourth degree of relationship.

First of all, if one compares the situation of parents (who are the closest lineal ascendants of the person who committed bigamy) with sons and daughters (who are the closest linear descendants of the person who committed bigamy) they are all in the first degree of relationship. The discrimination between them in the Instant Provision, therefore, seems to be based simply on the patriarchal and feudal order that children are not allowed to take any issue with their parents' bigamy, but no other legitimate reasons can be found. The Court, in the decisions of incompatibility with the Constitution regarding the House Head System case (2001Hun-Ka9, 3 February 2005) and Same-Surname-Same Origin Marriage Ban case (95Hun-Ka6, 16 July 1997), has declared that the ideology of patriarchy goes against the constitutional order of marriage. Therefore, excluding the lineal descendants, whose legal interests regarding the right of inheritance are as serious as those of lineal ascendants, from the list of people who can file a claim for revocation of bigamy is merely based on the relics of patriarchy which have not been tolerated by our Constitution since its enactment, and as a result, its legitimacy cannot be recognised.

Further, among the collateral blood relatives, uncles, cousins, nieces and nephews who are not even included in the scope of family as stipulated in the Civil Act may have the right to file a claim for revocation of bigamy. It is unreasonable that while cousins who can be younger than a lineal descendant have the right to file a claim for revocation of bigamy, the lineal descendant, who has more legal interests in the claim for revocation of bigamy, do not.

Meanwhile, there is an argument that since a public prosecutor is included in the list of persons who may file a claim for revocation of bigamy, the illegitimacy of such discrimination could be mitigated although lineal descendants are excluded. But, considering the fact that there is no procedural provision through which a lineal descendant can request a public prosecutor to exercise his/her right to file a claim for revocation of bigamy and that, although it is possible for a lineal descendant to request a public prosecutor to file a claim for revocation, it is only a way to just encourage the public prosecutor to exercise the authority. For the

foregoing reasons, simple inclusion of the public prosecutor in the list seems far short of correcting the unreasonableness of the discrimination reviewed above.

Consequently, the Instant Provision violates the principle of equality and the Constitution, as it gives a right to file a claim for revocation of bigamy to the lineal ascendants and the collateral blood relatives within the fourth degree of relationship while not to the lineal descendants without legitimate reasons.

However, should the court decide that the Instant Provision is unconstitutional, it will lose its effect immediately and a legal vacuum will occur. In order to prevent such a vacuum, the Court declared the Instant Provision as incompatible with the Constitution and it shall be tentatively applied until the legislator revises it by 31 December 2011.

#### II. 1. Concurring Opinion of one Justice

The decision should not be one of incompatibility with the Constitution, but one of limited unconstitutionality with the subject matter of review specified. The decision should say that "the Instant Provision's failure to stipulate the lineal descendants as the ones who can file a claim for revocation of bigamy while including the lineal ascendants and the collateral blood relatives is in violation of the Constitution."

#### 2. Dissenting Opinion of one Justice

Considering the facts that in most cases of bigamy, a prior marriage is actually dissolved and a subsequent marriage is regarded as a real marriage and that the Civil Act stipulates bigamy not as one of the causes for nullity of marriage, but as one of causes for revocation of marriage, it is proper to consider that revocation of bigamy should be left to the right to self-determination of those and their spouses who commit a bigamy and thus their legal rights are directly infringed by that bigamy. Therefore, the part in Article 818 of the Civil Act which provides for "the lineal ascendants, the collateral blood relatives within the fourth degree of relationship" as the ones who can file a claim for revocation of bigamy should be regarded as violating the Constitution, illegitimately infringing the marital right and the self-determination regarding marital relationship of the person directly involved in bigamy. As a result, the Court should not declare that the Instant Provision's failure to include the lineal descendants in the list of people who can file a claim for revocation of bigamy is in violation of the Constitution.

*Cross-references:*

Former decisions concerning similar issues:

- Decision of 16.07.1997, 95Hun-Ka6, 9-2KCCR *Korean Constitutional Court Report* (Official Digest), 1,13;
- Decision of 28.03.2002, 2000Hun-Ba53, 14-1KCCR *Korean Constitutional Court Report* (Official Digest) 159,165;
- Decision of 02.02.2005 2001Hun-Ka9, 17-1 KCCR *Korean Constitutional Court Report* (Official Digest) 1,24.

*Languages:*

Korean, English (translation by the Court).

*Identification:* KOR-2012-1-006

**a)** Korea / **b)** Constitutional Court / **c)** / **d)** 30.09.2010 / **e)** 2008Hun-Ma628 / **f)** Legal Remedies for Offenders Arrested and Detained *Flagrante Delicto* / **g)** 22-2(A) KCCR, *Korean Constitutional Court Report* (Official Digest), 718 / **h)**.

*Keywords of the systematic thesaurus:*

1.4.4 Constitutional Justice – Procedure – **Exhaustion of remedies.**

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

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

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:*

Arrest, without warrant / Detention, without warrant / Arrest, legality, review.

*Headnotes:*

Since those who are arrested have access to a remedy procedure for reviewing the legality of their arrest as provided in the Constitution or Criminal

Procedure Act, filing a constitutional complaint without having exhausted the legal remedy is against the rule of exhaustion of other remedies and thus non-justiciable. First of all, unawareness of the availability of the review of the legality of arrest guaranteed by the Constitution and Criminal Procedure Act cannot be a sufficient reason to consider that this case suffices as an exception to subsidiarity. Furthermore, considering the legislative purpose of that review, the scope of those eligible to request review, competent authority of that review, the procedures and the effect of release decisions as provided in the Constitution and the Criminal Procedure Act, the review of the legality of arrest is the most powerful and effective legal remedy for the offender who believes that his/her arrest on site was unjustified or that his/her detention was being overly extended beyond the necessary period of time. In that sense, requiring the offender to request the Court's review of the legality of the arrest would be deemed as neither merely forcing him/her to take an ineffective remedy of rights nor requiring a judicial bypass procedure.

*Summary:*

I. On 27 July or 15 August 2008, the complainants were arrested *flagrante delicto* by the police for violating the Assembly and Demonstration Act and committing general obstruction of traffic under the Criminal Act at the site of so called 'a candlelight rally' in *Jongno-gu* and *Jung-gu* calling for the "quarantine rules on U.S. beef imports to be renegotiated or scrapped" and then were taken into custody at detention centres of nine police stations located in the heart of Seoul. The complainants were eventually released within approximately 38 hours to 46 hours from the time of arrest and the public prosecutor did not request any detention warrant from the Court. Subsequently, the complainants filed a constitutional complaint with the Court in this case, arguing that the unduly extended detention followed by the arrest infringed on their right to personal liberty, freedom of assembly and right to equality. Meanwhile, the complainants have not filed any claim for a review of the legality of the arrest before filing this complaint.

Article 12.3 of the Constitution provides that "in a case where a criminal suspect is an apprehended *flagrante delicto*... investigative authorities may request an *ex post facto* warrant," thereby providing an exception to executing a priori warrant, and Article 213-2 and Article 200-2.5 of the Criminal Procedure Act stipulates that the request for the warrant of detention should be "made within 48 hours from the time of arrest."

Any person who claims that his or her basic right guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power may file a constitutional complaint, except the judgments of ordinary courts, with the Constitutional Court: provided that if any relief process is provided by other laws, no one may file a constitutional complaint without having exhausted all such processes (Article 68.1 of the Constitutional Court Act).

II. In a vote of 6 to 3, the Court ruled that the constitutional complaint is non-justiciable, stating that, although the complainants had been apprehended while committing offense at the protest site in the police officers' presence and held in custody for almost 48 hours in detention centres of police stations, filing their complaint with the Constitutional Court before exhausting the other remedy procedures to review the legality of their arrest violates the rule of exhaustion of other remedies.

#### II. 1. Dissenting Opinion of two Justices

The complainants argue that it was only after their release that they realised their arrest and detention by the investigation authority was in fact abusive and used as a means of punishing them for having attended the assembly at issue or preventing them from taking part in other subsequent assemblies. And asking these complainants to initially request the court for review of the legality of their arrest and wait for the Court's decision of dismissal before filing a constitutional complaint with the Court is as good as compelling them to take a bypass procedure which in fact cannot act as a functional legal remedy.

The procedure also cannot be a substantially effective legal remedy in this case for the following reasons:

- a. there is not enough basis to expect, given the nature of arrest that ends shortly within 48 hours, that the offender could file a petition for review of the legality of arrest in a timely manner even if the detention is exploited as a means of punishment or obstruction to attending other assemblies,
- b. the offender will most likely be hesitant in filing a request for the review since the court's decision on the legality of arrest would be made after his/her 48 hour detention period unless he/she is willing to take the risk that the detention period may be extended even further and
- c. the procedure is unable to function as a control of unlawful or unjustified arrest if the investigation authority releases the offender before the court has reached its decision on the legality of arrest.

#### 2. Dissenting Opinion of one Justice

The provisions mentioned above in the Headnotes reflect the legislator's policy judgment that detention of less than 48 hours is not against the principle of the warrant system, taking into account the unusual characteristics of a flagrant offender, nature of the detention followed by an apprehension of a suspected criminal *flagrante delicto*, the time inevitably required for a criminal procedure and the reality of investigation. As this 48-hour timeframe is hardly regarded as overly extended even in comparison with other countries, it cannot be assumed that the timeframe or standard for deciding whether to secure an *ex post facto* warrant significantly oversteps the boundary of legislative discretion and infringes on the fundamental rights of citizens. Therefore, the detentions in this case that lasted 38 hours to 46.5 hours from the time of arrest do not violate the principle of the warrant system provided in the Constitution, and no circumstances suggest that the fundamental rights of the complainants were violated by the detention in this case, either. For this reason, the detention in this case is not against the Constitution.

#### Cross-references:

Former decisions concerning similar issues:

- Decision of 04.09.1989, 89Hun-Ma22, 1KCCR *Korean Constitutional Court Report* (Official Digest), 176, 187;
- Decision of 28.01.1992, 91Hun-Ma111, 4KCCR *Korean Constitutional Court Report* (Official Digest) 51,56;
- Decision of 28.04.1994, 88Hun-Ma86, 6-1 KCCR *Korean Constitutional Court Report* (Official Digest) 371,387.

#### Languages:

Korean, English (translation by the Court).



*Identification: KOR-2012-1-007*

a) Korea / b) Constitutional Court / c) / d) 28.10.2010 / e) 2007Hun-Ra4 / f) Competence Dispute between Gangnam-Gu, etc. and the National Assembly / g) 22-2(A) KCCR, *Korean Constitutional Court Report* (Official Digest), 775-787 / h).

*Keywords of the systematic thesaurus:*

3.22 General Principles – **Prohibition of arbitrariness**.  
 4.5.6.1 Institutions – Legislative bodies – Law-making procedure – **Right to initiate legislation**.  
 4.8.4.2 Institutions – Federalism, regionalism and local self-government – Basic principles – **Subsidiarity**.

*Keywords of the alphabetical index:*

Tax revenue, decrease / Tax, district / Legislative authority / Legislative policy-making power / Local autonomy, rights / Local government, right to financial autonomy / Local Tax Act / Tax, State tax v. local tax.

*Headnotes:*

Under the local government's right to financial autonomy, there is a right to autonomous revenue, meaning that a local government has a right to autonomously decide its revenue policy from the possible source of revenue under its responsibility, including a right to impose and levy public charges such as local tax and allotted charges. There is also a right to autonomous expenditure, meaning that a local government can autonomously use its financial means to execute administrative matters within its budget under its own responsibility. The financial autonomy right of local governments, however, is not an absolute right but formed and restricted by Statutes such as the Local Tax Act, the Local finance Act, the Local Public Enterprises Act, etc.

Legislators may restrict local government's autonomy rights while enacting the matters pertaining to local autonomy. However, the restriction should not infringe on the essence of the rights such as denying the existence of local government itself or annihilating the local government's rights. Thus, in reviewing infringement of the local government's autonomy rights by the National Assembly's legislation, it is sufficient to review whether the essential parts of the local autonomy rights are infringed and there seems to be no need to apply the rule against excessive restriction or the principle of equality applicable to review infringement of fundamental rights.

The simple fact that a local government has the right to financial autonomy does not necessarily give the local government the right to have guaranteed source of income such as a specific tax. Rather, such a right is formed only after related provisions of Statute are enacted. And the issue regarding which types of tax should be included to which types of governmental institutions is a matter to be decided by a national policy in consideration of the basis of a specific tax, efficiency in levying the tax, and financial conditions of the institutions where the tax may possibly be reverted, and there is no constitutional or logical basis to consider that a certain type of tax should be a state tax or a local tax.

Therefore, it is within the legislator's authority to decide what kind of tax should be imposed on the people, whether the tax should be a state tax or a local tax, and whether it is a regional local government or an elementary local government to which a local tax should be reverted, and unless it is unreasonably and excessively arbitrary, the decision by them should be respected.

*Summary:*

I. On 3 July 2007, the respondent (the National Assembly), in order to cure the serious financial imbalance among Gus in the Special Metropolitan City, passed the revised bill to the Local Tax Act for newly enacting Article 6-2 and Article 6-3 (hereinafter, the "Instant Provisions") which prescribe that, as for Gu within jurisdiction of the Special Metropolitan City, the property tax which used to be "Gu tax" shall be the "Special Metropolitan City and Gu tax," and the Mayor of Special Metropolitan City shall grant all of the property tax belonging to the Special Metropolitan City to the autonomous Gus under jurisdiction. The revised bill was enacted on 20 July 2007 and took effect on 1 January 2008.

By stipulating that "local governments shall deal with administrative matters pertaining to the welfare of local residents, manage properties, and may enact provisions relating to local autonomy within the limits of and statutes subordinate rules," the Constitution provides an institutional guarantee of local autonomy (Article 117.1 of the Constitution). These local autonomy rights include a right to autonomous legislation, a right to organisational autonomy, a right to autonomous personnel management, a right to financial autonomy, etc. Among these rights, the right to financial autonomy means a local government's rights to autonomously manage its revenue and expenditure not directed by the State within the limits of Statute and subordinate laws.

A provision of the Local Tax Act makes property tax of a Gu (District) be the Special Metropolitan City and Gu tax (Article 6-2 of the Local Tax Act), thereby the property tax is jointly imposed by both the Special Metropolitan City (50/100) and autonomous Gus (50/100) under the jurisdiction, and a provision of the Local Tax Act stipulates that all of the property tax revenue belonging to the Special Metropolitan City shall be allotted to the autonomous Gus under jurisdiction (Article 6-3 of the Local Tax Act).

Plaintiffs filed this competence dispute suit with the Constitutional Court, arguing that, due to the respondent's act of enacting the Instant Provisions, more than 50% of the plaintiffs' property tax revenue goes to the Special Metropolitan City; the plaintiffs' tax revenues decrease; and Gus could be subordinated to the Special Metropolitan City, and therefore, the Instant Provisions infringe upon the plaintiffs' local autonomy rights or the core of their right to financial autonomy.

II. The Court held that Article 6.2 and 6.3 (hereinafter, the "Instant Provisions") do not infringe on the plaintiffs' local autonomy right guaranteed by the Constitution.

Although the Instant Provisions place restrictions on the plaintiffs' right to financial autonomy by decreasing their revenue, unless such restriction is so excessive that the plaintiffs' right to financial autonomy becomes nominal, thereby infringing on the essential part of the local government's right to financial autonomy, the respondent's act of legislating the Instant Provisions can be considered legitimate.

According to the data submitted by the plaintiffs, the actual rates of decrease in the plaintiffs' property tax revenue in 2008 from 2007, taking the revenue allocated by Seoul Metropolitan City to each autonomous Gu, are, for example, 9.8% for Jung-Gu, 28.8% for Seocho-Gu and 31.6% for Gangnam-Gu. And, after taking the amount of money provided by the Seoul Special Metropolitan City for compensation of the decrease in Gu's property tax revenue (in 2008, 60%, in 2009, 40%, and in 2010, 20%), the rates of decrease in the plaintiffs' property tax revenue become even lower, such as 3.9% for Jung-Gu, 11.5% for Seocho-Gu and 12.7% for Gangnam-Gu. Meanwhile, in elementary local governments, the rates of fulfilling the standard for local financial demand are far above 100%, such as 210.8% for Jung-Gu, 124.25% for Seocho-Gu and 197.9% for Gangnam-Gu, and therefore, it seems that despite the decrease in property tax revenue by the Instant Provisions, the plaintiffs can maintain the rates of fulfilling the standard for local financial demand over 100%.

Considering all the circumstances, although the Instant Provisions place some restrictions on the plaintiffs' right to financial autonomy by decreasing their property tax revenue, the restrictions cannot be regarded as excessive enough to make the plaintiffs' right to financial autonomy only nominal. Therefore, the respondent's act of enacting the Instant Provision cannot be considered as infringing on the core of the plaintiffs' right to financial autonomy guaranteed by the Constitution.

#### *Cross-references:*

Former decisions concerning similar issues:

- Decision of 29.11.2001, 2000Hun-Ba 78, 13-2KCCR *Korean Constitutional Court Report* (Official Digest), 646,657-658;
- Decision of 31.10.2002, 2002Hun-Ra2, 14-2KCCR *Korean Constitutional Court Report* (Official Digest) 378,386-387.

#### *Languages:*

Korean, English (translation by the Court).



# Latvia

## Constitutional Court

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### Important decisions

*Identification:* LAT-2012-1-001

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 25.10.2011 / **e)** 2011-01-01 / **f)** On Compliance of Section 1068.1 of the Civil Law with Article 105 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 28.10.2011, no. 171(4569) / **h)** CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

2.3.6 Sources – Techniques of review – **Historical interpretation.**

3.16 General Principles – **Proportionality.**

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

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

*Keywords of the alphabetical index:*

Property, ownership, joint.

*Headnotes:*

The right to property ensures the peaceful enjoyment of a property right. The general principle of peaceful enjoyment of property should always be considered in conjunction with the State's right to impose restriction on its use in the interest of society.

The State may impose duties and obligations on all joint owners of property to protect the institute of joint ownership and to fairly balance their interests.

*Summary:*

I. The contested provision prohibits a joint owner to act separately on the entire subject-matter of the joint ownership or part thereof, without the consent of all the joint owners. As a result, the right of each joint owner to act separately is more restricted than the right of a single owner to an unshared property. The restriction is based on the essence of joint ownership, which assures that all joint owners' rights are

protected and justice in mutual relations of joint owners is observed in legal situations.

II. The Constitutional Court established that the legitimate aim of the restriction is to protect the rights of other persons. It found that the contested provision is appropriate to reaching the legitimate aim because causal relation exists between the contested provision and its legitimate aim.

The Court reviewed the applicant's opinion that the contested provision restricts a person's rights by prohibiting him or her from bringing an action and receiving lease payment for an undivided part of a land plot that constitute the subject-matter of the joint ownership. The Court concluded that when the applicant purchased the undivided parts of a particular land, he became a joint owner of the land. As such, he must take into account that the extent of his rights and duties regarding the subject matter of the joint ownership, as established in civil law, differs from the right of a single owner.

The Court assessed the proportionality of the restriction and considered whether the societal benefit of the contested provision is greater than the restriction of the fundamental rights. It regarded the restriction in conjunction with other applicable legal mechanisms aimed to prevent the restriction of the applicant's fundamental rights, including a termination of legal joint ownership relationship or an agreement by joint owners on actions to be taken with the joint property. The Court indicated that in certain cases, preconditions of legal or factual nature for action with the subject matter of the joint ownership may cause the joint owners to lose their interest to preserve their legal status.

The Court concluded that there is no less restrictive alternative to protect a joint owner's rights while upholding societal interests. The reason is that the increase of one joint owner's rights in dealing with the subject matter of the joint ownership would reduce the extent of the other joint owners' rights. The institute of joint ownership in conjunction with the compulsory lease establishes a legal procedure and coordinates different interests of different persons. The contested provision is necessary to ensure the fairest balance possible between interests of each of the joint owners. The societal benefit gained from the contested provision is greater than the restriction of the rights of a joint owner. Therefore, it can be concluded that the legislator has selected an appropriate regulatory framework for regulation of mutual legal relations of joint owners.

The Court recognised that the contested provision is compliant with the first three sentences of Article 105 of the Constitution.

*Cross-references:*

Previous decisions of the Constitutional Court:

- Judgment no. 2001-12-01 of 19.03.2002, *Bulletin* 2002/1 [LAT-2002-1-004];
- Judgment no. 2002-01-03 of 20.05.2002;
- Judgment no. 2004-18-0106 of 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];
- Judgment no. 005-16-01 of 08.03.2006, *Bulletin* 2006/1 [LAT-2006-1-002];
- Judgment no. 2008-34-01 of 13.02.2009;
- Judgment no. 2009-09-03 of 19.11.2009.

*Languages:*

Latvian, English (translation by the Court).



*Identification:* LAT-2012-1-002

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 03.02.2012 / **e)** 2011-11-01 / **f)** On Compliance of Sub-programme 23.00.00 of the Law “On the State Budget 2011” with Article 1 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 07.02.2011, no 21(4624) / **h)** CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

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

1.3.4.12 Constitutional Justice – Jurisdiction – Types of litigation – **Conflict of laws.**

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

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

*Keywords of the alphabetical index:*

Legislative procedure / Budget, state.

*Headnotes:*

The State budget, as a governance plan, shall be regarded as an external normative act approved through an established legislative procedure.

A law is a legal act issued according to the procedure established in the Constitution. This definition of a law includes both the term’s material and formal meaning.

Limiting the Constitutional Court’s review to only legal norms regarded as law in the formal and material meaning would threaten the guarantee of comprehensive priority accorded to constitutionally important norms. The restriction would also limit the competence of the Constitutional Court, resulting in cases where people’s fundamental rights would be denied.

The funding established in the State budget is an issue of political decision-making. The budget amount cannot be reviewed by the Constitutional Court because it cannot reassess actions taken by the Cabinet of Ministers and the Parliament that have been elaborated and adopted based on an economic assessment or prognosis of the State’s economic issues.

As long as the resolution of issues related to the State budget does not exceed the principle of separation of powers, including the denial of a constitutional institution the possibility to exercise its tasks or functions set in the Constitution, the Cabinet of Ministers and the Parliament shall enjoy freedom of prognostication and decision-making in this respect.

When deciding on the State budget, it is necessary to assure the long-term balance between the State’s economic possibilities and the welfare of the entire society.

*Summary:*

I. In Section 12.4 of the Law “On Roads”, the legislator set out an amount of resources to be used for a State road fund programme. The norm provides that the grant cannot be less than the income of the State budget from the annual vehicle tax planned in the respective year or less than 80 % of the planned income into the State budget from the excess duty from oil products, or less than the one granted the previous year. Nevertheless, the contested provision in the Law “On the State Budget 2011” established that in 2011, the State road fund shall be granted resources for covering its expenses at the amount of 80,675,980 lats, whereas the income from the excess duty from oil products was planned at the amount of 220,200,000 lats.

According to the Applicants (twenty members of the Parliament), the contested sub-provision infringes on the principle of the rule of law and the principle of the legitimate expectations of merchants participating in public procurements of reconstruction and construction of roads, and drivers who purchase oil products and pay excess duty.

II. Since 1 January 2012, the contested provision was no longer enforced, but the Constitutional Court Law did not terminate the proceedings. The Constitutional Court reasoned that it is an important constitutional issue, and the decision may play an important role in assuring the principle of the rule of law for future preparation, elaboration and adoption of the State budget.

The Constitutional Court asserted that it has jurisdiction to assess whether, in the process of elaborating and adopting the State budget, the constitutional institutions have observed the principle of legitimate expectations and the rule of law.

The Constitutional Court determined that the contested provision did not create any legitimate expectations to private persons and that merchants do not have any subjective right to request from the State administration, organisation of a particular procurement procedure or performance of particular works, or establishment of a particular remuneration. Likewise, the contested provision did not create any legitimate expectations of drivers who purchase oil products that certain amount of budget resources would be transferred to maintain the roads. It does not follow from the Constitution that the legislator would have the duty to cover expenses, by means of incomes from a certain kind of tax, incurred in a certain field.

The Court also considered whether the stipulated budget elaboration procedure has been observed and whether public institutions involved in the budget elaboration had the duty to ensure the compatibility of the contested provision and Section 12.4 of the Law "On Roads".

The Court indicated that in 2009, as the economic situation of the State rapidly deteriorated, public institutions necessarily and urgently had to revise the budget elaboration methodology and to balance the budget by reducing resources pursuant to realisable possibilities to cover for planned expenses. This meant that the legislator had the duty to introduce amendments into normative acts, establishing necessary funding to cover the cost of planned expenses to ensure observance of the principle of the rule of law. This did not release the Cabinet of Ministers from the duty to ensure that the effective legal norms and the draft State budget did not conflict with each other.

The Court noted that the insufficient cooperation between the Cabinet of Ministers and the Parliament to ensure the principle of the rule of law when adopting the Law "On State Budget 2011" was insufficient, even though the formal procedure for adoption of the draft State budget has been observed.

The Court, nevertheless, determined that there is no reason to hold that non-compliance of the contested provision and Section 12.4 of the Law "On Roads" would have denied any constitutional institution's ability to fulfil its duties and functions established in the Constitution.

The Court concluded that the constitutional institutions have not arbitrarily breached procedural rules for adoption of the contested provision. The funding established in the contested provision testifies that, in the particular situation, the balance between State economic possibilities and the necessity to ensure welfare of the society has been observed. Likewise, funding granted to the State road fund in the frameworks of the contested provision has not caused any considerable threat to the interests of society or the State.

#### *Cross-references:*

Previous decisions of the Constitutional Court:

- Judgment no. 04-03(98) of 10.06.1998;
- Judgment no. 03-04(98) of 13.07.1998, *Bulletin* 1998/2 [LAT-1998-2-005];
- Judgment no. 01-05(98) of 27.11.1998, *Bulletin* 1998/3 [LAT-1998-3-007];
- Judgment no. 04-03(99) of 09.07.1999, *Bulletin* 1999/2 [LAT-1999-2-003];
- Judgment no. 03-05(99) of 01.10.1999, *Bulletin* 1999/3 [LAT-1999-3-004];
- Judgment no. 04-06(99) of 05.04.2000;
- Judgment no. 2001-06-03 of 22.02.2002, *Bulletin* 2002/1 [LAT-2002-1-002];
- Judgment no. 2005-12-0103 of 16.12.2005;
- Judgment no. 2006-04-01 of 08.11.2006;
- Judgment no. 2007-03-01 of 18.10.2007, *Bulletin* 2007/3 [LAT-2007-3-005];
- Judgment no. 2007-10-0102 of 10.05.2010, *Bulletin* 2008/2 [LAT-2008-2-001];
- Judgment no. 2007-15-01 of 12.02.2008;
- Judgment no. 2008-35-01 of 07.04.2009, *Bulletin* 2009/2 [LAT-2009-2-002];
- Judgment no. 2009-08-01 of 26.11.2009;
- Judgment no. 2009-11-01 of 18.01.2010, *Bulletin* 2010/2 [LAT-2010-2-001];
- Judgment no. 2009-42-0103 of 17.02.2010;
- Judgment no. 2009-43-01 of 21.12.2009, *Bulletin* 2009/3 [LAT-2009-3-005];

- Judgment no. 2010-06-01 of 25.10.2010, *Bulletin* 2011/1 [LAT-2011-1-001];
- Judgment no. 2010-22-01 of 27.01.2011;
- Judgment no. 2010-40-03 of 11.01.2011, *Bulletin* 2011/2 [LAT-2011-2-003];
- Judgment no. 2010-51-01 of 14.03.2011;
- Judgment no. 2011-44-01 of 20.12.2010;
- Judgment no. 2011-03-01 of 19.12.2011;
- Judgment no. 2011-05-01 of 03.11.2011.

### Languages:

Latvian, English (translation by the Court).



### Identification: LAT-2012-1-003

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 02.05.2012 / **e)** 2011-17-03 / **f)** On Compliance of Sections 3 and 4 of 10 May 2005 Cabinet of Minister Regulation no. 312 "Regulations regarding the Amount of the Blank Tape Levy and the Levy of Equipment Used for Reproduction and the Procedures for the Collection, Repayment, Distribution and Payment Thereof" with Articles 64, 105 and 113 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 03.05.2011, no. 69(4672) / **h)** CODICES (Latvian, English).

### Keywords of the systematic thesaurus:

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

### Keywords of the alphabetical index:

Political decision / Rights, related / Remuneration, fair, principle / Copyright.

### Headnotes:

A protected material right of persons subject to copyright consist of two elements: an exclusive right that enables an author to receive royalties and a restricted right or exception right that allows the State to legislatively restrict the author's right to use his or her work. Respectively, the function of an author's material rights is to guarantee the protection of material interests of the owner of the rights, namely to control economic use of a work.

The duty to protect material rights of persons subject to copyright includes the right of authors to gain material benefit from the use of their work; however, this right is not absolute as to its nature.

The Cabinet of Ministers, like the legislator, is committed to periodically considering whether a particular legal regulatory framework is still effective, applicable and necessary, and whether it can be improved.

### Summary:

I. In the case before the Constitutional Court, the applicants have contested provisions providing that the blank tape levy shall be paid in a certain amount for audio cassettes, video cassettes mini discs, CD-R, CD-RW, DVD-R, DVD-RW, an audio tape-recorder with audio cassette recording function, a radio with audio cassette recording function, an audio tape-recorder with audio cassette and CD recording function, a radio with audio cassette and CD recording function, a radio with CD recording function, a radio with MD recording function, a CD player with recording function, a MD player with recording function, a MP3 player with an integrated hard disk, a video player with video cassette recording function, a television set with video cassette recording function, a DVD player with recording function, a television set with DVD recording function, a satellite receiver with data recording function, any CD, or DVD recorder connected to a computer.

The Copyright Law, according to the applicants, establishes that authors have a right to fair remuneration. However, the right to receive a fair remuneration is restricted by the contested provisions because a levy on empty data carrier can only be collected in certain cases.

II. The Constitutional Court noted that the list of certain empty data carriers included in the Copyright Law is not exhaustive. The Cabinet of Ministers, nevertheless, takes the list into account when establishing the procedure to collect the empty data carrier levy. The legislator has not set a particular criteria for the Cabinet of Ministers to apply when deciding on whether to include certain empty data carriers and equipment into the contested provisions. Therefore, the Court concluded that the legislator has granted the Cabinet of Ministers the right to establish the criteria, according to which an exhaustive list of empty data carriers and equipment could be established. Likewise, the legislator also delegated the duty to elaborate such a list to the Cabinet of Ministers.

The Constitutional Court indicated that inclusion of certain empty data carriers and equipment into the contested provisions is a legal and political issue to be decided by the Cabinet of Ministers. The Cabinet of Ministers shall have the right and the duty to assess the necessity to include certain empty data carriers and equipment into the contested provisions. However, it must set clearly defined criteria.

The Constitutional Court indicated that the Cabinet of Ministers is committed to following the development of technologies and supplementing the list of empty data carriers and equipment included into the contested provisions. If the Cabinet of Ministers fails to fulfil its duty, no proper protection of the fundamental rights enshrined in Article 113 of the Constitution (the State shall protect copyright) is ensured.

The Constitutional Court recognised that the contested provisions fail to comply with Article 113 of the Constitution because the Cabinet of Ministers has yet to fulfil its duty to improve the content of the contested provisions. Specifically, the Cabinet of Ministers has failed to assess the impact of technology development onto empty data carriers and devices subject to the levy.

#### *Cross-references:*

Previous decisions of the Constitutional Court:

- Judgment no. 2000-08-0106 of 13.03.2001, *Bulletin* 2001/1 [LAT-2001-1-001];
- Judgment no. 2002-04-03 of 22.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008];
- Judgment no. 2004-18-0106 of 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];
- Judgment no. 2005-05-0306 of 21.11.2005;
- Judgment no. 2005-08-01 of 11.11.2005;
- Judgment no. 2005-12-0103 of 16.12.2005;
- Judgment no. 2006-42-01 of 16.05.2007;
- Judgment no. 2007-03-01 of 18.10.2007, *Bulletin* 2007/3 [LAT-2007-3-005];
- Judgment no. 2007-04-03 of 09.10.2007;
- Judgment no. 2007-22-01 of 02.06.2008;
- Judgment no. 2008-01-03 of 23.09.2008;
- Judgment no. 2009-76-01 of 31.03.2010;
- Judgment no. 2011-10-03 of 28.03.2012.

Federal Constitutional Court of Germany:

- Judgment no. 1 BvR 1631/08 of 30.08.2010.

Court of Justice of the European Union:

- Judgment no. C-467/08 of 21.10.2010.

#### *Languages:*

Latvian, English (translation by the Court).



# Lithuania

## Constitutional Court

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### Important decisions

*Identification:* LTU-2012-1-001

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 28.09.2011 / **e)** 21/2008 / **f)** On the State Family Policy Concept / **g)** *Valstybės Žinios* (Official Gazette), 118-5564, 30.09.2011 / **h)** CODICES (English, Lithuanian).

*Keywords of the systematic thesaurus:*

1.3.5.7 Constitutional Justice – Jurisdiction – The subject of review – **Quasi-legislative regulations.**

1.3.5.9 Constitutional Justice – Jurisdiction – The subject of review – **Parliamentary rules.**

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

*Keywords of the alphabetical index:*

Family, concept / Marriage / Unmarried persons.

*Headnotes:*

The constitutional concept of family may not derive solely from the institution of marriage. It is based on mutual responsibility among family members, understanding, emotional affection, assistance and similar relations as well as a voluntary determination to assume certain rights and responsibilities, i.e., the content of relationships. The form of expression of these relationships, however, has no essential significance for the constitutional concept of family.

*Summary:*

I. The petitioner, a group of *Seimas* Members, requested the Constitutional Court to review the Resolution of the *Seimas* “On the Approval of the State Family Policy Concept” of 3 June 2008 (hereinafter, the “Concept”) to determine whether the definitions of family, harmonious family, extended family, and incomplete family comport with the Constitution.

II. The Constitutional Court stated that under the Concept, the family is directly tied to marriage; that is, the idea of family is based exclusively on marriage. Under the provisions of the Concept, a man and a woman who live together and may be raising children (adopted children) but are not married to each other are not regarded as a family. A man or a woman, who has not been married, with their child is not regarded as an incomplete family. A man and a woman who fulfil all the criteria of the harmonious family, multi-child family, family living through a crisis, or family at social risk, but who are not married to each other or a man or a woman raising children, but who has not been married, with their child, are not correspondingly regarded as a harmonious family, multi-child family, family living through a crisis, or family at social risk.

The Constitutional Court established that the constitutional concept of family may not be derived solely from the institution of marriage. The fact that the institution of marriage and family are entrenched in the same Article 38 of the Constitution indicates an inseparable and unquestionable relationship between marriage and family; marriage is one of the grounds of the constitutional institution of family to create family relations. It is a historically established family model that undoubtedly has an exceptional value in the life of society, which ensures the viability of the Nation and the state as well as their historical survival. However, this does not mean that, *inter alia*, the provisions of Article 38.1 of the Constitution does not protect and defend families other than those founded on the basis of marriage.

The state has a duty to establish legal regulation, by law and other legal acts, that would ensure the protection of the family as a constitutional value, which implies an obligation, *inter alia*, to create preconditions for a proper functioning of a family, strengthen family relations and defend the rights and legitimate interests of family members. It also implies an obligation to regulate family relations, such that there would be no preconditions to discriminate against certain participants of family relations (e.g., a man and a woman who live together without having registered their union as a marriage, their children, one of the parents who is raising a child). In the Concept, which was approved by its resolution, the *Seimas* consolidated the notions of family whereby only a man and a woman who are or were married as well as their children are regarded as a family. The notion of the family in the Concept created preconditions to establish legal regulation under which other family relations are not protected. Under the Concept, the life of a man and a woman who are not and were not married, as well as their children living together, even though their relation is based on permanent bonds of emotional affection, reciprocal understanding, responsibility, respect, shared upbringing of the children

and similar ones, as well as on the voluntary determination to take on certain rights and responsibilities, which are characteristic of the family as a constitutional institution, would nevertheless not be deemed a family.

Taking into account the arguments set forth, the Constitutional Court concluded that the *Seimas*, by establishing in the Concept, regarded the notion of family as only a man and a woman who are married or were married, as well as their children (adopted children). However, the narrowing of the content of the family as a constitutional institution did not observe the concept of the family as a constitutional value that stems from the Constitution, which may be founded on the basis of marriage and other family relations.

The Court also noted that the Concept is not intended to directly regulate family relations. The Concept provides for certain state family policy guidelines, its objectives, principles, course of actions and tasks, and sets forth a certain position of the *Seimas* regarding the formation of the state family policy. It also creates preconditions to correspondingly change as well as establish legal regulation in the field of family policy. The Concept, which lays down certain guidelines of the formation and main directions of family policy, may provide some notions that help to disclose the aims and objectives of the law-making subject who adopted that Concept. The *Seimas*, when establishing the state family policy guidelines, its objectives, principles, course of actions and tasks, may define how, in the context of the Concept, the family is to be understood because this is necessary to develop the future state family policy.

III. This decision had one dissident opinion in which one judge disagreed with the argumentation of the Court, mostly in the field of construing the constitutional concept of family.

#### *Supplementary information:*

The judgment prompted wide discussion amongst law writers as well as society as a whole. It also led to initiatives in Parliament to change the Constitution (process currently started, but not completed yet).

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2012-1-002

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 25.10.2011 / **e)** 36/2010-37/2010-38/2010-39/2010-41/2010-42/2010-43/2010 – 62/2010-63/2010-64/2010-65/2010-66/2010-67/2010-68/2010-69/2010-71/2010-72/2010-74/2010-75/2010-78/2010-79/2010-80/2010-91/2010-92/2010-93/2010-103/2010-104/2010-105/2010-108/2010-3/2011 / **f)** On the consequences of recognition of a legal act as being in conflict with the Constitution / **g)** *Valstybės Žinios* (Official Gazette), 129-6116, 27.10.2011 / **h)** CODICES (English, Lithuanian).

