

THE BULLETIN

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

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

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

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

The decisions are presented in the following way:

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

T. Markert

Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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

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

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Republic of Korea	J. Kim / H. Lee		

European Court of Human Rights A. Vilfan Vospernik / L. Pardoe || Court of Justice of the European Union | R. Meyer / S. Hackspiel |
| Inter-American Court of Human Rights | J. Recinos |

Strasbourg, August 2013

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There was no relevant constitutional case-law during the reference period 1 September 2012 – 31 December 2012 for the following countries:

Albania, Algeria, Azerbaijan, Japan, Lithuania, Luxembourg, Netherlands.

Précis of important decisions of the reference period 1 September 2012 – 31 December 2012 will be published in the next edition, *Bulletin* 2013/1, for the following countries:

Brazil, Slovenia.

Armenia

Constitutional Court

Statistical data

1 September 2012 – 31 December 2012

- 99 applications have been filed, including:
 - 11 applications, filed by the President
 - 85 applications, filed by individuals
 - 3 applications, filed by the Human Rights Defender
- 37 cases have been admitted for review, including:
 - 16 applications, based on individual complaints concerning the constitutionality of certain provisions of laws
 - 15 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution
 - 1 case on the basis of the application of the 1/5 of the Deputies of the National Assembly
 - 5 applications, filed by the Human Rights Defender
- 26 cases heard and 26 decisions delivered (including decisions on applications filed before the relevant period) including:
 - 14 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution
 - 8 decisions on cases initiated on individual complaints concerning the constitutionality of certain provisions of laws
 - 4 decisions, filed by the Human Rights Defender

Important decisions

Identification: ARM-2012-3-003

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 23.10.2012 / **e)** / **f)** On the conformity with the Constitution of the provisions of Criminal Procedure Code / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Protection, judicial / Appeal, time-limit, reasonable.

Headnotes:

Effective exercise of the right to judicial protection by appealing an inferior court's judgment depends on the accessibility of the judgment to the interested person. It also depends on whether the duration of time in which interested person may present a grounded appeal for judicial protection of his or her rights was reasonable. The appellant should dispose of the judgment in order to be able to understand the grounds on which the breach of material or procedural law is based and its effect on the outcome of the case.

Summary:

I. The applicant argued that the calculation of the time-limit for the appeal begins "from the moment of the pronouncement," as set out in the Criminal Procedure Code. For the applicant, this moment occurs after the court announces the final part of the judgment. However, after the calculation of the time-limit starts, the appellant has yet to have knowledge of the substantive part of the judgment, which includes obtaining the necessary data for the appeal. This means that the appellant does not have a real possibility to appeal. The applicant also argued that for the regulation to appeal the decision rejecting the recognition of the appeal time-limit to be respected, it should be presented to the judge who made that decision.

II. The Constitutional Court considered whether the guarantee for the protection of the right to judicial protection under Article 380 of the Criminal Procedure Code concerning the consideration of the deadline to be respected, completely ensures the constitutional right to judicial protection. The Court stated that the legislature has endowed the courts with broad discretion to define the deadline to be respected. In this regard, the Court asserted that this regulation does not ensure the effective exercise of the right to judicial protection, as it leads to uncertainty. The Court also stipulated that in all those cases where the

deadline for an appeal is not respected due to reasons unrelated to acts, the courts shall recognise that the deadline has been respected.

The Court also reviewed the constitutionality of the first and second parts of Article 380 of the Criminal Procedure Code. Regarding the issue of whether judges who rejected the recognition of the deadline for an appeal should be the same judges who would be presented the application to appeal such decision, the Court found that this is within the discretion of the legislature. The Court considered the right to appeal that decision to be an essential guarantee in the framework of the mentioned regulation. In this regard, the Court stated that the commencement of the time for bringing the appeal against decisions to reject the recognition that the deadline to be respected shall be counted from the moment the appellant actually received the judgment or from the moment the judgment in fact may become accessible to the addressee by law.

The Court noted that the calculation of the deadline for an appeal from the moment of the pronouncement of the judgment, *per se*, is acceptable. Within this regulation, Article 402 of the Criminal Procedure Code, in accordance with which the judgment shall be sent to the parties to the procedure, is in systemic correlation with the challenged norms. Also, the notion “is sent” shall be interpreted and implemented as “is handed”.

Languages:

Armenian.



Identification: ARM-2012-3-004

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 18.12.2012 / **e)** / **f)** On the conformity with the Constitution of the provisions of Judicial Code / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

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

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:

Protection, judicial / Appeal / Proper response / Judicial power, Council of Justice.

Headnotes:

In legal practice, receiving a proper response within reasonable time is a constitutional right. Any ground that justifies the circumvention of this requirement, even if established by law, is without base, as the third part of Article 3 stipulates that the state is limited by the fundamental rights and freedoms of a human being and citizen as directly acting rights.

Summary:

I. The applicant challenged the sixth point of Article 111 and the first point of Article 158 of the Judicial Code. In accordance with Article 111, the decisions of the Council of Justice are not subject to appeal. For the applicant, the right to appeal is one of the elements of the right to access the court and the right to judicial protection. The Administrative Court, however, refused to admit the lawsuit concerning the decision of the Council of Justice. The applicant challenged the regulation, which allows the decisions of the disciplinary commission of the Council of Justice on refusal to initiate disciplinary proceeding to not be challenged. The applicant also noted that the Council of Justice is not included in the system of judicial bodies described by the Constitution; consequently, it is not endowed with the power to perform justice.

II. The Constitutional Court stated that the constitutionally defined notion of “proper response” not only assumes the form of the response or presence of it in general. It also means that the response shall be legitimate and with necessary justifications. In a legal state, this requirement may neither be circumvented by public officials, nor by state or self-government bodies, including the Disciplinary Commission of the Council of Justice.

Concerned with the constitutional status of the Council of Justice, the Court stressed that it is considered an independently acting subsystem, which has its definite constitutional functions in the sphere of guaranteeing the functional effectiveness of the judicial power. The Court also stated that the

functions of the Council of Justice do not go beyond the realisation of the constitutional function of assessing the performance of the official obligations of the judges and the official usefulness of the judges

As for the argument of the applicant, concerned with the expression of Article 158, which defines the Council of Justice as “acting as a court”, the Constitutional Court found that this definition relates to the form of the activity of the Council, not to its functional role as a court performing justice.

Taking into account the prohibition of appealing the decisions of the Council of Justice, the Constitutional Court recognised that it is necessary to determine whether there are enough guarantees within the regulation for it to be considered legitimate. The Court stressed the presence of such guarantees, which are the following: the Council of Justice has a constitutional basis, the concrete scope of the authorities of the Council of Justice is stipulated by the Constitution, independence and impartiality are the principles of the activity of the Council of Justice, and the Council of Justice performs just, public consideration of the case in reasonable time.

Based on the aforementioned, the Constitutional Court recognised the expression “acts as a court” to be constitutional. The regulation on prohibition of appeal of the decisions of the Council of Justice was recognised to be constitutional within the constitutional content expressed in this decision. In accordance with it, the Disciplinary Commission of the Council of Justice is obliged to provide reasons for the refusal to initiate proceedings in case it rejects the applicant’s application.

Languages:

Armenian.



Austria Constitutional Court

Important decisions

Identification: AUT-2012-3-004

a) Austria / b) Constitutional Court / c) / d) 11.10.2012 / e) B 99/12-8, B 100/12-8 / f) / g) / h) www.icl-journal.com; CODICES (German).

Keywords of the systematic thesaurus:

5.3.8 Fundamental Rights – Civil and political rights – **Right to citizenship or nationality.**
5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent.**
5.3.33.2 Fundamental Rights – Civil and political rights – Right to family life – **Succession.**
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Child, best interests / Citizenship, acquisition, condition / Motherhood, protection / Surrogacy.

Headnotes:

Declaring the non-acquisition of Austrian citizenship by descent because of presumed birth by a Ukrainian surrogate mother violates the right to respect for private and family life. In the context of the principle of the welfare of the child it is “inconceivable” to assume that surrogate motherhood is inconsistent with the public order and, consequently, not to recognise Ukrainian birth certificates.

Summary:

I. The applicants in these proceedings are twins born in Ukraine in June 2010 and currently in the custody of Mrs and Mr L., a married Austrian couple living in Vienna. Birth certificates issued in Ukraine show Mrs and Mr L. as the twins’ parents. According to the complaint, the couple underwent *in vitro* fertilisation resulting in Mrs L. becoming pregnant and giving birth to the twins by caesarean section. Under Section 7 of the Austrian Citizenship Act (*Staatsbürgererschaftsgesetz, StbG*) children acquire Austrian

citizenship by descent if their mother is an Austrian citizen at the time of birth. If Mrs L. had given birth to the twins as claimed by the couple, it would be beyond doubt that they are Austrian citizens. However, when Mr L. applied for passports for the children, the Austrian Embassy in Kiev suspected that Mrs L. might not have given birth to the twins but that an unknown Ukrainian surrogate mother had.

Because of this suspicion, the Federal Minister of the Interior requested the Government of Vienna (hereinafter, the "authority") to issue a decision declaring whether or not the twins were Austrian citizens. The couple presented (*inter alia*) the Ukrainian birth certificates, both bearing a certificate (apostille) in accordance with Article 3 of the Hague Convention Abolishing the Requirement for Legalisation for Foreign Public Documents (*BGBI.* 27/1968).

The authority issued two decisions stating that the twins were not Austrian citizens. It noted that surrogacy is unlawful under Section 3.3 of the Austrian Artificial Reproduction Act (*Fortpflanzungs-medizingesetz, FMedG*) and that according to Section 137b Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*) the mother of a child is the woman who gave birth to it. However, surrogacy is lawful under Ukrainian law. Under Article 123 of the Ukrainian Family Law Act, a child who is born after an embryo has been conceived by spouses using assisted reproductive technologies and transferred into the body of another woman is the child of the spouses. Referring to this regulation of surrogacy under Ukrainian law, the authority held that the Ukrainian birth certificates did not prove that Mrs L. was the mother of the twins. The authority – assuming the prohibition of surrogacy and the regulation of legal maternity to be part of the Austrian public order – argued that surrogate arrangements concluded by Austrian citizens under Ukrainian law could not be recognised under Austrian law. It accordingly concluded that the twins had not acquired Austrian citizenship by descent and were not Austrian citizens.

These decisions were challenged before the Austrian Constitutional Court. The applicants alleged violations of their constitutionally guaranteed rights to equal treatment and their right to respect for private and family life.

II. The Constitutional Court began by emphasising that relations between a child and its parents are protected by the right to family life guaranteed by Article 8 ECHR. Consequently, a child's right to acquire the citizenship of its parents by descent also falls within the scope of Article 8 ECHR. According to

the case-law of the Court, an authority's decision that interferes with the right to respect for private and family life violates Article 8 ECHR if the decision is based on a law or statute incompatible with Article 8 ECHR or if the authority has applied the relevant provisions in an "inconceivable" (*"denk unmöglich"*) manner. In this particular case, the Court found that the Government of Vienna had applied the relevant provisions in an "inconceivable" manner and had thus violated Article 8 ECHR.

Referring to its Decision of 14 December 2011, B 13/11, VfSlg. 19.596/2011 (regarding the citizenship of children born through surrogacy in Georgia, USA), the Court reiterated that the regulation of artificial reproduction technologies under the Austrian Artificial Reproduction Act – including the prohibition of surrogacy – and the related provisions regarding the legal family status in the Austrian Civil Code are neither part of the Austrian public order nor is there a constitutional obligation to provide for regulations of this kind.

It seemed clear to the Court that it would not be in the child's best interests either to refuse to recognise the biological and factual mother with whom he or she was living as the legal mother or to force a surrogate mother who does not want the child and who, under the family law applicable to her is not the legal mother, into legal maternity. Also, if the biological parents (i.e. the parents whose gametes were used to conceive the embryo) are not recognised as the legal parents of a child born through surrogacy, there are a number of rights the child cannot invoke against his or her biological parents even if he or she is living with them, including the right to succession. Finally, in cases such as the present one, children born through surrogacy in a foreign state whose nationality is not acquired by the mere fact of being born on the state's territory (which is the case in Ukraine) would be stateless, if the legal family status acquired in the state of birth were not recognised.

In view of Article 8 ECHR and the crucial role played by the principle of the welfare of the child in the balancing of conflicting interests, the Court held that in such cases, legal parenthood should be determined according to the relevant foreign law and that appropriate and authentic public foreign certificates should be regarded as relevant evidence for the acquisition of citizenship by descent according to Section 7 StbG.

In the context of the principle of the welfare of the child, the assumption by the authority that because surrogacy is unlawful in Austria, whereas it is legal in Ukraine, the Ukrainian birth certificates could not be recognised and Ukrainian law could not be applied in the present case should, in the Court's view, be

regarded as “inconceivable”. Consequently, the Court rescinded the challenged decisions, on the basis of a breach of Article 8 ECHR.

Languages:

German.



Belarus Constitutional Court

Important decisions

Identification: BLR-2012-3-005

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 16.10.2012 / **e)** D-763/2012 / **f)** On the conformity of the Law “On Making Alterations and Addenda to the Law “On Pension Provision” to the Constitution / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2012 / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension.**

Keywords of the alphabetical index:

Pension, amount / Pension, old age / Pensioner, working.

Headnotes:

A legislative amendment enacted to increase the rate of the old age pension responds to the character of a social State and is in accordance with constitutional rules. The amendment allows persons to continue labour activities without receiving a pension and to thereby acquire the right to a pension increase, while applying for a pension.

Summary:

I. The Constitutional Court in the exercise of obligatory preliminary review (the Court conducts abstract review of all laws adopted by Parliament before they are signed by the President) considered the constitutionality of the Law “On Making Alterations and Addenda to the Law “On Pension Provision”.

II. The Constitutional Court noted the following in its decision.

The constitutional right to social provision and social protection includes the right of citizens to provision at old age, including through the appointment of labour pensions to the entitled persons (old age pension, disability pension, long-service pension, etc.). The old age pension as a kind of labour pension is assigned in connection with previous labour activities of the person and it is one of the forms of social protection. These factors determine the content and nature of the obligation of the State regarding the citizens who acquired the right to receive the said pension.

The impugned law amended Article 231 of the Law “On Pension Provision” to provide for an increase in the rate of pensions on 6, 8, 10 and 12 % of earnings from which the pension is calculated, for each full first, second, third and fourth year of work respectively, and on 14 % of the earnings for the full fifth and every following year of work, where a person continues to work without receiving a state pension after acquiring the right to receive the old age pension. Where a person continues to work without receiving a pension for a period less than a year, the earnings from which the pension is calculated are increased by 1 % for each full two months of every partial year of work. This pension increase is added to the above-mentioned increase.

The legislator provided that the term “work without receiving state pension that gives the right to increase the pension” means periods of work, entrepreneurial, creative, and other activities for which payment of compulsory insurance contributions was made to the Social Security Population Fund of the Ministry of Labour and Social Protection in accordance with the legislation on social insurance.

The Constitutional Court held that the legislative amendment enacted to increase the rate of the old age pension takes into account the current demographic and economic situation in the Republic of Belarus. While receiving a pension, individuals are guaranteed the right to an increase in the pension rate (pension increase in proportion to the period during which the person works/continues to work and does not realise his right to pension) and thus allows them to secure a more dignified standard of living. This responds to the character of a social State, as enshrined in Article 1 of the Constitution, which is obliged to take all measures at its disposal to establish the domestic order necessary for the full exercise of the rights and freedoms of the citizens of the Republic of Belarus that are specified by the Constitution (part one of Article 59 of the Constitution).

The Constitutional Court recognised the Law “On Making Alterations and Addenda to the Law “On Pension Provision” to be in conformity to the Constitution.

Languages:

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



Identification: BLR-2012-3-006

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 28.11.2012 / **e)** D-779/2012 / **f)** On the Right of Employees to Reimbursement of Travel Expenses for Business Trips / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2012 / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 3.12 General Principles – **Clarity and precision of legal provisions**.
 5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation**.
 5.4.5 Fundamental Rights – Economic, social and cultural rights – **Freedom to work for remuneration**.

Keywords of the alphabetical index:

Compensation, right / Travel, expenses, reimbursement.

Headnotes:

Conditions in subordinate legislation limiting the right of an employee to compensation for expenses incurred on a business trip are incompatible with the right to such compensation, guaranteed by the Labour Code. The legislation must be amended to address this incompatibility.

Summary:

I. A number of citizens made applications to the Constitutional Court challenging the lawfulness of regulations which preclude the reimbursement of travel expenses for business trips where the claimant is unable to produce the original tickets and other travel documents as part of the claim.

II. The Court began by asserting that employment on a contractual basis as a form of exercise of the constitutional right to work (Article 41 of the Constitution) is inseparably linked with ensuring employees' labour rights, guaranteed by the Labour Code, including the right for compensation of expenses related to the fulfillment of labour duties. An employee may be sent on a business trip by order of his or her employer. The Labour Code stipulates that an employee has a right to the reimbursement of expenses incurred in such a business trip, which also includes relevant travel expenses. The procedure and amount of reimbursement is established by the Government of the Republic of Belarus or an authorised body.

For the implementation of the above-mentioned rules the Ministry of Finance and the Ministry of Labour and Social Protection adopted Instructions setting forth the reimbursement of travel expenses for business trips to the employee only upon the provision of original travel documents. Thus, according to the said instructions the employee's right to reimbursement for travel expenses for business trips (Article 95 of the Labour Code) cannot be realised without the provision of original travel documents. The said right cannot be realised even if the fact of having taken the business trip is confirmed by other documents.

The Constitutional Court pointed out that where an employee is unable to produce original travel documents he or she is actually deprived of the right to reimbursement for travel expenses incurred on a business trip due to the procedure stipulated by the Instructions. The Constitutional Court accordingly held that the right of an employee to compensation for business trip expenses, established by the Labour Code, cannot be limited by subordinate acts of the Ministry of Finance and the Ministry of Labour and Social Protection.

The Constitutional Court in ensuring the constitutional principle of supremacy of law, legality and equity for implementation of employee's right to compensation of travel expenses deemed it necessary to eliminate the identified conflict of legal regulation and proposed to the Council of Ministers to change the legal regulation of the procedure of reimbursement of travel expenses for business trips to employees.

Languages:

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



Belgium

Constitutional Court

Important decisions

Identification: BEL-2012-3-013

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 22.11.2012 / **e)** 144/2012 / **f)** / **g)** *Moniteur belge* (Official Gazette), 23.01.2013 / **h)** CODICES (French, Dutch, German).

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.**

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

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

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

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

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

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

5.5.1 Fundamental Rights – Collective rights – **Right to the environment.**

Keywords of the alphabetical index:

Building permit, parliamentary ratification / Environmental permit, parliamentary ratification / Building permit, procedure for granting / Constitutional Court, jurisdiction, legislation, drafting / Constitutional Court, jurisdiction, constitutional and international provisions / Aarhus Convention, judicial review / Aarhus Convention, legislative act / Environment, protection, Aarhus Convention / Environment, protection, access to a court / Environment, impact assessment / Court of Justice of the European Union, preliminary ruling / Court of Justice of the European Union, Constitutional Court, dialogue / Judicial procedures, parliamentary interference.

Headnotes:

A system for the adoption or ratification of building or environmental permits by a parliamentary assembly is consistent with the Constitution, taken together with the applicable rules of international law (Aarhus Convention and Directive 85/337/EEC of 27 June 1985), only to the extent that it provides either for a substantive examination by the parliamentarians based on adequate information concerning the project submitted (in which case the system is not covered by the Convention or the Directive) or for judicial review both of the basic conditions governing these permits and the procedure prior to their adoption (where the authorisation system is covered by the Convention or the Directive).

When conducting a review in the light of the Convention taken together with provisions of European law, the Court may, if appropriate, ask the Court of Justice of the European Union for a preliminary ruling on questions relating to the interpretation of those provisions.

Summary:

Several applications for annulment and preliminary questions were submitted to the Court in respect of the Walloon Region decree of 17 July 2008 “on some permits for which there are overriding public-interest grounds”. All the cases were joined by the Court.

By adopting Articles 1 to 4 of the impugned decree, the Parliament of the Walloon Region empowers itself to issue a series of urban planning and environmental permits following a special procedure. Permits are normally issued by the administrative authorities, but those referred to in Article 1 of the decree can be granted under the special procedure, on “compelling public-interest grounds”, by the Parliament of the Walloon Region (in federal Belgium, the regions are responsible for issuing urban planning and environmental permits).

Articles 5 to 17 of the impugned decree state that a series of specific permits which had been granted by the administrative authorities (a number of which were the subject of annulment proceedings before the State Council) are ratified by the Walloon Parliament, which thus gives them legislative force with retrospective effect.

The Parliament’s involvement rules out *de facto*, in the cases covered by the decree, the jurisdiction of the State Council, which normally, as the supreme administrative court, has jurisdiction to decide at last instance on appeals against urban planning and environmental permits.

In the applications for annulment and preliminary questions submitted to the State Council, it was argued that the impugned decree would lead to a situation where the permit decisions in question were removed from the State Council's power of review and could only be submitted to review by the Court, although the possibilities of appeal offered by the latter were not as wide as those open to interested third parties before the State Council.

The main question put to the Court was whether there was not in fact an infringement of the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) and the right to protection of a healthy environment (Article 23 of the Constitution) taken together with Articles 3.9 and 9.2 to 9.4 of the Aarhus Convention on "access to information, public participation in decision-making and access to justice in environmental matters" and with Article 10bis of Directive 85/337/EEC of 27 June 1985 on "the assessment of the effects of certain public and private projects on the environment".

The Court, which has direct review jurisdiction in respect of Articles 10, 11 and 23 of the Constitution, also assumes jurisdiction for verifying, when reviewing legislative provisions in relation to the provisions mentioned above, that the provisions submitted to it for review are compatible with the rules of international law and European law by which Belgium is bound and which are alleged to have been violated in combination with the aforementioned constitutional provisions, as, in the instant case, the invoked provisions of the Aarhus Convention and Directive 85/337/EEC.

In its Judgment of 16 February 2012, C-182/10, *Solvay and Others*, the Court of Justice of the European Union answered a series of preliminary questions which the Constitutional Court had referred to it in its Judgment no. 30/2010 of 30 March 2010, concerning the interpretation of certain provisions of the Aarhus Convention and Directive 85/337/EEC.

In its Judgment no. 144/2012, the Court finds that it does not itself have jurisdiction to conduct an exhaustive substantive and procedural review of the steps preceding the ratification or adoption of the permits in question. The jurisdiction of the Constitutional Court is therefore not sufficient to meet the requirements of judicial review when projects fall within the scope of the Aarhus Convention and Directive 85/337/EEC.

The Court next considers whether the difference of treatment between the category of citizens who may be adversely affected by the permits in question and the category of citizens who can challenge a permit

before the State Council, which can assess both compliance with the basic conditions governing the impugned permit and the procedure prior to its adoption, can be reasonably justified.

Referring to the answer given by the Court of Justice in the *Solvay* Judgment, the Court finds that the provisions of international and EU law do not preclude the possibility that some projects might form part of a system where authorisation is granted by a legislative assembly without any judicial review, provided the project is adopted in detail by a specific legislative act and, during the legislative procedure, the members of the assembly are provided with sufficient information about the design and scale of the project to be able to assess its main effects on the environment.

With regard to the permits ratified under Articles 5 to 17 of the decree, the Court finds that the projects were the subject of a simple "ratification" which meets neither the requirements of judicial review nor those of a "specific legislative act" within the meaning of the provisions of European law.

For the parliamentary ratification of permits under Articles 1 to 4, the Court also finds that the special procedure provides neither for the possibility of substantive examination by the parliamentarians nor for the provision to them of adequate information on the project in question. Consequently, it offers no guarantee that the requirements of European law with regard to "specific legislative acts" will be satisfied.

The Court holds that the majority of the impugned decree provisions must be annulled and that the preliminary questions on the annulled provisions have become devoid of purpose. The preliminary questions on the other decree provisions call for an affirmative answer (violation) as these provisions infringe the right of residents to an effective remedy against the permits in question.

Supplementary information:

- See also the Court's Judgment no. 30/2010 referring preliminary questions to the Court of Justice of the European Union and the reply from the Court of Justice in the Judgment of 16.02.2012, C-182/10, *Solvay and Others*.
- For a list of the 19 judgments (from 1997 up to the end of 2012) in which the Court has referred preliminary questions to the Court of Justice of the European Union, see www.const-court.be – preliminary questions to the Court of Justice.

- Article 10bis of Directive 85/337/EEC of 27.06.1985 on “the assessment of the effects of certain public and private projects on the environment” is largely reproduced at present in Article 11 of Directive 2011/92/EU of the European Parliament and the Council of 13.12.2011 on “the assessment of the effects of certain public and private projects on the environment”.
- The State Council has itself referred preliminary questions to the Court of Justice of the European Union, which replied in its Judgments of 18.10.2011 (C-128/09 to C-131/09, C-134/09 and C-135/09, *Boxus and Others*) and of 17.11.2011 (C-177/09 to C-179/09, *Le poumon vert de la Hulpe and Others*).

Languages:

French, Dutch, German.



Identification: BEL-2012-3-014

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 06.12.2012 / **e)** 145/2012 / **f)** / **g)** *Moniteur belge* (Official Gazette), 25.01.2013 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest**.
 2.1.1.4.18 Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000**.
 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
 2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation**.
 3.10 General Principles – **Certainty of the law**.
 3.12 General Principles – **Clarity and precision of legal provisions**.
 3.13 General Principles – **Legality**.
 3.14 General Principles – **Nullum crimen, nulla poena sine lege**.
 5.2 Fundamental Rights – **Equality**.
 5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion**.

5.2.2.9 Fundamental Rights – Equality – Criteria of distinction – **Political opinions or affiliation**.

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

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

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.

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

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

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

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

5.3.32 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:

Wearing the veil, prohibition of the full-face veil, criminal sanctions / Religion, dress, restrictions / Individuality of the person, face / Equality of the sexes / Democratic society, living together.

Headnotes:

By empowering the legislature to determine in which cases and in what form criminal prosecution is possible, Article 12.2 of the Constitution guarantees to all citizens that their actions will only be punishable under rules adopted by a democratically elected deliberative assembly.

Furthermore, the principle of legality in criminal matters proceeds from the concept that criminal law must be framed in terms allowing everyone to know, at the time of taking an action, whether or not it is punishable. It requires the legislature to specify, in terms that are sufficiently clear and precise and offer legal certainty, which acts will attract a sanction, so as to ensure, on the one hand, that the person taking an action is able to make a satisfactory prior assessment of the criminal consequences of that action, and on the other, that the courts are not given too much discretion.

However, the principle of legality in criminal matters does not preclude the law from conferring a power of discretion on the courts. Account needs to be taken of the general character of laws, the variety of situations to which they apply and the changing nature of the actions they are intended to punish.

Dress requirements may vary in time and place. However, some mandatory limits may be imposed on them in public spaces. No type of conduct may be permitted for the sole reason that it is justified on religious grounds. Freedom of expression and freedom of religion are not absolute. Provided it does not take the form of an act aimed at the destruction of recognised rights or freedoms, even the rejection of the fundamental values of our democratic society may be expressed, but the manner of expressing it is subject to restrictions. It is left to the discretion of the legislature to determine the restrictions to those freedoms which may be deemed necessary in the democratic society in which it operates.

Summary:

Applications for annulment were filed with the Constitutional Court against the Law of 1 June 2011 “aimed at prohibiting the wearing of any garment that covers the face completely or hides its main features”. Under this law, persons who go to places accessible to the public with their faces completely or partially covered, so that they are not identifiable, are punished with a fine or a prison sentence. The applications were submitted by individuals – Muslim women reported for wearing the full-face veil or persons active in the defence of fundamental rights – and by the not-for-profit association “Justice and democracy”. Other human rights organisations intervened in the proceedings. In its judgment, the Constitutional Court acknowledges the interest of all the applicants in bringing proceedings. It states that a law providing for a custodial sentence touches on such an essential aspect of citizens’ freedom that it does not only concern those persons who are or have been the subject of criminal proceedings.

On the merits, the Court is required first of all to rule on compliance with the principle of legality in criminal matters enshrined inter alia in Articles 12 and 14 of the Constitution. It reiterates the substance of this principle and concludes that it is only by examining a specific criminal-law provision that it is possible, having regard to the specific ingredients of the offences it is intended to punish, to determine whether the general terms used in the legislation are sufficiently vague to infringe the principle of legality in criminal matters.

The Court then seeks to ascertain the precision of certain terms used in the legislation. The word “identifiable” must be taken in its usual sense of “able to be recognised”. The Court deems this term to be sufficiently explicit for citizens to be reasonably capable of determining its scope. The Court goes on to hold that the notion of “places accessible to the public” also satisfies the condition of foreseeability of

criminal law even if it has not been defined explicitly. The Court bases this finding on a judgment of the Court of Cassation and on other legislation.

Another ground of complaint concerns the alleged infringement of freedom of religion and freedom of thought, conscience and religion. The applicants rely on Article 19 of the Constitution as well as on Article 9 ECHR and Article 18 of the International Covenant on Civil and Political Rights.

They also refer to Article 51 of the European Union’s Charter of Fundamental Rights, but the Court finds that the allegation of a violation of this Charter is inadmissible because they fail to demonstrate any link between their situation and the implementation of EU law.

The Court acknowledges that, in view of the general nature of the terms used, the impugned law may constitute interference with the freedom of conscience and religion of women who wear the full-face veil on the basis of a personal choice which they consider to be consistent with their religious beliefs. The Court therefore considers whether this interference is prescribed by a sufficiently accessible and precise law, is necessary in a democratic society, meets a pressing social need and is proportional to the legitimate aims pursued by the legislature. The first requirement is met, bearing in mind the reply given on the previous ground of complaint. The Court then refers to several judgments of the European Court of Human Rights, including the *Leyla Sahin v. Turkey* Judgment of 10 November 2005.

Next, the Court specifies the three aims pursued by the legislature as they emerge from the *travaux préparatoires* of the impugned law: public safety, equality between men and women, and a certain notion of “living together” in society. The Court considers that these aims are legitimate and fall within the category of those enumerated in Article 9 ECHR, namely public safety, protection of public order and protection of the rights and freedoms of others. The Court then verifies whether the requirements of being necessary in a democratic society and being proportional to the legitimate aims pursued are met. Based on the need for identity checks and prevention of crime and disorder, it can conclude that the measures are necessary to achieve public safety goals. With regard to “living together”, the Court notes that the individuality of any person in a democratic society is inconceivable unless it is possible to see that person’s face, a basic element of his or her individuality. Taking into account the essential values it seeks to uphold, the legislature took the view that, if persons who conceal this basic element of individuality move in public spaces, which,

by definition, concern the community as a whole, it becomes impossible to establish the human relationships that are essential to life in society. With regard to the dignity of women, the Court notes that the legislature took the view that the fundamental values of a democratic society preclude women from being forced to cover their faces under pressure from members of their family or their community and from thus being deprived, against their will, of the freedom to control their lives. Even where a woman has made a deliberate choice to wear the full-face veil, equality of the sexes, which the legislature rightly regards as a fundamental value in a democratic society, justifies the state in opposing the manifestation of religious belief in public spaces through behaviour which is irreconcilable with the principle of equality between men and women.

The Court also assesses whether the imposition of criminal sanctions has disproportionate effects in relation to the aims pursued. The Court refers in this connection to its case-law, under which it is within the discretion of the legislature, when it considers that certain offences warrant punishment, to opt for criminal sanctions in the strict sense or for administrative sanctions.

In view of the disparities observed between municipalities and differences in case-law, the Court accepts that the legislature's intention was to ensure legal certainty by standardising the sanction imposed and that it opted for criminal sanctions, given that the individuality of persons, of which the face is a basic element, constitutes an essential precondition for the functioning of a democratic society, every member of which is a subject of law.

The Court acknowledges the proportionality of the measure given that the legislature opted for the mildest form of criminal sanction. The fact that the penalty may be more severe in the event of recidivism does not alter that conclusion. The Court further notes that, in the case of persons forced to cover their face, Article 71 of the Criminal Code provides that no offence is committed where the perpetrator was compelled through force which he or she was unable to resist. Lastly, the Court makes an interpretative reservation which is reproduced in the operative part of the judgment. It would clearly be unreasonable to consider that places accessible to the public must be understood as including places intended for worship. The wearing of garments corresponding to the expression of a religious choice, such as a veil completely covering the face, in such places could not be made subject to restrictions without disproportionately affecting the freedom to manifest one's religious beliefs.

The Court also finds that the impugned law is not contrary to freedom of expression, the right to lead a life consistent with human dignity, individual freedom and the right to respect for private and family life. Neither is there any violation of the principle of equality and non-discrimination, and it is neither the purpose nor the effect of the law to regulate freedom of association.

Supplementary information:

The Court dismissed applications for a stay of execution of this law in its Judgments nos. 148/2011 of 05.10.2011 and 179/2011 of 17.11.2011.

Languages:

French, Dutch, German.



Bosnia and Herzegovina

Constitutional Court

Important decisions

Identification: BIH-2012-3-004

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 13.07.2012 / **e)** U 1/11 / **f)** / **g)** *Sluzbeni Glasnik* (Official Gazette of Bosnia and Herzegovina), 73/12 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

1.3.4.3 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between central government and federal or regional entities.**

2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution.**

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

Keywords of the alphabetical index:

Conflict of powers / Property, state.

Headnotes:

The State has exclusive responsibility to regulate the issue of state property.

Summary:

I. The applicant requested an assessment of the constitutionality of the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban. In the applicant's view, there was no constitutional basis for the enactment of this law by the National Assembly of the Republika Srpska, as it was incompatible with lines 2 and 6 of the Preamble of the Constitution and Articles I.1 and III.b of the Constitution and Article 1 Protocol 1 ECHR.

II. The Court examined the challenged Law in the context of the distribution of competences, those who hold the competence to regulate state property and the extent or proportion of this competence.

Under the Constitution, the structure of Bosnia and Herzegovina is defined as a state composed of the two Entities. The Brcko District also exists as a separate unit of local self-government.

Article III of the Constitution regulates the issue of responsibilities and relations between the Institutions of Bosnia and Herzegovina and the Entities. Specifically, Article III.1 prescribes the responsibilities of the Institutions, including foreign policy, foreign trade policy, customs policy, monetary policy, the financing of the institutions and the international obligations of Bosnia and Herzegovina, immigration, refugee and asylum policy and regulation, international and inter-Entity criminal law enforcement, including relations with Interpol, establishment and operation of common and international communications facilities, regulation of inter-Entity transportation and air traffic control. These are the exclusive responsibilities of the Institutions of Bosnia and Herzegovina. Article III.2 prescribes the responsibilities of the Entities, including the right to establish special parallel relationships with neighbouring states consistent with national sovereignty and territorial integrity, as well as the right of each Entity to enter into agreements with states and international organisations with the consent of the Parliamentary Assembly, although the Parliamentary Assembly may provide by law that certain types of agreements do not require such consent. The above paragraph also places the Entities under a duty to provide all necessary assistance to the government in order to enable it to honour the international obligations of Bosnia and Herzegovina and to provide a safe and secure environment for all persons in their respective jurisdictions. This paragraph does not contain any other list of exclusive responsibilities of the Entities. However, the third paragraph of the Article stipulates that all governmental functions and powers not expressly assigned in this Constitution to the Institutions will be those of the Entities.

Article III of the Constitution establishes a clear normative hierarchy between the state Constitution and the legal systems of the entities. Under Article III.3.b, the Entities and any subdivisions thereof will comply fully with the Constitution, which supersedes inconsistent provisions of the national law and of the constitutions and law of the Entities and with the decisions of the institutions of Bosnia and Herzegovina. The Constitution of Bosnia and Herzegovina, rather than that of the entity, is a guarantor of the relation of distribution of responsibilities between the State and the Entities.

The list of exclusive responsibilities of the Institutions of Bosnia and Herzegovina under Article III.1 of the Constitution (i.e. the responsibilities assigned to them under Article III.3.a) cannot be construed independently of other constitutional provisions. The Constitutional Court recalls its position that Article III.1 does not contain a complete catalogue of the responsibilities of the Institutions; other regulations of the Constitution set out responsibilities for the Institutions. According to the Constitutional Court, this list must be completed by the provision of Article I.1: "The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina," shall continue its legal existence under international law as a state, (...)"

It can be concluded that pursuant to the Succession Agreement, the State of Bosnia and Herzegovina was bestowed with the state property mentioned in this agreement, i.e. it is the title holder of that property.

Territorial integrity and sovereignty are clearly state attributes as demonstrated by line 6 of the Preamble in conjunction with Article III.2.a and III.5.a. Under these provisions, the state property reflects the statehood, sovereignty and territorial integrity of Bosnia and Herzegovina and forms an integral part of the constitutional attributes and powers of the state.

Examination of Articles 3-8 of the challenged law shows that the subject-matter regulated by the challenged Law is the immovable property acquired by Bosnia and Herzegovina on the basis of the International Agreement on Succession Issues, and "the immovable property which the former SRBiH had the right to manage and to dispose of"; therefore, the challenged Law regulates the state property of which "Bosnia and Herzegovina" and "the former SRBiH" are title holders transferring it to the Republika Srpska.

Analysis of the challenged Law shows that the Republika Srpska took over the responsibility for regulating the issue of denying "Bosnia and Herzegovina" the right of ownership over "the state property", and the legal transformation thereof into the Entity property, as well as the right to protection of property, the ceding of the right to property and the use of that property. In reply to the request, the National Assembly of Republika Srpska stated that the Constitution does not provide for the responsibility of Bosnia and Herzegovina to regulate the issue of state property; in view of the residual nature of the Entities' responsibilities, this responsibility lies with the Republika Srpska. It is for this very reason that the RS enacted Article 68.1.6 of the Constitution of the Republika Srpska. The argument was also put

forward that the responsibility of Bosnia and Herzegovina for regulating this issue cannot be derived from any other act but the Constitution. Yet the Office of the High Representative and the Venice Commission have both held that there is no express constitutional norm regulating the issue of responsibility for the distribution of property in Bosnia and Herzegovina.

The Constitutional Court concurred with the opinion of the National Assembly of the Republika Srpska that there is no explicit provision within the Constitution establishing the responsibility of Bosnia and Herzegovina to regulate the issue of state property belonging to Bosnia and Herzegovina within the meaning of Article 2 of the challenged Law. In that respect, the Court supported the opinion of the Office of the High Representative and the Venice Commission.

However, the Constitutional Court could not support the position of the National Assembly of the Republika Srpska to the effect that the issue would automatically fall within the "residual competencies" of the Entities. Reference was made to the position outlined above to the effect that Article III.1 of the Constitution does not contain a complete catalogue of the responsibilities of the Institutions of Bosnia and Herzegovina, although responsibilities of the Institutions of Bosnia and Herzegovina are outlined in other provisions of the Constitution. On the basis of the previous reasoning about the continuity between the Republic of Bosnia and Herzegovina and Bosnia and Herzegovina, it is clear that Bosnia and Herzegovina is the title holder of this property. Pursuant to Article I.1 of the Constitution, Bosnia and Herzegovina is entitled to continue to regulate "the state property" of which it is the title holder, meaning all the issues related to the notion of "the state property", both in terms of civil law and public law. The Constitutional Court also reiterated that although any level of government enjoys constitutional autonomy, the Entities' constitutional competence is subordinated to the obligation to comply with the Constitution and "the decisions of the Institutions of Bosnia and Herzegovina", and the right of the State of Bosnia and Herzegovina to regulate the issue of state property stems from the provisions of Article IV.4.e of the Constitution. It is undisputed that the above provision gives the State of Bosnia and Herzegovina, i.e. the Parliamentary Assembly, competence to regulate the issue of state property. Therefore, this concerns the exclusive responsibility of Bosnia and Herzegovina derived from Articles I.1, III.3.b and IV.4.e of the Constitution.

In view of the above, the Constitutional Court concluded that the Republika Srpska enacted the challenged Law in breach of Articles I.1 and III.3.b of the Constitution, which reflect the principle of constitutionality, and Article IV.4.e of the Constitution, which gives the Parliamentary Assembly competence to regulate such other matters as necessary to carry out the duties of the State, as the matter fell within the exclusive remit of Bosnia and Herzegovina to regulate the issue of property referred to in Article 2 of the challenged Law. The challenged Law was therefore unconstitutional and could not be allowed to remain in force.

III. The separate Dissenting Opinion of Judge Zlatko M. Knezevic was annexed to the Decision.

Languages:

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



Canada Supreme Court

Important decisions

Identification: CAN-2012-3-003

a) Canada / **b)** Supreme Court / **c)** / **d)** 21.09.2012 / **e)** 33981 / **f)** Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society / **g)** *Canada Supreme Court Reports* (Official Digest), [2012] 2 S.C.R. 524 / **h)** <http://scc.lexum.org/en/index.html>; [2012] 352 *Dominion Law Reports* (4th) 587; 434 *National Reporter* 257; 325 *British Columbia Appeal Cases* 1; 34 *British Columbia Law Report* (5th) 1; [2012] S.C.J. no. 45 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Constitutionality, review / Criminal Code / Prostitution.

Headnotes:

In determining whether to grant standing in a public law case, courts must consider three factors: whether the case raises a serious justiciable issue; whether the party bringing the case has a real stake in the proceedings or is engaged with the issues that it raises; and whether the proposed suit is, in all of the circumstances and in light of a number of considerations, a reasonable and effective means to bring the case to court. A party seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a party with standing as of right will generally be preferred.

Summary:

I. A Society whose objects include improving conditions for female sex workers in the Downtown Eastside of Vancouver and K, who worked as such for 30 years, launched a Canadian Charter of rights

and freedoms challenge to the prostitution provisions of the Criminal Code. The chambers judge found that they should not be granted either public or private interest standing to pursue their challenge. The British Columbia Court of Appeal, however, granted them both public interest standing.

II. In a unanimous decision, the Supreme Court of Canada dismissed the appeal. In this case, the issue that separates the parties relates to the formulation and application of the third factor to grant standing in a public law case, i.e. whether, in all of the circumstances and in light of a number of considerations, the proposed suit is a reasonable and effective means to bring the case to court. This factor has often been expressed as a strict requirement that a party seeking standing persuade the court that there is no other reasonable and effective manner in which the issue may be brought before the court. While this factor has often been expressed as a strict requirement, this Court has not done so consistently and in fact has rarely applied the factor restrictively. Thus, it would be better expressed as requiring that the proposed suit be, in all of the circumstances and in light of a number of considerations, a reasonable and effective means to bring the case to court.

The Court added that by taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible. Whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.

In this case, all three factors, applied purposively and flexibly, favour granting public interest standing to the respondents. In fact, there is no dispute that the first and second factors are met: the respondents' action raises serious justiciable issues and the respondents have an interest in the outcome of the action and are fully engaged with the issues that they seek to raise. Indeed, the constitutionality of the prostitution provisions of the Criminal Code constitutes a serious justiciable issue and the respondents, given their work, have a strong engagement with the issue.

In this case, the third factor is also met. The existence of a civil case in another province is certainly a highly relevant consideration that will often support denying standing. However, the existence of parallel litigation – even litigation that raises many of the same issues – is not necessarily a sufficient basis for denying standing. The court must also examine not only the precise legal issue, but the perspective from which it is made. In the other case, the perspective is very different.

Moreover, the existence of other potential plaintiffs, while relevant, should be considered in light of practical realities, which are such that it is very unlikely that persons charged under the prostitution provisions would bring a claim similar to the respondents'. Further, the inherent unpredictability of criminal trials makes it more difficult for a party raising the type of challenge raised in this instance.

Other considerations should be taken into account in considering the reasonable and effective means factor. This case constitutes public interest litigation: the respondents have raised issues of public importance that transcend their immediate interests. Their challenge is comprehensive, relating as it does to nearly the entire legislative scheme. It provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it. A challenge of this nature may prevent a multiplicity of individual challenges in the context of criminal prosecutions. There is no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim. It is obvious that the claim is being pursued with thoroughness and skill. There is no suggestion that others who are more directly or personally affected have deliberately chosen not to challenge these provisions. The presence of K, as well as the Society, will ensure that there is both an individual and collective dimension to the litigation.

Languages:

English, French (translation by the Court).



Identification: CAN-2012-3-004

a) Canada / b) Supreme Court / c) / d) 19.10.2012 / e) 34268 / f) R. v. Cole / g) *Canada Supreme Court Reports* (Official Digest), 2012 SCC 53, [2012] 3 S.C.R. 34 / h) <http://scc.lexum.org/en/index.html>; [2012] 436 *National Reporter* 102; 96 *Criminal Reports* (6th) 88; [2012] S.C.J. no. 53 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Search and seizure / Search and seizure of computer, police / Education, school, teacher / Evidence, obtained unlawfully.

Headnotes:

Individuals may reasonably expect privacy in the personal information contained on computers found in the workplace where personal use of those computers is permitted or expected. A person's reasonable expectation of privacy is determined according to all of the circumstances. Ownership of the computer and workplace policies are relevant considerations but are not determinative of that expectation. Although an individual may have a diminished reasonable expectation of privacy, that expectation is nonetheless protected by Section 8 of the Canadian Charter of Rights and Freedoms. The lawful authority of school officials to seize and search the computer did not give police the same authority. A third party cannot validly consent to a search or otherwise waive a constitutional protection on behalf of another.

Summary:

I. A high-school teacher was charged with possession of child pornography and unauthorised use of a computer. He was permitted to use his work-issued laptop computer for incidental personal purposes which he did. While performing maintenance activities on the laptop, a technician found a hidden folder containing nude and partially nude photographs of an underage female student. The technician notified the principal, and copied the photographs to a compact disc. The principal seized the laptop, and school board technicians copied the temporary Internet files onto a second disc. The laptop and both discs were handed over to the police, who without a warrant reviewed their contents and then created a mirror

image of the hard drive for forensic purposes. The trial judge excluded all of the computer material on the grounds that it was obtained in a manner contrary to Section 8 of the Charter. A summary conviction appeal court reversed that decision. The Court of Appeal set aside that decision and excluded the disc containing the temporary Internet files, the laptop and the mirror image of its hard drive. The disc containing the photographs of the student was found to be legally obtained and therefore admissible. As the trial judge had wrongly excluded this evidence, a new trial was ordered. The Crown appealed.

II. The Supreme Court of Canada, in a majority decision, allowed the appeal.

A unanimous Court held that the police had infringed the accused's rights under Section 8 of the Charter. His personal use of his work-issued laptop generated information that was meaningful, intimate, and organically connected to his biographical core. The ownership of the laptop by the school board, the workplace policies and practices, and the technology in place at the school diminished the accused's privacy interest in his laptop, at least in comparison to a personal computer, but they did not eliminate it entirely. The Court found that the totality of the circumstances supported the objective reasonableness of the accused's subjective expectation of privacy. While a school principal has a statutory duty to maintain a safe school environment, and, by necessary implication, a reasonable power to seize and search a school-board issued laptop, the lawful authority of the accused's employer to seize and search the laptop did not furnish the police with the same power. A third party cannot validly consent to a search or otherwise waive a constitutional protection on behalf of another. Receipt of the computer from the school board did not afford the police warrantless access to the personal information contained within it. That information remained subject, at all relevant times, to the accused's reasonable and subsisting expectation of privacy.

Eight of the judges held that, considering all of the circumstances, the admission of the evidence obtained by police would not bring the administration of justice into disrepute and therefore the evidence should not be excluded. The conduct of the police officer was not an egregious breach of the Charter. He sincerely, though erroneously, considered the accused's Charter interests and also had reasonable and probable grounds to obtain a warrant. The evidence was highly reliable and probative physical evidence whose exclusion would have a marked negative impact on the truth-seeking function of the criminal trial process.

III. Dissenting on the issue of remedy alone, one judge held that all of the evidence obtained by police should be excluded under Section 24.2 of the Charter. The Charter-infringing conduct was serious in its disregard for central and well-established Charter standards.

Languages:

English, French (translation by the Court).



Identification: CAN-2012-3-005

a) Canada / **b)** Supreme Court / **c)** / **d)** 14.12.2012 / **e)** 34103 / **f)** R. v. Khawaja / **g)** *Canada Supreme Court Reports* (Official Digest), 2012 SCC 69, [2012] x S.C.R. xxx / **h)** <http://scc.lexum.org/en/index.html>; [2012] 437 *National Reporter* 42; [2012] S.C.J. no. 69 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Criminal Code / Criminal offence / Terrorism, combat / Procedural fairness, principle / Sentencing, principles.

Headnotes:

Pursuant to Section 7 of the Canadian Charter of Rights and Freedoms, “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. The purpose of the terrorism provisions of the Criminal Code is to provide means by which terrorism may be prosecuted and prevented. Given this purpose, the perpetration of an offence requires a high *mens rea* threshold. To convict, a judge must be satisfied beyond a reasonable doubt that the accused specifically

intended to enhance the ability of a terrorist group to facilitate or carry out a terrorist activity. Furthermore, the *actus reus* of the section does not capture conduct that discloses, at most, a negligible risk of enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity. When the tailored reach of Section 83.18 is weighed against the objective of the law, it cannot be said that the selected means are broader than necessary or that the impact of the section is disproportionate.

While the activities targeted are in a sense expressive activities, most of the conduct caught by the provisions concerns acts or threats of violence. Threats of violence, like acts of violence, are excluded from the scope of the guarantee of freedom of expression. The particular nature of the conduct targeted justifies treating counselling, conspiracy or being an accessory after the fact as being intimately connected to violence. Read as a whole and purposively, the provision of the Code which is directed to acts that intentionally interfere with essential infrastructure and public health is also confined to the realm of acts and threats of violence. As such, the conduct falls outside the protection of Section 2.b of the Charter. The impugned provision is clearly drafted in a manner respectful of diversity, as it allows for the non-violent expression of political, religious or ideological views. It is impossible to infer, without evidence, that the motive clause will have a chilling effect on the exercise of Section 2 freedoms.

Summary:

I. After becoming obsessed with Osama Bin Laden and his cause, the accused communicated with and collaborated with individuals who were later convicted of providing material support or resources to Al Qaeda and of plotting to bomb targets in the U.K. and elsewhere in Europe. He was charged with seven offences under the Terrorism section of the Criminal Code. The accused brought a preliminary motion seeking a declaration that several provisions were unconstitutional. A motion judge held that Section 83.01.1.b.i.A, which provides that a terrorist activity must be an act or omission committed in whole or in part “for a political, religious or ideological purpose, objective or cause” (the “motive clause”), was an unjustifiable infringement of Sections 2.a, b and d of the Charter and must be severed from Section 83.01.1. The trial proceeded on the basis that the motive clause was severed from the legislation. The accused was found guilty of seven offences. The accused was sentenced to 10 and a half years in a penitentiary and his parole eligibility was set at 5 years. The Court of Appeal held that the motive clause was not unconstitutional and should not have been severed. It dismissed the

accused's appeals from his conviction and sentence but allowed the Crown's cross-appeal with respect to the sentence. It substituted a sentence of life imprisonment on one of the charges and substituted a total of 24 years of consecutive sentences for the remaining counts, to be served concurrently with the life sentence. Parole eligibility was set at 10 years.

II. A unanimous Supreme Court of Canada dismissed the appeal.

The judges held that the reinsertion of the motive clause by the Court of Appeal did not make the accused's trial and convictions unfair. The trial judge had made a specific finding that the motive component of the definition of terrorist activity had been proved beyond a reasonable doubt. The evidence of motive, and the accused's knowledge that the motive was shared by him and the terrorist cell, was overwhelming and essentially undisputed. There is no air of reality to the accused's statement that he could have, or would have, testified to raise a reasonable doubt on motive, had the clause not been struck.

The uncontradicted evidence before the trial judge established beyond a reasonable doubt that the accused's conduct did not fall within the exception in Section 83.01.1.b which provides that terrorist activity does not include acts or omissions committed during an armed conflict in accordance with international law. Since the armed conflict exception functions as a defence, the accused must raise it and make a prima facie case that it applies. Here, the accused K could not do so, as there was no evidential foundation to support its applicability.

The Court held that there is no merit to the accused's submissions that the convictions are unreasonable. However, the trial judge made critical errors in sentencing, effectively devaluing the seriousness of the accused's conduct in a way that was inconsistent with the evidence, and failed to give adequate weight to the ongoing danger the accused posed to society. While the weight to be given to rehabilitation in a given case is best left to the reasoned discretion of trial judges on a case-by-case basis, here the absence of evidence on rehabilitation prospects justified a stiffer sentence than otherwise might have been appropriate. The heightened gravity of the terrorism offences at issue is sufficient to justify imposition of consecutive sentences running over 20 years, without violating the totality principle. The general principles of sentencing, including the totality principle, apply to terrorism offences.

Supplementary information:

In a companion case, *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] x S.C.R. xxx, the Supreme Court of Canada refers to *R. v. Khawaja* with regards to its analysis of the constitutionality of the terrorism provisions of the Criminal Code. It also held that the extradition of Canadian citizens so that they may be tried on terrorism charges does not violate the mobility rights protected by Section 6.1 of the Charter.

Languages:

English, French (translation by the Court).



Identification: CAN-2012-3-006

a) Canada / **b)** Supreme Court / **c)** / **d)** 20.12.2012 / **e)** 33989 / **f)** *R. v. N.S.* / **g)** *Canada Supreme Court Reports* (Official Digest), 2012 SCC 72, [2012] x S.C.R. xxx / **h)** <http://scc.lexum.org/en/index.html>; 437 *National Reporter* 344; [2012] S.C.J. no. 72 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**
 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

Keywords of the alphabetical index:

Religion, wearing of niqab / Concealment of the face / Witness, examination.

Headnotes:

A witness who for sincere religious reasons wishes to wear the niqab while testifying in a criminal proceeding will be required to remove it if (a) this is necessary to prevent a serious risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (b) the salutary effects of requiring her to remove the niqab

outweigh the deleterious effects of doing so. Applying this framework involves answering four questions. First, would requiring the witness to remove the niqab while testifying interfere with her religious freedom? The second question is: would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness? If both freedom of religion and trial fairness are engaged on the facts, a third question must be answered: is there a way to accommodate both rights and avoid the conflict between them? If no accommodation is possible, then a fourth question must be answered: do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so?

Summary:

I. The accused, M-d S. and M-I S., stand charged with sexually assaulting N.S. N.S. was called by the Crown as a witness at the preliminary inquiry. N.S., who is a Muslim, indicated that for religious reasons she wished to testify wearing her niqab. The preliminary inquiry judge held a *voir dire*, concluded that N.S.'s religious belief was "not that strong," and ordered her to remove her niqab. On appeal, the Court of Appeal held that if the witness's freedom of religion and the accused's fair trial interests were both engaged on the facts and could not be reconciled, the witness may be ordered to remove the niqab, depending on the context. The Court of Appeal returned the matter to the preliminary inquiry judge. N.S. appealed.

II. The Supreme Court of Canada, in a majority decision, dismissed the appeal and remitted the matter to the preliminary inquiry judge to be decided in accordance with the reasons of the Court.

A majority of four judges held that two sets of rights provided by the Canadian Charter of Rights and Freedoms are potentially engaged – the witness's freedom of religion and the accused's fair trial rights, including the right to make full answer and defence. A clear rule that would always, or one that would never, permit a witness to wear the niqab while testifying cannot be sustained. Always permitting a witness to wear the niqab would offer no protection for the accused's fair trial interest and the state's interest in maintaining public confidence in the administration of justice. However, never permitting a witness to testify wearing a niqab would not comport with the fundamental premise underlying the Charter that rights should be limited only to the extent that the limits are shown to be justifiable. The need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canadian law. Competing rights claims should be

reconciled through accommodation if possible, and if a conflict cannot be avoided, through case-by-case balancing. The Charter, which protects both freedom of religion and trial fairness, demands no less.

III. Two judges held that wearing the niqab is incompatible with the rights of the accused, the nature of the Canadian public adversarial trials, and with the constitutional values of openness and religious neutrality in contemporary democratic, but diverse, Canada. Nor should wearing a niqab be dependent on the nature or importance of the evidence, as this would only add a new layer of complexity to the trial process. A clear rule that niqabs may not be worn at any stage of the criminal trial would be consistent with the principle of public openness of the trial process and would safeguard the integrity of that process as one of communication.

In a dissenting opinion, one judge held that the harmful effects of requiring a witness to remove her niqab, with the result that she will likely not testify, bring charges in the first place, or, if she is the accused, be unable to testify in her own defence, is a significantly more harmful consequence than the accused not being able to see a witness's whole face. Unless the witness's face is directly relevant to the case, such as where her identity is in issue, she should not be required to remove her niqab.

Languages:

English, French (translation by the Court).



Chile

Constitutional Court

Important decisions

Identification: CHI-2012-3-009

a) Chile / **b)** Constitutional Court / **c)** / **d)** 23.08.2012 / **e)** 2096-2011 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

4.15 Institutions – **Exercise of public functions by private bodies.**

5.2 Fundamental Rights – **Equality.**

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

Keywords of the alphabetical index:

Public servant / Private contractor.

Headnotes:

A norm permitting the public administration to contract on a fee basis does not affect the right of equality or the right to social security.

Summary:

I. The applicants worked for several years for the Ministry of the Interior on a fee contract basis which was terminated on June 2010, when the project they were working on was closed. They then launched proceedings against the Ministry, demanding coverage of servant payments at labour tribunals. Their suit was dismissed and they appealed.

Pending this appeal, the applicants submitted a claim alleging the unconstitutionality of the rule allowing the public administration to contract on a fee basis and seeking a declaration of its inapplicability as it breached the right to equality (they did not enjoy the same rights as public servants) and the right to social security (they did not receive servant payments).

II. The Constitutional Tribunal found that the rule was constitutionally compliant. There was no violation of the right to equality; permanent public servants were not entitled to servant payments if their functions

were terminated, and therefore no discriminatory treatment had occurred. There had been no violation of the applicants' right to social security either; if it was the case that members of the public administration could receive servant payments for dismissal, these could only be given by law.

Languages:

Spanish.



Identification: CHI-2012-3-010

a) Chile / **b)** Constitutional Court / **c)** / **d)** 30.08.2012 / **e)** 2253-2012 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

4.4.3.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**

4.4.3.4 Institutions – Head of State – Powers – **Promulgation of laws.**

Keywords of the alphabetical index:

Decree, presidential / Legislation, promulgation, process.

Headnotes:

The President did not commit an unconstitutional act by changing the name of a bill in the promulgation decree; this would only be the case if the bill and its content were substantially changed in the decree.

Summary:

I. Over a quarter of the current members of the National Congress asked the Constitutional Tribunal to determine whether the President of the Republic had infringed the Constitution by promulgating a law with a different name from that which had been determined by Congress. Originally, the bill was called by Congress "The Conditional Benefits for Extremely Poor Families Act", but the President named it in the promulgation decree as "The Ethical Family Income Act that establishes conditional

benefits for extreme poor families". The Congress members, the applicants in these proceedings, argued that this change would confuse public opinion, as the law did not create an ethical income for families, only conditional benefits.

Under the Constitution, once a bill is approved by Congress, the President must promulgate the law by issuing a decree. If the law is different from the bill approved by Congress, the Constitutional Tribunal must determine, if so required by one of the Chambers of the National Congress or a quarter of the currently serving members of either of them, whether the President exceeded his constitutional powers.

II. The Constitutional Tribunal was of the view that the President would only violate the Constitution if the promulgation decree had a different text to the bill approved by Congress. The name of the Act should not be considered as an essential part of the text of the law; a change in name does not substantially change it. The President's action was not unconstitutional but should not be repeated in future, as it affects the good faith that must exist between all state powers.

Languages:

Spanish.



Croatia Constitutional Court

Important decisions

Identification: CRO-2012-3-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 07.11.2012 / **e)** U-I-2414/2011, U-I-3890/2011, U-I-4720/2012 / **f)** / **g)** *Narodne novine* (Official Gazette), 126/12 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 3.9 General Principles – **Rule of law.**
 3.10 General Principles – **Certainty of the law.**
 3.12 General Principles – **Clarity and precision of legal provisions.**
 3.16 General Principles – **Proportionality.**
 3.22 General Principles – **Prohibition of arbitrariness.**
 5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation.**
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**

Keywords of the alphabetical index:

Administrative proceedings / Administrative sanction / Bank secret, guarantees / Bank secret, official / Conflict of interest, administrative law, prevention / Conflict of interest, distinction from corruption / Conflict of interest, jurisdiction in non-criminal matters / Conflict of interest, official / Commission on conflict of interest prevention, competences, limits / Commission on conflict of interest prevention, relations to other state bodies / Conflict of interest, administrative sanction, balance / Official, high, property, declaration.

Headnotes:

The purpose of the measures prescribed in the Act on the Prevention of the Conflict of Interest is the prompt prevention of foreseeable or potential conflict of interest, or the effective resolution of already existing or newly-arisen conflict of interest. The purpose of the

sanctions prescribed by the Act is not to punish officials for finding themselves in conflict of interest but rather to impose sanctions on those who do not observe the legal obligations prescribed by the Act. This legal distinction is of great significance for the correct understanding of the concept of conflict of interest. In other words, the area regulated by the Act belongs to administrative law.

Measures against officials who violate the provisions of the Act must not be grounded on the assumption that when a breach of the Act is identified, it is a conflict of interest with features of corruption, or even the offence of corruption itself. At this point, the effect of the Act ceases, and that of the supervisory body thereby established (the Commission), and the effect of criminal legislation begins.

Procedures concerning access to data protected by bank secrecy are possible and admissible, but only when disclosure of an official's assets is made in order to conduct criminal investigation (i.e. in order to establish his or her criminal liability). It is not acceptable in constitutional law for an administrative/supervisory body established for preventive purposes, such as the Commission, to assume the authority of criminal prosecution bodies.

In terms of preventing conflicts of interest, the sanction must not call into question the term of office of the elected official.

Summary:

I. Proposals for the constitutional review of Articles 8.10, 8.12-14, 12, 24.1, 27, 39.5, 42.1.2, 44, 46 and 47 of the Act on the Prevention of Conflict of Interest (hereinafter, the "Act") were submitted by three natural persons. Starting from their objections, the Constitutional Court, under Article 38 of the Constitutional Act on the Constitutional Court, initiated *sua sponte* a review of the constitutionality of Articles 26.3, 30.1, 45.3, 53.1-2, 55.2 and 55.4 of the Act.

The Court decided on all the proposals in one constitutional proceeding. The proposals for the constitutional review of the entire Act were not granted. The Constitutional Court repealed the following provisions or their parts of the Act: 8.13-14, 26.3, 27, 30.1.2-3, 39.5, 45.3, 46, 47, 53.1-2, 55.2 and 55.4.

The Act regulates the prevention of conflict between private and public interests in the exercise of public office. It also regulates those who are bound to proceed according to its provisions, the obligation to submit a declaration of assets and its content, the

process of checking the data in such declarations, the duration of the obligations referred to in the Act, the election, composition and competence of the Commission for Conflict of Interest ("the Commission") and other issues of importance for the prevention of conflict of interest.

The applicants contended that the Act, i.e. its separate provisions, encroaches upon the right to privacy of state officials and members of their families, that the legislator subsumed the provisions of the UN Convention against Corruption (hereinafter, the "Convention") relating to the conflict of interests of persons exercising public office under corruption and that the Act has transferred to the Commission the competences of the Constitutional Court, the Parliament and judicial power contrary to the principles of constitutionality and legality. Finally, the applicants claimed that the prescribed checking of personal data by the Commission and the obligation of financial institutions to provide access to the data of banking institutions which are protected by bank secrecy is not in compliance with the constitutional guarantee of safety and secrecy of personal data.

II. In this case the Constitutional Court found the following constitutional provisions to be of relevance; Article 3 of the Constitution (freedom, equality, the rule of law and other highest values of the constitutional order), Article 4 of the Constitution (principle of separation of powers), Article 5 of the Constitution (principle of constitutionality and legality), Article 35 of the Constitution (respect and protection of private and family life, dignity, honour and reputation) and Article 37 of the Constitution (guarantee of safety and secrecy of personal data).

The Court began by finding that the part of Article 45.3 of the Act which stipulates that the Commission shall determine the period for the publication of its decision is out of line with the Constitution since it provides for an unacceptable degree of arbitrariness in the application of the Act to a specific case, creates legal uncertainty, impairs legal certainty and prevents legal predictability of the effects of a law. Such legal solution is in breach of the principle of the rule of law. The period must be prescribed by law and must apply equally to everyone.

The Convention draws a clear distinction between the preventive (Chapter II) and criminal areas (Chapter III) of the fight against corruption, and between the specialist bodies established in these different areas. The anti-corruption legislation within the meaning of Chapter III of the Convention consists primarily of the Criminal Code, the Criminal Procedure Act, the Police Act and the Office for the

Suppression of Corruption and Organised Crime Act, which also founded a specialist body to fight corruption within its criminal sphere. The Act also established, within the meaning of Chapter II of the Convention, the Commission for Conflict of Interest, as a specialist body belonging to the preventive sphere of this fight, where corruption has not yet occurred.

The Constitutional Court found that the line between the administrative (preventive) and criminal sphere has not been drawn in a manner acceptable in constitutional law in Article 8.13-14 and the related Articles 39.5, 55.2, 55.4, 26.3, 27, 46 and 47 of the Act.

The Constitutional Court observed the mixing of the administrative (preventive) and the criminal sphere in the parts of the Act regulating the powers of the Commission over the checking of the data from officials' declarations of assets. Prescribing the authority of the Commission to request "facts and evidence" on all the officials' accounts that are protected by bank secrecy (part of Article 8.13) from all domestic and foreign banking and other financial institutions, which are not part of the system of public authorities, is not in conformity with the legal purpose of the establishment of the Commission, and may not in general be part of special administrative law that deals with preventive administrative measures in the area of preventing conflict of interest. This is directly contrary to the fundamental principles upon which the constitutional order of the state is organised and built, and excessively oversteps all the international legal commitments of the state. According to the Constitutional Court the same view also stands for the other side of this relationship: the obligation of domestic and foreign banking and other financial institutions to deliver such "facts and evidence" to the Commission (part of Article 39.5 of the Act), as well as the obligation of the official to give statements under legal coercion, allowing the Commission access to data protected by bank secrecy (Article 8.14 of the Act).

Pursuant to the above the Constitutional Court found parts of Article 8.13-14 and part of Article 39.5 of the Act in breach of the Constitution because they encroach upon the criminal law sphere, and provide the Commission with powers inherent to those related to criminal offences and to criminal prosecution authorities and criminal courts. Due to their existential link to Article 8.14 of the Act, Article 55.2 and part of Article 55.4 of the Act were also repealed.

The Constitutional Court repealed the part of Article 39.5 of the Act which stipulates that the Commission "shall have the right to establish the facts

through its own actions" due to its direct incompliance with the requirements of legal predictability and legal certainty. The actions of the Commission must be clearly defined. Their definition presumes at the same time their clear distinction from actions that only criminal prosecution bodies are authorised to undertake, as well as from actions that other bodies of state power and courts established for the protection of human rights, such as the Constitutional Court, are authorised to undertake. This relates to the constitutional requirement for a clear distribution of powers among bodies comprising the state and public authority system of the state.

Articles 26.3 and 27 of the Act presuppose that the official has fulfilled his or her duty to deliver to the Commission a written declaration in a timely fashion, enclosing appropriate "evidence" necessary to align the reported assets with the established assets. However, the disputed provisions indicate that the Commission itself has been determining whether a statement had justified the established "mismatch or disproportion" between the data on the assets reported by the official in the declaration and the data obtained by the Commission "from the Tax Administration and other competent authorities of the Republic of Croatia."

The Constitutional Court noted that the Commission does not have the specialism in tax, financial, bookkeeping and accounting activities to enable it to deliver final decisions as to whether an official has justified the mismatch between the data reported in the declaration and the data of the Tax Administration and other competent national authorities and whether such a difference represents a "mismatch or disproportion" requiring the undertaking of suitable measures. Therefore, the given legal provisions fail to ensure a sufficient degree of legal certainty and give rise to the possibility of arbitrary assessments, and thus are not in conformity with the requirements of the rule of law.

The Constitutional Court found that it is not appropriate for the establishment of the fact that an official had stated in his or her declaration "untruthful or incomplete facts concerning his or her assets with the intention of concealing them" (parts of Articles 46 and 47 of the Act) to be the subject of out-of-court procedures inherent to an administrative/supervisory body established for preventive purposes, such as the Commission. The establishment of "untruthful or incomplete facts on the assets with the intention of concealing these assets" presupposes not only an investigation conducted by competent bodies of criminal prosecution, but also the establishment of facts and proof of intent in a complex evidentiary hearing before a court. The given parts of the Act are

not in line with the Constitution because they encroach upon the criminal law sphere and provide the Commission with the competences of criminal prosecution authorities and criminal courts.

The Constitutional Court found other provisions of Articles 46 and 47 of the Act (Articles 3-5 and 16) unconstitutional. Specifically, the Act provides for two sanctions “for failure to respect the Act after a sanction has been imposed” or “a sanction that follows the sanction”. The first is a proposal to dismiss an appointed official from public office, which the Commission submits to the body of public authority which appointed the official (Article 46 of the Act). The second is the authority of the Commission to invite the elected official to resign from public office through public announcements (Article 47 of the Act). In the first case there is an overt imbalance between the elements of the offence and the graveness of the consequences for the official in question and for his or her family. In the second case, the sanctions are in breach of the fundamental structure of the constitutional and legal order (Articles 3-5 of the Constitution) since they result in the consequences not permitted under the Constitution. In brief, in terms of preventing conflict of interest, the sanction must not call into question the very term of office of the elected official.

In terms of the Commission’s powers, the Constitutional Court found the legal solution permitting the Commission to check data from the declaration of assets of officials “in the manner prescribed by the Ordinance that regulates the procedure of checking data from the declarations of assets of officials, rendered pursuant to this Act” (part of Article 30.1.3 of the Act) in breach of constitutional principles that are applied on the hierarchy of legislation in the domestic legal order (Articles 3 and 5 of the Constitution). In a democratic society based on the rule of law, legal proceedings which affect individual legal situations of third persons or which are related to decision about their rights and obligations or their punishment must be regulated by law.

The Constitutional Court noted in Article 30.1.2 of the Act a clear lack of alignment between the title of the enactment (“Ordinance on Procedures before the Commission”) and the subject-matter which the Ordinance regulates (“the manner in which the Commission operates and renders decisions, gives opinions, prescribes forms and establishes a register in order to apply the individual provisions of this Act”). Therefore, the subject-matter of this enactment is not related to the “procedures before the Commission” (part of Article 30.1.2 of the Act), as the legislator wrongly qualified them. These are rules of procedure

or rules on the work of the Commission and might appear to be simple terminological omissions. However, the Constitutional Court found that they bear a significant legal dimension and cause disruption to the legal consistency of the objective legal order of the Republic of Croatia in terms of the nomenclature of legislation. It therefore repealed that part of Article 30.1.2 of the Act.

Due to their existential link to Article 30.1.2-3 of the Act, the Constitutional Court also repealed the transitional provisions of Article 53.1-2 of the Act.

Cross-references:

- Decision and Ruling no. U-I-722/2009, 06.04.2011, *Bulletin* 2011/1 [CRO-2011-1-003].

Languages:

Croatian, English.



Czech Republic

Constitutional Court

Statistical data

1 September 2012 – 31 December 2012

- Judgments of the Plenary Court: 4
- Judgments of panels: 56
- Other decisions of the Plenary Court: 6
- Other decisions of panels: 1 308
- Other procedural decisions: 57
- Total: 1 431

Important decisions

Identification: CZE-2012-3-009

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 05.09.2012 / **e)** II. ÚS 670/12 / **f)** Extradition of an Alien (an asylum seeker) in relation to Insufficient Guarantees of Fair Trial in Georgia / **g)** / **h)** <http://nalus.usoud.cz>; CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Asylum, seeker / Extradition, receiving State, information / Extradition and torture / Prison treatment / Punishment, cruel and unusual treatment.

Headnotes:

When deciding in extradition proceedings the ordinary courts are obliged to address all relevant facts, but mainly the existence of grounded concerns that a

threat exists that the extradited person's fundamental procedural rights will be breached as well as a threat of torture, cruel and inhuman treatment or punishment. Otherwise the ordinary courts breach the fundamental rights of the extradited person protected by Articles 7.2 and 36.1 of the Charter of Fundamental Rights and Freedoms of the Czech Republic and Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Summary:

Upon the petition of the applicant, the Constitutional Court set aside by its judgment the decision of the Minister of Justice (Ref. no. 1475/2010-MOT-T/42) of 9 February 2012 as well as the resolution of the High Court in Prague (File no. 168/2011) of 26 October 2011 as contrary to Articles 7.2 and 36.1 of the Charter of Fundamental Rights of the Czech Republic and Freedoms (hereinafter, the "Charter") and Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter, the "Convention"). However, the Court dismissed the petition of the applicant seeking to have § 399 of the Criminal Code abolished. The resolution of the High Court in Prague held that the applicant's extradition for criminal proceedings to Georgia is permissible. Subsequently the Minister of Justice approved the applicant's extradition to Georgia pursuant to § 399 of Criminal Code. In his constitutional complaint the applicant objected to the fact that the High Court decided alone and in a confidential session and thus deprived the applicant of the opportunity to effectively defend his rights. Moreover, the decision was an entirely unexpected one since the Municipal Court in Prague had repeatedly held his extradition to Georgia was impermissible. The applicant alleged that both of the contested decisions failed to have sufficient regard to the reports of non-governmental organisations on the state of human rights in Georgia, which indicate a distinct lack of guarantees of a fair trial in Georgia, as well as political persecution and a critical state of prison facilities.

The Constitutional Court referred to its previous case-law in similar matters in which it had emphasised that the generally declared guarantees of fair trials that are also promised by the party requesting extradition, alongside its vows of improved conditions in prison facilities, cannot be given priority over the specific arguments of the applicant applicable to the unique and individual circumstance of the applicant (see Judgment File no. I. ÚS 2462/10, Judgment no. 221/59 Selected Decisions 195). Pursuant to Article 3 of the Charter and Article 3 of the Convention respectively, the Constitutional Court held that it is not competent to note a factual breach of the

prohibition of torture, inhuman and degrading treatment or punishment in foreign prison facilities, but it must test whether there are substantial reasons supporting the assumption that, in the event of extradition, a threat of such a breach exists (File no. I. ÚS 752/02, Judgment 54/30 Selected Decisions 65). The Court further noted that the decision to extradite an alien – an asylum seeker – may lead to an issue from the point of view of Article 3 of the Convention (to which Article 7 of the Charter corresponds), should serious and verified grounds exist to assume that the concerned individual is exposed to a real threat that he might be subject to torture or inhuman or degrading treatment or punishment (File. no. IV. ÚS 553/06, Judgment 17/44 Selected Decisions 217).

The Constitutional Court found that the Court of First Instance, based on the evidence tested, convincingly reasoned the impermissibility of extraditing the applicant to Georgia. However, both the court of second instance and the Minister of Justice failed to question the relevant findings of the court of first instance: the High Court merely disparaged the establishment of the contested criminal proceedings; and the state prosecutor as well as the Minister of Justice then continued by emphasising the adequacy of Georgia's guarantees as well as Georgia's involvement in international structures of human rights protection. This, however, appeared insufficient with regard to the significant view of the Constitutional Court on the matter. In the instant case the Constitutional Court concluded that the constitutional complaint is well-founded since the proceedings sufficiently established that substantial grounds exist for concerns that in the event of extradition of the applicant a threat exists of a breach of fundamental rights in the sphere of the justice and prison system. The High Court, in its failure to address those findings in an adequate manner, thus breached the fundamental rights of the applicant guaranteed by Articles 7.2 and 36.1 of the Charter and Article 3 of the Convention. For the above reasons the Constitutional Court set aside not only the contested decision of the High Court but also the decision of the Minister of Justice that is essentially connected with the Court's decision on permissibility of the extradition.

Jiří Nykodým was the Judge Rapporteur in the instant case. No Judges issued dissenting opinions.

Languages:

Czech.



Identification: CZE-2012-3-010

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 11.09.2012 / **e)** II. ÚS 1375/11 / **f)** Police Interference in the building of the Czech Television (unconstitutionality of search at other premises and protection of journalistic sources) / **g)** / **h)** <http://nalus.usoud.cz>; CODICES (Czech).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 3.18 General Principles – **General interest**.
 5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion**.
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
 5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.

Keywords of the alphabetical index:

Journalist / Journalist, sources, disclosure / Proportionality / Public safety / Search warrant, judicial.

Headnotes:

In constitutional law it is clear that the interest of public safety may prevail over the interest in the protection of journalistic sources. However, this is not the case where criminal proceedings regarding the leaking of information are pending while the concerned information had been declassified prior to the commencement of the concerned proceedings and had never been of international significance. In other words, while the right to protection of journalistic sources as a part of the fundamental right to information (Article 17.1 of the Charter of Fundamental Rights and Freedoms of the Czech Republic) does not in an absolute manner prevail over other fundamental rights and freedoms of others or over legitimately protected public interests, when an ordinary court issues a warrant to search premises (other than residential premises) and plots without such warrant being necessary and proportionate in a democratic society and, furthermore, in a situation when the public interest did not prevail over the protection of journalistic sources, it breaches the fundamental right of the television broadcast provider guaranteed by Articles 7.1, 10.2 and 17 of the Charter of Fundamental Rights and Freedoms.

Summary:

I. A search had been conducted in the offices of the employee journalists of the applicant, Czech Television (hereinafter, "Czech TV") based on a warrant for the search of premises (other than residential premises) and plots of land in order to seize an information report (a confidential document) that was the subject of a broadcast television commentary. The document was to be seized as an important item for criminal proceedings regarding a suspicion of a threat to classified information pursuant to provision 317.1 of the Criminal Code. The applicant alleged that the search interfered with its right to protection of journalistic sources pursuant to Article 17 of the Charter and Article 10 ECHR.

II. Upon the petition of the applicant, the Constitutional Court set aside by its judgment the judicial warrant by the judge of the Circuit Court in Prague 6 (File no. 37 Nt 1209/2011, 11 March 2011) as being contrary to Articles 7.1, 10.2 and 17 of the Charter of Fundamental Rights and Freedoms. The applicant's claim to have provision 41.3 of Law no. 231/2001 coll. on Provision of Radio and Television Broadcasting and provision 99.3 of the Criminal Code invalidated was dismissed.

When assessing the circumstances for issuance of the contested warrant within the framework of constitutional law, the Constitutional Court proceeded in line with its own case-law (File no. I. ÚS 526/98, Judgment 27/13 Selected Decisions 203), applying a three-step test while arriving at the conclusion that the first fundamental condition of limitation of the right to freedom of speech and the right to freedom of information had been satisfied. Then the Constitutional Court tested the legitimate aim of the restriction of the concerned fundamental right.

With reference to a consistent view of the Constitutional Court, such a legitimate aim exists where the protection of the rights and freedoms of others is at stake (in line with the positive obligations of the state in the sphere of fundamental rights and freedoms) and when public safety is at stake, and such legitimate aim is pursued by the means of the criminal law (File no. I. ÚS 201/01, Judgment 147/24 Selected Decisions 59, and others). In the instant case undoubtedly the concern was the protection of the proper operation of the state within its security structures. The Constitutional Court thus proceeded to test the third condition of restriction of the fundamental right to freedom of speech and access to information and it considered whether the restriction of this right through the warrant to search the premises of the applicant was necessary or proportionate in a democratic society (compare with

Judgment File no. Pl. ÚS 41/02, Judgment 10/32 Selected Decisions 61, and others).

The Constitutional Court noted that undoubtedly the interest of public safety may prevail over the interest in the protection of journalistic sources. However, the Court held that this is not the case in circumstances where criminal proceedings regarding leakage of information are pending while the concerned information had been declassified prior to the commencement of the concerned proceedings (it cannot be excluded that having the concerned information published in the Euro magazine significantly contributed to the declassification of the information while the mentioned magazine published the information before it was published by the applicant).

In the instant case, the right to protection of journalistic sources as a part of the fundamental right to information does not in an absolute manner prevail over other fundamental rights and freedoms of others or over legitimately protected public interests.

The Constitutional Court concluded that the law enforcement bodies involved in criminal proceedings ignored fundamental rules established for the protection of journalistic sources of information and thus their course of action was not in compliance with Article 17.4 of the Charter since the necessity of the interference with the right to freedom of speech must be interpreted in a restrictive manner. Law enforcement bodies active in criminal proceedings placed insufficient weight on the reasons of the applicant for protecting the identity of its source while the employees of the applicant had expressly relied on such protection prior to submission of the motion to have the concerned search warrant issued and not at a later point as is erroneously stated by the State Prosecutor's Office in its memorandum submitted to the Constitutional Court as a response to the constitutional complaint. The fact that, having exhausted all alternatives, the law enforcement authorities failed to establish the identity of the concerned source is not material to the case. In the instant case the public interest did not prevail over the right of the applicant to protect the source of information as confidential and the issuance of the contested warrant was not necessary in a democratic society.

With respect to the fact that the ordinary court issued the contested warrant without such warrant being proportionate and necessary in a democratic society, the Constitutional Court held that it had breached the fundamental right of the applicant guaranteed by Articles 7.1, 10.2 and 17 of the Charter and set the contested warrant aside. The accessory petition seeking to have § 41.3 of Law no. 231/2001 Coll. and part of § 99.3 of the Criminal Code invalidated was dismissed by the Constitutional Court as unfounded.

Jiří Nykodým was the Judge Rapporteur in the instant case and no dissenting opinions were issued.

Languages:

Czech.



Identification: CZE-2012-3-011

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 16.10.2012 / **e)** Pl. ÚS 16/12 / **f)** Unconstitutionality of Statute of Limitation Applicable to Objections against Court Order to pay a Bill of Exchange / **g)** 369/2012 Sb / **h)** <http://nalus.usoud.cz>; CODICES (Czech).

Keywords of the systematic thesaurus:

1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect.**
 3.16 General Principles – **Proportionality.**
 5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence.**
 5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality.**
 5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Equality of arms.**

Keywords of the alphabetical index:

Limitation period / Status, legal, inequality / Civil procedure, Code / Creditor, rights / Debtor, right to access courts.

Headnotes:

The three day limitation period for submission of objections contesting a court order to pay a bill of exchange stipulated by § 175.1 of Civil Procedure Code is disproportionately short with regard to all circumstances of its application. The period of limitation limits the opportunity of the bill of exchange debtors to effectively protect their rights before an impartial and independent court and it creates an unjustified unequal status between the bill of exchange debtors and creditors contrary to

Articles 4.4, 36.1 and to 37.3 of the Charter of Fundamental Rights and Freedoms of the Czech Republic.

Summary:

I. The applicant claimed that § 175 of the Civil Procedure Code, which imposes a three-day period of limitation on the raising of objections against payment of a bill of exchange, was unconstitutional. The application sought to set aside a decision of the High Court in Prague concerning the applicant's objections, in which the Court had set aside the decision of the court of first instance and held that the order to pay shall remain standing. The petitioner alleged that although she formally filed her objections within the statutory period of limitation, she filed her submission *pro se* and was unqualified to do so, which had a negative impact on the proceedings. The petitioner argued that the three-day period of limitation is too short for a party to the proceedings to secure legal representation and to formulate relevant objections via one's legal counsel.

The applicant contended that this fact, in combination with such objections, gave rise to an unequal status between the parties to court proceedings when, in the instant case, the original petitioner had had at their disposal several years to formulate the action while she only had three days to respond to it. The applicant argued that the concerned unconstitutionality was enhanced by the fact that while originally the bills of exchange were used as warranties of payment and negotiable instruments among professional entrepreneurs, currently the trend towards their use in consumer relations is increasing when on one side the party is a professional legal entity and on the other a consumer with no experience in financial transactions.

II. The Plenum of the Constitutional Court, in its Judgment dated 16 October 2012 pursuant to Article 87.1.a of the Constitution in proceedings on the invalidation of statute and other legal regulations, partially granted the petition of the applicant and as of the end of the day 30 April 2013, and set aside part of the provision § 175.1 of the Law no. 99/1963 Coll., Civil Procedure Code in its wording "in three days" and "within this period of limitation". The remaining part of the petition seeking to have § 175 of Civil Procedure Code abolished was dismissed as unfounded.

The Constitutional Court first tested the conditions for the petitioner's standing to file such a complaint and concluded that the condition was satisfied as part of provision § 175.1 of Civil Procedure Code was truly applicable in the instant case. Although the petitioner

formally satisfied the statutory period of limitation requirement and filed the objections in a timely manner, satisfaction of such a statutory period of limitation requirement may still have had negative impact through violation of her constitutionally guaranteed rights. In the view of the Constitutional Court, a conclusion contrary to the above would be a formalistic one and would result in an absurd situation when the petitioner would be in a more advantageous position from the procedural point of view if she had failed to attempt to satisfy the requirements of § 175 of the Civil Procedure Code and could have subsequently contested the insufficient length of the period of limitation. Furthermore, such procedure might lead to the complaint being dismissed by the Constitutional Court on procedural grounds due to a failure to exhaust all available means of remedy and such procedural circumstance would thus represent a vicious circle that would fail to ensure protection of the petitioner's fundamental rights.

Testing the merits of the claim itself the Constitutional Court, having referred to its recent case-law, noted that the period of limitation itself may not be unconstitutional; the unconstitutionality may be deemed merely through dialogue with the specific circumstances of the tested merit (Judgment File no. Pl. ÚS 6/05, 13 December 2005; N 226/39 SbNU 389; 531/2005 Coll). Such circumstances include the disproportionality of the period of limitation in relation to the time limitation imposed on the opportunity to exercise a constitutionally guaranteed right, the arbitrariness of the legislature in setting the deadline, and finally the unequal treatment of two groups of subjects, unacceptable from the constitutional point of view. These tests were applied by the Constitutional Court in the instant case to the contested three-day period of limitation imposed regarding the opportunity to challenge the court order to pay a bill of exchange.

The Constitutional Court further recalled the history of the law of bills of exchange and noted that the tested period of limitation has been governed by the Civil Procedure Code since its enactment in 1963. Yet, based on the explanatory report, it can be argued that a legislature in a socialist state perceived the law of bill of exchange as a certain residuum of bourgeois society that is to be applied solely in the sphere of international trade. While in the western countries the procedural issues in the law concerning bills of exchange have undergone significant development, the relevant Czech laws have not been amended even after 1989. In this respect, the Constitutional Court pointed to a comparison with Austria where this period of limitation was amended in 1979 in association with the enactment of the new law on protection of consumers (*Konsumentenschutzgesetz*, BGBl. no. 140/1979) and the period of limitation was

extended to 14 days. The extension was undertaken with regard to consumer relations in which the circumstances was applicable.

The Constitutional Court noted that the concerned period of limitation within the Civil Procedure Code had not been established arbitrarily by the legislator since it reflected the historically-established nature of bills of exchange. The legal provisions thus currently fail to correspond to the conditions of the market environment where the promissory note is applied between subjects that do not enjoy genuinely equal status. The Constitutional Court arrived at the conclusion that the three-day limitation period is disproportionate: such conclusion is supported by the extensive formalisation of bills of exchange, the limited opportunity to apply causal objections and mainly the concentrated nature of proceedings on a bill of exchange when objections raised after the expiration of the period of limitation available for submission of such objections are disregarded.

The Constitutional Court also noted that a longer period of limitation represents merely one of the means through which a balance between bill of exchange creditors and debtors in consumer relations can be achieved and it cannot be perceived by the legislature as a final and sufficient decision.

The Constitutional Court thus concluded that the three-day period of limitation limits the opportunity of the bill of exchange debtors to effectively protect their rights before an impartial and independent court and it creates an unjustified circumstance of unequal status of the parties. Therefore part of provision § 175.1 of Civil Procedure Code was abolished as contrary to Articles 4.4, 36.1 and to 37.3 of the Charter of Fundamental Rights and Freedoms.

The remaining part of the petition was dismissed as unfounded.

Simultaneously, the Constitutional Court noted that it was fully aware of the proposed amendment to the Civil Procedure Code pending within the legislative procedure, which would extend the period of limitation from three to eight days. With respect to the above, the Constitutional Court deferred the enforceability of the derogatory judgment until 30 April 2013. It, however, urged the legislature to bear in mind certain compliance with, and consistency of, provisions of the Civil Procedure Code when establishing a more extensive period of limitation.

Michaela Židlická was the Judge Rapporteur in the instant case. Judges Jiří Nykodým and Stanislav Balík granted dissenting opinions to the statement and the reasoning behind the judgment.

Languages:

Czech.

*Identification:* CZE-2012-3-012

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 27.11.2012 / **e)** Pl. ÚS 1/12 / **f)** Joinder of Parliament Debate on Multiple Bills and Duty of Job Seekers to Perform so called Public Service / **g)** 437/2012 Sb / **h)** <http://nalus.usoud.cz>; CODICES (Czech).

Keywords of the systematic thesaurus:

4.5.6 Institutions – Legislative bodies – **Law-making procedure.**

5.3.5.2 Fundamental Rights – Civil and political rights – Individual liberty – **Prohibition of forced or compulsory labour.**

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

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

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

Keywords of the alphabetical index:

Penalty, administrative / Job, applicant / Forced labour / Healthcare / Legislative procedure / Parliament, procedure / Public service / Registration, obligatory.

Headnotes:

A joinder of parliamentary debates on multiple Bills does not amount to a breach of constitutional principles related to the law-making procedure as long as such a joinder occurred within the recurrent debate of the Bills, with the Bills having been returned by the Senate, and provided that the previous debates provided an opportunity to all Deputies of Parliament to familiarise themselves with the Bills and to adopt a viewpoint on them.

The obligation to perform so-called public service under the threat of removal from the registry of job seekers amounts to a disproportionate burden hindering the exercise of rights set forth by statute when such rights are conferred upon job seekers pursuant to Article 26.3 of the Charter as part of their material security at the time of their unemployment. The consent of a job seeker to his or her registration in the registry of job seekers may not be interpreted to represent consent to the performance of public service which is a condition for continued inclusion on the registry. Such consent therefore amounts to signs of forced labour, which is contrary to Article 9.1 of the Charter and Article 4.2 ECHR. This obligation may, with respect to its external features, cause humiliation to job seekers, affecting their own personal dignity.

Summary:

I. The application to the Constitutional Court was made by two groups of Deputies of Parliament and one group of Senators. The first group of Deputies of Parliament sought to have 14 Acts abolished on the basis that the concerned Acts, having been either rejected or returned by the Senate, were finally enacted with amendments by the Chamber of Deputies of the Parliament of the Czech Republic. The applicants alleged that the procedure of enactment of the concerned Acts was contrary to the Constitution. Their petition was also directed against the new legal provisions governing public service which broadens the possibility of such service being performed by persons maintained in the registry of job seekers. Such a person may not, without significant and serious grounds, refuse the offer of performance of the concerned service by regional branches of the Employment Office since their registration in the job seekers registry would be discontinued for a period of at least six months in the event of refusal without such grounds. The group also sought invalidation of the duty of current operators of healthcare facilities to file for a new licence to practice medical care (a so called re-registration) if they wish to practice healthcare services after 31 March 2015.

In addition, the application of the group of senators was directed against new provisions of the National Healthcare information system, definitions of certain administrative offences and the extent of certain penalties imposable for such offences pursuant to the Act on Healthcare Services. Finally, another group of Deputies of Parliament challenged both the manner in which the Act on Healthcare Services was adopted and the actual content of that Act. At a general level, the application challenged the establishment of the term “healthcare services” and the newly defined standard of the healthcare services provision. In part the application sought to have a range of sectional

provisions governing certain specific instruments of the concerned Act invalidated; for instance, time constraints on the validity of 'living wills'.

II. The Plenum of the Constitutional Court, by a judgment of 27 November 2012, abolished the duty of persons maintained in the registry of job seekers to perform public service for a period exceeding two months, with no entitlement to be reimbursed or remunerated for such service. The Constitutional Court simultaneously abolished certain provisions of Act no. 372/2011 Coll., on Healthcare Services and Conditions for the Provision of Such Services (hereinafter, the "Act on Healthcare Services") which stipulates the duty of a so-called re-registration for current operators of non-government health facilities, defines the content of the National Registry of Healthcare Personnel and establishes time constraints on 'living wills' issued by patients for future events of loss of capacity to grant or withhold consent to the provision of healthcare services and treatment. The remaining parts of the petition were dismissed.

The extensive judgment of the Constitutional Court dealt with several autonomous spheres of legal provisions, which may be divided into several parts.

A. Joinder of the debate on the enactment of 14 Acts mainly from the sphere of social matters and healthcare

In this part the Constitutional Court dealt with the Chamber of Deputies' decision on all contested Acts after those Acts were rejected or returned by the Senate with amendments. However, in the repeated discussion of the Acts in the Chamber of Deputies the debates were joined and the length of contributions of individual Deputies to the debate was limited to 10 minutes and the number of their contributions to two. Such a procedure was, in the view of the Constitutional Court, contrary to § 54.8 of Law no. 90/1995 Coll., on Rules of Procedure of the Chamber of the Deputies since the necessary association and linkage of content was not established among the individual Acts. The Constitutional Court, however, did not find a violation of fundamental constitutional principles related to the procedure of the enactment of the concerned Acts. The Court took into account that such restriction was imposed in the very final stage and that such error had not removed from the participating Deputies the opportunity to familiarise themselves with the content of the Bills and to adopt a viewpoint towards them as well as the opportunity to publicly communicate such viewpoints (not only) within the Parliament premises.

B. Refusal to perform public service as grounds for removing an individual from the registry of job seekers after two months was found unconstitutional

The Constitutional Court abolished § 30.2.b of the Act on Employment in the wording of Act no. 367/2011 Coll. Pursuant to § 30.2.b, the regional branch of the Employment Office shall by its decision remove from the registry of job seekers a job seeker who, without serious grounds, refuses the offer to perform public service for up to a maximum of 20 hours per week in the event that such a job seeker has been registered for a continuous period exceeding two months.

The Constitutional Court drew from Article 26.3 of the Charter, which requires the State to provide an adequate level of material security to citizens who, through no fault of their own, are unable to earn a livelihood through work. The extent and the form of such security is stipulated by the legislature which may also stipulate eligibility conditions for the provision of such financial aid to persons who wish to work, but who do not have an opportunity to gain employment. Public service of up to 20 hours per week represents such a condition and is a special type of public relation under public law in which the job seeker performs a subordinate form of work but who remains formally unemployed and who cannot rely on rights to which he or she would be entitled in the ordinary position of an employee in employment relations.

By imposing this condition on job seekers in order for them to remain in the registry, the legislature was pursuing the aim of preventing the social exclusion of such individuals as well as maintaining or re-gaining their work habits and the aim of restricting the misuse of such aid by persons who do not require the concerned assistance. However, the Court considered that the performance of public service for up to 20 hours per week after two months for which the job seeker has been maintained in the registry does not represent a suitable and adequate means of achieving any of the above-mentioned aims. Furthermore, the regional branches of employment offices are accorded such broad discretion when choosing the job seekers to whom the public service is to be offered that such a procedure is arbitrary and establishes an unjustified inequality in the ability of individual job seekers to exercise the rights conferred upon them by the statute in association with their material security. These are the reasons for which the contested legal provisions interfere with the very essence of the social right pursuant to Article 26.3 of the Charter and represent a breach of this right.

At the same time, the provision is contrary to the prohibition of arbitrariness pursuant to Article 1.1 of the Constitution. With respect to the nature of public service, the nature of which is performance of a subordinate form of work, the Constitutional Court accepted the argument of the petitioners that the obligation upon job seekers to accept the offer of such work and to perform it is contrary to the prohibition of forced labour pursuant to Article 9.1 of the Charter or the prohibition of forced and compulsory labour pursuant to Article 4.2 ECHR. In this respect the Court considered whether the public service performed by job seekers is not performed under threat of punishment or involuntarily. The Constitutional Court recognised that the registration of individuals within the registry of job seekers is undertaken at their own request. It also recognised that the status of a job seeker does not only involve rights but also obligations; those obligations, however, must serve the purpose of legal provisions on the mediation of employment which govern and establish the registration of job seekers.

The Constitutional Court held that the obligation to perform public service under the threat of being removed from the registry of job seekers does not represent an adequate means for the achievement of such purpose and with respect to its length, of up to 20 hours a week, amounts to a disproportionate burden hindering the exercise of rights set forth by statute when such rights are conferred upon job seekers as part of their material security. The registration of job seekers within the registry is still the only way by which they may exercise their constitutionally guaranteed social rights, which might be in a number of cases of crucial or even of existential importance. The Constitutional Court concluded that the consent of a job seeker to his or her registration within the registry of job seekers may not be interpreted to represent consent to the performance of public service which is a condition for continued inclusion in the registry of job seekers and thus such consent amounts to signs of forced labour, contrary to Article 9.1 of the Charter and Article 4.2 ECHR.

Since the instant case does not represent any of the instances not subject to the prohibition of forced labour pursuant to the Charter or any other relevant convention, the Constitutional Court held that § 30.2.d of the Employment Act is contrary to the prohibition of forced labour. This obligation may, with respect to its external features, cause humiliation to the job seekers, affecting their own personal dignity. The concerned provision was also found by the Constitutional Court to be contrary to the right to fair remuneration guaranteed by Article 28 of the Charter, which applies with respect to the content of public

service in the form of subordinate work assigned to an individual performing such work in the event that the work is performed as a condition for continued inclusion in the registry of job seekers. The Constitutional Court did not recognise the remuneration pursuant to the above Article to mean the provision of assistance to job seekers (unemployment benefit, health insurance coverage and others), the extent of which is entirely dependent on whether the job seeker performs the public service or not.

C. Duty of re-registration of operators of non-government healthcare institutions is unconstitutional

Concerning the obligation on current operators of healthcare facilities to re-register for a new licence to practice medical care if they wish to practice healthcare services after 31 March 2015, the Constitutional Court noted that the authority of the legislature to adopt such a measure cannot be denied. However, regard must be had to the fact that such a measure leads to restriction of the very opportunity to engage in entrepreneurial activities in the sphere of the provision of healthcare services. Such a restriction of the right to engage in entrepreneurial activities, constitutionally guaranteed by Article 26.1 of the Charter, must pursue a legitimate objective and must satisfy the proportionality test. The Constitutional Court concluded that the contested obligation does not pursue any objectively recognisable objective at which achievement should be aimed. Such an objective cannot be interpreted either from the wording of statutes or from the explanatory report accompanying the original version of the Bill of the Act, in which the concerned obligation was not included; and neither the Ministry of Health nor any of the professional associations which were consulted for this purpose were able to define such an objective. The absence of such objective led the Constitutional Court to the conclusion that the concerned provisions are contrary to the constitutionally guaranteed right to engage in entrepreneurial activities as well as contrary to the prohibition of arbitrariness pursuant to Article 1.1 of the Constitution.

D. Non-compliance of legal provisions governing the National Registry of Healthcare Personnel with the right to informational self-determination

The Constitutional Court noted that the establishment of the National Registry of Healthcare Personnel pursues purposes associated mainly with the protection of life and health which are fit to justify restriction of this constitutionally guaranteed right.

The Court applied the proportionality test in which it primarily assessed whether the extent of the data on healthcare personnel, subject to both compulsory provision and subsequent publication when such data concern the right to informational self-determination of such personnel, stand as a proportionate and necessary means of pursuing the legitimate purposes of the establishment of the concerned registry.

In this respect, the Constitutional Court did not recognise as necessary the temporally unlimited publication of data on date and place of birth, citizenship, loss of the license to practice as a medical professional, loss of health competence and loss of the status of an upstanding citizen, as well as the length of the period for which a medical profession was prohibited from practice. Exclusion of such data from the publicly accessible sections of the registry does, however, reflect another aspect that is to be assessed within the concerned test; the question of access to the collected data. The law is to stipulate who and for what purpose will have access to the data and must ensure that other persons will not have access to such data or that the data will not be subject to misuse.

Although in these proceedings it was not possible to subject the entire legislation governing the National Information System to the proportionality test, the judgment does not bar submissions on other provisions of the concerned Act on the basis of the doctrine laid out in the decision. The Constitutional Court emphasised that the gathering and processing of personal data on the health condition of patients without their consent represents a very intensive interference with their fundamental rights and, in this respect, the legislation must be subject to especially strict requirements which the Court specified in its judgment. The Court accordingly urged the legislature to consider, in association with the enactment of legislation governing the National Registry of Healthcare Personnel, to what extent the remaining registries of the National Information System shall satisfy such tests and urged the legislature to remove by an early intervention any potential deficiencies possibly leading to any breach of the rights of patients, healthcare personnel or other persons to their informational self-determination.

E. Upper limit of penalties for administrative offences pursuant to the Act on Healthcare Services is not unconstitutional

In this part of the judgment the Constitutional Court listed the reasons for which it dismissed the petition of a group of senators who sought the invalidation of legal provisions of the Act on Healthcare Services which define the subject matter of administrative

offences. The group of senators contested as disproportionate the upper limit of penalties which may be imposed for such offences. Nevertheless, the Constitutional Court noted that the stipulation of such upper limits is primarily a political issue and the resolution of this question rests solely within the competencies of the legislature. The Court considered it essential that such a penalty does not lead to the liquidation of a healthcare provider, which means that administrative bodies are obliged to take regard to the impact of the penalty within the framework of the financial background of the liable subject when imposing the concerned penalty. Such obligation stems directly from the constitutional guarantee of right to property embedded within Article 11 of the Charter. Equally, such penalty may not interfere with the very essence and purport of the right to engage in entrepreneurial activities pursuant to Article 26.1 of the Charter. The Constitutional Court did not find the objections regarding the indefinite nature of the definitions of the concerned offences well-founded.

F. Time constraints of the validity of 'living wills' found contrary to Article 9 of the Convention on Human Rights and Biomedicine

The last part of the judgment is concerned with the instrument of a 'living will', which is a means of enabling a patient to grant or withhold consent to the provision of a specific healthcare service, or to the manner of its provision, in a situation where the patient lacks the capacity or ability to communicate such consent or non-consent. The last sentence of § 36.3 of the Act on Healthcare Services stipulates that the validity of such a living will is limited to five years. The Constitutional Court considered this restriction to be contrary to Article 9 of the Convention on Human Rights and Biomedicine. It enables the living will to be disregarded solely as a result of the expiration of the statutory period of its validity, which is contrary to the very purpose of such an instrument, the legal impact of which at the level of constitutional order is guaranteed by the above-mentioned provision.

In the remaining parts of the judgment the Constitutional Court dealt with the application of another group of Deputies of Parliament who sought to have certain provisions of the Act on Healthcare Services invalidated. In the view of the Court the introduction of the term of healthcare service does not mean a limitation of the extent of constitutionally guaranteed healthcare and thus a breach of Article 31 of the Charter. Neither is the new definition of the standard of the healthcare services provided, pursuant to § 28.2 in combination with § 4.5 of the Act on Healthcare Services, contrary to the above Article.