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

1.6.5.2 Constitutional Justice – Effects – Temporal effect – **Retrospective effect (ex tunc)**.  
 1.6.5.3 Constitutional Justice – Effects – Temporal effect – **Limitation on retrospective effect**.  
 1.6.5.4 Constitutional Justice – Effects – Temporal effect – **Ex nunc effect**.  
 1.6.9 Constitutional Justice – Effects – **Consequences for other cases**.

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

Retroactivity.

#### *Headnotes:*

Article 107.1 of the Constitution stipulates that a law may not be applied from the day of official promulgation of the Constitutional Court's decision that the act in question (or part thereof) conflicts with the Constitution. No obligation arises for the legislator to provide for a legal regulation establishing that the unconstitutional act is invalid from its entry into force.

#### *Summary:*

I. The petitioner, the Vilnius Regional Administrative Court, requested the Constitutional Court to review the constitutionality of Article 72 of the Law on the Constitutional Court, insofar as it does not establish that a legal act recognised as being in conflict with the Constitution becomes invalid from its entry into force; and Article 72.4 of the Law on the Constitutional Court, insofar as it does not explicitly establish what types of decisions are entrenched in the formulations "decisions <...> must not be executed" and "if they had not been executed". The petitioner doubted whether the Law on the Constitutional Court and other legal acts include such legal regulation, for which it would be possible to establish exceptions to the general rule whereby Constitutional Court rulings are effective only prospectively.

II. The general rule entrenched in Article 107.1 of the Constitution, whereby the power of Constitutional Court decisions regarding the compliance of legal acts with the Constitution is prospective, is not absolute. The Constitutional Court established that Article 67.1 of the Law on the Constitutional Court prescribes that provided there are grounds to believe a law or other legal act that should be applied in a concrete case actually conflicts with the Constitution, the court (judge) shall suspend the consideration of the case, take into account the Constitutional Court's competence, and request it to review the constitutionality of the law or other legal act in question. Thus, Article 67.1 of the Law on the Constitutional Court provides for one of the exceptions to the prospective power of Constitutional Court rulings, which the petitioner contends is not the case, even though it should have been provided for in Article 72 of the Law on the Constitutional Court. Consequently, contrary to what is being maintained by the petitioner, from Article 107.1 of the Constitution, the legislator is not obligated to provide in Article 72 of the Law on the Constitutional Court for a legal regulation establishing that a legal act recognised as being in conflict with the Constitution is invalid from its entry into force.

From Article 107.1 of the Constitution, which implements the general rule that the power of Constitutional Court decisions is prospective, no obligation arises for the legislator to establish the legal regulation under which the power of Constitutional Court decisions regarding the compliance of legal acts with the Constitution is directed retroactively rather than prospectively.

Taking into account the arguments set forth, the Constitutional Court held that Article 72 of the Law on the Constitutional Court insofar as it does not establish that a legal act recognised as being in conflict with the Constitution is invalid from its entry into force, is not in conflict with the Constitution.

Since the part of the petitioner's request to investigate the regulation established in Article 72.4 of the Law on the Constitutional Court raises questions concerning application of legal acts, the Court dismissed the request to review whether the said article explicitly establishes what types of decisions are entrenched in the formulations "decisions <...> must not be executed" and "if they had not been executed." The reason is that the Court determined that it does not conflict with Article 7.2 of the Constitution, Article 107.1 of the Constitution and the constitutional principle of a state under the rule of law.

III. This decision had one dissent opinion in which one judge disagreed with the argumentation and raised some questions that should be answered by the Constitutional Court.

*Languages:*

Lithuanian, English (translation by the Court).



*Identification:* LTU-2012-1-003

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 22.12.2011 / **e)** 13/2010-140/2010 / **f)** On the Law on Science and Studies / **g)** *Valstybės Žinios* (Official Gazette), 160-7591, 28.12.2011 / **h)** CODICES (English, Lithuanian).

*Keywords of the systematic thesaurus:*

4.6.8.1 Institutions – Executive bodies – Sectoral decentralisation – **Universities**.  
5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.  
5.4.21 Fundamental Rights – Economic, social and cultural rights – **Scientific freedom**.

*Keywords of the alphabetical index:*

Autonomy, universities / Education, higher, school / Education, academic community / Self-government.

*Headnotes:*

The autonomy of schools of higher education does not deny the legislator's right to regulate activities of these schools, *inter alia*, to establish, by taking account of the interests of society and its changing needs, various types of institutions of science and studies, different limits of these institutions' autonomy, and the basis of their organisational and governance structure. While not denying their autonomy, *inter alia*, the self-government thereof based on the democratic principles of governance, the legislator may establish various models of these schools' governance structure.

### Summary:

I. The constitutional justice case was initiated by a group of parliamentarians and the Supreme Administrative Court. The applicants asked whether some provisions of the Law on Science and Studies are compatible with the Constitution.

II. In this ruling, the Court, among other issues, has developed the notion of autonomy of schools of higher education. The Court emphasised that their autonomy, as guaranteed in Article 40.3 of the Constitution, implies academic and institutional autonomy. Academic autonomy and institutional autonomy are inseparably interrelated: without academic autonomy, institutional autonomy cannot be guaranteed. The self-government of a school of higher education stems, *inter alia*, from the constitutional freedom of science and research. Thus, autonomy implies self-government of these schools' academic community (scientific community), which is implemented, *inter alia*, through governance institutions of a particular school of higher education that represent the said community of that school. Self-government of the schools' academic community should relate to democratic principles of governance. In the context of their autonomy, the said principles include, *inter alia*, the direct participation of the academic community and its decisive influence in forming the school's governance institution that is vested with the greatest powers. It also includes limiting the number of office terms of members of the other governance, control and supervision institutions of the schools, and the number of office terms of people discharging functions of one-person institutions or holding the office of the head of a collegial institution. While establishing the governance and organisational structure of these schools and, *inter alia*, regulating the reorganisation of that structure, the legislator should heed the democratic principles of governance and not create preconditions that would violate these principles. Legal regulation that is not in line with these principles could create preconditions, *inter alia*, for the state to unreasonably interfere with the governance of these schools and/or to deny self-government of the academic community of these schools and, thus, to violate their autonomy.

Even while recognising the schools' autonomy, the legislator can still use their broad discretion to choose and regulate a concrete model of the organisation of science and studies to build on the state and society's progress for a particular period of time. Without denying their autonomy and, *inter alia*, the self-government thereof based on the democratic principles of governance, the legislator may establish various models of the schools' governance structure. One of the various models is an institution that would

directly represent the academic community and implement the self-government of that community, which would be empowered to decide on all the most important questions relating to both the schools' academic and institutional autonomy. Alternatively, several of such institutions could decide on the most important governance questions relating to academic autonomy and institutional autonomy separately. Another consideration is that an institution of control and supervision, which would be composed not only of or not of members of the academic community, could perform the advisory functions in the course of adopting decisions of governance of these schools.

The constitutional guarantee of these schools' autonomy implies that the legislator is obliged to provide for special legal regulation, most of which should be composed by local legal regulation established by these schools. Therefore, the general legal regulation established by laws and applicable to all these schools should neither be too detailed nor limit the right of these schools. From the principle of their autonomy, they should be able to regulate their activities by means of local legal acts.

The Constitution neither prohibits differentiation of the legal status of schools of different types nor of the rights and limits of autonomy of schools of higher education of the same type. It needs to be noted that in differentiating the status of these schools according to various important criteria, one must consider, *inter alia*, the historical traditions and established traditions of self-government based on democratic principles of governance peculiar to a concrete school, as well as the continuation of these traditions. Regarding concrete schools of higher education, one may establish special norms defining the rights, limits of autonomy, and the organisational and governance structure, which will differ from those established by the general legal regulation provided for by laws with respect to all the schools of higher education.

The Constitutional Court addressed the possibility of establishing, by laws, different limits of autonomy for different types of schools of higher education. If the legislator has chosen such a model of governance structure under which the senate is a collegial governance body that directly represents the academic community and is the sole body implementing self-government of that community, then such legal regulation would confine the senate's competence only to academic affairs. It does not participate, or participates only in an advisory capacity. Adopting strategic and other important decisions of governance of these state schools, *inter alia*, decisions on the use of financial funds and other assets for the purpose of implementing the mission of these schools, however, is incompatible with their autonomy.

*Languages:*

Lithuanian, English (translation by the Court).

*Identification:* LTU-2012-1-004

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 06.02.2012 / **e)** 46/2010-47/2010-48/2010-49/2010-51/2010-52/2010-70/2010-77/2010-82/2010-83/2010-84/2010-85/2010-86/2010-87/2010-94/2010-100/2010-101/2010-109/2010-114/2010-123/2010-124/2010-128/2010-129/2010-133/2010-134/2010-142/2010-143/2010-1/2011-2/2011-5/2011-8/2011-16/2011-21/2011-23/2011-25/2011-29/2011-32/2011-37/2011-39/2011 / **f)** On the recalculation and payment of pensions upon occurrence of an especially difficult economic and financial situation in the state / **g)** *Valstybės Žinios* (Official Gazette), not published yet / **h)** CODICES (English, Lithuanian).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Social payments, reduction / Pension, state / Pension, old-age / Compensation / Economic crisis / Economic and financial situation, extremely difficult / Pensioner, working.

*Headnotes:*

Under the Constitution, upon occurrence of an extreme state situation, *inter alia*, a very difficult economic and financial situation, it is impossible to accumulate the amount of funds necessary to pay pensions. Legal regulation of pensionary relations may be amended, *inter alia*, by reducing the awarded and paid pensions. However, the legislator must heed the constitutional principles of equality of rights and proportionality, and establish an equal and non-discriminatory scale to reduce the pensions. The reduced pensions may be paid only temporarily after proving for a mechanism of compensation for incurred losses.

*Summary:*

I. The case was initiated by 39 petitions from the administrative courts, asking the Constitutional Court to review whether legal provisions addressing the state's extremely difficult economic and financial situation actually conflict with the Constitution. The petitioners challenged legal provisions related mostly to the reduction of social payments for, *inter alia*, old-age pensions and state pensions, and legal provisions that would significantly reduce the old-age and state pensions for pensioners who were working at the moment of paying the pensions.

The petitioners' doubts are substantiated by the fact that because the challenged legal regulation reducing the social payments implies legal uncertainty and indefiniteness of acquired rights, it denies a person's legitimate expectations and violates the principle of inviolability of ownership. In addition, upon recalculating the pensions, the constitutional principles of a state under the rule of law and proportionality were also violated. The reason is that the awarded pensions were disproportionately reduced for working pensioners through the disputed legal regulation only because they were receiving a salary at the same moment. Meanwhile, the constitutional principle of equality of rights was also violated.

II. After examining all the circumstances, the Constitutional Court noted that the Provisional Law was adopted with the aim to limit the rising deficit of the state budget and the budget of the State Social Insurance Fund caused by the economic crisis. The Court stated that such a procedure to recalculate and pay social payments, which implied reduction of awarded social payments, was established in light of the state's particularly difficult economic and financial situation, and in pursuit of decreasing, *inter alia*, the expenditures of the State Social Insurance Fund.

Thus, by establishing such a procedure to recalculate pensions, which created preconditions to reduce awarded pensions, the legislator was addressing an extreme situation whereby, *inter alia*, the difficult economic and financial situation had made it impossible for the state to accumulate the amount of the funds necessary to pay pensions. Envisaging the reduction of pensions including old-age pension, the legislator applied to everyone the same amount of the current year's insured income, which the Government had approved. As such, the Court stated that the social payments were reduced proportionately, uniformly and indistinguishably, with exception of the old age pension amount received by people who did not exceed the established limit of LTL 650.

The Court noted that the constitutional principles of a state under the rule of law and of proportionality do not mean that the state is prohibited from establishing a pension amount limit below an amount that the pension would not be reduced even when there is a particularly difficult economic and financial state situation. The Court emphasised that a pension that secures only minimal socially acceptable needs and living conditions compatible with human dignity to the person who receives the pension, however, may not be reduced at all. Thus, the legislator did not violate the requirements arising from the constitutional principles of equality of rights and proportionality because the Provisional Law set forth that old-age and state pensions that did not exceed the marginal amount (established in the law), which was LTL 650, could not be recalculated (reduced). For pensions that exceeded the said amount in the course of their recalculation, they could not be reduced below this amount either.

In establishing the procedure to recalculate pensions in Article 6.1 of the Provisional Law, it also stipulated that the reduced pensions would be paid only temporarily, namely until 31 December 2011.

And lastly, by proposing that the Government prepare and approve the inventory schedule of such a procedure to compensate for the reduced state social insurance pensions of old-age and of lost capacity to work, the legislature has undertaken an obligation to establish the essential elements of compensation for the reduced pensions and provide for compensation for the losses incurred due to the reduced old-age pensions. Hereby, the legal regulation to reduce awarded social payments was recognised as compatible with the Constitution.

While assessing the major reduction of pensions for the pensioners who had been working at the moment of paying pensions, the Court held that the challenged regulation created a legal dilemma whereby a person had to choose either to have a certain job or conduct a certain business and receive a pension reduced to a greater extent; or not to have any job and not to conduct any business and receive such a pension that is paid to all the receivers of the same pension who do not have any job and do not conduct any business. The disputed legal regulation created preconditions to reduce the pensions of pension recipients who have a certain job or conduct a certain business due to the fact that they have a job or conduct a business, to a greater extent than pension recipients who neither have any job nor conduct any business. By distinguishing pension recipients in this way, the legislator restricted the right of the said former persons to freely choose a job or conduct a certain business, which is entrenched in Article 48.1

of the Constitution. That is, upon the implementation of that right, the pension awarded to these persons, solely due to the fact that they had a job or conducted a business, was reduced to a greater extent in comparison to pension recipients who did not have any job and did not conduct any business.

III. This ruling had one dissenting opinion in which one judge disagreed with the method of interpretation chosen by the Constitutional Court.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2012-1-005

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 27.02.2012 / **e)** 15/2008-19/2010-25/2010-106/2010-27/2011-36/2011 / **f)** On the awarding and payment limitations of maternity / paternity benefits and on limitation to choose an other work for the customs officers / **g)** *Valstybės Žinios* (Official Gazette), 26-1200, 29.02.2012 / **h)** CODICES (English, Lithuanian).

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

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

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

Maternity benefit / Paternity benefit / Maternity leave / Incomes / Work activity / Mother, working.

#### *Headnotes:*

The legislator may establish, as a legal regulation, the form of care and support for parents to take work leave. The legal regulation shall take into account the purpose of such a leave, which is the creation of possibilities for parents to raise and bring up children at home for some time without being engaged in work (professional) activities, as well as of the purpose of the financial support to be rendered during such a leave, which is compensation within the state's capabilities, of all lost income or part thereof. The legislator may take into consideration other income

(received for work performed at the time of the said leave) of the persons making use of such a leave. However, the legislator is not allowed to establish any legal regulation whereby the income received for work performed not during the leave would influence the amount of the financial support rendered at the time of such a leave, since the aforesaid work does not deny the purpose of such a leave in any way.

### Summary:

I. The constitutional justice case was initiated by two administrative courts that disputed, *inter alia*, the provisions of legal acts whereby the awarding and payment of maternity (paternity) benefits at the time of pregnancy and childbirth leave, and parental and childcare leave are regulated. The challenged legal regulation provides that the maternity, paternity benefits shall not be awarded when the income of the child's mother or father, on which the sickness and maternity social insurance contributions are calculated, do not adequately compensate the lost remuneration subject to compensation.

II. The Court noted that according to the legal regulation, the ground for awarding maternity benefit was related to the fact whether the woman receives income from work activities. It was not related to the moment of work performance for which income is received. That is, maternity benefit was not awarded without taking into account of the fact whether the work, for which the woman received income (on which the sickness and maternity social insurance contributions are calculated), was performed at the time of the pregnancy and childbirth leave. Consequently, the ground for awarding a maternity benefit was also related to the income from work activities performed not at the time of the woman's pregnancy and childbirth leave. That is, maternity benefit was not awarded if the woman, at the time of the pregnancy and childbirth leave, received income from work activities performed not during such a leave.

The Constitution provides that the state shall take care of families that raise children at home, and shall render them support according to legal procedure. The legislator may establish various forms of implementation thereof, *inter alia*, provide for the rendering of financial support; ensure a possibility for parents to make use of leave for raising children at home; develop flexible forms of work to create favourable conditions for working parents to coordinate raising children at home with work (professional) activities; give an opportunity not only to the mother, but also to the father to raise the child at home, and in their absence, give such a possibility to other working members of the family.

The Constitution neither establishes any ground, condition or length of the leave for raising children, nor any amount of financial support to be rendered during such a leave. This must be established by the legislator, who considers the norms and principles of the Constitution (*inter alia* the constitutional imperatives of a state under the rule of law, justice, reasonableness, proportionality, protection of acquired rights and legitimate expectations, equality of rights, balance among constitutional values, and social harmony). The legislator enjoys the discretion to choose the sources from which the support for families to raise children at home will be funded. Such support, *inter alia*, may be funded from the state budget. Also, such legal regulation may be established whereby the rendition of the said support would be grounded upon social insurance, or a different model of funding such support may be chosen.

The legislator, while considering the constitutional purpose of the paid leave before and after childbirth, may establish the legal regulation whereby the leave would be compensated by considering other income (received for work performed at the time of the said leave) of the women on such a leave. The legislator is not allowed to establish any legal regulation whereby the income received for work performed not during the leave before and after childbirth would influence the payment for the said leave, since the aforesaid work does not deny the purpose of such a leave in any way. Hence, the challenged legal regulation was recognised as not compatible with the Constitution.

The Constitution also establishes the constitutional guarantee of a paid leave before and after childbirth to working mothers, by considering special conditions and needs of the women's healthcare for some time before and after childbirth and the special link between mother and child for some time after childbirth. The purpose of this constitutional guarantee is to secure the protection of the physiological condition of a pregnant woman and a woman after childbirth and to secure the special bond between mother and child during the child's first weeks of life. This can be fostered by creating the possibility for a working woman to withdraw for a reasonable time from her work (professional) activities before and after childbirth. When one takes account of this constitutional purpose, a paid leave before and after childbirth for working mothers is a specific constitutional institute of protection of motherhood and childhood. Paid leave for a reasonable length of time before and after childbirth to working mothers implies that the legislator, while regulating the implementation of the right to this leave and taking into account of the constitutional purpose thereof in addition to heeding other norms and principles of the Constitution,

must establish, *inter alia*, the conditions for giving such a leave a reasonable (minimum and maximum) length of this leave as well as establish legal regulation to secure at the time of the leave the payment of the allowances, whose amount would comply with the average remuneration received during a reasonable time prior to the leave.

#### Languages:

Lithuanian, English (translation by the Court).



## Mexico

### Electoral Court

#### Important decisions

*Identification:* MEX-2012-1-001

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 18.06.2010 / **e)** SUP-JDC-158/2010 and SUP-JDC-150/2010 / **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:*

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

3.13 General Principles – **Legality.**

3.21 General Principles – **Equality.**

4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility.**

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

*Keywords of the alphabetical index:*

Election, candidate, gender / Electoral candidature / Election, party, equal opportunity / Election, party, candidates, list, gender, balance.

*Headnotes:*

The rules and legal provisions of political parties regarding the determination of the lists of candidates have to comply with the principles of legality and gender equality, as established in the Constitution.

*Summary:*

I. On 18 May 2010, Ms Magdalena Pedraza Guerrero (hereinafter, the “claimant”), a member of the Party of the Democratic Revolution (hereinafter, the “PRD”), filed a non-conformity proceeding against Agreement ACU-CPN-024-B/2010 (hereinafter, the “Agreement”), issued by the PRD, which designated candidates for the election of diverse public positions, including congress representatives (deputies), by the principle of proportional representation.

Even though the claimant acquired second place in both of the statutory procedures of the PRD to democratically select candidates, she was not selected as candidate for the election of deputies by proportional representation of the state of Tamaulipas, Mexico.

The claimant argued that, in the examination of her case, the competent body of the PRD issued an interpretation that contravened the principle of equality between men and women as established in Article 4 of the Constitution, and that infringed the principle of legality as provided by Article 16 of the Constitution, considering the inobservance of the guarantees of judicial security and the lack of a thorough and meticulous investigation in her case.

The claimant contended that the Agreement issued by the PRD lacked the correct motivation and foundation, regarding the concrete case of the designation of candidates for deputies by proportional representation in the state of Tamaulipas.

Considering these statements and the fact that the resolution of the non-conformity proceeding was taking an indefinite period to be finally solved, the claimant took a *per saltum* action and presented Proceedings for the Protection of the Political and Electoral Rights of Citizens directly to the Electoral Court of the Federal Judiciary.

II. The Electoral Court of the Federal Judiciary unanimously decided the following two questions:

First, the Court held that the claims regarding the lack of motivation and exhaustive investigation by the Party of the Democratic Revolution were unfounded. The claimant had argued that there were some legal provisions that were not considered by the party in the examination of her case: the current version of the Statute of the PRD (instead of the previous one approved by the XIth National Congress which was valid until 8 March 2010) and Agreement number ACU-CNE-135/2010 which regulated, among other issues, the procedure for the designation of candidates for the election of deputies by proportional representation of the state of Quintana Roo, Mexico.

The Electoral Court specified that the latest version of the Statute of the PRD clearly provided that the procedures for the selection of candidates for electoral processes that would be realised during 2010 would be regulated by the previous Statute approved by the XIth National Congress, until the competent bodies established by the reforms were duly established. Thus, the new Statute was not applicable to the case of the selection of candidates in the state of Tamaulipas. The Court also held that the consideration of Agreement number ACU-CNE-

135/2010 was not pertinent because for the designation of candidates in Quintana Roo the new Statute of the PRD was indeed the appropriate document that regulated this procedure, which was not the case in the state of Tamaulipas.

Second, the Court determined that the claimant had a valid claim regarding the lack of foundation and motivation of Agreement ACU-CPN-024-B/2010. The Statute which regulated the selection of candidates and the "Convocation for the election of candidates for governor, local deputies and members of city councils of the state of Tamaulipas" clearly specified the rules for the designation of candidates once concerned citizens had expressed their interest in taking part in the process and had participated in both of the statutory procedures of the PRD to democratically choose candidates (by Electoral Convention and by Elective Council).

Considering that the claimant had participated in these procedures, acquiring the second place in both of them, and that the political party had not made a reservation of her candidature using the pertinent legal provisions, it was decided that the said Agreement had to be modified.

The High Chamber of the Electoral Court considered that the right to stand for election of the claimant had been violated, infringing the principles of a democratic process that should exist in every political party as well as gender equality which is provided by the Constitution. Thus, the Court held that the claimant should be designated for the election of deputies of Tamaulipas in the definitive list of candidates.

#### *Supplementary information:*

Project presented by: Electoral Justice Manuel González Oropeza.

#### *Languages:*

Spanish.



*Identification:* MEX-2012-1-002

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 09.03.2011 / **e)** SUP-JRC-028/2011 / **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:*

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

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969.**

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

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

3.13 General Principles – **Legality.**

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

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

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

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

*Keywords of the alphabetical index:*

Reply, right / Censorship, prior.

*Headnotes:*

The right of reply protected by Article 6 of the Constitution cannot be restricted to allow for prior censorship or any further limitations not established by the Constitution. Although a state or local Electoral Institute can issue guidelines to protect and enforce the right of reply, these should not impose additional restrictions, at the risk of being revoked due to their unconstitutionality.

*Summary:*

I. On 16 January 2011 a local newspaper published an article titled “Aguirre lies again” referring to Angel Aguirre, a candidate of a coalition named “Guerrero Unites Us” (hereinafter, the “Coalition”) for governor of the State of Guerrero. That day the Coalition filed a

request before the Electoral Institute of the State of Guerrero (hereinafter, the “Institute”) in order to invoke the right to reply in accordance with Article 203 of the Law of Electoral Institutions and Procedures of the State of Guerrero (hereinafter, “State Electoral Law”). On 20 January 2011 the Institute issued Guidelines to Guarantee and Enforce the Right of Reply (hereinafter, the “Guidelines”). On 23 January 2011 the Coalition initiated a trial of constitutional electoral review against the Guidelines, which was referred on 25 January 2011 to the Electoral Court of the Federal Judiciary. The Coalition argued that the Guidelines contravened Article 6 of the Constitution as well as the Law on Printing Offenses.

II. In order to properly address the constitutionality of the Guidelines, the Electoral Court first analysed questions related to the freedom expression, specifically pertaining to the right of reply and prior censorship. To that end, the Court considered relevant criteria established by international instruments such as the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the European Convention on Human Rights. In addition, the Court’s analysis of the interplay of the right of reply and prior censorship drew upon the case-law of the European Court of Human Rights and the Inter-American Court of Human Rights, as well as case-law of the Constitutional Court of Spain. In addition, the Electoral Court considered the interpretation provided by the Supreme Court of Justice of the prohibition of prior censorship, which implies that the State cannot submit expressive or communicative activities of individuals to a permission granted by the authority in advance since it enables the authority to deny it for reasons of content.

All things considered, the Electoral Court concluded that restrictions on the exercise of the right of reply, which is guaranteed by Article 6 of the Constitution, have to be in accordance with the cases and conditions envisaged in Article 1 of the Constitution. Thus, although the Electoral Court recognised the competence of the Institute to issue the Guidelines, in its current version the Guidelines were proven unconstitutional inasmuch as they imposed more restrictions than Article 6 Constitution and Article 203 of State Electoral Law contemplated. Moreover, the Electoral Court concluded that it did not need to examine whether the Guidelines complied with the Law on Printing Offenses, since the unconstitutionality of the Guidelines had already been established. Consequently, the Electoral Court revoked the Guidelines.

III. Electoral Justice Flavio Galván Rivera issued a dissenting opinion as he considered that the trial of constitutional electoral review before the Electoral Court of the Federal Judiciary was not the adequate legal recourse to challenge the Guidelines. Electoral Justice Galván Rivera was of the view that the claim should have been referred as an appeal to the State Electoral Court of Guerrero.

Electoral Justice Manuel González Oropeza issued a concurring opinion due to the fact that he considered that both the Electoral Court of the Federal Judiciary and the State Electoral Court of Guerrero are competent to solve the claim, since the State Electoral Courts can judge on matters of constitutionality and legality.

#### *Supplementary information:*

Project presented by: Electoral Justice María del Carmen Alanis Figueroa.

#### *Cross-references:*

- *Bulletin* 1999/3 [ESP-1999-3-023];
- *Bulletin* 1998/1 [ECH-1998-1-003];
- *Special Bulletin Leading Cases – ECHR*, [ECH-1991-S-004];
- Inter-American Court of Human Rights, “*The Last Temptation of Christ*” (*Olmedo-Bustos et al.*) v. *Chile*, Judgment of 05.02.2001;
- Inter-American Court of Human Rights, *Ricardo Canese v. Paraguay*, Judgment of 31.08. 2004;
- European Court of Human Rights (Former Section I), *Gaweda v. Poland*, Application no. 26229/95, 14.03.2002.

#### *Languages:*

Spanish.



#### *Identification:* MEX-2012-1-003

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 06.07.2011 / **e)** SUP-REC-15/2011 / **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:*

- 3.3.1 General Principles – Democracy – **Representative democracy.**
- 3.13 General Principles – **Legality.**
- 4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates.**
- 5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

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

Election, local, law / Electoral system / Political party, regional, registration / Political party, registration, refusal.

#### *Headnotes:*

The rights of peaceful assembly and the right to stand for election are guaranteed by Articles 9 and 35 of the Constitution.

In order to protect these and other prerogatives, the Electoral Court of the Federal Judiciary is competent to determine the non-application of an electoral law that is deemed contrary to the Constitution.

#### *Summary:*

I. On 18 January 2011 the General Council of the Electoral Institute of the Federal District in Mexico (hereinafter, the “local Electoral Institute”) issued Agreement number ACU-11-11, which approved the rules concerning the requirements that local political associations should follow in order to be constituted as local political parties.

Through its president Ms Lucerito del Pilar Márquez, the local political association “Liberty Movement” (“*Movimiento Libertad*”) indicated at the local Electoral Institute its intention to constitute itself as a local political party. As registration was denied, the president of “Liberty Movement” filed claims before the local Electoral Court, then before the Regional Chamber of the Federal District of the Electoral Court and, finally, dissatisfied with the decisions, presented a Resource of Reconsideration (an appeal mechanism against actions and decisions issued by the Regional Chambers of the Electoral Court) at the High Chamber of the Electoral Court of the Federal Judiciary.

Ms del Pilar Márquez argued that both Agreement number ACU-11-11 and the dispositions contained in Articles 214.I and 214.II of the Election Code of the Federal District (hereinafter, the “local Election

Code”) should not be applied because they were contrary to the Constitution. “Liberty Movement” questioned, *inter alia*, the following requirements:

First, that the local Election Code specified that in order to be constituted as a political party, a political association had to have a number of members or affiliates larger than 2% of the voter list in each of the 16 delegations (boroughs) that constitute the Federal District. This requirement was considered disproportionate considering that Article 30.2 of the federal Election Code specifies a percentage of only 0.026% of the electoral list (Federal Register of Voters).

Second, that the local Election Code required the presence of 1,000 members for each of the assemblies realised in the 16 delegations of the Federal District, while Article 28.a.I of the federal Election Code – which emanates directly from the Constitution – stipulates the presence of 300 participants in the district assemblies or 3,000 in state assemblies.

Bearing in mind that the aforementioned prerequisites to be constituted as a local political party were more demanding and disproportionate compared to the obligations to register a national political party, “Liberty Movement” filed a Resource of Reconsideration before the High Chamber of the Electoral Court considering that their rights to peacefully associate and assembly (Articles 9 and 35.III of the Constitution) were violated.

II. The High Chamber of the Electoral Court determined, by majority, that the claims presented by the local political association “Liberty Movement” were essentially founded and accurate. Therefore, considering that Agreement number ACU-11-11 as well as Articles 214.I and 214.II of the local Election Code were contrary to the Constitution, it revoked the previous decision issued by the Regional Chamber of the Electoral Court and deprived the Agreement issued by the local Electoral Institute of all its legal effects.

The sixth paragraph of Article 99 of the Constitution allowed the High Chamber to establish the unconstitutionality of the aforementioned Agreement, as it specifies that the chambers of the Electoral Court can decide not to apply electoral laws which are contrary to the Constitution. In such an event, the Electoral Court of the Federal Judiciary has to notify the Supreme Court of Justice of the decision.

Additionally, the Electoral Court considered that the requirement of the minimum number of affiliates in order to be registered as a local political party constituted a restriction of the right of political association, inasmuch as the demographic differences in the 16 delegations or boroughs of the Federal District could hamper the creation of a party.

III. Electoral Justices José Alejandro Luna Ramos and María del Carmen Alanis Figueroa issued a dissenting opinion. They considered that, according to Article 61.1.b of the Law of electoral dispute resolution in Mexico (Law of the Means of Impugnment in Electoral Matters) for the Resource of Reconsideration presented by “Liberty Movement” to be lawful, the previous decision by the Regional Chamber of the Electoral Court should have determined the non-application of an electoral law, which was not the case.

#### *Supplementary Information:*

Project presented by: Electoral Justice Manuel González Oropeza.

#### *Languages:*

Spanish.



#### *Identification: MEX-2012-1-004*

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 03.08.2011 / **e)** SUP-RAP-147/2011 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary Mexico* / **h)** CODICES (Spanish).

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

2.1.1.4.2 Sources – Categories – Written rules – International instruments – **Universal Declaration of Human Rights of 1948.**

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.**

4.9.8 Institutions – Elections and instruments of direct democracy – **Electoral campaign and campaign material.**

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

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

*Keywords of the alphabetical index:*

Assembly, freedom / Election, association / Election, campaign.

*Headnotes:*

Article 134 of the Federal Constitution and Article 47.1.c of the Election Code establish that public servants working in the federal, state and local governments, as well as the Federal District, are obliged at all times to impartially invest the public resources under their management and not to affect the equity of the competition between political parties.

These dispositions should not affect the rights to peaceful assembly and freedom of association of public servants.

*Summary:*

I. On 27 June 2011 the General Council of the Federal Electoral Institute approved the Agreement that specifies the norms regarding impartiality in the application of public resources, as required by Article 347.1.c of the Election Code and Article 134 of the Constitution.

The Party of the Democratic Revolution (hereinafter, the "PRD") presented an Appeal Resource against the second norm of the aforementioned Agreement, which read:

SECOND. In addition to the assumptions established in the first norm, the President of the Republic, the Governors of the States, the Chief of Government of the Federal District, the Municipal Presidents, the Chiefs of Delegations of the Federal District and public servants in general, will incur a violation of the principle of impartiality in the application of public resources if they realise any of the following:

[...]

I. Attend, during business days, meetings, rallies, assemblies, reunions or public events that aim to promote or influence, in any way, voting in favour or against a political party, coalition, applicant, pre-candidate or candidate, or abstention from voting.

The PRD argued that, first of all, if this provision was intended to limit public interventions of high ranking officers in electoral matters solely to Saturdays and

Sundays, then it should not be directed at public servants in general.

Additionally, the PRD stated that in the Agreement the authority assumes that workdays are 24 hour days, which is invasive to the private life of public servants and violates their freedom of association and freedom of assembly as recognised by Articles 9 and 35.III of the Constitution. While labour paid hours should not be used to promote electoral acts that could promote or influence voting in favour of or against any electoral subject, this prohibition only covers work hours and not the totality of business days.

II. By a majority of six votes against one, the High Chamber of the Electoral Court of the Federal Judiciary determined that the wording that refers to "public servants in general" is consistent with Article 134 of the Constitution and 347.1.c of the Election Code and, thus, should not be modified. These provisions are established to generate certainty during federal electoral processes. Consequently, it is clear that public servants should refrain from attending these types of public acts, thereby contributing – with their neutral character – to preserving the authentic and effective exercise of suffrage. Therefore, the first of the claims of the PRD was considered unfounded.

Regarding the second claim of the PRD, the High Chamber decided in favour of the party considering that public servants should not be deprived of their legitimate rights to peaceful assembly and association during their private and/or leisure time. The restriction on the participation of public servants in activities that could affect the equality of electoral procedures is limited only to work hours during business days. The rights to freedom of association and to peaceful assembly are granted to Mexican citizens in Articles 9 and 35.III of the Constitution, as well as Article 20 of the Universal Declaration of Human Rights, Articles 21 and 22 of the International Covenant on Civil and Political Rights and Articles 15 and 16 of the American Convention on Human Rights (Pact of San José).

Therefore, the Electoral Court determined that precept I of the second norm of the Agreement should be modified as follows:

[...]

I. Attend, during work hours, meetings, rallies, assemblies, reunions or public events that aim to promote or influence, in any way, voting in favour or against a political party, coalition, applicant, pre-candidate or candidate, or abstention from voting.

*Supplementary Information:*

Project presented by: Electoral Justice Manuel González Oropeza.

*Languages:*

Spanish.

*Identification:* MEX-2012-1-005

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 23.11.2011 / **e)** SUP-JRC-292/2011 / **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:*

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

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969.**

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

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

3.13 General Principles – **Legality.**

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

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

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

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

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

*Keywords of the alphabetical index:*

Reply, right / Censorship, prior.

*Headnotes:*

The right of reply protected by Article 6 of the Constitution cannot be differentiated amongst individuals on the basis of their respective roles in electoral matters. Requiring that the right of reply should be first sought from the organ of the mass media that presented the message that affected the rights of the petitioner does not constitute a form of prior censorship.

*Summary:*

I. On 9 March 2011 the High Chamber of the Electoral Court of the Federal Judiciary (hereinafter, the “Electoral Court”) revoked the Guidelines to Guarantee and Enforce the Right of Reply (hereinafter, the “Guidelines”) issued by the Electoral Institute of the State of Guerrero (hereinafter, the “Institute”). In compliance with the decision of the Electoral Court, on 29 September 2011 the Institute issued a new version of the Guidelines. On 5 October 2011 the Party of the Democratic Revolution (hereinafter, the “PRD”) appealed the new version of the Guidelines before the Electoral Court of the State of Guerrero (hereinafter, the “State Electoral Court”). The State Electoral Court found the appeal partially substantiated.

However, the PRD challenged the decisions of the State Electoral Court and filed an action for constitutional electoral review before the Regional Chamber of the Electoral Court. On 17 November 2011 the High Chamber asserted jurisdiction of the constitutional electoral review. In the complaint, the PRD contended that the State Electoral Court’s decision unlawfully con-firmed the Guidelines in that it excluded citizens, pre-candidates and leaders of political parties from exercising their right of reply in electoral matters, which contravenes Article 6 of the Constitution. The PRD also argued that the Guidelines favoured prior censorship inasmuch as they require that a formal request must first be made to the director or other person in charge of an organ of the mass media to exercise the right of reply in order to make a petition before the Institute. Additionally, the PRD contended that the terms for the procedure to exercise the right of reply before the Institute established in the Guidelines and modified by the State Electoral Court are excessive.

II. The High Chamber agreed with the arguments presented by the PRD that the Guidelines excluded citizens, pre-candidates and leaders of political parties from exercising their right of reply. Thus, the High Chamber deemed the Guidelines contrary to Article 6 of the Constitution and to Article 14 ACHR in that they unlawfully differentiated the right of reply in electoral matters.

However, the High Chamber did not agree with the PRD's contention that the requirement that a request regarding the right of reply must first be made directly to the director or other person in charge of the relevant organ of the mass media is a form of prior censorship. To arrive to that conclusion, the High Chamber considered the relevant international instruments and the national legislation and concluded that they all indicate that the right of reply should be first sought from the organ of the mass media that presented the message that affected a person's right to dignity or right to respect for one's honour and reputation. Finally, after carefully studying the time needed for each part of the procedure to exercise the right of reply before the Institute, the High Chamber deemed that the term is adequate and reasonable.

Consequently, the Electoral Court revoked the judgment of the State Electoral Court and modified the Guidelines so as to include a provision that ensures that the leaders of political parties can exercise their right of reply in electoral matters.

#### *Supplementary information:*

Project presented by: Electoral Justice María del Carmen Alanis Figueroa.