The Constitutional Court found the objections against the following matters to be unfounded: the manner in which the Act on Healthcare Services defines the meaning of the opinion of a minor patient regarding the provision of healthcare services (§ 35); the possibility of the healthcare service provider to reject the admission of a patient or to terminate care (§ 48.1 and § 48.2); the possibility of a healthcare professional to decline to provide a healthcare service (§ 50); and the definition of the position of a specialist deputy (§ 14). The Constitutional Court did not deal with the petition seeking invalidation of §§ 52-54, which govern the processing of a patient's data and the maintenance of medical records, given that the petitioners failed to provide any arguments supporting their applications.

III. Pavel Rychetský was the Judge Rapporteur. Judges Vladimír Kůrka, Stanislav Balík, and Ivana Janů submitted dissenting opinions to sentence I and judges Pavel Holländer, Miloslav Výborný, Jiří Nykodým, Jan Musil, and Vlasta Formánková submitted dissenting opinions to sentence V. Dagmar Lastovecká submitted a dissenting opinion to the reasoning behind the judgment.

Languages:

Czech.



Denmark Supreme Court

Important decisions

Identification: DEN-2012-3-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 15.02.2012 / **e)** 159/2009 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen* 2012, 1761; CODICES (Danish).

Keywords of the systematic thesaurus:

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

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

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

5.4.15 Fundamental Rights – Economic, social and cultural rights – **Right to unemployment benefits**.

Keywords of the alphabetical index:

Social assistance / Unemployment / Subsistence, minimum level / Refugee / Discrimination.

Headnotes:

Unemployment benefits may be reduced for a refugee without violating Article 75.2 of the Constitution, which obliges the State to help those who cannot support themselves, Article 14 ECHR or other international conventions.

Summary:

I. In April 2003, the applicant was granted permission to reside in Denmark as a refugee.

In June 2003, the local Municipality decided that the applicant was entitled to Start Help benefits, which he received until November 2007. As of 1 December 2007, the applicant was granted early retirement pension.

Following an amendment to the Active Social Policy Act in 2002, regular unemployment benefits could only be granted to persons who, within the last eight years, had spent at least seven years in Denmark. Persons who did not meet this

requirement received Start Help (reduced unemployment benefits) instead.

The applicant brought a case against the local Municipality and the Ministry of Employment before the Danish courts. The applicant claimed that the granting of Start Help benefits – instead of regular unemployment benefits – constitute a violation of Article 75.2 of the Constitution, which obliges the State to help those who cannot support themselves. The applicant continued that it also violated Article 14 ECHR on non-discrimination in conjunction with Article 8 ECHR and Article 1 Protocol 1 ECHR and of certain other international conventions.

Before the Supreme Court, the applicant argued that the granting of Start Help benefits instead of regular unemployment benefits constituted a violation of Article 75.2 of the Constitution. Furthermore, the applicant argued that social benefits, such as unemployment benefits, are covered by Article 14 ECHR in conjunction with Article 8 ECHR and Article 1 Protocol 1 ECHR. Since the requirement of having spent at least seven of the past eight years in Denmark affects relatively more foreigners than Danish nationals, the applicant argued that the use of Start Help instead of regular unemployment benefits in his case constituted indirect discrimination.

The defendants argued that Article 75.2 of the Constitution, while it entitles citizens to receive help, does not determine the level of help provided. Therefore, the help provided by the authorities could, if well reasoned, be reduced to the minimum level of subsistence. The Constitution, it was argued, should not be interpreted to conform to European Convention on Human Rights.

Furthermore, the defendants argued that the requirements to obtain regular unemployment benefits conform with Article 14 ECHR since they were founded on the principle of earning that did not discriminate on the basis of nationality.

II. The Supreme Court found that Article 75.2 of the Constitution entails an obligation for the State to ensure a minimum level of existence for persons covered by it. However, the Court found that the size of the Start Help and other benefits that the applicant and his spouse received were sufficient to satisfy Article 75.2 of the Constitution.

In relation to the European Convention on Human Rights, the Supreme Court found that the situation of the applicant was covered by Article 14 ECHR read in conjunction with Article 1 Protocol 1 ECHR, which, depending on the circumstances, also covers indirect discrimination.

Based on the interpretative notes to the 2002 amendment to the Active Social Policy Act, the Court stated that one of the purposes of Start Help was to encourage people to enter the labour market and fewer people to live on social welfare payments. In relation to foreign nationals, the purpose of the rules was also to strengthen their integration into Danish society. Furthermore, the Court noted that the applicant was eligible for and, in fact, received other public benefits such as housing benefit and that the rules on Start Help did not have consequences that could be characterised as disproportionate.

Finally, the Court noted that the European Convention on Human Rights leaves the States wide discretion to determine matters of social and economic policy.

For these reasons, the Supreme Court held that Start Help did not in the applicant's case constitute indirect discrimination in contravention to Article 14 ECHR in conjunction with Article 1 Protocol 1 ECHR. None of the other international conventions cited by the applicant could lead to a different result.

Supplementary information:

Following an amendment to the Active Social Policy Act in December 2011, which entered into force on 1 January 2012, Start Help has been abolished. As such, the regular unemployment benefits may be obtained even if the person in question has not resided in Denmark for a specified period of time.

Languages:

Danish.



Estonia

Supreme Court

Important decisions

Identification: EST-2012-3-005

a) Estonia / b) Supreme Court / c) *en banc* / d) 12.07.2012 / e) 3-4-1-6-12 / f) / g) www.riigiteataja.ee/akt/130032012023 / h) www.riigi.kohus.ee/?id=11&tekst=RK/3-4-1-6-12; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.1 General Principles – **Sovereignty.**

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

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

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

Keywords of the alphabetical index:

European Stability Mechanism, treaty.

Headnotes:

Article 4.4 of the European Stability Mechanism Treaty interferes with the financial competence of Parliament and is related to the principle of a democratic state subject to the rule of law. It also interferes with the financial sovereignty of the state of Estonia, in that the people's right of discretion is indirectly restricted. Article 4.4 of the Treaty provides for a proportional measure for the achievement of the objective.

Summary:

I. By the Government order "Approval of the Draft Treaty establishing the European Stability Mechanism and grant of authorisation" the Draft European Stability Mechanism Treaty (hereinafter, the "Treaty") was approved and the permanent representative of Estonia to the EU was authorised to sign it. The representative signed the amended Treaty which the Member States were required to ratify. The Chancellor of Justice made a request to the Supreme

Court, relying on § 6.1.4 of the Constitutional Review Court Procedure Act (hereinafter, the "CRCPA"), to declare Article 4.4 of the signed Treaty in conflict with the principle of parliamentary democracy and with § 65.10 and § 115 of the Constitution.

II. An assessment was first made of the admissibility of the Chancellor of Justice's request. The Court noted that the Treaty is an international agreement and not part of the primary or the secondary law of the European Union. Paragraph 123 of the Constitution prohibits entering into international treaties which are in conflict with the Constitution. § 6.1.4 of the CRCPA grants the Chancellor of Justice the right to file with the Supreme Court a request to declare a signed international agreement or one of its provisions in conflict with the Constitution. The Court found that the Chancellor of Justice is entitled to make such requests even if the Treaty has yet to be ratified; it has not been ratified yet. A preliminary review prevents a situation in which an unconstitutional international agreement might later be withdrawn or censured.

Another significant question had arisen over the constitutionality of Article 4.4 of the Treaty. The Court noted that the Treaty determines the upper limit of the obligations of the Member States and sets out when and how the capital has to be paid in.

Article 4.4 of the Treaty interferes with the financial competence of the Parliament provided for in § 65.6 of the Constitution in conjunction with § 115.1 of the Constitution and in § 65.10 of the Constitution in conjunction with § 121.4 of the Constitution, and is related to the principle of a democratic state subject to the rule of law. The Parliament's possibility of making political choices is restricted, because the choices already made have decreased national financial resources. It also interferes with the national financial sovereignty arising from the preamble to and § 1 of the Constitution, because the people's right of discretion is indirectly restricted. Article 4.4 interferes with the financial competence of the Parliament, as well as the state's financial sovereignty related thereto and the principle of a democratic state subject to the rule of law due to the possibility that, at the request of the European Stability Mechanism Treaty (hereinafter, the "ESM") the callable capital must be paid in the future.

The Court was of the opinion that the purpose of Article 4.4 of the Treaty is to guarantee for the ESM in an emergency the efficiency of the decision-making mechanism to eliminate threats to the economic and financial sustainability of the euro area. This objective is legitimate for interfering with the principles addressed above.

The objective of Article 4.4 of the Treaty is related to the purpose of the Treaty to safeguard the financial stability of the euro area. Financial instability and the closely related economic instability of the euro area also endanger the financial and economic stability of the state of Estonia, because Estonia is part of the euro area. Economic and financial stability is necessary in order for Estonia to be able to fulfil its obligations arising from the Constitution. Consequently, the interference arising from Article 4.4 of the Treaty is justified by substantial constitutional values – the need arising from the preamble to and § 14 of the Constitution to guarantee the protection of fundamental rights and freedoms.

The Court found that Article 4.4 of the Treaty provides for an appropriate, necessary and reasonable measure for the achievement of the objective. In weighing up reasonableness the Court deemed it necessary to distinguish the interference occurring on the ratification of the Treaty and the interference which may occur later in implementing the Treaty when, at the request of the ESM, the callable capital must be paid. The interference occurring on ratification is not in itself very serious; however, the interference is based on weighty constitutional values – the need to guarantee the protection of fundamental rights and freedoms. Therefore, Article 4.4 of the Treaty does interfere with the financial competence of the Parliament as well as the principles of the financial sovereignty of the state and of a democratic state subject to the rule of law, but the objectives justifying the interference are sufficiently significant. Article 4.4 of the Treaty is not therefore in conflict with the Constitution; the Court dismissed the request of the Chancellor of Justice.

The Court made the following statement, *obiter dicta*.

When the Constitution of the Republic of Estonia Amendment Act (hereinafter, the “CREAA”) was passed in a referendum, the people gave their consent in form and in substance for Estonia to accede to the European Union and to enjoy the rights and obligations arising from membership. The Court held that the CREAA should be considered as authorisation to ratify the Accession Treaty as well as authorisation allowing Estonia to be part of the changing European Union, provided any amendment of the founding treaties of the European Union or a new treaty is in accordance with the Constitution. The CREAA does not authorise the integration process of the European Union to be legitimised or the competence of Estonia to be delegated to the European Union to an unlimited extent. If it becomes evident that the new founding treaty of the European Union or the amendment to a founding treaty of the European Union gives rise to more extensive

delegation of the competence of Estonia to the European Union and more extensive interference with the Constitution, it will be necessary to seek the approval of the holder of supreme power, i.e. the people, and presumably to amend the Constitution again. These requirements are also to be considered if the Treaty leads to amendments to the TFEU and TEU.

Supplementary information:

There are 5 separate opinions from 9 judges.

Cross-references:

- Decision no. 3-4-1-17-08, 19.03.2009, Supreme Court *en banc*, *Bulletin* 2009/1 [EST-2009-1-003];
- Decision no. 3-4-1-1-03, 17.02.2003, Constitutional Review Chamber, *Bulletin* 2003/2 [EST-2003-2-002];
- Decision no. III-4/A-1/94, 12.01.1994, Constitutional Review Chamber;
- *Golder v. United Kingdom*, 21.02.1975, European Court of Human Rights, Series A, no. 18; *Special Bulletin Leading Cases – ECHR* [ECH-1975-S-001].

Languages:

Estonian, English (translation by the Court).



France

Constitutional Council

Important decisions

Identification: FRA-2012-3-010

a) France / **b)** Constitutional Council / **c)** / **d)** 21.09.2012 / **e)** 2012-271 QPC / **f)** Committee radically against bullfighting Europe and another [Criminal immunity in respect of bullfights] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 22.09.2012, 15023 / **h)** CODICES (French, German, English, Spanish).

Keywords of the systematic thesaurus:

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

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

5.2.1 Fundamental Rights – Equality – **Scope of application.**

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

Keywords of the alphabetical index:

Animal, cruelty / Bullfighting / Legality of crimes and punishments / Criminal law / Tradition.

Headnotes:

The French Criminal Code punishes serious ill-treatment and acts of cruelty inflicted on animals kept in captivity. There is, however, one exception to this rule: bullfights are not illegal where it can be argued that there is an uninterrupted local tradition. This difference of treatment is not contrary to the principle of equality before the law.

Summary:

On 21 June 2012, the *Conseil d'État* applied to the Constitutional Council, in the manner provided for under Article 61-1 of the Constitution, for a priority preliminary ruling on an issue of constitutionality concerning the conformity of the first sentence of the seventh sub-paragraph of Article 521-1 of the Criminal Code with the rights and freedoms guaranteed by the Constitution.

The first sub-paragraph of Article 521-1 of the Criminal Code punishes, *inter alia*, serious ill-treatment and acts of cruelty inflicted on animals kept in captivity. The first sentence of the seventh sub-paragraph of this article states that these provisions do not apply to bullfights. However, this exclusion is limited to cases where it can be argued that there is an uninterrupted local tradition. The applicants submitted that the provisions of the seventh sub-paragraph infringed the principle of equality before the law. The Constitutional Council dismissed this complaint and held the impugned provisions to be constitutional.

The Constitutional Council noted that the exclusion from criminal liability introduced by the impugned provisions of the seventh sub-paragraph of Article 521-1 of the Criminal Code is applicable only in the parts of the country where the existence of an uninterrupted tradition can be proved, and only in respect of acts pertaining to that tradition. The legislator's intention in enacting these provisions was that Article 521-1 of the Criminal Code should not endanger bullfighting traditions. Accordingly, the difference of treatment introduced by the legislator between actions of the same kind performed in different geographical areas is in direct relation to the object of the law by which it is established. Furthermore, it is for the courts with jurisdiction to assess the factual situations falling within the definition of "uninterrupted local tradition". This concept is unambiguous.

Languages:

French, German, English, Spanish.



Identification: FRA-2012-3-011

a) France / **b)** Constitutional Council / **c)** / **d)** 05.10.2012 / **e)** 2012-279 QPC / **f)** Mr Jean-Claude P. [Arrangements governing the movement of Travellers] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 06.10.2012, 15655 / **h)** CODICES (French, German, English, Spanish).

Keywords of the systematic thesaurus:

- 1.6.5.1 Constitutional Justice – Effects – Temporal effect – **Entry into force of decision.**
 3.16 General Principles – **Proportionality.**
 4.9.7.1 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Electoral rolls.**
 5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections.**
 5.2.2.5 Fundamental Rights – Equality – Criteria of distinction – **Social origin.**
 5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty.** 5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement.**
 5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement.**
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**
 5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote.**

Keywords of the alphabetical index:

Travel, permit / Travellers / Administrative authorities / Travel permit, visa, requirement to stamp.

Headnotes:

The requirement for persons travelling in France with no fixed abode or residence to hold travel permits and the rules on the issuance and stamping of these permits are not in themselves contrary to the principle of equality and freedom of movement. However, requiring persons who have no regular income to hold a special travel permit ("*carnef*") is contrary to the principle of equality. Likewise, requiring this permit to be stamped every three months and punishing persons who travel without it with a one-year prison sentence are contrary to freedom of movement.

The requirement for persons travelling in France with no fixed abode or residence to be attached to a municipality is not contrary to freedom of movement and the right to respect for private life. But requiring these persons to be continuously attached to the same municipality for three years in order to be placed on the electoral roll is an unconstitutional breach of the principle that all citizens are eligible to vote.

Summary:

On 17 July 2012, the *Conseil d'État* applied to the Constitutional Council, in the manner provided for under Article 61-1 of the Constitution, for a priority preliminary ruling on a constitutional issue concerning

the conformity with the rights and freedoms guaranteed by the Constitution of the provisions of Articles 2 to 11 of the Law of 3 January 1969 on the carrying on of itinerant activities and the rules applicable to persons travelling in France with no fixed abode or residence.

In its Decision no. 2012-279 QPC of 5 October 2012, the Constitutional Council gave a ruling of unconstitutionality on the provisions of the Law of 3 January 1969 introducing a travel carnet and those requiring persons with no fixed abode or residence to be attached to the same municipality for a continuous period of three years in order to be placed on the electoral roll. It declared the remainder of the provisions of the Law of 3 January 1969 to be constitutional.

I. The provisions of the Law of 3 January 1969 introducing a travel carnet are unconstitutional.

Article 5 of the 1969 Law introduces a travel carnet. This must be held by persons who have been travelling in France for over six months without any fixed abode or residence, who live permanently in a vehicle, trailer or any other mobile unit and who are unable to furnish proof of any regular income guaranteeing them normal living conditions. Such persons must have this travel carnet stamped by the administrative authorities every three years. Anyone travelling without this document is liable to a prison sentence of one year. The Constitutional Council held these various provisions to be unconstitutional.

In requiring persons with no fixed abode or residence for over six months to hold a travel permit, the 1969 Law pursued civil, social, administrative and judicial aims. Applying special rules to persons unable to furnish proof of a regular income is unrelated to those aims and therefore unconstitutional. Likewise, requiring this carnet to be stamped every three months and punishing persons travelling without it with a one-year prison sentence constitutes a disproportionate interference with their freedom of movement in relation to the aim pursued.

These provisions are set aside with immediate effect upon publication of the Constitutional Council's decision.

II. The provisions of the Law of 3 January 1969 requiring persons with no fixed abode or residence to be attached to a municipality for a continuous period of three years in order to be placed on the electoral roll are contrary to the right to vote.

The Constitutional Council has a long-standing and consistent body of case law in which measures restricting the exercise by citizens of their civic rights are subjected to close scrutiny. Applying this case law in the instant case, it found that, in requiring three years' continuous attachment in order to be placed on the electoral roll, the provisions of the 1969 Law were unconstitutional. These provisions are set aside with immediate effect upon publication of the Constitutional Council's decision.

III. The other provisions of the impugned law of 1969 are constitutional.

The Constitutional Council held that the existence of travel permits applicable to persons travelling in France with no fixed abode or residence and the rules governing the issue and stamping of these permits are not in themselves contrary to the principle of equality and freedom of movement. The aim for the state is to remedy the difficulty of locating persons on its territory who, unlike the settled population, cannot be found by means of an address. The Council accordingly held that the legislator's intention in requiring such persons to hold a travel permit was to enable, for civil, social, administrative or judicial purposes, those who cannot be found at a fixed place of abode or residence for a certain period of time to be identified and located, while ensuring, for the same purposes, a means of communication with them.

The Council also held that the distinction made by the law between persons who have a fixed abode or residence for over six months and those who do not is based on a difference of situation and, consequently, is not contrary to the principle of equality before the law.

Lastly, the Council held that the requirement to be attached to a municipality restricts neither the freedom of movement of the persons concerned nor their freedom to choose a fixed or mobile form of accommodation, nor their freedom to decide on the place of their temporary establishment. It further held that it does not limit their ability to determine a fixed place of abode or residence for more than six months and that it does not entail any obligation to reside in the municipality to which they are declared attached by the administrative authorities. The requirement to be attached to a municipality is a purely administrative one which does not infringe the freedoms relied upon by the applicant.

Languages:

French, German, English, Spanish.



Identification: FRA-2012-3-012

a) France / **b)** Constitutional Council / **c)** / **d)** 29.12.2012 / **e)** 2012-662 DC / **f)** Finance Law for 2013 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 30.12.2012, 20966 / **h)** CODICES (French, German, English).

Keywords of the systematic thesaurus:

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

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

4.10.1 Institutions – Public finances – **Principles.**

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

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

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

Keywords of the alphabetical index:

Bearer bond / Exceptional contribution / Taxation, wealth, / Finance Law / Tax, niche / Pension, taxation / Taxation, income, / Taxation, stock options / Inheritance, tax.

Headnotes:

Some maximum marginal rates of taxation applicable to certain sources of income place an excessive burden on the taxpayers concerned in terms of their capacity to pay tax. They are therefore contrary to the principle of equality in relation to public charges.

Summary:

The Finance Law for 2013 implements several policy choices of the Government and Parliament:

- it significantly increases mandatory levies;
- it modifies the taxation of income from capital assets, making them subject, in most cases, to the scale for income tax;
- this increased taxation of income from capital assets was accompanied by an increase in the number of tax bands and raising of the rates of wealth tax.

The Constitutional Council held none of these three basic policy choices of the 2013 Finance Law to be unconstitutional. It held *inter alia* that, in subjecting some income from capital assets to income tax, while that income remains subject to social charges at rates higher than those applied to income from employment, the legislator did not create an inequality in relation to public charges. It further held that it was possible to couple this reform of the taxation on income from capital assets with a reform of wealth tax owing to the setting at 1.5% of the maximum marginal rate of this tax, which takes account of the capacity of those holding the assets concerned to pay tax.

Having deemed these policy thrusts of the 2013 Finance Law constitutional, the Constitutional Council examined the constitutionality of the various articles and held as follows:

- Article 3, establishing a new marginal income tax rate of 45 %, is constitutional.
- However, the effect of this increase is to raise the marginal taxation of supplementary pensions to 75.04 % for those received in 2012 and to 75.34 % for those received starting from 2013. This new level of taxation was contrary to the principle of equality in relation to public charges because it places an excessive burden on the pensioners concerned in terms of their capacity to pay tax. The Council censured it, thus lowering the maximum marginal tax rate to 68.34 %.
- The main purpose of Article 9 is to make dividends subject to the scale for income tax. This policy choice is not unconstitutional. However, it cannot be applied retrospectively to persons who, being subject to a flat-rate withholding tax, have already paid tax in 2012 in accordance with the law.
- Article 9 also raised the tax rate on bearer bonds from 75.5 % to 90.5 %. This new rate of taxation placed an excessive burden on the taxpayers concerned in terms of their capacity to pay tax. The Council censured this increase as being contrary to the principle of equality in relation to public charges.
- Article 11 modifies the tax on capital gains and economic benefits resulting from stock options and the acquisition of shares for no consideration allocated with effect from 28 September 2012 and stipulates that they are to be subject to the scale for income tax. The effect of this is to raise marginal taxation of these gains and benefits from 72 % to 77 % (depending on the time for which the assets have been held). In addition, where a taxpayer's income subject to income tax exceeds 150 000 euros, these gains and benefits will be taxed at a rate of 68.2 % or 73.2 %. These new tax rates, which placed an excessive burden on the taxpayers concerned in terms of their capacity to pay tax, were contrary to the principle of equality in relation to public charges. The Council censured the new rates, thus lowering the maximum marginal tax on these gains and benefits to 64.5 %.
- Article 12 introduced an "exceptional solidarity contribution" of 18 % on occupational income in excess of 1 million euros. This contribution was based on the income of each individual, whereas the income tax on the same income and the exceptional contribution of 4 % on high incomes were levied by household. As a result, two households for tax purposes with the same level of income from gainful employment might either be subject to the exceptional solidarity contribution of 18 % or, on the contrary, be exempted from it depending on the breakdown of income between the taxpayers making up the household. Since the legislator had disregarded the requirement to take account of taxpayers' capacity to pay tax, the Constitutional Council, without ruling on the other complaints against this article, censured Article 12 for violating the principle of equality in relation to public charges.
- Article 13 increases the number of tax bands and raises the rates of the solidarity tax on wealth (ISF) to bring them close to those in force before 2011. At the same time, the tax on income from capital assets was increased significantly. This twofold increase is not unconstitutional with a maximum marginal rate of ISF set at 1.5 %. However, the Council criticised the fact that financial benefits or income which the taxpayer has not generated or which are not at his disposal were incorporated into the calculation of the upper limit for ISF; this violated the requirement to take account of the taxpayer's capacity to pay tax.
- Article 14 maintained a special tax regime applicable to the inheritance of properties located in the *départements* of Corsica. Its effect was that, without any legitimate reason, the transfer of these properties was exempted from inheritance tax. The Council held that the maintenance of this special tax regime violated the principles of equality before the law and equality in relation to public charges and censured Article 14.

- Article 15 modified the taxation of capital gains from real estate on building land to make them subject to the scale for income tax. The effect of this was to increase marginal taxation of these capital gains to 82 %, taking into account all the other taxes to which they might be subject. This new level of taxation, which placed an excessive burden on the taxpayers concerned in terms of their capacity to pay tax, was contrary to the principle of equality in relation to public charges. The Council censured this article.
- Article 73 concerns "tax niches". It sets the overall upper limit for most tax benefits at 10 000 euros. It provided for an upper limit increased to 18 000 euros and 4 % of taxable income in respect of tax reductions granted for overseas investment and capital financing of cinematographical works. Whereas the Finance Law brings about a significant increase in income tax, the maintenance of this upper limit enabled some taxpayers to limit the progressive nature of income tax in a way that clearly violated the principle of equality in relation to public charges. The Council censured the provision setting the proportion of tax benefits at 4 % of taxable income.
- Lastly, various articles were considered to be out of place in a Finance Law, *inter alia* because they did not relate to the resources, expenditure, treasury, borrowing, debt, guarantees or accounting of the state.

Languages:

French, German, English.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2012-3-020

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 19.06.2012 / **e)** 2 BvR 1397/09 / **f)** Family allowance in same-sex registered civil partnerships / **g)** BVerfGE (Official Digest) 131, 239 / **h)** *Zeitschrift für das gesamte Familienrecht* 2012, 1472-1477; *Europäische Grundrechte-Zeitschrift* 2012, 547-555; *Familie und Recht* 2012, 538-539; *Neue Zeitschrift für Verwaltungsrecht* 2012, 1304-1310; *Streit* 2012, 119-121; *Zeitschrift für Tarifrecht* 2012, 667-668; CODICES (German).

Keywords of the systematic thesaurus:

4.6.9.3 Institutions – Executive bodies – The civil service – **Remuneration**.
5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.

Keywords of the alphabetical index:

Same-sex civil partnership, registered / Civil servants, family allowance / Marriage, family, protection.

Headnotes:

The difference in treatment between married civil servants and those living in (same-sex) registered civil partnerships with regard to Grade 1 family allowance (§ 40.1 no. 1 of the Federal Civil Servants' Remuneration Act (*Bundesbesoldungsgesetz*)) is an indirect unequal treatment because of sexual orientation, which has to be measured against the principle of equality under Article 3.1 of the Basic Law.

If the privileged status of marriage comes along with disadvantages in the treatment of other living arrangements which are legally binding in a manner comparable to marriage, although the circumstances regulated and the purposes pursued by the respective legislation are comparable, such a distinction cannot be justified by merely referring to the requirement of marriage protection. In such

cases, it is not enough to simply invoke Article 6.1 of the Basic Law; required is a sufficiently weighty factual reason which, with a view to the respective subject-matter and objective of the legislation, justifies the disadvantageous treatment of these other living arrangements.

Summary:

I. The proceedings are based on the constitutional complaint of a federal civil servant who has been living in a registered civil partnership since 2002. His application for payment of family allowance was rejected in 2003. The court action lodged against this was unsuccessful in the administrative courts. The difference in treatment between marriage and civil partnership in federal civil servants' remuneration law was retroactively eliminated during the pending constitutional complaint proceedings on 1 January 2009. Therefore, the Federal Constitutional Court only had to rule on the constitutionality of the law as it stood up to this point in time.

II. The Federal Constitutional Court ruled that the difference in treatment between registered civil partnerships and marriage in the payment of family allowance under civil service law (§ 40.1 no. 1 of the Federal Civil Servants' Remuneration Act, hereinafter, the "Act") has been incompatible with the general principle of equality under Article 3.1 of the Basic Law since 1 August 2001.

The Panel further ruled that the impugned decisions based on the unconstitutional provision violate the complainant's fundamental right under Article 3.1 of the Basic Law, and remitted the case to the Higher Administrative Court for a new decision.

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

1. The general principle of equality requires that all persons be treated equally before the law, as well as that equal treatment be applied to what is essentially alike and unequal treatment to what is essentially different. It is hence also prohibited to rule out unequal favourable treatment where favourable treatment is granted to one group of individuals but denied to another.

The legislator is, as a rule, strictly bound by the requirements of the principle of proportionality in the event of an unequal treatment of groups of individuals. This also applies if unequal treatment of situations leads (only) indirectly to unequal treatment of groups of individuals. The requirements as to the justification of unequal treatment of groups of individuals become stricter the more the personal

characteristics permitting a distinction come close to those listed in Article 3.3 of the Basic Law - that is, the greater the risk is that an unequal treatment which is based on these characteristics could lead to discrimination against a minority. This is for instance the case with distinctions based on sexual orientation.

Article 6.1 of the Basic Law places marriage and the family under the special protection of the state. Hence, the Constitution guarantees marriage as an institution, and – as a binding value decision – confers special protection through the state order on the entire sphere of private and public law relating to marriage and the family. As an institution reserved solely to a union between a man and a woman, marriage is thus afforded independent constitutional protection. In order to do justice to this mandate of protection, it is the special task of the state to avoid everything that could damage or otherwise impair marriage, and to promote it through appropriate measures.

With regard to the constitutional mandate of protection and promotion, the legislator is entitled, as a matter of principle, to favour marriage especially as a legally binding, long-term relationship between couples involving particular mutual duties (for instance in case of illness or destitution) as compared to other living arrangements. The value decision of Article 6.1 of the Basic Law constitutes a material reason for differentiation which is primarily suited to justify favouring marriage in comparison with other unions that are characterised by a lower degree of mutual obligation.

If the privileged status of marriage comes along with disadvantages in the treatment of other living arrangements which are legally binding in a manner comparable to marriage, although the circumstances regulated and the purposes pursued by the respective legislation are comparable, such a distinction cannot be justified by merely referring to the requirement of marriage protection. In such cases, it is not enough to simply invoke Article 6.1 of the Basic Law; required is a sufficiently weighty factual reason which, with a view to the respective subject-matter and objective of the legislation, justifies the disadvantageous treatment of these other living arrangements.

The special protection afforded to marriage is not alone able to justify the difference in treatment between marriage and registered civil partnerships. There are also no further factual reasons that would justify placing married civil servants in a more favourable position.

There have been few differences in the fundamental structures of the institutions of marriage and civil partnership under family law since the introduction of the civil partnership in 2001. In particular, the extent of the legally binding nature and the mutual duties in marriage and civil partnership have been largely harmonised since the Civil Partnerships Act of 2001. With the Act Revising the Law on Civil Partnerships, which came into force on 1 January 2005, the Law on registered civil partnerships was brought even closer to the Law on marriage and to a large degree referred to its provisions on marriage.

Viable, factual reasons justifying the difference in treatment between married civil servants and those living in registered civil partnerships do not emanate from the purpose of the provision contained in § 40.1 no. 1 of the Act. The spouse-related part of the family allowance takes on a “social, namely family-related equalisation function” with which, in the interest of the functionality of the system of professional civil servants and judges, is intended to also contribute towards the independence of married civil servants. Where § 40.1 no. 1 of the Act grants married civil servants a right to Grade 1 family allowance, it is intended to compensate for *de facto* additional requirements of married civil servants existing above all in comparison to unmarried civil servants. This purpose of the statute cannot justify granting privileges to married civil servants over those living in a registered civil partnership. For there is nothing to suggest that the additional requirements to be compensated for by § 40.1 no. 1 of the Act do not equally exist in the case of civil servants living in a registered civil partnership.

The legislator is obliged to eliminate the violation of the Constitution that has been found for civil servants living in a registered civil partnership who have asserted their right to the payment of the family allowance in good time, retroactively with effect from 1 August 2001, the date of reference being the time of the introduction of the institution of the registered civil partnership.

Languages:

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



Identification: GER-2012-3-021

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 22.08.2012 / **e)** 1 BvR 199/11 / **f)** Licensing fee for Internet-enabled Personal Computers (PCs) / **g)** / **h)** *Archiv für Presserecht* 2012, 462-464; *Neue Juristische Wochenschrift* 2012, 3423-3424; *Kommunikation und Recht* 2012, 740-742; *Zeitschrift für Urheber- und Medienrecht – Rechtsprechungsdienst* 2012, 581-583; CODICES (German).

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

5.2 Fundamental Rights – **Equality.**

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

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

Keywords of the alphabetical index:

Internet, personal computers / Licence fees / Media, broadcasting, public service.

Headnotes:

The duty to pay licence fees for Internet-enabled Personal Computers (hereinafter, “PCs”) does not violate any fundamental rights.

Summary:

I. The operators of suitable receiving devices (largely television and radio sets) are obliged by law in Germany to pay radio and television licence fees. These fees are used to finance the public service broadcasting corporations.

The applicant is a lawyer and uses a PC in his firm amongst other things for internet applications. He does not use it to receive television and radio broadcasts, and does not have any traditional television or radio devices.

The broadcasting corporation imposed licence fees for the internet-enabled PC. The Federal Administrative Court rejected the applicant's action against this at final instance.

The Federal Constitutional Court did not accept the constitutional complaint against the judgment of the Federal Administrative Court for adjudication because the prerequisites for its acceptance were not met. The applicant's fundamental rights have not been violated by the levying of licence fees for his internet-enabled PC.

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

1. The impugned ruling does not violate the applicant's right to freedom of information. It is true that the applicant is impaired in acquiring and accepting information from the internet by the levying of the licence fee. This encroachment is however constitutionally justified.

The licence fee for internet-enabled PCs is levied on a basis that is constitutional in formal terms. It falls under the legislative power of the German federal states (*Länder*). It is not a tax. Rather, the fee is a charge in return for a benefit received (*Vorzugslast*), i.e. a public charge serving to compensate for benefits received through a public facility or activity.

The fee is linked to the status of being part of the television or radio audience. This status arises through possessing a television or radio receiver. The material provisions of the Inter-State Broadcasting Licence Fees Treaty (*Rundfunkgebührenstaatsvertrag*) do not breach the principle of clarity of the law.

The obligatory licence fee for internet-enabled PCs is not disproportionate. It serves to finance public service broadcasting. The levying of the fee is suitable and necessary to achieve this goal. Access barriers are not as effective a method. Their protection against evasion is subject to doubt. In addition, they would clash with the universal service mandate of public service broadcasting. Levying licence fees for internet-enabled PCs is appropriate. The applicant is not directly prevented from obtaining information from other sources on the internet, but only incurs the relatively modest, reduced fee for access. This merely slight impairment of the freedom of information is offset by an important benefit, i.e. the safeguard of public service broadcasting.

2. The obligatory levy on the internet-enabled PC, which is used as a work tool, does not constitute a violation of the applicant's occupational freedom. This is already the case because there is no direct relationship with the applicant's work or an objective tendency to regulate an occupation or profession.

3. Furthermore, there is no violation of the general principle of equality. The equal treatment of owners of traditional and new types of television or radio receivers is based on a sensible, plausible foundation. It is to counter a threat of "flight from the licence fee", and hence guarantee that public law broadcasting is financed in such a way that it can operate adequately. What is more, the unequal treatment of the owners of internet-enabled PCs *vis-à-vis* persons without a receiving device is justified. The advantage derived from owning a receiving device constitutes an objective criterion for differentiation.

Languages:

German.



Identification: GER-2012-3-022

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 12.09.2012 / **e)** 2 BvR 1390/12, 1421/12, 1438/12, 1439/12, 1440/12, 2 BvE 6/12 / **f)** ESM Treaty, Fiscal Compact / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Wertpapiermitteilungen* 2012, 1812-1826; *Europäische Grundrechte-Zeitschrift* 2012, 569-596; *Europäisches Wirtschafts- und Steuerrecht* 2012, 423-444; *Neue Juristische Wochenschrift* 2012, 3145-3161; *Deutsches Verwaltungsblatt* 2012, 1370-1375; *Verwaltungsrundschau* 2012, 421-431; CODICES (German, English).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.
 4.5.2.1 Institutions – Legislative bodies – Powers – **Competences with respect to international agreements**.
 4.10.2 Institutions – Public finances – **Budget**.
 5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.

Keywords of the alphabetical index:

Treaty establishing the European Stability Mechanism, interpretation / European Fiscal Compact / *Bundestag*, overall budgetary responsibility.

Headnotes:

The safeguarding of the *Bundestag's* overall budgetary responsibility requires commensurate interpretations of the Treaty establishing the European Stability Mechanism to be ensured under international law.

Summary:

I. The Federal Constitutional Court ruled on several applications for the issue of temporary injunctions. The applications' aim was to prohibit the Federal President from signing the statutes passed by the *Bundestag* and the *Bundesrat* in June 2012 (as measures to deal with the sovereign debt crisis in the euro currency area) until the decision in the respective main proceedings was rendered. These statutes are mainly the Act of assent to the Treaty establishing the European Stability Mechanism (hereinafter, "ESM Treaty"), the Act of assent to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (hereinafter, "Fiscal Compact") and the Act of assent to the European Council Decision to amend Article 136 of the Treaty on the Functioning of the European Union (hereinafter, "TFEU") with regard to a stability mechanism for Member States whose currency is the euro.

II. The applications were unsuccessful for the most part.

Diverging from the usual scope of examination in preliminary injunction proceedings, the review in the present temporary injunction proceedings was not restricted to a mere weighing of the consequences of the decision. Instead, the Panel summarily examined the contested approval laws to the international treaties and their accompanying legislation, so as to determine whether the violations exist which the applicants claimed in accordance with procedure. This was required because with the ratification of the Treaties, the Federal Republic of Germany would enter into commitments under international law. Their cancellation would not be easily possible in the event that violations of the Constitution should be established in the main proceedings. If a summary review in temporary injunction proceedings were to establish a high probability that there is indeed the alleged violation of the precept of democracy, which Article 79.3 of the Basic Law lays down as the identity of the Constitution, a serious detriment to the common good would result in the temporary injunction not being issued. Avoiding possible economic and political disadvantages which a delayed entry into force of the contested laws entails, cannot be a consideration in this determination.

The main proceedings were regarded as admissible to the extent that the applicants, relying on Article 38 of the Basic Law (right to elect the *Bundestag*), asserted a violation of the *Bundestag's* overall budgetary responsibility, which is entrenched in constitutional law through the principle of democracy (Articles 20.1, 20.2 and 79.3 of the Basic Law).

According to Article 38 of the Basic Law in conjunction with the principle of democracy, the decision on public revenue and public expenditure must remain in the hands of the *Bundestag* as a fundamental part of the ability of a constitutional state to democratically shape itself. The *Bundestag* may not establish mechanisms of considerable financial importance which may result in incalculable budgetary burdens incurred without its mandatory approval being given. The *Bundestag* may also not establish permanent mechanisms based on international treaties which are tantamount to accepting liability for decisions by free will of other states, above all if they entail consequences which are difficult to predict. The *Bundestag* must approve individually every large-scale federal aid measure on the international or European Union level made in solidarity resulting in expenditure. Sufficient parliamentary influence must also be ensured on the manner of dealing with the funds provided.

The *Bundestag's* overall budgetary responsibility is also safeguarded by the design as a stability union the monetary union has to date been given under the Treaties, in particular by the provisions of the Treaty establishing the European Union and of the Treaty on the Functioning of the European Union. However, a democratically legitimised change of the stability requirements under European Union law is not unconstitutional from the outset. The Basic Law does not guarantee that the law in force will not be changed.

Measured against these standards, the applications are unfounded for the most part.

The Act of assent to the insertion of Article 136.3 TFEU does not impair the principle of democracy. The provision contains the authorisation to establish a permanent mechanism for mutual aid between the Member States of the euro currency area. Admittedly, this changes the present design of the economic and monetary union in such a way that it moves away from the principle of the independence of the national budgets. This, however, does not relinquish the stability-oriented character of the monetary union because the essential elements of the stability architecture remain intact. The possibility of establishing a permanent stability mechanism, which is opened up by Article 136.3 TFEU, does not result

in a loss of national budget autonomy. Through the challenged Act of assent, the *Bundestag* does not transfer budget competences to bodies of the European Union. For the provision itself does not establish a stabilisation mechanism, but merely gives the Member States the possibility of installing such a mechanism on the basis of an international agreement. The ratification requirement for the establishment of a stability mechanism makes participation of the legislative bodies a precondition for the stability mechanism to enter into force.

The Act of assent to the ESM Treaty essentially takes account of the requirements under constitutional law with regard to the safeguarding of the *Bundestag's* overall budgetary responsibility.

However, the following needs to be ensured in the ratification procedure under international law: the provisions of the Treaty may only be interpreted in such a way as to not increase the liability of the Federal Republic of Germany beyond its share in the authorised capital stock of the ESM without the approval of the *Bundestag* and that the information of the *Bundestag* and the *Bundesrat* according to the constitutional requirements is ensured.

Admittedly, it can be assumed that the express and binding limitation of the liability of the ESM Members to their respective portions of the authorised capital stock (sentence 1 of Article 8.5 TESM), limits the Federal Republic of Germany's budget commitments to EUR 190 024 800 000. This ceiling can also be assumed to apply to all capital calls made according to Article 9 TESM. However, an interpretation in the sense that in the case of a revised increased capital call, the ESM Members cannot rely on the liability ceiling cannot be ruled out. The Federal Republic of Germany must ensure that it is only bound by the Treaty in its entirety if no payment obligations that go beyond the liability ceiling can be established for it without the *Bundestag's* consent.

A reservation in the ratification procedure is also required with regard to the provisions of the ESM Treaty on the inviolability of the documents (Articles 32.5 and 35.1 TESM) and on the professional secrecy of the legal representatives of the ESM and of all persons working for the ESM (Article 34 TESM). Admittedly, a good argument can be made that these provisions are above all intended to prevent a flow of information to unauthorised third parties, for instance to actors on the capital market, but not to the parliaments of the Member States. However, an interpretation is conceivable which would stand in the way of sufficient parliamentary monitoring of the ESM by the *Bundestag*. A ratification of the ESM Treaty is

therefore only permissible if the Federal Republic of Germany ensures an interpretation of the Treaty which guarantees that with regard to their decisions, *Bundestag* and *Bundesrat* will receive the comprehensive information they need to be able to develop an informed opinion.

In other respects, the provisions of the ESM Treaty are unobjectionable according to the summary review.

Admittedly, the provision under Article 4.8 TESM, according to which all voting rights of an ESM Member are suspended if it fails to fully meet its obligations to make payment *vis-à-vis* the ESM, is not unproblematic in view of its potentially far-reaching consequences under the overall budgetary responsibility. However, the provision does not violate the *Bundestag's* overall budgetary responsibility because the latter can, and must, see to it that the German voting rights are not suspended.

Furthermore, it cannot be established that the amount of the payment obligations entered into through the participation in the ESM exceeds the limit of the burden on the budget to such an extent that the budget autonomy effectively fails. The legislator's assessment that the risks involved in making available the German shares in the European Stability Mechanism are manageable, while without the granting of financial assistance by the ESM the entire economic and social system would be under the threat of unforeseeable, serious consequences, does not transgress its latitude of assessment and must therefore be accepted by the Federal Constitutional Court.

The objection that the ESM could become the vehicle of unconstitutional state financing by the European Central Bank cannot be raised against the ESM. As borrowing by the ESM from the European Central Bank, alone or in connection with the depositing of government bonds, would be incompatible with the prohibition of monetary financing entrenched in Article 123 TFEU, the Treaty can only be taken to mean that it does not permit such borrowing operations.

The provisions on the *Bundestag's* involvement in the decision-making processes of the ESM which result from the Act of assent to the ESM Treaty and from the ESM Financing Act also essentially comply with the requirements placed on the safeguarding of the principle of democracy at the national level. This applies to the *Bundestag's* rights of participation as well as with regard to its rights to be informed and to the personal legitimation of the German representatives in the bodies of the ESM.

The Act of assent to the Fiscal Compact (hereinafter, the “TCSG”) does not violate the *Bundestag’s* overall budgetary responsibility. The regulatory content of the Treaty is for the most part identical to the existing requirements of the Basic Law’s “debt brake” and to the budgetary obligations arising from the Treaty on the Functioning of the European Union. The Fiscal Compact does not grant the bodies of the European Union powers which affect the *Bundestag’s* overall budgetary responsibility. Article 3.2 TCSG, according to which a correction mechanism is to be put in place by the Contracting Parties at the national level in the event of significant deviations from the medium-term objective of submitting a balanced budget, on the basis of the principles to be proposed by the European Commission, only concerns institutional but not specific substantive requirements for the preparation of the budgets.

By ratifying the Fiscal Compact, the Federal Republic of Germany does not undertake an irreversible commitment to pursue a specific budget policy. Admittedly, the Treaty does not provide for a right of termination or resignation for the Contracting States. It is, however, recognised under customary international law that the resignation from a treaty by mutual agreement is always possible, and that unilateral resignation is at any rate possible in the event of a fundamental change in the circumstances which were relevant on the conclusion of the treaty.

Languages:

German; English translation on the Court’s website.



Identification: GER-2012-3-023

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 10.10.2012 / **e)** 1 BvL 6/07 / **f)** / **g)** to be published in the Federal Constitutional Court’s Official Digest / **h)** *Deutsches Steuerrecht* 2012, 2322-2331; *Wertpapiermitteilungen* 2012, 2254-2259; *Höchstrichterliche Finanzrechtsprechung* 2012, 1293-1298; CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Fiscal law, retroactive amendment / Effect, retroactive effect, false and genuine / Legitimate expectations, protection, principle.

Headnotes:

Statutes with false retroactive effect are basically permissible if the principles of proportionality and of the protection of legitimate expectations are adhered to. Retroactive amendments to fiscal law for an assessment period which is still running are cases of false retroactive effect and not in principle impermissible. They are however similar to cases of genuine retroactive effect, and are hence subject to special requirements from the point of view of the protection of legitimate expectations and proportionality.

The proposal of the Mediation Committee of *Bundestag* and *Bundesrat* dated 11 December 2001 to insert § 8 no. 5 into the Trade Tax Act, but all the more the corresponding resolution passed by the *Bundestag* on 14 December 2001, destroyed the expectation of the continued application of the law as it stood concerning the exemption of income from “ownership of free-float shares” under § 8b.1 of the Corporation Tax Act from trade tax.

Summary:

I. The submission for concrete review was made by a Finance Court, which regarded the former § 36.4 of the Trade Tax Act (hereinafter, the “Act”), which ordered the application of § 8 no. 5 of the Act already for the 2001 assessment period, as unconstitutional.

II. The First Panel of the Federal Constitutional Court refined its case-law on the retroactive effect of fiscal statutes following on from several orders of the Second Panel dated July 2010. Retroactive amendments to fiscal law for an assessment period which is still running are cases of false retroactive effect and not in principle impermissible. They are however similar to cases of genuine retroactive effect, and are hence subject to special requirements from the point of view of the protection of legitimate expectations and proportionality. Legitimate expectation of the continued application of the law is questioned by the introduction of a draft bill and certainly destroyed by the definitive resolution of the *Bundestag* on the retroactive statute. In the case submitted here of a provision which has been proposed for the first time in the mediation procedure between the *Bundestag* and the *Bundesrat*, the legitimate expectation of the continued application of the law as it stands is eliminated by the proposal made by the Mediation Committee.

The Federal Constitutional Court ruled that retroactive enactment is constitutional insofar as it relates to the period after the proposal of the Mediation Committee made on 11 December 2001. If, by contrast, it includes advance distributions that were decided on and accrued up to and including 11 December 2001, this is incompatible with the principles of the protection of legitimate expectations (Article 20.3 of the Basic Law), and hence unconstitutional.

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

The provision contained in § 8 no. 5 of the Act, which was retroactively enacted, is related to the system change in the law on corporation tax from the previous imputation system to what used to be known as the half-income system (*Halbeinkünfteverfahren*). In this system, half of the dividend which had been paid out, on which 25% corporation tax had been levied, was included in the shareholder's income tax assessment basis. The dividends not assessed according to income tax or corporation tax law from "ownership of free-float shares" of fewer than 10% (since 2008: fewer than 15%) are added to the profit in the law on trade tax.

The Federal Government's draft bill had initially not provided for a provision on this question. It was only the recommendation for a resolution of the Mediation Committee dated 11 December 2001 which contained the provision which later passed into law. The *Bundestag* passed a resolution on 14 December 2001, in line with the proposal made by the Mediation Committee; the *Bundesrat* concurred on 20 December 2001. The Act was promulgated in the Federal Law Gazette on 24 December 2001.

The provision contained in § 36.4 of the Act, according to which § 8 no. 5 of the Act is to be applied to the 2001 assessment period for the first time, leads to a false retroactive effect.

According to the Federal Constitutional Court's established case-law, a genuine retroactive effect only applies in fiscal law if the legislator subsequently amends a tax debt which has already arisen. The amendment of fiscal-law provisions with effect for an on-going assessment period is to be attributed to the category of false retroactive effect and – in contradistinction to a genuine retroactive effect – is not in principle impermissible.

Retroactive provisions within an assessment period are however similar to cases of genuine retroactive effect in many respects. More stringent requirements therefore apply to compatibility with the Constitution. If the legislator reforms company tax law during the

on-going assessment period and relates the legal amendments to the beginning of this period, then the unfavourable impact of a disappointment of legitimate expectations which are eligible for protection must be proportionate.

The distribution of dividends is not necessarily the result of acts by an owner of free-floating shares which are based on specific legitimate expectations. However, at least within the assessment period, the owner of free-floating shares can legitimately rely on the law in force at the time of the acts. The Mediation Committee's proposal of 11 December 2001 ended the legitimate expectation that the current legislation would remain in force.

Once a draft bill has been introduced in the *Bundestag* by a body entitled to introduce bills, taxpayers may no longer unrestrictedly expect the law currently applicable to continue to apply unchanged. At least from the time of the definitive resolution of the *Bundestag*, those concerned must, according to the Federal Constitutional Court's established case-law, anticipate that the new provision will be promulgated and will enter into force.

It is characteristic of the case at hand that the provision which was enacted retroactively was contained for the first time in the Mediation Committee's recommendation for a resolution dated 11 December 2001. As to its expectation-impeding impact, the recommendation for a resolution of the Mediation Committee not only corresponds to a draft bill, but goes beyond it. The acceptance of such a mediation proposal by the *Bundestag* is as a rule considerably more probable than that of a draft bill because the mediation proposal is situated at the end of the parliamentary decision-making process, including the efforts of the Mediation Committee to reach a compromise, and marks its outcome.

§ 36.4 of the Act is constitutional insofar as it declares § 8 no. 5 to be applicable to advance dividends which accrued subsequent to 11 December 2001. This also applies insofar as the accrual took place prior to promulgation in the Federal Law Gazette of 24 December 2001. In one of its orders dated 7 July 2010, the Federal Constitutional Court granted protection of legitimate expectations in the event that the accrual of funds took place prior to the promulgation of the new provision. This was however a matter of severance agreements between employers and employees, on conclusion of which the employee disposes of his or her employment contract, and hence of parts of his or her economic existence. The case constellation at hand is not comparable with such a case.

Languages:

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

*Identification:* GER-2012-3-024

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 25.10.2012 / **e)** 1 BvR 901/11 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Statement, unjustified classification, allegation of fact.

Headnotes:

Unjustified classification by the non-constitutional courts of an utterance as an allegation of fact may violate freedom of expression.

Summary:

I. The constitutional complaint is directed against a judgment of a civil court which prohibits the applicant from making an utterance. The applicant submits that its fundamental right to freedom of expression is violated.

The applicant, which was the defendant in the original proceedings, distributes the magazine Tacheles by email at irregular intervals.

In May 2009, the plaintiff in the original proceedings, Focus Magazin Verlag GmbH, published a cover story on the subject of implantology in its magazine Focus. The title page read: “Big Focus list of doctors – 115 recommended specialists”. This list was printed in the article. The list included the dentist Mr B., who is also the Vice-President of the Bavarian Land (State) Medical Chamber. The list was the result of a study which involved, among other procedures, a questionnaire sent to dentists.

In June 2009, the magazine Tacheles discussed the Focus list of doctors. The following is a quotation of part of the article:

“Vice-President of Bavarian Land Medical Chamber involved in advertising affair

The Vice-President of the Bavarian Land Medical Chamber, who is also the Chairman of an implantologists' association, is included in a Focus list of what are claimed to be the 115 best implantologists in Germany. The editorial department presumably telephoned a large number of dentists in advance and offered them a place on this list, subject to conditions of some sort. The Vice-President claims that his participation in the whole action was agreed in advance with the Federal Chamber of Dentists. The president of the Federal Chamber of Dentists now denies this, as follows: ‘... the Federal Chamber of Dentists has nothing to do with this except that it explained certain “professional titles” and terms to Focus, or referred Focus to relevant internet sites. In this connection the Federal Chamber of Dentists was not aware that Focus was planning the article which has now been published.’ ... We think: an eminent representative of his profession who apparently places his own financial interests and the interests of his professional association above the interests of the Bavarian dentists he represents should be asked to resign.”

The plaintiff is of the opinion that this article claims that a financial payment was the condition for being included in the list of doctors. It submits that such a claim violates its right of personality as an enterprise. It seeks an order that the defendant desists from making the following statement: “The editorial department presumably telephoned a large number of dentists in advance and offered them a place on this list, subject to conditions of some sort.”

Passau Regional Court dismissed the action. In response to the plaintiff's appeal, the Higher Regional Court reversed the judgment of the Regional Court and ordered the applicant to desist from making the statement in question. The Higher Regional Court refused leave for further appeal.

II. The constitutional complaint is clearly well-founded. The challenged decision of the Higher Regional Court violates the applicant's fundamental right of free expression under sentence 1 of Article 5.1 of the Basic Law.

1. The fundamental right of freedom of expression gives everyone the right to freely express and to disseminate his or her opinion in words, writing and images; it does not expressly distinguish between a

value judgment and an allegation of fact. Allegations of fact are characterised by the objective relationship between the statement and reality and are accessible to examination using methods of evidence. Opinions, in contrast, are characterised by the element of taking a position, of holding a view or of opining.

The allegation of a fact is within the area of protection of freedom of expression insofar as it is a condition for the formation of opinions. The protection of freedom of expression for allegations of fact therefore only ends where they cannot contribute to the constitutionally required formation of opinion. The Federal Constitutional Court therefore proceeds on the assumption that an allegation of fact which is proved to be false or is made in the awareness that it is false is not covered by the protection of sentence 1 of Article 5.1 of the Basic Law. True statements must usually be permitted, even if they are detrimental to the person affected. This also applies to statements in which elements of fact and elements of valuation are intermingled. In the weighing of interests, weight is attached to the correctness of the content of the allegation of fact on which the value judgment is based. The meaning and scope of freedom of expression are misunderstood if an utterance is incorrectly categorised as an allegation of fact, an utterance defamatory per se or abusive criticism, with the result that it does not enjoy the protection of the fundamental right to the same degree as utterances which are to be regarded as value judgments without an insulting or abusive character.

A crucial factor in the interpretation of an utterance is the meaning it has as understood by an unprejudiced and prudent public. The assessment of this must always commence with the wording of the utterance. But its meaning is also determined by the linguistic context in which the disputed utterance stands and from recognisable concomitant circumstances.

The non-constitutional courts' classification of an utterance as a value judgment or an allegation of fact is reviewed by the Federal Constitutional Court by reason of its importance for the extent of protection of the fundamental right and in order to weigh it against conflicting legal interests.

2. There are well-founded constitutional objections to the Higher Regional Court holding that the text passage in dispute is not within the area of protection of freedom of expression.

The Higher Regional Court restricts its grounds of judgment to the question of the truth contained in the statement as to whether the Focus editorial department itself or an agency telephoned dentists. This does not do justice to the legal dispute. For the

subject of the proceedings is the question as to whether the right of personality of Focus Magazin Verlag GmbH is violated by the applicant claiming that it offered places in the list for money. The Higher Regional Court should have examined whether it is at all possible to derive such a statement from the text and, if this is the case, whether this is based on an allegation of fact or on a value judgment. The Court should also have considered the overall statement of the article (criticism of the Vice-President of the Bavarian Land Chamber of Dentists) and in this connection taken account of the concern of the magazine Tacheles (evaluation of facts with reference to the work of dentists) and the intention of the challenged utterance (criticism of the composition of the list of doctors). At all events, it is not clear on the face of it that the identity of the person making the telephone call is of decisive importance for the interpretation of the challenged utterance if there is the required overall consideration. Insofar as the Higher Regional Court regards as crucial the question as to whether the editorial department itself or an agency made the telephone calls, it should consequently set out why the statement challenged by the plaintiff follows from this and why this is a violation of the plaintiff's right of personality. In this connection, in any case, there can at most be a question only of a violation of its right of personality as an enterprise. But no reflection of any of this can be found in the decision of the Higher Regional Court.

3. The particular weight of the violation of a fundamental right is indicated by the failure to recognise the protection granted by the freedom of expression.

4. The challenged decision is based on the constitutional errors set out above. It is not out of the question that the Higher Regional Court will reach a different decision in the matter if it considers the case again.

Languages:

German.



Identification: GER-2012-3-025

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 28.10.2012 / **e)** 2 BvR 737/11 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.

Keywords of the alphabetical index:

Smoking, passive / Remand detainee, impairment by fellow inmates smoking / Interest in bringing proceedings in constitutional complaint proceedings.

Headnotes:

The accommodation of a remand detainee who is a non-smoker together with two fellow inmates who are heavy smokers may violate the fundamental right of the person concerned to physical integrity.

Summary:

I. The constitutional complaint relates to the impairment of a remand detainee by smoking on the part of fellow inmates in the cell.

The applicant, a non-smoker, was placed on remand in Stralsund Prison on 27 February 2010 in a three-person cell with two other inmates who were smokers. The two smoking inmates were transferred to another cell on 3 March 2010, and the applicant was accommodated together with a non-smoker.

The applicant filed an application dated 29 November 2010 to the Stralsund Regional Court for a court ruling. He applied amongst other things for a finding that the “authorisation of the application of physical pain through substances that are harmful to health” had been unlawful. Both his fellow inmates had been heavy smokers, even smoking several times during the night. The smoke had already caused him serious headaches after the first night, and these had persisted despite his taking pain-killers. Nothing had at first been done when he had stated that the conditions in the cell were intolerable for him. He had been forced to inhale substances which were harmful to health, thus causing him physical pain. He had not consented to such joint accommodation.

The Regional Court rejected the application for a court ruling by order of 9 December 2010.

The complaint filed a complaint against this order. The Higher Regional Court rejected the complaint by order of 3 March 2011.

The applicant’s constitutional complaint challenges the orders of both the Regional and the Higher Regional Courts.

II. The constitutional complaint is admissible and manifestly well-founded. The Federal Constitutional Court has rescinded the impugned orders and remitted the case to the Regional Court.

The admissibility of the constitutional complaint is not countered by the fact that the applicant has now been transferred to another prison to serve a criminal sentence. The interest in bringing proceedings in constitutional complaint proceedings is also to be presumed to continue to apply in cases of major encroachments on fundamental rights if the direct burden ensuing from the act of state which is the object of the complaint is restricted to a period of time in which the person concerned was highly unlikely to be able to bring about a ruling on the part of the Federal Constitutional Court in the regular course of business. Apart from encroachments on fundamental rights which the Basic Law has subjected to judicial reserve, also those on other fundamental rights can be considered major in the sense that is relevant here.

Accordingly, the applicant cannot be denied a continuing interest in bringing proceedings. Because of the typically short duration of remand detention, a remand detainee can, as a rule, not obtain a favourable ruling from the Federal Constitutional Court regarding measures of its enforcement whilst still on remand. Were the interest in bringing proceedings for constitutional complaints relating to such measures to cease to exist in each case when the person concerned is transferred into criminal detention, or on his or her transfer to another prison as a consequence of the latter, effective constitutional-court protection of fundamental rights would largely fail to exist in this area. In view of the weight attached to the encroachment complained of by the applicant, the interest in bringing proceedings also does not cease to apply because the encroachment on fundamental rights complained of did not reach the required severity.

The impugned order of the Regional Court violates the applicant’s fundamental right to life and physical integrity under sentence 1 of Article 2.2 of the Basic Law. At least with regard to inescapable joint accommodation in a small space, passive smoking is not only a considerable nuisance, but also has effects which are harmful to health which at least cannot be

ruled out. Hence, the fact that an inmate is exposed to smoking by a fellow inmate in his or her cell without his or her permission can constitute a considerable encroachment on fundamental rights. The inmate has a right to protection against being placed at risk and suffering considerable nuisance as a result of smoking by fellow inmates and by prison staff. Accordingly, there was a considerable encroachment on the fundamental right under sentence 1 of Article 2.2 of the Basic Law as – according to his uncontradicted statement – the applicant, as a non-smoker, was accommodated for several days against his will in a cell with two fellow inmates who were heavy smokers.

According to sentence 3 of Article 2.2 of the Basic Law, the right to life and physical integrity may be interfered with only pursuant to a law. The Regional Court invoked sentence 3 of § 13.1 of the Act on the Enforcement of Remand Detention in Mecklenburg-Western Pomerania (*Gesetz über den Vollzug der Untersuchungshaft in Mecklenburg-Vorpommern*). According to this provision, in the case of a risk to life or health, or of need of assistance, remand detainees may be placed together during the resting periods without the consent of the remand detainee who is endangered or in need of assistance. The provision however does not provide a legal basis for the encroachment on the fundamental right to physical integrity that is to be ruled on here resulting from the joint accommodation of the applicant in a cell specifically with several fellow inmates who smoked.

The Regional Court furthermore at all events failed to appreciate the significance of the fundamental right to physical integrity when applying the provision invoked as a basis for the encroachment. This was a result of the fact of it considering the joint accommodation of the applicant with two smokers to be lawful without reviewing the proportionality of the encroachment.

The Regional Court did not even appropriately explore the very question of whether the encroachment was necessary. The necessary clarification of the facts was not carried out. The Regional Court presumed that it had not been possible to jointly accommodate the applicant with one or several non-smokers because of the occupation situation. The prison's statement which the court cited did not however even explicitly state that the only way in which the applicant could be securely accommodated was in fact by placing him together with two fellow inmates who smoked.

The adequacy of the encroachment was also not sufficiently reviewed. It is not possible to justify arbitrary restrictions by claiming that the material situation in the prison did not permit any other course

of action. Rather, the principle of proportionality, which must particularly govern the enforcement of remand detention, also makes demands on the equipment of the prisons. It is a matter for the State to take all measures within what is reasonable which are suitable and necessary in order to avoid curtailing the rights of remand detainees. It must procure, provide and deploy the material and staffing that are necessary in order to do so.

Languages:

German.



Identification: GER-2012-3-026

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 08.11.2012 / **e)** 1 BvR 22/12 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift-Spezial* 2013, 24-25; *Datenschutzberater* 2013, 21; CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Detention, preventive / Observation, permanent / Interim proceedings, non-constitutional courts.

Headnotes:

In interim legal protection proceedings, as elsewhere, the administrative court's examination as to whether the permanent observation of a man released from preventive detention is lawful must rely on a sufficiently current factual basis to assess how dangerous he is.

Summary:

I. Following his release from preventive detention, the applicant is subject to long-term observation. His constitutional complaint is directed against decisions in administrative court interim legal protection proceedings relating to this observation.

In 1985, the Regional Court sentenced the applicant to five years' imprisonment followed by preventive detention for two offences of rape. In a decision of 10 September 2010, the Higher Regional Court – following the case-law of the European Court of Human Rights – held that the preventive detention was terminated. When the applicant was released from preventive detention, the Police Directorate ordered that the applicant should initially be subject to long-term observation for a period of four weeks, and following this, extended this period regularly, that is, for a period of two years to date.

According to the information which he provided in the original proceedings, which remain undisputed, the applicant lives in one-room lodgings in a rear building. In the courtyard in front of this rear building, a police car containing three police officers is permanently parked. Two more police officers remain in the kitchen of the lodgings when the applicant is in his room. There is no direct observation of the applicant in his private living quarters. Outside his home, the applicant is constantly accompanied by police officers. The officers have instructions to keep a distance when the applicant is talking to doctors, lawyers and civil servants at government authorities. If the applicant enters into contact with women apart from this, the police officers inform them of the reason for the observation in what is known as a warning to persons endangered.

The applicant applied for his observation to be terminated by interim injunction; this was refused by an Administrative Court in the Land (state) Baden-Württemberg by an order of 16 August 2011. The appeal against this was dismissed by the Baden-Württemberg Higher Administrative Court by an order of 8 November 2011.

II. The Chamber accepts the constitutional complaint challenging these two orders for decision and grants the relief sought by it.

The Federal Constitutional Court has already developed the constitutional principles which govern the assessment of the constitutional complaint: the courts are required to grant interim relief if the applicant is otherwise threatened by a substantial injury of his rights, extending beyond marginal areas, which cannot later be removed by the decision in the principal proceedings. An exception applies if overriding and particularly important reasons conflict with this. In addition, the examination must be thorough enough to effectively protect the applicant against substantial and unreasonable disadvantages which cannot otherwise be averted or repaired. In the case of such disadvantages, the courts may only limit themselves to a summary review of the factual and

legal situation, such as would be sufficient in other circumstances, where this is justified by special reasons, *inter alia* with regard to the disadvantages in question. They must also include questions of the protection of fundamental rights.

The decisions in the original proceedings do not satisfy these requirements in every respect. Initially, the administrative courts rightly recognised that the permanent observation of the applicant is a serious encroachment upon fundamental rights. However, they did not pay sufficient consideration to the special constitutional weight of the applicant's application.

However, it is unobjectionable that the administrative courts, in the interim legal protection proceedings, regarded the general police provision in Baden-Württemberg police law as an adequate legal basis for the permanent observation of the applicant. Admittedly, it is doubtful whether the current legal position provides a sufficiently refined legal basis to support the conduct of such observation in the long term. Instead, this is most probably a new form of police measure which has not yet been specifically defined by the Land legislator and by reason of its far-reaching effects possibly needs an express and detailed enabling statute. However, there are no well-founded constitutional objections, in view of the weight of the legal interests involved, to the courts in interim legal protection proceedings regarding the existing legal basis as adequate and postponing the final determination of a legal basis until the principal proceedings. In doing this, they interpret the general police provision as making it possible for the authorities to provisionally react to unforeseen situations of danger even with measures which essentially require more specific legislation. In this way the courts enable the legislator to close any gaps in the law. If one observes strict requirements of proportionality, this is constitutionally unobjectionable. It is then the responsibility of the legislator to react to this or to accept the risk that such measures are in the long term regarded by the courts as not covered by the current legal position.

However, there is another reason why the decisions challenged do not satisfy the requirements of the necessary intensity of examination in the area of constitutionally relevant interim legal protection. The courts based their decision conclusively on a psychiatric report of 5 March 2010. The report was made at a time when the applicant was still in preventive detention. The expert could at most make assumptions as to how the applicant would behave in freedom after decades of imprisonment and preventive detention. But the applicant has now lived for a considerable time in completely changed circumstances. A decision on the continuation of

almost uninterrupted police observation is a far-reaching decision, and these circumstances suggest that it is not appropriate to base such a decision on out-of-date assumptions.

Languages:

German.



Greece

Council of State

Important decisions

Identification: GRE-2012-3-002

a) Greece / **b)** Council of State / **c)** Plenary Session / **d)** 20.02.2012 / **e)** 668/2012 / **f)** On the constitutionality of the “Memorandum” / **g)** / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

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

3.1 General Principles – **Sovereignty.**

3.16 General Principles – **Proportionality.**

3.18 General Principles – **General interest.**

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

4.10 Institutions – **Public finances.**

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

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

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

Keywords of the alphabetical index:

Administrative court, jurisdiction / Annulment, application / Binding effect, constitutional doctrine / Constitutional complaint, admissibility, limits of review / Fundamental rights / International agreement, constitutional requirements, parliamentary approval / Judicial review over other state powers / Legislation, delegated / Monetary policy, powers / Pension system / Property right / Tax, unequal treatment / Treaty, international, ratification.

Headnotes:

The “Memorandum” agreement, which was signed between the Greek Government and the Euro area Member States and the International Monetary Fund, sets the goals and time-limits of granting financial support to Greece during the economic crisis and does not constitute an international treaty, since it is not legally binding for the signatory parties. State measures adopted to fulfil the aims set by the

“Memorandum” do not violate basic individual rights, because they are intended to serve, for a limited period of time, the public interest of avoiding default and restructuring a viable economy.

Summary:

I. The Athens Bar Association joined forces with the highest syndicate of civil servants and other professional organisations and individual citizens to challenge, by way of application for judicial review, various regulatory and individual administrative acts, which set measures of economic austerity in implementation of the Laws responding to the economic crisis and the need to establish financial support to Greece by the International Monetary Fund (IMF) and by Euro area Member States (Statutes 3833/2010 and 3845/2010).

II. First of all, the Court deemed the application admissible only insofar as it concerned administrative acts, whether regulatory or individual, issued under statutory authorisation of the said laws in order to set the conditions of the application of these laws to particular cases or individual situations. The constitutionality review of these laws was only incidental to the review of the directly challenged administrative acts. The application was rejected as inadmissible insofar as it was directed against particular provisions of the above-mentioned laws, as it was held that these legislative provisions were of a non-reviewable, general and abstract nature and did not contain a complete and exhaustive regulation of a certain individual case that would render ineffective the issue of a reviewable administrative act. Had the latter been the case, then the legislative provisions in question would be considered reviewable by the Court on the grounds of unconstitutionality, more specifically, for being contrary to the citizens' right to judicial protection (Article 20.1 of the Constitution, Article 6.1 ECHR), because they would then implement the choice of the Administration to initiate a legislative act, which escapes direct judicial review, instead of administrative acts establishing measures of severe economic austerity, which are subject to judicial review.

Then the Court proceeded to examine the question whether the Memorandum (analysed in the Memorandum of Understanding on Specific Economic Policy Conditionality and the Memorandum of Economic and Financial Policies) signed by the Democracy of Greece, on one part, and the Euro area Member States and the IMF, on the other, and ratified by Statute 3845/2010, to which it was attached, constituted an international agreement that conveyed national competences to organs of international organisations and was adopted contrary

to the application requirements of Article 28.2 of the Constitution, which suggest that such an agreement is voted by a majority of three fifths of the total number of Members of Parliament. The majority of the Court in plenary session decided that Statute 3845/2010 was not enacted in breach of Article 28.2 of the Constitution, because the attachment of the said Memorandum to it served nothing more than to publicise its content and the time-schedule set for the enforcement of the aims and means of the program of the Greek government to deal with the financial crisis and avoid default. Being a mere governmental program in nature, the Memorandum (dated 9 February 2010) neither conveys competences to organs of international organisations nor does it establish rules with immediate effect, but requires, instead, the further issue of legislative acts (statutes or regulatory acts authorised by statute) for the realisation of the pronounced policies. The Memorandum is no international treaty for the additional reason that it is not legally binding for the signatory parties since no mutual commitments are undertaken by them and no forcing mechanisms or other forms of legal sanctions are provided for as means to secure the realisation of the aims of the Treaty. The only legal obligations that the Greek State undertook as against the other Member States of the Euro area arise from the adoption of Council Decision 2010/320/EU in accordance with Articles 126.9 and 136 of the Treaty on the Functioning of the European Union and from the EU Loan Facility Agreement of 8 May 2010. These European-law instruments, issued – in any case – after the enactment of Statute 3845/2010 which authorised the directly challenged administrative acts, are the only internationally binding rules for the Greek State, as they set out the measures that it has to adopt in order to fulfil the obligations it assumed, as Member State of the Euro area, in its program to limit its enormous deficit.

Given the fact that neither the Memorandum nor Statute 3845/2010 grant competences relevant to the exercise of economic and financial policy to other Member States of the Euro area, to organs of the European Union or to the International Monetary Fund and the fact that they do not transfer any other kind of powers to organs of international organisations that limit the exercise of national sovereignty, the Court found that the Greek government maintains its powers under Article 82.1 of the Constitution to make national policy and that Statute 3845/2010 is not opposed to Article 28.3 of the Constitution which states that: “Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the

rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity.”

The Court then proceeded to examine the constitutionality of the content of the Memorandum provisions that formed part of Statutes 3833/2010 and 3845/2010. In general terms, the Court held that all measures taken by the Greek government, which involved cuts in salaries and pensions paid by the state and by state social security organisations, as a small part of a broader program of financial adjustment and structural reform of the Greek economy within the European framework, aimed at the immediate lowering of public-sector expenditure, the rationalisation of public finances, the viable reduction of the financial deficit and the service of the country's international debt. In adopting the necessary measures to the above-mentioned goals, the legislator enjoys a wide margin of appreciation which is subject to judicial review only in its outer limits. The cuts in salaries and pensions lead to a reduction in the income of citizens, but not to the deprivation thereof they are thus neither contrary to Article 1 Protocol 1 ECHR nor to the constitutional principle of proportionality (Article 25.1.4 of the Constitution). They are also not opposed to the constitutional protection of property (Article 17 of the Constitution), because the Constitution does not guarantee the right to a salary or pension at a certain level, but allows for the differentiation of the amounts paid by the state according to national circumstances, without requiring the provision of compensation. The fact that these measures are obligatory and do not leave to the Administration the exercise of a margin of appreciation at each particular case, is not in opposition to any other constitutional or legislative provision. The right to human dignity (Article 2 of the Constitution) is also not hurt because the applicants have failed to prove that a minimum standard of decent living is jeopardised by the aforementioned cuts. Finally, the principle of equality in the sharing of public burdens is not violated by measures that provide for cuts in the citizens' income, while, at the same time, allowing tax-payers to put in order their obligations by paying less taxes to the state than the amounts really owed. According to the majority of the Court, these measures are only temporary and aim at creating an immediate revenue influx for the Greek state, only until another set of measures, designed to fight tax-avoidance and tax-fraud, start to operate. Seen in this light, the examined measures of economic austerity are not contrary to the principle of equal contribution to the public burdens by the Greek citizens.

Languages:

Greek.



Identification: GRE-2012-3-003

a) Greece / **b)** Special Highest Court of Article 100.1.e of the Constitution / **c)** / **d)** 28.06.2012 / **e)** 25/2012 / **f)** Special Supreme Court Decision 25/2012 on the constitutionality of Article 21 of the Code of Laws on the Trials of the State / **g)** / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

1.4 Constitutional Justice – **Procedure**.
 2.3.6 Sources – Techniques of review – **Historical interpretation**.
 2.3.9 Sources – Techniques of review – **Teleological interpretation**.
 3.10 General Principles – **Certainty of the law**.
 3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 3.18 General Principles – **General interest**.
 4.7.7 Institutions – Judicial bodies – **Supreme court**.
 4.7.10 Institutions – Judicial bodies – **Financial courts**.
 4.10.2 Institutions – Public finances – **Budget**.
 5.1.5 Fundamental Rights – General questions – **Emergency situations**.
 5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens**.
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Appeal, jurisdiction / Constitution, interpretation, jurisdiction / Public power, review / Supreme Court, jurisdiction.

Headnotes:

The differentiation between the amount of interest paid by the State and that paid by private parties on overdue payments does not contravene the right to judicial protection (Article 20.1 of the Constitution). The establishment of a privileged interest rate for the Greek State is justified by the severe economic crises that Greece underwent throughout its history and for very long periods of time which also affected the periods when more favourable conditions for the country's development existed. Article 21 of the Code of Laws on the Trials of the State introduces an acceptable preferential treatment in favour of the

Greek State, which aims at the proper exercise of public power through the safeguard of financial stability and of the assets of the State and ultimately, at the fulfilment of state obligations against its citizens. The same provision also aims to limit public debt created by paying default interest on overdue payments and guarantees the public estate to which all citizens contribute through the payment of taxes and the state's ability to calculate in advance the amount of state debts and their consequences. Article 21 of the Code of Laws on the Trials of the State does not violate Article 17 of the Constitution on the protection of property.

Summary:

I. The case was remitted to the Special Highest Court with authority to settle constitutional controversies between the courts of highest jurisdiction (established by Article 100.1.e of the Constitution), following Decision 2812/2011 of the Court of Auditors (*in plenum*) and contrary decisions (*in plenum*) of the same Court and of the Highest Civil and Criminal Court (*Areios Pagos*), on the constitutionality of Article 21 of the Code of Laws on Trials of the State (codifying decree of 26 June/10 July 1944). This Law stipulates that the Greek State should pay its debts to a minimum of 6% default interest rate and the question raised before the Special Highest Court concerned the conformity of this provision with Article 4.1 of the Constitution (principle of equality), Article 20.1 of the Constitution (judicial protection) and Article 25.1 of the Constitution (principle of proportionality) and also the application of Article 293 of the Civil Code and Article 15.5 of Statute 876/1979 which provide in contrary that the higher interest rate paid by private parties on overdue payments is decided each time by a governmental decision.

II. The Special Highest Court decided first that Article 21 of the Code of Laws on Trials of the State, which sets the percentage of default interest rate paid by the Greek State, constitutes a substantive and not a procedural legal provision, which does not accord preferential treatment to the State within the judicial process. Therefore, the differentiation between the amount of interest paid by the State and that paid by private parties does not contravene the right to judicial protection (Article 20.1 of the Constitution).

Then the Court proceeded to examine the conformity of Article 21 of the Code of Laws on Trials of the State with the equality principle enshrined in Article 4.1 of the Constitution, according to which, there is no equality between the State and private parties when the former acts in the exercise of public power or when a privilege established in favour of the State with a certain substantive-law provision aims at

the proper execution of the public power and at the fulfilment of the obligations of the State against its citizens. In doing so, the Special Highest Court stressed the fact that ever since the year 1877, the Greek State always paid less default interest in its capacity as debtor compared to what private individuals paid for their debts. The Court documented this thesis by supplying a historical report on all the financial crises suffered by the Greek State, starting in 1893, when Greece declared a moratorium, and continuing in 1898, when it was placed under international economic control after the war against Turkey, in 1908 and after the military coup in Goudi in August 1909, after the Balkan wars, the so-called Catastrophe in Minor Asia in 1922, the international economic crisis of 1929 and the moratorium declared by Greece in 1932. The Court also made reference to the times after the dictatorship in the period 1967-1974 and in the year 1985, when strict economic measures affecting the income of the Greek citizens had to be made and to the years 2004 and 2009, when the Council of the European Union issued Decisions on the existence of an excessive deficit in Greece. Finally the Court mentioned the recent obligations that Greece has undertaken against the member states of the Euro-area and the International Monetary Fund, which mean that extensive cuts in salaries and pensions and a great reduction in the total income have to be suffered by the Greeks as well as raises in taxes and all kinds of social contributions. All these measures, which have been absolutely necessary in order to secure the financial stability of Greece, signify the danger to the Greek economy as a whole in the case that the State is judicially ordered to pay a higher than 6% default interest rate on its deferred payments, considering the facts that in the year 2011 the public deficit reached 9,1%, the public debt 165,3% of the gross domestic product and that in 2012, the overdue payments of the State amounted to 6.333 million euros.

On the basis of all the above-mentioned evidence, the majority of the Special Highest Court ruled, finally, that the establishment of a privileged interest rate for the Greek State is justified by the severe economic crises that Greece underwent throughout its history and for very long periods of time which affected also the periods when more favourable conditions for the country's development existed. Therefore, Article 21 of the Code of Laws on the Trials of the State was deemed to introduce an acceptable preferential treatment in favour of the Greek State, which aims at the proper exercise of public power through the safeguard of financial stability and of the assets of the State and ultimately, at the fulfilment of state obligations against its citizens. The same provision aims also at the limitation of public debt created from

paying default interest on overdue payments and guarantees the public estate to which all citizens contribute through the payment of taxes and the state's ability to calculate in advance the amount of state debts and their consequences. By taking into account all the aforementioned facts and the aims served, Article 21 of the Code of Laws on the Trials of the State is contrary neither to the equality principle and the principle of equality in the sharing of public burdens nor to the principle of proportionality.

Finally, the majority of the Court ruled that Article 21 of the Code of Laws on the Trials of the State does not violate Article 17 of the Constitution on the protection of property, for the additional reason that the provision alone of a higher interest rate for the debts of the citizens in comparison to the interest rate for the debts of the State does not create a property right for the lenders of the State since the same higher interest is not payable for the debts of the State.

Languages:

Greek.



Hungary Constitutional Court

Important decisions

Identification: HUN-2012-3-006

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 14.11.2012 / **e)** 38/2012 / **f)** On the annulment of certain provisions of the Act on Contraventions criminalising people living at public areas permanently / **g)** *Magyar Közlöny* (Official Gazette), 2012/151 / **h)** CODICES (Hungarian).

Keywords of the systematic thesaurus:

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

3.5 General Principles – **Social State.**

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

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

Keywords of the alphabetical index:

Arbitrariness, prohibition / Criminal law, social / Competence, legislative, limits / Punishment / Homeless, discrimination.

Headnotes:

Legislative provisions which rendered permanent living in the public space a regulatory offence, which accorded unduly wide legislative powers to local governments to impose fines or even detention on homeless persons, and to define punishable anti-social behaviour, and which empowered local governments to confiscate the property of homeless people, violate the rights and human dignity of the affected persons, as well as the prohibition of discrimination and the principle of legal certainty.

Summary:

I. In an earlier Decision (176/2011), the Constitutional Court ruled that making dustbin scavenging a regulatory offence is unconstitutional. In its reasoning the Court established that by making certain acts which are outside the scope of littering regulatory offences, the local government overstepped the

scope of its law-making power. Decision 176/2011 underlined the fact that dustbin scavenging is an activity that does not violate the rights of others, nor can it be established that it is dangerous for society. In addition, the decision emphasised that by making dustbin scavenging a regulatory offence, the local government stigmatised homeless and other marginalised people, which was against the prohibition of discrimination. Following this decision, a legislative package was adopted by Parliament which ordered the improper use of the public domain to be punished even by confinement. As a result of these amendments, local governments can list the purpose of the usage of public areas and sanction the improper use of public areas. In addition, the law made it possible to impose a fine (or even confinement) on those living in public places permanently.

The Commissioner of Fundamental Rights requested the Constitutional Court to review whether these legislative amendments were compatible with Articles B.1, I.3, II and XIII of the Fundamental Law of 2012, which guarantee that Hungary is a democratic state governed by the rule of law, set conditions for the limitation of fundamental rights, recognise human dignity as an inviolable human right and guarantee the right to property. The Commissioner contended that these regulations gave room for excessively broad interpretation and authorisation for local government to sanction the improper use of public places and thus it infringed the rights and human dignity of the affected vulnerable group. In addition, the Commissioner argued that such regulations are neither effective nor preventive but only suitable for further discrimination and humiliation of the people affected. The Commissioner argued that living on the streets is the result of a serious situation of social crisis and generally does not depend upon the free choice of the individual.

II. First, the Court annulled Section 186 of the Act II of 2012 on Contraventions and some related provisions. The Court held that the concept of the rule of law applies in the same manner under the Fundamental Law of 2012 (Article B.1) as under the previous Constitution. The Court also took into consideration its own existing case-law, which has consistently reaffirmed certain rules concerning the limitation of fundamental rights.

The Court noted that, although the definition of crimes within the competence of the legislature, and thus the sphere where democratic majority opinion could be realised, in exceptional cases constitutional control can be applicable (Decision 21/1996). According to Decision 30/1992, the legislature may not act arbitrarily when defining the scope of conduct

to be punished: "A strict standard is to be applied in assessing the necessity of ordering the punishment of a specific conduct: with the purpose of protecting various life situations as well as moral and legal norms, the tools of criminal law necessarily restricting human rights and liberties may only be used if such use is unavoidable, proportionate and there is no other way to protect the objectives and values of the State, society and the economy that can be traced back to the Constitution". At the same time, the Court explained that it must not give way to arbitrary interpretation of the law by those applying the law. Thus, a sanction must fit within one of the constitutional bases required and also the principle that sanctions must comply with the requirements of legal certainty.

Section 186 of the challenged Act qualified living in public areas as an inappropriate use of public places and declared it an offence. The legislature thereby criminalised living in public areas, namely, homelessness itself. According to the Court, neither the removal of homeless people from public areas nor providing an incentive for such persons to avail themselves of the social care system can be considered as a constitutional reason that could be the basis for the criminalisation of homeless people's living in public areas.

In the Court's view, homelessness is a social problem which the State must handle in the framework of social administration and social care instead of punishment. If the State punishes unavoidable living in a public area, the regulation fails to meet the requirement of the protection of human dignity ensured by Article II of the Fundamental Law. Taking this into consideration, the Court declared that the Act on Contravention already contained several other provisions sanctioning the violation of the rights of others and public peace (e.g. vagrancy, the ban of alcohol consumption, illegal gambling, violation of public morality). Furthermore, the Court held that the contested regulation violated legal certainty, as the insufficiencies and inconsistencies of the regulation resulted in serious problems that could not be resolved by judicial interpretation.

Second, the Court also annulled Sections 51.4 and 143.4.e of Act CLXXXIX of 2011 on Local Governments. The challenged provisions accorded to local governments the power to impose fines by defining contraventions related to antisocial behaviour. The Court held that the Act ensures an excessively wide and discretionary authority for local governments to define the banned acts. As the legal definitions used by the Act are not clear, it does not facilitate proper interpretation.

In addition, the Court considered that, since the legal terms used are not clear, the risk of abuse of local governments' law-making competence might increase given that the fine – based on local governments' regulations – is part of the revenue of local governments. Without any legal guarantees this economic interest might encourage local governments to prescribe prohibitions as widely as possible and impose fines in order to increase their revenue.

Taking this into consideration, the Court held that the concerned provisions are contrary to the Fundamental Law, since they violated the requirements of legal certainty and of the subordination of the public administration to the law.

Third, although the Commissioner did not challenge Act CXL of 2004 on the General Rules of Public Administrative Procedures and Services, the Court extended the review to some of its provisions since they were closely related to the regulations contested in the petition.

The reviewed provisions accorded law-making authorisation to local governments to confiscate the property of homeless people. The right to property is ensured by Article XIII of the Fundamental Law and it may only be restricted in exceptional cases, in such circumstances and manner as stipulated by an Act. Therefore, the Court declared that the confiscation imposed by the local government – in the absence of legal framework regulations – violated legal certainty and the requirements of the limitation of the right to property.

III. Four justices –István Balsai, Egon Dienes-Oehm, Béla Pokol, Mária Szívós – attached dissenting opinions to the decision.

Languages:

Hungarian.



Identification: HUN-2012-3-007

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 06.12.2012 / **e)** 40/2012 / **f)** On the annulment of certain provisions of the Act on Allowances to Persons with Reduced Work Capacity / **g)** *Magyar Közlöny* (Official Gazette), 2012/163 / **h)** CODICES (Hungarian).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Disability, discrimination / Social welfare, arrangements / State, social guarantee.

Headnotes:

The basic requirements of legal certainty and equal opportunity shall prevail during the transformation of the rehabilitation system.

Summary:

I. In 2011 the rehabilitation system changed substantially. Previously, the employment prospects of persons with reduced capacity to work had been largely determined by two main types of welfare provision: disability pensions and rehabilitation subsidies. In the last two decades several attempts had been made to curb disability pension claims by tightening the rules. The disability pension used to function depending on the length of time employed, on the income acquired during employment, and on the extent of the disability. As of 1 January 2012 the disability pension was abolished and substituted by a quasi-subsidy system that guarantees sick-leave services. The new rehabilitation scheme consists of two pillars: rehabilitation allowance and disability benefit. Those whose capacity to work could have been partially or fully rehabilitated, receive rehabilitation allowances. Disability subsidy can be given to people with 80-100% disability who were essentially previously deemed unfit for work, as well as persons who had previously received disability pensions and had by 31 December 2011 turned 57 years old.

The Commissioner of Fundamental Rights requested the Constitutional Court to review the constitutionality of Sections 7.4 and 13.2.d of Act CXCI of 2011 on Allowances to Persons with Reduced Work Capacity (hereinafter, the "Act"). According to Section 7.4 of the Act, rehabilitation allowance has to be suspended in the case of engagement in remunerative activities, participation in public works or in the case of incapacity for work. Under Section 13.2.d of the Act, disability benefit has to be cancelled when beneficiaries engage in income earning activities and their incomes in average for three consecutive months surpass 150% of the minimum wage. According to the Commissioner, the principle of equal opportunity ensured by Article XV of the Fundamental Law was infringed by the regulation restricting access to employment for people receiving low level allowances.

II. The Court held that the concept of the principle of equal opportunity under the Fundamental Law of 2012 is the same as that under the previous Constitution. Under Article XV.4 of the Fundamental Law, special measures shall be taken to facilitate the realisation of equal opportunity. Article XV.5 of the Fundamental Law states that special measures shall be taken to protect children, women, the elderly and persons living with disabilities. Previously, the constitution did not contain a reference to persons living with disabilities; therefore the Court in the instant case had to interpret this notion. The Court adopted the legal definition in Article 1 of the United Nations Convention on the Rights of Persons with Disabilities, according to which persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. The Court chose this definition because it is more inclusive than the one used by Act XVI of 1998 on the Rights of the Persons with Disabilities.

The Court considered that it follows from Articles XV.4 and XV.5 of the Fundamental Law that the legislator has to create rules which help improve the social position of disadvantaged groups. These are provisions which enable the legislator to decide where and to what extent it wishes to employ measures for rendering opportunities equal. Once these measures are introduced, they should comply with the principles of legal certainty and equal opportunity. That means that these measures should help those in need to participate in society effectively on an equal basis with others.

The Court held that the provision stipulating the suspension of the disbursement of rehabilitation allowances did not meet the requirements of legal certainty and equal opportunity. The Court found it

disconcerting that any income, no matter how small, resulted in the suspension of rehabilitation allowances even if the need thereof persisted and an income necessary to minimal subsistence would have been ensured. The second reason for annulling Section 7.4 of the Act was that it did not facilitate taking up gainful employment or activity by those in need and their earliest entry to a full and equal (to those not in need) social environment – on the contrary, it had an adverse effect. However, the Court rejected the petition to annul Section 13.2.d of the Act, since under this provision only having an average income for three consecutive months surpassing 150% of the minimum wage resulted in cancelling the disability benefit.

III. Three justices – István Balsai, Egon Dienes-Oehm, Mária Szívós – attached dissenting opinions to the decision.

Supplementary information:

Parliament has already adopted Section 30.2 of Act CCVIII of 2012, according to which the disbursement of rehabilitation allowances shall be suspended only if beneficiaries simultaneously engage in continuous income earning activities for more than twenty hours per week.

Languages:

Hungarian.



Identification: HUN-2012-3-008

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 20.12.2012 / **e)** 42/2012 / **f)** On the annulment of certain provision of the Act on Legal Aid / **g)** *Magyar Közlöny* (Official Gazette), 2012/175 / **h)** CODICES (Hungarian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Constitutional Court, access, individual / Legal aid, right.

Headnotes:

Provisions on legal aid should be available also for proceedings before the Constitutional Court. There should be no exclusion of persons with reduced financial resources from access to legal aid financed from the state budget, necessary for the effective enforcement of their rights in the course of constitutional complaint proceedings.

Summary:

I. Section 51.2 of Act CLI of 2011 on the Constitutional Court declares legal representation to be mandatory in Constitutional Court proceedings. However, according to Section 3.3.c of the Act LXXX of 2003 on Legal Aid, persons submitting a constitutional complaint may not receive legal aid.

The Commissioner of Fundamental Rights requested the Constitutional Court to review the constitutionality of Section 3.3.c of the Act LXXX of 2003 on Legal Aid (hereinafter, the “Act on Legal Aid”). The Commissioner contended that the contested provision raised several constitutional concerns. It violated the prohibition of discrimination asserted in Article XV.2 of the Fundamental Law and was contrary to the principle of equal opportunity stated in Article XV.4 of the Fundamental Law. The provision barred persons with reduced financial resources from the possibility of making use of the mechanism of making a constitutional complaint. In addition, the provision violated the right to an effective remedy guaranteed by Article XXVIII.7 of the Fundamental Law, since the Constitutional Court, as the highest forum for legal redress, plays an outstanding role in the protection of fundamental rights.

In its Opinion no. 665/2012 on Act CLI of 2011 on the Constitutional Court of Hungary the Venice Commission recommended that provisions on legal aid should be available also in proceedings before the Constitutional Court. (CDL-AD (2012)009 paragraphs 43, 54).

II. The Court held that the concept of the principle of equality under the Fundamental Law of 2012 has almost the same meaning as under the previous Constitution. Previously, the general equality rule was deduced from the right to human dignity (Article 54.1 of the former Constitution) and the prohibition of discrimination (Article 70/A of the former Constitution). Now, the general equality rule is enshrined in Article XV.1 of the Fundamental Law, which states: “everyone shall be equal before the law”. In the Court’s view, excluding access to legal aid in the course of constitutional complaint proceedings resulted in inequality in two ways. First, the institution of legal aid was established so that professional legal advice and representation could be given to those persons who, due to their precarious social situation, would not be able to pay the lawyer’s fee related to the solution of legal disputes and the enforcement of their rights. There is no constitutionally acceptable reason for excluding the possibility to use this type of assistance in the course of constitutional complaint proceedings. Therefore the challenged provision violates Article XV.1 of the Fundamental Law.

Second, under Article XV.2 of the Fundamental Law, Hungary guarantees fundamental rights to every person without discrimination on, *inter alia*, the ground of financial situation. The aim of the constitutional complaint is to protect fundamental rights. In order to ensure to everyone equality with regard to protection of their fundamental rights, the equal enforcement of rights by means of a constitutional complaint must be ensured to everyone on an equal basis. As a consequence of Section 3.3.c of the Act on Legal Aid, those people who do not possess sufficient financial resources to pay the lawyer’s fee are not able to submit a constitutional complaint. This resulted in discrimination based upon a person’s financial situation. Last but not least, the Court held that it follows from Articles XV.4 of the Fundamental Law that the legislator has to facilitate the realisation of equal opportunity with special measures.

III. Two justices – Egon Dienes-Oehm, Béla Pokol – attached dissenting opinions to the decision.

Languages:

Hungarian.



Identification: HUN-2012-3-009

a) Hungary / b) Constitutional Court / c) / d) 20.12.2012 / e) 43/2012 / f) On the annulment of certain provisions of the Act on Protection of Families / g) *Magyar Közlöny* (Official Gazette), 2012/175 / h) CODICES (Hungarian).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 3.12 General Principles – **Clarity and precision of legal provisions.**
 3.21 General Principles – **Equality.**
 5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation.**
 5.3.33.2 Fundamental Rights – Civil and political rights – Right to family life – **Succession.**

Keywords of the alphabetical index:

Family law / Family life, definition / Family, concept / Family, definition / Homosexuality / Succession, succession law / Unmarried person, discrimination.

Headnotes:

The Act on Protection of Families had an excessively restrictive interpretation of the notion of family when it stated that the family is defined as marriage between a man and a woman plus their direct descendants or adopted children. In addition, excluding registered partners from inheritance was in breach of the Civil Code to an extent that could not have been resolved through interpretation.

Summary:

I. The Commissioner of Fundamental Rights filed two connected petitions with the Court. According to these petitions the legislator may not exclude existing, functioning and recognised same-sex partnerships from the concept of family because it constitutes an infringement of the rights of the persons concerned, and at times even of the rights of their children, and because it leads to legal uncertainty given that the challenged Act is incompatible with certain provisions of the Civil Code which recognise the succession rights of the excluded parties.

First, the Commissioner requested the Court to review the constitutionality of Section 7 of Act CCXI of 2011 on the Protection of Families (hereinafter, the “Act”). According to the Commissioner, the contested provision raised the following constitutional concerns. It violated the prohibition of discrimination ensured by

Article XV.2 of the Fundamental Law and it was contrary to the right to equal dignity ensured by Article II of the Fundamental Law as well as the protection of marriage enshrined in Article L of the Fundamental Law. The contested provision specified only marriage as a basis of the family. By doing so, it excluded the recognition and protection of ‘marriage-like’ relationships of those who live in registered partnerships (same-sex partners). Consequently, the Act made a distinction not only on the basis of the forms of partnerships, but also on the basis of the sexual orientation of the persons choosing them. The Commissioner also pointed out that the Act’s concept of family was not only detrimental for same-sex registered couples but also heterosexual couples who wish to live in partnerships other than marriage.

Second, the Commissioner initiated constitutional review of Section 8 of the Act, according to which, if the deceased did not leave any last will (in case of legal succession), only relatives (related in collateral line or linear descent), persons in an adoptive relationship and the spouse shall inherit. The Commissioner found these rules to be contrary to the Civil Code that made possible legal succession also within registered partnerships. This provision would have entered into force on 1 July 2012, but the Constitutional Court suspended it with its Decision 31/2012 and reviewed it on its merit in its current decision.

II. First of all, the Court reviewed the constitutionality of Section 7 of the Act, according to which the concept of the family had been determined as a system of relations which generates an emotional and economic community of natural persons, based on the marriage of a man and a woman, next of kinship or adoptive guardianship. The Court has found this concept of family extremely narrow. According to the reasoning, the State should protect in the same way the long-term emotional and economic partnership based on the same purpose (for example those partnership relations where the couples raise and take care of each other’s children, those couples who do not have any children or are not able to have any children because of other circumstance, widows, grandchildren cared by grandparents, etc.). If the legislature determines rights and obligations concerning families, it cannot withdraw rights from those people who intend to form a family without marriage but with another long-term emotional and economic partnership. The already existing level of the protection of partnerships shall not be reduced.

Article L of the Fundamental Law contains a constitutional guarantee for the protection of the institution of marriage, which is defined as “the union of a man and a woman established by voluntary decision”, as well as

of the family “as the basis of the nation’s survival”. However, the State’s duty to protect families and marriages should not result in any kind of direct or indirect discrimination for children based on the difference that their parents raise them within marriage or in a different type of relationship. Taking all of these into consideration the Court declared that the concept of family in the Act provides a reductive definition compared to Article L of the Fundamental Law, and annulled it.

Second, the Court reviewed the constitutionality of Section 8 of the Act affecting rules of inheritance. The Court emphasised that the Civil Code contains the rules governing the basic regulations of intestate succession. Under the Civil Code, a registered partner is entitled to the same inheritance rights as a spouse. In contrast with this, the challenged Act consistently neglected to mention registered partnerships, which could result in the exclusion of registered partners from legal succession. It could happen, for example, that if the deceased person does not have any descendants under the Civil Code the registered partner of the deceased is the legal successor, while under the Act the brother or sister of the deceased is the legal successor.

The legal rules of inheritance have to be unambiguous. Section 8 of the Act was, however, in breach of the Civil Code to an extent that could not be resolved by way of judicial interpretation, thus it violated legal certainty. Therefore the Court annulled the contested provision.

III. András Holló and Miklós Lévy attached a concurring opinion, István Balsai, Egon Dienes-Oehm, Béla Pokol attached dissenting opinions to the decision.

Cross-references:

- Decision 31/2012, *Bulletin* 2012/2 [HUN-2012-2-002].

Languages:

Hungarian.



Identification: HUN-2012-3-010

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 29.12.2012 / **e)** 45/2012 / **f)** On the annulment of certain provisions of the Transitional Provisions to the Fundamental Law / **g)** *Magyar Közlöny* (Official Gazette), 2012/184 / **h)** CODICES (Hungarian).

Keywords of the systematic thesaurus:

1.3.5.4 Constitutional Justice – Jurisdiction – The subject of review – **Quasi-constitutional legislation**.
3.9 General Principles – **Rule of law**.
4.5.6 Institutions – Legislative bodies – **Law-making procedure**.

Keywords of the alphabetical index:

Constitution, amendment / Constitution, amendment, validity / Constitution, changes / Constitution, transition, provisional.

Headnotes:

Transitional Provisions adopted under the Fundamental Law are not valid where they do not comply with the requirements for the adoption of such provisions under the Fundamental Law. Parliament, acting as a constitution-amending power, must comply with the constitutional requirements of law-making. The Fundamental Law may only be amended directly, through the appropriate constitutional procedure. Indirect amendment of the Fundamental Law, through the addition of general normative rules contained within transitional provisions, which purport to become an integral part of the constitutional text, is not permitted.

Summary:

I. In March 2012 the Commissioner of Fundamental Rights submitted a petition in which he requested the Court to examine whether the Transitional Provisions to the Fundamental Law (hereinafter, the “TPFL”) comply with the requirements of the rule of law laid down in Article B of the Fundamental Law. According to the Commissioner the TPFL, adopted by Parliament in December 2011 in a separate document, gravely violates the principle of the rule of law, and may cause problems of interpretation and endanger the unity and operation of the legal system.

First, the Commissioner found it problematic from the point of view of the rule of law that the status of the TPFL as a legal source and its place in the legal system is not clearly defined. The Fundamental Law provides for the adoption of transitional provisions,

but the TPFL exceeds this authorisation and defines itself as part of the Fundamental Law, attempting thereby to prevent examination of the content of its provisions as to their compliance with the rules on guarantees laid down in the Fundamental Law. The Commissioner emphasised that it would entail grave dangers if Acts adopted on the basis of the TPFL were contrary to the Fundamental Law itself and its fundamental rights provisions.

Second, according to the Commissioner there are numerous articles of the TPFL that do not comply with the requirement of transitionality appearing also in the title of the legal norm: the main criterion of the transitional provisions to a rule of law is that their adoption is made necessary by the transition from the old regulation into the new one, therefore they always include concrete and temporary provisions, i.e. transitional provisions related to the transition itself. Beyond the formal objections, the Commissioner indicated in his petition that other constitutional concerns may also be raised regarding the content of the contested provisions.

Thirdly, subsequent to the Commissioner's petition, Parliament amended the Fundamental Law. According to Article 1 of the First Amendment of the Fundamental Law, the Closing Provisions of the Fundamental Law shall be supplemented with the following point 5: "5. The Transitional Provisions to the Fundamental Law (31 December 2011) adopted according to point 3 above form a part of the Fundamental Law." The Constitutional Court enquired the Commissioner if he upheld his petition in the new constitutional background.

The Commissioner upheld the petition challenging the TPFL, since the First Amendment to the Fundamental Law did not answer all the questions according to which the Commissioner contested the TPFL. In the Commissioner's opinion, the TPFL could not overrule the Fundamental Law; neither could they make exceptions from the application of its regulations.

II. The starting point of the Court's constitutional review was that the Fundamental Law is a unified system. Under Article R of the Fundamental Law, the basis of the legal order is the Fundamental Law. The Fundamental Law, like any other constitution, requires absolute priority and implementation in the whole legal order. It is the standard against which all pieces of legislation shall be evaluated. Every amendment of the Fundamental Law shall be an integral part of the constitutional text, ensuring the coherence of the Fundamental Law from the point of view of its content and structure. That means that a constitutional amendment must appear in the official version of the text of the Fundamental Law. If the

TPFL could set down exceptions to the Fundamental Law, the standard itself would be infringed. Such a situation would call the constitutional status of the Fundamental Law itself into question.

Point 3 of the Closing Provisions of the Fundamental Law requires Parliament to adopt transitional provisions for the purpose of securing the transition from the former Constitution to the new one. However, alongside the real transitory regulations, the TPFL contained permanent normative provisions. The Court did not review the constitutionality of these provisions one by one. Instead, the Court examined whether Parliament, acting as a constitution-amending power, had complied with the constitutional requirements of law-making. The Court declared that many of the provisions of the TPFL were certainly not temporary measures, so the Court annulled them.

Among these nullified provisions were: the preamble on the criminal responsibility of communist leaders and the reduction of their pensions; Articles 11.3 and 11.4, which allowed the president of the National Judicial Office and the Prosecutor General to transfer cases to courts of their choosing; Articles 12 and 13, which dealt with the early retirement of judges and prosecutors; and Article 18, which stated that the president of the Budgetary Council was to be appointed by the President of Hungary.