#### *Cross-references:*

- *Bulletin* 1999/3, [ESP-1999-3-023];
- *Bulletin* 1998/1, [ESP-1998-1-003];
- *Special Bulletin Leading Cases – ECHR* [ECH-1991-S-004];
- Inter-American Court of Human Rights, “The Last Temptation of Christ” (*Olmedo-Bustos et al.*) v. *Chile*, Judgment of 05.02.2001;
- Inter-American Court of Human Rights, *Ricardo Canese v. Paraguay*, Judgment of 31.08.2004;
- European Court of Human Rights (Former Section I), *Gaweda v. Poland*, Application no. 26229/95, 14.03.2002.

#### *Languages:*

Spanish.



## Moldova Constitutional Court

### Important decisions

*Identification:* MDA-2012-1-001

**a)** Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 10.04.2012 / **e)** 5 / **f)** Review of the constitutionality of a number of provisions of Article VII of Law no. 56 of 9 June 2011 amending certain pieces of legislation / **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**.

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

Health, protection / Allowance / Social security.

#### *Headnotes:*

Citizens enjoy the rights and freedoms enshrined in the Constitution and in law, and are subject to the obligations provided for therein. The state has a prime duty of respect for and protection of persons. Under Articles 15 and 16 of the Constitution, all citizens are equal before the law and the public authorities, without any distinction on grounds of race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, personal property or social origin.

In accordance with Article 47 of the Constitution, the state must take measures to ensure that every person has a decent standard of living, adequate to guarantee their and their family's good health and welfare. This includes food, clothing, housing, medical care and social assistance. These provisions determine the cases in which citizens are entitled to assistance: unemployment, illness, disability, widowhood, old age and other cases where they lose their means of subsistence due to circumstances beyond their control.

In implementing the constitutional provisions guaranteeing social rights, Parliament must comply with Article 54.4 of the Constitution, whereby restrictions of rights and fundamental freedoms must not affect the existence and the essence of those rights and freedoms.

### *Summary:*

I. A request for constitutional review of the provisions of Articles 4, 9.1 and 13.1.c of Law no. 289 of 22 July 2004 on allowances in the event of temporary incapacity for work and other social assistance benefits was made to the Constitutional Court.

The applicant submitted that financing by the employee and the employer of part of the allowance payable in the event of temporary incapacity for work and the reduction in the amount of the allowance, as provided for in the legislation under consideration, breached the right to social protection and ownership rights. The legislation was incompatible with Articles 1.3, 15, 16, 18, 46, 47, 54 and 126.2.g of the Constitution.

II. The Constitutional Court held that withdrawal of the social assistance award on the first day of incapacity for work on account of illness annulled employees' right to claim social assistance benefits for their incapacity for work on the first day due to an illness or a non-occupational accident. It observed that, on account of an indeterminate number of persons who abused the system, the state had introduced a "blanket" sanction affecting other employees who were unfit to work on account of an illness or non-occupational accident. As a result, the majority of employees would receive no payment for the first day of incapacity for work. They were, however, still obliged to pay the insurance contributions.

The Constitutional Court considered it unacceptable for the state to require employees to fulfil an obligation without taking into account the duty to protect their interests in circumstances when they had no control. This occurs in situations resulting in an incapacity for work covered by insurance contributions.

Lastly, the Constitutional Court held that withdrawing the award of benefits for the first day of incapacity for work on account of an illness would infringe on the very essence of employees' right to appropriate financial security for the duration of their inability to work.

The Constitutional Court nonetheless considered that the right to social assistance enshrined in Article 47 of the Constitution entailed that it was insured persons who should be able to benefit from the allowance for

temporary incapacity for work during the period of incapacity. This meant that the protection afforded by the constitutional provision under consideration was inapplicable to employers. The provision in question did not restrict the state's right to regulate employers' participation in the payment of social assistance allowances.

The Constitutional Court held that the challenged amendment did not infringe on the relevant constitutional provisions and conformed to the principle of requiring an additional contribution from the employer in the event of an employee's temporary incapacity for work.

The Constitutional Court accepted the authorities' argument that Article 4.3 of the law under consideration – providing for the full coverage of expenses incurred in cases of tuberculosis, AIDS, cancer or miscarriage – established the full financing by the state of expenses concerning vulnerable groups within the health care system. This provision was deemed to comply with the Constitution.

Regarding the constitutionality of the provisions reducing the amount of the allowance, the Court held that the Constitution included no specific guarantee as to the amount of the social benefit. The Court accepted the argument that the reduction in the amount of the allowance payable in the event of temporary incapacity for work was aimed at guaranteeing equal treatment of employees temporarily unable to work and employees fit for work. The reason is that employees paid income tax and other social welfare contributions on their salaries but the allowance was tax-free.

The Court nonetheless noted that the effect of the legislative amendments had not been to deprive the persons concerned by these provisions of the full amount of the social benefits in question but to decrease the allowance. The Court underlined that this decrease did not affect these persons' means of subsistence and did not impose an excessive, disproportionate burden on them.

In light of the above considerations, the Constitutional Court held that Article 4.2.a, providing that the insured person should bear the cost of the first day of incapacity for work, was unconstitutional. The other challenged provisions were held to be constitutional.

The finding of unconstitutionality of the provision in question created a legal vacuum concerning financing of the first day of incapacity for work. In accordance with Article 79 of the Code of Constitutional Jurisdiction, the Court sent an official note to Parliament on the need to fill this vacuum.

*Languages:*

Romanian, Russian.

*Identification:* MDA-2012-1-002

**a)** Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 03.05.2012 / **e)** 6 / **f)** Review of the constitutionality of Article 3.3 of Law no.142-XVI of 7 July 2005 approving the list of fields of vocational training and specialisations for the preparation of future managers at first degree level in higher education establishments / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

*Keywords of the systematic thesaurus:*

2.1.1.4.2 Sources – Categories – Written rules – International instruments – **Universal Declaration of Human Rights of 1948.**

2.1.1.4.9 Sources – Categories – Written rules – International instruments – **International Covenant on Economic, Social and Cultural Rights of 1966.**

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

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

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

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

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

*Keywords of the alphabetical index:*

Education, higher, access, requirement.

*Headnotes:*

Article 35.1 of the Constitution expressly recognises the right of access to education. This right is put into effect through a compulsory general school system, a secondary school system, vocational education, the higher education system and other forms of instruction and training.

Article 35.5 of the Constitution provides that educational institutions, including those not belonging to the state, are to be established and function in accordance with the law.

Under Article 35.6 of the Constitution, higher education institutions have the right to be autonomous.

Article 43 of the Constitution guarantees the right to work and to employment protection. Everyone has the right to work in a job of his or her free choice, to equitable, satisfactory working conditions and to protection against unemployment.

*Summary:*

I. The Constitutional Court was requested to review the constitutionality of Article 3.3 of Law no. 142-XVI of 7 July 2005 approving the list of fields of vocational training and specialisations for the preparation of future managers at first-degree level in higher education establishments.

The applicant submitted that the quota for enrolling students in public higher education institutions and private higher education institutions under contract and the payment of the apprenticeship tax breached Articles 4, 35, 43 and 54 of the Constitution; Articles 23 and 26 of the Universal Declaration of Human Rights; Articles 6.1 and 13 of the International Covenant on Economic, Social and Cultural Rights; and Article 5 of the UNESCO Universal Declaration on Cultural Diversity.

II. The Constitutional Court noted that, by its very nature, the challenged legislation concerned the state's possibility to determine an enrolment quota for public higher education institutions and private higher education institutions under contract and the payment of apprenticeship tax.

It deemed that the Constitution empowered Parliament to delegate to the relevant central government authorities certain responsibilities regarding education. Additionally, the Court indicated that the government and the Ministry of Education had not overstepped their authority.

The Constitutional Court considered that the right to education constituted a fundamental human right. The right of access to education of a high standard, without discrimination or exclusion, and free access to higher education must be guaranteed for everyone on an equal footing and according to merit.

The Court held that the challenged provisions entailed no restriction on citizens' freedom to choose their field of vocational training in line with their abilities and skills or on the right to education. This is enshrined in the Constitution and the international instruments to which the Republic of Moldova was a party.

In this context, the Court stated that limiting the number of students enrolled in higher education (*numerus clausus*) was an established practice in other countries, in accordance with public and economic interests.

The Constitutional Court previously held that the introduction of quotas for enrolment in higher education institutions (first degree level) did not infringe on the principle of universities' autonomy in admission matters. This was clarified in Judgment no. 30 of 18 December 2007 on review of the constitutionality of government Decree no. 594 of 28 May 2007 concerning the standard programmes for 2007 for the enrolment of students and pupils in higher education institutions [first degree level].

In light of the above considerations, the Court held that Article 3.3 of Law no. 142-XVI of 7 July 2005 approving the list of fields of vocational training and specialisations for the preparation of future managers at first-degree level in higher education establishments was constitutional.

III. One judge issued a dissenting opinion, contending that the limit on the number of students provided for in Article 3.3 of the law indirectly permitted the government to unjustly withdraw the licences of private higher education institutions. This judge considered that the provision must be deemed to violate Article 46 of the Constitution and Article 1 Protocol 1 ECHR.

#### *Languages:*

Romanian, Russian.



## Montenegro Constitutional Court

### Important decisions

*Identification:* MNE-2012-1-001

**a)** Montenegro / **b)** Constitutional Court / **c)** / **d)** 19.01.2012. / **e)** U-I no.2/11 / **f)** / **g)** / **h)** CODICES (Montenegrin, English).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Discrimination, prohibition / Initiative / Family.

*Headnotes:*

One of the highest constitutional values is the principle of the rule of law (Article 1.2 of the Constitution). The law shall conform with the Constitution and international agreements (Article 145 of the Constitution).

Apart from direct discrimination targeted at certain category of persons, Article 8.1 of the Constitution prohibits indirect discrimination, which occurs when the effects of a legal provision are discriminatory.

Apart from the right to marry and establish a family, Article 8 ECHR guarantees the right to respect family life and private life and respect for the home.

The sphere of family and marital social relations are subject to a broad appreciation of the state.

### Summary:

I. In the case before the Constitutional Court, the applicants argued that provisions of Article 12 of the Family Law conflict with provisions of Articles 8 and 17 of the Constitution.

The applicants contended that the provisions are also contrary to international law, Article 26 of the International Covenant on Civil and Political Rights that guarantees equal and effective protection against discrimination, including sexual orientation, and Article 14 ECHR.

During the course of the proceedings before this Court, one applicant withdrew his request for constitutional review, choosing instead to defer to the Government.

The Government opined that the contested provisions are neither in contravention to the provisions of Article 8 of the Constitution nor the quoted provisions of the international act since they pertain to the codification of a civil union, defined as a union between a man and a woman.

Family relations and the right to marry constitute constitutional rights that are stipulated by law. The legislator is authorised to regulate the way that these rights are to be exercised consistent with the law. In deciding on the applicants' initiative, the Constitutional Court reviewed the challenged provision of Article 12 of the Family Law in relation to the provisions of the Constitution that stipulate the term "marriage" (Article 71 of the Constitution), "family" (Article 72 of the Constitution) and prohibition of discrimination (Article 8 of the Constitution).

II. After reviewing the initiative, the Constitutional Court found that the legislator did not overstep its constitutional competence by enacting the contested provisions, which defined civil union as a lasting union between a man and woman, marriageable without obstacles, and accorded civil union the same status as a marriage in relation to mutual support and property – legal relations. The Court posited that because the distinction was reasonable and justifiable, it was not discriminatory.

The contested provisions of Article 12.1 of the Family Law, where different sex is a mandatory element for a common law union, is put into the context of family and family relations.

The Court determined that the legislator had full justification for the legislative solution and for different treatment of lasting unions of same sex individuals.

Also, the Court decided that the sphere of family and marital social relations are subject to broad, state discretion. Thus, there are no legal impediments to recognising certain rights to the same sex partners in lasting economic and emotional union in the same way as these rights are enjoyed by marital partners.

Therefore, the Constitutional Court did not accept the initiative to review the constitutionality of the provision in Article 12 of the Family Law.

### Cross-references:

European Court of Human Rights:

- *Mata Estevez v. Spain*, Application no. 56501/00;
- *Schalk and Kopf v. Austria*, Application no. 30141/04, 24.06.2010, 92, 93, 94 and 105;
- *Mellacher and others v. Austria*, Applications nos. 10522/83, 11011/84, 11070/84, 19.12.1989, *Series A*, no. 169, page 28;
- Decision on admissibility of the case *Adriana C. Goudswaard – van der Lans v. Netherlands*, Application no. 75255/01, 22.09.2005;
- Decision of the Human Rights Committee in relation to *Young v. Austria*, no. 941/2000.

### Languages:

Montenegrin, English.



# Netherlands

## Council of State

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### Important decisions

*Identification:* NED-2012-1-001

**a)** Netherlands / **b)** Council of State / **c)** Spatial Planning Chamber / **d)** 08.02.2012 / **e)** 201100875/1/R2 / **f)** X (a citizen), mayor and aldermen of Lemsterland and others v. the Minister of Economic Affairs, Agriculture and Innovation and others / **g)** *Landelijk Jurisprudentienummer*, LJN: BV3215 / **h)** CODICES (Dutch).

*Keywords of the systematic thesaurus:*

1.2.1.5 Constitutional Justice – Types of claim – Claim by a public body – **Organs of sectoral decentralisation.**

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

*Keywords of the alphabetical index:*

Economic crisis / Spatial planning.

*Headnotes:*

Public bodies, including municipalities, cannot rely on fundamental rights under the European Convention on Human Rights.

*Summary:*

I. In December 2010, the Minister of Economic Affairs, Agriculture and Innovation and the Minister of Infrastructure and Environment (hereinafter, the “ministers”) adopted the Government Integration Plan: “Wind energy along the embankments of the Northeast Polder”, which provides for sets of wind turbines. In addition, the ministers and several other public bodies made implementing decisions that were disputed by, *inter alia*, the mayor and aldermen of Lemsterland and the mayor and aldermen of Urk (hereinafter, the “municipalities”). The municipalities appealed to the Administrative Jurisdiction Division of the Council of State, arguing *inter alia* that their rights under Article 6 ECHR had been violated.

II. Article 1.4 of the Crisis and Recovery Act provides that local bodies (i.e., bodies that do not belong to the central government) established under public law may not lodge an appeal against central government decisions. This provision sets aside Article 8:1.1 of the General Administrative Law Act. Under Article 94 of the Constitution, the courts shall not apply provisions of Acts of Parliaments in cases brought before them, if these provisions do not conform to self-executing provisions of treaties and of decisions of international organisations.

The Administrative Jurisdiction Division of the Council of State, citing its own case-law, held that the European Convention on Human Rights does not apply in disputes between public bodies. The nature and historical origin of rights contained in the European Convention on Human Rights imply that they are not meant to protect public bodies. Therefore, public bodies including municipalities cannot rely on these rights in court. This view stems from the text, system and purpose of the European Convention on Human Rights and is supported by the demarcation in Article 34 ECHR: the Court may receive applications from any person, non-governmental organisation or group of individuals. It follows from the European Court of Human Rights’ case-law that municipalities are neither a person, non-governmental organisation nor a group of individuals within the meaning of Article 34 ECHR.

*Supplementary information:*

The Crisis and Recovery Act has been in force since 31 March 2010. This Act ensures that planned construction projects can be carried out more quickly. With the Crisis and Recovery Act, the government wishes to make sure that in economically difficult times, the country’s economic structure is nevertheless reinforced through implementing projects sooner than planned. The act aims to simplify and accelerate a number of procedures.

*Cross-references:*

- European Court of Human Rights, *Demirbaş v. Turkey*, Application no. 1093/08, 09.11.2010;
- Administrative Jurisdiction Division of the Council of State, 29.04.2008, no. 200707109/1;
- Administrative Jurisdiction Division of the Council of State, 07.12.2011, no. 201107071/1/H1.

Languages:

Dutch.



## Norway Supreme Court

### Important decisions

*Identification:* NOR-2012-1-001

**a)** Norway / **b)** Supreme Court / **c)** Chamber / **d)** 10.03.2011 / **e)** 2011-00516-P / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2011-347 / **h)** CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Detention, length / Law, retroactivity.

*Headnotes:*

A decision to refuse parole made pursuant to parole rules that are stricter than the rules that applied at the time the criminal act was perpetrated and at the date of conviction does not constitute a violation of the prohibition against retroactive legislation and the requirement of predictability.

*Summary:*

I. The case concerned the validity of a decision to refuse parole. The question before the Supreme Court was whether the refusal constituted a violation of the prohibition against retroactive legislation and the requirement of predictability in Article 97 of the Constitution and/or Article 7 ECHR because it was made pursuant to parole rules that were stricter than the rules that applied at the time the criminal act was perpetrated and at the date of conviction.

II. The Supreme Court held that the defendant had no justified expectation, either at the date of the criminal act or at the date of conviction, of release on parole after 12 years in prison that was protected against subsequent changes in court practice or legislation. The public administration was entitled to change the rules and make them more stringent in respect of persons already serving sentences. The defendant

also had no immunity against legislation which introduces stricter rules.

Abolition of legislation which provided for parole after 12 years imprisonment was not a breach of Article 97 of the Constitution and Article 7 ECHR. Article 7 ECHR does not implicitly require countries that have a system of parole an obligation to have clearly defined rules for the point in time at which parole shall be granted. The Supreme Court rejected the appellant's direct appeal against the judgment of the District Court.

*Languages:*

Norwegian, English (translation by the Court).



## Peru Constitutional Court

### Important decisions

*Identification:* PER-2012-1-001

a) Peru / b) Constitutional Court / c) Plenary / d) 12.09.2011 / e) 00928-2011-PA/TC / f) / g) / h) (Spanish).

*Keywords of the systematic thesaurus:*

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

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

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

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

*Keywords of the alphabetical index:*

Religion, affiliation / Religion, association, registration / Religion, change, right / Religion, free exercise / Religion, freedom, negative / Child, choice of a denomination by the parents / Religion, church law / Religion, church, regulation, internal / Religion, church, state, separation.

*Headnotes:*

Although the Constitutional Court is not competent to order the Catholic Church to recognise and formalise abandonment of the Church by an individual, the lack of that formalisation does not disturb or harm the right of a minor to exercise, having regard to the conditions regarding his age, his religious freedom and change of religion or belief, or affect the right of his parents to educate their child according to their religious and moral convictions.

*Summary:*

I. The appellants brought a claim against the diocese of Callao, seeking an order that the defendant excommunicate their son, the minor Bruno Salas García, from the Catholic Church through the mechanism of apostasy established in the Church's

Code of Canon Law. They also sought issuance of the corresponding baptism certificate with annotation of that excommunication from the parish of San Pablo, Callao.

The appellants argued that failure to accede to this request affected the right of religious freedom in terms of “free right to not believe in any religion”.

The appellants reside in Spain, and during a trip to Peru made by Mrs Lourdes Leyla Garcia Leon with her minor son (three years), he was baptised in the parish of San Pablo, Callao. When the child’s father, who claims to be atheist, became aware of the baptism, he urged the mother of the child to seek the nullification of that baptism. The mother requested the nullification of the act but received a response that this is not possible. The request was repeated by the child’s father with the same result.

The plaintiffs requested that the Constitutional Court order the “annotation” or formalisation of the abandonment of the Catholic Church in the child’s baptism certificate, under the mechanism of apostasy (“total rejection of the Christian faith”, according to Canon 751 of the Code of Canon Law) which the plaintiffs claim to have made on behalf of her minor son, through the communication of 15 October 2009 addressed to the defendant, to which no response has been provided to date.

The appellants based their request on the corollary of the right to religious freedom, which is the freedom not to believe in any religion.

II. The Constitutional Court was required to elucidate whether the absence of such formal act of abandonment of the Catholic Church violates any fundamental right of that child that would justify the intervention of constitutional justice.

It was contended that the right affected was the right to change religion or belief, enshrined in various international human rights instruments (Article 18 of the Universal Declaration of Human Rights, Article 18.1 and 18.2 of the International Covenant on Civil and Political Rights and Article 12.1 and 12.2 of the American Convention on Human Rights), which is one manifestation of the fundamental right of religious freedom, also recognised in national law by Article 3.a of Law no. 29635, the Law on Religious Freedom.

The Court was required to determine whether the absence of any annotation of the formal act of abandonment of the Catholic Church in the book of baptism violated the religious freedom of this child in terms of his right to change of religion or belief.

The abandonment of the Catholic Church, as an exercise of the right to change one’s religion or belief, does not require the intervention of any instance of that Church, which respects the right to religious freedom. In that order, such a right precludes the imposition of conditions in order to retain those who do not want to stay in a religious faith since it requires the full freedom to change religion or belief.

The Constitutional Court was in accord with the case law of the Spanish Supreme Court, which holds that the book of baptism is not an organised set of personal data (Judgment of 19 September 2008, Appeal no. 6031/2007, foundation 4), and that “the data stored in the book of baptism merely reflect the historical fact of the realisation of that baptism by a certain date in respect to an identified person” (Judgment of 14 October 2008, Appeal no. 5914 / 2007, foundation 3).

The Court held that the appellants had not established the violation of religious freedom of their minor son or specifically, his right to change his religion or belief, since the absence of any formalisation of the abandonment of the Catholic Church through a corresponding entry in the book of baptism did not forbid the son of the appellants to exercise his religious freedom and his ability to freely choose or not to profess any religious belief, when he reaches adulthood or even earlier; in the latter case under the guidance of his or her parents, in a manner consistent with the evolving capacities of the child, in accordance with Article 14.2 of the UN Convention on the Rights of the Child.

Although the minor’s abandonment of the Catholic Church had not been formalised, the appellants could educate their minor child in the belief they freely choose, be it “critical rationalist, freethinker and atheist”, or any another conviction.

The Court held that the formal abandonment of a religious denomination is an internal matter for each confession, in this case the Catholic Church. Accordingly, to grant the request of the appellants to order the entry of the formal act of abandonment in the baptismal book would imply a violation of religious freedom of the Catholic Church, in the collective or individual aspect of that freedom (Article 2.3 of the Constitution). It would also be a violation of the secular or non-denominational condition of the State enshrined in Article 50 of the Constitution (cf. STC 6111-2009-PA/TC, bases 23 to 28; STC 05416-2009-PA/TC, bases 22 to 27), and would affect the independence and autonomy of that Church, recognised both by Article 50 of the Constitution and by Article 1 of the Agreement between the Peruvian State and the Holy See, an international treaty which

entered into force in 1980. For these reasons, the request of the petitioners for an order of the Constitutional Court compelling the Catholic Church to formalise the abandonment from the Church, either on behalf of themselves or their minor son, goes against the constitutional and supranational frame described.

Therefore, the formal abandonment of the Catholic Church corresponds to be claimed by the plaintiffs in the respective instances of the Church, where, according to the law of the Church (Canon Law) they may challenge the response they receive if they are in disagreement with it.

The Constitutional Court dismissed the claim considering that the infringement of the right to religious freedom and, specifically, the right to change religion or belief had not been established.

#### *Languages:*

Spanish.



## Poland Constitutional Tribunal

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### Statistical data

1 January 2012 – 30 April 2012

Number of decisions taken:

Judgments (decisions on the merits): 12

- Rulings:
  - in 6 judgments the Tribunal found some or all of the challenged provisions to be contrary to the Constitution (or other act of higher rank)
  - in 6 judgments the Tribunal did not find the challenged provisions contrary to the Constitution (or other act of higher rank)
- Initiators of proceedings:
  - 2 judgments were issued upon the request of the President of the Republic
  - 2 judgments were issued upon the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
  - 1 judgment was issued upon the request of the National Chamber of Notaries
  - 1 judgment was issued upon the request of the National Council of Legal Counsels
  - 1 judgment was issued upon the request of a trade union
  - 4 judgments were issued upon the request of courts – question of law procedure
  - 1 judgment was issued upon the request of a legal person – constitutional complaint procedure
- Other:
  - 4 judgments were issued by the Tribunal sitting in plenary session
  - 5 judgments were issued with a dissenting opinion

## Important decisions

*Identification:* POL-2012-1-001

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 19.07.2011 / **e)** K 11/10 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2011, no. 160, item 964; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2011, no. 6A, item 60 / **h)** CODICES (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.**

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

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

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

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

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

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

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

*Keywords of the alphabetical index:*

Symbol, nazi / Symbol, communist.

*Headnotes:*

The criminalisation of preparation, distribution or publication of materials promoting a totalitarian regime or inciting hatred based on national, ethnic, race or religious differences is admissible, provided that criminal law regulations are sufficiently precise that they do not constitute unjustified interference with the freedom of speech or allow for the use of a broader interpretation.

*Summary:*

I. A group of MPs challenged the constitutionality of Article 1.28 of the Act of 5 November 2009 amending the Penal Code, the Code of Criminal Procedure, the Executive Penal Code, the Penal Fiscal Code and certain other acts (Journal of Laws – Dz. U. no. 206, item 1589, as amended). This provision criminalised the producing, recording, importing, purchasing, storing, possessing, presenting, transporting or sending – for the purpose of dissemination – of

printed materials, recordings or other objects comprising the content specified in Article 256.1 of the Criminal Code or bearing fascist, communist or other totalitarian symbols.

The applicant argued that this regulation constituted a disproportionate restriction of the freedom of expression and violated the principle of specificity of criminal provisions and the principle of appropriate legislation. Furthermore, the circumstances eliminating unlawfulness (Article 256.3 of the Penal Code) had been regulated inappropriately.

II. The Constitutional Tribunal reviewed the constitutionality of the amended Article 256 of the Criminal Code (i.e. of the added §§ 2 and 3) and discontinued proceedings as to the remaining Article 256.4 of the Criminal Code. Article 256.1 of the Criminal Code had not been challenged by the applicant and so constitutional review of the consistency of Article 256.2 of the Criminal Code, to the extent it criminalises conduct covered by Article 256.1 of the Criminal Code with Article 54.1 of the Constitution in conjunction with Article 31.3 of the Constitution, was inadmissible.

Freedom of speech is a value which is subject to particular protection. Interference with it by means of the regulation of criminal law requires precision and caution from both the legislator and the courts.

If there is a term lacking sufficient specificity in a criminal law provision, the legislator should be expected to provide the utmost precision in the description of the characteristics of that act. The use of the phrase “printed materials, recordings or other objects being carriers of fascist, communist or other totalitarian symbols” in a criminal law provision infringes the principle of specificity of criminal law provisions. It is not known whether a symbol of communism will be considered to be a red flag, or whether this would have to be a red flag with a sickle and hammer, or a T-shirt with an image of Che Guevara. These comments also apply to objects bearing fascist symbols.

The excerpt of Article 256.2 of the Penal Code (which contained terms lacking sufficient specificity) was not accompanied by sufficient procedural guarantees. Instituting criminal proceedings in haste in cases concerning “fascist, communist or other totalitarian symbols”, even if the outcome of the proceedings proved positive for the suspect (the accused), could lead not only to unnecessary interference with the rights of the individual but also a chilling effect on public debate. It could also strengthen extremist political factions which use the examples of the state’s repressive methods to gain new supporters.

The Constitutional Tribunal noted that the lack of sufficient specificity in the excerpt from Article 256.2 of the Penal Code was not compensated for by circumstances eliminating unlawfulness. However, Article 256.3 of the Penal Code was found to be in compliance with Article 54.1 in conjunction with Article 31.3 of the Constitution.

Account was also taken of Article 20.2 of the ICCPR, which stipulates that: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". It was noted that the international law-maker was specifying, in an incomplete way, the scope of propagating hatred in the context of communist ideology; public propagation and incitement of hatred based on social class differences have been the basis of the official ideology or political programme of extreme left-wing factions in many countries.

Carrying out the assessment of conformity of the challenged provision to the higher-level norm for the review formulated in Article 54.1 of the Constitution made it unnecessary for the Tribunal to present its views on the conformity of the provision to the higher-level norms from an international law perspective, as the allegations formulated on the basis of those norms were identical and the applicant did not go beyond citing the content of the higher-level norm.

#### Cross-references:

##### Decisions of the Constitutional Tribunal:

- Judgment K 24/00 of 21.03.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 3, item 51;
- Judgment SK 22/02 of 26.11.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 9A, item 97, *Bulletin* 2004/1 [POL-2004-1-004];
- Judgment P 2/03 of 05.05.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, o. 5A, item 39, *Bulletin* 2004/2 [POL-2004-2-015];
- Judgment P 8/04 of 18.10.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 9A, item 92;
- Judgment SK 30/05 of 16.01.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 1A, item 2, *Bulletin* 2006/1 [POL-2006-1-002];
- 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 P 3/06 of 11.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 121;
- Judgment P 10/06 of 30.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 128, *Bulletin* 2007/2 [POL-2007-2-003];
- Judgment K 8/07 of 13.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 3A, item 26, *Bulletin* 2008/1 [POL-2008-1-001];
- Judgment SK 43/05 of 12.05.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 4A, item 57;
- Judgment P 50/07 of 13.05.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 4A, item 58;
- Judgment Kp 3/09 of 28.10.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 9A, item 138, *Bulletin* 2010/1 [POL-2010-1-002];
- Judgment Kp 8/09 of 03.12.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 11A, item 164;
- Judgment SK 52/08 of 09.06.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 5A, item 50;
- Judgment SK 25/08 of 22.06.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 5A, item 51;
- Judgment K 19/06 of 04.11.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 9A, item 96.

##### Decisions of the Federal Constitutional Court of Germany:

- Decision 1 BvR 680/86 of 03.04.1990;
- Decision 1 BvR 681/86 of 03.04.1990;
- Decision 1 BvR 150/03 of 01.06.2006;
- Decision 1 BvR 204/03 of 23.03.2006;
- Decision 1 BvR 2150/08 of 04.11.2009, *Bulletin* 2009/3 [GER-2009-3-030].

##### Decision of the Constitutional Court of Hungary:

- Judgment 14/2000 AB of 09.05.2000, *Bulletin* 2000/2 [HUN-2000-2-002].

##### Decision of the European Court of Human Rights:

- *Vajnai v. Hungary*, Application no. 33629/06, 08.07.2008.

#### Languages:

Polish, English (translation by the Tribunal).



*Identification:* POL-2012-1-002

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 20.07.2011 / **e)** K 9/11 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2011, no. 149, item 889; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2011, no. 6A, item 61 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

3.3 General Principles – **Democracy.**

4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members.**

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

4.9.4 Institutions – Elections and instruments of direct democracy – **Constituencies.**

4.9.8.3 Institutions – Elections and instruments of direct democracy – Electoral campaign and campaign material – **Access to media.**

4.9.9.6 Institutions – Elections and instruments of direct democracy – Voting procedures – **Casting of votes.**

5.1.1.1.1 Fundamental Rights – General questions – Entitlement to rights – Nationals – **Nationals living abroad.**

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

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

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

*Keywords of the alphabetical index:*

Voting, two-day / Voting, proxy / Voting, postal / Constituency, single-member.

*Headnotes:*

The term “the day of the elections” in the provisions under review was consistently couched in the singular, pointing to an interpretation to the effect that voting should be held on a single day (in principle a non-working day).

Proxy voting is not tantamount to the transfer of electoral rights from somebody granting a proxy vote to a proxy. The proxy is obliged to vote on the voter’s

behalf and in accordance with the voter’s wishes. Lack of control over the action taken by the proxy, i.e. over the content of the vote, arises from the principle of the secret ballot and creates the necessity for a relationship based on special trust between the voter and the proxy.

Postal voting allows voters residing abroad to cast votes if they find it difficult to get to polling stations of district electoral commissions which are a long distance from where they are residing or staying.

The ban on using large-format election posters or paid election radio or TV advertisements does not only restrict the freedom to express opinions and to disseminate information on the part of political parties and election committees, but also the freedom to acquire information (on the part of voters). These bans cannot be justified by a general clause about public order, or by an argument that they were meant to “improve the quality of political discourse” and to optimise the spending of funds allocated for electoral campaigns which, in the case of a political party, are mainly derived from the state budget.

The principle of substantive equality has not been expressed in Article 97.2 of the Constitution in relation to elections to the Senate, and cannot be reconstructed from other constitutional provisions. A clear connection cannot therefore be discerned in the electoral system for the Senate between the number of voters in a constituency and the number of seats allocated to that constituency.

*Summary:*

I. A group of MPs challenged the constitutionality of various provisions within the Electoral Code, in the Provisions implementing the Electoral Code and in the Act of 3 February 2011 amending the Electoral Code. The provisions covered two-day voting, proxy-voting, postal voting, and introduced a ban on the use of large-format election posters or the broadcasting of paid election radio or TV advertisements. They also introduced single-member constituencies in relation to elections to the Senate.

The applicants challenged the legislative procedure in which the Electoral Code was enacted, and certain inter-temporal regulations of the Electoral Code. They contended that the regulations of the Electoral Code on two-day voting were in conflict with provisions of the Constitution using the term “the day of the elections” and that the adopted model of proxy-voting infringed the principle of formal equality (“one man – one vote”). They also argued that postal voting impinged on the standard of reliability of elections in a democratic state and that the restrictions on access

to media could not be reconciled with the standard of free electoral competition in a democratic state. The introduction of single-member constituencies could not, in their opinion, have been achieved through a Senate amendment, as it introduced a significant change to electoral law. Finally, they claimed that the legislator did not respect the six month period of “legislative silence” before the ordinance of the elections, and that, by giving the President the discretionary power to call elections before or after the date of entry of the Electoral Code, the legislator infringed Article 2 of the Constitution.

II. The Constitutional Tribunal declared the provisions of the Electoral Code on two-day voting, along with the restrictions in access to media, unconstitutional to the extent that they concerned presidential elections and elections to the national Parliament and Senate. In terms of elections to the European Parliament and to the constitutive organs of units of local self-government and elections of mayors of villages, towns and cities, they were found not inconsistent with the Constitution, as the Fundamental Law does not, in principle, regulate European or local self-government elections. The Tribunal also declared the Act of 3 February 2011 amending the Electoral Code and Article 16.1 and Article 16.2 of the Provisions implementing the Electoral Code unconstitutional. The proceedings as to the remainder were discontinued.

A statute which has yet to enter into force, such as the Electoral Code in the present case, enjoys a stronger presumption of constitutionality of its provisions than one which is already binding. Nevertheless the Tribunal took account of the fact that this statute was passed by Parliament unanimously (including the MPs who signed the application in the present case).

If the restrictions in access to media were to be justified by a change in the way funds are spent on campaigns by election committees, the legislator should make appropriate changes to the provisions on financing electoral campaigns, rather than forcing changes by means of instruments with the potential to limit the freedom of speech.

Regarding the single-mandate constituency amendment, the Tribunal noted the greater level of freedom enjoyed by the Senate in terms of proposing amendments to a new statute which regulates given matters for the first time or where there is a statute that repeals the existing statute in its entirety and contains fresh regulation of those matters. The amendment concerning single-member constituencies in Senate elections had been adopted by senate resolution; it had not been rejected by Parliament. It

did not constitute an introduction of solutions into the content of the statute which had not been the object of legislative work in Parliament before.

The Law in accordance with which the 2011 parliamentary elections should have been carried out had been known half a year before the final date for ordering elections by the President. Nevertheless, the uncertainty until 31 July 2011 as to which regulation would be binding during the elections weighed in favour of the unconstitutionality of Article 16.1 and Article 16.2 in conjunction with Article 1 of the Provisions implementing the Electoral Code.

The Tribunal issued this judgment *en banc*. Eleven dissenting opinions were raised.

#### Cross-references:

##### Decisions of the Constitutional Tribunal:

- Decision K 5/93 of 23.11.1993, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1993, item 39, *Bulletin* 1993/3 [POL-1993-3-018];
- Decision K 25/97 of 22.09.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 3-4, item 35, *Bulletin* 1997/3 [POL-1997-3-017];
- Judgment U 19/97 of 25.05.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 4, item 47, *Bulletin* 1998/2 [POL-1998-2-011];
- Judgment K 3/98 of 24.06.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 4, item 52, *Bulletin* 1998/2 [POL-1998-2-014];
- Judgment K 25/98 of 23.02.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 2, item 23, *Bulletin* 1999/1 [POL-1999-1-004];
- Judgment K 8/99 of 14.04.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 3, item 41, *Bulletin* 1999/1 [POL-1999-1-009];
- Judgment K 10/99 of 14.12.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 162;
- Judgment K 27/00 of 07.02.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 2, item 29;
- Judgment U 3/01 of 19.02.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 1A, item 3, *Bulletin* 2002/2 [POL-2002-2-014];
- Judgment K 11/02 of 19.06.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 4A, item 43;

- Judgment K 14/02 of 24.06.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 4A, item 45;
- Judgment K 12/03 of 18.02.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 2A, item 8;
- Judgment K 37/03 of 24.03.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 3A, item 21;
- Judgment P 2/03 of 05.05.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 5A, item 39, *Bulletin* 2004/2 [POL-2004-2-015];
- Judgment K 15/04 of 31.05.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 5A, item 47, *Bulletin* 2004/2 [POL-2004-2-017], [POL-2004-2-018];
- Judgment K 17/03 of 08.02.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 2A, item 14;
- Judgment P 1/05 of 27.04.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 4A, item 42, *Bulletin* 2005/1 [POL-2005-1-005];
- Judgment K 18/04 of 11.05.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 5A, item 49, *Bulletin* 2005/1 [POL-2005-1-006];
- Judgment K 45/05 of 21.12.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 11A, item 140;
- Judgment K 40/05 of 20.07.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 7A, item 82, *Bulletin* 2006/3 [POL-2006-3-013];
- Judgment K 31/06 of 03.11.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 10A, item 147;
- Judgment U 5/06 of 16.01.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 1A, item 3;
- Judgment K 2/07 of 11.05.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 5A, item 48, *Bulletin* 2007/3 [POL-2007-3-005];
- Judgment K 42/05 of 22.05.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 6A, item 49;
- Judgment K 39/07 of 28.11.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 10A, item 129, *Bulletin* 2008/1 [POL-2008-1-005];
- Judgment K 5/07 of 19.09.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 7A, item 124;
- Judgment K 66/07 of 24.11.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 9A, item 158;
- Judgment K 7/09 of 21.07.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 7A, item 113;
- Judgment Kp 3/09 of 28.10.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 9A, item 138, *Bulletin* 2010/1 [POL-2010-1-002];
- Judgment Kp 1/08 of 04.11.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 10A, item 145;
- Judgment P 61/08 of 23.11.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 10A, item 150;
- Judgment Kp 6/09 of 20.01.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 1A, item 3;
- Judgment K 3/09 of 08.06.2011, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2011, no. 5A, item 39, *Bulletin* 2011/2 [POL-2011-2-003];
- Judgment Kp 1/11 of 14.06.2011, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2011, no. 5A, item 41, *Bulletin* 2011/2 [POL-2011-2-004].

Decisions of the European Court of Human Rights:

- *Casado Coca v. Spain*, Application no. 15450/89, 24.02.1994;
- *United Communist Party of Turkey v. Turkey*, Application no. 133/1996, 30.01.1998.

Languages:

Polish, English (translation by the Tribunal).



# Portugal

## Constitutional Court

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### Important decisions

*Identification:* POR-2012-1-001

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 17.01.2012 / **e)** 24/12 / **f)** / **g)** *Diário da República* (Official Gazette), 41 (Series II), 27.02.2012, 6982 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

- 3.10 General Principles – **Certainty of the law.**
- 3.16 General Principles – **Proportionality.**
- 3.17 General Principles – **Weighing of interests.**
- 3.22 General Principles – **Prohibition of arbitrariness.**
- 5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis*.**
- 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**
- 5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent.**
- 5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law.**

*Keywords of the alphabetical index:*

Identity, personal, right / Paternity, search / Paternity, right to know.

*Headnotes:*

The legislator is not restricted under the Constitution to determining that its decisions will only take effect in the future. The attribution by legislation of retroactive effect may in some cases be the best way to pursue the public interest and protect subjective legal positions, although the legislator's power to attribute it is limited both by express prohibition and by the concept of a democratic state based on the rule of law and the protection of the legitimate trust to which citizens are entitled in the continuity of the legal order. There is no conflict in the relationship between these limitations; both are ways of safeguarding the values within the principle of the state based on the rule of law, and that of certainty of law.

Provision within the legislation for a definitive time limit after which a paternity investigation can no longer be brought will curtail the opportunity of the investigating party to establish the paternal bond to which he or she aspires. This type of negative impact may attract criticism from a constitutional perspective. The legislator is responsible for finding ways of bringing differing and sometimes conflicting constitutionally protected rights and interests into harmony with each other and must also decide whether and under what circumstances it is justifiable to reduce the scope of, or the protection offered by, one such right or interest, in order to promote all of them in a balanced or proportionate fashion. A distinction must be drawn between a provision which has a "simple" negative impact on fundamental rights and one with a negative impact to an unconstitutional extent.

In order for legislation with a negative impact on rights to avoid constitutional criticism, it must fulfil requisites other than that of proportionality, such as the requirement that it must not have retrospective effect.

*Summary:*

I. An appeal was lodged with the Plenary of the Constitutional Court, pointing out that the Chambers of the Court had handed down opposing judgments on the same question of unconstitutionality.

In Ruling no. 164/1, one of the Chambers held that a norm which required the imposition of a new time limit for bringing paternity and maternity investigation actions on cases that were pending when the norm came into force was unconstitutional. However, in Ruling no. 285/11, another of the Chambers did not find the same norm unconstitutional.

II. The Plenary of the Constitutional Court reflected upon its earlier jurisprudence to the effect that ordinary-law norms imposing time limits for bringing court actions do not violate any constitutional norm or principle. They simply represent legitimate choices by the ordinary legislator with regard to the ways of pursuing the constitutional values which are set out in the Article of the Constitution that protects the fundamental right of access to the law and to effective jurisdictional protection. Recently, however, the Court has moved away from this position, and has taken the view that subjecting the bringing of actions for the investigation of paternity or maternity also brings into play other constitutional principles besides those of access to the law and to jurisdictional protection and the protection of legal security. The right to personal and to moral integrity can and should be held to give rise to a basic right to know who the identity of one's parents and for this to be recognised. A person's paternity and maternity

constitute essential references for his or her individuality, biologically and socially. The right to know one's parentage is an essential dimension of the right to personal identity.

The Plenary of the Constitutional Court found in favour of the jurisprudence in the first of the Rulings and found the norm to be unconstitutional.

III. The Ruling was the object of one concurring and six dissenting opinions. The majority decision was reached by the casting vote of the President of the Court. A particular concern in the dissenting opinions was that the Court's jurisprudence states that in order for there to be a requirement for the material aspect of trust of the principle of legal security to be protected against innovations in the law, this cannot be dictated by the need to safeguard constitutionally protected rights or interests which should themselves be considered to prevail over that principle. In the view of the dissenting Justices, the legislature's option to pursue a particular interest and the consequent decision to apply the new law to pending cases was a choice that fell within its freedom to create and shape the law, and was designed to avoid an inadmissible fragmentation of the democratic legal order; the norm would have ensured that all the cases that were pending when the new law came into force would have been treated in the same way. The legislator's choice would appear to be fitting and justified by the need to afford equal treatment to those situations; it did not breach the principle of legal security.

The point was made in the dissenting opinions that the Constitutional Court has previously held that time limits on bringing actions to establish filiation do not represent a restriction on the fundamental rights at stake but rather a conditioning of those rights which simply imposes an onus of diligence in terms of the initiation of proceedings.

The dissenting Justices also observed that even if the imposition of time limits on the exercise of the right to investigate one's paternity could be treated as a restriction on the fundamental right to personal identity, thereby and to that extent making that imposition subject to the constitutional rule that laws restricting fundamental rights, freedoms or guarantees cannot have retroactive effect, in this particular case this constitutional norm was not breached; the application of the new limit to pending cases (to legal situations that had not yet crystallised) was not an example of authentic retroactivity. The legal position with regard to formal transitional norms, such as the norm under scrutiny in this case, was entirely separate from the position with regard to the prescriptive content and scope of the substantive norm which the transitional norm imposes.

#### *Cross-references:*

- Rulings nos. 164/11 of 24.03.2011 and 285/11 of 07.06.2011 are respectively included in the jurisprudence selected for Bulletins on Constitutional Case-Law nos. 2011/1 and 2011/2.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2012-1-002

**a)** Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 15.02.2012 / **e)** 85/12 / **f)** / **g)** / **h)** CODICES (Portuguese).

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

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

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

Administrative offence / Criminal offence.

#### *Headnotes:*

The Constitutional Court's case-law has constantly emphasised that administrative offences and criminal offences possess different natures. The degree of the legal reproof and the material sanctions in each category are also different. These differences justify the fact that the principles which guide penal law do not automatically apply to the law governing administrative offences.

The norm of the Securities Code which states that the communication or disclosure by any person or entity by any means of information that is not complete, true, up-to-date, objective and lawful is a serious administrative offence does not breach any constitutional principle or norm.

Under the Constitution, criminal law is subject to the principle of “typicity” (penal norms must adequately categorise the crimes they establish) and to the requirement that such norms must clearly determine what conduct is criminalised (in the criminal field, the requirement of determinability is one of the dimensions of the principle of legality). This principle and requirement do not, however, extend to the law governing administrative offences.

Similarly, the principle of the subsidiarity of the punishment (in the sense that the latter must always be the *ultima ratio*) is only valid in penal law. In terms of the law on administrative offences, unconstitutionality only comes into play where the legislator has clearly overstepped the mark and has provided for sanctions which are unnecessary, inappropriate or manifestly excessive.

### Summary:

I. In an administrative offence case, the Stock Market Commission (hereinafter, the “CMVM”) resolved to order a bank to pay various fines for infractions regarding the communication or disclosure of information that was not complete, true, up-to-date, objective and lawful. These infractions are set out in the Securities Code. The Lisbon Court of Appeal upheld the CMVM’s decision. The bank then appealed against the Appeal Court’s ruling to the Constitutional Court.

According to the applicant, the CMVM had breached both the “typicity” dimension of the principle that sanctions must be provided for by law, and the constitutional principles of equality and that a punishment must be necessary and proportional.

II. The Constitutional Court noted that the CMVM is a public administrative entity, with the fundamental role of ensuring the proper operation of the stock markets, both at the level of the primary market (the issue of securities), and at that of the secondary market (the free exchange of securities that have already been issued). It is furnished with public administrative powers (notably powers to regulate, supervise and inspect, which include the procedural treatment of administrative offences and the imposition of the respective fines). Entities that act in a professional or qualified capacity in the stock markets are subject to regular monitoring by the CMVM and are under a legal duty to cooperate with it. In particular, they must provide information, which must be “complete, true, up-to-date, objective and lawful”.

The Constitutional Court took the view that requirements that apply under the penal law should not be extended to the field of administrative offences. The differences between the two domains manifest themselves in the administrative (and non-judicial) nature of the entity that imposes administrative-offence sanctions, and in the requirement for the determinability of the type of crime that is a key feature of penal law but does not operate in the administrative-offence domain.

It observed that the norm before it should be analysed in conjunction with the Securities Code provision on this type of information (information regarding financial instruments, organised forms of trading, financial intermediation activities, the settlement and clearing of operations, public offers of securities, and issuers) and on the means by which it is provided (any means of disclosure, even if it is included in advice, recommendations, advertising, or risk-rating reports), and with the norm that sets out the upper and lower limits on the fines that are applicable to the respective administrative offences. The concept of ‘information’ for the purposes of the Securities Code cannot be considered vague; it is perfectly circumscribed.

It is not constitutionally unlawful to configure a type of administrative offence that sanctions a form of conduct, regardless of the damaging effects this configuration may have on the legal assets it is designed to safeguard. The Constitution does not prohibit the creation of administrative-offence infractions that are purely formal or simply refer to the mere undertaking of an act, which is in itself enough to characterise the type of offence, regardless of whether or not it has any external consequences. In terms of the stock market, an administrative offence intervention that imposes sanctions before and irrespective of whether any damage is done is fully justified, as the protection of the assets in question does not have to refer to damage that has actually been caused or injuries that have actually taken place. In this type of market it is often difficult to identify damage, most of which is diffuse in nature; and by the time the damage to the market can be identified, it is usually already irreparable and uncontrollable. Furthermore, unlawful practices are normally accompanied by the generation of a chain of economic effects that go beyond the space in which the securities in question circulate. With a market as fast and sensitive as this, any sense of danger already constitutes a moment at which effective damage not only exists, but is fuelling investor distrust. It is therefore acceptable for the Securities Code to sanction the simple breach of duties to inform, and any lack of accuracy in that information.

The Court noted that the norm which was the object of the present appeal should also be read in conjunction with the Securities Code norm that sets upper and lower limits on sanctions for administrative offences that are qualified as 'very serious': 25,000 and 2,500,000 Euros. In another of its provisions, the Securities Code sets out the criteria for determining the exact amount of the fine (concrete unlawfulness, culpability on the part of the agent, the benefits obtained, requirements to prevent the problem arising and whether the agent was a natural or a legal person). The lower and upper limits cannot, therefore, be viewed as being in breach of the principle of determinability of norms. The fine is determined by weighing up the circumstances that are expressly mentioned in the law, between the established limits. The persons and entities at which the norm is directed are thus perfectly able to discern the forms of conduct that are prohibited, and to foresee the sanction that would be imposed on such conduct.

The Court emphasised that under its own jurisprudence, the setting of broad limits for sanctions in the administrative offence field does not *per se* constitute a breach of constitutional principles, and that it is necessary to determine whether the law lays down other mechanisms to help ensure legal security.

The administrative offence in question is intended to safeguard the value of the truth and transparency of the stock market. The reliability of information is a fundamental pillar of the proper operation of the stock market, and one which makes it possible to ensure that investment decisions are fully informed. Ensuring the transparency and reliability of information is an essential need. The financial market and system warrant constitutional protection. One of the priority tasks with which the Constitution charges the state is that of ensuring the markets operate efficiently, and within that context, particularly repressing practices which harm the general interest. It is also a constitutional requirement that the financial system be structured by law, so as ensure that savings are securely invested and the necessary financial resources are dedicated to the development of the economy and society. The operation of the stock markets is a specific instrument that serves to further the state's economic development. At stake here are on the one hand supra-individual legal assets that are employed in an economic development programme, which is why the Constitution concerns itself with protecting the markets and on the other, the property rights of savers, investors and the clients of financial institutions. The requirement to provide information is thus the result of a complex set of interests, particularly in terms of the protection of

investors, who are acting within the context of a market characterised by a high level of risk and who must be provided with a system in which opportunities are equal. The administrative offence at issue here is also intended to protect individual rights, such as the right of citizens to the protection of their assets.

The question here is not just one of constitutional values linked to financial stability and economic and social development, but also the protection of the rights of savers, investors and the clients of financial institutions, and first and foremost their right to property. To safeguard these constitutional values, the legislator opted to establish sanctions which would prove to be an effective deterrent.

#### *Cross-references:*

- Rulings nos. 344/93 of 12.05.1993, 278/99 of 05.05.1999, 160/04 of 17.03.2004 and 537/2011 of 15.11.2011.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2012-1-003

a) Portugal / b) Constitutional Court / c) Plenary / d) 28.02.2012 / e) 96/12 / f) / g) / h) CODICES (Portuguese).

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

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

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

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

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

4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy.**

*Keywords of the alphabetical index:*

Referendum, local / Common land.

*Headnotes:*

Common land (land possessed and managed by local communities) is used and enjoyed in accordance with the decisions taken by the competent bodies of the common owners. The latter are the residents of one or more parishes or parts of parishes to whom usage and custom afford the right to use and enjoy that land.

The Constitution expressly provides for local referenda; local authorities may submit matters within their sphere of competence to referendum by their registered electors. The parish is one of the entities included in the concept of 'local authority'.

The object of a local referendum can only be a question of important local interest which falls within the competences of local authority bodies (whether those competences are exclusive, or whether they are shared with the state or the autonomous regions) and which must and can be decided by them. In order to determine the lawfulness of a local referendum, the initial question that must be answered is whether that competence exists.

Under the ordinary law that establishes the framework of competences pertaining to parishes, parish councils possess the specific competence to administer or use common land where no assembly of common owners exists. In the present case there was an Assembly of Common Owners of the land in question, and so the existence of specific competence on the part of the parish authority bodies in this matter was excluded. The parish bodies did not, therefore, have the right to decide on matters regarding that common land, and they did not share any significant authority with the assembly of common owners. Under the legislation governing local referenda, local authority organs can only share such authority with the state (on the mainland) or the autonomous regions.

*Summary:*

I. Under the terms of the organic law that approved the legal regime governing local referenda, the chairman of a parish assembly asked the Constitutional Court to conduct a prior review of the constitutionality and legality of an assembly decision to submit to referendum the question of the rental of a piece of common land owned by the parish in order to build a factory for the transformation of animal-meat sub-products.

Common land is composed of plots of community land that cannot be the object of commercial legal transactions and cannot be privately appropriated in any way, including acquisition by prescription. It is used and enjoyed by residents of one or more given parishes. Its legal nature is that of community property which is in the possession and under the management of local communities.

Express provision was made for community means of production (including common land) in the original version of the 1976 Constitution, which referred to community assets that were owned and managed by their local communities as being an integral part of the public sector of the economy. This constitutional guarantee was reinforced by the 1989 constitutional revision, which transferred community assets that were possessed and managed by local communities from the public sector to the cooperative and social sector, thereby reaffirming their specific nature and the autonomous domain over them.

Ownership of and domain over common land pertains to a collective community of inhabitants. This differs from a collective of a local territorial authority nature. In constitutional terms the local communities in question hold their collective rights (rights of enjoyment, use, or domain) in the capacity of communities of inhabitants to which the principles of self-administration and self-management apply.

There is a distinction between community ownership and public property, as well as a difference between civic domain and public domain.

The Constitutional Court emphasised that *prima facie*, considering the draft referendum from a material point of view, no result of any popular consultation could ever require the undertaking of acts that are not in conformity with the Constitution.

The important issue here was whether, in the light of the community nature of this type of property and the autonomy which local authority bodies in principle enjoy with regard to assets that belong and are subject to the administration of local territorial collective authorities, the administration of common land is included in the competences of these bodies.

The law allows assemblies of common owners to decide to dispose of limited areas within common land, for compensation and by means of a competitive public request for tenders, but only in the cases and under the circumstances provided for by the law itself. In practical terms this disposal corresponds to the partial abolition of the status of common land. If administrative powers can be delegated to a parish council in such a way as to

include a competence to dispose of part of a piece of common land, this would imply accepting the possibility that the council could abolish the common-land status of part of the land itself. This state of affairs would not be compatible with the regime governing the possession and enjoyment of this type of community asset.

Where an assembly of common owners exists, only the competences that specifically pertain to its executive council can be delegated to the local parish council. The assembly, not its executive council, has the competence to decide to stop making use of the common land.

#### *Supplementary information:*

The local referendum is not a new concept in Portugal. It was initially introduced in the first Constitution passed under the republican regime (the 1911 Constitution). However, in practice it has been infrequently employed. Legal theorists consider that the Constitutional Court's jurisprudence on it is both demanding and restrictive.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2012-1-004

**a)** Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 06.03.2012 / **e)** 107/12 / **f)** / **g)** *Diário da República* (Official Gazette), 72 (Series II), 11.04.2012, 12906 / **h)** CODICES (Portuguese).

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

5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**

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

Appeal, right, time-limit.

#### *Headnotes:*

The ordinary legislator cannot be required to provide for the possibility of an appeal on constitutional grounds against every judicial order issued in criminal proceedings. This would represent an unnecessary encroachment on other fundamental rights which can only be protected if crime is effectively repressed. A degree of limitation or restriction on the ability to appeal during certain procedural phases must be accepted. Certain acts undertaken by judges may not be subject to appeal.

The appeal is an instrument designed to guarantee the right to a defence. This right must therefore guide the extent of the means used to enforce that guarantee; it must be shown in each case that the only way to effectively guarantee the right to a defence is to permit the possibility of an appeal.

The scope of the constitutional protection of the right to appeal includes the ability to call on a higher instance jurisdictional entity, not only in regard to the final decision to convict, but also in regard to any judicial acts which could result in the removal or undue restriction of the rights of accused persons.

The precluding of appeals will only be deemed constitutionally admissible if the essential core of the right to a defence is unharmed (examples would be where the issues at stake are merely incidental or interlocutory, or where the power of the single instance court to decide on the issues does not compromise the ability to appeal against the merits of the final decision). A norm which makes it impossible to reconsider decisions which have a substantially negative impact on the accused is unlawful.

#### *Summary:*

I. The question for consideration by the Court was whether the maximum expression of the guarantee offered by the right to appeal entitled an accused person to a review by the Supreme Court of Justice, not of the decision imposing a seventeen year prison sentence on him but of the decision whereby he was refused leave to appeal against his sentence because the appeal was not lodged in time.

II. There is always a degree of tension where appeals in criminal cases are concerned, between the criminal procedural law objective of safeguarding criminal justice and an effective state penal system and ensuring that this objective is not attained at the expense of fundamental human rights, notably the right of accused persons to a defence; these opposing values must be able to co-exist.

The Constitutional Court has often been called upon to resolve questions of unconstitutionality raised by alleged violations of the fundamental right to appeal. An accused must be “tried as quickly as possible”, which can only happen if the procedure is fast and effective, but this must be achieved in a way that is compatible with the guarantees enjoyed by the defence, including the right to appeal. These guarantees thus take the shape of an inherent limit, which must be assessed in each case, on the way in which criminal proceedings can be conducted.

The primary purpose of an appeal is to correct errors or faults in decisions on the merits of or grounds for the case. It allows an accused to overcome the antithesis between the public interest in a conviction and his or her interest in a defence.

Over the years, the Constitutional Court has upheld the constitutional conformity of a wide range of normative solutions, including interpretative ones, which prevent an accused from appealing against certain judicial acts that lie outside the core decision-making perimeter. It used the same criterion when it considered an interpretation based on the legal norm before it in the present case, but with the text that applied before the 2007 Reform entered into effect. This interpretation meant it was not possible to appeal against a decision in which the Court of Appeal pronounced for the first time on whether a case was especially complex. The Constitutional Court held that this type of decision could have such a negative impact on the right of the accused to a defence (it could lead to an increase in the length of remand in custody) that there must be recourse to appeal against it. The interpretation outlined above was accordingly unconstitutional.

In its case-law, the Constitutional Court has held that it is arbitrary or unjustified to subject the ability to appeal to the Supreme Court of Justice against Court of Appeal decisions to a distinction between decisions which end proceedings for objective reasons, and those which end proceedings based on the merits of the appeal. The latter are admissible for appeal and the former are not. From the point of view of the right to a defence, it is immaterial whether a decision that concludes a case does so for reasons of merit or for purely formal reasons.

In the present case, the Court of Appeal decided not to admit an appeal that had already been allowed by the court of first instance, on the grounds that the preconditions for bringing the appeal had not been met. The Constitutional Court was then asked to rule on the constitutional legitimacy of the Court of Appeal’s interpretation of the norm on which it based its decision.

This question was accentuated in the present case by the fact that the Court of Appeal decision led to the immediate transit *in rem judicatam* of the first-instance decision to sentence the accused to more than eight years in prison – a sentence against which he could then have appealed to the Supreme Court of Justice if the Court of Appeal had considered the merit of the conviction and upheld it.

The inability to appeal to the Supreme Court of Justice against a Court of Appeal ruling, in which the latter reviewed a first-instance decision, but did not hear and issue a final decision on the actual object of the case, is not *per se* controversial, because the principle that there must be at least two levels of jurisdiction would clearly be satisfied. However, in the procedural situation before the Constitutional Court, the request by the accused to appeal against the first-instance decision to convict him was admitted by the same court of first instance. Then, with no prior adversarial hearing, the Court of Appeal refused to hear the appeal on the grounds that it had not been lodged in time, when the court of first instance had itself granted an extension of the applicable time limit, due to the particular complexity of the case. The Constitutional Court noted that the question of whether the original appeal had been lodged in good time had indeed been considered at two levels of jurisdiction (the first instance and the Court of Appeal) albeit with opposing conclusions.

Where an accused person has not been given the opportunity to put forward the defence’s arguments and thus to influence the initial judicial decision (a decision which, in the present case, was unfavourable to the accused), he or she is entitled to have the decision considered by a higher instance court.

III. One Justice dissented from the decision to admit this appeal to the Constitutional Court, arguing that the current system for the concrete review of appeals on the grounds of unconstitutionality does not permit *amparo* remedies, which, from a substantive point of view, was the nature of the appeal in the present case.

#### *Cross-references:*

- Rulings nos. 31/87 of 28.01.1987, 259/88 of 09.11.1988, 118/90 of 18.04.1990, 265/94 of 23.03.1994, 610/96 of 17.04.1996 and 424/09 of 14.08.2009.

#### *Languages:*

Portuguese.



*Identification:* POR-2012-1-005

**a)** Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 06.03.2012 / **e)** 110/12 / **f)** / **g)** *Diário da República* (Official Gazette), 72 (Series II), 11.04.2012, 12917 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

5.1.1.5.2 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Public law**.

*Keywords of the alphabetical index:*

Legal personality, responsibility / Administrative offence.

*Headnotes:*

It cannot be inferred from the constitutional principle that legal persons enjoy the rights and are subject to the duties which are compatible with their nature, that natural persons and legal persons are equivalent, or that there should be equality between the two. The ordinary legislator can legitimately require that legal persons be treated differently from natural persons who possess an individual personality, on the basis that each type of entity possesses a specific nature and characteristics that differentiate it from the other. In the law governing sanctions, as well as social administrative offences, there has accordingly been a progressive increase in the accountability of legal persons, characterised by the imposition of higher fines than those imposed on natural persons for the same type of infraction.

The General Regime governing Administrative Offences established higher upper and lower limits for fines applicable to legal persons, by comparison to those for natural persons, a differentiation that is justified by the absence of any factual equality between the agents responsible for unlawful administrative offences. This can also be explained by the need to avoid the dilution of individual liability when an infraction can be imputed to an entity with a collective personality.

*Summary:*

I. The Inspectorate-General of the Environment and Territorial Administration (hereinafter, the “IGAAT”)

imposed a fine on the accused, a legal person. The fine was determined in accordance with the norms contained in the Framework Law governing Environmental Administrative Offences. The Court of Appeal refused to apply the norm that had served as the basis for the imposition of the fine, stating that it was unconstitutional because it violated the principle of proportionality. The Public Prosecutors’ Office therefore brought the present mandatory appeal against the latter decision before the Constitutional Court.

The Framework Law governing Environmental Administrative Offences classifies such offences as minor, serious, or very serious. The classification of offences will depend on whether the offender is a natural or a legal person, and the degree of culpability. The fine and any accessory sanctions are determined in accordance with the severity of the administrative offence and any circumstances pertinent to its commission, the culpability and economic situation of the perpetrator and any benefits they obtained through the commission of the offence; the prior and subsequent conduct of the perpetrator and the need to prevent future occurrences.

In this particular case, a single fine of €40,000 was imposed on the accused, a legal person, for a number of different acts: the operation of a facility without an environmental licence and the use of water resources without the respective permit. These are viewed under the law as very serious administrative offences. The implementation of a project without a prior environmental impact procedure, and failure to separate the resulting waste at source will automatically attract sanctions.

The amount of the fine was based on the minimum possible for the first of the administrative offences (€38,500), and partial fines of €2,500 and €1,500 for the third and fourth offences. The administrative authority limited itself to issuing a warning with regard to the second infraction. These penalties were combined into a single fine of €40,000.

II. The Constitutional Court has made repeated reference in its case-law to the broad margin the legislator possesses to shape legislation and to determine the legal amount of fines, and has stated that only legislative solutions which permit sanctions that are unnecessary, inappropriate or clearly and manifestly excessive will attract criticism from the Court. The administrative law requirement of necessity is not as demanding as that applicable to criminal penalties, where necessity is a *conditio iuris sine qua non* of the legitimacy of a penalty, within the framework of a democratic state based on the rule of law.

The sanctions applicable to an unlawful act that constitutes a social administrative offence do not possess the same level of ethical censure as criminal penalties, and when the penalties for such an act are determined, reasons of pure utility and social strategy are particularly important factors. The freedom the legislator enjoys when defining the law on social administrative offences is only curtailed in cases of clear disproportionality.

The Court did not assess the proportionality of the amount of the fine using the level of pecuniary penalties as a reference point. The differences between criminal unlawfulness and the unlawfulness involved in social administrative offences preclude a simple transposition of the constitutional principles applicable to the definition of criminal penalties onto the sanctions for such administrative offences. There are substantive reasons for the distinction between crimes and administrative offences, notably the nature of the unlawfulness and the sanction. One of the fundamental criteria for determining the amount of a fine is the loss of economic benefits which is designed to rule out any incentive for the offender to repeat the unlawful conduct.

The present case involved very serious environmental administrative offences, classified as such due to the significance of the rights and interests which were violated. Therefore, the minimum limit of €38,500 for the fine applicable to infractions committed by legal persons set out in the norm under dispute cannot be considered manifestly disproportionate and would appear to possess the dissuasive effect needed to avoid repetition of the unlawful conduct and to prevent the violated norm from being deprived of legal efficacy.

#### *Supplementary information:*

In Ruling no. 557/11 the Constitutional Court decided not to hold another norm contained in the same legislative act as that before it in the present case (the legislative act governing the fines applicable to very serious environmental administrative offences) unconstitutional. The norm addressed in the above ruling was applicable to natural persons, with a different level of fines from those applicable to legal persons.

#### *Cross-references:*

- Rulings nos. 62/11 of 02.02.2011, 67/11 of 02.02.2011, 132/11 of 03.03.2011, 360/2011 of 12.07.2011 and 557/11 of 16.11.2011.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2012-1-006

**a)** Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 07.03.2012 / **e)** 128/12 / **f)** / **g)** *Diário da República* (Official Gazette), 72 (Series II), 11.04.2012, 12925 / **h)** CODICES (Portuguese).

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

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

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

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

Criminal Code / Criminal liability / Defamation.

#### *Headnotes:*

The Criminal Code was drafted in the context of an open society and a democratic state based on the rule of law. The legislator did not overstep the limits imposed by the Constitution by criminalising the conduct of a person who insults another by alleging that they are responsible (or suspected of being responsible) for certain acts, or by making remarks that offend their dignity or the respect they are due. Provided the legislative solution deployed is not manifestly arbitrary or excessive, the use of penal means to protect human dignity and honour will be constitutionally compliant.

#### *Summary:*

I. One of the provisions of the Criminal Code classified a 'simple insult' as a crime, stating that anyone who insults another person by attributing facts to them, or even saying that they are suspected of being responsible for those facts, or by addressing words to them that offend their honour or the consideration due to them, will be sentenced to prison or will have a fine imposed on them. The applicant

argued that it was unconstitutional as it violated the constitutional principles of proportionality, the subsidiarity of the criminal law, and that penalties must be necessary. The Constitutional Court was asked to assess its constitutional compliance.

II. The Court has recognised in its case-law that the legislator enjoys a wide discretion under the Constitution to determine the forms of behaviour which are damaging to rights or interests that are protected by constitutional law and the legal assets that need to be defended by the threat of penal sanctions.

The criminal law system of a state based on the rule of law is there to protect legal assets that are essential to life in a community. The Court emphasised that the Constitution does not contain any prohibition on criminalisation. Subject to certain principles, such as justice, humanity and proportionality, it is up to the legislator to determine the legal assets that require penal protection.

The Court was of the view that in this particular case there was no situation that could be said with any certainty not to need penal protection. This would only be the case if the interests the norm sought to defend did not need protecting from an ethical or social perspective or if the protection they needed could be provided by the deployment of non-penal sanctions or controls.

Honour, the legal asset that is protected by making insult a crime, must be perceived as warranting protection to the extent that it is directly derived from the dignity of the human person. The legislator had taken the view that this protection should be of a criminal law nature, and had acted in accordance with the legal order and not in an arbitrary or excessive fashion.

#### *Cross-references:*

- Rulings nos. 634/93 of 04.11.1993, 83/95 of 21.02.1995 and 1142/96 of 06.11.1996.

#### *Languages:*

Portuguese.



#### *Identification: POR-2012-1-007*

**a)** Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 28.03.2012 / **e)** 158/12 / **f)** / **g)** *Diário da República* (Official Gazette), 92 (Series II), 11.05.2012, 16572 / **h)** CODICES (Portuguese).

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

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

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

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

Domestic violence, crime / Appeal, time-limit.

#### *Headnotes:*

The attribution of the nature of urgency to cases involving crimes of domestic violence, as a result of which the time limit of twenty days under the Code of Criminal Procedure for lodging appeals is not suspended during judicial holidays, is not unconstitutional. The need for greater procedural speed with regard to crimes of domestic violence constitutes sufficient grounds for a differentiation between regimes. It is not up to the Constitutional Court to take the legislator's place by assessing the reasonableness of this differentiation. The control exercised by the Court is negative, as opposed to positive; its only responsibility is to verify whether the legislative solution in question is intolerable or inadmissible from a constitutional-law perspective. The principle of equality does not prevent distinctions being made in the law, provided these are not discriminatory; the rationale behind the principle of the equality is that it prohibits arbitrariness.

The imposition of a regime under which procedural steps are deemed urgent in cases involving crimes of domestic violence, particularly in terms of the time limits for lodging appeals or undertaking judicial acts during holiday periods, is not arbitrary in nature; rather, it is in harmony with the goal of protecting the victims of such acts, which is a constitutionally legitimate objective.

#### *Summary:*

I. Having been convicted of two crimes of domestic violence and one crime of mistreatment, the applicant appealed to the Constitutional Court regarding certain legal provisions within the law establishing the prevention of domestic violence and the protection

and provision of assistance to victims, to the effect that the applicable proceedings are urgent, even if no accused persons have been detained, and that the time limit for lodging appeals against decisions handed down in those proceedings is not suspended during judicial holidays. The rationale behind the introduction of this legislation was the promotion of an integrated response to domestic violence. Its main purposes include the legal establishment and swift, effective protection of victims' rights, swift and effective police and jurisdictional protection for victims, and the imposition of appropriate coercive measures on, and penal reactions to, the perpetrators of crimes of domestic violence. This does not rule out the seeking of other responses to the problem, particularly in the fields of labour law, social security and health, and measures regarding administrative and other forms of police protection.

The legislator's aim was to protect the offended party, identified in crimes of domestic violence as a type of victim who is especially fragile and in need of a legally regulated status, with the recognition of specific rights and duties. The regime under which procedural steps are deemed urgent, and the impact this has on the calculation of time limits, has an important formal and functional role. This is because in crimes of domestic violence, there are often issues of spatial proximity and a connection with and/or economic dependence on the agent of the crime (these circumstances often remain in place during the proceedings). Situations in which aggressive conduct is repeated or intensified, often exacerbated by the fact that proceedings are pending, are quite common.

The legislator also noted the necessity to respond swiftly to violations of the legal asset protected by the criminalisation of this type of act, with appropriate legal provision. This is vindicated by the public disquiet which such conduct increasingly engenders and the significance of the issue of domestic violence in Portuguese society (which the Assembly of the Republic has acknowledged by creating a particular victim's statute and establishing a 'National Plan against Domestic Violence').

The applicant argued that the courts, not the legislator, should determine whether proceedings should be urgent in an abstract sense. In his view, this abstract attribution of urgency to proceedings regarding a given category of crimes to the detriment of others would lead to a violation of the guarantees applicable to criminal procedure, a fundamental right.

II. The Constitutional Court stated that only the legislator possesses the competence to set out the legal regime governing criminal procedure in a general, abstract way. This task does not belong to

the courts. Their responsibility is to apply the law to the cases submitted to them.

Whether the attribution of urgency to proceedings is the result of *ope legis* or of *ope judicis* is immaterial from the perspective of ensuring fulfilment of the guarantees applicable to criminal procedure. The compatibility of the regime to which the procedure is subject with the guarantees of the defence is the important factor, rather than the way in which that regime is determined.

The Constitutional Court observed that the applicant's contention that the attribution of urgency to proceedings violates the guarantees applicable to criminal procedure may have derived from the fact that the Constitution often reserves this type of solution for situations in which accused persons are the object of measures that deprive them of their freedom and because the urgency here is not dictated by the interests of the accused, the principle of equality is compromised.

However, it had already pointed out in previous cases that this conception was misconstrued, namely with regard to crimes involving abuse of the freedom of the press.

The Constitutional Court also held that the reduction in the time limit for appeals does not endanger the guarantees of the defence, as the party concerned still has adequate time to take an informed decision as to whether to accept or challenge the sentence, lodge the respective appeal and provide the grounds for it.

#### *Cross-references:*

- Rulings nos. 186/92 of 20.05.1992, 384/93 of 08.06.1993, 47/95 of 02.02.1995, 49/95 of 02.02.1995 and 409/10 of 09.11.2010.

#### *Languages:*

Portuguese.



*Identification:* POR-2012-1-008

a) Portugal / b) Constitutional Court / c) Plenary / d) 04.04.2012 / e) 179/12 / f) / g) *Diário da República* (Official Gazette), 78 (Series II), 19.04.2012, 2206 / h) CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Enrichment, illicit / Public office, holder.

*Headnotes:*

In a democratic state based on the rule of law, heed must be paid to the constitutional law principle under which the criminal law must only be used to protect legal assets and values that clearly merit deserve penal protection.

The construction of a type of crime that does not make it possible to identify the action or omission which is prohibited violates the principle of the 'typicity' and non-retroactivity of the criminal law.

A type of crime in which a decision to convict is not necessarily based on the positive demonstration of the accused person's culpability and can be arrived at by sacrificing the principles of the presumption of innocence, '*in dubio pro reo*' and '*nemo tenetur se ipsum accusare*' also violates the principle of the presumption of innocence.

*Summary:*

I. The President of the Republic asked for a prior review of norms contained in a Decree of the Assembly of the Republic approving the regime that created the crime of illicit enrichment. At stake were two norms that amended the Criminal Code by introducing the crimes of illicit enrichment and illicit enrichment by a public official; and another two norms that were appended to the Law which regulates crimes that entail special responsibility because they are committed by political office-

holders. One of them configures the crime of illicit enrichment by a political office-holder or senior public office-holder; the other gives the Public Prosecutors' Office the competence to prove all the elements of the crime of illicit enrichment.

II. The Constitutional Court began by briefly outlining the background to the matter that formed the object of the present abstract review, both in international and comparative law and in Portuguese law, making reference first to the 2003 United Nations Convention against Corruption (which came into force in Portuguese law in 2007), a normative instrument with binding legal effects. These include the imposition of legal duties on the states that are parties to the Convention – specifically here, the duty to criminalise certain forms of conduct. Portugal made no reservations with regard to this Convention. Under the Convention, "Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income." The Court noted that states which had signed the Convention, but had not yet criminalised illicit enrichment (and had not made reservations in this respect), were not necessarily failing to fulfil their undertakings; the Convention allows states not to criminalise illicit enrichment if this is based on their Constitution or on fundamental principles of their legal order. The Court reviewed the positions of a number of countries on this subject, namely those of Finland (which considers it unnecessary to provide for a crime such as illicit enrichment), and the United States and the United Kingdom (both of which take the view that implementation of the Convention article on illicit enrichment would imply transferring the burden of proving the legitimate nature of the source of income in question to the accused). However, all states that signed the Convention are under a duty to take the necessary and appropriate measures to prevent the forms of conduct the Convention is designed to combat.

The Court cited the case of the European Union, which is a party to the Convention. The EU has instruments which, while they do not refer to "illicit enrichment" as such, are connected to it (e.g. the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union). The Court also mentioned a number of legal orders which admit the existence of the crime of illicit or unjustified enrichment, despite the difficulties faced in criminalising it. The Macau Special Administrative Region is of particular interest in this respect, due to the closeness between its legal system

and the Portuguese system. However, the Constitutional Court noted that the vast majority of states do not accept the criminalisation of illicit or unjustified enrichment, either because they deem it unnecessary within the framework of the other instruments with which they fight corruption, or because it is difficult for them to reconcile it with the principle of the presumption of innocence. An important exception in this regard is France.