In addition, the Court annulled Article 21 of the TPFL, which allowed Parliament to decide on the status of churches; and Article 22, which defined the constitutional complaint proceeding of the Constitutional Court. The Court also nullified Articles 23.1, 23.4 and 23.5 concerning electoral registration, Article 27 on the extension of the restriction of the competence of the Constitutional Court, Article 28.3 which allowed the government to pass regulations for local governments if they neglect to regulate a matter prescribed by law, and Article 29, under which new taxes could be assessed in cases where the Court of Justice of the European Union imposes a fine on Hungary because of government actions that contravenes European Union law.

Last but not least, the Court annulled Article 31.2 of the TPFL, according to which the transitional provisions were accepted on the basis of the old and new constitutions; and Article 32, which declared 25 April as a memorial day of the Fundamental Law.

III. András Holló and István Stumpf attached a concurring opinion, István Balsai, Egon Dienes-Oehm, Barnabás Lenkovic, Péter Szalay and Mária Szívós attached dissenting opinions to the decision.

Cross-references:

- Decision 31/2012, *Bulletin* 2012/2 [HUN-2012-2-002].

Languages:

Hungarian.



Ireland

Supreme Court

Important decisions

Identification: IRL-2012-3-005

a) Ireland / **b)** Supreme Court / **c)** / **d)** 11.12.2012 / **e)** SC 486/2012 / **f)** McCrystal v. The Minister for Children and Youth Affairs / **g)** [2012] IESC 53 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

4.9.8.1 Institutions – Elections and instruments of direct democracy – Electoral campaign and campaign material – **Campaign financing.**

4.10.1 Institutions – Public finances – **Principles.**

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

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

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

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

5.3.41.3 Fundamental Rights – Civil and political rights – Electoral rights – **Freedom of voting.**

Keywords of the alphabetical index:

Referendum process, plebiscitary democracy / Information campaign, publicly funded / Democratic process, right / Fair procedures, right.

Headnotes:

A government information campaign in a referendum process to amend the Constitution must be fair, equal, impartial and neutral when public funds are used.

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 unanimous decision of the Supreme Court summarised here arose from an appeal by the Appellant of a decision of the High Court. The Appellant challenged the public information campaign run by the Minister for Children and Youth Affairs regarding a proposed amendment to the Constitution by way of a referendum, held on 10 November 2012, which was concerned with the rights of children. The public information campaign involved a website, an information booklet distributed to all homes in the State as well as television, radio and newspapers advertisements which were funded by €1.1 million of public monies voted by the *Oireachtas* (Parliament). The Appellant argued that this campaign promoted a Yes result in the referendum process, an act which was contrary to the decision of the Supreme Court in *McKenna v. An Taoiseach* (no. 2) [1995] 2 IR 10, which has become known as “the McKenna Principles”. In that case, the Court held that the Government acted in breach of the Constitution by spending public monies to advocate a particular result in a referendum process. The Appellant’s case was heard by the High Court as a matter of urgency, and was dismissed by the President of the High Court.

II. On appeal, the Supreme Court gave a preliminary ruling two days prior to the referendum, and found that the public information campaign run by the Minister was in breach of the Constitution and the McKenna Principles. The Constitution entrusts the act of amending the constitutional text to the People by way of a referendum and the Court underlined the importance of plebiscitary democracy which is enshrined in the Constitution. The McKenna Principles require that a referendum process is equal, fair, impartial and neutral so that the People can make a free decision by themselves. Thus, publicly funded information campaigns must be equal, fair, impartial and neutral and the McKenna Principles prevent the Government from spending public monies to advocate for a particular result in a referendum. The Court noted that the 1995 McKenna Principles are recognised internationally for a referendum process. For example the Court referred to the European Commission for Democracy through Law (Venice Commission), Code for Good Practice on Referendums, adopted by the Council for Democratic Elections at its 19th Meeting (Venice, 16 December 2006) and the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007). The Court found that that there were extensive passages in the

booklet and on the website which did not conform to the McKenna Principles. The Court granted a declaration that the Minister for Children and Youth Affairs acted wrongfully in spending public moneys on the booklet, website and advertisements, in a manner which was not fair, equal, impartial or neutral.

III. In her subsequent written judgment, Chief Justice Denham emphasised that it is the decision of the People alone to amend the Constitution and noted that referendums are as old as democracy itself. She explained that the McKenna Principles permit the Government to campaign for a particular result in a referendum but that public monies cannot be used. Any information which is disseminated by the Government at public expense must be equal, fair, impartial and neutral. The Chief Justice discussed the McKenna Principles which are as follows: the right to equality, the right to a democratic process, right to fair procedures and the right to freedom of expression. The Chief Justice considered the Venice Commission’s Code of Good Practice on Referendums as well as legislation governing referendums in other States from a comparative perspective. The Chief Justice examined the contents of the website, information booklet and advertisements and found that they failed the test of being fair, equal, impartial and neutral and also failed to hold the scales equally between both sides of opinion on the proposed amendment to the Constitution. In doing so, the Minister breached the equality rights of the citizens, interfered with the democratic process and breached fair procedures.

IV. In his judgment, O’Donnell J noted that the website in particular was not impartial and that its language displayed a tone which advocated for a Yes vote in the referendum. He agreed with the decision of the Chief Justice and made the observation that the most valued position in politics is the appearance of being above politics. He stated that the fact that the message in the Minister’s public information campaign cannot necessarily be described as strident, blatant and egregious, or campaigning advocacy or propaganda, is to miss the point. The only question is whether it was fair, equal, impartial and neutral and in his view it was clearly established that it was not. Judgments were also written by Fennelly J and Murray J which also upheld the McKenna Principles in this case.

Cross-references:

- *McKenna v. An Taoiseach and Others*, *Bulletin* 1995/3 [IRL-1995-3-003].

Languages:

English.



Israel

Supreme Court

Important decisions

Identification: ISR-2012-3-010

a) Israel / **b)** Supreme Court (High Court of Justice) / **c)** Panel / **d)** 27.08.2012 / **e)** HCJ 1268/09 / **f)** Zozel v. The Prison Service Commissioner / **g)** / **h)**.

*Keywords of the systematic thesaurus:*3.21 General Principles – **Equality**.5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment**.5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age**.*Keywords of the alphabetical index:*

Prison, officer, right / Retirement, compulsory.

Headnotes:

The Prison Service Commission Ordinance no. 02.33.00, entitled “Considering Extension of Service for Prison Personnel Eligible for Retirement” provides that prison personnel who have reached the age of 57 and have served more than 10 years in the Prison Service are “eligible for retirement” and may request that their service be extended for up to 3 years. The Ordinance applies to personnel serving in professional, administrative and staff positions and unjustifiably discriminates between Prison Service personnel and all other State employees serving in parallel positions.

Summary:

The applicant, Leah Zozel began her service in the Prison Service in 1986 and was mandatorily retired by the Service in April 2009 at the age of 57 years and 2 months (i.e. 6 months after she had reached the “age of retirement for Prison Personnel” as defined in the State Service (Pension) Act). When the applicant was nearing the age of retirement, the Service notified her that she was eligible for retirement, whereupon she submitted a request to extend her service. Following an examination of her

request by the Committee for Examining the Extension of Service, the Prison Service Commissioner ordered that the applicant's service be extended by only 6 months. The applicant's appeal against the Commissioner's decision was refused, on the basis that the cancellation of a budgeted position for a "flexible senior warden", which was the position she actually held, formed part of a general reorganisation. The Prison Service's decision to retire the applicant was, she contended, based on an unconstitutional Ordinance which should be declared null and void, and the procedure followed by the Commissioner in denying her request was defective.

The majority judgment of the Supreme Court (sitting as the High Court of Justice) was given by Judge E. Chayot. The Court unanimously granted the applicant's petition, concluding that the consideration upon which the decision to deny her request for the extension of service was based could not stand alone as the sole consideration taken into account in this matter, and that no other considerations were examined. The Court (Deputy President M. Naor and Judges Y. Danziger, N. Hendel and U. Fogelman concurring) also held the Ordinance to be invalid, concluding that it unjustifiably discriminates between prison personnel and all other State employees serving in parallel positions, and thus unreasonably and disproportionately harms the principle of equality and conflicts with the principles outlined in HCJ 10076/02 *Rosenbaum v. The Prison Service Commissioner* (2006) ("the Rosenbaum case") regarding the retirement policy of the Prison Service and the Police. Although the Court recognised that the procedure in the Ordinance significantly differs from that at issue in *Rosenbaum* (which the Court disqualified in that case), it nonetheless concluded that it unreasonably discriminates between prison personnel and other State employees, especially because of the early default age of retirement and because workers are placed under the burden of proving their qualification to retain their positions.

The Court held that the Prison Service failed to show relevant reasons to justify the age of 57 as the default age of retirement of all prison personnel in all positions. It also concluded that the Prison Service failed to justify the gap between the procedure under the Ordinance as applied to prison personnel and the procedure that applies to all other State employees, and that no satisfactory answer was given as to why there should not be a procedure enabling prison personnel, or personnel serving in positions parallel to those of all other State employees, to retain their positions until they reach the age of 67, unless the Prison Service Commissioner believed that there was justification to retire them before that. In a dissenting opinion, Judge S. Joubran would have disqualified

only Article 8.d and 8.e of the Ordinance, pursuant to which the extension of the prison personnel's service shall be reviewed annually and allowed service to be extended for up to 3 years, except in exceptional circumstances. In a separate opinion, Deputy President (retired) E. Rivlin concluded that it was unnecessary to invalidate the Ordinance; specific examination of the Prison Service's exercise of discretion in each instance would suffice.

The Court accordingly declared the Ordinance invalid to the extent it applies to prison personnel serving in professional, administrative and staff positions. The declaration of invalidity was suspended for a period of 12 months to allow the Prison Service to prepare and formulate new procedures in line with the principle of equality. The Court also overturned the Commissioner's decision on the applicant's early retirement and ordered that she be allowed to resume her employment with the Prison Service, with the salary and the rank that she had at the time of her retirement, but that she be given a position as per the needs of the Prison Service.

Languages:

Hebrew.



Italy

Constitutional Court

Important decisions

Identification: ITA-2012-3-003

a) Italy / **b)** Constitutional Court / **c)** / **d)** 21.11.2012 / **e)** 301/2012 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 27.12.2012 / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

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

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

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

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

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

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

Keywords of the alphabetical index:

Intimate relations / Prisoner.

Headnotes:

The appeal lodged by a member of the judiciary challenging the constitutionality of Law no. 354 of 1975 on the prison system is inadmissible because the judge in question fails to explain how an answer to his question would help with the inquiry into the case before him.

The Constitutional Court can neither purely and simply revoke the challenged provision relating to visual supervision by prison staff during visits to prisoners, which prevents the latter from having sexual relations with their spouses or partners, nor confine itself to laying down the principles governing this matter, because only the legislature has the necessary discretionary powers in this field.

Summary:

I. The Florence Surveillance Judge (*Magistratura di Sorveglianza*) submitted Article 18 of Law no. 354 of 1975 (rules on the prison system and on the execution of measures to restrict personal liberty) to the Constitutional Court. This article provides that prison staff must exercise visual supervision of prisoners' conversations, which means that prisoners cannot have intimate relations with their spouses or cohabiting partners.

The referring judge (judge *a quo*) considers that the article in question is primarily incompatible with Article 2 of the Constitution, which enshrines inviolable human rights: the prisoner's right to have sexual relations with his spouse or steady partner is one of these rights, which, in the case of restrictions of personal liberty, can be restricted but not negated, as stipulated in Council of Europe Recommendations (Recommendation no. 1340 (1997) of the Parliamentary Assembly on the effects of detention on the family and social fronts (Article 6) and Recommendation R(2006)2 of the Committee of Ministers on the European Prison Rules (Rule no. 24.4)), and European Parliament Recommendation no. 2003/2188 (INI) of 9 March 2004 on the rights of prisoners in the European Union (Article 1.c).

There is also an infringement of Article 3.1 and 3.2 of the Constitution in that the preclusion of intimate relations contradicts the equality principle and hampers the full development of the prisoner's personality; and Article 27.3 of the Constitution is also violated, because enforced sexual abstinence accompanied by unnatural and degrading practices amount to inhuman treatment which cannot be deemed conducive to the re-education of convicted persons. The article referred to the Court is also contrary to Article 29 of the Constitution, which provides that "the Republic recognises the rights of the family as a natural society founded on marriage", because it encourages the practice of "fictitious" marriages by prisoners, and to Article 31 of the Constitution because, far from protecting motherhood, it discourages it. Finally, by imposing sexual abstinence, the article impedes the normal development of sexuality, with negative repercussions in the physical and psychological spheres and consequently a breach of Article 32 of the Constitution.

II. The Court declares the constitutionality question inadmissible for two different reasons.

Firstly, the judge *a quo* failed to specify the details of the case at issue, consequently failing to prove the relevance of the question, i.e. its usefulness for resolving the case before his court. The judge *a quo* merely explained that he had been invited to pronounce on a complaint submitted by a prisoner, without specifying the content of the complaint and therefore without advancing arguments to demonstrate the need to apply the provision which he deems unconstitutional to the case in question. Nor does the judge specify to which type of prison regime the complainant is subject, and in particular whether he is eligible for the leave provided for in Law no. 354 of 1975 (Law on the prison system and the execution of measures to restrict liberty), potentially enabling him to meet with his partner outside prison and therefore making it unnecessary to authorise “intimate meetings” inside prison.

The Court pointed out on many occasions that an inadequate description of the actual case before the judge *a quo* has prevented the Court from appraising the relevance of the constitutionality question and resulted in it being rendered inadmissible (*ex plurimis* Judgment no. 338 of 2011 and orders no. 93 of 2012 and no. 260 of 2011).

The requirement to allow persons subject to restrictions on their liberty to continue to have intimate relations is now extensively recognised, which suggests that the national legislature should examine this issue, in the light, *inter alia*, of the information set out in the texts of the supranational institutions mentioned above, although these instruments are not binding, and of the experiments carried out in other countries. Many States have granted prisoners the right to an active sex life inside prison, in different forms and within different limits: the European Court of Human Rights has come down in favour of this approach, without going so far as to hold that the Convention, particularly Articles 8.1 and 12 thereof, require States Parties to facilitate sexual relations inside a prison, even between spouses (European Court of Human Rights, judgments of 4 December 2007, *Dickson v. United Kingdom*, and 29 July 2003, *Aliev v. Ukraine*).

The judge *a quo* repudiated Article 18 of Law no. 354 of 1975, which provides that prisoners’ conversations must take place in designated premises under the non-auditory supervision of a warder. The pure and simple revocation of the article would clearly not provide an acceptable solution. First of all, visual supervision is not geared specifically to preventing sexual relations; its main aim is to ensure security and prevent criminal acts from being committed inside prisons; the preclusion of intimate relations is therefore an indirect consequence of this requirement. Secondly,

eliminating such supervision cannot *ipso facto* meet the prisoner’s need for intimacy, because regulations are required on this issue as a whole, and there are many possible solutions. The legislature must determine which individuals are to be granted the right in question and the conditions for its exercise; this choice is incumbent on the legislature because there are no “constitutionally mandatory” solutions: in this latter case intervention can only be countenanced by the Court which “adds” rules to those already in force or replaces them with the only standards compatible with the Constitution.

Nor can the Court adopt a “judgment adding principles” (*sentenza additiva di principio*), which merely lays down principles to be applied subsequently under detailed regulations on the subject adopted by the legislature: such principles would themselves express a choice (should only married prisoners be entitled to intimate relations or should this right also be granted to persons in a “steady” relationship with a partner? What criteria should be used for ascertaining the “steadiness” of a relationship? Should the criteria include cohabitation?). This choice is a matter for the legislature, which alone has the necessary discretionary powers.

The question is therefore inadmissible for this second series of reasons.

Languages:

Italian.



Japan

Supreme Court

Important decisions

Identification: JPN-2012-3-001

a) Japan / b) Supreme Court / c) Grand Bench / d) 16.11.2011 / e) (A) 1196/2010 / f) / g) *Keishu*, 65-8 / h).

Keywords of the systematic thesaurus:

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

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

5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial by jury.**

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

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

Keywords of the alphabetical index:

Judges, independence / Saiban-in system, participation, citizen.

Headnotes:

There is no conflict between the participation of citizens in criminal trials and the constitutional principles, which guarantee a fair criminal trial by an impartial court established by law and based on evidence as well as the independence of judges.

Summary:

I. In this case, the defense counsel alleged, as one of the reasons for the final appeal, that the Act on Criminal Trials Examined through Participation of Saiban-ins (Lay Judges) (hereinafter, the “Saiban-in Act”) is unconstitutional. However, the Saiban-in Act does not violate the Constitution on the points alleged by the defence counsel, as explained below.

II. First, the Court examined whether citizens’ participation in judicial proceedings is generally prohibited under the Constitution.

1. This issue should be determined by comprehensively examining the fundamental principles of governance and various principles for criminal trials adopted under the Constitution, the legislative developments of the Constitution including the historical background at the time of the enactment of the Constitution, and the texts of the relevant provisions of the Constitution.
2. The Constitution provides various principles to realise a fair criminal trial. In the process of conducting a criminal trial, these principles must be observed strictly, which requires a high level of legal expertise. The Constitution also provides for detailed rules for judges’ independence and guarantee of their status. In view of all of these points, the Constitution seems to expect judges to play the primary role in conducting criminal trials.
3. On the other hand, from a historical and international perspective, there was a movement spreading in European countries and the United States from the 18th Century to the first half of the 20th Century, along with the development of democracy, toward reinforcing the public foundation of the judicial system by permitting citizens to directly participate in judicial proceedings. This would ensure the authenticity of the judicial system, in addition to the aforementioned requirement of due process.

In the middle of the 20th Century, when the Constitution of Japan was enacted, the United States and many other democratic countries in Europe adopted the jury system or other criminal trial systems involving citizen participation. In the process of setting out the details of the judicial power against this historical background and under the principle of sovereignty of the people, attention was paid to the issue of allowing citizens’ participation in judicial proceedings. The relevant documents concerning the legislative process of the Constitution suggest that in view of the wording of the Constitution, the Government considered it permissible. There is no conflict between reinforcing the democratic foundation by permitting citizens to participate in criminal trials, and fulfilling the mission of criminal trials. That is, clarifying the facts based on evidence while fully securing the constitutional guarantee of human rights, and thereby ensuring rights of individuals and order in society.

4. From this viewpoint, there is no reason to consider that the Constitution prohibits any form of citizens' participation in judicial proceedings. The constitutionality of a system designed for citizens' participation in judicial proceedings should be determined depending on whether the system actually put in place conflicts with any of the principles provided for realising fair criminal trials.

III. Next, the Court examined whether any of the specific elements of the Saiban-in system under the Saiban-in Act violated the Constitution.

1. The defence counsel alleged that the Saiban-in system violated Article 32 of the Constitution, which guarantees that all persons shall have the right to access to the courts. Counsel also alleged that it violated Article 37.1 of the Constitution, which guarantees that in all criminal cases, the accused shall enjoy the right to a speedy and public trial by an impartial tribunal; and violated Article 31 of the Constitution, which guarantees due process.

However, in view of the provisions of the Saiban-in Act, a judicial body that handles a case to be tried under the Saiban-in system is to be composed of three judges, whose status and independent exercise of their authority are guaranteed, and six Saiban-ins, who are appointed through the procedure that gives consideration to ensuring their impartiality and neutrality (Article 2.2 and 2.3, Articles 13 to 37, Articles 41 and 43). In addition, Saiban-ins are authorised to attend proceedings at open court with judges, to state their opinions in the deliberation, which concerns the finding of fact, the application of laws and a sentence (if the accused is found guilty), and to cast a vote. The matters in which Saiban-ins participate to make a determination constitute the elements of the judiciary. However, Saiban-ins do not necessarily have to be equipped with legal knowledge or experience in advance in order to decide on these matters. Moreover, the presiding judge is required to give consideration to enable Saiban-ins to perform their duties sufficiently (Articles 51 and 66.5). In light of all of these arrangements, it can be fully expected that Saiban-ins, with the aforementioned authority vested therein, will reach a reasonable conclusion through the deliberation with judges, while reflecting their various viewpoints and senses in the conclusion. On the other hand, it is the judges' decision whether to guarantee various constitutional principles for criminal trials (Article 6.2).

In view of such a framework of the Saiban-in system as described above, the system fully guarantees a fair trial by an impartial court established by law and based on evidence (Articles 31, 32 and 37.1 of the Constitution). Also, judges are to play the primary role in conducting criminal trials. Thus, there is no problem with this system in ensuring various constitutional principles for criminal trials.

Consequently, the defence counsel's arguments alleging violation of Articles 31, 32 and 37.1 of the Constitution are groundless.

2. The defence counsel alleged that under the Saiban-in system, judges are influenced and bound by a determination made by Saiban-ins, thus violating Article 76.3 of the Constitution, which guarantees the independence of judges when exercising their authority.

However, in accordance with Article 76.3 of the Constitution, judges shall be bound by the Constitution and laws. And as mentioned above, the Saiban-in Act is the legislation of citizens' participation in a form that complies with the Constitution. Therefore, even if judges have to agree with a conclusion different from their own opinions under the deliberation system provided in the Saiban-in Act, this is a result of their being bound by law that complies with the Constitution. Hence, such situation would never be deemed to be in violation of said paragraph.

Languages:

Japanese, English (translation by the Court).



Kazakhstan

Constitutional Council

Important decisions

Identification: KAZ-2012-3-001

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 13.04.2012 / **e)** 5 / **f)** On the Official Interpretation of the Norms of the Constitution on the Issues of the Calculation of Constitutional Terms / **g)** *Kazhstanskaya pravda* (Official Gazette), 19.04.2012 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Arrest and detention, safeguard / Court control / Detention, duration / Detention, lawfulness / Judicial supervision / Protection, judicial, effective, right / Liberty, personal, right.

Headnotes:

The constitutional provision on the detention of a person for a period exceeding seventy-two hours without the sanction of a court means that no later than this specified time a judgement must be made as to whether an application for arrest and detention is to be made concerning a detainee, and any other measures provided by the law taken. Otherwise the detainee is subject to release.

Summary:

I. On 1 March 2012, the Prime Minister filed an appeal requesting the Constitutional Council to provide an official interpretation of the provisions of the Constitution of the Republic of Kazakhstan concerning the calculation of terms of detention.

The Prime Minister contended that the Constitution does not establish in all cases the starting point for the calculation of and termination of the terms of detention to which explicit reference is made in its

text and does not specify or define the date from which the beginning of the calculation and the termination of terms should proceed.

II. The Constitutional Council began its decision by noting that, according to Article 1.1 of the Constitution, the individual, his life, rights and freedoms are accorded the highest values in the state.

The right to personal freedom is one of the fundamental human rights (Article 16.1 of the Constitution). It belongs to everyone by virtue of birth, is recognised as absolute and inalienable, and Article 39 of the Constitution lists it as one of the rights and freedoms which may not be limited in any event save for the exceptional reasons enumerated in Article 39.1 of the Constitution.

Article 16 of the Constitution provides that arrest and detention shall be allowed only in cases stipulated by law and with the sanction of a court, and that an arrested person has a right of appeal. Article 16 further provides that without the sanction of a court, a person may be detained for a period not exceeding seventy-two hours; and that every person detained, arrested and accused of committing a crime shall have the right to the assistance of a defence lawyer (defender) from the moment of detention, arrest or accusation.

“Detention” in constitutional law is defined as a coercive measure, which entails the short-term, no more than seventy-two hours, restriction of the personal liberty of a person in order to suppress an offense or to ensure proceedings on criminal, civil and administrative cases, and also to ensure the application of other measures of compulsory character, which is carried out by authorised government bodies, officials and other persons on the basis, and within the framework, provided by the law.

The Constitutional Council interpreted the constitutional proscription of the detention of a person for a period exceeding seventy-two hours without the sanction of a court as meaning that no later than the specified time concerning the detainee a judgement must be made as to whether an application for arrest and detention is to be made, and also other measures provided by the law must be taken. Otherwise, the detainee is subject to release. The Constitutional Council also noted that the legislature has the power to set shorter terms, within seventy-two hours, for adoption of the relevant decisions.

The beginning of the term of detention is that hour to within a minute of the time when restriction of the freedom of the detained person, including the

person's freedom of movement, has been realised (e.g. compulsory retention in a certain place, compulsory bringing in inquiry and investigation bodies, capture, closing indoors, coercive action or orders to remain in a certain place), and also any other actions significantly limiting the personal liberty of the person, irrespective of the according of any procedural status to the detainee or the performance of other formal procedures. The moment of the termination of this term is the expiration of seventy-two hours which is calculated as running continuously from the first point of the actual initial detention.

Languages:

Kazakh, Russian.



Korea Constitutional Court

Important decisions

Identification: KOR-2012-3-013

a) Korea / **b)** Constitutional Court / **c)** / **d)** 30.06.2011 / **e)** 2009Hun-Ma406 / **f)** Constitutionality of police action blocking passage to Seoul Plaza / **g)** KCCR, *Korean Constitutional Court Report (Official Digest)*, 457-479 / **h)**.

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

Police cordon, movement, restriction / Police, power, exercise / Danger, serious, specific and imminent.

Headnotes:

An individual's passage through Seoul Plaza or cultural and other activities in his or her spare time in Seoul Plaza (which is open to the public) is guaranteed as general freedom of action.

The exercise by the state of police power which encroaches on the fundamental rights of individuals must, in order to be constitutionally compliant, be least restrictive in pursuing its legislative aim and must strike a balance between the public interests protected and private interests encroached upon.

Summary:

I. Upon the death of the former President Roh Moo-hyun, on 23 May 2009 a memorial altar was set up in front of Daehanmoon of Deoksugung Palace which is

located near Seoul Plaza. The head of the National Police Agency, the respondent in this case, then blocked any passage whatsoever through the Plaza by surrounding it with police buses, on the basis that those visiting the memorial altar might hold unlawful and violent demonstrations there.

The applicants, who tried to pass through the Seoul Plaza but failed due to the wall of police buses on 3 June 2009, filed this constitutional complaint with the Constitutional Court claiming that the above conduct by the head of the National Police Agency encroached on their rights including general freedom of action.

II. The Constitutional Court held that the exercise of public power by the chief of the National Police Agency, blocking all passage through Seoul Plaza of the Seoul Metropolis on the grounds that a rally or protest might be held there (hereinafter, the "Passage Blockade") was unconstitutional as it encroached on the general freedom of action of the applicants as citizens of the Seoul Metropolis.

The Passage Blockade imposed an outright ban on the holding of any rallies in Seoul Plaza. It even prevented ordinary citizens from passing through. It was accordingly deemed to be the type of far-reaching and extreme measure which should only be deployed in the face of imminent, evident and serious danger which could not be prevented by conditional permission for a demonstration or an individual ban or dissolution of rally.

In this particular case, the Passage Blockade was based only on the fact that many people had gathered to pay their respects to former President Roh who belonged to a political party other than the current ruling party, and that some citizens had previously committed unlawful violence. No imminent and evident danger could be discerned which would justify the maintenance of the Passage Blockade until four days after the "date of violence". The Passage Blockade was not the least restrictive means which could have been deployed; despite the need to prevent a broad full-scale rally, a solution could have been adopted which would have achieved the goals the respondent pursued without leading to an excessive restriction on citizens' movement, leisure or cultural activities.

The public interest in protecting the lives and property of citizens by preventing large-scale unlawful and violent demonstrations is highly significant. However, the public interest could have been substantially achieved by less restrictive means. The public interest could not be considered as being of greater weight than the actual disadvantages suffered by

ordinary citizens and, as a result, the Passage Blockade failed to balance the relevant legal interests.

Cross-references:

Previous decisions concerning similar issues:

- Decision 2003Hun-Ka18, 16-2(B) KCCR, *Korean Constitutional Court Report* (Official Digest), 86, 95;
- Decision 2000Hun-Ba67, 15-2(B) KCCR, *Korean Constitutional Court Report* (Official Digest), 41, 56;
- Decision 2002Hun-Ma518, 15-2(B) KCCR, *Korean Constitutional Court Report* (Official Digest), 185,199.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2012-3-014

a) Korea / **b)** Constitutional Court / **c) / d)** 30.08.2011 / **e)** 2009Hun-Ba42 / **f)** Disclosure of conversation unlawfully acquired under the Protection of Communications Secret Act / **g)** 23-1(B) KCCR, *Korean Constitutional Court Report* (Official Digest), 286 / **h)**.

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

Keywords of the alphabetical index:

Conversation, confidentiality / Telephone tapping.

Headnotes:

The freedom of expression, including freedom of speech and the press, guaranteed by Article 21 of the Constitution, has traditionally been the freedom to

express ideas or opinions and to spread them. Article 17 of the Constitution declares that “the privacy of no citizen shall be infringed” and Article 18 of the Constitution stipulates freedom of communication the essential substance is which is the protection of secrecy of communication.

Article 16.1.22 of the Protection of Communications Secret Act (hereinafter, the “Instant Provision”) imposes penalties on those who disclose the substance of conversations learned about through unlawful procedures, thereby restricting the freedom of expression of the person wishing to disclose the substance of the conversations. It may be necessary to disclose certain illegally acquired conversations in the public interest, such as the forming of public opinion in a democratic state. However, by prohibiting the disclosure of such conversations, the Instant Provision results in a collision between two basic rights: privacy of communication between the participants in the conversation and the freedom of expression of those seeking to disclose.

Where there is a clash between two basic rights, the Constitutional Court must strike a balance between them in its review of the relevant statutes, in order to maintain unity of the Constitution. The Instant Provision should be reviewed under the principle against excessive restriction, and an assessment should be made as to whether its purpose is legitimate, whether the means to achieve it are appropriate and whether a balance has been struck between the restricted freedom of expression and the protection of confidential conversations (3 KCCR 518, 528-529, 89Hun-Ma, 16 September 1991).

Summary:

I. The applicant, through an unknown channel, obtained what was known as the ‘X-File of Agency for National Security Planning’ that recorded a conversation between Lee Hak-soo, then chief secretary to the chairman of Samsung Group, and Hong Seok-hyun, then chairman of JoongAng Media Network, wiretapped by the agents of the National Security Planning on September 1997. The applicant, a member of the National Assembly, published the substance of the conversation in a press release at the National Assembly Members Office Building on 18 August 2005 and posted them on the Internet, and was indicted on charges of violating the Protection of Communications Secret Act, which prohibits the disclosure of undisclosed conversations of others, learned through ways not stipulated by the Act. Whilst on trial at the Seoul Central District Court, the applicant filed a motion requesting a constitutional review of Article 16.1.2 of the Protection of Communications Secret Act. This was dismissed by

the court which also found him guilty on 9 February 2009. The applicant filed this constitutional complaint on 10 March 2009.

II. The Constitutional Court ruled that the part of ‘the substances of conversations’ of Article 16.1.2 of the Protection of Communications Secret Act which imposes penalties for disclosing or leaking the substance of conversations learned from recording or eavesdropping on undisclosed conversations between other individuals does not violate the Constitution.

A. Whether freedom of expression has been infringed

The Instant Provision which imposes penalties on persons who have disclosed the illegally obtained conversations of others may be enforced in order to protect the freedom of expression of the violator by applying the general provision of circumstances precluding illegality of Article 20 (Justifiable Act) of the Criminal Act. Therefore, the absence of a special provision of circumstances precluding illegality in the provision at issue, as stipulated in criminal defamation, cannot be deemed as violation of the principle of proportionality in restricting basic rights.

B. The principle of proportionality between punishment and responsibility

The Instant Provision imposes the same statutory penalty (a maximum prison sentence of ten years and a maximum suspension of qualification of five years) for the disclosure or leaking of the substance of illegally obtained conversations as it does for the unlawful acquisition of the undisclosed substances of conversations of others. This is because the disclosure of illegally obtained conversations may have just as invasive an impact on the privacy of conversations (depending on the manner, time and scope of the disclosure) as the act of unlawfully obtaining their content. In view of the gravity of the damage, the nature of the crime, the interests protected, national history and culture, the values and legal sensibility of the people, and the policy of prevention of crime, the penalty the Instant Provision imposes is not excessive beyond the reasonable degree necessary to achieve its purpose, despite the fact that it imposes the same statutory penalty on those who have disclosed or leaked the substance of illegally obtained conversations as on those who have unlawfully acquired the undisclosed content of the conversations of others, and despite the absence of provision for optional pecuniary penalty.

C. Whether the principle of equality has been violated

The Instant Provision aims to protect privacy by protecting the secrecy of private conversations, regardless of the damage defamation may cause. Therefore, the nature of the Instant Provision, which prohibits the disclosure of conversations, is not identical enough to the nature of criminal defamation to warrant comparison between them. Even if they are comparable, the necessity for punishment by means of the Instant Provision differs from criminal defamation in that the conduct punished by the Instant Provision is the disclosure of illegally obtained conversations, which invades the privacy of conversations between individuals in the private sphere. It would not therefore constitute unreasonable discrimination, by comparison to criminal defamation, to omit the special provision of circumstances precluding wrongfulness for those who disclose conversations.

Cross-references:

Previous decisions concerning similar issues:

- Decision 89Hun-Ma165, 3, *Korean Constitutional Court Report* (Official Digest), 518, 528-529;
- Decision 2000Hun-Ba25, 13-1, *Korean Constitutional Court Report* (Official Digest), 652, 658;
- Decision 2003 Do3000, the Supreme Court;
- Decision 93Hun-Ba40, 7-1, *Korean Constitutional Court Report* (Official Digest), 539, 547.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2012-3-015

a) Korea / **b)** Constitutional Court / **c)** / **d)** 30.08.2011 / **e)** 2006Hun-Ma788 / **f)** Government's act of omission regarding comfort women's claim for war crime compensation against Japan under the Agreement between Two Nations / **g)** 23-2(A) KCCR, *Korean Constitutional Court Report* (Official Digest), 366-401 / **h)**.

Keywords of the systematic thesaurus:

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

4.6.10 Institutions – Executive bodies – **Liability.**

4.6.10.2 Institutions – Executive bodies – Liability – **Political responsibility.**

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

5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime.**

Keywords of the alphabetical index:

War crime / War crime, compensation / Diplomatic settlement.

Headnotes:

The executive's omission to act can be only be challenged when the government power in question neglects its duty derived specifically from the Constitution and those whose basic rights have been breached are entitled to request an administrative action or exercise of government power (12-1 KCCR 393, 98Hun-Ma206, 30 March 2000).

Under Article 3.1 of the Agreement on the Settlement of Problems concerning Property and Claims and Economic Cooperation between the Republic of Korea and Japan (hereinafter, the "Agreement"), in the event of a dispute between Korea and Japan as to the interpretation of the agreement, it should primarily be settled through diplomatic channels, with arbitration as the next step. In this context, an assessment will be made as to whether the government's act of dispute resolution corresponds to the duty to take action by governmental power specifically written in the statutes as previously mentioned.

Under Article 10 of the Constitution, all citizens are to be assured of human worth and dignity and are entitled to pursue happiness, and the State is obliged to confirm and guarantee the fundamental and inviolable human rights of individuals. The State is also obliged, under Article 2.2 of the Constitution, to protect citizens residing abroad as prescribed by legislation.

Summary:

I. The applicants in this case are victims, known as "comfort women", who were forced into sexual slavery by the Japanese military during World War II.

On 22 June 1965, the Republic of Korea concluded an Agreement on the Settlement of Problems concerning Property and Claims and Economic Cooperation between the Republic of Korea and Japan (Treaty no. 172) with Japan. Under Article 2.1 of the Agreement, Japan is to provide the Republic of Korea with a specific amount of aid or loan not confined to any particular purpose; this would serve as a full and final settlement of issues related to the properties, rights and interests of the two parties and their peoples (including juridical persons), as well as claims between the two parties and their peoples.

The issue of comfort women has been raised as a serious concern since 1990. Japan has insisted that all rights to claim damages under the above clause (Article 2.1) have been extinguished. It has continuously refused to pay damages to the applicants. The Korean government has expressed its position that “illegal acts against humanity” involving state power, such as issue of comfort women, should not be deemed to have been resolved by the Agreement and the Japanese government should be held legally accountable.

II. In a vote of 6 to 3, the Court ruled that the omission to act by the respondent in this case was unconstitutional for the reasons set out below.

According to the Preamble, Articles 10 and 2.2 of the Constitution and Article 3 of the Agreement, the respondent's duty to pursue dispute settlement procedures under Article 3 of the Agreement stems from the constitutional request to assist and safeguard, in successful filing of claims against Japan, the people whose dignity and value were seriously compromised by Japan's systematic continuous and unlawful acts. Failure on the respondent's part to fulfil its duty to proceed with dispute resolution would have a very negative impact on the applicants' rights. The respondent's obligation to act in this case originates from the Constitution and is stipulated in law.

Although the Korean government did not directly violate the fundamental rights of comfort women, the government is liable for causing disruption in settling the payment of claims by Japan and in restoring the victims' dignity and value in that it signed the Agreement without clarifying details of the claims and employing a comprehensive concept of “all claims.”

The claims of the comfort women against the extensive anti-humanitarian crimes committed by Japan constitute property rights guaranteed by the Constitution. The payment of claims would imply a post-facto recovery of the dignity, value and personal liberty of those whose rights had been ruthlessly and

constantly violated. In this sense, preventing the settlement of claims would not be confined to the issue of constitutional property rights but would also directly concern the violation of dignity and value as human beings. Hence the resulting infringement of fundamental rights is of great implication. The comfort women are elderly; further time delays may make it impossible for them to recover their dignity and value as human beings through the settlement of claims. Considering that the victims' claims serve as a desperate remedy for the violation of fundamental rights and given the background and circumstances of signing the Agreement and domestic and foreign developments, it is not unlikely that this case may result in an effective judicial remedy.

Even if the nature of diplomacy, which requires strategic choices based on understanding of international affairs is taken into account, “possible elevation to an exhaustive legal dispute” or “uneasiness in diplomatic relations,” very unclear and abstract reasons set out by the respondent as rationale for omission to act, scarcely suffice as reasonable causes or national interests that need serious consideration, for disregarding a remedy for the applicants.

Pursuit of dispute settlement under Article 3 of the Agreement is the only rightful exercise of power consistent with the state's responsibility to protect the fundamental rights of citizens. As the failure of the respondent to intervene has resulted in a serious violation of fundamental rights, the omission to act is in violation of the Constitution.

Cross-references:

Previous decisions concerning similar issues:

- Decision 89Hun-Ba189, 5-2, *Korean Constitutional Court Report* (Official Digest), 646;
- Decision 2004Hun-Ba81, 20-2 (A), *Korean Constitutional Court Report* (Official Digest), 91,100-101.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2012-3-016

a) Korea / **b)** Constitutional Court / **c)** / **d)** 29.09.2011 / **e)** 2007Hun-Ma1083, 2009 Hun-Ma 203,352 (cases are consolidated) / **f)** Limitation on the number of workplace transfers for foreign workers / **g)** 180 KCCR, *Korean Constitutional Court Report* (Official Digest), 1453-1469 / **h)**.

Keywords of the systematic thesaurus:

4.5.2.3 Institutions – Legislative bodies – Powers – **Delegation to another legislative body.**
 4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**
 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**
 5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**
 5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession.**

Keywords of the alphabetical index:

Foreign worker, freedom to choose place of work / Statutory reservation, principle / Delegation, legislative power, scope.

Headnotes:

Foreigners are entitled to fundamental rights that are considered as 'human rights' such as human dignity and worth and the right to pursue happiness, as opposed to rights reserved for citizens. Foreigners can therefore be recognised as holders of fundamental rights which can be considered as human rights in principle (see 13-2 KCCR 714, 724, 99Hun-Ma494, 29 November 2001).

The freedom to choose one's place of work, which falls within the category of freedom of occupation, is closely related to human dignity and worth and the right to pursue happiness. It should be considered as a right reserved for all human beings, not as a right reserved for citizens. Foreigners should not be absolutely denied the freedom to choose a workplace as in the case of political rights, social basic rights or the freedom to enter the territory of a state. They should be entitled to the freedom to choose a workplace, even if it is on a limited basis (See 12-2 KCCR 168, 183, 97Hun-Ka12, 31 August 2000).

Questions had arisen over the constitutionality of certain provisions which limited foreign workers with employment permits from transferring their workplaces more than three times and only allowed

one additional transfer if there were exceptional grounds as specified by presidential decree. The delegation of decision-making to presidential decree also came under question.

Summary:

I. The applicants are foreign workers who entered Korea with legitimate employment permits pursuant to the Act. After they had transferred their workplaces three times following the procedures stipulated in the Act, they were no longer able to transfer their workplaces due to Article 25.44 of the Act (hereinafter, the "Instant Provision") and Article 30.2 of the Enforcement Decree (hereinafter, the "Provision of the Decree"). They therefore filed this constitutional complaint, arguing that the provisions at issue violated their freedom of occupation.

II. The Constitutional Court found Article 25.44 of the former Act on the Employment etc. of Foreign Workers (hereinafter, the "Act") and Article 30.2 of the Enforcement Decree of the Act (hereinafter, the "Enforcement Decree"), which limits foreign workers with employment permits from transferring their workplaces more than three times and only allows one additional transfer if there are exceptional ground specified by the Enforcement Decree to be constitutional and not in violation of the applicants' fundamental rights.

A. Decision on the Instant Provision of the Act

1. The freedom to choose a workplace, which falls within the category of freedom of occupation, is closely related to the right to pursue happiness as well as human dignity and value. It should not be perceived as a right reserved exclusively for citizens but as one guaranteed to all mankind. Foreigners should enjoy the freedom to choose a place of work, albeit on a limited basis. The applicants formed part of a legitimate workforce within Korean society and had lawfully obtained employment permits. They had entered the country legally and had been leading a regular life there. They should therefore be regarded as bearers of the freedom to choose a workplace.

2. The Instant Provision was enacted to protect employment opportunities for local workers and to contribute to the balanced development of national economy through effective supply and demand of human resources for small or medium sized companies by systematic employment management of foreign workers. The Act allows foreign workers to transfer workplaces up to three times during the three years of their stay in Korea for certain reasons stipulated in the Act. An additional transfer is possible if there is are exceptional grounds specified by the

Enforcement Decree. The Instant Provision does not seem unreasonable beyond the extent of discretion granted to the legislature, and does not impinge upon the applicants' freedom to choose a workplace.

3. Decisions on whether to increase the number of possible workplace transfers have to be made in the context of aspects of the local labour market such as employment opportunities for local workers and the demand and supply of human resources for small or medium sized companies. This case therefore falls into a category where the requirements of concreteness and clarity for delegated rule-making need to be relaxed. In view of the legislative purposes and overall intent of the Act, it is possible to predict that the matters to be specified in the Presidential Decree by the delegation of the proviso of the Instant Provision would be the specific conditions under which additional transfer of workplace is exceptionally allowed and the number of such additional transfers. The proviso does not therefore violate the principle against blanket delegation.

4. The proviso of the Instant Provision stipulates "...the foregoing sentence shall not apply if there is any inevitable reason specified by Presidential Decree." Unless an unlimited number of additional transfers were allowed, delegation of the possible number of additional transfers to the Enforcement Decree would naturally be required. Under the principle of presumption of constitutionality, the proviso of the Instant Provision can be interpreted as 'Provided, that ... if there any inevitable reason as the Presidential Decree stipulates,' which conforms to the Constitution. It can therefore reasonably be presumed that the Instant Provision also delegates the relevant specific matters related to the possible number of additional transfer to be determined by the Enforcement Decree. It does not violate the principle of statutory reservation, by regulating matters delegated to it by its parent Act without deviating from the scope of delegation.

B. Decision on the Provision of the Enforcement Decree

The Provision of the Decree was put in force in order to allow transfers of workplace in addition to the provision which allows foreign workers to transfer their workplaces up to three times during the three years of their stay in Korea. It extensively stipulates almost all possible grounds for additional transfers of workplace which are not upon the initiative of the foreign worker. There is also a need for the systemic management of foreign workers in order to maintain national security and social order as well as a period of adjustment to the culture and language for foreign workers. The provision of the Enforcement Decree is

not excessively arbitrary without reasonable cause and does not violate the applicants' freedom to choose a workplace.

C. Conclusion

The Instant Provision and the Provision of the Decree do not impinge on the applicants' right to choose a workplace or violate the principle against blanket delegation and the principle of statutory reservation.

Cross-references:

Previous decisions concerning similar issues:

- Decision 97Hun-Ka12, 12-2-2, *Korean Constitutional Court Report* (Official Digest), 168, 183;
- Decision 2007Hun-Ba3, , *Korean Constitutional Court Gazette* 128,589,595.

Languages:

Korean, English (translation by the Court).



Latvia

Constitutional Court

Important decisions

Identification: LAT-2012-3-005

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 19.12.2012 / **e)** 2012-03-01 / **f)** On the Compliance of Sections 11.1 and 25.1 of the Law “On National Referendums and Legislative Initiatives” with Articles 1, 77 and 78 of the Constitution of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), 20.12.2012, no. 200(4803) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

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

1.3.4 Constitutional Justice – Jurisdiction – **Types of litigation.**

3.1 General Principles – **Sovereignty.**

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

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

4.5.6 Institutions – Legislative bodies – **Law-making procedure.**

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

Keywords of the alphabetical index:

Bill, constitutionality / Legislative initiative, popular / Legislative procedure / Referendum / Referendum, initiative, procedure / Referendum, mandatory.

Headnotes:

The content of a legal norm may be broader than its worded text. Therefore, the Constitutional Court in concrete cases assesses the contested norm as a whole, taking into consideration not only the grammatical wording of the norm, but also its content, context and aims.

The legislator enjoys discretion also in establishing the procedure for holding a national referendum, to the extent that it is not restricted by the norms of the

Constitution. Likewise, Parliament has a broad margin of appreciation both as regards choosing which laws among several in which to include the relevant regulation, and as regards issues linked with the legislative technique within the framework of one law.

A legal provision must be recognised as unclear if its true meaning cannot be established using methods of interpretation. The fact *per se* that in order to establish the meaning of a legal norm it must be interpreted does not mean that it is incompatible with the Constitution.

It is the obligation of general jurisdiction courts and administrative courts to verify, whether the body or person applying the law has revealed the content of concepts with a high degree of juridical abstraction used in regulatory enactments and whether the result of applying this legal norm complies with the basic principles of a democratic state governed by law.

Voters, exercising the right of legislative initiative, participate in the legislative process and not only enjoy the legislator’s right established in the Constitution, but are also subject to the obligations imposed upon the legislator. Thus, in exercising the right to legislative initiative, the same limits to discretion, which the norms and principles of the Constitution set for the legislator, have to be complied with.

Both the legislator which exercises the legislative rights permanently (i.e., the Parliament) and the legislator who exercises the legislative right on separate occasions, (i.e., the people), are obliged to comply with the norms of higher legal force and to respect the constitutional values enshrined therein.

None of the constitutional institutions, which include the people, in exercising its powers, has the right to violate the Constitution.

Summary:

I. The Applicants, thirty Members of Parliament, contended that the contested norms of the Law “On National Referendums and Legislative Initiatives” do not comply with the Constitution, to the extent that they:

1. Do not envisage the requirement “fully elaborated” with regard to a draft law submitted by the electorate;
2. Do not contain criteria for assessing whether a draft law should be considered as being fully elaborated;

3. Do not envisage the right and obligation to examine the compatibility of a draft law submitted by the electorate with the requirements of Parliament to any of the state institutions;
4. Do not envisage an effective mechanism for assessing the legality of decisions adopted by the state institutions involved in the procedure of the electorate's legal initiative;
5. Impose a duty upon the President of the State to move forward a draft law, the constitutionality of which has not been assessed;
6. Envisage putting a draft law to a national referendum, the constitutionality of which has not been assessed.

II. The Constitutional Court, abiding by its jurisdiction, did not examine the arguments expressed by the applicant on the best legal political means for dealing with issues concerning the safeguarding and development of Latvia as a nation state.

The Constitutional Court concluded that the applicant's assumption that the contested provisions suffer from the deficiencies referred to in the application is erroneous. Considering the fact that the Applicant's legal substantiation of the incompatibility of the contested provisions with the norms of higher legal force is founded upon political considerations and assumptions, as well as the applicant's request for the assessment of issues concerning the interpretation and application of the contested provisions, it is impossible to continue judicial proceedings in the case. Thus, on the basis of the Constitutional Court Law, the judicial proceedings in the case were terminated.

The Constitutional Court recognised that it was nevertheless possible to state the requirements that a fully elaborated draft law should meet, for example:

1. It should be presented in the form of a draft law, complying with the requirements of the Parliament Rules of Procedure;
2. It cannot provide for such issues, which are not at all to be regulated by law;
3. In accordance with the principle of legality it must be recognised that a draft law, which, if it were adopted, would be incompatible with the norms, principles and values included in the Constitution, as well as Latvia's international commitments, cannot be recognised as fully elaborated.

Cross-references:

Previous decisions of the Constitutional Court:

- Judgment 03-05(99) of 01.10.1999; *Bulletin* 1999/3 [LAT-1999-3-004];
- Judgment 2001-02-0106 of 26.06.2001; *Bulletin* 2001/2 [LAT-2001-2-003];
- Judgment 2001-15-03 of 12.06.2002;
- Judgment 2002-20-0103 of 23.04.2003; *Bulletin* 2003/1 [LAT-2003-1-005];
- Judgment 2004-01-06 of 07.07.2004; *Bulletin* 2004/2 [LAT-2004-2-006];
- Judgment 2006-04-01 of 08.11.2006;
- Judgment 2006-05-01 of 16.10.2006; *Bulletin* 2006/3 [LAT-2006-3-004];
- Judgment 2007-24-01 of 09.05.2008; *Bulletin* 2008/2 [LAT-2008-2-003];
- Judgment 2007-22-01 of 02.06.2008;
- Judgment 2008-09-0106 of 16.12.2008;
- Judgment 2008-40-01 of 19.05.2009;
- Judgment 2008-43-0106 of 03.06.2009;
- Judgment 2009-04-06 of 30.10.2009;
- Judgment 2010-02-01 of 19.06.2010;
- Judgment 2010-15-01 of 04.10.2010;
- Judgment 2010-44-01 of 20.12.2010;
- Judgment 2010-51-01 of 14.03.2011;
- Judgment 2010-55-0106 of 11.05.2011;
- Judgment 2010-60-01 of 10.10.2011;
- Judgment 2010-71-01 of 10.10.2011;
- Judgment 2011-14-03 of 03.05.2012.

Languages:

Latvian, English (translation by the Court).



Mexico

Supreme Court

Important decisions

Identification: MEX-2012-3-007

a) Mexico / **b)** Supreme Court of Justice of the Nation / **c)** En banc / **d)** 14.07.2011 / **e)** MX-SCJN 912/2010 / **f)** Miscellaneous 912/2010 Rosendo Radilla Pacheco Case / **g)** No. de registro: 23183 - 10a. Época - Instancia: Pleno - *Semanario Judicial de la Federación y su Gaceta* – Libro I, Octubre de 2011, Tomo 1, 313 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969.**

2.3.11 Sources – Techniques of review – **Pro homine/most favourable interpretation to the individual.**

4.7.8 Institutions – Judicial bodies – **Ordinary courts.**

4.7.11 Institutions – Judicial bodies – **Military courts.**

4.7.16.1 Institutions – Judicial bodies – Liability – **Liability of the State.**

Keywords of the alphabetical index:

Discipline, military / Jurisdiction, conflict / International agreement, directly applicable / International obligation / Interpretation, conformity / International law, national law, relationship / Treaties, Human Rights, states / Inter-American Court of Human Rights, Rulings.