The almost total absence of a crime of illicit enrichment in the European criminal-law context contrasts with the situation in fiscal law, where there is a range of normative 'institutes' targeted at certain unjustified increases in personal assets revealed by the existence of a mismatch between declared income and certain 'manifestations of wealth'. The functional purpose of these normative instruments is to detect anomalous situations in which the capacity to pay taxes revealed by the taxpayer when he/she buys certain items does not match the capacity that can be deduced from the income he/she declares. In Portugal there are both fiscal-law initiatives (the indicative assessment of taxable income based on a comparison between declared income and certain manifestations of wealth) and non-fiscal measures. However, the above manifestations of wealth do not automatically lead to additional taxation, which is always dependent on an absence of justifications for the mismatch from the taxpayer. Among others, the non-fiscal measures include the crime of money-laundering, the loss of advantages, and loss/confiscation of property.

On the question of whether the norms which the Court was asked to review fulfilled certain preconditions that would be required in order to constitutionally legitimate the selection by the legislator of forms of behaviour it intended to be qualified as criminal (preconditions that would preclude that typification of forms of conduct that are not linked to the protection of legal assets), the Constitutional Court stated that in this particular case, there was no clearly defined legal asset. This meant that the norm was unconstitutional, because the purpose of the new criminalisation was to punish crimes that have been committed in the past, even if they have not been the object of criminal proceedings and conviction, and that have generated illicit enrichment. The norm would have sought to punish, in order to protect an undefined legal asset.

The type of crime envisaged by the legislator formulated led the Court to consider that under the terms of the norms, once a mismatch between income and assets was detected, that mismatch would qualify as unlawful enrichment, unless it could be shown that there were legitimate causes for it. This situation does not fulfil the requirement that the

legislator must ensure that criminal norms do not lead to presumptions of guilt and do not cause criminal liability to arise from "facts" that are merely presumed.

III. This Ruling was the object of two dissenting opinions and one partially dissenting opinion. The dissenting Justices were of the opinion that there was no indetermination or overlap in terms of the protected legal asset; one of them contended that the legal asset the legislator sought to protect was that of the transparency of sources of income, which already had a concrete presence in the legal system, notably the obligation on the part of public officeholders to declare their income for the purpose of the public control of their wealth. The other Justice was of the view that the legal asset in question was a composite, the constitutional-law legitimacy of which was provided by the same grounds which legitimise the criminalising norms the direct breach of which would lead to the enrichment the legislator sought to sanction. Both dissenting Justices felt that the issue here was that the construction of the type of crime was such that there was no typification of the forms of behaviour which would constitute a breach of the norms, and that there was also a violation of principle of the presumption of innocence in terms of the prohibition on the reversal of the burden of proof.

In the view of the author of the partially dissenting opinion, criminalisation was unnecessary. Legal provision was already in place to sanction such conduct. There was a legal asset with clear penal dignity inherent in the principle of the state based on the rule of law, in the case of the norms regarding the 'illicit enrichment' of public officials and political and senior public officeholders. According to this Justice, this asset was that of the trust of society as a whole in the state and the resulting capacity on the part of the state to intervene in order to achieve purposes with which it is entrusted. The concealment of the source of the assets or income of persons who hold public authority or are involved in the management of public property and services could endanger this legal asset.

#### *Cross-references:*

- Rulings nos. 426/91 of 06.11.91 and 108/99 of 10.02.1999.

#### *Languages:*

Portuguese.



# Romania

## Constitutional Court

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### Important decisions

*Identification:* ROM-2012-1-001

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 11.01.2012 / **e)** 2/2012 / **f)** Decision on the objection of unconstitutionality of the Law amending and supplementing Law no. 303/2004 on the status of judges and prosecutors and Law no. 317/2004 on the Superior Council of Magistracy / **g)** *Monitorul Oficial al României* (Official Gazette), 131, 23.02.2012 / **h)**.

*Keywords of the systematic thesaurus:*

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

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

4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment.**

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

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

4.7.16.2 Institutions – Judicial bodies – Liability – **Liability of judges.**

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

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

*Keywords of the alphabetical index:*

Constitutional Court, decision, effect, binding / Proceedings, disciplinary, judge / Judicial authority.

*Headnotes:*

The constitutional principle of judicial independence necessarily involves the principle of responsibility. Judges must be subject to the law, including disciplinary liability, in order to exercise their power responsibly. Likewise, the constitutional status of magistrates imposes specific requirements, including good reputation, as a prerequisite of access and promotion in the profession.

Authorities entitled to carry out disciplinary action include the Judicial Inspection, the Minister of Justice, the President of the High Court of Cassation and Justice, and the Prosecutor General of the Prosecution Office attached. Extending the scope to include the High Court of Cassation and Justice and regulating the powers of the new holders of the rights to carry out the disciplinary action are not likely to infringe on the constitutional provisions. The reason is that the mentioned authorities do not acquire power of decision with respect to disciplinary sanctioning of judges and prosecutors, and the role of the court to adjudicate over disciplinary liability rests with the Superior Council of Magistracy, given its role as guarantor for judicial independence.

*Summary:*

I. On the grounds of Article 146.a of the Constitution and of Article 15.1 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, the High Court of Cassation of Justice referred the case to the Constitutional Court to review the unconstitutionality of certain provisions of the Law amending and supplementing Law no. 303/2004 on the status of judges and prosecutors and Law no. 317/2004 on the Superior Council of Magistracy. On the same grounds, the Secretary General of the Chamber of Deputies sent to the Constitutional Court the referral made by 86 Deputies belonging to the Social Democratic Parliamentary Group on the unconstitutionality of the same Law.

Given the referrals' subject matter of unconstitutionality, the Court ordered the joinder of the two cases.

The main constitutional challenge was that the mentioned Law infringed on the provisions of Article 124.3 of the Constitution, which states that "Judges are independent and they are subject only to the law".

It was also claimed that this Law infringes on Article 1.4 of the Constitution on the separation of powers, Article 20 of the Constitution (International human rights treaties) with reference to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 124 of the Constitution (Administration of justice), Article 126 of the Constitution (Courts of law) and Article 129 of the Constitution (Use of remedies). The reason is that some of the facts covered as breaches by judges and prosecutors concern the content of judgments, which may only be considered by means of remedies but verification of certain issues outside the judicial activity is unacceptable. The breaches include total absence of legal grounds within judgments or prosecutor's judicial acts, use of inappropriate

expressions within judgments or within the prosecutor's judicial acts, or statement of grounds manifestly contrary to legal reasoning that would likely affect the prestige of justice or dignity of the judiciary, and failure to comply with the decisions of the Constitutional Court or with the decisions of the High Court of Cassation and Justice delivered in the resolution of appeals in the interest of the Law.

It was also claimed that legal provisions that define the concepts of "bad faith" and "gross negligence" are vague, thus violating the principle of legality. Also, provisions that impose the prerequisite of "good reputation" for access and promotion to magistracy are contrary to Article 26 of the Constitution (Personal, family and private life). That it, the Law makes no distinction between the magistrate's general conduct and professional behaviour and does not legally explain the concept in question, whose common sense involves a high degree of subjectivity.

Concerning the amendments and completions to Law no. 317/2004 on the Superior Council of Magistracy, it was noted that the current holders of the rights to carry out disciplinary action include the Judicial Inspection, the Minister of Justice, the President of the High Court of Cassation and Justice and the Prosecutor General of the Prosecution Office. It was argued that the extension of the rights to the High Court of Cassation and Justice violates judicial independence, as well as the principle of separation of powers. The reason is that the extension would allow the Executive to influence the process of triggering disciplinary liability of judges.

Also, the regulation of the procedure of judges and prosecutors' disciplinary investigation was criticised for violating constitutional principles that enshrine an independent and impartial justice, respectively equality before the law, without privileges and discrimination.

It was also claimed that the organisation of the Judicial Inspection as an autonomous authority with legal personality likely breaches judicial independence because the role of the Judicial Inspection to control the activity of magistrates is part of the wider activity of the Superior Council of Magistracy.

II. Regarding the main challenge, the Court held, in principle, that judicial independence is not regulated by the constituent legislator as an end in itself or privilege, but rather it serves the administration of justice as a guarantee for citizens. They must be assured that judges are independent of the representatives of the legislative and the executive. Regardless of their particular status, they must be subject to the law, including norms establishing

disciplinary liability, so as to exercise their powers responsibly. Therefore, the constitutional principle of independence of judges necessarily involves another principle, that of responsibility. Independence of the judge does not constitute and cannot be construed as a discretionary power or an obstacle to his liability under the law, whether it is criminal, civil or disciplinary liability.

Concerning provisions governing facts that constitute disciplinary breach, the Court held that they do not sanction a judge for how he interprets and applies the law. The Court defines disciplinary breach as the failure to comply with certain obligations imposed by law, the Constitution, and international human rights treaties for which Romania is part.

The Court also found that the impugned texts are not sufficiently clear and precise with regard to their recipients. Also, regarding the problem with legal interpretation and enforcement, the Court stressed the role of the Superior Council of Magistracy. This court has jurisdiction in the field of disciplinary liability of judges and prosecutors and will be asked to interpret and apply these texts, in relation to the *de facto* situations, which will be subject to judgment in compliance with the constitutional principles governing the status of magistrates.

Considering the status of certain categories of persons, the Court also held that constitutional provisions protecting the personal, family and private life do not exclude the possibility that the legislator can impose specific requirements on conduct, which can be subsumed under the concept of "good reputation". In the magistrates' case, good reputation is a condition of public trust in justice and its efficiency, without which the quality of justice and full application of constitutional provisions governing its administration could not be conceived.

The Court also found that the extension of the scope of those entitled to carry out disciplinary action is not likely to infringe on the invoked constitutional provisions. The new holders do not acquire the power to decide on disciplinary sanctions against judges and prosecutors. The court with jurisdiction over disciplinary liability is the Superior Council of Magistracy, given its role as guarantor for judicial independence.

The possibility of new holders entitled to carry out disciplinary action to order initiation of preliminary disciplinary investigation, even if the judicial inspector has made a proposal for annulment, is consistent with the new role given to the authorities concerned. It is not likely to affect the autonomy of the Judicial Inspection, whose functions are, according to Article 641.3 of Law no. 317/2004, as amended,

“analysis, verification and control in specific areas of activity”. Thus, it is not meant to substitute other holders of disciplinary action. In addition, the impugned norms establish a clear distinction between participants in the disciplinary proceedings and the court with jurisdiction over disciplinary investigation, in accordance with Article 134.2 of the Constitution.

Regarding the claim that the law establishes inequities both between disciplinary action holders and between different categories of petitioners, according to the followed remedy, it was assessed as unfounded. The reason is that the disciplinary cases are resolved under the same procedure by the same court, the Superior Council of Magistracy. As such, it does not matter who is the holder of the disciplinary action or the remedy that the petitioner intends to follow.

The Court also held that the legislation at issue does not create a separate authority of the Superior Council of Magistracy, but rather it strengthens the Judicial Inspection, as the structure of the Superior Council of Magistracy.

#### *Languages:*

Romanian.



#### *Identification:* ROM-2012-1-002

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 25.01.2012 / **e)** 51/2012 / **f)** Decision on the objection of unconstitutionality of the Law on organisation and conduct of elections for local public administration authorities and elections for the Chamber of Deputies and the Senate in 2012, as well as for the amendment of Title I of the Law no. 35/2008 for elections to the Chamber of Deputies and the Senate and for the amendment of Law no. 67/2004 for election of local public administration authorities, the Local Public Administration Law no. 215/2001 and Law no. 393/2004 on the status of locally elected officials / **g)** *Monitorul Oficial al României* (Official Gazette), 90, 03.02.2012 / **h)**.

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

3.4 General Principles – **Separation of powers.**  
 3.9 General Principles – **Rule of law.**  
 3.13 General Principles – **Legality.**  
 4.5.6 Institutions – Legislative bodies – **Law-making procedure.**  
 4.5.7 Institutions – Legislative bodies – **Relations with the executive bodies.**  
 4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**  
 5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law.**  
 5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote.**  
 5.3.41.6 Fundamental Rights – Civil and political rights – Electoral rights – **Frequency and regularity of elections.**

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

Election, law, electoral / Parliament, procedure, minimum guarantees / Powers, separation and interdependence, principle.

#### *Headnotes:*

Changing the electoral law less than one year before the elections and increasing the complexity of operations involved in the exercise of electoral rights (determined in this case by the organisation at the same time of general elections and local elections) infringe on the principle of legal certainty and can lead to restriction on the exercise of the right to vote.

Organising two types of elections at the same time breaches the right to be elected because a person cannot run simultaneously for the office of mayor and for a mandate as a Deputy or Senator; and for the office of President of the County Council and for a mandate as a Deputy or Senator. The re-dimensioning of the current term of office of elected officials violates the principle of non-retroactivity.

#### *Summary:*

On the grounds of Article 146.a of the Constitution and Article 15.1 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, the Secretary General of the Chamber of Deputies forwarded to the Constitutional Court the referral concerning the unconstitutionality of the Law on the organisation and unfolding of elections for local public administration authorities and elections for the Chamber of Deputies and the Senate of 2012. It also requested the Constitutional Court to review Title I of Law no. 35/2008 for the election to the Chamber of

Deputies and the Senate and amending and supplementing Law no. 67/2004 for the election of local public administration authorities, of Law on local public administration no. 215/2001 and Law no. 393/2004 on the of the locally elected officials, formulated by 88 Deputies belonging to the Social Democratic Parliamentary Group and of 58 Deputies belonging to the National Liberal Party Parliamentary Group.

As grounds for objection, the applicants offered challenges to the norms, claiming they are both intrinsically and extrinsically unconstitutional.

In the first group of challenges, the applicants argued that there is no motivation to adopt the impugned Law by means of the Government's assumption of responsibility (i.e. a regulation), which can be used only *in extremis*. For this reason, violation of Article 114 of the Constitution on the Government also involves violation of provisions of Article 1.4 and 1.5 of the Constitution, both on the separation of powers and obligation to observe the Constitution and the laws, in conjunction with Article 61.1 of the Constitution on the role and structure of Parliament.

In terms of intrinsic constitutionality, the applicants contended that the law violates Article 11.1 and 11.2 of the Constitution relating to international law and domestic law, in conjunction with Article 1.5 of the Constitution on the obligation to respect the Constitution, its supremacy and the laws. The reason is that the regulation on "merging" local elections and parliamentary elections and organisation thereof in November 2012 amended the electoral legislation less than a year before the elections. The regulation disregarded the Code of Good Practice in Electoral Matters adopted by the Venice Commission and induced a state of confusion among the electorate that will be forced to vote with a high number of ballots.

It was also claimed that by disposing the "merging" elections, the law regulated – only the 2012 elections – an extension of approximately six months of the current mandates of local elected officials (as they gained seats after the elections in June 2008), thus violating the constitutional principles of the rule of law and its retroactivity.

Regarding legal provisions that establish, under sanction of rejection, a series of procedural terms, it was argued that they violate the principle of separation of powers and the principle of judicial independence in that they establish the possibility to sanction the court for failure to resolve appeals in those terms.

Another objection of the applicants concerned Article 126.6 of the Constitution, which exempts from judicial review the administrative acts of public authorities regarding relations with Parliament, and acts of military command.

II. Allowing the referral of unconstitutionality, the Court held as follows:

The extrinsic criticism of unconstitutionality is unfounded. This law meets the criteria for which compliance is required by Article 114 of the Constitution for the Government's assumption of responsibility on a bill, as specified in a case-law of the Constitutional Court (Decision no. 1.655 dated 28.12.2010, published in the Official Gazette, Part I, no. 51 of 20 January 2011). Given the importance of this area, the Court recommended that the regulations in electoral matter be debated in Parliament. It also recommended that they not be adopted by means of exceptional proceedings, where Parliament is bypassed, but rather through a silent vote on a regulatory content almost exclusively at the Government's discretion. The Court noted, in this context, the importance for proper functioning of the rule of law, and cooperation between state powers in the spirit of constitutional loyalty norms.

The intrinsic challenges of unconstitutionality are founded. The Court held, with reference to the Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report, adopted by the European Commission for Democracy through Law in the 52<sup>nd</sup> Plenary Session (Venice, 18-19 October 2002), the right to free elections compels compliance with requirements, including that of stability and legal rules in the election. In a broader level, the stability of these rules is an expression of the legal principle established implicitly by Article 1.5 of the Constitution. By making changes in less than one year before the election procedure, the impugned law violates these requirements. Such a legislative change may create unexpected additional difficulties to enforcement authorities, including adaptation to newly established procedure and corresponding technical operations as well as difficulties in exercising voting rights, which can result in the restriction of this right. In addition, a cumbersome voting due to the large number of ballots, and various public authorities on which voters must express at the same time their option may have the effect of preventing the free expression of their opinion.

The Court also held that the organisation at the same time of two types of elections determines the infringement of the right to be elected as provided by Article 37 of the Constitution. This is because there are situations where a candidate who has not won a local elective office might express his desire to

participate in national elections for a parliamentary mandate, which is possible only in elections taking place at different times. But the impugned law stipulates the organisation and conduct of elections for Parliament on the same date as elections for local government. As such, a person cannot run simultaneously for mayor and for a mandate of Deputy or Senator or for president of the County Council and for a mandate of Deputy or Senator.

On the other hand, by changing the duration of the ongoing terms of office of the locally elected, the impugned law violated the principle of non-retroactivity of law, enshrined by Article 15.2 of the Fundamental law. From this perspective, the Constitutional Court has stated in its case-law that the legislator was free to modify, through a new law, the duration of the office terms for management positions in a different manner than according to the law in force. The change shall only apply for the future, not for the ongoing terms of office. Otherwise, it would mean ignoring the rule of non-retroactivity of law, which is a rule of constitutional level, referred to in Article 15.2 of the Fundamental law" (Decision no. 375, 06.07.2005, published in the Official Gazette of Romania, Part I, no. 591, 08.07.2005).

The Court has also stated that provisions regulating, under the sanction of preclusion, deadlines for settling actions lodged against Government decisions that delimit single-member constituencies where the elections for the Chamber of Deputies and the Senate in 2012, respectively the appeal against the decisions to resolve these actions, actually penalised the court, a sanction incompatible with the role and status of the courts.

The Court also found that the impugned norms submitted to judicial control of an administrative act – Government decision to delimit the single-member constituencies – concerns the constitutional relations between Parliament and Government, an act exempted from review in accordance with Article 126.6 of the Constitution.

Also on the regulation in terms of the composition of special parliamentary committees, respectively "two representatives from each parliamentary group", the Court found that it is contrary to Article 64.4 and 64.5 of the Constitution, which impose the principle of political configuration in the composition of parliamentary committees.

III. A judge of the Constitutional Court formulated dissenting opinion, and two judges concurring opinion.

*Languages:*

Romanian.



# Russia

## Constitutional Court

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### Important decisions

*Identification:* RUS-2012-1-001

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 28.02.2012 / **e)** 4 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 58, 16.03.2012 / **h)** CODICES (Russian).

*Keywords of the systematic thesaurus:*

- 3.3.1 General Principles – Democracy – **Representative democracy.**
- 4.8.2 Institutions – Federalism, regionalism and local self-government – **Regions and provinces.**
- 4.8.6.1.1 Institutions – Federalism, regionalism and local self-government – Institutional aspects – Deliberative assembly – **Status of members.**
- 5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association.**
- 5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

*Keywords of the alphabetical index:*

Regional parliament / Parliament, member, independence / Deprivation of office / Withdrawal from the faction.

*Headnotes:*

A member of a regional parliament who leaves her party may not be expelled from her parliamentary faction and relieved of office.

*Summary:*

I. The applicant had challenged the provisions of the Federal law “on the general organisational principles of local authorities”.

According to the Federal law, a member of a regional parliament elected on a list fielded by a party may not leave his parliamentary faction and must remain a member of the party which put forward his candidacy. Otherwise he may be relieved of office.

The applicant, a regional parliament member, had decided to leave her party. The parliamentary faction expelled her from its ranks, and the regional parliament terminated her member’s credentials. She challenged this decision before a court, but was unsuccessful.

The applicant considered that according to the provisions at issue, the constitutional right to be elected was subject to a political party’s decision. However, under the Constitution no one may be compelled to join or remain in any kind of association. The Constitution further provides that the holder of sovereignty and the sole source of power in Russia is the people. Thus the impugned provisions infringed the rights both of Members of Parliament (hereinafter, “MPs”) and of constituents.

II. The Constitutional Court examined the application with reference to two fundamental principles: that of the MP’s independence and that of the people’s sovereignty. Political parties contribute to the fulfilment of these principles.

The nature of parliament and its role in a democratic state determines the independence of MPs. According to the principle of a free mandate, an MP is not bound by promises or by the party’s instructions, but represents the interests of society as a whole. An MP must be free from all forms of party pressure, as well as from corporate and regional pressure. Furthermore, the law envisages the possibility of an MP with no party affiliation working within a parliamentary faction.

Political parties form the backbone of the constituent representative system of present-day democracies through which citizens exercise their right to participate in the life of society. By voting for MPs, the electors choose persons who proclaim a political stance.

On the one hand, an MP could not be completely subjugated to the will of a party, for that would limit his independence and sever his link with the electorate.

On the other hand, an MP’s total independence would be liable to distort the realisation of popular sovereignty.

To achieve a proper balance between these major principles, the possibility of leaving their political party and the prohibition on joining another parliamentary faction had been laid down for MPs (as required by the principle of MPs’ independence from party pressure).

According to the challenged provision, an MP’s expulsion from his parliamentary faction does not presuppose the annulment of his office as a member of parliament.

Therefore, the Constitutional Court held that the decisions delivered by the courts of first instance petitioned for this purpose should be revised.

*Languages:*

Russian.



*Identification:* RUS-2012-1-002

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 27.03.2012 / **e)** 8 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 82, 13.04.2012 / **h)** CODICES (Russian).

*Keywords of the systematic thesaurus:*

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

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

3.15 General Principles – **Publication of laws.**

*Keywords of the alphabetical index:*

Treaty, international / Treaty, publication / Application, provisional.

*Headnotes:*

International treaties affecting human and civil rights, freedoms and obligations, applicable in the Russian Federation on a provisional basis, must necessarily be the subject of an official publication.

*Summary:*

I. The relevant provision of the law “on the international treaties of the Russian Federation” allows the provisional application of a treaty before its entry into force, if the treaty so provides. Mandatory official publication is prescribed only for treaties already in force.

The applicant had imported goods for personal use into Russia and paid the customs duty according to the rules in force. Subsequently the customs authorities decided to apply the provisions of the Customs Code of the

Customs Union and of the Treaty on the Customs Code of the Customs Union (signed by Russia, Belarus and Kazakhstan). This had been provisionally applicable since 1 June 2010 and established higher duties. The applicant challenged this decision before a court, which ruled that the application of the Treaty was possible without prior official publication.

The applicant considered that this provision violated Articles 2, 15 and 29 of the Constitution in permitting the provisional application of an unpublished treaty affecting citizens’ rights, freedoms and obligations. This prevented interested persons from acquainting themselves with it and foreseeing its consequences.

II. The Constitutional Court noted that the Constitution requires the official publication of legal acts affecting human and civil rights, freedoms and obligations. Moreover, the international treaties of the Russian Federation constitute an integral part of its legal system and take precedence over national law.

The Federal law “on the international treaties of the Russian Federation” prescribes the mandatory official publication of treaties already in force.

The same law allows a treaty to be provisionally applied before it comes into force, if the treaty so provides. However, mandatory official publication is prescribed only for treaties already in force. The law says nothing about the publication of treaties before their entry into force. Consequently, treaties of this type are not published even where they contain provisions affecting human and civil rights, freedoms and obligations.

Thus, citizens have access to neither the text nor the substance of the treaties, which is incompatible with the State’s obligation to secure the rights and freedoms of citizens.

The Constitution protects the rights and freedoms of citizens, the law-based state, the rule of law, legal stability and maintenance of trust in the law and the State. The Constitutional Court accordingly held that these constitutional principles necessitate the publication of provisionally applied treaties affecting human and civil rights, freedoms and obligations, and that all such treaties must be published.

*Languages:*

Russian.



# Serbia

## Constitutional Court

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### Important decisions

*Identification:* SRB-2012-1-001

**a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 08.03.2012 / **e)** UŽ-3238/2011 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), no. 25/2012 / **h)** CODICES (English, Serbian).

*Keywords of the systematic thesaurus:*

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

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

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

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

*Keywords of the alphabetical index:*

Gender identity / Human dignity, violation / Personality, free development.

*Headnotes:*

A failure by the Municipal Administration to take a decision on an application for a change in data regarding gender, by issuing a resolution on its lack of subject-matter jurisdiction, violates the appellant's right to dignity and free development of his or her personality.

*Summary:*

I. The appellant, X, submitted a constitutional appeal for violation of his right to dignity and free development of one's personality, violation of the principle of non-discrimination and violation of his right to respect for private and family life.

X indicated that he was born as a person with pseudo-hermaphroditism, i.e., as a person with physical characteristics of the female sex, but with a male gender identity, that he was diagnosed with gender identity disorder (GID), and that gender reassignment surgery was performed on him.

Following the surgery, he attempted to secure legal recognition of the transformation of his gender. His application for legal gender reassignment was dismissed by a resolution of the Municipal Administration, on the grounds of a lack of subject-matter jurisdiction, because the Law on Civil Registry Books (hereinafter, the "Law") does not regulate a procedure for gender reassignment in civil registries, and he was informed of the possibility to lodge a complaint with the Ministry of Human and Minority Rights, Public Administration and Local Self-Governance (hereinafter, the "Ministry").

II. The Constitutional Court established the following:

X was born as a person with pseudo-hermaphroditism; his birth was entered in the registry of births and he was assigned to the female sex; he entered into a marriage, which terminated due to the death of the spouse; he has two children; after being diagnosed with the gender identity disorder (the diagnosis was female to male transgenderism F 64.o) sex reassignment surgery was performed on him.

X submitted to the Municipal Administration an application "for the correction of entry referring to sex in the birth certificate".

The Municipal Administration passed a resolution, which, on the grounds of lack of subject-matter jurisdiction, dismissed the application. The rationale of this resolution stipulated that the Ministry had provided an opinion to the effect that "no correction of the data on sex reassignment may be made ... under the Law", as well as that X may "institute non-contentious proceedings before a competent court for determination of the contents of the document – the registry of births".

The Constitutional Court noted that the free development of a person and their personal dignity are related primarily to the establishment and free development of their physical, mental, emotional and social life and identity. The sphere of private life of an individual undoubtedly includes, *inter alia*, his or her sexual affiliation, sexual orientation and sexual life, and the right to private life also implies the right to determine the details of one's personal identity and self-determination; hence, the right to reassign one's sex according to one's gender identity.

The respect for guaranteed human rights implies, among others, that an individual may request a public authority to take actions and pass acts that will ensure this respect, which constitutes a "positive obligation of the state".

Under the applicable regulations, the municipal administration, i.e., the civil registrar, is the only entity competent to make an entry; thus it is the only entity competent to change the data in civil registries of births, marriages and deaths. Accordingly, the “positive obligation” rests squarely on the civil registry office.

The registration of a change in the data on gender is not regulated by the Law. However, the Constitutional Court found that the interpretation of the provisions of the applicable Law offers a valid basis for acting under the application of X. Article 28 of the Law stipulates that the competent authority shall transmit the decision on the fact of birth, marriage and death, as well as changes concerning these facts, to the competent civil registrar for the purpose of their registration in a civil registry, within 15 days from the day on which the decision became final and binding. X does not have a final and binding decision of a competent authority on the registration of his gender reassignment. However, the data entered in a civil registry regarding the fact of birth, as a rule, is not entered on the basis of a decision, but on the basis of a notification from a health care institution where the person was born.

The Constitutional Court held that the provisions of the Law should be interpreted in such a way that registration of the change in the data on sex may be made by analogously applying the legal provisions governing the registration of the fact of birth and all other data, including gender, which is entered into the civil registry for a person born in a health-care institution. If a health-care institution also notifies the competent civil registrar of the data on a child’s gender at birth, then, in the opinion of the Constitutional Court, the documents of another health-care institution to the effect that a surgical intervention was performed on a particular person in that institution, whose consequence is a change in the gender previously entered on the civil registry, may not be considered insufficient.

The Constitutional Court held that the Municipal Administration failed to honour its “positive obligation” through which the legal situation would be brought into accord with the actual one, thus enabling X to exercise the rights guaranteed to him by both the Constitution and the European Convention on Human Rights. In such a manner, the right of X to dignity and free development of one’s personality and his right to respect for his private life had been violated.

The Constitutional Court found that the consequences of the above established violations of X’s rights could be effectively redressed by ordering a competent authority, the Municipal Administration, to decide on the application of X, proceeding from the

positions and interpretation of the provisions of the Law, presented by the Constitutional Court in this decision.

The Constitutional Court considered that the established violation of X’s right was of such nature that it certainly raised the possibility of other persons finding themselves in the same legal situation. Accordingly, the Court held that this decision, as a measure for redressing harmful consequences, shall also refer to those persons.

The Constitutional Court decided to transmit this decision to the Ministry and Ombudsman and also decided to send a letter to the National Assembly referring to all the aspects of the problem created by the lack of a legal framework in cases of post-operative transsexuals.

*Languages:*

English, Serbian.



# Slovakia

## Constitutional Court

### Important decisions

*Identification:* SVK-2012-1-001

**a)** Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 26.01.2011 / **e)** PL. ÚS 3/09 / **f)** Constitutionality of changes in health insurance system – “ban on profit” amendment / **g)** / **h)** CODICES (Slovak).

*Keywords of the systematic thesaurus:*

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

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

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 insurance / Health, reform / Privatisation.

*Headnotes:*

The legislature is entitled to pursue significant reform of the health care system in the legitimate public interest, but this must be done in conformity with the Constitution, which requires, in particular, that the legislature must take into account any ensuing interference with the position of legal entities which have provided health care insurance in good faith before the amendment, and must undertake to address such interference.

The Treaty on the Functioning of the European Union is a valid reference norm for the constitutional review of laws.

*Summary:*

I. In Slovakia the government substantially reformed the health care system in 2004. The possibility to establish private health-care insurance companies (hereinafter, “HICs”) in the form of joint-stock entities was part of this reform. HICs established following the

reform distribute resources which come from the legally-required payments of individuals (both employees and self-employed persons). In 2007 the new government amended the Law on Health Insurance and precluded the possibility of HICs making profit from their activities.

The challenged provision loosely reads: once HICs providing health-care insurance to the public have settled their fiscal obligations (liabilities) and the result of their business in this field is net profit, this profit may only be used for the purposes of further public health-care insurance.

One HIC sued the Slovak Republic for compensation. The ordinary court suspended the proceedings and sought a review of the relevant provision of the Law on Health Insurance by the Constitutional Court. At the same time a group of Members of Parliament (hereinafter, “MPs”) challenged the same provision.

The MPs contended that the challenged amendment was not in the public interest, on the basis that the goal of the amendment was not really non-profit health insurance, but to put private HICs out of business. The MPs observed that the legal order does not allow HICs to return their license and to transform their business and carry out voluntary health insurance, that Article 40 of the Constitution does not prescribe any particular kind of health insurance system and that, although state-controlled HICs are in the form of joint-stock companies (the government owns 100% of shares), they are not affected by the amendment, because they are not concerned with net profit. The MPs argued that the amendment could not pass the proportionality test. The MPs also contended that the amendment is not in conformity with the principle of a state governed by the rule of law, particularly with the principle of legal certainty, on the basis that it is too vague and that it has retroactive effect due to its removal of the license to provide health-care on a business basis. They also argued that the restriction on the pursuit of profit violates the freedom of enterprise.

II. The Court identified three points in the case:

1. the legal status of HICs;
2. the retroactive effect of the amendment; and
3. interference with the right to property and freedom of enterprise. Although Parliament (as the opposing party in the case) argued that HICs are public entities and that therefore the amendment has no effect on private persons, the Court decided that the 2004 reform established HICs which carry out distribution of finances for public health on a business basis and for profit.

The Court held that the challenged amendment did not have retroactive effect. It had merely so-called *unechte-Rückwirkung* ('false retroactive effect'), in that it adversely affected the current and prospective legal position of HICs.

The Court decided that the amendment interfered unconstitutionally with the right to property which also covers shares and licenses, because no compensation of any kind was provided for this interference. The elimination of the possibility to make or pursue a profit, without compensation, interferes with the freedom of enterprise.

The Court applied the proportionality test. The Court affirmed that the objective of improving health care is constitutionally acceptable but expressed doubts as to whether an amendment which eliminates the possibility of profit for HICs, thereby eliminating the commercial aims of HICs, is rationally connected to that objective. These doubts notwithstanding, the Court proceeded to the test of necessity. The Court stated that there were other less drastic means of improving health care, so the amendment did not pass the test at this stage. Nevertheless, the Court reiterated in the third step (i.e. the test of proportionality in the strict sense) that there was imbalance in the fact that not only did doubts exist concerning the rational connection of the amendment to its objective, but the amendment also interfered significantly with the right to property and even with the essence of the right to enterprise.

The MPs also challenged the amendment's conformity to the Treaty on the Functioning of the European Union (hereinafter, the "TFEU"). The Court stated that it considered the TFEU as a reference norm for the constitutional review of laws because it is an international treaty signed with the consent of Parliament (Article 125.1a Constitution). However, in this particular case the Court did not consider it necessary to carry out this review, because it was sufficient to state that the amendment was not in conformity with the national Constitution.

#### *Supplementary information:*

The essential point to note in this case, popularly known as "the profit ban" case, is that the Court did not state that profit could not be banned, but that if profit is banned, the legislator must compensate the private entities affected for the worsened legal position in which they are placed as a result of such ban.

#### *Languages:*

Slovak.



## Slovenia

### Constitutional Court

#### Statistical data

1 January 2012 – 30 April 2012

In this period, the Constitutional Court held 24 sessions – 13 plenary and 11 in panels: 4 in the civil and criminal panel each and 3 in the administrative panel. It received 97 new requests and petitions for the review of constitutionality/legality (U-I cases) and 442 constitutional complaints (Up cases).

In the same period, the Constitutional Court decided 154 cases in the field of the protection of constitutionality and legality, as well as 419 cases in the field of the protection of human rights and fundamental freedoms.

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): [www.us-rs.si](http://www.us-rs.si);
- In the IUS-INFO legal information system on the Internet, full text in Slovene, available through [www.ius-software.si](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-2012-1-001

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 26.09.2012 / **e)** U-I-109/10 / **f)** / **g)** *Uradni list RS* (Official Gazette), 78/11 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

3.3 General Principles – **Democracy**.  
3.9 General Principles – **Rule of law**.  
5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.

*Keywords of the alphabetical index:*

Democratic state, core elements / Human dignity, violation / Political sign, exposition / Value, democratic / Value system.

*Headnotes:*

A regulation or other act of the authorities which has symbolic significance can be found to be unconstitutional in cases where such symbol expresses values which are entirely incompatible with fundamental constitutional values, such as human dignity, freedom, democracy, and the rule of law. Naming a street after Josip Broz Tito, who is a symbol of the former totalitarian regime, is contrary to the constitutional values on which the Slovenian constitutional order is based, in particular, the principle of respect for human dignity recognised in Article 1 of the Constitution, which is at the very core of the constitutional order of the Republic of Slovenia.

*Summary:*

I. In 2009 the local authorities in the capital city of Slovenia, Ljubljana, named a street in the city Tito Street, after Josip Broz Tito, who was the President for life of the former communist regime, the Socialist Federal Republic of Yugoslavia. In 2010 a number of residents brought a claim to the Constitutional Court challenging the constitutionality of this act.

II. The Constitutional Court held that human dignity is at the centre of the constitutional order of the Republic of Slovenia. Its ethical and constitutional significance already proceeds from the Basic Constitutional Charter, which not only constitutes the constitutional foundation of Slovenian statehood, but which also outlines certain principles that demonstrate the fundamental legal and

constitutional quality of the new independent and sovereign state. By adopting the independence documents not only was the fundamental relationship entailing state sovereignty between the Republic of Slovenia and the Socialist Federal Republic of Yugoslavia (hereinafter, the "SFRY") severed, but there was also a complete departure from the fundamental value system of the former constitutional order. Differently than the former SFRY, the Republic of Slovenia is a state whose constitutional order proceeds from the principle of respect for human rights and fundamental freedoms. Human dignity is the fundamental value which permeates the entire legal order and therefore it also has an objective significance in the functioning of authority not only in individual proceedings but also when adopting regulations.

As the fundamental value, human dignity has a normative expression in numerous provisions of the Constitution; it is especially concretised through provisions which guarantee individual human rights and fundamental freedoms. As a special constitutional principle, the principle of respect for human dignity is directly substantiated in Article 1 of the Constitution, which determines that Slovenia is a democratic republic. The principle of democracy in its substance and significance exceeds the definition of the state order as merely a formal democracy, but substantively defines the Republic of Slovenia as a constitutional democracy, thus as a state in which the acts of authorities are legally limited by constitutional principles and human rights and fundamental freedoms. This is because individuals and their dignity are at the centre of its existence and functioning. In a constitutional democracy the individual is a subject and not an object of the functioning of the authorities, while his or her self-realisation as a human being is the fundamental purpose of the democratic order.

It can be stated that a regulation or other act of the authorities which has symbolic significance is unconstitutional in cases in which such symbol, through the power of the authority, expresses values which are entirely incompatible with fundamental constitutional values, such as human dignity, freedom, democracy, and the rule of law. The name Tito Street is inseparably connected with the symbolic significance of the name Tito. The fact that Josip Broz Tito was the President for life of the former SFRY entails that it is precisely his name that to the greatest extent symbolises the former totalitarian regime. Accordingly, naming a street after Josip Broz Tito, who is a symbol of the Yugoslav communist regime, can be objectively understood as recognition of the former non-democratic regime.

In the Republic of Slovenia, where the development of democracy and free society based on respect for human dignity began with the break up with the former system, the glorification of the communist totalitarian regime by the authorities by naming a street after the leader of that regime is unconstitutional. Naming a street after Josip Broz Tito does not simply entail preserving a name from the former system and which today would merely be a part of history. The challenged Ordinance was issued in 2009, eighteen years after Slovenia declared independence and established the constitutional order, which is based on constitutional values that are the opposite of the values of the regime before independence. Such new naming no longer has a place in the present societal and constitutional context, as it is contrary to the principle of respect for human dignity, recognised in Article 1 of the Constitution, which is at the very core of the constitutional order of the Republic of Slovenia.

*Languages:*

Slovenian, English (translation by the Court).



## South Africa Constitutional Court

### Important decisions

*Identification:* RSA-2012-1-001

**a)** South Africa / **b)** Constitutional Court / **c)** en banc / **d)** 30.03.2012 / **e)** CCT 41/11; [2012] ZACC 4 / **f)** Mandlakayise John Hlophe v. Premier of the Western Cape Province; Mandlakayise John Hlophe v. Freedom Under Law and Others / **g)** www.constitutionalcourt.org.za/Archimages/18726.pdf / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

1.1.2.2 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Number of members.**  
 1.1.2.4 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointment of members.**  
 1.4.11.1 Constitutional Justice – Procedure – Hearing – **Composition of the bench.**  
 1.5.1.1 Constitutional Justice – Decisions – Deliberation – **Composition of the bench.**  
 1.5.1.3.1 Constitutional Justice – Decisions – Deliberation – Procedure – **Quorum.**  
 3.4 General Principles – **Separation of powers.**  
 5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing.**  
 5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality.**

*Keywords of the alphabetical index:*

Bias, judicial risk / Challenging, judge, impartiality / Constitutional Court, judge, appointment / Court, composition, change during proceedings / Court, impartial, criteria / Ethics, judicial / Fairness, procedural, principle / Judge, acting / Judge, appointment, conditions / Judge, bias, apprehension / Judge, bias, reasonable suspicion / Judge, impartiality, perception / Judge, impartiality, subjective / Judge, recusal / Judge, relief of duty / Judge, substitute / Leave to appeal, refusal / Necessity, principle / Necessity, strict, measure / Public confidence, protection / Constitutional Court, quorum / Recusal,

judicial conditions / Trial, unfair, risk / Constitutional Court, judge, acting, appointment.

*Headnotes:*

The Constitution does not permit the appointment of Acting Judges to the Constitutional Court to fulfil a quorum in a particular matter where a Constitutional Court Judge has recused him or herself from hearing that matter. Where Judges of the Court consider themselves precluded by interest or conflict from deciding the merits of a matter, an application for leave to appeal may be determined by those judges, sitting to make up a quorum, only to the extent that it is necessary to avoid an injustice.

*Summary:*

I. This case involved two applications for leave to appeal to the Constitutional Court. The applicant was the Judge President of the Western Cape High Court. He sought leave to appeal against two separate judgments of the Supreme Court of Appeal (hereinafter, “SCA”). In both that Court had invalidated a decision of the Judicial Service Commission (hereinafter, “JSC”). That decision was concerned with a complaint against the applicant laid by the judges of the Constitutional Court, with the JSC, in May 2008. The complaint alleged that he had been guilty of gross misconduct. The applicant counter-complained that the Judges of the Constitutional Court too were guilty of gross misconduct because they released a press statement on their complaint before informing him.

The JSC held that the evidence in both complaints did not justify a finding that any of the judges were guilty of gross misconduct, and closed the matters. It was this decision the SCA set aside in the two judgments.

The applications for leave to appeal against the SCA judgments were heard by a bare quorum of eight judges because three judges had recused themselves on the ground of conflict before the hearing (they had been called to testify against the applicant). In addition, three of the judges who heard the matter had also been complainants before the JSC. Yet another two were involved in mediation attempts between the then Constitutional Court judges and the applicant. If the three complainant judges recused themselves, as they would have ordinarily been obliged to do, there would have been no quorum.

None of the parties sought the recusal of any of the complainant or mediating judges at any stage of the proceedings. All the parties accepted that it was necessary for the Court to determine the issues.

The first issue was whether Acting Judges may be appointed to the Constitutional Court under Section 175.1 of the Constitution to hear the applications. If that was not possible, the second issue was whether the Court should decide the merits of the applications.

II. The Court, in a unanimous judgment, found that Section 175.1 of the Constitution does not allow for the appointment of Acting Judges to hear a specific case where Constitutional Court judges recuse themselves. The Court held that the purpose of Section 175.1 is to deal with normal instances of vacancies and physical absences of Constitutional Court judges; not with the exceptional occurrence where recusal leads to a lack of a quorum. The Court held further that this interpretation accords with the constitutional imperatives of judicial independence and the separation of powers.

The Court went on to consider the applications for leave to appeal. The Court proceeded on the basis that a balance had to be struck between its obligation to provide finality and the possible injustice to the applicant that might arise from conflicted Judges hearing his application. All the parties agreed, and the Court held, that these applications could not remain pending – there was a need for finality.

The Court found that the dismissal of the applications would mean the process of determining the merits of the complaint before the JSC would resume, and would not in itself amount to a finding against the applicant on the substance of the complaints. The fact that the applicant had already had the benefit of an appeal to the Supreme Court of Appeal in both cases was also taken into account. The Court concluded that these considerations mitigated the threat of injustice. The Court held further that even though the parties had consented to the conflicted judges sitting in the matter, regard still had to be had to the fact that they would ordinarily have had to recuse themselves. In the circumstances, the Court concluded that it was in the interests of justice that leave to appeal in both cases be refused.

#### *Supplementary information:*

Legal norms referred to:

- Sections 34, 165, 167, 174.3, 174.4, 175.1, 178.1, 178.6 of the Constitution;
- Section 99.9 of the Interim Constitution (Act 200 of 1993).

#### *Cross-references:*

- *Acting Chairperson: Judicial Service Commission & Others v. Premier of the Western Cape Province* 2011 (3) *South African Law Reports* 538 (SCA);
- *Freedom Under Law v. Acting Chairperson, Judicial Service Commission & Others* 2011 (3) *South African Law Reports* 549 (SCA);
- *Judge President Hlophe v. Premier of the Western Cape Province; Judge President Hlophe v. Freedom under Law and Others (Centre for Applied Legal Studies and Others as Amici Curiae)* [2011] ZACC 29; 2012 (1) *Butterworths Constitutional Law Reports* 1 (CC);
- *Justice Alliance of South Africa v. President of the Republic of South Africa and Others, Bulletin* 2011/2 [RSA-2011-2-011];
- *Natal Rugby Union v. Gould* 1999 (1) *South African Law Reports* 432 (SCA);
- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others, Bulletin* 1999/3 [RSA-1999-3-008];
- *S v. Dlamini; S v. Dladla and Others; S v. Joubert; S v. Schietekat, Bulletin* 1999/2 [RSA-1999-2-007].

#### *Languages:*

English.



#### *Identification: RSA-2012-1-002*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 12.04.2012 / **e)** CCT 61/11; [2012] ZACC 6 / **f)** Competition Commission of South Africa v. Senwes Limited / **g)** [www.constitutionalcourt.org.za/Archimages/18777.PDF](http://www.constitutionalcourt.org.za/Archimages/18777.PDF) / **h)** CODICES (English).

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

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:*

Competition, infringement, fine / Competition, judicial proceedings / Competition, proceedings, formal error, remedy / Procedural fairness, principle / Procedural formality / Competition, exclusionary practice, terminology exact.

*Headnotes:*

Section 8.c of the Competition Act 89 of 1998 (Act) prohibits a dominant firm from engaging in an exclusionary act if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain. A complaint referral against an entity is valid if its substance is covered by the terms of this provision. The complaint need not use terms for the specific exclusionary practice (for example, “margin squeeze”) that the Act does not itself use.

*Summary:*

I. Senwes Ltd (Senwes), as an owner of silos, provides grain storage services and trades in the sale of grain. Before 2003, Senwes charged all its customers the same fee for storage regardless of whether they were traders or farmers. During the first 100 days of storage all customers paid the same daily fee. After 100 days a capped tariff applied to all until the next harvest season. In 2003, Senwes withdrew the capped tariff from traders but continued to offer it to farmers. This new arrangement (“the differential tariff”) differentiated between traders and farmers.

The differential tariff adversely affected the business operations of traders who were rivals of Senwes. Specifically, rival traders were unable to compete with the grain prices Senwes offered to farmers because the traders had to pay the high storage costs charged by Senwes. A rival trader submitted a complaint against Senwes with the Competition Commission claiming that Senwes had abused its dominant position in the storage market in contravention of Sections 8 and 9 of the Act. Some of those complaints were referred to the Competition Tribunal.

The Competition Tribunal found that Senwes, by charging the differential tariffs, had contravened Section 8.c of the Act. The Tribunal labelled its conduct “margin squeeze”. Senwes complained that the complaint referral had never embodied the notion of “margin squeeze”. But an appeal to the Competition Appeal Court was unsuccessful. The Supreme Court of Appeal (SCA) then held that the margin squeeze complaint was not part of the complaint originally referred to the Tribunal and, as a

result, the Tribunal had no authority to determine it. It therefore set the Tribunal’s decision aside.

II. The Constitutional Court in a majority judgment reversed the Supreme Court of Appeal judgment and reinstated the finding by the Tribunal against Senwes. The Court found that the SCA erred in concluding that a complaint relating to a contravention of Section 8.c of the Act was not part of the referral. The finding that Senwes had contravened Section 8.c was supported on the evidence and had been properly made. The Tribunal had erred only in labelling the conduct “margin squeeze” when neither the complaint submitted to it nor the Section on which the complaint was based use this label. However, Senwes was not prejudiced by this finding. It received the referral which contained this complaint before the hearing at the Tribunal. That same complaint formed part of the issues to be determined by the Tribunal. Senwes also received written statements of witnesses in support of that complaint. All of this happened before the Tribunal hearing. At the hearing, Senwes was in fact given an adequate opportunity to refute the complaint.

III. A dissenting judgment of two Judges held that the conflicting meanings attributed to the complaint by first the Tribunal and Competition Appeal Court, and then the Supreme Court of Appeal, and lastly the Court itself, showed that the complaint referral was capable of different reasonable interpretations. The minority therefore considered that in fairness to Senwes the Tribunal should early in the proceedings have made a proper ruling on the ambit of the referral. The minority would therefore have referred the matter back to the Tribunal for it to make a ruling on the meaning of the complaint, and for the hearing to proceed on the basis of that ruling.

*Supplementary information:*

Legal norms referred to:

- Section 8.c of the Competition Act 89 of 1998;
- Sections 2, 4, 5, 8, 9, 20, 21, 24, 25, 26, 27, 31, 50, 49(B), 50, 51 and 55 of the Competition Act 89 of 1998;
- Marketing Act 59 of 1968;
- Marketing of Agricultural Products Act 47 of 1996.

*Cross-references:*

- *Biowatch Trust v. Registrar, Genetic Resources and Others*, Bulletin 2009/2 [RSA-2009-2-006];
- *Netstar (Pty) Ltd v. Competition Commission* 2011 (3) *South African Law Reports* 171 (CAC);

- *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others*, Bulletin 2000/1 [RSA-2000-1-003];
- *Woodlands Dairy (Pty) Ltd and Another v. Competition Commission 2010 (6) South African Law Reports 108 (SCA)*.

### Languages:

English.



### Identification: RSA-2012-1-003

a) South Africa / b) Constitutional Court / c) / d) 12.04.2012 / e) CCT 103/11; [2012] ZACC 7 / f) Maccsand v. City of Cape Town and Others / g) [www.constitutionalcourt.org.za/Archimages/18784.pdf](http://www.constitutionalcourt.org.za/Archimages/18784.pdf) / h) CODICES (English).

### Keywords of the systematic thesaurus:

4.8.1 Institutions – Federalism, regionalism and local self-government – **Federal entities**.

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

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

5.5.1 Fundamental Rights – Collective rights – **Right to the environment**.

### Keywords of the alphabetical index:

Conflict of powers / Local government, powers / Province, legislative competence / Environment, zoning / Legislation, national, application, general / Legislation, provincial, precedence / Land, planning permission / Land, regulation on use / Resource, mineral.

### Headnotes:

Mining is controlled by national government through national legislation, while land use is controlled by the local municipality through provincial legislation. When national government grants a mining right, over specific land, the mere grant of the right does not trump local government's control over the use of the

land. A mining right granted by national government is subject to local municipality authority for the land in question to be used for mining.

### Summary:

I. The Minister for Mineral Resources (Minister) granted Maccsand, a private company, mining rights over two dunes situated in the metropolitan area of Cape Town. The power to grant the mining right derives from national legislation, the Mineral and Petroleum Resources Development Act (hereinafter, "MPRDA"). Both dunes are zoned as urban public open spaces. The zoning or land use authorisation is controlled by the local municipality of Cape Town, in terms of the Land Use Planning Ordinance (hereinafter, "LUPO"), which is provincial legislation.

Maccsand commenced mining without having the dunes rezoned for mining purposes. The City of Cape Town obtained an interdict from the High Court preventing Maccsand from mining until rezoning and until environmental permits were issued in terms of the National Environmental Management Act (hereinafter, "NEMA"). Maccsand appealed against the High Court's decision. The Supreme Court of Appeal held that the national and provincial legislation operated side-by-side and that the holder of a mining right cannot proceed without the land in question being zoned for mining. The Court set aside the interdict based on NEMA as the notices under NEMA were no longer in force.

In the Constitutional Court, both Maccsand and the Minister argued that the provincial legislation requiring rezoning does not apply to land used for mining. They submitted that mining falls under the exclusive competence of national government and to hold that provincial legislation regulating municipal planning applies to it would be tantamount to allowing municipal government to intrude into the national sphere.

The provincial executive minister for local government, environmental affairs and development planning in the Western Cape cross appealed to the Constitutional Court against the refusal of the Supreme Court to sustain the interdict based on NEMA.

II. The Court held that the provincial law and the national law served different purposes which fall within the competences of the local and the national sphere. Each sphere exercises the power allocated to it by the Constitution and regulated by the relevant legislation. Mining rights under the MPRDA have to be exercised subject to LUPO. Regarding NEMA, the cross-appeal failed, since the order sought was based on a notice that was not yet operational.

*Supplementary information:*

Legal norms referred to:

- Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA);
- National Environmental Management Act 107 of 1998 (NEMA);
- Land Use Planning Ordinance 15 of 1985 (LUPO).

*Languages:*

English.

*Cross-references:*

- *Johannesburg Metropolitan Municipality v. Gauteng Development Tribunal and Others* [2010] ZACC 11; 2010 (6) *South African Law Reports* 182 (CC); 2010 (9) *Butterworths Constitutional Law Reports* 859 (CC), *Bulletin* 2010/2 [RSA-2010-2-005];
- *Wary Holdings (Pty) Ltd v. Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) *South African Law Reports* 337 (CC); 2008 (11) *Butterworths Constitutional Law Reports* 1123 (CC);
- *Fuel Retailers Association of Southern Africa v. Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* [2007] ZACC 13; 2007 (6) *South African Law Reports* 4 (CC); 2007 (10) *Butterworths Constitutional Law Reports* 1059 (CC), *Bulletin* 2007/2 [RSA-2007-2-009];
- *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Another* [2001] ZACC 19; 2001 (3) *South African Law Reports* 1151 (CC); 2001 (7) *Butterworths Constitutional Law Reports* 652 (CC);
- *Biowatch Trust v. Registrar Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) *South African Law Reports* 232 (CC); 2009 (10) *Butterworths Constitutional Law Reports* 1014 (CC), *Bulletin* 2009/2 [RSA-2009-2-006];
- *Affordable Medicines Trust and Others v. Minister of Health and Others* [2005] ZACC 3; 2006 (3) *South African Law Reports* 247 (CC); 2005 (6) *Butterworths Constitutional Law Reports* 529 (CC), *Bulletin* 1995/3 [RSA-1995-3-009];
- *Giddey NO v. JC Barnard and Partners* [2006] ZACC 13; 2007 (5) *South African Law Reports* 525 (CC); 2007 (2) *Butterworths Constitutional Law Reports* 125 (CC);
- *Tongoane and Others v. Minister of Agriculture and Land Affairs and Others* [2010] ZACC 10; 2010 (6) *South African Law Reports* 214 (CC); 2010 (8) *Butterworths Constitutional Law Reports* 741 (CC), *Bulletin* 2010/2 [RSA-2010-2-004].

# Spain

## Constitutional Court

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### Important decisions

*Identification:* ESP-2012-1-001

**a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 13.01.2012 / **e)** ATC 9/2012 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), 36, 11.02.2012 [www.boe.es/boe/dias/2012/02/11/pdfs/BOE-A-2012-2148.pdf](http://www.boe.es/boe/dias/2012/02/11/pdfs/BOE-A-2012-2148.pdf) / **h)** [www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Auto.aspx?cod=10489](http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Auto.aspx?cod=10489); CODICES (Spanish).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Constitution, amendment.

*Headnotes:*

The right to participate in political activity includes the opportunity to take part in the plenary phase during the process of consideration of the draft text of a constitutional reform, its progression through a particular procedure and the final adoption of the constitutional reform.

*Summary:*

I. The parliamentary groups of the Spanish Socialist Party and the People's Party tabled a motion of reform of Article 135 of the Constitution to the Congress of Deputies, in order to introduce the principles of budgetary stability and financial sustainability in the constitutional text.

The reform was carried out through the ordinary process of Article 167 of the Constitution. In addition, considering the political situation in Spain at the time (anticipated elections had been announced), the Bureau of the Congress decided to

process the reform through the urgency – and “single reading” – procedure.

The parliamentary group of the left-wing political party *Esquerra Republicana-Izquierda Unida-Iniciativa Per Catalunya Verds* submitted an amendment to the whole draft of the constitutional reform, together with an alternative text. The amendment was declared inadmissible by the Bureau of the Congress.

Two deputies of the said political party claimed at the Constitutional Court that a violation of their constitutionally protected right to participate in political activity had occurred. They challenged the application of the ordinary procedure of Article 167 of the Constitution, stating that the exceptional procedure of Article 168 of the Constitution was more appropriate given the object of the constitutional reform. Moreover, they challenged the application of the urgency and “single reading” procedure and the declaration of inadmissibility of the proposed amendment.

II. The Constitutional Court declared the appeal inadmissible, on the basis that no violation of a constitutionally protected right had been established.

Regarding the applicants' contention that the constitutional reform would have been better processed through the exceptional procedure laid down in Article 168 of the Constitution; the Court stated that the decision of the Bureau of the Congress was lawful. The object of the constitutional reform in question did not fulfil the strict conditions for application of the exceptional procedure of Article 168 of the Constitution; therefore the ordinary procedure of Article 167 of the Constitution was the only applicable procedure.

With regard to the decision to process the reform in a “single reading” procedure, the Constitutional Court noted that the applicants had been given the opportunity to take part in this process, so that their right to participate in political activity was not violated. Furthermore, the Court noted that the application of the urgency procedure – which entails the reduction of the terms for the proposal of amendments – was justified by the political situation existing in Spain at the time of the constitutional reform, namely, that general elections had been called.

Finally, concerning the inadmissibility of the amendment to the whole draft of the constitutional reform with the proposal of an alternative text, the Court observed that this amendment did not bear the necessary substantive connection to the legislative initiative it was designed to alter. On the contrary, it had a substantially different object.

In conclusion, after ruling out a violation of the applicants' right to participate in political activity, the Constitutional Court rejected the existence of a violation of the deputies' rights throughout the process of constitutional reform.

#### *Cross-references:*

Constitutional Court:

- First Chamber, no. 161/1988, 20.09.1988;
- First Chamber, no. 23/1990, 15.02.1990;
- Plenary, no. 234/2000, 03.10.2000;
- Fourth Section, no. 29/2011, 14.03.2011;
- Plenary, no. 119/2011, 05.07.2011.

#### *Languages:*

Spanish.



#### *Identification:* ESP-2012-1-002

**a)** Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 30.01.2012 / **e)** SSTC 12/2012, 17/2012, 23/2012, 24/2012 / **f)** Hidden cameras / **g)** *Boletín Oficial del Estado* (Official Gazette), 47, 24.02.2012, [www.boe.es/boe/dias/2012/02/24/pdfs/BOE-A-2012-2719.pdf](http://www.boe.es/boe/dias/2012/02/24/pdfs/BOE-A-2012-2719.pdf) / **h)** [www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10298](http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10298); CODICES (Spanish).

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

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.  
 5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.  
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.  
 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

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

Right to one's own image.

#### *Headnotes:*

The use of hidden cameras is always unlawful and contrary to the Constitution, even if the information obtained and subsequently broadcasted is of public interest. The use of a ruse by a journalist, in order to obtain information which would not otherwise be achieved, employing techniques such as hidden cameras, constitutes a violation of the recorded person's rights to privacy and to his or her own image.

#### *Summary:*

I. The regional TV channel of Valencia broadcasted a report about a woman who acted as a beautician and naturopath without holding the proper license. The images had been obtained in the woman's private practice, by an undercover journalist using a hidden camera, and they were subsequently broadcasted in a TV programme about fake professionals.

The TV channel and the production company were sentenced to pay compensation to the supposed professional, for the interference with her privacy and the violation of her right to her own image. They subsequently lodged an appeal to the Constitutional Court, claiming that a violation of an aspect of their freedom of information – the freedom to impart information – had occurred.

II. The Constitutional Court of Spain rejected the appeal, on the basis that there had not been a violation of the applicants' freedom to impart information.

The Court quoted several decisions of the European Court of Human Rights regarding the special protection required when there is a conflict between the freedom of information and the rights to privacy and to one's own image. In particular, the Court recalled the reasonable expectation of privacy of everyone in certain places and circumstances.

The Constitutional Court stated that the use of hidden cameras is unlawful and declared it constitutionally forbidden, even if the information obtained and subsequently broadcasted is of public interest.

The Constitutional Court held that the hidden nature of this method of journalistic investigation constitutes a violation of the right to one's own image and to privacy. The unlawfulness of the method derives from the fact that the recording is taken through the use of a deception or a ploy of the journalist, who feigns an appropriate identity in a given context in order to gather and record statements which he would not have obtained if he had acted under his true identity.

The Constitutional Court examined three further appeals based on similar facts. One of them was rejected for the same reasons. The other two appeals were declared inadmissible because they had not been lodged within the thirty-day time-limit from the decision of the Supreme Court, as required by law.

#### Cross-references:

European Court of Human Rights:

- *Peck v. the United Kingdom*, Application no. 44647/98, 28.01.2003;
- *Von Hannover v. Germany*, Application no. 59320/00, 24.06.2004, *inter alia*.

#### Languages:

Spanish.



#### Identification: ESP-2012-1-003

**a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 29.03.2012 / **e)** SSTC 39/2012 - 69/2012, 108/2012, 113/2012, 115/2012 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), 101, 27.04.2012, [www.boe.es/boe/dias/2012/04/27/pdfs/BOE-A-2012-5636.pdf](http://www.boe.es/boe/dias/2012/04/27/pdfs/BOE-A-2012-5636.pdf) / **h)** [www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10353](http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10353); 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.**
- 5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**
- 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.**
- 5.3.16 Fundamental Rights – Civil and political rights – **Principle of the application of the more lenient law.**

#### Keywords of the alphabetical index:

*Res judicata.*

#### Headnotes:

When a final judicial decision fixes the time of release of a prisoner applying a specific formula for the calculation of sentence redemptions, a subsequent decision which disregards it, extending the time the prisoner has to serve in prison, constitutes a violation of the right to an effective remedy, by violating the principle of *res judicata*. It entails, in addition, an infringement of the right to liberty of the prisoner who has already served the prison sentence established by the final judicial decision which has been disregarded.

#### Summary:

I. In February 2006 the Supreme Court, in Judgment STS no. 197/2006, adopted the so-called “Parot Doctrine”, named after the first prisoner to whom it was applied, ETA terrorist Henri Parot. According to this doctrine, sentence redemptions (e.g. for education, training or working in prison) should be applied successively to individual prison sentences – starting from the harshest one – even if they are being served concurrently, and not to the 30-year maximum sentence, which is the longest term of imprisonment any person can serve under Spanish law.

Several inmates serving long prison sentences filed challenges to this sentencing policy to the Constitutional Court, demanding that the “Parot Doctrine” be overturned. The leading case in the wave of appeals was that of an ETA inmate, the first prisoner after Parot to whom the sentencing doctrine was applied. Five days before the date of his release, in 2006, he was informed that he would not be released until 2018 after the High Court (*Audiencia Nacional*, which has jurisdiction across the whole country) conducted a review of the time served, applying the new formula.

When the new Criminal Code entered into force in 1995, abrogating the 1973 Criminal Code, the trial court had ruled not to apply the new law to the aforementioned applicant – who was serving a long prison sentence since 1988 for the commission of several crimes – on the basis that it did not entail a better treatment for the prisoner. On the contrary, this application would have excluded the possibility for the applicant to benefit from the sentence redemptions he had gained thanks to the work he had carried out in prison.

He and all the other plaintiffs claimed that the application of the “Parot Doctrine”, in order to revise their sentences and extend the time they had to serve in prison, constituted a violation of their fundamental rights to an effective remedy and to liberty, and an infringement of the principle of equality in the application of the law.

II. The full bench of the Constitutional Court examined thirty-four appeals. It granted protection to four of the applicants, acknowledging the violation of the right to an effective remedy of all four and the right to liberty of three of them. Twenty-seven appeals were rejected and a further three appeals against the “Parot Doctrine” were deemed inadmissible for procedural reasons.

First, regarding the four applicants who were granted protection, the Constitutional Court acknowledged that there had been a violation of their right to an effective remedy – as regards the principle of *res judicata* – and to their right to liberty. The judicial resolutions which reviewed the prison sentences of the applicants were not in accordance with the previous final judgment of the High Court (*Audiencia Nacional*) which had established the time the inmates had to serve in prison, fixing the date of their release through application of the sentence redemptions for working during their incarceration. This judgment, since it was final and incontestable, had found a well-established legal status on which the prisoners had based their expectation of being released at the fixed time. They relied on the application of the 1973 Criminal Code and on the possibility to benefit of the sentence redemptions gained thanks to their working activity in prison.

The Constitutional Court held that the application of the so-called “Parot Doctrine” and the consequent review and extension of the prisoners’ sentence unlawfully disregarded the final judgment of the trial court. For this reason, the Court acknowledged there had been a violation of the applicants’ right to an effective remedy, as regards the principle of *res judicata*.

With respect to the applicants’ right to liberty, the Constitutional Court held that the consequences which can flow from the violation of their right to an effective remedy must be taken into account. According to the Criminal Code in force at the time the crimes were committed (the 1973 Criminal Code) and the calculation of the sentence redemptions settled by the judicial authority in its final decision, the applicants had already served their sentences. Consequently, their stay in prison after the time fixed in that decision constituted, for three of them, an unlawful detention and a violation of their right to liberty.

On the other hand, the Constitutional Court noted that the application of the new sentencing policy established by the Supreme Court (the “Parot Doctrine”) by the trial courts did not mean a violation of the principle of equality in the application of the law. The challenged decisions of the trial courts did not entail an unnoticed overruling: they merely applied the Supreme Court’s doctrine, without any arbitrariness or motiveless disregard of the sentencing policy applied until then.

Second, concerning the twenty-seven applicants who were not granted protection, the Constitutional Court noted that in their cases there was not a final judicial decision which, applying the calculation of the sentence redemptions for working in prison, established the time the inmates have to serve in prison and the date of their release. The judicial decisions merely stated that the 1973 Criminal Code – and not the 1995 Criminal Code – was to be applied to the prisoners. For this reason, the Constitutional Court ruled there had been neither a violation of the applicants’ right to an effective remedy, nor of their right to liberty.

#### Cross-references:

##### Supreme Court:

- Second Chamber, no. 197/2006, 28.02.2006.

##### European Court of Human Rights:

- *Del Rio Prada v. Spain*, Application no. 42750/09 10.07.2012.

#### Languages:

Spanish.



#### Identification: ESP-2012-1-004

**a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 20.06.2012/ **e)** STC 138/2012 / **f)** *Sortu* / **g)** *Boletín Oficial del Estado* (Official Gazette), 163, 09.07.2012, [www.boe.es/boe/dias/2012/07/09/pdfs/BOE-A-2012-9214.pdf](http://www.boe.es/boe/dias/2012/07/09/pdfs/BOE-A-2012-9214.pdf) / **h)** [www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=16261](http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=16261); CODICES (Spanish).

*Keywords of the systematic thesaurus:*

1.2.2.4 Constitutional Justice – Types of claim – Claim by a private body or individual – **Political parties.**

1.3.4.7.1 Constitutional Justice – Jurisdiction – Types of litigation – Restrictive proceedings – **Banning of political parties.**

4.5.10.1 Institutions – Legislative bodies – Political parties – **Creation.**

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

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

*Keywords of the alphabetical index:*

Political party, ban / Political party, freedom of association, scope / Political party, freedom to create.

*Headnotes:*

Refusal to register a political party, based solely on the suspicion that it could continue the activity of a banned political party, violates the fundamental freedom of association, by violating the right to create political parties. In order to prove that a political party continues the activity of a banned political party and refuse its registration it is necessary to prove the existence of a scheme to link the two parties and the participation of its promoters in that scheme. The adjudication must be based on a strict scrutiny of the statements contained in the Statutes of the new political party.

*Summary:*

I. The Special Chamber of the Supreme Court declared the founding of the political party *Sortu* to be unlawful and refused its incorporation in the Register of Political Parties. In its judgment, the Supreme Court ruled that *Sortu* continued the unlawful activities of *Herri Batasuna*, *Euskal Herritarrok* and *Batasuna*, which were political parties banned in 2003 by a judgment pronounced by the same Chamber of the Supreme Court.

*Sortu* appealed against the decision arguing that there was no evidence to conclude that it was trying to continue the activity of *Batasuna*. It claimed that the Special Chamber's resolution violated its freedom of association, with respect to the right to create political parties.

II. The Constitutional Court stated that it is necessary to pay attention to the constitutive Statutes of the political party and to the declarations of its promoters, as well as to the activity of the outlawed parties in respect to the founding of *Sortu*. The Court noted the condemnation of terrorist violence both in the Statutes of *Sortu* and in the statements and actions of its promoters. The Court considered that these expressions in support of exclusively peaceful and democratic ways to achieve political objectives and the condemnation of terrorism (expressly including ETA) as an instrument of political action should be regarded, as a sufficient circumstantial evidence to counteract or dilute the probative force of other pieces of evidence from which it could be inferred that *Sortu* could continue or pursue the activity of legally banned and dissolved parties.

The evidence handled by the Special Chamber of the Supreme Court was clearly insufficient to conclude that *Sortu* was part of a scheme to circumvent the ban, that it had been manipulated by ETA or that it was the successor of *Batasuna*.

Therefore, the suspicion that *Sortu* could continue the activity of outlawed parties cannot constitute a legally sufficient argument to infringe the exercise of the freedom of association. The Constitutional Court accordingly held that the refusal to register the political party was disproportionate, in view of the different measures introduced in the legal system to achieve *ex-post* control over the activity of political parties.

The Constitutional Court declared *Sortu's* right to become a legal political party, but, at the same time, detailed some acts (related to the "glorification" of terrorism) that, due to their incompatibility with the principle of democracy and political pluralism, could lead to the banning *a posteriori* of *Sortu* or any other political party.

*Cross-references:*

Constitutional Court:

- Plenary, no. 48/2003, 12.03.2003;
- Plenary, no. 62/2011, 25.05.2011, *Batasuna*.

European Court of Human Rights:

- *Herri Batasuna and Batasuna v. Spain*, Application nos. 25803/04 and 25817/04, 30.06.2009;

- *Etxeberria Barrena Arza, Nafarroako Autodeterminazio Bilgunea and Aiarako and others v. Spain*, Application nos. 35579/03, 35613/03, 35626/03 and 35634/03, 30.06.2009;
- *Herritarren Zerrenda v. Spain*, Application no. 43518/04, 30.06.2009.

*Languages:*

Spanish.



## Sweden

### Supreme Administrative Court

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#### Important decisions

*Identification:* SWE-2012-1-001

**a)** Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 30.11.2010 / **e)** / **f)** / **g)** RÅ 2010 ref. 115 I / **h)**.

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Media, press, advertisement, commercial nature /  
Media, press, editorial material protection.

*Headnotes:*

Advertisements normally fall within the scope of the Freedom of the Press Act. However, according to a developed legal principle intervention can be made against advertisements if these are of a predominantly commercial nature, i.e. if the advertisement is done in a commercial activity, with a commercial purpose and under purely commercial conditions.

*Summary:*

A Swedish newspaper had published information about which betting odds were offered by certain foreign gaming companies. The supervisory body responsible for control of lottery activities in Sweden, the Gaming Board, had found that the information constituted an illegal promotion for foreign lotteries which is prohibited according to Article 38 of the Swedish Act on Lotteries (SFS 1994:1000). As the companies did not have the necessary license in Sweden, the Gaming Board for Sweden ordered the newspaper to cease with the publication of the betting odds. The question arose whether the decision of the Gaming Board violated the prohibition against censorship laid down in the Freedom of the Press Act (SFS 1949:105). First it had to be determined whether the published information fell within the scope of the Freedom of the Press Act, which is a

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requirement for protection by the constitutional and unconditional prohibition against censorship.

It was undisputed that the information had been published for the same purpose as the rest of the editorial material, which was to satisfy the readers' interest of news. Moreover, the Court found that the published information gave the impression of being editorial material. Although it could be assumed that the publication of the betting odds had had a commercial worth for the companies it could not be concluded that the publication was an advertisement of a predominantly commercial nature falling outside the scope of the Freedom of the Press Act. The Court noted that the prohibition at hand was too general and extensive and that it comprehended all commercial advertisements for foreign gaming companies. The Court did not find any other reason why the published information should not benefit from the constitutional protection. Hence, the Gaming Board's order violated the Freedom of the Press Act.

*Languages:*

Swedish.



*Identification:* SWE-2012-1-002

**a)** Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 14.12.2010 / **e)** 283-10 / **f)** / **g)** RÅ 2010 ref. 112 / **h)**.

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Treaty, double taxation, relation to national law / Tax, double taxation, treaty.

*Headnotes:*

A double taxation treaty should, in general, be applied independently of provisions in posterior law. However, if the Swedish legislator had made a clear

statement (in the preparatory works, *min anm.*) that a certain income should be taxable in Sweden or that a posterior law should be applied independently of the treaty, then those provisions should have superiority over the treaty. If the intent of the legislator, as the Court found in this case, is unclear, it has to be assumed that the legislator did not have the intention to override the treaty.

*Summary:*

I. The case concerned a decision taken by the Swedish Council of Advance Tax (a council from which individuals can get a legally binding decision in advance on the interpretation of a tax provision in relation to a specific question) regarding a question from a person whether a certain income was taxable in Sweden. In the case, it was undisputed that the relevant provision in the Swedish Income Tax Act (SFS 1999:1229) was inconsistent with a provision in the law implementing the double taxation treaty between Sweden and Greece. In order to answer the question the Swedish Supreme Administrative Court had to decide which law should have superiority.

In 2008 the Supreme Administrative Court had ruled in a similar case (RÅ 2008 ref. 24) in which inconsistencies had been found between the rules in a double taxation treaty and the Swedish national law. In that case the Court found that the Swedish law had superiority over the treaty.

II. In RÅ 2010 ref. 112 the Court noted that different conclusions had been drawn from its earlier jurisprudence. The Court therefore found it necessary to stress that the case of 2008 was not meant to change the basic view on the relation between laws implementing double taxation treaties and other Swedish national law.

*Languages:*

Swedish.



*Identification:* SWE-2012-1-003

**a)** Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 28.04.2011 / **e)** 215-11 / **f)** / **g)** RÅ 2011 ref. 22 / **h)**.

*Keywords of the systematic thesaurus:*

1.2.2.1 Constitutional Justice – Types of claim – Claim by a private body or individual – **Natural person.**

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

1.3.5.10 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by the executive.**

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

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

5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing.**

*Keywords of the alphabetical index:*

International Criminal Court, sentence, execution in member state, parole, right / Parole, right.

*Headnotes:*

Because of the importance of the right to a court hearing, decisions which can be subjected to legal review should not be limited narrowly. A decision should be considered to concern a person's civil rights or obligations if nothing speaks clearly against it.

*Summary:*

The Swedish Supreme Administrative Court has under certain criteria the jurisdiction to examine decisions taken by the Swedish Government. This is called legal review. According to Article 1 of the Act on Legal Review (SFS 2006:304) a person can apply for legal review if the decision concerns his or her civil rights or obligations in the meaning of Article 6.1 ECHR.

The case concerned a person who had been sentenced to prison by the International Criminal Tribunal for Rwanda and who was serving that sentence in a Swedish prison. The Swedish Government had decided not to grant the person a parole after serving two-thirds of the sentence. Such parole is normally granted to prisoners who have been sentenced to prison by a Swedish court. The person applied at the Supreme Administrative Court for legal review. In order for the Court to consider the case it had to be determined whether the Government's decision concerned the applicant's civil rights or obligations in the meaning of Article 6.1 ECHR.

The Court noted that the European Court of Human Rights had not rendered a judgment in a case in which the circumstances were similar. The Court found, however, with reference to the European Court's decisions in cases of similar nature, that the case was admissible.

*Languages:*

Swedish.

*Identification: SWE-2012-1-004*

**a)** Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 22.06.2011 / **e)** 7800-07 / **f)** / **g)** RÅ 2011 ref. 46 / **h).**

*Keywords of the systematic thesaurus:*

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.**

*Keywords of the alphabetical index:*

Media, TV, sponsorship, logo, exhibition / Media, TV, sponsorship, information of viewers.

*Headnotes:*

As regards the sponsor advertisements, although the overall purpose of such advertisements is commercial, there exists an unconditional legal obligation in the Swedish Act on Radio and Television (SFS 1996:844) to inform viewers of the companies that are financing the broadcast. The objective of this obligation is to give the viewers the possibility to scrutinize the content of a certain program. This, in its turn, is a way to safeguard the objective of the Fundamental Law on Freedom of Expression.