Headnotes:

Mexico's reservations or interpretative declarations made when acceding to the American Convention on Human Rights and to the inter-American Convention on the Forced Disappearance of Persons does not prevent the Inter-American Court of Human Rights' judgments from being complied with.

Summary:

I. The ruling clarifies the forced disappearance of Mr Rosendo Radilla, allegedly perpetrated by soldiers of the Mexican army deployed in the municipality of Atoyac de Álvarez, State of Guerrero (25 August 1974). Due to the inaction by the State in this case, despite numerous complaints being filed before state and federal authorities for many months by the family members of the victim, civil associations filed a complaint against Mexico before the Inter-American Court of Human Rights (15 November 2001).

Since the inaction by the government persisted, notwithstanding the recommendations from the Inter-American Commission on Human Rights (15 March 2008), after analysing the case, the Inter-American Court of Human Rights (hereinafter, the "ICHR") ruled against Mexico (session held 23 November 2009, which was notified and published in Mexico's Official Gazette of the Federation on 9 February 2010).

II. The Supreme Court of Justice of the Nation (hereinafter, the "SCJN"), sitting *en banc*, determined no restriction should be established to condition the recognition of the contentious jurisdiction of the ICHR by Mexico, the ruling being analysed is binding. Regarding judgments for the plaintiffs rendered by the Inter-American Court of Human Rights, the exceptions, limitations or interpretations made by Mexico cannot be reviewed.

The reservations or interpretative declarations formulated by Mexico when acceding to the American Convention on Human Rights and to the Inter-American Convention on the Forced Disappearance of Persons does not prevent the judgment being complied with. Specifically, the reservation made by Mexico to Article IX of the Convention on the Forced Disappearance of Persons was ruled invalid by the ICHR because it would imply ignoring the right of the lower-court judge to investigate and eventually sanction the parties who are responsible.

Following the ruling stating that the judgment of the ICHR would be complied with internally, the specific administrative obligations had to be differentiated from the opinion that must be adopted in the future by the courts in Mexico.

As a result of its importance, paragraph 339 of the judgment by the ICHR in the case of Mr Rosendo Radilla Pacheco only compels federal judges to exercise a "control of conventionality" *ex officio* between domestic regulations and the American Convention. The rulings rendered by the Inter-American Court of Human Rights against Mexico are *binding* upon the Judiciary Power according to its

terms. Conversely, when Mexico has not been condemned in the cases in which said jurisprudence was created, the interpretive opinion established by the jurisprudence of the ICHR serve only as guidelines (but are not binding) for the Judiciary Power of the Federation.

The Judiciary Power of the Federation shall adjust its subsequent constitutional and legal interpretations in matters of military jurisdiction by focusing on the opinions contained in the jurisprudence of the Inter-American Court of Human Rights. The obligation to control conventionality is binding upon all judges in Mexico. This issue makes it necessary to amend precedent P./J. 74/99.

The newly amended Article 1.2 of the Federal Constitution establishes that the rules on human rights shall be construed according to their provisions and pursuant to international convention on the matter, always affording persons the most extensive protection. From this moment, military jurisdiction established by Article 57 of the Code of Military Justice may not be asserted under any circumstance in situations that violate the human rights of civilians. In the future, Mexican judges must rule to restrict military jurisdiction in compliance with the judgment of the *Radilla* Case and by applying Article 1 of the Constitution. So, the SCJN must resume its jurisdiction to hear jurisdictional conflicts between the military and civil sphere in compliance with Article 1 of the Constitution. In this manner, the Judiciary Power of the Federation must adjust its “subsequent constitutional and legal interpretations in matters of military jurisdiction by focusing on the opinions contained in the jurisprudence of the Inter-American Court of Human Rights”.

Regarding administrative obligations, the Judiciary Power of the Federation shall comply with the reparation measures, such as permanent training for judges related to the jurisprudence of the Inter-American System (with emphasis on the limits of military jurisdiction; civil rights and judicial protection; regarding international standards applicable to the administration of justice) and with respect to the due process in cases of forced disappearance of persons. Any court in Mexico that hears a controversy related to the forced disappearance of persons must inform the SCJN, so that the latter may exercise its fundamental jurisdiction or, as the case may be, assert jurisdiction. In terms of the victims and their families, the Judiciary Power of the Federation shall guarantee at every trial access to the file as well as the copies of such file.

Cross-references:

- Inter-American Court of Human Rights, *Radilla Pacheco v. Mexico*.

Languages:

Spanish.



Identification: MEX-2012-3-008

a) Mexico / **b)** Supreme Court of Justice of the Nation / **c)** *En banc* / **d)** 14.08.2012 / **e)** Jurisdictional conflict 60/2012 / **f)** Restrictive interpretation of military jurisdiction / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

4.7.11 Institutions – Judicial bodies – **Military courts.**

Keywords of the alphabetical index:

Jurisdiction, conflict / International law, enforcement, domestic / Inter-American Court of Human Rights, Rulings.

Headnotes:

In the event that a State continues to have military criminal jurisdiction in times of peace, its use must be minimal, according to what is strictly necessary, and must be inspired by the principles and rights that govern modern criminal law. This restrictive and exceptional nature of military jurisdiction, inherent to the democratic rule of law, must be limited to the protection of special legal interests, related to the attributes of military forces. Therefore, military courts must only try soldiers when they have committed a crime or violations to the military order.

Summary:

I. The military judge (assigned to the Fifth Region) recused himself from hearing a criminal case against three soldiers (9 April 2012). They were charged with allegedly making false declarations before a court of law and simulating evidence in the reports submitted before an authority, actions that are sanctioned by

Article 248bis of the Federal Penal Code with respect to Articles 57.II.a and 58 of the Code of Military Justice.

Such a recusal had been analysed previously. On that occasion, the Seventh District Judge of the State of Michoacán, seated in Morelia, ruled not to accept the recusal (16 December 2011). The Supreme Court of Justice of the Nation (hereinafter, "SCJN") ruled in favour of asserting jurisdiction with respect to this jurisdictional conflict (25 April 2012).

The facts that serve as grounds for the action filed against the soldiers occurred when they filed a complaint before an agent of the Federal Prosecutor's Office (with jurisdiction in Morelia, State of Michoacán) to release into their custody a vehicle with a jute bag containing 3 kilos of marihuana. They also handed over a civilian who had been detained and who the soldiers claimed was related to the finding. However, the facts stated in the complaint were found to be false.

II. After confirming that a jurisdictional conflict existed, the Plenary Session of the SCJN ruled in favour of asserting its jurisdiction in order to resolve conflicts of this nature.

Although the SCJN recognised that the suspects were federal employees, the case did not violate military rights because the right being protected by the crime being prosecuted is the administration of justice and the alteration of the truth. Therefore, the military judge lacked jurisdiction to hear the criminal acts attributed to the aforementioned soldiers.

Taking into account the nature of the crimes, and considering the violation of the legal rights that were committed by persons who presented themselves as soldiers on active duty and that these were not rights pertaining to the military sphere, the criminal military jurisdiction is not competent to judge and punish the acts attributed to them. Prosecution of the suspects was therefore left to the ordinary courts.

The foregoing is based on paragraph 274 of the ruling rendered by the Inter-American Court of Human Rights (*Rosendo Radilla v. Mexico*), which states that "if the criminal acts committed by a person who enjoys the classification of active soldier does not affect the juridical rights of the military sphere, an ordinary courts should always prosecute said person". This resolution also coincides with the ruling of the SCJN in paragraph 44 of the SCJN miscellaneous 912/2011 (*Radilla Case*), which states "just as the second paragraph of Article 1 of the Federal Constitution establishes that the rules regarding human right shall be interpreted [...] according to international treaties on the

subject matter and always bestowing on the persons the most extensive protection, it shall be deemed that military jurisdiction shall never be invoked in situations that violate the human rights of the civilian population".

Cross-references:

- Inter-American Court of Human Rights, *Radilla Pacheco v. Mexico*.

Languages:

Spanish.



Identification: MEX-2012-3-009

a) Mexico / **b)** Supreme Court of Justice of the Nation / **c)** *En banc* / **d)** 21.08.2012 / **e)** Appeal for *Amparo* Proceedings 133/2012 / **f)** Violation of International Convention by Article 57.II.a of the Code of Military Justice and Legitimation of the Victim and Family Members to Seek Constitutional Relief by Filing *Amparo* Proceedings / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969**.
4.7.11 Institutions – Judicial bodies – **Military courts**.
5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime**.

Keywords of the alphabetical index:

Court, military, jurisdiction, conflict / International law, enforcement, domestic / Victim, truth, rights / Victim, justice, right / Court, military, victim, civilian, rights.

Headnotes:

When military courts heard crimes involving civilians, they would exercise jurisdiction not only with respect to the perpetrator (who must necessarily be an active soldier), but also with respect to the civilian victims, who have standing in the criminal proceedings not only to request the reparation of the damage, but also to assert their rights to the truth and to justice.

Alleging that the criminal actions remained within civil, not military justice, the victims were granted standing to challenge the unconstitutionality of Article 57.II.a of the Code of Military Justice, which was indirectly applied by the military judge who asserted jurisdiction to hear the criminal actions.

Summary:

I. The homicide victim's family filed a motion for constitutional relief by *amparo* proceedings before a federal judge regarding the crime for which the alleged perpetrators are being tried by a military court. In this motion, they contest the constitutionality of an Article of the Military Code of Justice, questioning the assertion of jurisdiction by said military court and request the recusal of a military public prosecutor in favour of a civil prosecutor.

The Seventh District Judge (federal) of the State of Guerrero ruled that the victims were entitled to file the action. When reviewing this issue, contrary to the argument stated by the government defendant with respect to lacking standing to file a claim, the Supreme Court of Justice of the Nation (hereinafter, the "SCJN") determined that the District Judge ruled correctly when it considered that the plaintiffs could challenge the assertion of jurisdiction by the military judge to hear the aforementioned criminal actions, since they were the victims of a homicide being tried before the criminal military jurisdiction.

II. Citing Articles 1, 20, 103 and 107 of the Federal Constitution and Articles 8 and 25 of the American Convention on Human Rights as well as precedents established by the First Chamber of the SCJN and the resolutions of the Inter-American Court of Human Rights pursuant to which Mexico has been condemned, the SCJN ruled that when military courts hear crimes involving civilians, they exercise jurisdiction not only with respect to the perpetrator (who must necessarily be an active soldier), but also with respect to the civilian victims.

The SCJN, sitting *en banc*, also considered that the District Judge had correctly ruled that if a military judge hears a criminal case in which the victim or injured party was a civilian, then jurisdiction would be asserted over such party. This clearly breaches Article 13 of the Federal Constitution by reason of Article 57.II.a. The SCJN concluded that since a military court asserted jurisdiction, Article 13 of the Federal Constitution had been violated.

With respect to the argument claimed by the government defendant about the alleged lack of reiteration of the opinion of the Inter-American Court of Human Rights (specifically, with respect to the

isolated precedent in the *Case of Radilla Pacheco v. Mexico*), the SCJN determined that the resolution was international jurisprudence and does not need to be reiterated in court opinions in order to be valid. This precedent from an international source is of a binding nature.

Cross-references:

- Inter-American Court of Human Rights, *Radilla Pacheco v. Mexico*.

Languages:

Spanish.



Identification: MEX-2012-3-010

a) Mexico / **b)** Supreme Court of Justice of the Nation / **c)** *En banc* / **d)** 30.08.2012 / **e)** Appeal for *Amparo* Proceedings 134/2012/ **f)** Violation of International Convention by Article 57.II.a of the Code of Military Justice / **g)** No. de registro: 24191 - 10a. Época - Instancia: Tribunales Colegiados de Circuito - *Semanario Judicial de la Federación y su Gaceta* – Libro XVI, Enero de 2013, Tomo 3, 1782 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969**.
4.7.11 Institutions – Judicial bodies – **Military courts**.

Keywords of the alphabetical index:

Conventionality / Jurisdiction, conflict / International law, enforcement, domestic.

Headnotes:

The military judge lacks jurisdiction in cases involving civilian victims. Jurisdiction should therefore be awarded to the federal criminal judge.

Summary:

I. The legal representative of a minor, the alleged victim of sexual aggression by an active soldier, filed a motion for *amparo* proceedings against the admission of two crimes in the jurisdiction of the First Military Judge of the First Region.

Since the District Judge who heard the *amparo* proceedings admitted only part of this alleged crime and dismissed the remainder of the file, the plaintiff filed a motion for review before the Collegiate Court for Criminal Matters of the First Circuit in turn. This Collegiate Court ruled that the appeals for *amparo* proceedings could fall within one of the considerations analysed by the Supreme Court of Justice of the Nation (hereinafter, the "SCJN") in Miscellaneous file 912/2010 (*Radilla* Case), since constitutional relief (*amparo*) was granted because the District Judge ruled that the order to be remanded in custody during the trial being challenged were issued by an authority lacking legal jurisdiction to issue it; to wit: the First Military Judge assigned to the First Military Region.

II. Although this ruling was determined by the fact that a crime was allegedly committed by an active soldier, another determining factor was that the alleged victim was a minor and, therefore, not subject to military jurisdiction.

The SCJN sitting *en banc* decided to assert jurisdiction to review the case. The judgment appealed was finally overruled, granting the plaintiff actions established above against the government.

Cross-references:

- Inter-American Court of Human Rights, *Radilla Pacheco v. Mexico*.

Languages:

Spanish.

*Identification:* MEX-2012-3-011

a) Mexico / **b)** Supreme Court of Justice of the Nation / **c)** *En banc* / **d)** 11.09.2012 / **e)** Appeal for *Amparo* Proceedings 252/2012 / **f)** Restrictive interpretation of military jurisdiction / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

4.7.8 Institutions – Judicial bodies – **Ordinary courts.**
4.7.11 Institutions – Judicial bodies – **Military courts.**

Keywords of the alphabetical index:

Discipline, military / Jurisdiction, conflict.

Headnotes:

Article 13 of the Federal Constitution states that the military courts shall have jurisdiction in the event of the following:

- a. a crime or misdemeanour committed by an active soldier; and
- b. when such act is committed against military discipline.

Therefore, it is inadmissible for a common law offence to become military by the mere fact that it was committed by a member of the armed forces because it would also be necessary for such crime to be committed against military discipline.

Summary:

I. In a case file, the Third Criminal Judge of the First Judicial District, assigned to the Judiciary power of the State of Nuevo León, recused himself from hearing a case involving a soldier. The case was sent to the Second Military Judge of the First Region, since it was considered to fall within his jurisdiction; however, the latter did not admit the case. Given the refusal to hear the case, the state judge remitted it to the Collegiate Court (federal) in turn, so that it may rule on the possible existence of a jurisdictional conflict.

Since the premises of Articles 57.II.a and 58 of the Code of Military Justice had been met, this Court (Second Collegiate Court for Criminal Matters of the Fourth Circuit) resolved the conflict in favour of military jurisdiction (ruling dated 30 June 2011).

After receiving the case file again, the aforementioned Second Military Judge declared the proceedings resumed and admitted all of the court

rulings entered by the lower court judge (assigned to the State Judiciary Power). The soldier who was being prosecuted filed a motion for constitutional relief by *amparo* proceedings against the order to be remanded in custody during the trial (which constitutes the formal start of the proceedings). After receiving the negative reply from the federal judge hearing the *amparo* proceedings, the aforementioned soldier filed a motion for review, which the SCJN ruled to assert jurisdiction over.

II. The soldier who filed a motion for *amparo* proceedings was being prosecuted for crimes related to the administration of justice and law enforcement, which are not related to military discipline. Therefore, the SCJN determined that a military court did not have jurisdiction; but, on the contrary, must be understood as jurisdiction of ordinary civil courts.

Additionally, the SCJN clarified that the proceedings were against an active soldier, who by definition is a civil servant or federal employee assigned to the Ministry of Defence. The fact of being given preventive policing (in aid to civilian police forces) at the moment the crime was committed does not strip him of his position as a federal employee. Therefore, jurisdiction, within the civil court system, must be assigned to a federal criminal judge. In view of this situation, the ruling determined that the order to be remanded in custody during the trial that was being challenged must be revoked because it was issued by an incompetent authority.

Consequently, the criminal court that was declared to have jurisdiction must hear the case again, focusing on the legal situation of the military suspect from the beginning of the proceedings. This competent court, therefore, must rule on the order to be remanded in custody during the trial, by previously analysing the facts and evidence contained in the file, according to Article 19 of the Constitution.

Cross-references:

- Inter-American Court of Human Rights, *Radilla Pacheco v. Mexico*.

Languages:

Spanish.



Mexico Electoral Court

Important decisions

Identification: MEX-2012-3-012

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 19.12.2012 / **e)** SUP-RAP-482/2012 / **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.**

4.9.8 Institutions and instruments of direct democracy – **Electoral campaign and campaign material.**

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

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:

Election, presidential / Election, propaganda / Impartiality, principle / Public servant.

Headnotes:

Electoral propaganda by public officials, and the principles of equity, impartiality and free voting, are guaranteed by Articles 41 and 134 of the Federal Constitution, and by Article 347.I.c of the Federal Code of Electoral Institutions and Procedures (FCEIP).

Summary:

I. The applicants, two national political parties, challenged a resolution issued by the federal electoral administrative authority, which had dismissed their complaints concerning the transmission of a promotional broadcast on radio and television, in which a government official had appeared, voicing support for a candidate for the presidency of Mexico.

II. The Court dismissed the claims and confirmed the resolution of the federal electoral administrative authority, on the basis that the acts attributed to the public official do not fall within any constitutional or legal restriction. The Court viewed the official's appearance in the promotional broadcast as the legitimate exercise of the possibility to inform the public on a subject of public interest, in the case of a message which, in the political context, conveyed solely the stance of the speaker, without revealing any benefit to the candidate. Thus, it was not feasible to attribute responsibility to the public official for any illegal or unconstitutional conduct.

Supplementary information:

Judge María del Carmen Alanis Figueroa and Judge Manuel González Oropeza voted against the reasoning in the judgment. Both judges considered that the appearance of the public official in the promotional broadcast was contrary to the principles of impartiality and equity in the contest, comparable to the diffusion of government propaganda in favour of a political option and the active participation of a public official in favour of the vote of a specific candidate.

Languages:

Spanish.



Moldova Constitutional Court

Important decisions

Identification: MDA-2012-3-003

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 06.11.2012 / **e)** 13 / **f)** Review the constitutionality of a number of provision from the Annex 2 to the Regulations on medical screening in the Armed Forces of the Republic of Moldova, approved by Government Decision no. 897 from 23 July 2003 and from the Annex 8 to the Regulations on the enlistment of citizens in the full-term and short-term military service, approved by Government Decision no. 864 from 17 August 2005 / **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.**

2.1.1.4.4 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.**

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

Keywords of the alphabetical index:

Data, protection / Medical institution, document, discovery / Data, medical, protection.

Headnotes:

In line with Article 28 of the Constitution, the State shall respect and protect intimate, family and private life, which is in line with Article 8 ECHR, Article 17 of the International Covenant on Civil and Political Rights and with Article 12 of the Universal Declaration of Human Rights.

Accordingly, a public authority shall not interfere with the exercise of this right unless provided by law that, in a democratic society, it is necessary for national security, safety, economic welfare, preservation of order and prevention of criminal acts, protection of health or of morality, or for the protection of others rights and freedoms.

Summary:

The Ombudsman notified the Constitutional Court of the constitutional review of a number of provisions from Annex 2 to the Regulation on military and medical screening in the Armed Forces (hereinafter "Annex 2") and from Annex 8 to the Regulation on the enlistment of citizens for full or short term military service (hereinafter "Annex 8"). The author of the referral claimed that provisions on the template of the Annex 8 certificate that specified the Medical Standard for military service eligibility (hereinafter, the "Medical Standard"), and Section no. 2 of the Medical Standard of Annex 2 on establishing the aptitudes needed for military service (having specified the name of the illnesses and physical deficiency) are unconstitutional. They not only contradict Article 28 of the Constitution and Article 54 of the Constitution, they also violate Article 8 ECHR, Article 17 of the International Covenant on Civil and Political Rights, as well as with the Article 12 of the Universal Declaration for Human Rights.

At the crux of the claim is personal data protection, which is fundamentally important to exercising the right to privacy. Disclosure of such data to the public or a third party may qualify as interference in private life and result in liability exposure. In line with the Law on personal data protection, the notion "personal data" represents any information referring to identifiable or unidentifiable natural entity (subject of personal data). Provisions of the same law define "special categories of personal data" *inter alia* as data on the state of health.

Regarding military registration, the enlistment of military service for a full or short term, contract based military service, conscription of recruits, and reserves at the military centres for the examination of their military-medical situation are all subject to the Military-Medical Commission's screening. The screening is in line with the requirements of the Regulations on the military-medical expertise in the Armed Forces. The Medical Standard is the main document for the military-medical expertise, aimed at determining citizens' eligibility for the enrolment in military service, in times of peace or of war. Section 2 enumerates the illnesses and physical deficiency. Young people who do not qualify for military service are subsequently excluded from the military registry and handed a certificate (Annex 8). The

certificate sets out the relevant article of the Medical Standard that serves as the basis for withdrawing them from the registry. Subsequently, this article shall replace the medical diagnosis. Considering the Medical Standard is published in the Official Gazette, the names of the illnesses and physical deficiency are made known to the public. Therefore, the practice of replacing the diagnosis with the relevant code of the illness does not ensure the confidentiality of medical data.

The Court pointed out that in line with the Law on patient's rights and responsibilities, confidential data on his/her diagnosis, health state, private life obtained as a result of the screening, treatment, prophylaxis, rehabilitation and bio-medical examination (clinical study) constitute medical secrets. This information cannot be disclosed to a third party, unless provided for by the law.

The Court has concluded that the right to choose to withhold the confidentiality of the data with regards to patient's health condition and subsequently, the obligation to withhold the medical secret shall be extended to the content of the Military-Medical Commission's conclusion.

The Court noted that the national legislation provides for the obligation to submit documents on military registration when issuing identity documents, marital status acts, individual working contracts, as well as in other cases, upon the request of public authorities, public institutions and economic agents. This obligation leads to the disclosure of medical diagnosis to a third party.

The Court concluded that by including the article/illness code from the Medical Standard in the certificate template, making reference to the order of Defence Minister, and specifying the number and its issuing date as a ground for withdrawal, these acts constitute an unjustified limitation of the right to private life. The reason is that they are accessible to third parties. The Court has qualified this right as disproportional interference in the exercise of the right to private life, guaranteed by the Article 28 of the Constitution, correlated to the provision of the Article 54 of the Constitution.

Grounded in the above-mentioned arguments, the Court recognised as constitutional Section 2 of the Medical Standard from Annex 2, by which there is a specified name of the illnesses and physical deficiency.

At the same time, it declared unconstitutional the syntagma "Grounds: Article ___ of the Medical Standard (Defence Ministry's Order of the Republic of Moldova no. __ from _____)" from the template of the certificate of Annex 8.

Languages:

Romanian, Russian.

*Identification:* MDA-2012-3-004

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 15.11.2012 / **e)** 14 / **f)** constitutional review of some provisions of the Civil Procedure Code no. 225-XV from May 2003 / **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**.

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:

Act, administrative, administrative body / Decision, administrative, illegal / Law, administrative / Procedure, administrative.

Headnotes:

In line with Article 20 of the Constitution, an individual is entitled to obtain effective reparation from the competent courts of law against actions infringing his/her legitimate rights, freedoms and interests.

This principle is found in Article 114 of the Constitution, according to which justice shall only be carried out by the courts. In the name of the law, these courts include the Supreme Court of Justice, appeal courts and courts of law, as set out in Article 115 of the Constitution.

According to Article 53.1 of the Constitution, a person whose rights have been violated by a public authority through an administrative act or failure to solve a complaint within reasonable time shall be entitled to obtain the acknowledgement of the claimed right, annulment of the act and reparation of damages.

Summary:

I. On 15 November 2012, the Constitutional Court delivered a judgment on the constitutional review of certain provisions of the Civil Procedure Code no. 225-XV from 30 May 2003 (Application no. 21a/2012).

According to the applicant, Article 470.1 of the Civil Procedure Code, which compels the Court to inform the Ministry of Justice and the National Bank on the examination process of the request to recognise a foreign court's judgment are unconstitutional. The reason is that they infringe Articles 6, 114, 115 and 116 of the Constitution. These entities' participation by issuing some conclusions allows the judge to clarify all the relevant aspects aimed at solving the case. In this context, considering the set of available elements and the lack of pertinent arguments of the applicant in favour of his position, the Court suspends the process for this part of the application.

Subsequently, the Court examined the application part pertaining to the obligation to respect the preliminary procedure. The procedure refers to a set of interconnected, constitutional elements, such as free access to justice, the right to defence, and where justice must only be done by the courts of law. Respecting the procedure during the preliminary extra-judiciary settlement of the litigation is a special condition when exercising the right to take court action needed only in certain cases.

II. The Court cannot agree with the applicant, who claims that the contested legal provisions contradict Article 20 of the Constitution (which guarantees free access to justice) as they introduce a condition to the access to the court by undertaking a preliminary procedure, which has introduced a delay. In this context, the European Court of Human Rights mentions that access to justice can be limited, particularly by setting the admissibility criteria – a field where the State enjoys some discretion (*Guerin v. France*, 29 July 1998, § 37).

The Court found that by establishing the preliminary procedure for litigation settlement, there was no intent to restrain the free access to justice (as those interested obviously benefit from it within the legal framework). The sole intent was to establish a climate of order, in line with Article 20 of the Constitution. Thus, the abuse of power was prevented, as the protection of rights and legitimate interests of other parties was ensured.

In this context, the Court notes that the Recommendation Rec (2001) 9 of the Committee of Ministers to member states on alternatives to litigation

between administrative authorities and private parties, suggests the use of alternatives: internal administrative appeal, conciliation, or mediation, a transaction that can be useful prior to taking action in the court. The use of these modalities can be mandatory, thus being a preliminary condition to triggering the legal procedures. The Court mentions that within the administrative litigation, the preliminary procedure is welcome, which does not imply the involvement of a body with jurisdictional attributions. Rather, it implies the involvement of the very same body issuing the administrative act or of the hierarchically superior body. The Court holds that unlike judicial review of screening the judgments and decisions through the appeal, the court review proceeding is the right of and the obligation that the court instances have to undertake to check (in cases, under the conditions and following the procedure established by the law) the legality of some acts emanating from extrajudicial bodies. The practice of this court review fully ensures the right to an effective remedy, guaranteed by the Article 13 ECHR.

Thus, the Court notes that the right to require the court annulment of an act can be subjected to some structural conditions in case they pursue a legitimate goal because it is necessary in a democratic society and proportional with the pursued goal. In this situation, the legitimate goal pursued by the lawmaker was to make it possible for the issuing body of the act or to its hierarchical superior body to verify and decide on the appealed act. In line with the above mentioned, the full court review of the administrative acts guarantees that the application of the provisions of Article 53.1 of the Constitution interrelates with Article 20 of the Constitution.

In the light of the above, the Court held that “such a preliminary condition” does not infringe Article 20 of the Constitution, which guarantees free access to justice, and does not affect the substance of this guaranteed right.

Languages:

Romanian, Russian.



Identification: MDA-2012-3-005

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 11.12.2012 / **e)** 18 / **f)** constitutional review of some provisions of the Administrative Litigation Law no. 793-XIV from February 2000 / **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.**

2.1.1.4.4 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.**

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

3.16 General Principles – **Proportionality.**

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:

Act, administrative, appeal, procedure / Law, administrative / Procedure, suspension.

Headnotes:

Article 20 of the Constitution ensures the free access to justice, a principle transposed into the procedural norms that govern its applicability. The Constitution provides for the right of any person prejudiced in any of his/her rights by a public authority through an administrative act or failure to solve a complaint within reasonable time, to obtain the acknowledgement of the claimed right, cancellation of the act, and payment of damages (Article 53.1 of the Constitution).

Article 6 of the Supreme Law stands for the checks and balances principle. In line with Article 114 of the Constitution, justice shall be done in the name of the law only by the courts of law.

The contested norm, which forbids the suspension of the acts issued by the Court of Accounts and by the National Commission of the Financial Market, is disproportional with the right of the party acting in good faith (regarding the demand of suspending the act) and with the right of the court to dispose with guaranteeing measures.

Summary:

I. The Constitutional Court has been notified by an Member of Parliament on the constitutionality review of a number of provisions from the Law no. 793-XIV from 10 February 2000, with regards to administrative litigation. The applicant contested the constitutionality of Article 21.3 of the Administrative Litigation Law, according to which “by derogation from the provisions of paragraphs 1 and 2, the enforcement of the decisions of National Commission of Financial Market and those of the Court of Accounts cannot be suspended, until the definite settlement of the case.” The applicant considers that the lawmaker has abused the attribution of the court, thus infringing on the checks and balances principle, provided for by Article 6 of the Constitution, along with Article 20 of the Constitution, Article 54 of the Constitution and Article 114 of the Constitution.

II. Aiming at ensuring a fair trial, Article 21 of the Administrative Litigation Law makes it possible for a person to require the administrative court to suspend the contested administrative act's enforcement. The Court held that, in line with Article 21.2 of the Administrative Litigation Law, in duly justified and aimed at preventing any imminent damage, the court can decide *ex officio* on suspending the administrative act. On the other hand, the Court noted that, according to the Article 21.3, contrary to the norms called upon, “[...] there cannot be suspended the enforcement of the decisions of National Commission of Financial Market and those of the Court of Accounts until the definite settlement of the case”. The Court specified that the suspension of the administrative act constitutes a form of safeguarding the action, guaranteeing the possibility of satisfying the claims in case the court finds in favour of a party. This contributes in a real way to the subsequent enforcement of the pronounced judgment and constitutes an efficient means of protecting the subjective rights of the parties to the proceedings. The Court mentioned that, in line with the norms on civil procedures, safeguarding the action is a procedural act that the court of law decides upon the request of the parties to the proceedings.

The Court held that the safeguard granted to the applicant by Article 21.1 and 21.2 from the Administrative Litigation Law aims at avoiding irreparable consequences in the case of obtaining the effects of the appealed administrative act. At the same time, to avoid ungrounded abuses on behalf of the applicant, the judge is provided with the possibility to estimate the prejudice, the imminent emergence of which is implied by the applicant.

The Court observed that, in line with Article 177.1 of the Civil Procedure Code, in the claim to safeguard the action, there are specific reasons and circumstances to request the safeguarding of the action. Thus, the lawmaker has entrusted the applicant with the submission of pertinent evidence, providing the reasoning for the necessity of safeguarding the action. In this context, the Court mentioned that the applied provisional measures which are determined separately by a court of law in every case, pertain to the substance of the matter of the action. The court of law shall decide on the provisional measure, which maintains the state of things during the examination of the case, under circumstances where there is a plausibility risk for irreparable damage. The Court held that the right to demand from the court of law the suspension of the administrative act constitutes a genuine safeguard against the abuses of the administrative authorities, which issues acts of an executory nature.

Subsequently, the Court referred to Recommendation no. R (1989) 8 of the Committee of Ministers to member states on provisional court protection in administrative matters, considering also the parallel with Article 39 of the Rules of the European Court of Human Rights. As a result, the Court mentioned that the judges shall be empowered and have available sufficient means in order to have justice carried out. The Court's Decision no. 12 of 20 February 2001 states: “[...] Justice is carried out in the name of law, only by the law courts where the judges are delivering justice under the conditions which exclude any pressure exercised upon them. Neither the legislative power, nor the President of the country, nor the Government are entitled to intervene in the work of judicial authorities [...]”

The Court held that by the derogatory norm comprised by Article 21.3 of the Administrative Litigation Law, the Parliament introduced a different treatment relative to other issued acts by the National Commission of Financial Market, by the Court of Accounts and other public authorities.

Considering the above-mentioned arguments, the Constitutional Court recognised as unconstitutional the provisions of the Article 21.3 of the Administrative Litigation Law no. 793 – XIV from 10 February 2000.

Languages:

Romanian, Russian.



Morocco

Constitutional Council

Important decisions

Identification: MAR-2012-3-003

a) Morocco / **b)** Constitutional Council / **c)** / **d)** 19.11.2011 / **e)** 821 / **f)** Organic Law no. 59-11 on the election of members of local authority councils / **g)** *Official Gazette* (in Arabic), no. 5997bis, 22.11.2011 / **h)**.

Keywords of the systematic thesaurus:

4.8.2 Institutions – Federalism, regionalism and local self-government – **Regions and provinces.**

4.9.3.1 Institutions – Elections and instruments of direct democracy – Electoral system – **Method of voting.**

4.9.4 Institutions – Elections and instruments of direct democracy – **Constituencies.**

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

4.9.13 Institutions – Elections and instruments of direct democracy – **Post-electoral procedures.**

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

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

Keywords of the alphabetical index:

Election, candidate, gender / Election, constituency, boundary, establishment / Election, vote, by proxy / Local government, election / Election, vote, right, citizen residing abroad / Eligibility, conditions / Local council, deputy, election.

Headnotes:

Neither the ineligibility which Article 5 of Organic Law no. 59-11 on the election of members of local authority councils imposes on Moroccan citizens residing abroad who hold elective or public governmental responsibilities in their countries of residence, nor the provisional ineligibility laid down in Article 6 as a sanction are contrary to the right to stand for election as secured under Article 17 of the Constitution.

The following are also in conformity with the Constitution:

- the exception laid down in Article 111.4 of the Organic Law on prefectural and provincial councils to the principle of the inadmissibility of lists of candidates containing the names of persons belonging to more than one political party or simultaneously containing candidatures accredited by a political party and candidatures by persons of no political affiliation;
- the possibility provided by Article 12.1 of the Organic Law of voting by proxy, even though it derogates from the personality principle *vis-à-vis* elections;
- the identification of electoral offences committed and the applicable sanctions in Articles 41 to 72 of the Organic Law, provided the proportionality principle has been respected;
- the inclusion in the Organic Law of principles governing division into constituencies.

Lastly, it is incumbent on the legislature to select the optimum provisions for improving the representation of women.

Summary:

I. The Head of Government invited the Constitutional Council to examine, under emergency procedure, the constitutionality of Organic Law no. 59-11 on the election of members of local authority councils, pursuant to the provisions of Article 132.2 and 132.4 of the Constitution.

The Organic Law on the election of members of local authority councils, which was submitted to the Constitutional Council for examination, concerns the number of members of the said councils, their terms of office, rules on eligibility and cases of incompatibility, cases of prohibition for plurality of mandates, as well as their mode of election and provisions geared to improving female representation in such councils, the specific case of voting by Moroccan citizens residing abroad and electoral disputes (preparatory documents for the election, election campaigns and their funding, voting procedure, vote counting and declaration of results, etc.).

II. In examining this Organic Law the Constitutional Council focused on the following articles:

Articles 5 and 6 concerning ineligibility

The Council held that Article 5 on the ineligibility of Moroccan citizens residing abroad who hold elective or public governmental responsibilities in their countries of residence, is justified on the grounds of the contradictory obligations which might result from plural public mandates in two different states. The Council held that this condition does not detract from the citizenship rights of Moroccan citizens residing abroad, including the right to stand for election as secured by Article 17 of the Constitution, and that the said provision is consequently not contrary to the Constitution.

Where Article 6 is concerned, the Council held that a decision to revoke a mandate which has become final under a judgment constituting *res judicata* is accompanied by the requisite judicial guarantees, and that the provisional ineligibility accompanying the judgment as a sanction, as mentioned in the second indent of Article 6.2, does not infringe the right of candidature secured by the Constitution.

Articles 8 and 111 concerning lists of candidates

Article 8 of the Organic Law lays down that lists of candidates containing the names of persons belonging to more than one political party or simultaneously containing candidatures accredited by a political party and candidatures by persons of no political affiliation are inadmissible. Article 111.4 of the Organic Law excludes the election of members of prefectural and provincial councils from the application of the provisions of Article 8. Such exclusion is justified by the fact that the councils in question have small electoral bases and are the only local authority councils whose members are elected by indirect suffrage, which makes it impossible, when these councils are being set up, to comply fully with the provisions of Article 8. On the basis of the foregoing comments, the Council held that all the provisions of Article 8 and also the exception concerning these provisions under Article 111 of the Organic Law are compatible with the Constitution.

Article 12 concerning voting by Moroccan citizens resident outside the national territory

Article 12.1 provides that voters residing outside the national territory who are registered on the general lists of electors can vote by proxy during elections. The Constitutional Council considers that even though voting is a personal right by virtue of Article 30 of the Constitution, Article 17 of the Constitution

requires the law to establish the conditions and modalities for the effective exercise, in their respective countries of residence, of the right to vote and the right to stand for election of Moroccans residing abroad, with the result that the measure ordered by the legislature, under its discretionary powers, to authorise voting by proxy is not unconstitutional – as a derogation to the personality principle *vis-à-vis* elections in the specific case of the category in question, relating to the measures set out in the ensuing paragraphs of the same article.

Articles 41 to 72 concerning the determination of offences and the applicable sanctions

The Constitutional Council held that the successive examination of these articles revealed that even though the legislature has reinforced the sanctions applicable to electoral offences, it has thereby implemented the provisions of Article 11 of the Constitution, which provides that “free, honest and transparent elections constitute the foundation of the legitimacy of democratic representation”, and therefore, in enshrining these sanctions, the legislature has not overstepped the principle of proportionality between the latter and the electoral offences committed.

Articles 76 and 77 concerning the criteria for establishing electoral constituencies and the electoral constituency for women

The Constitutional Council held that the concept of electoral system covers the criteria for establishing electoral constituencies, which are an integral part of such system, and that consequently, the legislature’s inclusion in the Organic Law of the principles for dividing the territory into constituencies, is in no way contrary to the Constitution. In connection with the provisions on the electoral constituency reserved for women only, the Council held that it is incumbent on the legislature to select the provisions which it deems conducive to improving female representation in the local authority councils, and that as regards these provisions the Council’s role is confined to considering their conformity with the Constitution.

Languages:

Arabic, French.



Norway

Supreme Court

Important decisions

Identification: NOR-2012-3-003

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 21.12.2012 / **e)** 2012-02398-P / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2012, 1985 / **h)** CODICES (Norwegian, English).

Keywords of the systematic thesaurus:

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

Asylum, procedure / Child, best interests.

Headnotes:

The review of administrative decisions should in general be based on the facts at the time the decision was made. Norway's human rights obligations – the obligation to ensure the right to an effective remedy under Article 13 ECHR – give no grounds for any other solution. This includes immigration cases.

Summary:

Questions had arisen over the validity of a refusal by the Immigration Board of Appeal of the application for asylum and residence in Norway of an Iranian family with children who, at the time of the decision, had lived there for a long time. A majority of the Supreme Court concluded, after an extensive review of theory, preparatory works of acts and case law that the review of administrative decisions should in general be based on the facts at the time the decision was made. Norway's human rights obligations give no grounds for any other solution. This includes immigration cases. The obligation to ensure the right to an effective remedy under Article 13 ECHR is safeguarded through the system in force in Norway today. The Immigration Board of Appeals, which should be regarded as a court of law according to the

European Convention on Human Rights system, is required to hear requests for reversals based on new circumstances. Refusals to grant reversals may also be heard by the courts.

Section 38.3 of the Immigration Act provides that the best interests of the child is to be a fundamental consideration in cases relating to the granting of a residence permit on the grounds of strong humanitarian considerations or a special connection to Norway and should be interpreted to mean that consideration for the child's best interests will carry significant weight. This is in conformity with Article 3 of the Convention on the Rights of the Child. Importance is to be attached to a connection that has developed while the child has been an illegal immigrant in the country. However, so much weight may be attached to immigration-regulating considerations, cf. Section 38.4 of the Immigration Act, including derived consequences of a decision and regard for the other rules of the Act, that they must prevail over consideration of the best interests of the child. In certain circumstances, consideration for the child's best interests may be so weighty that it takes precedence regardless of any other counter-considerations. Section 38.1 of the Immigration Act does not allow for a right of judicial review of the administration's application of the conditions "strong humanitarian considerations" or "special connection to Norway". In cases under Section 38.3 of the Immigration Act it must be clear from the decision that the regard for the child's best interests has been properly evaluated and measured against conflicting considerations and carries weight as a fundamental consideration. The courts may examine whether the decision has complied with these requirements. The concrete weighing of interests cannot be examined. A concrete review of the Immigration Board of Appeals' decisions showed that consideration for the child had been duly evaluated and that there were no errors which would lead to invalidation.

Decision in plenary. Dissenting votes 14-5.

Languages:

Norwegian, English (translation by the Court).



Identification: NOR-2012-3-004

a) Norway / b) Supreme Court / c) Plenary / d) 21.12.2012 / e) 2012-02399-P / f) / g) *Norsk retstidende* (Official Gazette), 2012, 2039 / h) CODICES (Norwegian, English).

Keywords of the systematic thesaurus:

2.1.1.4.15 Sources – Categories – Written rules – International instruments – **Convention on the Rights of the Child of 1989.**

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:

Asylum, procedure / Child, best interests.

Headnotes:

A court has a procedural right to deliver a declaratory judgment to the effect that a deportation violates Article 8 ECHR relating to the right to respect for private and family life.

Summary:

Having reviewed the validity of the refusal by the Immigration Board of Appeal of an application for a residence permit for a family from Bosnia and Herzegovina who had children in Norway, the Supreme Court's majority held that the Immigration Board had relied on a correct understanding of Section 38 of the Immigration Act in its assessment as to whether a residence permit should be granted. The decision satisfied the requirements as to reason in Section 38.3 of the Immigration Act as these are specified in another plenary judgment of the same date in case HR-2012-2398-P. A court has a procedural right to deliver a declaratory judgment to the effect that a deportation violates Article 8 ECHR relating to the right to respect for private and family life. Having reviewed the European Court of Human Rights' judgment of 4 December 2012 in *Butt v. Norway*, the majority concluded that there were no such "exceptional circumstances" that could constitute grounds for a violation of the Convention when the duty to leave the country had been breached over several years. Unlike the European Convention on Human Rights and the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child does not contain any requirement for an effective remedy in law at national level. It is accordingly not possible to deliver a declaratory judgment for a breach of this Convention.

Plenary decision.

Dissenting votes 11-8 as to the feasibility of delivering a declaratory judgment for breach of the Convention on the Rights of the Child, 14-5 regarding the other issues.

Languages:

Norwegian, English (translation by the Court).



Poland

Constitutional Tribunal

Statistical data

1 September 2012 – 31 December 2012

Number of decisions taken:

Judgments (decisions on the merits): 25

- Rulings:
 - in 12 judgments the Tribunal found some or all of the challenged provisions to be contrary to the Constitution (or other act of higher rank)
 - in 13 judgments the Tribunal did not find the challenged provisions contrary to the Constitution (or other act of higher rank)
- Initiators of proceedings:
 - 1 judgment was issued upon the request of the President of the Republic (ex post facto review), as well as upon the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
 - 1 judgment was issued upon the request of a group of Senators
 - 6 judgments were issued upon the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
 - 1 judgment was issued upon the request of the First President of the Supreme Court
 - 2 judgments were issued upon the request of the Prosecutor General
 - 1 judgment was issued upon the request of a Regional Parliament
 - 1 judgment was issued upon the request of a Trade Union
 - 2 judgments were issued upon the request of courts – the question of law procedure
 - 10 judgments were issued upon the request of a physical person – the constitutional complaint procedure
- Other:
 - 3 judgments were issued by the Tribunal sitting in plenary session
 - 9 judgments were issued with a dissenting opinion

Important decisions

Identification: POL-2012-3-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 19.05.2011 / **e)** K 20/09 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2011, no. 115, item 674; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2011, no. 4A, item 35 / **h)** CODICES (English, Polish).

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

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

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

Keywords of the alphabetical index:

Expropriation, restitution, conditions / Expropriation, compensation / Expropriation, compensation, subsequent / Real estate, expropriation, compensation, subsequent / Real estate, owner / Real estate, local government.

Headnotes:

The introduction of a time-limit after the lapse of which a claim for compensation 'expires' is justified by the necessity to maintain public order. At issue is not solely the assessment of the security of subjects of rights and obligations, but also the legal system and the principles governing the functioning of society in accordance with values shared by society, which have been enshrined in the Constitution. Undoubtedly, they include the reliability of legal transactions as well as a general principle of civil law in the light of which property claims are time-barred or expire after a certain period.

Summary:

I. The Ombudsman challenged the constitutionality of Article 73.4 of the Introductory Law to Public Administration Reform Acts (Act of 13 October 1998), to the extent it enables the expiry of the period for filing claims for compensation for immovable properties taken over for the construction of public roads before the administrative decision confirming the acquisition of property has been issued.

The applicant argued that the challenged law was disproportionate and inconsistent with the principle of appropriate legislation and with the principle of the protection of citizens' trust in the state and its laws.

II. The Constitutional Tribunal stated that the challenged law is sufficiently precise and comprehensible that the linguistic rules of interpretation make it possible to derive a norm therefrom which is consistent with the Constitution. The occurrence of differences in interpretation in the jurisprudence of the administrative courts and the referral of the indicated issue to be resolved by the Supreme Administrative Court do not *per se* weigh in favour of the infringement of the principle of specificity, as the Ombudsman contended.

The Tribunal further noted that the regulation under review, by making it possible to achieve the adjustment of facts and the legal situation with regard to immovable properties taken over for the construction of public roads in order to strike a balance between the public interest and the private interest, does not impose excessive burdens on the affected parties. Indeed, one should note that the legislator deferred in time the possibility of filing a claim for compensation and pursuing satisfaction of the said claim by providing affected parties with a two-year period, without prejudice to their subjective right, in which to obtain information about the adopted legislative solution and its impact on their property rights. Article 73.4 of the Introductory Law provided for a five-year period for filing a relevant claim which did not have to meet any special formal requirements and which played a dual role. Moreover, this was the only action that was required from an eligible party by law so that the party could escape the negative consequences of the lapse of the time-limit.

The mere indication of a fixed time-limit, maintaining adequate *vacatio legis*, may not be regarded as an excessive burden. Whether a compensatory claim is satisfied depends on the level of activity and efforts of the affected party, in accordance with the principle of *jus civile vigilantibus scriptum est* (the civil law is written for the vigilant). The assumption that the civil law requires due diligence on the part of persons or entities as to their rights is fully approved in a democratic state ruled by law.

In the view of the Tribunal, the setting of a fixed time-limit in Article 73.4 of the Introductory Law is also justified by the requirement to strike a budget balance, which has the status of a constitutionally protected value.

Finally, the Tribunal stated that the introduction of a five-year period in which it is possible to seek compensation, as well as meeting minimum procedural requirements, does not undermine the essence of the right to just compensation. The compensatory mechanism under review ought to be regarded as corresponding to the constitutional guarantee of just compensation.

III. No dissenting opinions were issued.

Cross-references:

Decisions of the Constitutional Tribunal:

- Judgment SK 9/98 of 25.05.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 4, item 78, *Bulletin* 1999/2 [POL-1999-2-017];
- Judgment SK 13/98 of 22.02.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 1, item 5, *Bulletin* 2000/1 [POL-2000-1-006];
- Judgment P 5/99 of 14.03.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 2, item 60, *Bulletin* 2000/1 [POL-2000-1-009];
- Judgment K 24/00 of 21.03.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 3, item 51;
- Judgment U 6/00 of 26.06.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 5, item 122;
- Judgment K 21/01 of 09.04.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 2A, item 17;
- Judgment K 45/01 of 25.06.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 4A, item 46, *Bulletin* 2002/2 [POL-2002-2-020];
- Judgment SK 11/02 of 20.07.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 7A, item 66;
- Judgment SK 44/04 of 23.05.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 5A, item 52;
- Judgment SK 56/04 of 02.06.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 6A, item 67;
- Judgment K 32/04 of 12.12.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 11A, item 132, *Bulletin* 2006/1 [POL-2006-1-001];
- Judgment P 8/05 of 13.03.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 3A, item 28;

- Judgment SK 21/04 of 26.07.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 7A, item 88;
- Judgment SK 14/05 of 01.09.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 8A, item 97;
- Judgment SK 70/06 of 09.10.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 9A, item 103;
- Judgment K 43/07 of 28.02.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 1A, item 8;
- Judgment K 45/07 of 15.01.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 1A, item 3;
- Procedural Decision K 34/08 of 03.03.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 3A, item 30;
- Procedural Decision SK 38/07 of 30.03.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 3A, item 43;
- Judgment K 47/07 of 19.05.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 5A, item 68;
- Judgment P 33/07 of 15.09.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 8A, item 123;
- 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 SK 36/07 of 24.11.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 10A, item 151;
- Judgment SK 2/09 of 12.01.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 1A, item 1;
- Judgment K 8/08 of 18.03.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 3A, item 23.

Languages:

Polish, English (translation by the Tribunal).



Identification: POL-2012-3-006

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 11.10.2011 / **e)** K 16/10 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2011, no. 240, item 1436; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2011, no. 8A, item 80 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors**.
 5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.
 5.3.4.1 Fundamental Rights – Civil and political rights – Right to physical and psychological integrity – **Scientific and medical treatment and experiments**.
 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

Keywords of the alphabetical index:

Child, authority, parental / Child, custody / Child, custody, decision / Child, custody, parental / Minor, understanding, capacity.

Headnotes:

Legal provisions which assign legal significance to the opinion of a minor over 16 and which provide for specific effects to flow there from (namely, the necessity to have an issue resolved by a competent organ of the state, in the case of disagreement or an objection), go beyond the scope of the requirement that the said persons and entities are obliged to consider and take into account the child's opinion before taking a decision concerning his or her person. The further extension of the scope of the regulations, although perceived by the applicant as necessary and desirable, falls within the discretion of the legislator.

Summary:

I. The Ombudsman challenged the constitutionality of several norms of the Polish Mental Health Protection Act, of the Act on the Professions of Medicine and Dentistry and of the Act on Patients' Rights and the Ombudsman for Patients' Rights, relating to the consent to medical treatment granted by minors, on the basis that these laws established an excessively high fixed age limit for all children.

The applicant contended that the challenged norms, due to their arbitrary character and their automatic application, overlook the individual ability of a particular underage patient to make decisions for himself or herself in a conscious and responsible way.

II. The Constitutional Tribunal noted that there is no doubt that the health of every person, including a minor, constitutes an element of his or her personal life, which is subject to legal protection and over which the person has discretion, within the meaning of Article 47 of the Constitution. Also, Article 41.1 of the Constitution, within the above-mentioned two aspects of the individual's freedom, both positive and negative, ensures that everyone is free to make use of healthcare services, which implies both the possibility of accepting them ("freedom to") as well as the possibility of refraining from them ("freedom from"). The institution of substitutive consent (and also cumulative consent) undeniably restricts the autonomy of the patient which is protected at the level of the Constitution. Therefore, a question arises whether this actual restriction, stemming from the application of the challenged regulations, is based on other provisions of the Constitution.

The Tribunal stated that leaving a decision on matters affecting the patient at the discretion of medical personnel that have been tasked with carrying out basic activities related to medical treatment (such as admission to hospital, a medical procedure, a medical examination), could lead to much more significant infringements of the rights of patients than those which, in the applicant's opinion, occur in the context of the current provisions.

Furthermore, considerations which determine the granting of legal capacity to minors (the need to protect third parties and the requirements of legal transactions) should differ from considerations that are taken into account when specifying the scope of the right to self-determination, in situations which do not pose any direct risks (such as a decision to change one's first and last name or adoption) as well as in situations which are dangerous to one's life and health (such as diseases and medical treatment).