*Summary:*

The Gaming Board for Sweden had prohibited a Swedish TV-channel to show the logotypes of foreign gaming companies in sponsor advertisements and to show information about betting odds which were

offered by certain foreign gaming companies during broadcasted sport events. The Board had found that the information constituted an illegal promotion for foreign lotteries which is prohibited according to Article 38 of the Swedish Act on Lotteries (SFS 1994:1000). The question arose whether the decision of the Gaming Board violated the constitutional rights laid down in the Fundamental Law on Freedom of Expression (SFS 1991:1469).

The Court found that the sponsor advertisements did not fall outside the scope of the Fundamental Law on Freedom of Expression and that the obligation to inform viewers of financing companies must have superiority over the prohibition of illegal promotion of foreign lotteries. The Court concluded that the decision of the Gaming Board to prohibit the TV-channel to show the logotypes of foreign gaming companies in sponsor advertisements violated the Fundamental Law on Freedom of Expression. In its judgment the Court regarded the fact that there had been no alternative way to inform the viewers of the financier of the program and that the prohibition was of a general nature.

Regarding the information about betting odds the Court noted that nothing suggested that the information did not constitute editorial material. The fact that the information could be of commercial importance did not justify the conclusion that it was meant to be shown as publicity. The Court found that the information was of an entertaining and informative character. Although it had a commercial significance the information was not to be regarded as commercial publicity. The decision was found to violate the Fundamental Law on Freedom of Expression.

#### *Languages:*

Swedish.



## Switzerland Federal Court

### Important decisions

*Identification:* SUI-2012-1-001

**a)** Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 26.09.2011 / **e)** 1C\_105/2011 / **f)** X. v. Vaud Canton Automobile and Navigation Department / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 137 I 363 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

5.3.14 Fundamental Rights – Civil and political rights – **Ne bis in idem**.

*Keywords of the alphabetical index:*

Road traffic, offence / Driving licence, cautionary cancellation.

*Headnotes:*

Cancellation of driving licence, “*non bis in idem*” principle. Article 4.1 of Additional Protocol no. 7 ECHR, Article 14.7 UN Covenant II, Article 11.1 of the Swiss Code of Criminal Procedure (CPP; prohibition of dual prosecution), Articles 16 ff. and 90 ff. of the Law on road traffic (LCR).

Conformity of the dual criminal and administrative prosecution laid down in the LCR with the interpretation of Article 4.1 of Additional Protocol no. 7 ECHR, as set out in the judgment of the European Court of Human Rights in the case of *Zolotukhin v. Russia*, 10 February 2009. There are no grounds for varying from the prevailing case-law to the effect that the coexistence of these procedures does not violate the “*non bis in idem*” principle (recital 2).

*Summary:*

X. drove his motor vehicle along the motorway between Lausanne and Geneva at a speed of 132 km/h, although the speed-limit was 100 km/h. By a decision of July 2010, the Geneva Canton Traffic Offences Department fined him CHF 600 for

infringement of various provisions of the Law on road traffic. When this decision became enforceable, X. paid the fine.

In September 2010, the Vaud Canton Automobile and Navigation Department (hereinafter, "SAN") ordered X.'s driving licence to be withdrawn for one month, in connection with an offence classified as "moderately serious". The SAN rejected X.'s complaint, and the Vaud Cantonal Court rejected his appeal.

X. lodged a public law appeal inviting the Federal Court to set aside this judgment and the SAN decision. The Federal Court rejected this appeal.

Drawing on Article 4.1 of Additional Protocol no. 7 ECHR, the appellant argues that the administrative measure ordered on the basis of the same facts as the criminal penalty infringes the *non bis in idem* principle. He refers to the interpretation of this Article in the judgment of the European Court of Human Rights in the case of *Zolotukhin v. Russia*, 10 February 2009 (no. 14939/03).

The *non bis in idem* principle states that no one may be prosecuted or penalised by the courts of one State for an offence of which they have already been acquitted or convicted under a final judicial decision in accordance with the law and criminal procedure of this State. This right is secured by Additional Protocol no. 7 ECHR and the International Covenant on Civil and Political Rights. Furthermore, the rule is implicit in the Federal Constitution and the Swiss Code of Criminal Procedure.

In the *Zolotukhin* case, the applicant had first of all been sentenced to three days' administrative detention and then found guilty of a violation of the Russian Penal Code. In its judgment, the European Court decided to harmonise the interpretation of the "same offence" concept – the *idem* part of the *non bis in idem* principle – for the purposes of Article 4.1 of Protocol no. 7. It explained that Article 4.1 of Protocol no. 7 should be understood as banning the prosecution or trial of a person for a second "offence" where the latter originated in the same facts, or in facts which were substantially the same. This shows the need for an approach based strictly on the "sameness" of the material facts, avoiding adopting the legal classification of these facts as a relevant criterion.

The *Zolotukhin* judgment prompted different reactions in Swiss doctrine vis-à-vis dual criminal and administrative procedure in cases of road traffic offences. According to the established case-law of the Federal Court, such dual procedure does not infringe the "*non bis in idem*" principle. Its implementation presupposes that the judge in the first

procedure has been put in a position to appraise all the legal aspects of the circumstances; this precondition is lacking in the instant case because of the limited decision-making powers of each of the competent authorities. The Federal Court has also stipulated that an administrative authority decision to withdraw a driving licence may not, in principle, vary from the *de facto* findings of a criminal-law decision which has come into force.

In matters of infringement of road traffic regulations, the European Court of Human Rights has already pronounced on dual administrative and criminal procedures. Having noted that the withdrawal of a driving licence is serious enough to be considered as a punitive, deterrent measure and is analogous to a criminal sanction, it ruled that withdrawal of a driving licence ordered by an administrative authority following a criminal conviction for the same facts does not constitute a violation of Article 4.1 of Protocol no. 7 where the administrative measure derives directly and foreseeably from the conviction (cf. the judgment in the case of *Nilsson v. Sweden* of 13 December 2005, no. 73661/01). The close connection between both sanctions has led the European Court to conclude that the administrative measure is analogous to a penalty complementing the criminal conviction, and is an integral part of it (judgment *Mazni v. Romania* of 21 September 2006, no. 59892/00).

The *Zolotukhin* judgment did not go into dual administrative and criminal procedures in matters of road traffic offences. This field has a number of specific features. Despite its criminal aspect, the withdrawal of driving licences is an administrative sanction separate from the penal sanction and serves a primarily preventive and educational purpose. Moreover, the dual system laid down in the LCR means that only by ensuring the involvement of both authorities can the circumstances at issue be considered from the angle of all the relevant legal rules. Since not all the consequences of the criminal act could be judged concurrently, two authorities with different competences, empowered to order different types of sanction and pursuing different goals are successively called on to decide on the same circumstances under two separate procedures. This being the case, it cannot be inferred from the *Zolotukhin* judgment that all dual procedures laid down in legal systems should be proscribed. We must also acknowledge that the Federal legislature has clearly rejected the proposal to transfer responsibility for withdrawing licences to the criminal courts. There is consequently no reason to vary from the prevailing case-law, especially since Federal criminal procedure and the Cantonal administrative procedures provide all the safeguards laid down in the Federal Constitution and the European Convention on Human Rights.

*Languages:*

French.

*Identification:* SUI-2012-1-002

**a)** Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 21.11.2011 / **e)** 1C\_549/2010 / **f)** Alternative – Die Grünen party of Zug Canton and others v. Great Council and State Council of Zug Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 137 I 305 / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

1.3.5.8 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by federal or regional entities.**

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

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

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

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

*Keywords of the alphabetical index:*

Equality, effective / Equality between men and women, commission / Parliament, inaction / Parliament, obligations.

*Headnotes:*

Appeal against the failure to renew the Commission for Equality between Men and Women in Zug Canton. Article 8.3 of the Federal Constitution (equality between men and women) and Article 29.1 of the Federal Constitution (guarantee of a fair trial), Paragraph 5.2 of Zug Cantonal Constitution (equality between men and women), Article 2 of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The National Parliament's decision not to renew the Commission has no legislative or revocatory force; failure to examine the request for annulment (recital 1).

Examination of the request to force Zug Canton to lay down the legal bases for such a Commission; case-law and doctrinal statement on denial of justice or unjustified delays in issuing an order. The appellants must plausibly establish that the Cantonal legislature is required to take sufficiently decisive action. Capacity to act and to appeal (recital 2).

The obligation to guarantee effective equality between men and women is laid down in Article 8.3 of the Federal Constitution and Paragraph 5.2 of Zug Cantonal Constitution, as well as in the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW; recital 3). The Confederation and Cantons are required to discharge this duty under constitutional law and public international law, until such time as this goal has been achieved; they have discretionary powers solely vis-à-vis the means of carrying out this duty (recital 4). Zug Canton is obliged to provide an alternative to the former Commission and to determine by whom, how and with what resources the equality mission should be implemented in the future. On the other hand, it is not required to maintain an equality commission or to set up an office for the purpose (recital 5).

*Summary:*

In 1998, Zug Cantonal Parliament set up a Commission for Equality between Men and Women. The Commission's terms of reference and budget were limited to four years and were then regularly extended until the end of 2010. The Zug Cantonal Council of State presented Parliament with a proposal for extending this institution's term of office under a new title, assigning it wider powers for a period of eight years. Parliament rejected this proposal in October 2010, thus putting an end to the activities of the Commission for Equality between Men and Women.

A number of associations and private individuals lodged public-law appeals with the Federal Court asking it to set aside the Parliamentary decision and to force Zug Canton to continue the activities geared to ensuring equal rights between men and women by creating the requisite legal bases. The Federal Court rejected the appeal within the meaning of the recitals to the extent that it was admissible.

The Federal Court heard and determined the appeals against the Cantonal legislative measures. In the instant case, the Cantonal Parliament refused to set

up a new Commission for Equality between Men and Women or to issue any new legal provisions. This Parliamentary order is not a legislative measure, nor does it have revocatory force vis-à-vis any legal provisions.

The question therefore arises of the extent to which Zug Canton can be required to retain its provisions on the Commission for Equality between Women and Men or to lay down new provisions geared to ensuring such equality. The Federal Court has in the past dealt with several similar cases of appeals against alleged denials of justice involving inaction on the part of Cantonal Parliaments. The Federal Court has hitherto left the question open whether and under what conditions appeals against legislative inaction are possible. The Law on the Federal Court includes explicit provisions on denial of justice arising from inaction by a court or administrative body; individuals can therefore plead infringement of Article 29.1 of the Federal Constitution securing the right to a fair trial. On the other hand, the Law on the Federal Court comprises no regulations on inaction on the part of the legislature; individuals therefore cannot, in this case, adduce denial of justice or unjustified delays in issuing an order. They can, however, demonstrate that the legislature is duty-bound to act. In this hypothesis, a Federal or conventional law provision is needed in order to require Parliament, in sufficiently practical and clear manner, to adopt legislative provisions. Whether or not such a duty really exists is a question of substantive law.

Article 8.3 of the Federal Constitution secures equality between women and men as follows: Men and women have equal rights. The law provides for legal and factual equality, particularly in the family, during education, and in the workplace. Men and women have the right to equal pay for work of equal value. This means that the Constitution mandates authorities at all levels (Confederation, Cantons and municipalities) to ensure gender equality and take the requisite steps to achieve genuine equality in social realities. Banning discrimination is insufficient: the utmost must be done to combat prejudice and stereotyping, thus eliminating all forms of prejudice. However, the Constitution does not specify how these goals are to be achieved, but leaves extensive room for manoeuvre to the legislature regarding its choice of methods.

This constitutional mandate to guarantee effective equality is specified and clarified by the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). States Parties undertake to conduct, by all appropriate means and without delay, a policy geared to eliminating discrimination against women and to ensure the effective application

of these principles. The Convention clarifies these aims in specific fields such as political and public life, education and vocational guidance, social security, health and economic and social life. Moreover, it provides for such practical measures as prohibiting dismissals on the grounds of pregnancy or marital status. Many of the obligations set out in the Convention are general in nature, leaving the States Parties wide discretionary powers. In view of the special nature of the Convention, its various provisions are exempt from the traditional distinction between directly applicable rights and State obligations.

It is clear from the Federal Constitution, the Zug Cantonal Constitution and the Convention that the Confederation and the Cantons are mandated to guarantee equality between men and women, and that they are bound by this mandate until the relevant goal has actually been achieved. The authorities therefore have discretionary powers solely vis-à-vis the means of achieving this goal. At the Federal level, the Federal Law on equality between women and men provides for a Gender Equality Office to promote the achievement of gender equality in all fields, endeavouring to eliminate all forms of direct or indirect discrimination. The Cantons have set up similar institutions. There are, however, other possibilities for promoting equality between men and women and combating all forms of discrimination. Special officials in the various departments of the Cantonal administration could help guarantee equality in their specific fields. Staff working in a legislative section could be detailed to analyse the specific problems and ensure the effective implementation of equality. Some of these approaches could be used by the executive without the help of Parliament.

For all these reasons, Zug Canton is not required to restore the former Commission for Equality between Men and Women or to set up a similar body. It is, however, obliged to resort to other solutions and to define the means of implementing the constitutional mandate. On the other hand, it would be contrary to the Federal and Cantonal Constitutions and the Convention to abandon any attempt to promote gender equality and combat all forms of discrimination against women.

#### *Languages:*

German.



*Identification:* SUI-2012-1-003

**a)** Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 23.11.2011 / **e)** 2C\_349/2010 / **f)** X. and Y. v. Vaud Canton Population Department / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 137 I 351 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.  
 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.  
 5.3.34 Fundamental Rights – Civil and political rights – **Right to marriage**.

*Keywords of the alphabetical index:*

Asylum, procedure / Residence, lawfulness / Residence, permit.

*Headnotes:*

Obligation to establish lawfulness of residence in Switzerland during the preparatory procedure for marriage, compatibility with the safeguard on the right to marriage; Article 14 of the Federal Constitution (right to marriage and family), Article 12 ECHR, Article 14 of the Federal Law on asylum (exclusive asylum procedure), Article 98.4 of the Swiss Civil Code (obligation to establish lawfulness of residence).

The only exception to the principle of exclusive asylum procedure is where there is a “manifest” right to a residence permit (recital 3.1). Where a registry officer cannot conduct the marriage of a foreigner because he has not established the lawfulness of his residence in Switzerland, the Aliens Police authority must issue the latter with a temporary residence permit for the marriage, unless there is reason to believe that the law is being infringed and provided that in view of his personal situation it is clear that the person concerned will fulfil the conditions for admission to Switzerland once he is married; this interpretation ensures respect for the right of marriage and is compatible with the principle of exclusive asylum procedure (recital 3.8). Application to the instant case (recital 3.9).

*Summary:*

X., a Cameroonian national born in 1979, arrived in Switzerland in June 2003 and submitted an asylum application in the country. The Federal Refugee

Office refused to examine his application and ordered his expulsion. X. nevertheless remained in Switzerland.

In October 2010 X. applied for a residence permit with a view to marrying Y., a Cameroonian national holding a residence permit. X. and Y. had been living together since 2008. Y.’s first four children are from a former marriage with a Swiss national. X. has recognised Y.’s fifth child, born in 2008, as his daughter.

X. and Y. submitted a request for marriage on 6 March 2011. The registry officer set the engaged couple a time-limit of “60 days, non-extendable” to submit a document proving the lawfulness of X.’s residence in Switzerland, in accordance with Article 98.4 of the Swiss Civil Code (hereinafter, “CC”). According to this provision, engaged persons who are not Swiss citizens must establish the lawfulness of their residence in Switzerland during the preparatory procedure.

Under a decision of 11 March 2011, the Vaud Canton Population Department refused to examine the request for a residence permit submitted by X. in October 2010 on the basis of the principle of the exclusivity of asylum procedure. The appeal lodged by X. and Y. was rejected by the Cantonal Court of Vaud Canton.

X. and Y. lodged an appeal with the Federal Court against the aforementioned judgment. They contend that the refusal to grant them residence authorisation for at least the time required to prepare and conclude their marriage constitutes a violation of the right to marriage as secured under Article 12 ECHR. The Federal Court admitted the appeal to the extent of its admissibility and referred the case back to the Cantonal Department for a fresh decision within the meaning of the recitals.

According to case-law, an exception can only be made to the principle of the exclusivity of asylum procedure if the right to a residence permit as required under Article 14 of the Federal Law on asylum (hereinafter, “LASI”) appears “manifest”. Exceptions can be made to this principle under Article 8.1 ECHR, particularly in order to protect marital relationships. However, such an exception presupposes not only that there is a close, effective relationship between the spouses but also that the appellant is married to a person holding a guaranteed right of presence in Switzerland.

The appellants have been living together since 2007 and have a young daughter whom they have been raising together since her birth in July 2008. The

mother holds a guaranteed right of presence in Switzerland to the extent that she has custody rights and parental authority over her fourth child, who was born in February 2003 of a Swiss father, whose nationality he inherited. Therefore, X. could most likely claim a right to residence authorisation on the basis of Article 8.1 ECHR.

Case-law on the right to and respect for private and family life within the meaning of Article 8.1 ECHR enables foreign single persons to imply a right to a residence permit where there is sound evidence of a marriage which is desired and imminent with a person entitled to long-term residence in Switzerland. The Cantonal Court nevertheless dismissed this possibility in the instant case on the grounds that the planned marriage did not appear imminent.

The appellants first of all adduce the guarantee on the right to marriage secured under Article 12 ECHR. They claim that this guarantee was infringed by the Cantonal authorities' refusal, based on Article 14 LASI, to examine their application for residence authorisation with a view to concluding the planned marriage. They refer to the judgment of the European Court of Human Rights of 14 December 2010 in the case of *O'Donoghue and others v. United Kingdom* (no. 34848/07).

The *O'Donoghue* judgment implies that the right to marriage secured by Article 12 ECHR can also be claimed by foreigners residing irregularly in a member State. This also applies to the guarantee on the right to marriage enshrined in Article 14 of the Federal Constitution, which in principle must be enjoyed by all natural persons of full age, whatever their nationality – including stateless persons – or religion. The *O'Donoghue* judgment also suggests that systematically banning undocumented foreigners from marrying infringes Article 12 ECHR and that measures geared to combating marriages of convenience are only admissible if they are reasonable and proportionate.

In the light of these requirements, it must be admitted that the system established by the Swiss legislature may prove incompatible with the Convention in the case of foreigners who are irregularly present in Switzerland but nonetheless genuinely and sincerely wish to marry. Where the Aliens Police authority refuses to regularise their situation, even temporarily, they will be unable to go through with the desired marriage in Switzerland, by virtue of Article 98.4 CC. Such a practice would therefore lead to a general, automatic and undifferentiated ban on the exercise of the right to marriage for a whole category of individuals.

Article 98.4 CC provides no room for manoeuvre for registry officers dealing with requests for marriage from foreigners who have not established the lawfulness of their residence in Switzerland. Such persons have no alternative but to renounce marriage, in accordance with the Swiss legislature's wishes. In the instant case, in refusing to consider the appellants' application for marriage, the registry officer was merely drawing the conclusions from the Cantonal Department's decision rejecting X.'s request for a procedure to issue him with a residence permit, even a provisional one. To that extent the civil authority is bound by the decision of the Aliens Police authority.

Accordingly, it is for this authority, when conducting the residence permit procedure with a view to the marriage, to take account, in its decision, of the requirements vis-à-vis respect for the right to marriage and the proportionality principle. In order to apply the law in a manner complying with the Constitution and the Convention, the Aliens Police authorities must issue a residence permit for the marriage provided that there is no evidence of wrongdoing and that the person concerned is likely to fulfil the conditions for admission to Switzerland after the marriage.

Where, as in the instant case, the foreigner wishing to marry is a (rejected) asylum-seeker, the principle of the exclusivity of asylum procedure cannot prevent the opening of a residence authorisation procedure with a view to a marriage. On the one hand, the case-law requirement of a "manifest" right to a residence permit in order to counter the principle of the exclusivity of asylum procedure is wholly compatible with the similar conditions enabling a foreigner to await the outcome of proceedings in Switzerland. On the other hand, the legislature has clearly expressed its wish to prevent the introduction of Article 98.4 CC from causing violations of constitutional or conventional law.

In the instant case it must be acknowledged that the appellants are in a steady, reliable relationship and that their wish to marry is genuine and sincere. X. should therefore, after the marriage, be able to obtain residence authorisation on the basis of Article 8.1 ECHR by virtue of his future spouse's long-term right of presence. X. does have a police record, but only for minor offences.

Under these conditions, it must be accepted that X. fulfils all the conditions for obtaining residence authorisation for marriage. The challenged judgment should therefore be set aside and the case referred back to the Cantonal authority for re-examination.

*Languages:*

French.



## “The former Yugoslav Republic of Macedonia” Constitutional Court

### Important decisions

*Identification:* MKD-2012-1-001

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 24.11.2011 / e) U.br.147/2011 / f) / g) / h) CODICES (Macedonian, English).

*Keywords of the systematic thesaurus:*

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.**

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

3.16 General Principles – **Proportionality.**

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

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

*Keywords of the alphabetical index:*

Speech, political / Defamation.

*Headnotes:*

Statements about relations between natural persons that are not relevant and not of necessary interest to society and the general public may not be protected under freedom of expression, if they are untrue and infringe upon the rights of others.

*Summary:*

I. Ljubomir D. Frckoski from Skopje filed an individual complaint, claiming his freedom of thought and public expression had been violated by the courts (at first

instance by Skopje Basic Court and by the Court of Appeal in Skopje), which found him criminally guilty of libel and insult, and sentenced him.

The complaint had arisen after the applicant published an article in a column in the daily *Dnevnik* on 20.01.2009, with the headline “Frankfurt School vis-à-vis Demir Hisar School”. In this article, the applicant tried to critically analyse and draw a parallel between the political dialogue that ruled in the country and the presidential elections in 2009 (Note: the applicant was also a candidate during the presidential elections in 2009). The applicant metaphorically compared the “Frankfurt school” to prestige while the “Demir Hisar School” was likened to a provincial school (Note: Demir Hisar is a small, provincial town in south-western part of Macedonia). The column referred to the then presidential candidate of the party VMRO-DPMNE, Mr Gjorge Ivanov (Note: Mr Ivanov won the elections, and is currently the President of the Republic).

The applicant also noted that Svetomir Skaric, a retired professor at the “Justinian I” Faculty of Law in Skopje and now an Advisor to the President, had filed a private criminal action against him for “Insult” and “Libel.” In the article “Frankfurt school vis-à-vis Demir Hisar school,” the applicant allegedly made the following incriminating statements about Svetomir Skaric: “You owe little candidate, you owe...Nobody is asking you to pay back, but you owe. You owe me and Professor Micajkov for bringing you at the Faculty and fighting in the Academic Council to admit you. In the Council your current mentor Skaric was bloodthirstily against your admission (see record from the Academic Council at the Faculty of Law)”.

The applicant maintained that his constitutional right to thought and expression of thought was violated. Because the courts had incorrectly interpreted the provisions of the Criminal Code for “Libel” and “Insult”, he was wrongfully found guilty and sentenced.

II. The Constitutional Court took note of the relevant facts of the case, as determined by the first and the second instance courts, which are detailed in the full text of the decision. It based its legal opinion on Articles 8.1 of the Constitutional (specifically lines 1, 3 and 11, 11, 16.1, 25, 50.1, 54), Articles 12, 18 and 29.2 of the Universal Declaration for Human Rights, Articles 17 and 19 of the International Covenant for Civil and Political Rights, Articles 8 and 10 ECHR.

According to the Court, freedom of expression can be a very sensitive and complex issue, particularly when restrictions are imposed to balance the freedom with the right to privacy, honour and reputation of another

person. In this case, the contested column commented on the nomination of Mr Gjorge Ivanov for President of the Republic of Macedonia by the VMRO-DPMNE party. The applicant took an apparent stance against the nomination. The Court noted the courts had deemed that statements in the article should be treated as a text and integral to a debate on an issue of public interest. The election of a President is certainly a political issue of public interest. Hence, the courts’ assessment of the incriminating part of the column and grounds for the sentencing judgment in the interest of protecting the honour and reputation of the injured party should take place in that context.

a. Regarding the criminal offence of libel, according to the Court, it may not be disputed that the incriminating statement is a statement of fact whose truthfulness may be proven. Although the Court, as a higher instance court, is not competent to reassess the facts in light of protection accorded to freedom of expression, it nevertheless has the right and obligation to determine whether the courts enabled the defendant to prove the truthfulness of the incriminating statement. In this context, according to the Court, the applicant could have presented evidence about the truthfulness of his statement during the proceeding. In the absence of evidence that would categorically corroborate the truthfulness of the statement or demonstrate a strong ground to be considered as such, what remains for this Court is but to accept the finding of the courts that the statement was untrue.

According to the Court, the disputed statement in the article does not provide any relevant information to the public to form an opinion about that candidate for president of the state and to assess whether it will support him or not. In other words, the statement does not concern a debate on a public interest but derives from a purely private context focused on one natural person and his actions.

The Court noted that the relation between professor-mentor and candidate for an assistant, and their mutual relation (whether positive or negative) do not at all relate to the general public interest. Hence, their presentation in public is irrelevant and unjustified, especially if untrue. The Court emphasised that the presentation of facts about relations between natural persons that are not relevant and of necessary interest to society and wider public may not be covered under freedom of expression, if they are untrue and infringe upon the rights of others. This applies equally to statements where the court did not consider the relevance of the free printed medium and its role in the democratic society, and had excessively and disproportionately protected the honour and reputation of the private prosecutor.

There is no doubt for the Court that the presented statement objectively affects the honour and reputation of the injured party. Namely, honour and reputation are not acquired only by actions in the public sphere but also through a person's relation to other people where the integrity of the social relation may be based on respect, friendship, collegiality, sincerity, etc. Hence, a public, untrue statement about the relation of one person with another as well as the perception of the public about the conduct of the person in given situations may be questioned and deemed the source of violation of the honour and reputation of the individual as a friend, colleague, mentor, etc.

For these reasons, the Court found that the interference of the state is proportionate with the legitimate aim to protect the reputation of the injured party. In the judgment of this Court, the courts had based their decisions on an acceptable assessment of the relevant facts. The Court determined that the courts had fairly balanced the two rights by neither interpreting the principle of freedom of expression too restrictively nor interpreting the aim for the protection of the reputation of the injured party too extensively. The Court also found that the severity of the fine pronounced for libel is a moderate and proportionate measure within the circumstances of the case.

The Court found that all the legally relevant facts and circumstances, and the challenged decision for the criminal offence of "libel" had been taken into account. As such, the first instance and second instance courts had acted within the frameworks of their court competences in finding that the right to freedom of public expression of thought was not violated.

b. Regarding the criminal offence of "Insult", the Court acknowledged that the applicant in his column speaks about the nomination of Mr Gjorge Ivanov for President of the state and that the presidential election is undoubtedly a public interest. The applicant's expression of his opinion interfered in the private sphere and integrity of an individual who is not a public figure. According to the Court, the interference constituted an infringement upon the rights of others and may not be protected under freedom of expression. The Court also noted that the statements about the private prosecutor Mr Skaric were offensive and implied an insult against him. Therefore, the first and second instance courts had acted within the frameworks of their court competences when they found that the applicant guilty of insult. Consequently, the Court determined that the right to freedom of thought and public expression of thought were not violated because in exercising his right to freedom of public expression, the applicant had undermined another protected right of another citizen, namely that of Mr Skaric.

III. Judge Igor Spirovski disagreed with the majority decision on the offence of "Insult". He expressed the view in his dissenting opinion. He believed that the applicant's manner of expression, as a participant in the public debate on the nomination of Mr Ivanov for president of the state, had given rise to an issue of public interest. The applicant's use of the said comparison and its explication in the text do not generally exceed the frontiers of freedom of expression in a democratic society. In his opinion, the contested courts' judgments do not contain sufficient and convincing reasons for the conclusion that the incriminating value comparison, used in a political speech, was insulting and was directed at the injured party – Mr Skaric specifically. Therefore, the applicant's conviction for the criminal offence of "Insult" violates his right to freedom of public expression of thought.

*Languages:*

Macedonian.



# Ukraine

## Constitutional Court

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### Important decisions

*Identification:* UKR-2012-1-001

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 20.01.2012 / **e)** 2-rp/2012 / **f)** Official interpretation of the provisions of Articles 32.1, 32.2, 34.2 and 34.4 of the Constitution / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 9/2012 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

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

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:*

Public servant, confidentiality of information.

*Headnotes:*

Information regarding an individual's private and family life should be interpreted, under the Constitution, as including any information or data concerning relations of non-property and property character, circumstances, events and relationships related to an individual and his or her family members apart from information concerning persons holding office related to the performance of authorities of state and local self-government. Such information is confidential and its collection, storage, use and dissemination without the consent of the individual concerned by the state, local government bodies and legal and natural persons constitutes interference on his or her private and family life. Such interference is permissible only in cases provided by law and in the interests of national security, economic welfare and human rights.

*Summary:*

Articles 32.1 and 32.2 of the Constitution prohibit interference in personal and family life unless envisaged by the Constitution. The collection,

storage, use and dissemination of confidential information about a person without his or her consent is not permitted, except in cases determined by law, and only in the interests of national security, economic welfare and human rights. These requirements correspond with legislative provisions.

Under the Civil Code, the content of the right to inviolability of private and family life, which falls into the category of an individual non-property right, consists of the freedom of an individual to define his or her behaviour in the sphere of private life and the extent to which others can become familiar with it, and the right to maintain secrecy over the circumstances of his or her private life (Articles 270, 271 and 301 of the Civil Code). An individual cannot refuse personal non-property rights and should not be deprived of them (Article 269.3 of the Civil Code).

The Constitutional Court began by observing that a comprehensive definition of all types of behaviour of an individual in the sphere of private and family life is not possible; private and family rights form part of natural human rights which are inexhaustible and are implemented in various relations of property and non-property character. The right to private and family life is a fundamental value necessary for the full prosperity of an individual in a democratic society and his or her right to live an independent life.

The Court also held that attribution of confidentiality of information regarding somebody holding an office related to the performance of authorities of state or local government bodies and members of his or her family should be defined in each specific case. Somebody holding this type of office is entitled to protection of their rights but is subject to additional legal restrictions. The public character of both the subjects of authority and their officials necessitates disclosure of certain information for the formation of public opinion, in terms of trust in power and support of its authority in society.

Having analysed Articles 24.1, 24.2 and 32.1 of the Constitution, the Constitutional Court took the view that implementation of a right to inviolability of private and family life is guaranteed to all, irrespective of sex, political, property, social, language or other characteristics, and whether the person is in the public eye (such as civil servants, statesmen or public figures who have a certain role to play in political, economic, social or cultural life).

Providing the official interpretation of Article 32.1 and 32.2 of the Constitution, the Constitutional Court noted that personal data regarding the private and family life of an individual consists of information or a combination of data regarding an individual who is

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identified or may be specifically identified. This includes nationality, education, marital status, religion, health, financial condition, address, date and place of birth, place of residence or stay, data on personal property and non-property relationships between them and other persons, specifically family members, as well as information about events and occurrences which took place or take place in an individual's private or working life, except for information concerning the performance of authority by a person holding office connected with authorities of state or local government institutions. Such information on individuals and their family members is confidential and may only be disseminated with their consent except in cases provided by law and only in the interests of national security, economic welfare and human rights.

Article 34.1 and 34.2 of the Constitution guarantee the universal right to freedom of thought and speech, and the free expression of views and beliefs; everyone is entitled to freely collect, store, use and disseminate information by oral, written or other means of their choice. These constitutional provisions correspond with the provisions of the Civil Code regarding the right of the natural person to freely collect, use and disseminate information (Article 302.1.1).

Article 34.3, however, allows for the restriction by law of the exercise of rights to free collection, use and dissemination of information in the interests of national security, territorial indivisibility or public order, in order to prevent disturbances or crimes, to protect the public health and the reputation or rights of others, to prevent the publication of information received confidentially or to support the authority and impartiality of justice.

The Constitution sets out an exhaustive list of reasons for the restriction by law of rights to free associations, storage, use and dissemination of information; the implementation of these rights must not violate civil, political, economic, social, religious, ecological and the rights, freedoms and legal interests of other citizens and legal persons (Article 5.2 of the Law on Information dated 2 October 1992 no. 2657-XII), including the constitutional right of a person not to have his personal and family life encroached upon.

The provisions of Articles 32.1 and 34.3 of the Constitution, which are linked, envisage both the inadmissibility of violation of a right to inviolability of private and family life and implementation of a right to free collection, storage, use and dissemination of information.

Article 32.2 of the Constitution lists in full reasons for possible lawful interference into an individual's private and family life (including those holding office related to performance of authorities of state or local self-government and their family members), namely the individual's agreement to the collection, storage, use and dissemination of confidential information about him or her, and in the absence of such consent, in cases determined by law, and only in pursuance of national security, economic welfare and human rights.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2012-1-002*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 25.01.2012 / **e)** 3-rp/2010 / **f)** Official interpretation of the provisions of Articles 1, 95.1, 95.2, 95.3, 96.2, 116.2, 116.3, 116.6, 124.2 and 129.1 of the Constitution, 4.1.5 of the Budget Code, and 9.1.2 of the Code of Administrative Proceedings in conjunction with certain constitutional provisions / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 11/2011 / **h)** CODICES (Ukrainian).

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

3.5 General Principles – **Social State**.  
4.10.2 Institutions – Public finances – **Budget**.  
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.  
5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension**.

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

Social benefits and assistance, amount / Court, legal act, enforcement.

#### *Headnotes:*

One of the characteristics as a social state is provision for public needs in the sphere of social protection at the expense of the State Budget. This is dependent on the financial capacities of the state, which is obliged to distribute justly and impartially social wealth among citizens and territorial communities and to strive for a

balanced budget. The level of state guarantees of the right to social protection must be in line with the Constitution. Any changes to the mechanism of social benefits and assistance must conform to the principles of proportionality and justice.

The power of the Cabinet of Ministers in terms of drafting the law of the State Budget and ensuring the execution of a relevant law are related to its functions. The Cabinet of Ministers regulates the order and the scope of social benefits and assistance which are financed at the expense of the State Budget pursuant to the Constitution and laws.

When courts are dealing with cases on the social protection of citizens, they must be guided, in particular, by the principle of legality, which assumes the application of laws by courts (and legal acts of respective state bodies) adopted on the grounds, within the limits of authority and in the manner envisaged by the Constitution and laws.

#### *Summary:*

Ukraine as a social state recognises the human being as the highest social value and distributes the public wealth according to the principles of social justice. It is mindful of the consolidation of public consent in society.

The main objective of the social state is the creation of conditions for implementation of social, cultural and economic human rights, the facilitation of independence and responsibility of every person for his or her actions and the provision of social assistance for those citizens who cannot provide a sufficient standard of living for themselves and their families due to circumstances beyond their control.

In its Decision of 26 December 2011 no. 20-rp/2011, the Constitutional Court noted that the scale of social benefits depends on the state's social economic capabilities. The social protection the state offers for those entitled to such provision in cases of complete, partial or temporary disability, loss of a family breadwinner, unemployment due to circumstances beyond their control and in old age and in other cases established by law includes a set of measures which the state realises within the limits of its social economic capabilities.

The Constitutional Court noted that social protection for large swathes of the national population, including those in receipt of pensions and other types of social benefits and assistance, is provided at the expense of the budget costs. This obliges the state to abide by Article 95.1 and 95.3 of the Fundamental Law according to which the budgetary system is built on

the principles of just and impartial distribution of social wealth among citizens and territorial communities; the state aspires to a balanced budget.

Pursuant to the legal position the Constitutional Court outlined in its Decision of 26 December 2011 no. 20-rp/2011, the social economic rights envisaged by laws are not absolute; the state can change the mechanism for their implementation, particularly if it became impossible to continue with financial provision by means of proportional distribution of funds in order to maintain the balance of interests of society as a whole. Such changes may be driven by the need to prevent or eliminate real threats to economic security, the most important function of the state under Article 17.1.

Changes to the calculation of social benefits and assistance should be carried out pursuant to the criteria of proportionality and justice and are constitutionally admissible up to the limit where the essence of the content of the right to social protection comes into question.

The vesting by Parliament of the Cabinet of Ministers with the right to establish the order and scale of social benefits and assistance financed at the expense of the State Budget in cases provided by law relates to its functions as set out in Article 116.2 and 116.3 of the Constitution. The Cabinet regulates the order and scale of social benefits and assistance which are financed at the expense of the State Budget in accordance with the Constitution and laws.

Courts are obliged, by the constitutional principles of the law-based state and the rule of law, as well as recognition of the highest legal force of the Constitution, whose norms have direct effect (Articles 1 and 8 of the Fundamental Law) to be guided in their consideration of cases by the main principles of judicial proceedings envisaged by Article 129.3 of the Constitution and other principles of proceedings in courts of specific jurisdiction in cases determined by law (Article 129.4 of the Fundamental Law). Courts of administrative jurisdiction must act, when considering cases arising from litigation on the social protection of certain categories of citizens, in accordance with principles such as legality (cases are determined in line with the Constitution and laws) and with international treaties agreed to be binding by Parliament and in the application of other regulatory legal acts (Article 9.1.1 and 9.1.2 of the Code of Administrative Proceedings).

Legal acts of the Cabinet of Ministers which regulate budgetary relations (in particular issues of social protection at the expense of the State Budget) form part of budgetary legislation under Article 4.1.5 of the

Budget Code. Courts of general jurisdiction must therefore, when considering cases on social protection of rights of citizens, apply legal acts of the Cabinet of Ministers adopted on the grounds and in pursuance of the Budget Code and other legislation including the law on the State Budget for the relevant year.

Judges M. Markush, D. Lylak, P. Stetsiuk and V. Shyshkin attached a dissenting opinion.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2012-1-003

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 13.03.2012 / **e)** 6-rp/2012 / **f)** conformity with the Constitution of Article 7.1.2, Chapter VIII.2 “Final and Transitional Provisions” of the Law on Fundamentals of Preventing and Counteracting Corruption / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 23/2012 / **h)** CODICES (Ukrainian).