Finally, when justifying the different solutions adopted in the above-indicated medical statutes, it should primarily be emphasised that the provisions challenged by the Ombudsman have a general character and regulate typical situations, whereas the legal acts which grant a wider scope of decisions to the child concern exceptional circumstances. In the view of the Constitutional Tribunal, the legislator has no constitutional obligation to transfer these special solutions to statutes that regulate basic healthcare services which are provided on a mass scale.

III. No dissenting opinions were issued.

Cross-references:

Decisions of the Constitutional Tribunal:

- Decision K 21/96 of 24.06.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 2, item 23, *Bulletin* 1997/2 [POL-1997-2-016];
- Judgment K 24/98 of 21.10.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 6, item 97;
- Judgment K 18/02 of 28.04.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 4A, item 32, *Bulletin* 2003/2 [POL-2003-2-020];
- Judgment SK 16/07 of 23.04.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 3A, item 45, *Bulletin* 2008/3 [POL-2008-3-006];
- Judgment K 1/08 of 23.02.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 2A, item 14;
- Judgment U 5/07 of 10.03.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 3A, item 20.

Languages:

Polish, English (translation by the Tribunal).



Portugal

Constitutional Court

Statistical data

1 January 2012 – 31 December 2012

Total: 1 224 judgments, of which:

- Abstract reviews
Prior: 4
Ex Post Facto: 11
Omission: -
- Referenda
National: -
Local: 12
- Concrete reviews
Summary Decisions¹: 605
Appeals: 448
Challenges: 109
- President of the Republic²: -
- Mandates of Members of the Assembly of the Republic³: -
- Electoral Matters⁴: 8
- Political Parties⁵: 12
- Declarations of Assets and Income: 2
- Incompatibilities⁶: -

¹ Summary decisions are those that can be issued by the rapporteur if he/she believes that the Court cannot hear the object of the appeal, or that the question which is to be decided is a simple one – particularly because it has already been the object of a decision by the Court, or it is manifestly without grounds. A summary decision can consist of just a referral to earlier Constitutional Court jurisprudence. It can be challenged before a Conference of the Court (made up of three Justices from the same Chamber). The Conference's decision is then definitive if it is unanimous; otherwise it can itself be challenged before the Chamber's Plenary.

² Questions regarding the President's mandate, not his/her election.

³ Questions involving disputes with regard to the loss of a seat.

⁴ Cases involving electoral coalitions, electoral disputes and disputes about electoral administrative matters.

⁵ Includes records of the abolition or disbanding of political parties, and challenges against decisions taken by party organs.

- Funding of Political Parties and Election Campaigns⁷: 13

Important decisions

Identification: POR-2012-3-015

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 18.09.2012 / **e)** 404/12 / **f)** / **g)** *Diário da República* (Official Gazette), 194 (Series I), 08.10.2012, 5554 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 5.1.1 Fundamental Rights – General questions – **Entitlement to rights.**
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
- 5.1.4.1 Fundamental Rights – General questions – Limits and restrictions – **Non-derogable rights.**
- 5.3 Fundamental Rights – **Civil and political rights.**
- 5.3.37 Fundamental Rights – Civil and political rights – **Right of petition.**

Keywords of the alphabetical index:

Ombudsman, access / Ombudsman, powers.

Headnotes:

The law requires military personnel and militarised agents to exhaust the various forms of remedies available within the military hierarchy as a prior condition before making a complaint to the Ombudsman. This requirement reflects a balanced consideration of the nature of the military institution, and its functional demands and the specific statute governing the persons who serve in the military. The fact that access to a protected asset is thereby rendered more difficult does not mean that there is a disproportionate

⁶ Only with regard to declarations of incompatibility and disqualifications of political officeholders.

⁷ Annual accounts of political parties, election campaign accounts, and appeals against decisions by the Political Accounts and Funding Entity (ECFP). The ECFP is an independent organ that operates under the aegis of the Constitutional Court and whose mission is to provide the latter with technical support when it considers and scrutinises political parties' annual accounts and the accounts of campaigns for elections to all the elected entities with political power (President of the Republic; Assembly of the Republic; European Parliament – Portuguese Members; Legislative Assemblies of the autonomous regions; elected local authority organs).

sacrifice of the right of complaint, in its role as a fundamental right of citizenship.

However, restricting the possibility to complain to the Ombudsman with regard to actions or omissions on the part of the armed forces to cases where there is a violation of the plaintiff military personnel's own constitutional rights, freedoms or guarantees breaches the constitutional guarantee under which citizens are entitled to complain to the Ombudsman with regard to actions or omissions of the public authorities – a guarantee whose nature is itself that of a fundamental right.

Summary:

I. The Ombudsman asked for an *ex post facto* abstract review of the constitutionality of two norms contained in the National Defence Law. The first of the contested norms says that, before serving military personnel can complain to the Ombudsman, all the forms of remedies within the military hierarchy must have been exhausted. The second of the norms before the Court limited the ability of serving members of the military to lodge complaints with the Ombudsman to cases involving actions or omissions on the part of the armed forces that result in violations of the plaintiffs' own constitutional rights, freedoms or guarantees or in losses to those plaintiffs.

II. The Court recalled that when the Constitution instituted the office of Ombudsman as an organ to which citizens can complain against actions or omissions by public authorities, it created an additional guarantee designed to protect the rights and interests of private individuals. The scope of such complaints shows that the office of the Ombudsman is an organ that guarantees the Constitution and is not limited to the defence of fundamental rights. The office also prevents and redresses injustices derived from illegalities, or from breaches of constitutional principles that are binding on the Administration. The Constitution also states that the Ombudsman's work is independent from the non-judicial and the litigious recourses provided for in the Constitution and in the ordinary law.

Following its previous case-law, the Court was of the view that when the norm before it imposed the prior exhaustion of administrative remedies provided for by law, as a condition to exercise the right to complain to the Ombudsman, the goal is to make this right autonomous from other rights to make claims or to appeal. This requirement means that a complaint to the Ombudsman must follow on from an action or omission by the highest body in the administrative hierarchy in question.

The fact that the Constitution says that the work of the Ombudsman is independent from non-judicial and litigious recourses that it and the ordinary law provide for does not prevent of this interpretation. This formulation refers to the actions of the Ombudsman him or herself, which in practice directly reflects in his or her ability to act on his or her own initiative.

The fact that the Ombudsman's role is independent of any non-judicial or litigious legal recourse with regard to the right to complain means that several instruments bring together more than one form of protection, that are subject to different prerequisites and pursue different objectives. Resorting to non-judicial or litigious means does not entail any reduction in the ability to exercise the right of complaint. The requirement that a serviceman or woman who wants to complain must first exhaust all the means at his or her disposal within the military hierarchy does not preclude the availability of the right of complaint. Also, when the procedure applicable to the latter is initiated, it is not influenced by the way in which the preceding hierarchical process took its course and was decided.

It is true that by imposing the requirement to resort first to the remedies the law offers within the military hierarchy, the legislator deprives the interested party of a free choice as to which initiative to take, and of the ability to simultaneously pursue the military option and the right of complaint. While this rule does not reduce the latter right, it has a disadvantageous effect on the ability of military personnel or militarised agents to activate the constitutional-law position provided to them by the constitutional right to complain to the Ombudsman.

In order to determine whether this solution is constitutional, there is a need to apply the parameters that pertain to a state based on the rule of law – particularly those of the principle of proportionality. However, the exact parameters applicable to conditioning factors and restrictions are somewhat fluid ones.

The Constitution does not expressly authorise the legislator to restrict the right to complain to the Ombudsman – a restriction which in the present case took the shape of the exclusion of the immediate exercise of the right of complaint.

The Court recalled that both legal doctrine and jurisprudence have accepted restrictions on fundamental rights that are not expressly authorised by the Constitution. They are seen as unwritten limits that are made necessary by the requirement to safeguard other rights that the Constitution also guarantees.

In the present case, the right that was also necessary to safeguard was the defence of the nation, which the state ensures via the armed forces. This is a right that allows important restrictions to be made on fundamental rights.

In its case-law, the Court has expressed that the specific requirements of the military institution justify the subjection of those who serve in it to a specific statute, with duties in terms of behaviour and limitations on rights that are not imposed on citizens in general.

The Court said that it was necessary to gauge whether service in the military is or is not a good enough reason for the particular regime to which the norms before the Court subject the right to complain to the Ombudsman.

It said that, from the point of view of constitutional legitimacy, it is justified for a situation in which a serviceman or woman questions a decision that affects him or her to be brought first of all before whoever possesses the power to reconsider and possibly revise that decision, within the respective hierarchical chain of command. In order to safeguard the hierarchical principle, only a definitive decision by the armed forces command structure ought to be binding on those forces where the Ombudsman is concerned.

The Court also considered the constitutionality of the legal solution that limited the ability to make complaints to the Ombudsman to actions or omissions on the part of the armed forces that result in violations of the plaintiff military personnel's own constitutional rights, freedoms or guarantees, or in losses to those plaintiffs. The Court held that the norm was efficient in excluding some of the content of the right to complain to the Ombudsman. That is, without reasonable grounds, the norm contradicted the constitutional design of an institution whose purpose is to control public authorities. As such, the norm excluded violations of a plaintiff's fundamental rights that do not possess the nature of constitutional rights, freedoms or guarantees, the violation of other rights that pertain to the plaintiff but are not fundamental rights, any rights pertaining to third parties, and any damage to interests that are not protected by rights, whether those interests pertain to the plaintiff or to third parties. This reduction in the content of the right of complaint is not compatible with the normative indications laid down by the Constitution. The Constitution enshrines the right to complain against actions or omissions on the part of public authorities, without any restriction. The Court, therefore, declared this norm unconstitutional.

III. The Ruling was the object of two dissenting opinions with regard to the question of the prior exhaustion of all forms of recourse within the military hierarchy.

Cross-references:

- Rulings nos. 103/87 (24.03.1987), 662/99 (07.12.1999) and 229/2012 (02.05.2012).

Languages:

Portuguese.



Identification: POR-2012-3-016

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 26.09.2012 / **e)** 445/12 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**
- 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**
- 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**
- 5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**
- 5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime.**

Keywords of the alphabetical index:

Charge, criminal / Prosecution, private / Appeal, right / Appeal, right, statute of limitation.

Headnotes:

A Penal Code norm was interpreted such that, in cases when the Public Prosecutors' Office does not also bring charges, the time-limit to bring criminal proceedings is neither suspended nor interrupted by

notification that private criminal charges have been brought.

In the case of “private crimes”, the law treats the act of damaging a legal asset as a criminal offence. The desire to see the commission of that act punished by a penal sanction must substantially be pursued in the form of a private prosecution brought by the victim or another civil party with the right and legitimacy to do so, which does not turn the resulting criminal proceedings into a mere matter of private interest.

Under the Constitution, the Public Prosecutors’ Office continues to “own” the criminal action brought under the principle of legality, even if the law does not charge the MP with taking the initiative to bring such an action. The powers to prosecute are conditioned by the wishes and actions of the victim of the crime.

Only the state has the state power/duty to punish; citizens do not.

Summary:

I. The present appeal on the grounds of alleged unconstitutionality was lodged by the ‘private prosecutors’, against a decision in which the Lisbon Court of Appeal held that the time-limit for criminal proceedings is suspended or interrupted by notification that private criminal charges have been brought, when the Public Prosecutors’ Office (hereinafter, the “MP”) also brings charges, but not otherwise.

The Court *a quo* was of the view that, although the Penal Code provisions do not make any distinction between the suspensory or interruptive force of criminal charges based on whether the latter are public or private in nature, such a distinction results from both the substantive criminal-law nature of the statute of limitations and the status of a ‘private prosecutor’ – a person who brings a private prosecution – so it is only the declaration by the MP that it is also bringing charges that has the power to interrupt or suspend the statute of limitations.

The Constitutional Court reminded us that it was not its place to judge whether the Court of Appeal’s normative interpretation – with regard to the distinction based on whether the private prosecution was accompanied by charges brought by the MP or not – was correct. The object of the present appeal was for the Constitutional Court to consider the constitutionality of the normative interpretation set out in the Court of Appeal’s decision.

The statute of limitations that applies to criminal proceedings is justified by substantive reasons and is linked to criminal-policy requirements rooted in the purpose served by criminal penalties. As time passes, the extent to which the community reproaches someone who is judged guilty of a criminal act tends to diminish and the vehemence with which society expresses its expectation that the criminalising norm be put into practice dies down. At the same time, the special preventative reasons for prosecution – that the perpetrator be dissuaded from committing new crimes – also become less urgent and the sanction gradually ceases to be linked to the goal of the perpetrator’s resocialisation. It is also necessary to bear in mind that time has the effect of making probative difficulties worse. When combined with the idea that the role of penal interventions should be restricted to one of *ultima ratio*, all this justifies the option whereby the state does not pursue proceedings after a given amount of time that is determined by law.

Penal law seeks to reconcile the public interest in pursuing the perpetrator of a criminally unlawful act on the one hand and that perpetrator’s right for it not to take too long for its penal consequences to be defined on the other. The legal system lays down a normal time-limit and a maximum time-limit after which proceedings can no longer be brought and stipulates causes for those limits’ suspension or interruption, all of which are justified in the light of the search for a balance between the aforementioned interests. From this perspective, interruption of the statute of limitations presupposes that the state, acting in the person of its competent organs and by undertaking unequivocal procedural acts, first manifests its intent to implement its *jus puniendi* to the perpetrator of the unlawful act. When the state’s punitive intent is confirmed by means of these procedural acts, the mere passage of time ought not to favour the perpetrator.

The question that arose in the present appeal was whether the Constitution requires that the effect which the law attributes to the bringing of criminal charges by the Public Prosecutors’ Office should also be recognised, in the case of private crimes, as being produced by a private prosecution, even when that prosecution is not accompanied by one brought by the MP.

The MP does not possess the legitimacy to bring and pursue proceedings for private crimes on its own initiative. The implementation by the public authorities of the power to punish is to a large extent subject to the victim(s) of the crime taking the initiatives required to bring charges. If a private prosecutor brings criminal charges, the MP can also prosecute or not. If

it does formally accuse the alleged perpetrator, it can only do so with regard to the same facts as those alleged by the person who brought the private prosecution, part of those facts, or other facts that do not imply any substantial alteration of those facts.

The Court said that it was thus necessary to take into account, in its own right, the fact that when a private person (the victim or other person with the right and legitimacy to do so) brings proceedings, this does not have the effect of interrupting or suspending the statute of limitations. That is, whether this makes the victim's position so unbalanced that it violates the principle of a fair trial by cancelling in practical terms the power of the jurisdictional protection that criminal proceedings offer to the legal right in question.

In its provisions on the guarantees applicable to criminal procedure, the Constitution of the Portuguese Republic (hereinafter, the "CRP") pays detailed attention to the procedural position of official suspects and persons who have been accused of a crime. The victim's right to participate in proceedings is also included among those guarantees, but here the CRP limits itself to stating that the right exists, leaving it to the ordinary law to define it. The CRP also gives everyone the right of access to the law and to an effective jurisdictional protection of their legally protected rights and interests.

The fact that the details of the victim's procedural rights are left to the ordinary law gives the legislator a broad margin of appreciation. The only normative solutions that can be criticised in constitutional-law terms, on the grounds that they fail to provide enough protection, are those that eliminate the essential core of the victim's powers to intervene autonomously.

In order not to raise criticism on constitutional grounds, the legislator's freedom to shape the solution cannot result in such a serious limitation of this constitutional right that the latter is unjustifiably or excessively restricted.

II. The Court found that the constitutional rule that the victim must be allowed to intervene in penal proceedings with a view to activating the *jus puniendi* is mainly fulfilled in practice if he or she is a party to the proceedings, i.e. by allowing him or her to be a civil party. Criminal procedural law defines a civil party's role as that of someone who collaborates with the Public Prosecutors' Office, to whose work he or she subordinates (with the exceptions provided for by law) his or her actions in the proceedings. However, a civil party can bring criminal charges independently of any brought by the MP, and can submit evidence to the Court, ask the Court to take such steps as he or she deems necessary, and appeal against decisions

that affect him or her, even if the MP has not done so. The difference in the case of "private crimes" is that the MP can only act if the civil party with the right and legitimacy to do so – the 'private prosecutor' – acts first.

The Court also considered the fact that the norms differentiate between the treatment afforded to the victim in his or her role as private prosecutor and their treatment of the Public Prosecutors' Office, in terms of the effects that the bringing of charges by one or the other have. It found no violation of the principle of equality, inasmuch as in criminal proceedings a civil party's position as a procedural subject could never be the same as that of the MP.

The right to a fair trial means that when the purposes of parties to proceedings are at odds, their powers to influence the judge must be comparable. However, one cannot claim the same or equivalent powers or the same or equivalent consequences of one's actions when what is at stake is the determination of the exact substantive effects of a given procedural action.

If, when a private prosecutor brings criminal charges, the Public Prosecutors' Office declines to do the same, it may be that his or her search for penal protection will become unproductive. This consequence is not limited to the case of "private crimes". The victim always retains the option of resorting to civil means to protect the right that was breached, by seeking reparation for the material and non-material losses he or she has suffered. This means that notwithstanding the limitation of his or her ability to bring a criminal lawsuit, one cannot say that he or she is deprived of access to the courts in order to defend those of his or her rights and interests that are protected by the law.

Cross-references:

- Rulings nos. 205/01 (09.05.2001); 464/2003 (14.10.2003); 325/2006 (17.05.2006) and 183/2008 (12.03.2008).

Languages:

Portuguese.



Identification: POR-2012-3-017

a) Portugal / b) Constitutional Court / c) Third Chamber / d) 01.10.2012 / e) 465/12 / f) / g) / h) CODICES (Portuguese).

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.**

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

Keywords of the alphabetical index:

Labour law, right to work, breach, burden of proof, worker.

Headnotes:

Provisions contained in the Civil Code and the Code of Civil Procedure and under which, in procedural labour-law, the regime governing the burden of proof applies in such a way that the burden of proving a breach of the worker's right to actually be given work to do lies with him or her.

Labour relations are marked by the fact that one of their subjects is in a vulnerable position, and it is the constitutional order's intention to protect the weaker party in the labour relationship. This is not enough to warrant an interpretation whereby, within the system governing constitutional-law assets, the value "work/labour" occupies a hierarchical position in relation to other assets that would on its own justify reversing the general principles of the burden of proof in labour-law proceedings. As the pertinent Civil Code provision suggests, the legislator can opt to reverse the burden of proof. It falls to the legislator to decide how to reconcile different constitutional rights that may conflict with one another in certain circumstances. However, there is nothing in the Constitution that leads to the conclusion that – whatever the ordinary law does or does not say and solely as a result of the constitutional protection provided for the worker – such a reversal in labour-law proceedings exists.

Summary:

I. The present case involved an appeal by a private individual who had been dismissed by a company.

The worker alleged that the employer had injured his right to actually be given work to do. He said that the court *a quo* had applied the Civil Code regime regarding the burden of proof, under which the party who invokes a right is the one who has to provide evidence of the facts that constitute the alleged right. The appellant considered that, when applied to the labour law, this regime was unconstitutional, because it violated: the principle of the dignity of the human person; the principle that fundamental rights must be implemented to their maximum extent; the right to a fair trial; and the right that work be organised under socially dignified conditions, in such a way as to provide the worker with personal fulfilment. These rights in turn imply the worker's right to actually be given work to do. The appellant argued that in such cases, the Constitution requires a reversal of the burden of proof. He stated that this right to effective occupation is a fundamental right, which is itself derived from the right to work, and also because "work/labour" is a value that generally possesses a special constitutional-law protection.

Today, there is no doubt that the worker's right to actually be given work to do exists in the Portuguese legal order, at the ordinary legislation level. This is demonstrated by the current Labour Code, which prohibits employers from unjustifiably preventing workers from effectively working. The question of whether this right can be said to possess the substantial status of a constitutionally protected fundamental right, notwithstanding the fact that its existence is only formally explicit in ordinary law, is a different matter.

One school of thought says that the right to effectively engage in the activity that corresponds to a post at work is included (alongside the freedom to look for work and the right to equality in access to positions, types of work and occupational categories) in the scope of the constitutional norm that covers the right to work. Even though, this right is set out in the chapter on economic, social and cultural rights, its complex structure includes subjective legal positions that are close to those of constitutional rights, freedoms and guarantees, because they possess a negative dimension that characterises the latter.

II. The Constitutional Court emphasised that the issue here was not the existence of fundamental rights that are implicitly derived from the Constitution without any explicit formal reference to them therein. In its case-law, the Court has also pointed out that there are norms linked to social rights, the scope of protection of which includes subjective dimensions, the structure of which is identical to that of constitutional rights, freedoms and guarantees.

There can be no doubt that when the Constitution enshrines the right to work, it implicitly also enshrines the worker's right to actually be given work to do and provides special protection to both work/labour and the condition of the person who does that work and provides that labour. The various constitutional norms that talk about the right to work demonstrate that the constitutional order does not see the activity of working persons strictly as a mere instrument for economic survival. It also attaches value to that activity as a precondition for the affirmation of both the person's dignity and autonomy.

However, this does not necessarily mean that the Constitution requires fair trial in labour-law proceedings. The issue does not have to include an alleged violation of the worker's right for work to be organised under socially dignified conditions, in such a way as to ensure his or her personal fulfilment, to be a process in which the general rules regarding the burden of proof are reversed.

As the appellant argued, the system of fundamental rights possesses a unity of purpose that is organised around the idea of personal dignity. This is precisely why it is not the place of an interpreter of the Constitution to establish rigid, abstract hierarchies of the various values and legal assets that are protected within this system. Work/labour is not the only legal right that receives the system's protection. There are other values, all of which impose requirements on the infra-constitutional order. Examples include the integrity of the human person, freedom of thought, expression and artistic creation, and the privacy of personal life. If one were to follow the appellant's theory in relation to all these constitutionally protected rights (that, in proceedings where a party invoked a right that was linked to other rights, the constitutional protection afforded to them would automatically entail a reversal of the burden of proof), it would be difficult to reconcile. This difficulty pertains to the way procedural rules would have to be shaped on the one hand, with the requirements for legal security required by the constitutional principles of the democratic state based on the rule of law and of access to the law and effective jurisdictional protection on the other. There is no reason to conclude that in this regard the value or right to "work/labour" deserves preferential or exceptional treatment.

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, it has not often been used in practice. Legal theorists consider that the Constitutional Court's case-law on it is both demanding and restrictive.

Cross-references:

- Rulings nos. 372/91 (17.10.1991), 581/95 (31.10.1995), 683/99 (21.12.1999), 509/02 (19.12.2002) and 632/08 (23.12.2008).

Languages:

Portuguese.



Identification: POR-2012-3-018

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 15.11.2012 / **e)** 540/12 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**
- 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**
- 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**
- 5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**
- 5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**

Keywords of the alphabetical index:

Provision, constitutional, guarantees, criminal procedure.

Headnotes:

The Code of Criminal Procedure lays down the general principle that it is possible to appeal against any ruling, sentence or court order unless the law specifically provides otherwise, and goes on to list the decisions against which appeal is not permitted. With regard to a second level of appeal against decisions that include a final verdict on the object of

the case in question, the general rule is that one can lodge a second-level appeal against appeal-court decisions in appeal cases. However, it is specifically not possible to appeal to the STJ against: court-of-appeal rulings in which the accused is found not guilty at appeal, thereby confirming the same decision at first instance; court-of-appeal rulings in which the accused is found guilty at appeal and sentenced to a penalty that does not entail deprivation of his/her liberty; or guilty verdicts handed down by a court of appeal in an appeal case, in which the decision at first instance is confirmed and the offender is sentenced to a term of imprisonment of no more than eight years.

Summary:

I. The Public Prosecutors' Office was legally required to bring the present appeal before the Plenary of the Constitutional Court because in previous cases, two of the Court's chambers had reached conflicting decisions on the same question of unconstitutionality.

The question here was whether the Constitution permitted certain Code of Criminal Procedure provisions to be interpreted such that the Supreme Court of Justice (hereinafter, "STJ") could admit an appeal by a civil party against a ruling in an appeal case. The Court of Appeal had found the accused not guilty of a given crime and thus overturned the guilty verdict at first instance in which he had been sentenced to a penalty that did not entail deprivation of his liberty.

The legislator has sought to restrict second-level appeals to the Supreme Court of Justice to cases where the criminal offence is of the greatest gravity. The legislator initially made discrete use of the principle of dual and coinciding sentences (*duplex sententia conformis*), which it combined with the criterion of the seriousness of the abstract penalty applicable to the crime in question. It subsequently changed this to a combination of the same principle with the criterion of the seriousness of the actual penalty applied in the case (the concrete penalty) to further increase the extent to which the ability to bring a second-level appeal before the STJ was dependent on the gravity of the criminal offence. It then decided that it should not be possible to appeal against court-of-appeal rulings in appeal cases involving crimes that were punishable by fines or by prison terms of no more than five years. Since 2007, the legislative option has been that it is impossible to appeal against court of appeal rulings in appeal cases in which the penalty imposed does not entail deprivation of liberty.

The constitutional norms and principles included in the so-called "constitution for criminal procedure" require that an official suspect or accused person be ensured all the guarantees available to the defence. This includes the right of appeal and the guarantee that he/she is presumed innocent until the sentence in which he/she is convicted transits *in rem judicatam*. The accused's right to appeal in criminal proceedings forms part of the complex of guarantees included in the right to a defence. The case law of the Constitutional Court is that there is no constitutional requirement for two levels of appeal in criminal proceedings. Even guilty verdicts do not necessarily have to be subject to a third degree of jurisdiction, and the legislator has some leeway to shape the levels of appeal.

II. The fact that the right of appeal forms part of the complex of guarantees included in an accused person's right to a defence has already led the Court to hold that procedural provisions regulating the possibility of appealing against a given judicial decision in different ways for the accused and for civil parties specifically, and for the defence and for the prosecution in general, are not in breach of the principle of equality. The Court takes the view that, within the scope of criminal proceedings, the principle of equality must be seen in the light of the specific nature of a procedure that ensures the accused has access to all the guarantees applicable to the defence. The procedural statuses of the subjects in the proceedings do not have to be absolutely identical and on an exact par with, and symmetrical copies of, one another. The accused can sometimes benefit from a formally privileged status, the purpose of which is to compensate him/her for a presumed weakness or greater degree of weakness in the confrontation that takes place in criminal proceedings, compared to the prosecution. The accused cannot have fewer rights than the prosecution, but the possibility of his/her having more is not excluded *per se*.

The Court pointed out that the material inequality that in principle exists between the prosecution (normally supported by the state's institutional power) and the defence means that criminal procedure is, and must be, to some extent oriented towards the defence to ensure the latter enjoys all its guarantees. This procedure must be one in which the accused's rights are seen as untouchable. This is particularly valid with regard to the right to appeal and the right to the presumption of innocence. These rights of the accused must be projected in the stability of criminal law decisions in different ways, depending on whether the verdict is guilty or not guilty. It is not constitutional for this treatment to be differentiated in a way that facilitates the stabilisation of guilty verdicts

(thereby reducing the possibilities available to the accused person's defence) and fails to do so in the case of decisions to acquit (by extending the discussion about the facts of which the defendant is accused).

This is further strengthened by the fact that the provisions of the "constitution for criminal procedure" do not require the victim/civil party's procedural status to be exactly the same as that of the accused person. With regard to the victim, the Constitution only says that he/she has the right to intervene in proceedings, in ways that are to be set out in the ordinary law. The Court referred to its own case law, in which it has held that the question of the admissibility of an appeal by a civil party must be seen in the light of the Constitution's provisions on access to the law and to effective jurisdictional protection. These do not even give rise to a right of appeal by the parties to the proceedings subjects, and thus do not impose a duty on the legislator to provide, as a rule, for two levels of jurisdiction.

The Court was of the view that the right to intervene in criminal proceedings that the Constitution affords to victims precludes depriving the latter of procedural powers that prove decisive to the defence of their interests. In particular, victims cannot be denied the power to appeal (to a second instance) against acquittal decisions. However, the question of the admissibility of an appeal by a civil party must be seen and taken into account in the light of the principle of access to the law and effective jurisdictional protection – not in that of a supposed right to equality with the accused.

III. Six Justices attached opinions to the Ruling. Three concurred with the decision, but dissented from its grounds. Another lent additional weight to the grounds based on the fundamental choices which the constitutional order makes with regard to criminal procedural matters, thereby explaining why she had changed her previous position (as a member of the chamber that had earlier declined to find the same norm unconstitutional). Two Justices dissented from the present Ruling, arguing that the Court's earlier decision that the norm was not unconstitutional was correct.

Cross-references:

- Rulings nos. 178/88 (14.07.1988), 132/92 (02.04.1992), 189/01 (03.05.2001), 259/02 (18.06.2002), 49/03 (29.01.2003), 464/03 (14.10.2003), 399/07 (11.07.2007), 645/09 (15.12.2009), 546/11 (16.11.2011) and 153/12 (27.03.2012).

Languages:

Portuguese.



Identification: POR-2012-3-019

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 05.12.2012 / **e)** 581/12 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

4.6.3 Institutions – Executive bodies – **Application of laws.**

4.6.3.1 Institutions – Executive bodies – Application of laws – **Autonomous rule-making powers.**

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

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

5.5.1 Fundamental Rights – Collective rights – **Right to the environment.**

Keywords of the alphabetical index:

Region, executive, services, rates, setting, petrol stations / Fuel, supply, facilities / Protection, environmental, plans.

Headnotes:

The legal duty to inspect specifically imposed on municipal councils with regard to petrol stations implies both adapting municipal organisational structures, departments and services where civil defence and environmental protection plans are concerned and carrying out inspections. The latter must be undertaken by the inspection units of the council in question, both when a licence or permit is granted and subsequently. Fuel supply facilities are a public risk and a polluting factor that produces an enormous environmental burden. This in turn obliges municipalities to adapt their departments, services and organisational structures, both in environmental and urban terms, and in respect of their civil defence measures. The measures must include constant preventative monitoring work.

It is fair to presume that whoever operates petrol stations (or other facilities that supply liquid fuels) that are not situated on the regional and national road networks will give rise to or cause inspection work by the municipal councils that cover the council areas where those stations are located. It does not matter whether the stations are built entirely on private property or on land that forms part of the municipal public domain. The specific nature of the technical requirements this monitoring work is designed to control means that the responsibility for occasioning it lies entirely with the said facilities. The legal duty to inspect incumbent on municipal councils creates a sufficiently strong presumption that the mere location of such a station within a given council area is the cause of an activity the purpose of which is to prevent risks from materialising. Municipalities cannot be required to provide the entities which are the object of that activity with evidence of each of the actions it comprises, in order to justify establishing a charge as compensation for the activity, which is itself undertaken pursuant to the law.

Local authority charges are levies that are based on the concrete provision of a local public service. Monitoring actions, which petrol stations require, can be deemed to be effectively carried out, and also to be taken advantage of, by the owners of those facilities. Their payment of compensation is therefore justified.

The norm contained in the Municipality of Sintra Table of Charges and Other Revenues that allows the levying of a charge on liquid fuel pumps, when applicable to liquid fuel supply equipment that is entirely situated on private property, cannot therefore be criticised on constitutional grounds.

Summary:

I. One of the constitutional norms governing the fiscal system is that a law that determines each tax's applicability and rate must create taxes, and the related tax benefits and guarantees available to taxpayers. It also says that the passage of such laws pertains exclusively to the Assembly of the Republic, unless the latter authorises the government to do so. This means that this is a matter falling within Parliament's partially exclusive legislative competence.

The present case involved a mandatory appeal that the Public Prosecutors' Office was obliged to bring because a court had refused to apply certain norms on the grounds that they were unconstitutional.

At issue was a precept contained in the Municipality of Sintra Table of Charges and Other Revenues that served as the grounds for the levy of charges that

were contested by an enterprise, which was the respondent in the present case. This precept established a charge owed by liquid-fuel supply stations situated entirely on private property. It was alleged that this circumstance of the stations' location meant that the levies charged by the Municipality of Sintra were not justified by the provision of any corresponding service by the administrative entity concerned. Thus, it lacked the synallagmatic content that must govern the imposition and collection of any amount in the form of a municipal charge. The argument was that, because these levies are unilateral, their nature was that of true taxes. This would mean they were unconstitutional because their imposition violated the constitutional rules on the competence to create this type of cost.

II. The Constitutional Court took the view that an analysis of levies that only considers the tax/charge dichotomy is too simplistic. The Constitution enshrines other formats, which it generically calls "other financial contributions to public entities". The latter are levies that are situated in an intermediate zone that ranges from charges to taxes, all of which are characterised by a para-commutative structure and are intended to provide compensation for the provision of services and/or items which the entities that pay them presumably cause or benefit from. The bilateral nature of charges continues to be one of their essential characteristics. However, it is also necessary to bear in mind the existence of contributions the format of which possesses para-commutative outlines and where there is a more or less diffuse relationship based on an exchange between the administration and given groups of individuals.

The regime governing the Assembly of the Republic's partially exclusive legislative competence differs with regard to these three categories of levy: taxes and their details are subject to the passage of a formal law (unless the Assembly authorises the government to create them). In contrast, in the case of charges and financial contributions, the Assembly's exclusive competence only applies to the definition of the general regime. This type of levy can be concretely created by governmental legislative acts without any need for parliamentary authorisation.

In the case before the Court, the levy which the Municipality of Sintra imposed on the respondent, is based solely on a municipal regulation issued under the Law governing Local Authorities and the General Regime governing Local Authority Charges (hereinafter, "RGAL"). Given that there is no other legal act containing a generic empowerment of municipalities to create other types of levy, there are two possibilities. One is that the levy in question can

be said to match the concept of charge set out in the RGTAL, and the aforesaid regulatory precept is thus not unconstitutional. The other possibility is that the levy corresponds to a tax or some other tax-like contribution with para-commutative outlines, and the precept must therefore inevitably be deemed unconstitutional.

The RGTAL defines local authority charges as levies that are based on the concrete provision of a local public service, the private use of property and/or items in the public and private domain pertaining to local authorities, or the removal of a legal obstacle to the behaviour of private individuals, which the law says is a local-authority attribute.

The protection of the environment is a legitimate extra-fiscal goal. The Basic Law governing the Environment provides for the existence of an environmental and spatial planning instrument in the form of the setting of charges for the use of natural resources and environmental elements and for the disposal of effluents. However, it neither creates such charges itself, nor empowers municipalities to do so.

The RGTAL is the only legal act that empowers the Municipality of Sintra to create the levies set out in its Table of Charges and Other Revenues, inasmuch as it is the only one that permits the fulfilment of the principle that charges must be created by a law.

It is only with knowledge of the reciprocal rights and duties of the municipal administration and the parties with an interest in the existence and operation of the above-mentioned petrol stations that it is possible to assess whether the coercive pecuniary payment demanded by the Municipality of Sintra corresponds to any concrete counter-provision of services. The law charges municipal bodies with the task of licensing and inspecting fuel storage and supply facilities except those located on the regional and national road networks. The mere functioning and operation of petrol stations entails risks to people's health and safety and interferes with the quality of the environment. The reasons that led the legislator to establish a technical normative framework with a preventative nature and to create an inspection system designed to ensure that petrol stations comply with that framework also constitute a fulfilment of the duty to protect the environment. These stations represent a source of pollution, especially with regard to the environmental elements air, water, soil and subsoil around them. It is also the prohibition on pollution that justifies the normative conditions and the concrete terms under which the inspection work is conducted.

The Court said that it is necessary to bear in mind that municipalities play a central role in the operation of the inspection system. The reason is that it is the environment of each municipality in which petrol stations are situated that is degraded. Also, it is on them that the duty to protect the interests provided for in the specific legislation and regulations governing petrol station falls – a duty that goes beyond the general duties of administrative policing. As such, and considering the obligations to which the municipality is subject, the Court was of the view that the levy in question possesses a bilateral structure. For all these reasons it found that the norm before it was not unconstitutional.

Cross-references:

- Ruling no. 177/10 (05.05.2010).

Languages:

Portuguese.



Romania

Constitutional Court

Important decisions

Identification: ROM-2012-3-005

a) Romania / **b)** Constitutional Court / **c)** / **d)** 01.11.2012 / **e)** 924/2012 / **f)** Decision on the referral of unconstitutionality of Senate Resolution no. 38/2012 for the establishment of the Commission of inquiry into reported abuses in the activities of public authorities and institutions in the context of the referendum of 29 July 2012 / **g)** *Monitorul Oficial al României* (Official Gazette), 787, 22.11.2012 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
 3.9 General Principles – **Rule of law**.
 4.5.4.1 Institutions – Legislative bodies – Organisation – **Rules of procedure**.
 4.5.4.4 Institutions – Legislative bodies – Organisation – **Committees**.
 4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies**.

Keywords of the alphabetical index:

Parliament, controlling function.

Headnotes:

A parliamentary inquiry is an expression of a Parliament control function within a constitutional democracy. This type of parliamentary control can be exercised through an ad-hoc commission of inquiry or through a standing committee. The commissions of inquiry are not constitutionally or statutorily enabled to pronounce a person's guilt or innocence. Their purpose is to clarify the circumstances when and why the events under investigation occurred. To this effect, only the subjects of law that have specific constitutional relationships with the Parliament pursuant to Title III, Chapter IV of the Constitution, Relations between Parliament and Government, must appear before the commissions of inquiry. Other subjects of law can be invited before the commissions of inquiry without any correlative obligation to respond to the invitation.

Summary:

I. Pursuant to Article 146.I of the Constitution and Article 27 of Law no. 47/1992 on the Organisation and Operation of the Constitutional Court, the Secretary General of the Senate sent to the Constitutional Court the referral formulated by the Parliamentary Group of the Democratic Liberal Party in the Senate. The purpose was to review the constitutionality of the Senate Resolution no. 38/2012 to establish a Commission to inquiry into reported abuses in the activities of public authorities and institutions in the context of the referendum of 29 July 2012.

Regarding grounds for the referral of unconstitutionality, arguments concerning both the extrinsic and intrinsic unconstitutionality of the respective ruling were brought.

1. Extrinsic pleas of unconstitutionality

During the Senate meeting to adopt the impugned resolution, it was initially found that there was no quorum. The president of the meeting required the Plenary to wait for another 10 minutes so that the number of Senators necessary for the statutory quorum be met. After the necessary period of time expired, quorum was met. However, this practice contradicts Article 121.3 of the Senate's Standing Orders. The president of the meeting should have suspended the meeting, and announced the day and time to resume the proceedings instead of waiting for the Senators to complete the non-existent quorum. The provisions of Article 1.3 and 1.5 of the Constitution are thus considered violated.

2. Intrinsic pleas of unconstitutionality

It has been claimed that the commission of inquiry was established to review whether the prosecutors fulfilled their responsibilities as stipulated by law. The commission's objective, however, contradicts Articles 1.4 and 132.1 of the Constitution. The reason is that the prosecutor's activity can only be controlled by their superiors – not by other public authorities or institutions.

The impugned ruling also stipulated that the legislature had overstretched its power through the commission of inquiry, in the activity of the judiciary, to which the Public Ministry also belongs. This constitutes a violation of the provisions of Article 132.1 of the Constitution.

II. Rejecting, as unfounded, the referral of unconstitutionality, the Court held as follows:

1. Extrinsic pleas of unconstitutionality

According to the transcript of the Plenary meeting published in the Official Gazette of Romania for the debate and adoption of the impugned ruling, there was a legal quorum. There was also a majority of votes, as provided in Articles 67 and 76.2 of the Constitution. As for the allegedly violated procedural provisions, by regulating the working procedure within the Senate Plenary, they fail to transpose the provisions of the Constitution into its Standing Orders. Therefore, in terms of the consequences of the interpretation of Article 121.3 of the Senate's Standing Orders, Articles 67 and 76.2 of the Constitution cannot be considered as violated.

2. Intrinsic pleas of unconstitutionality

By invoking its case-law, the Court held that the parliamentary inquiry was an expression of the control function that the Parliament has within the constitutional democracy. This type of parliamentary control can be exercised through an ad-hoc commission of inquiry or a standing committee.

By resuming the general grounds formulated in several decisions (Decision no. 45 of 17 May 1994, Decision no. 1.231 of 29 September 2009), the Court emphasised that only subjects of law that have specific constitutional relationships with the Parliament pursuant to Title III, Chapter IV of the Constitution, Relations between Parliament and Government must appear before the commissions of inquiry. Other subjects of law can be invited to take part in the debate before the commissions of inquiry, without any correlative obligation to respond to the invitation.

The Court also stressed, referring to the same case-law, that these commissions of inquiry are not constitutionally or statutorily enabled to determine the guilt or innocence of a person. Rather, the commissions are an expression of the parliamentary control. Their purpose is to clarify the circumstances when and why the events under investigation occurred. Therefore, it is obvious that these commissions investigate/verify facts or circumstances, not persons. The respective commissions do not have the competence to give a decision, but to draw up a report on the facts under investigation, indicating the conclusions reached based on the papers and documents consulted and on the hearings performed.

As for the Public Ministry, it is a part of the judicial authority. The fact that the prosecutors carry out their activity under the authority of the Minister of Justice does not qualify the Public Ministry as a public institution whose activity would be subject to parliamentary control.

Therefore, the Court found that the decision to establish a commission of inquiry to carry out the activity mentioned represented an application of the provisions of Article 69.1 of the Constitution, respectively of the principle according to which MPs are serving the people. Thus, benefiting from the recognition of the above-mentioned constitutional text, they must prove availability for discussions, debates and solving Community problems, not for ignoring them.

Seeing the provisions of the impugned ruling, the Court held that they contained no implicit or express reference to the activity of the judiciary, so that the activity of the commission of inquiry complied with the limits of Article 111 of the Constitution. The same idea results also from the explanatory memoranda submitted with the draft ruling. It expressly indicates that this commission of inquiry “does not aim at investigating prosecutors, but at verifying the citizens’ referrals and their authenticity.” This means that those invited to give relations are the citizens subject to some judicial investigations. Thus, it gives substance to parliamentary review, which is an essential guarantee of the fundamental principle provided by Article 61.1 of the Constitution, according to which the Parliament is the supreme representative body of the Romanian people. Sanctioning any abuses by judicial bodies while investigating certain cases falls under the competence of the Superior Council of Magistracy, pursuant to Article 134.2 of the Constitution, or of courts (work-related offences or preventing the course of justice), as the case may be.

Languages:

Romanian.



Identification: ROM-2012-3-006

a) Romania / **b)** Constitutional Court / **c)** / **d)** 20.11.2012 / **e)** 967/2012 / **f)** Decision on the exception of unconstitutionality of the provisions of Articles 1.11 and 299.11 of the Civil Procedure Code / **g)** *Monitorul Oficial al României* (Official Gazette), 853, 18.12.2012 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

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

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

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

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

5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**

Keywords of the alphabetical index:

Right to appeal to court, refusal.

Headnotes:

In regulating the rules of procedure to exercise legal remedies, the legislator is bound to observe all the reference constitutional norms and principles. Any limitation imposed by law must not prejudice the right of access to justice in its substance. Thus, abolishing the only legal remedy that exist in a certain matter (in this case against the rulings pronounced on the substance by courts of first instance, in cases whose subject matter is represented by the obligation to pay an amount of up to 2,000 lei inclusively) equals to voiding the content of the constitutional provisions on free access to justice and the exercise of legal remedies.

Summary:

I. By the Civil Decision no. 845R of 26 March 2012, pronounced in File no. 18.420/4/2010, the Bucharest County Court – Vth Civil Division referred to the Constitutional Court the exception of unconstitutionality of the provisions of Articles 1.11 and 299.11 of the Civil Procedure Code, exception invoked by an Owners Association in Bucharest.

The exception of unconstitutionality has been formulated pursuant to Article 146.d of the Constitution, as well as to Article 29 of Law no. 47/1992 on the Organisation and Operation of the Constitutional Court.

According to the author of the exception, abolishing, by the impugned legal text, the legal remedy of the appeal against rulings pronounced in cases of requests concerning debts having as object amounts of money of up to 2,000 lei inclusively is contrary to the constitutional provisions of Article 16 of the Constitution (Equality of rights), Article 20 of the Constitution (International treaties on human rights), Article 21 of the Constitution (Free access to justice), Article 53 of the Constitution (Restriction on the exercise of certain rights and freedoms) and Article 129 of the Constitution (Use of appeal). Other provisions that have been invoked include Article 6 ECHR (Right to a fair trial) and Article 13 ECHR (Right to an effective remedy), as well as the provisions of Article 47 (Right to an effective remedy and to a fair trial) contained in the Charter of fundamental rights of the European Union.

II. By admitting the invoked exception of unconstitutionality, the Court held the following:

Pursuant to the provisions of Article 126.2 of the Constitution, the legislator has the exclusive competence to establish, in the event of some special situations, special rules of procedure and special ways to exercise the rights of procedure, the significance of the free access to justice not being that of an access, in all cases, to all the judicial structures and to all legal remedies.

The Constitution does not include provisions on the obligation to have all legal remedies, but it refers to the possibility for the parties concerned and the Public Ministry to exercise the legal remedies, subject to the law. The significance of the phrase “subject to the law”, contained in the provisions of Article 129 of the Constitution, refers to the procedural conditions to exercise legal remedies and does not have in view the impossibility of exercising any legal remedy against rulings settling the substance of the case. In regulating the rules of procedure referring to the exercise of legal remedies, the legislator is bound to observe all constitutional rules and principles. Any limitation brought to the conditions for the exercise of legal remedies must not prejudice the right in its substance.

By ascertaining the provisions submitted to constitutional review, any legal remedy against the rulings pronounced on the substance by courts of first instance has been removed, particularly in cases involving the obligation to pay an amount of up

to 2,000 lei inclusively. The Court ascertained that it made it impossible for a judicial control court to examine the case, at a higher degree of jurisdiction, under all aspects of legality and validity of the ruling pronounced by the first court. Or the abolition of the only legal remedy in the matter, namely the appeal, equals to voiding the content of the provisions of Article 129 of the Constitution, pursuant to which: "Judicial decisions may be appealed against by the concerned parties and by the Public Ministry, subject the law."

The Court also determined that the threshold-value of 2,000 lei of the subject-matter of the dispute cannot be a criterion to justify a different legal treatment for the exercise of legal remedies against rulings pronounced on the substance of the case, for the same categories of disputes, i.e. requests on debts having as object the payment of an amount of money. The impugned legislative solution creates a situation of legal inequality within the same category of individuals. The pecuniary value of the subject-matter of the referral cannot be considered a sufficient criterion likely to provide an equitable judgment leading to the investigation and analysis of all the aspects relevant for rendering a final and irrevocable solution. Thus, the abolition of the judicial review on rulings pronounced by the court of first instance, in case of trials and requests on debts having as object amounts of money of up to 2 000 lei inclusively, violates the constitutional principle of equality before the law, as regulated by Article 16 of the Constitution.

Referring to the alleged violation of provisions of Article 13 ECHR (Right to an effective remedy), in its case-law, the Court stated that this conventional provision did not impose a certain number of degrees of jurisdiction or a certain number of legal remedies. Instead, it assumed that an infringement case of a right enshrined by the Convention can be submitted to the judgment of a national court. Or in this case, the Court could not ascertain the violation of this conventional provision, analysed from the perspective of the provisions of Article 20 of the Constitution, as long as the impugned texts met this essential requirement. That is, the possibility of the person to address a court, while examining a complaint based on a provision of the Convention.

As for provisions of Article 47 in the Charter of fundamental rights of the European Union (Right to an effective remedy and to a fair trial), the Court ascertained that the reporting of these provisions contained in a document having the same legal force as the Founding treaties of the European Union must relate to the provisions of Article 148 of the Constitution. They do not apply to those contained by Article 20 of the Basic Law, referring to

the international treaties on human rights. Regarding this plea of unconstitutionality, the general grounds held by the Court through Decision no. 1.479 of 8 November 2011, published in the Official Gazette of Romania, Part I, no. 59 of 25 January 2012, apply here, pursuant to which the provisions of the Charter of fundamental rights of the European Union are applicable in the constitution review as far as they provide, ensure and develop the constitutional provisions concerning fundamental rights. In other words, this means as far as their protection level is at least at the level of the constitutional rules in the matter of human rights. Or, if the provisions of Article 47 of this document of the European Union also refers, among others, to the possibility of a person to address a court, in the examination of a complaint based on the infringement of certain rights and freedoms guaranteed by European law, the Court ascertained that, in this case, the impugned legal texts did not violate these European provisions, analysed from the perspective of the provisions of Article 148 of the Constitution.

Languages:

Romanian.



Identification: ROM-2012-3-007

a) Romania / **b)** Constitutional Court / **c)** / **d)** 21.11.2012 / **e)** 972/2012 / **f)** Decision on the referral formulated by the President of the Superior Council of Magistracy on the existence of a legal dispute of constitutional nature between the judiciary, represented by the High Court of Cassation and Justice, on the one hand, and the legislative authority, represented by the Senate, on the other hand / **g)** *Monitorul Oficial al României* (Official Gazette), 800, 28.11.2012 / **h)** CODICES (Romanian).

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.**
3.13 General Principles – **Legality.**

4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**

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

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

Keywords of the alphabetical index:

Conflict of powers / Court, decision, execution / *Ultra vires.*

Headnotes:

The Parliament, as supreme representative body of the people and sole legislative authority of the country, cannot replace the judicial power, respectively solve, by own rulings, disputes lying within the competence of the courts. The legislator cannot amend, suspend or void the effects of certain final and irrevocable rulings.

Summary:

I. Pursuant to Article 146.e of the Constitution and to Articles 11.1.A.e, 34, 35 and 36 of Law no. 47/1992 on the Organisation and Operation of the Constitutional Court, the President of the Superior Council of Magistracy required the Constitutional Court to adjudicate on the existence of a legal dispute of constitutional nature between the judiciary, represented by the High Court of Cassation and Justice, on one hand; and the legislative authority, represented by the Senate, on the other hand. This was generated by the negative vote of the Senate to enforce a ruling of the High Court of Justice and Cassation, which had irrevocably confirmed the state of incompatibility of a Senator.

There have been stated reasons that the refusal of the Parliament of Romania – Chamber of Senate to enforce a ruling of the High Court of Justice and Cassation can lead to an institutional blockage in the light of the constitutional provisions enshrining the separation and balance of powers and equality before the law.

II. Having examined the request for the settlement of the legal dispute of constitutional nature, the Court held as follows:

1. The facts

On 26 January 2011, the National Integrity Agency (which referred the matter to itself to this effect) drew up an assessment report, finding the state of incompatibility of Senator MD since 19 December 2008, when he was validated as Senator. He also

holds the position of director-manager for a theatre of Bucharest, a leading position specific to a public institution. This violates the provisions of Article 71.2 of the Constitution, Articles 81.2 and 82.1.a of Law no. 161/2003 on certain measures to ensure transparency in the exercise of public dignity, of public office and in the business environment, and to prevent and punish corruption.

Mr MD lodged an objection against the report of the National Integrity Agency before the Bucharest Court of Appeal – VIIIth Contentious Administrative and Fiscal Division, soliciting the annulment of the administrative act. By Civil Judgment no. 5.153 of 16 September 2011 the Bucharest Court of Appeal rejected the objection formulated by the applicant, final and irrevocable solution through the rejection by the High Court of Justice and Cassation of the appeal lodged by Mr MD. He lodged an exceptional review proceeding against this solution.

At the meeting of 29 October 2012, the Senate discussed the opinion of the Committee for legal affairs, appointments, discipline, immunities and validations concerning the situation of incompatibility of Senator MD. This Committee had held that the lodging of an exceptional review proceeding by Mr MD did not suspend the enforcement of the final and irrevocable ruling, neither the effects of the assessment report of the National Integrity Agency. On 30 October 2012 at the Senate meeting, the debates that took place a day before were closed and a vote was taken “whether we agree to the opinion on the situation of incompatibility of Senator MD”. According to the transcript, by “23 votes in favour, 32 votes against and 10 abstentions. It has been rejected.”