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

4.6.9 Institutions – Executive bodies – **The civil service.**

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

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

Public servant, extra-mural activity, restriction / Public servant, right of property, corporate rights.

#### *Headnotes:*

The 2011 Legislation on the Fundamentals of Preventing and Counteracting Corruption excluding certain persons from membership of a profit-seeking enterprise or organisation is in compliance with the Constitution is a provision that establishes a mechanism that the State may establish in order to prevent conflicts of interest from arising.

#### *Summary:*

I. The applicants, fifty-three People’s Deputies, asked the Constitutional Court to recognise as unconstitutional provisions of Article 7.1.2 of the Law on Fundamentals of Preventing and Counteracting Corruption of 7 April 2011 no. 3206-VI (hereinafter, the “Law”). This provision excluded certain persons indicated in Article 4.1.1 of the Law from membership of the governing body of a profit-seeking enterprise or organisation.

II. Certain rules of conduct are established by the Constitution and in the legislation, specifically restrictions on the off-duty activities of officials of state bodies and local government authorities. Such restrictions are constitutionally based; the engagement of such persons in certain activities outside work could result in a situation which is incompatible with the performance of their official duties due to conflict of interest. The State may establish legal mechanisms to prevent a conflict occurring or to resolve it.

Article 7.1.2 of the Law, viewed in conjunction with its provisions and other laws, indicates that those named in Article 4.1.1 of the Law cannot be members of any governing body of a profit-seeking enterprise or organisation. Unlike general meetings of participants of a profit-seeking enterprise, other governing bodies which are appointed by general meeting consist of officials performing their duties on a permanent basis on the grounds of civil or labour agreements or contracts (Article 48.3 of the Law on Commercial Associations, Articles 33.2.17, 51.3, 53.9 and 62.4 of the Law on Joint Stock Companies).

According to the legal position of the Constitutional Court “any activity performed “on a permanent basis” excludes its combination with certain positions in state bodies and bodies of local self-government which imply activities on the same permanent basis, in particular positions of heads of bodies of executive power” (paragraph 14 of item 2 of the reasoning part of Decision no. 14-rp/2002 dated 4 July 2002).

In support of their argument that the above provisions were unconstitutional, the People’s Deputies contended that the ban on belonging to the governing body of a profit-seeking enterprise or organisation extends to the ban on the persons indicated in Article 4.1.1 of the Law in general meetings of the shareholders of a commercial association, which does not conform to Article 41.1 of the Constitution.

Persons authorised to perform functions of the state and local self-government as well as other natural and legal persons are entitled to own, use and

dispose of their own property. This includes the acquisition and implementation of corporate rights.

Under Article 167.2 of the Commercial Code possession of corporate rights is not considered to be entrepreneurship. The law may, however, establish restrictions on the ownership and implementation of these rights by certain persons. One such restriction is provided by Article 7.1.2, excluding persons indicated in Article 4.1.1 of this Law from membership of the governing body or supervisory board of a profit-seeking enterprise or organisation, in particular from being head or member of a supervisory board, executive body, auditing committee, auditor of a commercial associations, or headship or membership of another body or association. The established prohibition does not apply to the ownership and/or implementation by persons authorised to perform functions of the state and local government of other corporate rights related to participation in the management of the operating activity of commercial associations.

Under Article 19.1 of the Constitution, the legal order in Ukraine is based on the principles according to which nobody can be compelled to do something that is not envisaged by legislation. Under Article 100.1 of the Civil Code, the right to participate in an association is a personal non-property right; it cannot be passed to other persons. Persons authorised to perform functions of the state and local self-government accordingly have the right to acquire shares or interests in a commercial association, manage it by participating in general shareholders' meetings and collect dividends and information about the association. They are also entitled to a share of its assets if it is liquidated.

The applicant also questioned the conformity with the Constitution of Chapter VIII.2 "Final and Transitional Provisions" of the Law, which stipulates that information on expenses is to be revealed in declarations on property, income, expenses and financial liabilities for 2011 from the date the Law enters into force.

Under Article 58.1 of the Constitution, laws and other normative legal acts have no retroactive force, except in cases where they mitigate or annul the responsibility of a person.

The Constitutional Court considered Chapter VIII.2 "Final and Transitional Provisions" of the Law in conjunction with Article 12.1 of the Law, according to which persons indicated in Article 4.1.1, Article 4.1.2.a must submit a declaration on property, income, expenses and financial liabilities for the

previous year before 1 April at the place of service indicated on the format stipulated by the Law.

The Constitutional Court found that because Article 12 came into force on 1 January 2012, the obligation of persons mentioned in Article 4.1.1, sub-item "a" of Article 4.1.2 to declare their expenses emerged from that date. Persons seeking to hold positions in state bodies and bodies of local government and those holding relevant positions shall declare their expenses from 1 January 2012 in the format indicated in the Law.

At the same time, Chapter VIII.2 "Final and Transitional Provisions" of the Law established control over expenses performed by the above persons during the period from 1 July 2011 till 31 December 2011, i.e. over relations which had emerged before Article 12 entered into force. This violated the constitutional requirement regarding the irreversibility of the effect of laws and other normative legal acts.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2012-1-004*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 04.04.2012 / **e)** 7-rp/2010 / **f)** Conformity with the Constitution of the provisions of Article 22.2 of the Law on the Elections of the People's Deputies concerning proportional assignment of electoral voting stations abroad to all single-seat electoral districts established on the territory of the capital / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 29/2011 / **h)** CODICES (Ukrainian).

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

4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members.**  
 4.9.4 Institutions – Elections and instruments of direct democracy – **Constituencies.**  
 4.9.9.1 Institutions – Elections and instruments of direct democracy – Voting procedures – **Polling stations.**  
 5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections.**

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

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

*Keywords of the alphabetical index:*

Electoral voting stations, abroad / Electoral district, single-seat.

*Headnotes:*

Provisions within the 2011 Legislation on the Elections of the People's Deputies, which stipulated proportional assignments to all single-seat electoral districts established on the territory of the capital for electoral voting stations abroad, have resulted in a significant increase in the number of voters who are not tied to the territorial community of the capital and do not guarantee the reflection of the will of those voters living there. They also stand in the way of the right to be elected of parliamentary candidates running for election in single-seat electoral districts in the capital; their opportunities to shape the expression of will of voters residing or staying abroad are limited.

*Summary:*

I. The applicants, fifty-nine People's Deputies, asked the Constitutional Court to recognise as unconstitutional several provisions of Article 22 of Law no. 4061-VI on the Elections of the People's Deputies of 17 November 2011 (hereinafter, the "Law"). These stipulate that electoral voting stations abroad are to be formed by the Central Election Commission at Ukrainian diplomatic establishments and military units abroad, with proportional assignments to all single-seat electoral districts established on the territory of the capital – the city of Kyiv.

Under Article 1.1 and 1.3 of the Law, People's Deputies are to be elected by the citizens on the basis of universal, equal and direct suffrage by secret vote under a mixed electoral system (proportional and majority voting). The Law also allows for the election of 225 People's Deputies (out of a total of 450) under the proportional system in the national multi-seat electoral district according to the electoral lists of candidates from political parties, the remaining 225 are elected under the system of relative majority in single-seat electoral districts (Article 1.2 and 1.3).

Article 18.1 and 18.2 of the Law provide for elections of People's Deputies to be held in the national multi-seat electoral district, which includes the whole

territory of Ukraine and electoral voting stations abroad, and in 225 single-seat electoral districts. These are to be formed by the Central Election Commission and will exist on a permanent basis. Single-seat electoral districts are to be formed in the Autonomous Republic of Crimea, oblasts, the cities of Kyiv and Sevastopol with approximately equal number of voters in each district; approximate average number of voters in single-seat electoral districts shall be determined by the Central Election Commission in accordance with the information of the State Register of voters. Deviations in the number of voters in a single-seat electoral district must not exceed 20 % of the approximate average number of voters.

Under the Law, the Central Election Commission must form voting stations abroad, following the establishment of single-seat electoral districts, with proportional assignments to all single-seat electoral districts, formed on the territory of the capital – the city of Kyiv (items 6.2, 6.3, 6.4 of Chapter XV "Final and Transitional Provisions").

The Central Election Commission must therefore establish single-seat electoral districts in the city of Kyiv taking into consideration the number of voters who, at the point these districts are established, are included in the State Register of Voters in the capital as well as the 20 % limit of deviation from the approximate average number of voters in single-seat electoral districts, not including voters registered in the State Register who are residing or staying abroad.

II. It was accordingly found that the requirement established in Article 22.2 of the Law regarding proportional assignment of voting stations abroad to all single-seat electoral districts, formed on the territory of the capital, taking account of the proportion of voters residing or staying abroad and voters in the city of Kyiv, does not comply with Article 18.2 of the Law, which sets out the definitive limit of deviation of the number of voters in the single-seat electoral district (up to 20 % from the approximate average number of voters in single-seat electoral districts).

Proportional assignment of voting stations abroad to all single-seat electoral districts causes a significant increase in the number of voters who are not tied to the territorial community of the city of Kyiv. Implementation of the provisions of the Law according to which voters living or staying abroad vote for parliamentary candidates in the single-seat electoral districts, formed on the territory of the capital, does not guarantee the reflection of the will of those voters living on the territory of the capital.

The provisions of the Law also stand in the way of the implementation of the right to be elected of parliamentary candidates running for election in the single-seat electoral districts in the city of Kyiv; their opportunities to shape the expression of the will of voters residing or staying abroad are limited.

The proportional assignment of voting stations abroad to all single-seat electoral districts established on the territory of the capital under Article 22.2 of the Law does not provide equal and free electoral rights for those voters residing or staying outside Ukraine and who, under the existing proportional and majority electoral system, can only realise such rights under the proportional component of the mixed vote system.

Judges V. Shyshkin and P. Stetsiuk attached a dissenting opinion.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2012-1-005

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 05.04.2012 / **e)** 8-rp/2010 / **f)** Constitutional compliance of Articles 52.5, 98.10.2 and 99.3 of the Law on Elections of the People's Deputies (case on the nomination of candidates for People's Deputies under the mixed electoral system) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 30/2011 / **h)** CODICES (Ukrainian).

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

4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members.**

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

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

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

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

Election, candidate, list / Election, vote, influence.

#### *Headnotes:*

Provisions of the 2011 Legislation on the election of People's Deputies do not provide equal influence of electoral votes on the results of parliamentary elections. This is out of line with the constitutional principle of equal electoral rights.

#### *Summary:*

Under Articles 77.3 and 92.1.20 of the Constitution, the organisation and procedure for conducting elections of People's Deputies are established exclusively by laws which are adopted on the grounds of and in conformity with the Constitution.

Under Law no. 4061-VI on Elections of the People's Deputies of 17 November 2011, (hereinafter, the "Law"), People's Deputies are elected on the basis of universal, equal and direct suffrage by secret ballot under the mixed (proportional and majority) electoral system (Article 1.1 and 1.3). Parliament is comprised of 450 People's Deputies (under Article 76.1 of the Fundamental Law). 225 of them are elected under the proportional system in the national multi-seat electoral district according to the electoral list of candidates from political parties. The remaining 225 are elected under the majority system of relative majority in single-seat electoral districts.

Article 52.5 of the Law allows somebody on the electoral list of candidates for People's Deputies from a political party to be in a simultaneous ballot in one of the single-seat electoral districts. A candidate in this position has a better chance to realise his or her right to be elected as a People's Deputy than candidates for the same office who are only running in a single-seat electoral district. This provision runs counter to the principle of equal electoral rights and is in breach of Articles 8, 38.1, 71.1 and 76.1 of the Constitution.

Articles 98.10.2 and 99.3 of the Law provide that if, during the establishment of the results of the elections it becomes apparent that somebody has been elected a People's Deputy under both the electoral list of candidates in the national multi-seat electoral district and in a single-seat electoral district, he or she will be deemed to have been elected a People's Deputy in a single-seat electoral district. A decision will be taken to the effect that this candidate has not attained the deputy's mandate in the national multi-seat electoral district. The elected People's

Deputy is deemed to be the next candidate on the electoral list of candidates from the political party concerned. These provisions are connected with Article 52.5 of the Law.

The Constitutional Court found that as Article 52.5 of the Law is in breach of the Constitution, Articles 98.10.2 and 99.3 of the Law, which are closely linked to it, also contravene the Fundamental Law as they do not provide equal influence of electoral votes on the results of parliamentary elections, which runs counter to the constitutional principle of equal electoral right.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2012-1-006

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 12.04.2012 / **e)** 9-rp/2010 / **f)** Official interpretation of the provisions of Article 24 of the Constitution (equality of parties to proceedings) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 32/2011 / **h)** CODICES (Ukrainian).

#### *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.**

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

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

Convicted person, participation, civil proceedings.

#### *Headnotes:*

Under the Constitution, all persons (whether they are citizens of the Ukraine, foreigners or stateless persons) are equal before the law and enjoy equality in their constitutional rights and freedoms. The state guarantees their rights and freedoms within the judicial order and they are entitled to participate in the

consideration of their cases in courts of all jurisdictions, specialisation and instances. This also applies to convicted persons serving sentences in correction facilities.

#### *Summary:*

I. The applicant asked the Constitutional Court for an official interpretation of the provisions of Article 24 of the Constitution, which relate to the right of a convicted person serving a sentence in a correction facility to be transferred to a court in order to participate in civil proceedings.

Under Article 24.1 and 24.2 of the Fundamental Law, citizens have equal constitutional rights and freedoms and are equal before the law; there are no privileges or restrictions based on race, colour of skin, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics.

Foreigners and stateless persons staying in Ukraine on a legal basis enjoy the same rights and freedoms and shoulder the same responsibilities as citizens of Ukraine, subject to exceptions established by the Constitution, laws or international treaties (Article 26.1 of the Fundamental Law). This provision is stated in Article 7.4 of Law no. 2453-VI on the Judicial System and Status of Judges of 7 July 2010.

Equality of all people in their constitutionally guaranteed rights and freedoms brings with it the need to ensure equal legal possibilities for the realisation of rights and freedoms which are identical in content and scope. Application to a court in a law-based state is a universal mechanism for the protection of the rights, freedoms and legal interests of natural and legal persons.

The main principles of judicial proceedings are legality, equality before the law and access to court for all participants in a trial, adversarial procedure and the freedom of the parties to present their evidence and prove its weight before the court (Article 129.3.1, 129.3.2 and 129.3.4 of the Fundamental Law).

Nobody is to be restricted in his or her right for access to justice (including the right to initiate judicial examination and to participate directly in a trial) or deprived of such a right.

Under Article 63.3 of the Fundamental Law a convicted person enjoys all human and citizens' rights, subject to restrictions determined by law and established by court decision.

Every person has a right to participate in the consideration of his or her case in courts of all instances in the order established by the procedural law (Article 7.3 of the Law on the Judicial System and Status of Judges). However, the law makes no provision for somebody who has been convicted and is serving a sentence (in the form of arrest, restriction of freedom, detention in a penal battalion, deprivation of freedom for a certain term or for life) to participate in the consideration of a judicial case.

II. The Constitutional Court concluded that the personal participation of somebody in the situation outlined above as a party to the proceedings creates preconditions for the comprehensive, objective and impartial consideration of a case. This right should be safeguarded by the appropriate procedural law, in courts of all jurisdictions, specialisation and instances. Decisions as to the procedure for their participation in the consideration of a case should be adopted by a court in the order and under the conditions established by the relevant procedural law.

#### *Languages:*

Ukrainian.



## United States of America Supreme Court

### Important decisions

*Identification:* USA-2012-1-001

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 21.03.2012 / **e)** 10-209 / **f)** Lafler v. Cooper / **g)** 132 *Supreme Court Reporter* 1376 (2012) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

4.7.15 Institutions – Judicial bodies – **Legal assistance and representation of parties.**  
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**  
5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel.**

*Keywords of the alphabetical index:*

Counsel, right, effective / Plea bargaining, right / Plea bargaining, received offer / Counsel, ineffective, remedy / Plea bargain, rejection due to ineffective counsel.

*Headnotes:*

The constitutional right of assistance of counsel in criminal proceedings is a right to effective assistance of counsel.

The right to effective assistance of counsel applies to certain steps before trial, including the plea bargaining process.

An accused does not have a constitutional right to receive a plea bargain; however, when one has been offered he or she has a right to effective counsel in regard to the decision whether or not to accept it by entering a guilty plea and waiving the right to a trial.

To satisfy the requirements for a claim that he or she has not received effective assistance of counsel, an accused must show that the assistance was ineffective and that he or she was prejudiced as a result.

To show prejudice from ineffective assistance of counsel where a plea offer has been rejected because of counsel's deficient performance, an accused person must show a reasonable possibility that the outcome of the plea process would have been different with competent advice; thus, he or she must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed.

When the right to effective counsel has been violated due to inadequate assistance during plea negotiation, if an offered plea was for less serious counts than those for which the accused was found guilty at trial, then the proper remedy will be to require the prosecution to offer the plea again.

#### *Summary:*

I. Anthony Cooper was charged under the laws of the State of Michigan with assault with intent to murder and three other charges. The prosecution offered to dismiss two of the charges and to recommend a sentence of 51 to 85 months for the other two, in exchange for a guilty plea. Cooper rejected the offer, allegedly after his defence counsel convinced him that the prosecution would not be able to establish his intent to murder the victim. At trial, Cooper was convicted on all four counts and received a mandatory minimum sentence of 185 to 360 months in prison.

In a post-conviction motion in state court, Cooper claimed that his defence counsel's advice to reject the plea offer denied him the effective assistance of counsel as guaranteed under the Sixth Amendment to the U.S. Constitution. The Sixth Amendment states in relevant part that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...and to have the Assistance of Counsel for his defence." The Due Process Clause of the Fourteenth Amendment makes the Sixth Amendment applicable to the States. In its 1984 decision in *Strickland v. Washington*, the U.S. Supreme Court ruled that the Sixth Amendment right to counsel is the right to effective assistance of counsel.

The state trial court rejected Cooper's claim. The Michigan Court of Appeals affirmed. Cooper then filed a petition in federal court, and the federal trial court ruled that the Michigan Court of Appeals had unreasonably applied the constitutional standards set forth in *Strickland v. Washington*. As a remedy, the federal court ordered specific performance of the original plea offer. The Federal Court of Appeals for the Sixth Circuit affirmed, and U.S. Supreme Court accepted the case for review.

II. The Supreme Court affirmed the decision of the Sixth Circuit Court of Appeals. It applied the two-part test established in *Strickland v. Washington*, under which a claimant must show that defence counsel had been ineffective and that as a result the claimant had been prejudiced. The parties agreed that the defence council's assistance was deficient. Thus, the primary question before the Court was how to apply the *Strickland* prejudice test when ineffective assistance resulted in an accuser's rejection of the plea offer and the accused subsequently was convicted at trial. In such a context, the Court said, the *Strickland* prejudice test requires an accused to show a reasonable possibility that the outcome of the plea process would have been different with competent advice. Thus, he or she must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed. The Court concluded that Cooper's claim satisfied these requirements.

The Court's determination that prejudice could result in the circumstances of Cooper's case represented a rejection of an argument presented by the State of Michigan and the U.S. Solicitor General. According to that argument, *Strickland* prejudice cannot arise from plea bargaining if the accused is later convicted at a fair trial. Put another way, a fair trial wipes clean any deficient performance by defence counsel during plea bargaining. The Court, however, disagreed. Citing the fact that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas, the Court declared that the right to effective assistance of counsel "cannot be defined or enforced without taking account the "central role" that plea bargaining plays in the criminal justice system.

The Court also addressed the question of the proper remedy. It stated that Sixth Amendment remedies for ineffective assistance of counsel should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests. Thus, a remedy must neutralise the taint of

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a constitutional violation but at the same time not grant a windfall to a defendant or needlessly squander the resources the State properly invested in the criminal prosecution. If the offered plea was for less serious counts than those for which the accused was found guilty at trial, then the proper remedy according to the Court would be to require the prosecution to offer the plea again. The judge can then decide, the Court stated, whether to vacate the conviction from trial and accept the plea, or leave the conviction undisturbed. Therefore, the Court concluded that the federal court's specific performance remedy in the instant case was incorrect; instead, the federal court should have ordered the State to offer the plea again. The Supreme Court therefore vacated the judgment and remanded the case back to the federal court.

III. The Court's judgment was adopted by a 5-4 vote. The views of the four dissenting Justices were presented in two dissenting opinions.

#### *Supplementary information:*

The Supreme Court decided *Lafler v. Cooper* on the same day that it ruled in *Missouri v. Frye*, another case that addressed a claim of ineffective assistance of counsel in the plea bargaining process [USA-2012-1-002]. According to commentators, these two decisions have added a broad new dimension – what has been termed the field of “plea-bargaining law” – to criminal procedure practice and Sixth Amendment jurisprudence.

#### *Cross-references:*

- *Strickland v. Washington*, 466 United States Reports 668, 104 *Supreme Court Reporter* 2052, 80 *Lawyers' Edition* 2d 674 (1984), *Bulletin* 2012/1 [USA-2012-1-002].

#### *Languages:*

English.



#### *Identification: USA-2012-1-002*

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 21.03.2012 / **e)** 10-444 / **f)** Missouri v. Frye / **g)** 132 *Supreme Court Reporter* 1399 (2012) / **h)** CODICES (English).

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

4.7.15 Institutions – Judicial bodies – **Legal assistance and representation of parties.**

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

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

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

Counsel, right, effective / Plea bargaining, right / Plea bargain, more favourable conviction, reasonable probability / Counsel, ineffective / Plea bargain, counsel, ineffective.

#### *Headnotes:*

The constitutional right of assistance of counsel in criminal proceedings is a right to effective assistance of counsel.

The right to effective assistance of counsel applies to certain steps before trial, including the plea bargaining process.

An accused does not have a constitutional right to receive a plea bargain; however, when one has been formally offered he or she has a right to effective counsel in regard to the decision whether or not to accept it by entering a guilty plea and waiving the right to a trial.

Because plea bargains are central to the criminal justice system, defence counsel have responsibilities in the plea bargaining process that must be met to render the effective assistance of counsel that the Constitution requires.

To satisfy the requirements for a claim that he or she has not received effective assistance of counsel, an accused must show that the assistance was ineffective and that he or she was prejudiced as a result.

When defence counsel allows a plea offer to expire without advising the defendant or allowing him to consider it, defence counsel does not render the effective assistance the Constitution requires.

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, accused persons must demonstrate a reasonable probability that: they would have accepted the earlier plea offer had they been afforded effective assistance of counsel; the plea would have been entered without cancellation by the prosecution or refusal of the court to accept it if they have authority to exercise such discretion; and the end result of the criminal process would have been more favourable.

### Summary:

I. In 2007, in the State of Missouri, Galin Frye was arrested for operating a motor vehicle after his driver's license had been revoked. Due to earlier similar violations, he was charged with a felony crime that carries a maximum term of imprisonment of four years.

Prior to Frye's jury trial, the prosecutor sent a letter to Frye's defence counsel that included an offer to reduce the charge to a misdemeanour and to recommend, if Frye would plead guilty, a 90-day prison sentence to the court. Frye's defence counsel did not inform Frye about the prosecutor's offers, and they expired. Frye subsequently pleaded guilty without an underlying plea agreement and the trial court sentenced him to three years in prison.

Frye then filed for post-conviction relief in state court. He alleged that his counsel's failure to inform him of the prosecution's plea offer denied him the effective assistance of counsel as guaranteed under the Sixth Amendment to the U.S. Constitution. The Sixth Amendment states in relevant part that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...and to have the Assistance of Counsel for his defence." The Due Process Clause of the Fourteenth Amendment makes the Sixth Amendment applicable to the States. In its 1984 decision in *Strickland v. Washington*, the U.S. Supreme Court ruled that the Sixth Amendment right to counsel is the right to effective assistance of counsel. The Court in *Strickland* established a two-part test: a claimant must show that defence counsel had been ineffective and that as a result the claimant had been prejudiced.

The trial court subsequently denied Frye's post-conviction motion, but the Missouri Court of Appeals reversed. The U.S. Supreme Court accepted the case for review.

II. The Supreme Court affirmed the decision of the Missouri Court of Appeals. The Court first addressed the State of Missouri's argument that a right to effective assistance of counsel was not implicated because Frye had not accepted the prosecutor's offered plea bargain and that therefore Frye had the opportunity for a full trial and all the constitutional guarantees, including that of effective assistance of counsel, that accompany it. The Supreme Court rejected the State's argument, concluding that the right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected. The Court, citing the fact that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas, observed that plea bargains have become central to the criminal justice system. Therefore, plea bargaining as a whole is a critical stage of a criminal proceeding and defence counsel must meet responsibilities in the plea bargain process "to render the adequate assistance of counsel that the Sixth Amendment requires." The Court pointed out that there is not a constitutional right to receive a plea bargain, but the right to effective counsel is invoked in circumstances where one has been formally offered.

The Court then applied the two-step *Strickland* test to the decision of the Missouri Court of Appeals in the instant case. The Court concluded that the Court of Appeals had correctly applied an objective reasonableness standard to determine that defence counsel's assistance was ineffective. The Court then turned to the question of whether prejudice had occurred in these circumstances. The Court said that in order to show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, accused persons must demonstrate a reasonable probability that they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. In addition, accused persons must demonstrate a reasonable probability that the plea would have been entered without cancellation by the prosecution or refusal of the trial court to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, the Court said it is necessary to show a reasonable probability that the end result of the criminal process would have been more favourable by reason of a plea to a lesser charge or a sentence of less prison time. The Court concluded that the Missouri Court of Appeals had failed to require Frye to show that the plea offer would have been adhered to by the prosecution and accepted by the trial court. Therefore, the Court remanded these questions to the Court of Appeals.

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III. The Court's judgment was adopted by a 5-4 vote. The four dissenting Justices joined in a dissenting opinion.

*Supplementary information:*

The Supreme Court decided *Missouri v. Frye* on the same day that it ruled in *Laffler v. Cooper*, another case that addressed a claim of ineffective assistance of counsel in the plea bargaining process. According to commentators, these two decisions have added a broad new dimension – referred to as the field of “plea-bargaining law” – to criminal procedure practice and Sixth Amendment jurisprudence.

*Cross-references:*

- *Strickland v. Washington*, 466 *United States Reports* 668, 104 *Supreme Court Reporter* 2052, 80 *Lawyers' Edition* 2d 674 (1984), *Bulletin* 2012/1 [USA-2012-1-002].

*Languages:*

English.



*Identification:* USA-2012-1-003

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 02.04.2012 / **e)** 10-945 / **f)** *Florence v. Board of Chosen Freeholders of the County of Burlington* / **g)** 132 *Supreme Court Reporter* 1510 (2012) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.20 General Principles – **Reasonableness**.  
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.  
 5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty**.  
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

*Keywords of the alphabetical index:*

Prison, contraband, search / Prison, detainee, rights / Search, body, visual / Strip-search.

*Headnotes:*

Correctional facility officials' regulations impinging on the constitutional rights of detainees will be valid if they are reasonably related to legitimate penological interests.

Correctional facility officials must be permitted to devise reasonable policies for body searches of detainees in order to detect and deter the possession of prohibited contraband in their facilities.

Courts should defer to correctional officials' expert judgment as to the requirements for body searches of detainees in the absence of substantial evidence in the record to indicate that officials have exaggerated their response.

Reasonable policies for body searches may be applied to all correctional facility detainees, regardless of the reasons for an individual detainee's lawful detention.

*Summary:*

I. In 2005, Albert Florence was a passenger in an automobile driven by his wife when a State of New Jersey police officer ordered her to stop because she appeared to be exceeding the speed limit. During the stop, the police officer checked a state-wide database and found that a warrant had been issued in 2003 for Mr Florence's arrest because he purportedly had failed to pay a monetary fine imposed in an earlier judicial proceeding. Because of the warrant, Florence was arrested and detained at a detention centre in the New Jersey County of Burlington. Six days later, he was transferred to a correctional facility in Essex County. On the seventh day after the arrest, he was released when the authorities learned that he indeed had paid the fine prior to 2005 and that the warrant erroneously had not been deleted from the database.

Upon his detention at both the Burlington County detention centre and the Essex County facility, Florence was subjected to search procedures required for all entering detainees. He was required to remove all of his clothing and assume certain positions (including his lifting of his genitals) for purposes of close visual inspections in which officers looked for body markings and prohibited items (contraband) such as weapons or drugs. The inspecting officers did not touch any unclothed areas of Florence's body. In its opinion in the instant case, the U.S. Supreme Court noted that the term “strip-search” had been applied to describe these inspections; however, the Court cautioned that this term is imprecise because it could mean various types of instructions or procedures they were not part of Florence's inspections.

After his release, Florence filed a civil lawsuit in U.S. federal court against the government agencies involved in his detention, alleging that the inspection procedures violated the Fourth and Fourteenth Amendments to the U.S. Constitution. The Fourth Amendment guarantees the right of the people to be “secure in their persons...against unreasonable searches and seizures.” The Due Process Clause of the Fourteenth Amendment makes the Fourth Amendment applicable to the States and their subdivisions. Florence claimed that under the Fourth Amendment detainees being processed for minor offenses (not serious crimes or offenses involving weapons or drugs) prior to a determination of guilt should not be required to undress and expose their private parts for visual inspections unless the authorities have reason to suspect a particular detainee of concealing a weapon, drugs, or other contraband.

The U.S. District Court upheld Florence’s complaint, ruling that a search of the type he experienced, “without reasonable suspicion”, violates the Fourth Amendment when it is imposed on an individual not subject to indictment for a crime. The U.S. Court of Appeals for the Third Circuit reversed that decision, and the U.S. Supreme Court accepted the case for review.

II. The Supreme Court affirmed the decision of the Court of Appeals. The Court concluded that the search procedures at the two detention facilities struck a reasonable balance between respect for a detainee’s privacy and institutional security and public health interests; therefore, the Fourth Amendment does not require adoption of the rule that Florence proposed.

The Court’s ruling was grounded on its conclusion that the “difficulties of operating a detention centre must not be underestimated by the courts.” The maintenance of safety and order at such institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face. Therefore, as a general matter, courts must uphold regulations impinging on detainees’ constitutional rights if they are reasonably related to legitimate penological interests. In this regard, the Court observed, correctional officials have a significant interest in conducting a thorough body search as a standard part of the intake process of detainees. This is because the admission of detainees creates numerous risks for facility staff, for the existing detainee population, and for new detainees themselves.

As a result of these considerations, the Court stated that correctional officials must be permitted to devise reasonable search policies to detect and deter the possession of prohibited contraband in their facilities. Therefore, courts should defer to correctional officials’ expert judgment in the absence of substantial evidence in the record to indicate that officials have exaggerated their response. The Court also observed that the seriousness of an offense is not a good predictor of which individuals might have prohibited items, and cited the difficulty of determining whether an individual detainee would qualify for Florence’s proposed exemption.

The Court also stated that its decision would not require a ruling on the types of searches that would be reasonable in particular circumstances: for example, where a detainee will be held without assignment to the general prison population and will not be in substantial contact with other detainees.

III. The Court’s judgment was adopted by a 5-4 vote. Two Justices in the majority filed concurring opinions, and the four dissenting Justices joined in a dissenting opinion.

#### *Supplementary information:*

As noted above, the Court’s opinion warned that the use of the term “strip-search” is imprecise and therefore was not suitable for describing the search procedures imposed on Mr Florence. However, the term is included in the Keywords of the alphabetical index section above, as well as the Summary, because of the frequent use of the term in common usage including the extensive commentary and news media reporting regarding the Supreme Court’s decision.

#### *Languages:*

English.



## **Systematic thesaurus (V21) \***

\* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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<sup>1</sup> This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

<sup>2</sup> Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

<sup>3</sup> For example, rules of procedure.

<sup>4</sup> For example, age, education, experience, seniority, moral character, citizenship.

<sup>5</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>6</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>7</sup> Vice-presidents, presidents of chambers or of sections, etc.

<sup>8</sup> For example, State Counsel, prosecutors, etc.

<sup>9</sup> (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

<sup>10</sup> For example, assessors, office members.

<sup>11</sup> (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

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<sup>13</sup> Referrals of preliminary questions in particular.

<sup>14</sup> Enactment required by law to be reviewed by the Court.

<sup>15</sup> Review *ultra petita*.

<sup>16</sup> Horizontal distribution of powers.

<sup>17</sup> Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

<sup>18</sup> Decentralised authorities (municipalities, provinces, etc.).

<sup>19</sup> For questions other than jurisdiction, see 4.9.

<sup>20</sup> Including other consultations. For questions other than jurisdiction, see 4.9.

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<sup>22</sup> As understood in private international law.

<sup>23</sup> Including constitutional laws.

<sup>24</sup> For example, organic laws.

<sup>25</sup> Local authorities, municipalities, provinces, departments, etc.

<sup>26</sup> Or: functional decentralisation (public bodies exercising delegated powers).

<sup>27</sup> Political questions.

<sup>28</sup> Unconstitutionality by omission.

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<sup>32</sup> May be used in combination with Chapter 1.2. Types of claim.

<sup>33</sup> For the withdrawal of the originating document, see also 1.4.5.

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<sup>36</sup> Only for issues concerning applicability and not simple application.

<sup>37</sup> This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

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<sup>41</sup> Includes the principle of social justice.

<sup>42</sup> See also 4.8.

<sup>43</sup> Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

<sup>44</sup> Including maintaining confidence and legitimate expectations.

<sup>45</sup> Principle according to which general sub-statutory acts must be based on and in conformity with the law.

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<sup>47</sup> Including compelling public interest.

<sup>48</sup> Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

<sup>49</sup> Including questions of treason/high crimes.

<sup>50</sup> Including prohibition on monopolies.

<sup>51</sup> For the principle of primacy of Community law, see 2.2.1.6.

<sup>52</sup> Including the body responsible for revising or amending the Constitution.

<sup>53</sup> For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

<sup>54</sup> For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

<sup>55</sup> For example, the granting of pardons.

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<sup>56</sup> For regional and local authorities, see Chapter 4.8.

<sup>57</sup> Bicameral, monocameral, special competence of each assembly, etc.

<sup>58</sup> Including specialised powers of each legislative body and reserved powers of the legislature.

<sup>59</sup> In particular, commissions of enquiry.

<sup>60</sup> For delegation of powers to an executive body, see keyword 4.6.3.2.

<sup>61</sup> Obligation on the legislative body to use the full scope of its powers.

<sup>62</sup> Representative/imperative mandates.

<sup>63</sup> Including the convening, duration, publicity and agenda of sessions.

<sup>64</sup> Including their creation, composition and terms of reference.

<sup>65</sup> State budgetary contribution, other sources, etc.

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<sup>67</sup> For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

<sup>68</sup> For local authorities, see 4.8.

<sup>69</sup> Derived directly from the Constitution.

<sup>70</sup> See also 4.8.

<sup>71</sup> The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

<sup>72</sup> Civil servants, administrators, etc.

<sup>73</sup> Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

<sup>74</sup> Other than the body delivering the decision summarised here.

<sup>75</sup> Positive and negative conflicts.

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<sup>76</sup> Notwithstanding the question to which to branch of state power the prosecutor belongs.

<sup>77</sup> For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

<sup>78</sup> Comprises the Court of Auditors in so far as it exercises judicial power.

<sup>79</sup> See also 3.6.

<sup>80</sup> And other units of local self-government.

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<sup>81</sup> See also keywords 5.3.41 and 5.2.1.4.

<sup>82</sup> Organs of control and supervision.

<sup>83</sup> Including other consultations.

<sup>84</sup> For questions of jurisdiction, see keyword 1.3.4.6.

<sup>85</sup> Proportional, majority, preferential, single-member constituencies, etc.

<sup>86</sup> For example, *Panachage*, voting for whole list or part of list, blank votes.

<sup>87</sup> For aspects related to fundamental rights, see 5.3.41.2.

<sup>88</sup> For the creation of political parties, see 4.5.10.1.

<sup>89</sup> For example, names of parties, order of presentation, logo, emblem or question in a referendum.

<sup>90</sup> Tracts, letters, press, radio and television, posters, nominations, etc.

<sup>91</sup> For the access of media to information, see 5.3.23, 5.3.24, in combination with 5.3.41.

<sup>92</sup> Impartiality of electoral authorities, incidents, disturbances.

<sup>93</sup> For example, signatures on electoral rolls, stamps, crossing out of names on list.

<sup>94</sup> For example, in person, proxy vote, postal vote, electronic vote.

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<sup>95</sup> This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

<sup>96</sup> For example, Auditor-General.

<sup>97</sup> Includes ownership in undertakings by the state, regions or municipalities.

<sup>98</sup> Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

<sup>99</sup> For example, Court of Auditors.

<sup>100</sup> The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

<sup>101</sup> *Staatszielbestimmungen*.

<sup>102</sup> Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

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<sup>103</sup> Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

<sup>104</sup> Positive and negative aspects.

<sup>105</sup> For rights of the child, see 5.3.44.

<sup>106</sup> The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

<sup>107</sup> Includes questions of the suspension of rights. See also 4.18.

<sup>108</sup> Taxes and other duties towards the state.

<sup>109</sup> Universal and equal suffrage.

<sup>110</sup> 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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<sup>111</sup> For example, discrimination between married and single persons.

<sup>112</sup> This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

<sup>113</sup> Detention by police.

<sup>114</sup> Including questions related to the granting of passports or other travel documents.

<sup>115</sup> May include questions of expulsion and extradition.

<sup>116</sup> Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.

<sup>117</sup> In the meaning of Article 6.1 of the European Convention on Human Rights.

<sup>118</sup> This keyword covers the right of appeal to a court.

<sup>119</sup> Including the right to be present at hearing.

<sup>120</sup> Including challenging of a judge.

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<sup>121</sup> Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

<sup>122</sup> This keyword also includes the right to freely communicate information.

<sup>123</sup> Militia, conscientious objection, etc.

<sup>124</sup> Aspects of the use of names are included either here or under "Right to private life".

<sup>125</sup> Including compensation issues.

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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.



## **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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