2. The submitted request

Having examined whether the vote casted at the Senate Plenary meeting concerning the state of incompatibility of Senator MD has given rise to the Chamber of the Parliament assigning to itself competences that constitutionally do not belong to it. If so, it may have violated the competence of the judicial power, which had previously rendered a ruling referring to this issue, or created another legal dispute of constitutional nature. The Court held as follows:

The ruling, having the force of *res judicata*, answers to the need of legal security, the parties having the obligation to be subject to the compulsory effects of the legal act, without the possibility to discuss what has been already established by judgment. Therefore, the final and irrevocable ruling is included in the acts of public authority, being invested with a

specific efficiency by the constitutional normative order. On the other hand, an intrinsic effect of the ruling is represented by its enforceability, which must be observed by citizens as well as public authorities. Or, the abridgement of a final and irrevocable ruling of its enforceable character represents a violation of the legal order of the rule of law and a perversion of the course of justice.

The Plenary discussion on Civil Judgment no. 5.153 of 16 September 2011 of the Bucharest Court of Appeal, remained final and irrevocable as a result of the rejection of the appeal through Decision no. 3.104 of 19 June 2012 of the High Court of Justice and Cassation, judgment finding the state of incompatibility of Senator MD. This was followed by the negative vote concerning the enforcement of this ruling. The Senate acted as a superior court, which affects the fundamental principle of the rule of law, respectively the principle of separation and balance of powers – legislative, executive and judicial – within the constitutional democracy, enshrined in Article 1.4 of the Basic Law.

The Court held to this effect that the sentence according to which a Chamber of the Parliament, by virtue of its own statutory provisions, can censor a final and irrevocable ruling, which acquired the force of *res judicata*, equals to the turning of this authority into a judicial power, competing with the courts as concerns the course of justice. The recognition of such an act would have as effect the acceptance of the idea that there are persons/institutions/authorities to which the rulings rendered by the courts provided by the Constitution and law are not opposable. Or, such an interpretation given to the provisions referring to the statutory autonomy is manifestly in contrast to the provisions of Articles 1.4, 16.2, 61.1, 124 and 126.1 of the Constitution.

From this perspective, the Court noted that, by the negative vote concerning the state of incompatibility irrevocably found by a ruling, the Senate acted *ultra vires*, assigned to itself competences that belong to the judicial power.

Consequently, the Constitutional Court found the existence of a legal dispute of constitutional nature between the judiciary, represented by the High Court of Cassation and Justice, and the legislative authority, represented by the Senate. The dispute was generated by the refusal of the Senate to take note of the cessation by right of the position of Senator of Mr MD, by the remaining final and irrevocable of the ruling finding the state of incompatibility of this one.

Languages:

Romanian.



Russia

Constitutional Court

Important decisions

Identification: RUS-2012-3-005

a) Russia / **b)** Constitutional Court / **c)** / **d)** 16.10.2012 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 248, 26.10.2012 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime.**

Keywords of the alphabetical index:

Jurisdiction, territorial / Offence, place of commission / Judicial protection / Offence, committed outside the national territory.

Headnotes:

The fact that the Code of Criminal Procedure has no rules of territorial jurisdiction for the prosecution of offences committed by Russian citizens against their compatriots outside Russian territory results in a violation of the constitutional right of access to justice.

Summary:

I. The Criminal Code provides that any person who commits offences against interests protected by the Code must incur criminal liability. But no proceedings may be brought against a person who proves that he or she has been finally judged in another country in respect of the same acts and, if he or she has been sentenced, that the sentence has been served or become time-barred.

The rules of the Code of Criminal Procedure are applied to offences committed on board aircraft or ships flying the Russian flag.

The appellant was a crew member on a Maltese-registered ship. An offence was committed on board a Maltese-registered ship in Constanta (Romania) in 2010. After returning to Russia, he filed a complaint with a court. But the Court declared the application inadmissible on the ground that an offence committed on board a Maltese-registered ship outside Russian territory is not subject to Russian law.

II. The Constitutional Court noted that the Constitution requires citizens to respect the law and guarantees their defence and the protection of their rights outside the country's borders. They have the right to judicial protection of their rights and freedoms and to a fair hearing within a reasonable time by an independent and impartial tribunal. The interests of the victims of offences are protected by law. Protection of their rights is not confined to compensation for damage caused. Victims must be able to lodge a complaint against the person responsible for the offence.

The Code of Criminal Procedure does not permit determination of the criminal court with jurisdiction. This violates the principle of equality and restricts the constitutional right of access to justice. Accordingly, the rule in question is unconstitutional.

Languages:

Russian.



Identification: RUS-2012-3-006

a) Russia / **b)** Constitutional Court / **c)** / **d)** 05.12.2012 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 292, 19.12.2012 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality.**

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

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

Keywords of the alphabetical index:

Religion, activity, freedom / Religion, public gathering, local authority, approval / Religion, public gathering, public order, disturbance, danger.

Headnotes:

Application of the Law on Public Gatherings to the organisation of religious services, processions or ceremonies is consistent with the Constitution, but only where such gatherings are likely to disturb public order.

Summary:

I. The Ombudsman applied to the Constitutional Court on behalf of representatives of the “Jehovah’s Witnesses” religious organisation, who had received sanctions for organising a public gathering without the approval of the municipal authorities.

The law in force prohibits the organisation of religious services, processions or ceremonies outside places of worship without the approval of the municipal authorities. The appellant contended that this constitutes a violation of Articles 28 and 31 of the Constitution.

II. The Court held the impugned law to be constitutional, but interpreted it in a particular way. The Court held that organisers are required to inform the authorities in cases where religious ceremonies present a potential danger to public order. It ruled that arbitrary and illegal interference by the public authorities in the exercise of freedom of worship should be eliminated.

The Court held that the legislature should change the law and draw up rules taking due account of the specific characteristics of religious ceremonies.

Languages:

Russian.

*Identification:* RUS-2012-3-007

a) Russia / **b)** Constitutional Court / **c)** / **d)** 06.12.2012 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 295, 21.12.2012 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Civil servant, pregnancy, dismissal / Pregnancy, worker, protection / Motherhood, protection.

Headnotes:

The legislative provisions permitting the dismissal of pregnant women holding civil service posts are contrary to Article 38 of the Constitution.

Summary:

I. The appellant was dismissed from her civil service post for unjustified absence (for a disciplinary offence). She argued that she had been absent from work because her disabled son had been taken to hospital. She invoked her pregnancy as a further argument. Despite this information, her appeal was dismissed. The courts ruled that the Law on Public Service does not protect pregnant women from dismissal.

The appellant contended that the provisions in question were arbitrary and discriminatory. The appellant argued that the dismissal of a pregnant woman holding a civil service post violates the constitutional right to protection of motherhood and childhood.

II. The Constitutional Court noted that motherhood, childhood and the family are placed under the state’s protection. This support meets specific social concerns. This particular guarantee forms part of the measures for social protection of pregnant women.

The Court noted that the Labour Code prohibits the dismissal of pregnant women. The same safeguard is provided in the Law on Municipal Service and the Law on Public Prosecution. However, the Law on Public Service allows pregnant women to be dismissed from their posts. That is contrary to the principles of equality and fairness.

The Court accordingly found a violation of Article 38 of the Constitution.

Languages:

Russian.



Serbia

Constitutional Court

Important decisions

Identification: SRB-2012-3-003

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 18.07.2012 / **e)** VIIIU-421/2011 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), no. 71/2012 / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

4.7.4.3 Institutions – Judicial bodies – Organisation – **Prosecutors / State counsel.**
5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

Keywords of the alphabetical index:

Prosecutor, deputy public prosecutor, election.

Headnotes:

The State Prosecutors' Council has the character of a "court" (tribunal) because it directly decides on the rights and obligations of bearers of prosecutorial functions; therefore, its decisions and procedures are subject to the requirements of a fair trial.

Summary:

I. Sixty-two people lodged appeals with the Constitutional Court against decisions made by the State Prosecutors' Council (hereinafter, the "SPC"). They objected to a decision-making procedure that was invoked by the first composition of the SPC to decide on the election of deputy public prosecutors no. 119-01-253/09-01 of 15 December 2009 or against individual decisions of 2010. These decisions established that because they were not elected, their office of public prosecutors terminated. Regarding individual decisions, they were passed through a procedure to review decisions passed by the first composition of the SPC. As such, the appellants' objections were overturned.

II. The Court has found that the appellants exercised prosecutorial functions in some of then-existing prosecutor's offices before the announcement of public notices on the election of deputy public prosecutors in all public prosecutor's offices or in public prosecutor's offices. The Court held that they had submitted their applications on time. The Court also recognised that decisions of the National Assembly, passed on the public prosecutors election in appropriate prosecutor's offices, cite the elected candidates' names and recognised that the SPC passed a Decision on the election of deputy public prosecutors that also cites the names of elected candidates. Also, sitting in its first composition, the SPC passed individual decisions in relation to some of the appellants, establishing that their office of public prosecutors or deputy public prosecutors had terminated since they had not been elected.

The Court finds that by virtue of its competencies and powers, the SPC also has the character of a "court"; therefore, its decisions and procedures are subject to the requirements of a fair trial. Thus, importance must be attached to a provision contained in Article 32.1 of the Constitution, which guarantees that everyone shall have the right to a public hearing before an independent and impartial tribunal established by law, within reasonable time, which tribunal shall pronounce judgment on their rights and obligations, grounds for suspicion resulting in initiated procedure and accusations brought against them.

The obligation of the permanent composition of the SPC to review the decisions of the first composition of the SPC requires the Court to find whether the permanent composition of the SPC constitutes a body established under the law.

In the *Saveljic* Decision, the Court found that because the High Judicial Council was sitting in its incomplete composition, it could not question the legality of its work and decision-making. The reason is that its first composition was in a position to discharge all the duties that fell within the scope of its competence. Nonetheless, in terms of reviewing the decisions by the first composition of the High Judicial Council or by the SPC on grounds of an objection, the permanent composition must be considered from the point of view of the requirement for impartiality of its members.

As an objection against a decision of the SPC constitutes a legal remedy, it cannot be questioned that impartiality is challenged when the same member who decides in the first instance decides on the legal remedy. Members of the first composition of SPC who participated when the decision on the election was passed could not have participated in the work concerning the objections.

The Court has found that in the review procedure, some other omissions were also made. The point at issue are the decisions in which certain unelected bearers of prosecutorial functions are accused of being unqualified, incompetent or unworthy of exercising prosecutorial functions.

The Court finds that appellants could be divided into three groups, according to their factual and legal situation.

The first group is composed of appellants to whom the first composition of SPC never delivered individual decisions stating grounds for their non-election. Regarding this group, because the presumptive right to be elected was not refuted in the election procedure, it should not have been refuted either by the permanent composition of the SPC, but rather a decision to elect these appellants should have been passed.

The second group is composed of appellants in relation to whom the first composition of the SPC passed individual decisions, whereby they established that their prosecutorial functions had terminated on grounds of non-election. The grounds for non-election pertained to the fact that the number of deputy public prosecutors was reduced in those public prosecutor's offices for which they had applied. These decisions expressly state that they do meet all the statutory requirements for election. Nonetheless, the permanent composition of the SPC established new facts in view of promptness in the performance of this group's work, even though they lacked the normative grounds for doing so.

The third group is composed of appellants in relation to whom the first composition of the SPC passed individual decisions, specifying grounds for their non-election. All those grounds come down to the issue of their "tardiness, or immense tardiness." That is, specific cases are cited where those unelected bearers of prosecutorial functions failed to comply with deadlines for undertaking certain procedural actions.

The Court finds that the criterion of "tardiness" ("promptness") was not used when the decision on the election of deputy public prosecutors of 15 December 2009 was passed. Thereby, this criterion could not have formed the basis for the establishment of facts even in the review procedure.

Also, the Court notes that the criterion of "tardiness" was applied arbitrarily and/or discretionally.

The subsequent application of this criterion to justify the decision on the appellants' non-election resulted in discrimination against them since this criterion was used exclusively in relation to them, following the completion of the election procedure.

The manner in which SPC applied the criterion of worthiness to exercise prosecutorial function also raises certain legal issues. The reason is that the presumption of worthiness shall be overturned only based on evidence admissible in court. The principle of equality of arms is only one feature of the wider concept of the right to a fair trial. It was necessary for those, whose worthiness was challenged when evidence was heard, to be given an opportunity to contest it in a public hearing the facts.

Taking the above into account, the Court considers that the presumption of having the right to be elected has not been overturned in a legally valid manner. Given that the burden of proof concerning grounds for non-election lies on the SPC, the Court has upheld the appeals. However, it overturned the contested decisions and ordered the SPC to elect the appellants within 60 days of receiving this Decision by applying relevant provisions of the Rules of Procedure for the Review of Decisions passed by the first composition of SPC.

Languages:

English, Serbian.



South Africa Constitutional Court

Important decisions

Identification: RSA-2012-3-010

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 20.09.2012 / **e)** CCT 38/12; [2012] ZACC 18 / **f)** National Treasury and Others v. Opposition to Urban Tolling and Others / **g)** www.constitutionalcourt.org.za/Archimages/19572.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
4.6.2 Institutions – Executive bodies – **Powers**.
4.7.1 Institutions – Judicial bodies – **Jurisdiction**.
4.10.1 Institutions – Public finances – **Principles**.

Keywords of the alphabetical index:

Constitutional Court, interference in other state bodies activities, minimum, principle / Government, power, discretionary / Interim order, conditions / Interim protection / Interlocutory decision / Order, temporary / Power, province, scope / Power, separation and interdependence, principle / Road, public.

Headnotes:

An interim order that has an immediate and irreparable effect is appealable. There was no need to develop the common-law test for the grant of an interim order as the existing test already permits a court to consider the principle of separation of powers when it weighs the balance of convenience. Beyond the common-law test, separation of powers is a vital tenet of our constitutional democracy. Courts must refrain from entering the exclusive terrain of the executive and legislative branches of government, unless the intrusion is mandated by the Constitution. Courts should grant an interim interdict preventing the national executive from exercising its statutory power only in exceptional circumstances and when a strong case is made out. They must ask whether it is constitutionally appropriate to grant an interdict whose effects would be to encroach upon the exclusive domain of another sphere of government.

Summary:

I. During 2007, Cabinet approved an extensive upgrade of roads in Gauteng province as part the Gauteng Freeway Improvement Project (hereinafter, "GFIP"). The upgrade entailed extensive work by South African National Roads Agency Limited (hereinafter, "SANRAL"). SANRAL incurred debt to third parties of R21 billion to finance the road upgrades. In 2008, it took a decision, acting under the South African National Roads Agency Limited Act (SANRAL Act) and with the approval of the Minister of Transport, to declare certain Gauteng roads as toll roads.

On 23 March 2012, Opposition to Urban Tolling Alliance (OUTA) and other parties approached the High Court on an urgent basis for an interim interdict restraining SANRAL from levying and collecting tolls on the Gauteng roads, pending the final determination of their application to review and set aside the decisions of:

- a. SANRAL and the Transport Minister to declare the Gauteng roads as toll roads; and
- b. the departmental head to grant certain environmental approvals related to the GFIP.

The High Court granted the interim interdict.

II. The Constitutional Court, in a majority judgment by Moseneke DCJ, held that the interim order had an immediate and irreparable effect and was thus appealable. It was not necessary to develop the common-law test for the grant of an interim interdict because it is already sufficiently flexible to permit a court to consider the principle of separation of powers when it weighs the balance of convenience.

The interim interdict had to be set aside because the High Court failed to consider or to give effect to the constitutional imperative of separation of powers. Beyond the common law, separation of powers is a vital tenet of our constitutional democracy. Courts must refrain from entering the exclusive terrain of the executive and legislative branches of government, unless the intrusion is mandated by the Constitution. Courts should grant an interim interdict preventing the national executive from exercising its statutory powers only in exceptional circumstances and when a strong case is made out. Courts must ask whether it is constitutionally appropriate to grant an interdict whose effect would be to encroach upon the exclusive domain of another sphere of government. On this the High Court judgment was deafeningly silent.

The High Court should have held that the prejudice to motorists if the interim interdict were refused did not exceed the prejudice that the National Executive, National Treasury and SANRAL would have to endure were it granted.

The harm and inconvenience to motorists resulted from a National Executive decision about the ordering of public resources, over which the Executive disposes and for which it, and it alone, has public responsibility. The duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of the Executive's functions and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the National Executive, subject to budgetary appropriations by Parliament. Another consideration is that the collection and ordering of public resources almost inevitably calls for policy-laden and polycentric decision making. Courts are not always well suited to make decisions of that nature.

III. The Constitutional Court upheld the appeal, set aside the order of the High Court and ordered costs to be costs in the review.

In a separate concurrence, Froneman J agreed with the outcome of the main judgment but differed in some of his reasoning. He adopted a narrower approach for the grant of leave to appeal, and a separate requirement for temporary interdicts sought against the two other national arms of government.

Supplementary information:

Legal norms referred to:

- Sections 167, 239 of the Constitution;
- Sections 2, 25.1, 27.1, 27.3, 27.4 and 34.1 of the South African National Roads Agency Limited Act 7 of 1998;
- Section 6 of the Promotion of Administrative Justice Act 3 of 2000;
- Section 24 of the National Environmental Management Act 107 of 1998.

Cross-references:

- *Albutt v. Centre for the Study of Violence and Reconciliation, and Others*, *Bulletin* 2010/1 [RSA-2010-1-002];
- *Cronshaw and Another v. Coin Security Group (Pty) Ltd* 1996 (3) *South African Law Reports* 686 (SCA);

- *Doctors for Life International v. Speaker of the National Assembly and Others*, Bulletin 2006/2 [RSA-2006-2-008];
- *Democratic Alliance v. President of the Republic of South Africa and Others* 2012 (1) *South African Law Reports* 417 (SCA);
- *Ex Parte Institute for Security Studies: In Re S v. Basson*, Bulletin 2005/2 [RSA-2005-2-008];
- *Fose v. Minister of Safety and Security*, Bulletin 1997/2 [RSA-1997-2-005];
- *Glenister v. President of the Republic of South Africa and Others* [2008] ZACC 19; 2009 (1) *South African Law Reports* 287 (CC); 2009 (2) *Butterworths Constitutional Law Reports* 136 (CC);
- *Gool v. Minister of Justice and Another* 1955 (2) *South African Law Reports* 682 (CPD);
- *Gory v. Kolver NO and Others (Starke and Others intervening)*, Bulletin 2006/3 [RSA-2006-3-014];
- *International Trade Administration Commission v. SCAW South Africa (Pty) Limited*, Bulletin 2012/1 [RSA-2012-1-003];
- *Machele and Others v. Mailula and Others* [2009] ZACC 7; 2010 (2) *South African Law Reports* 257 (CC); 2009 (8) *Butterworths Constitutional Law Reports* 767 (CC);
- *Minister of Health and Others v. Treatment Action Campaign and Others (no. 1)* [2002] ZACC 16; 2002 (5) *South African Law Reports* 703 (CC); 2002 (10) *Butterworths Constitutional Law Reports* 1075;
- *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)*, Bulletin 2001/1 [RSA-2001-1-006];
- *Molteno Brothers and Others v. South African Railways and Others* 1936 *Appellate Division* 321;
- *Opposition to Urban Tolling Alliance and Others v. The South African National Roads Agency Ltd and Others* [2012] ZAGPPHC;
- *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];
- *President of the Republic of South Africa and Others v. United Democratic Movement (African Christian Democratic Party and Others intervening, Institute for Democracy in South Africa and Another as Amici Curiae)* [2002] ZACC 34; 2003 (1) *South African Law Reports* 472 (CC); 2002 (11) *Butterworths Constitutional Law Reports* 1164 (CC);
- *Setlogelo v. Setlogelo* 1914 *Appellate Division* 221;
- *Webster v. Mitchell* 1948 (1) *South African Law Reports* 1186 (W);

- *RJR- MacDonald Inc v. Canada (Attorney General)* 1994 1 SCR 311;
- *Smith and Others v. Inner London Education Authority* 1978 1 ALL ER 411 (CA).

Languages:

English.



Identification: RSA-2012-3-011

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 20.09.2012 / **e)** CCT 76/12; [2012] ZACC 17 / **f)** Camps Bay Ratepayers' and Residents' Association and Another v. Gerda Yvonne Ada Harrison and Another / **g)** www.constitutionalcourt.org.za/Archimages/19570.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.4.14.3 Constitutional Justice – Procedure – Costs – **Party costs**.
 3.20 General Principles – **Reasonableness**.
 4.7.15.1.3 Institutions – Judicial bodies – Legal assistance and representation of parties – The Bar – **Role of members of the Bar**.

Keywords of the alphabetical index:

Costs, court, discretion / Lawyer, fees payable by the losing party / Lawyer, fees, scale / Lawyer, legal fees, reduced.

Headnotes:

A successful party gets costs as an indemnification for its expense in having been forced to litigate, and a moderating balance must be struck to afford that party adequate indemnification within reasonable bounds. Where argument before the Court is largely a repetition of issues that have already been argued before previous courts, counsel's fees should be adjusted down accordingly. In South Africa, the legal profession owes a duty of diffidence in charging fees that goes beyond what the market can bear.

Summary:

I. This was a judgment setting aside and reducing the amount of counsel's fees payable by the losing party to the winning party, as awarded by the Taxing Master of the Constitutional Court in respect of the decision in *Camps Bay Ratepayers' and Residents' Association and Another v. Harrison and Another* [2010] ZACC 19.

In that case, an application for leave to appeal against a judgment of the Supreme Court of Appeal was dismissed with costs. Senior counsel retained by one of the successful parties charged a fee, inclusive of hourly preparation and appearance, of R 453 150, while junior counsel charged R 263 500 for the same items, including VAT. After the losing party objected, this Court's Taxing Master reduced these to a fee of R 240 000 for senior counsel and R 160 000 for junior counsel, exclusive of VAT. The losing party still considered these fees to be "excessive", and approached the Constitutional Court to review the award.

II. The Constitutional Court unanimously affirmed the principle that where argument before the Court was largely "a rehearsal of issues that had already been well trampled out" before previous courts, counsel's fees should be adjusted down. A successful party gets costs as an indemnification for its expense in having been forced to litigate, and a moderating balance must be struck to afford the innocent party adequate indemnification within reasonable bounds.

In this case, counsel had, for the most part, already thoroughly ventilated the main issues in three previous courts. The Court accordingly found that the amount awarded by the Taxing Master could not be considered fair and reasonable. The Taxing Master's award was therefore set aside. The Court found that total reasonable remuneration for counsel's work on the appeal, inclusive of hourly preparation and appearance in the Constitutional Court, was no more than R 180 000 for senior counsel and R 120 000 for junior counsel, plus VAT.

More generally, the Court expressed its disquiet that counsel's fees have "skyrocketed" in recent years. In a country with high levels of inequality and poverty, the Court stated that it could find no justification for advocates charging excessive amounts to argue an appeal. The Court emphasised that, in South Africa, "the legal profession owes a duty of diffidence in charging fees that goes beyond what the market can bear". The Court stated that the beneficent practices of some counsel in respect of *pro bono* cases and indigent clients should find a place even where clients can pay, as in this case.

Cross-references:

- *Camps Bay Ratepayers' and Residents' Association and Another v. Harrison and Another* [2010] ZACC 19; 2011 (2) *South African Law Reports* 42 (CC); 2011 (2) *Butterworths Constitutional Law Reports* 121 (CC).

Languages:

English.

*Identification: RSA-2012-3-012*

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 27.09.2012 / **e)** CCT 129/11; [2012] ZACC 21 / **f)** PFE International Inc. (BVI) and Others v. Industrial Development Corporation of South Africa Limited / **g)** www.constitutionalcourt.org.za/Archimages/19636.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 4.7.2 Institutions – Judicial bodies – **Procedure.**
- 5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation.**
- 5.3.24 Fundamental Rights – Civil and political rights – **Right to information.**

Keywords of the alphabetical index:

Information, access, reasonable / Court, master of own process / Document, right of access, limitations / Information, access / Information, denial / Information, obligation to provide / Rule of procedure.

Headnotes:

The provisions of the Promotion of Access to Information Act, which embody the right of access to information contained in the Constitution, are not applicable where access to information is governed by other laws, including the Court rules pertaining to subpoenas.

Summary:

I. The applicants in High Court proceedings claimed documents from the Industrial Development Corporation (hereinafter, "IDC"), a state corporation, which it refused to hand over, under the Promotion of Access to Information Act (hereinafter, "PAIA"). The IDC opposed the claim on the basis that the request for information was governed by the Uniform Rules of Court (Rules) to the exclusion of PAIA, as the applicants sought the documents for the purposes of a civil trial in relation to which litigation proceedings had already commenced.

The High Court found in favour of the applicants and ordered the IDC to furnish them with the requested documents pursuant to the provisions of PAIA. On appeal, the Supreme Court of Appeal (hereinafter, "SCA") overturned the High Court's judgment. The SCA held that PAIA did not apply because that Act specifically excludes from its application documents in court proceedings that have already commenced, as access is governed by the court Rules. Under the Rules of Court, the applicants would in due course become entitled to receive the documents they claimed. They could not have them now, under PAIA.

In the Constitutional Court, the applicants argued that the Supreme Court of Appeal interpreted PAIA incorrectly. They contended that because a trial date had not been set when the request was made, the Rules did not apply to their request for documents and therefore PAIA was not excluded.

II. The Constitutional Court held that PAIA stipulates three conditions that must be met before a finding that it is non-applicable can be reached: first, that the relevant record has been requested for the purpose of criminal or civil proceedings; second, that it is requested after the commencement of the criminal or civil proceedings; and third, the production of or access to that record is provided for in "any other law". The only issue was whether the Rules constituted "any other law" as contemplated in PAIA. The Constitutional Court, favouring a generous and purposive interpretation, upheld the wide meaning given by the SCA to the Rules because, amongst other things, such an interpretation.

- a. gives effect to the clear exclusion stipulated in PAIA (regarding documents related to litigious processes),
- b. avoids different legislative regimes applying to the same documents in the same context; and
- c. avoids the absurd consequences that would otherwise result in relation to the established discovery process.

In making its ruling the Constitutional Court emphasised the power and flexibility that courts have in relation to their own processes. The Constitutional Court accordingly found that PAIA was not applicable in the circumstances as the applicants' right of access to information was given effect to and governed by the Rules.

Supplementary information:

Legal norms referred to:

- Section 32 of the Constitution of the Republic of South Africa, 1996;
- Promotion of Access to Information Act 2 of 2000;
- Rule 33 of the Uniform Rules of Court.

Cross-references:

- *PFE International Inc (BVI) and Others v. Industrial Development Corporation of South Africa Ltd* 2011 (4) *South African Law Reports* 24 (KZD);
- *Industrial Development Corporation of South Africa Ltd v. PFE International Inc (BVI) and Others* 2012 (2) *South African Law Reports* 269 (SCA);
- *Brümmer v. Minister for Social Development and Others*, *Bulletin* 2009/2 [RSA-2009-2-010];
- *Mazibuko and Others v. City of Johannesburg and Others*, *Bulletin* 2009/3 [RSA-2009-3-016];
- *MEC for Education, KwaZulu-Natal, and Others v. Pillay*, *Bulletin* 2007/3 [RSA-2007-3-014];
- *South African National Defence Union v. Minister of Defence and Others*, *Bulletin* 2007/2 [RSA-2007-2-007];
- *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Others*, *Bulletin* 2004/1 [RSA-2004-1-004];
- *Phumelela Gaming and Leisure Ltd v. Gründlingh and Others*, *Bulletin* 2006/1 [RSA-2006-1-003];
- *Trust Sentrum (Kaaipstad) (Edms) Bpk and Another v. Zevenberg and Another* 1989 (1) *South African Law Reports* 145 (C);
- *Bladen and Another v. Weston and Another* 1967 (4) *South African Law Reports* 429 (C).

Languages:

English.



Identification: RSA-2012-3-013

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 21.09.2012 / **e)** CCT 128/11; [2012] ZACC 19 / **f)** South African Transport and Allied Workers Union and Others v. Lebogang Michael Moloto NO and Another / **g)** www.constitutionalcourt.org.za/Arch images/19739.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.4.10 Fundamental Rights – Economic, social and cultural rights – **Right to strike.**

Keywords of the alphabetical index:

Labour dispute / Labour law / Strike, employer, preparation / Strike, non-union employees, participation / Strike, advance notice, none / Strike, advance notice, employees intending to strike, identification.

Headnotes:

For a strike to be valid, all employees intending to strike, in particular non-unionised employees, must give notice of the intention to strike to the employer before the strike occurs.

Summary:

I. The Supreme Court of Appeal found that a notice by a union under Section 64.1.b of the Labour Relations Act (hereinafter, “LRA”), which requires that notice of a strike be given to an employer before the strike commences, does not cover non-unionised employees. The question thus was whether one notice, not given expressly on behalf of every employee intending to strike, fulfilled the statutory requirement.

II. Reversing the decision by the Supreme Court of Appeal (hereinafter, “SCA”), the majority of the Constitutional Court found that a single strike notice was sufficient, whether or not given by or on behalf of the employees in question.

The majority judgment per Yacoob ADCJ, Froneman J and Nkabinde J, with which two other judges concurred, held that the right to strike and the specific purpose of the notice provision in the LRA requires nothing more than a notice 48 hours before a strike. The Court held that this interpretation conforms better with the spirit, purport and objects of the Bill of Rights.

The Constitutional Court declared that the dismissal of the individual applicants on 18 November 2004 by the employer was automatically unfair in terms of Section 187.1.a of the LRA.

III. The minority judgment per Maya AJ, with which three other judges concurred, would have upheld the decision of the SCA. The purpose of a strike notice is to give the employer an indication of which of its employees might strike, in order for it to prepare for the impending power play. The minority concluded that it is essential that a strike notice indicates who is covered by the notice. Since the strike notice in question did not cover non-union employees, their strike was illegal and they had been validly dismissed.

Cross-references:

- *SATAWU and Another v. Equity Aviation Services (Pty) Ltd* [2006] 11 *Butterworths Labour Law Reports* 1115 (LC);
- *Equity Aviation Services (Pty) Ltd v. SATAWU* [2009] 10 *Butterworths Labour Law Reports* 933 (LAC);
- *National Education Health and Allied Workers Union v. University of Cape Town and Others*, *Bulletin* 2002/3 [RSA-2002-3-019];
- *NUMSA and Others v. Bader Bop (Pty) Ltd and Another*, *Bulletin* 2002/3 [RSA-2002-3-021];
- *South African National Defence Union v. Minister of Defence and Another*, *Bulletin* 1999/2 [RSA-1999-2-006];
- *Chirwa v. Transnet Limited and Others* [2007] ZACC 23; 2008 (4) *South African Law Reports* 367 (CC); 2008 (3) *Butterworths Constitutional Law Reports* 251 (CC);
- *Ceramic Industries Ltd t/a Betta Sanitaryware and Another v. NCBAWU and Others* [1997] 6 *Butterworths Labour Law Reports* 697 (LAC);
- *Fidelity Guards Holdings (Pty) Ltd v. PTWU and Others* [1997] 9 *Butterworths Labour Law Reports* 1125 (LAC);
- *S v. Makwanyane*, *Bulletin* 1995/3 [RSA-1995-3-002];
- *Business SA v. COSATU and Another* [1997] 5 *Butterworths Labour Law Reports* 511 (LAC);
- *S v. Zuma and Others* [1995] ZACC 1; 1995 (2) *South African Law Reports* 642 (CC); 1995 (4) *Butterworths Constitutional Law Reports* 401 (CC);
- *CWIU v. Plascon Decorative (Inland) (Pty) Ltd* [1998] *Butterworths Labour Law Reports* 1191;
- *Fidelity Guards Holdings (Pty) Ltd v. PTWU and Others* [1997] 9 *Butterworths Labour Law Reports* 1125 (LAC);
- *SA Airways (Pty) Ltd v. SATAWU (2010)* 3 *Butterworths Labour Law Reports* 321 (LC);

- *Transnet Ltd v. SATAWU and Another* [2011] 11 *Butterworths Labour Law Reports* 1123 (LC);
- *South African Police Service v. Police and Prisons Civil Rights Union and Another* [2011] ZACC 21; 2011 (6) *South African Law Reports* 1 (CC); 2011 (9) *Butterworths Constitutional Law Reports* 992 (CC);
- *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, Bulletin* 1996/3 [RSA-1996-3-016];
- *National Union of Metalworkers of South Africa and Others v. Bader Bop (Pty) Ltd and Another, Bulletin* 2003/3 [RSA-2003-3-021];
- *National Education Health & Allied Workers Union v. University of Cape Town and Others, Bulletin* 2003/3 [RSA-2003-3-019];
- *Investigating Directorate: Serious Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others, Bulletin* 2000/2 [RSA-2000-2-011];
- *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);
- *De Lange v. Smuts NO and Others, Bulletin* 1998/2 [RSA-1998-2-004];
- *CWIU v. Plascon Decorative (Inland) (Pty) Ltd* [1998] 12 *Butterworths Labour Law Reports* 1191 (LAC);
- *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, Bulletin* 1996/3 [RSA-1996-3-016];
- *Schoeman & Another v. Samsung Electronics SA (Pty) Ltd* (1997) 18 *Industrial Law Journal* 1098 (LC);
- *New National Party v. Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) *South African Law Reports* 191 (CC); 1999 (5) *Butterworths Constitutional Law Reports* 489 (CC);
- *South African Transport and Allied Workers Union and Another v. Garvas and Others* [2012] ZACC 13;
- *Ceramic Industries Ltd t/a Betta Sanitaryware and Another v. NCBAWU and Others* [1997] 6 *Butterworths Labour Law Reports* 697 (LAC);
- *Poswa v. Member of the Executive Council Responsible for Economic Affairs Environment and Tourism, Eastern Cape* 2001 (3) *South African Law Reports* 582 (SCA);
- *Early Bird Farm (Pty) Ltd v. Food and Allied Workers Union and Others* (2004) 25 *Industrial Law Journal* 2135 (LAC) (Early Bird Farm);
- *County Fair Foods (A Division of Astral Operations Ltd) v. Hotel Liquor Catering Commercial and Allied Workers Union and Others* (2006) 27 *Industrial Law Journal* 348 (LC);
- *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v. National Union of Metalworkers of SA and Others* (1999) 20 *Industrial Law Journal* 677 (LC) and *Public Servants Association of SA v. Minister of Justice and Constitutional Development and Others* (2001) 22 *Industrial Law Journal* 2303 (LC);
- *Transportation Motor Spares v. National Union of Metalworkers of SA and Others* (1999) 20 *Industrial Law Journal* 690 (LC) (Transportation);
- *SA Clothing and Textile Workers Union v. Stuttafords Department Stores Ltd* (1999) 20 *Industrial Law Journal* 2692 (LC);
- *Afrox Limited v. SA Chemical Workers Union and Others* (1) (1997) 18 *Industrial Law Journal* 399 (LC);
- *Transnet Ltd v. SA Transport & Allied Workers Union* (2011) 32 *Industrial Law Journal* 2269 (LC).

Languages:

English.



Identification: RSA-2012-3-014

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 28.09.2012 / **e)** CCT 113/11; [2012] ZACC 22 / **f)** Print Media South Africa and Another v. Minister of Home Affairs and Another / **g)** www.constitutional.court.org.za/Archimages/19672.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality**.
- 4.6.2 Institutions – Executive bodies – **Powers**.
- 5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation**.
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
- 5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press**.

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

Keywords of the alphabetical index:

Vagueness / Censorship, preventative, prohibition.

Headnotes:

Provisions establishing a system that required publishers, with the exception of registered newspapers, to submit publications falling within broad criteria relating to sexual content to an administrative body for prior approval were declared unconstitutional for limiting the right to freedom of expression in a manner which is not reasonable and justifiable.

Summary:

I. The Films and Publications Act created a system that required publishers, with the exception of registered newspapers, to submit intended publications that contained broadly defined sexual content to the Film and Publications Board, an administrative body, for prior approval. All publications containing sexual conduct that violates or shows disrespect for the right to human dignity, degrades a person or constitutes incitement to cause harm fell to be submitted.

Print Media South Africa and the South African National Editors Forum challenged the Act on three grounds. First, the constitutionality of this scheme was challenged on the basis that the criteria for prior submission were vague and overbroad, and where failing to comply attracts severe criminal sanctions, this unduly trammes upon the right to freedom of expression guaranteed by Section 16 of the Constitution. Second, the exclusion of magazines from the exception afforded to registered newspapers was challenged on rationality and equality grounds. Finally, a provision in the Act that criminalised failure to submit material for prior classification on the request of any person was challenged.

The South Gauteng High Court declared various sections of the Act unconstitutional. The parties applied to the Constitutional Court to confirm the declaration of invalidity.

II. Writing for the majority, Skweyiya J confirmed the High Court order of invalidity but for wider reasons than the High Court gave. The Court held that the prior classification system in itself limited the right to freedom of expression by regulating its exercise. This

it did in an unjustifiable manner as the limitation did not meet the requirements of Section 36 of the Constitution, the general limitations clause. This is because the limitation did not achieve its purposes in a proportional manner and because there were less restrictive alternatives available. The entire system of prior classification under the Act was declared unconstitutional and severed.

The Court also held that the unequal treatment of magazines compared to newspapers offended the right to equality and the legality principle without justification and ordered that the words “or magazine” be read into the Act.

Lastly, the Court held that the provision that criminalised the failure to submit for classification upon request of any person was a drafting error, declared it unconstitutional and read in a reference to the correct section of the Act.

III. In a separate concurring judgment Van der Westhuizen J (with whom Yacoob J and Froneman J concurred) regarded it as necessary, to reach a finding of constitutional invalidity, to consider the vagueness and overbreadth of the impugned criteria. This was because the criteria are inextricably linked to the Act’s scheme of administrative prior restraint and because judicial prior restraint would not be a constitutionally acceptable less restrictive alternative to administrative prior restraint where the criteria for submission were themselves based on vague criteria.

Supplementary information:

Legal norms referred to:

- Section 16 of the Constitution of the Republic of South Africa, 1996;
- The Films and Publications Act 3 of 2009;
- Constitutional Court Rule 16.2.

Cross-references:

- *Albutt v. Centre for the Study of Violence and Reconciliation, and Others*, *Bulletin* 2010/1 [RSA-2010-1-002];
- *Bertie van Zyl (Pty) Ltd and Another v. Minister for Safety and Security and Others*, *Bulletin* 2009/2 [RSA-2009-2-005];
- *S v. Mamabolo (E TV and Others Intervening)*, *Bulletin* 2001/1 [RSA-2001-1-005];
- *South African National Defence Union v. Minister of Defence and Another*, *Bulletin* 1999/2 [RSA-1999-2-006];

- *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].*

Languages:

English.



Identification: RSA-2012-3-015

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 28.09.2012 / **e)** CCT 120/11; [2012] ZACC 23 / **f)** Bogaards v. S / **g)** www.constitutionalcourt.org.za/Archimages/19669.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

5.3.13.2.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to have adequate time and facilities for the preparation of the case.**

Keywords of the alphabetical index:

Action on grounds of failure to fulfil obligations, judgment of the Court establishing such a failure / Common law, development / Constitution, application to common law / Court, filling of legislative gap / Due process, substantive, principle / Fairness, procedural, principle / Gap, legal, unconstitutional / Law, lacuna / Notice, right / Procedural requirement, essential, infringement / Procedure, appeal / Procedure, criminal / Procedure, requirement, disregard, human rights, violation / Sentence, increased.

Headnotes:

A court order, rather than a detention warrant, is the legal basis for a person's imprisonment. The right to appeal in Section 35.3.o of the Constitution requires that notice be given to an accused person when a court on appeal considers an increase in his or her sentence.

Summary:

I. Mr Bogaards (applicant) was charged with harbouring and concealing escapees in contravention of Sections 11 and 12 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (hereinafter, "Terrorism Act"). The alternative charge was Section 115.e of the Correctional Services Act 111 of 1998 (hereinafter, "CSA") (harbouring or concealing escaped prisoners). At trial in the regional court he was convicted of contravening the Terrorism Act and was sentenced to three years in prison. After an appeal to the High Court, the Supreme Court of Appeal, the second appellate court to consider the matter, set aside the conviction under the Terrorism Act and convicted him on the alternative charge under the CSA. It also increased his sentence to five years' imprisonment.

In the Constitutional Court, the applicant challenged his conviction under the CSA, arguing that the escapees were not "prisoners" as defined. Section 6 of the CSA provides that a prisoner may not be committed to prison without a valid warrant of detention. But the escapees were being held in terms of a court order rather than a warrant of detention. Hence it was argued that they were not "prisoners".

Regarding sentence, the applicant contended that an informal rule had developed based on the 'salutary practice' that, where an appellate court is *prima facie* of the view that a sentence should be increased, it will notify the appellant in advance. He further contended that the Supreme Court of Appeal had breached this rule by failing to notify him of the possibility of imposing a higher sentence upon appeal, which infringed his constitutional right of appeal. The State argued that the Supreme Court of Appeal did not increase a previously-imposed sentence but rather that it had imposed sentence afresh, therefore occasioning no breach of the 'salutary practice'. The State further contended that the Applicant had had a fair trial because the issue of an appropriate sentence had been fully argued before the Supreme Court of Appeal.

II. The Constitutional Court unanimously found that the escapees were "prisoners" in terms of the CSA and therefore that the applicant's appeal in respect of his conviction under Section 115.e of that Act had to fail.

As to sentence, Justice Khampepe, on behalf of the majority, held that the requirement of fairness that underpins the right to a fair trial under Section 35.3 of the Constitution demands that an accused person be informed if an appellate court contemplates imposing a higher sentence, so that he or she has the opportunity

to make appropriate submissions on why the sentence should not be increased. Accordingly, the majority held that the Supreme Court of Appeal erred in imposing an increased custodial sentence without giving the applicant notice that it was considering doing so. The majority went on to hold that the fact that the 'salutary practice' of notice-giving had not been enshrined as a formal requirement at common law constituted an infringement of the right of appeal under Section 35.3.o of the Constitution. Thus, the Constitutional Court was obliged to develop the common law and to elevate to a formal requirement the practice of giving notice to an accused of the possibility of an increase in his sentence by an appellate court. The majority upheld the appeal against the sentence of five years' imprisonment and remitted the matter to the trial court for reconsideration.

III. Jafta J and Nkabinde J, writing for the minority, reasoned that the question whether the applicant's fair trial rights had been infringed was one of fact and involved a value judgment. They concluded that the Supreme Court of Appeal had not increased the applicant's sentence, but had replaced his conviction under the Terrorism Act with a 'new conviction and fresh sentence' under the CSA. Accordingly, the applicant's fair trial rights were not infringed and the Supreme Court of Appeal had not been obliged to give notice to the applicant. The minority would have dismissed the appeal in its entirety.

Supplementary information:

Legal norms referred to:

- Section 35.3.o of the Constitution of the Republic of South Africa, 1996;
- Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004;
- Correctional Services Act 111 of 1998.

Cross-references:

- *S v. Andhee* 1996 (1) *South Africa Criminal Law Reports* 419 (A);
- *S v. Anderson* 1964 (3) *South African Law Reports* 494 (AD);
- *S v. Jaipal* [2005] ZACC 1; 2005 (4) *South African Law Reports* 581 (CC); 2005 (5) *Butterworths Constitutional Law Reports* 423 (CC);
- *S v. Zuma and Others* [1995] ZACC 1; 1995 (2) *South African Law Reports* 642 (CC); 1995 (4) *Butterworths Constitutional Law Reports* 401 (SA);
- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, *Bulletin* 1999/3 [RSA-1999-3-008];

- *R v. Grundlingh* 1955 (2) *South African Law Reports* 269 (A);
- *Parker v. Director of Public Prosecutions* (1992) 28 NSWLR 282; 65 A Crim R 209;
- *S v. Sunday and Another* 1995 (1) *South African Law Reports* 497 (CPD).

Languages:

English.



Identification: RSA-2012-3-016

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 05.10.2012 / **e)** CCT 122/11; [2012] ZACC 24 / **f)** Democratic Alliance v. President of the Republic of South Africa and Others / **g)** www.constitutional.court.org.za/Archimages/19876.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.1.1.2.1 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Independence – **Statutory independence.**
 1.1.2.1 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Necessary qualifications.**
 1.6 Constitutional Justice – **Effects.**
 3.4 General Principles – **Separation of powers.**
 3.20 General Principles – **Reasonableness.**
 4.4.3 Institutions – Head of State – **Powers.**
 4.7.4.3.2 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Appointment.**
 5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence.**

Keywords of the alphabetical index:

Executive act, review, standard / Fairness, procedural principle / Prosecution, independence, guarantees / President, powers, review, standard / Procedural unconstitutionality / President, discretion / President, conduct, review, rationality / Prosecutor general / Decision making, process, rationality / Decision, rationality.

Headnotes:

The requirements that a candidate for the office of National Director of Public Prosecutions be “fit” and “proper” are objectively ascertainable jurisdictional requirements (which may be determined by a court) rather than considerations to be determined according to the President’s subjective discretion.

Review for rationality entails an evaluation of the rationality of both the process by which a particular decision was made and the rationality of the decision ultimately made, and is concerned with whether the means employed by the decision-maker are rationally related to the purpose for which the decision-maker’s power was conferred.

Review for rationality is the appropriate mechanism for judicial evaluation of presidential conduct as it ensures that there are basic threshold requirements for the exercise of presidential powers while restraining courts from interfering excessively in the executive branch of government’s area of responsibility.

Summary:

I. On 25 November 2009 the President of the Republic of South Africa appointed Mr Simelane as the National Director of Public Prosecutions (hereinafter, “NDPP”) in terms of Section 179 of the Constitution read with Sections 9 and 10 of the National Prosecuting Authority Act 32 of 1998 (hereinafter, the “Act”). The Democratic Alliance (hereinafter, the “DA”), an opposition political party, approached the North Gauteng High Court for an order declaring the appointment inconsistent with the Constitution and invalid. The High Court held that there was no basis on which to interfere with the President’s decision and dismissed the application with no order as to costs.

The DA appealed to the Supreme Court of Appeal, arguing that Mr Simelane is not a “fit and proper person” as required by Section 9.1.b of the Act. The Supreme Court of Appeal, after noting that the requirements of the Act are objectively ascertainable jurisdictional facts, set aside the judgment of the High Court and declared the decision of the President to appoint Mr Simelane, and the process by which that decision was reached, inconsistent with the Constitution, irrational and invalid.

Pursuant to Section 172.2.a of the Constitution, an order that the President’s conduct was constitutionally invalid has no force unless it is confirmed by the Constitutional Court. The DA accordingly applied for confirmation of the order, which confirmation the

Minister of Justice (hereinafter, the “Minister”) opposed on behalf of the State.

The Minister argued that the President has a wide discretion in appointing the NDPP and that the “fit and proper” enquiry requires no more than a subjective value judgment on his part.

II. The Constitutional Court, after considering the relevant jurisprudence and legislative provisions, confirmed the Supreme Court of Appeal’s decision that the requirements of fitness and propriety are objectively ascertainable jurisdictional facts rather than considerations to be determined exclusively according to the President’s subjective discretion. This was held to accord with the constitutional requirement that the NDPP be a non-political appointee committed to prosecutorial independence.

The Constitutional Court emphasised the nature of the rationality enquiry: it is concerned both with the process by which the decision is made – in that the means selected for making the particular decision must be rationally connected to the purpose for which the power to make the decision was conferred – and the ultimate decision itself. It does not involve a determination of whether better means were available to the decision-maker, but merely whether the means chosen were rationally connected to the decision-maker’s purpose. The Constitutional Court noted that imposing rationality as the standard of review (rather than the more demanding standard of reasonableness) gives effect to the separation of powers as it ensures that the exercise of all public power is subject to a minimum threshold requirement without allowing courts unduly to invade the executive branch’s legitimate area of operation.

Acting Deputy Chief Justice Yacoob, with whom nine judges concurred, found that the President acted irrationally, inconsistently with the Constitution and invalidly in deciding to appoint Mr Simelane. First, there was strong evidence from Mr Simelane’s participation in a Commission of Inquiry prior to his appointment that he was lacking in credibility and conscientiousness, had been dishonest while under oath and had attempted improperly to interfere with the independent functioning of a previous NDPP. The President’s failure to account for these “brightly flashing red lights warning of impending danger” cannot have been rationally related to the purpose of his power of appointment, *viz* to appoint an NDPP of conscientiousness and integrity. Second, the Public Service Commission (the organ of State charged with maintaining professional ethics in public administration) had recommended that disciplinary steps be taken against Mr Simelane following his conduct at the aforementioned Commission of Inquiry, which

recommendation the President ignored for spurious reasons. The President's conduct "coloured the rationality of the entire process [of appointment], and thus rendered the ultimate decision irrational".

The Constitutional Court thus confirmed the declaration of invalidity made by the Supreme Court of Appeal.

III. Acting Justice Zondo wrote a separate concurrence on one aspect of the issues, indicating that the Public Service Commission may have been obliged to provide Mr Simelane with a hearing before recommending that he be subject to disciplinary proceedings. This did not however render the Public Service Commission's recommendation irrelevant. He concurred in declaring the President's conduct invalid.

Supplementary information:

Legal norms referred to:

- Sections 172.2.a and 179 of the Constitution of the Republic of South Africa, 1996;
- Sections 9, 10, 32 and 33 of the National Prosecuting Authority Act 32 of 1998.

Cross-references:

- *Albutt v. Centre for the Study of Violence and Reconciliation and Others*, *Bulletin* 2010/1 [RSA-2010-1-002];
- *Poverty Alleviation Network and Others v. President of the Republic of South Africa and Others* [2010] ZACC 5; 2010 (6) *Butterworths Constitutional Law Reports* 520 (CC);
- *Minister for Justice and Constitutional Development v. Chonco and Others*, *Bulletin* 2009/3 [RSA-2009-3-013];
- *Merafong Demarcation Forum and Others v. President of the Republic of South Africa and Others*, *Bulletin* 2008/2 [RSA-2008-2-009];
- *Affordable Medicines Trust and Others v. Minister of Health and Another*, *Bulletin* 2005/1 [RSA-2005-1-002];
- *Minister of Defence v. Potsane and Another; Legal Soldier (Pty) Ltd and Others v. Minister of Defence and Others*, *Bulletin* 2001/3 [RSA-2001-3-015];
- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, *Bulletin* 1999/3 [RSA-1999-3-008];
- *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996, *Bulletin* 1996/3 [RSA-1996-3-016];

- *Brink v. Kitshoff NO*, *Bulletin* 1996/1 [RSA-1996-1-009];
- *Democratic Alliance v. President of the Republic of South Africa and Others* [2011] ZASCA 241; 2012 (1) *South African Law Reports* 417 (SCA); 2012 (3) *Butterworths Constitutional Law Reports* 291 (SCA);
- *Democratic Alliance v. President of the Republic of South Africa and Others* [2010] ZAGPPHC 194.

Languages:

English.



Identification: RSA-2012-3-017

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 09.10.2012 / **e)** CCT 16/12; [2012] ZACC 27 / **f)** Mario Gaspare Oriani-Ambrosini, MP v. Maxwell Vuyisile Sisulu, MP Speaker of the National Assembly / **g)** www.constitutionalcourt.org.za/Archimages/19761.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.3.3 General Principles – Democracy – **Pluralist democracy**.
 4.5.4.1 Institutions – Legislative bodies – Organisation – **Rules of procedure**.
 4.5.6.1 Institutions – Legislative bodies – Law-making procedure – **Right to initiate legislation**.
 5.3.29 Fundamental Rights – Civil and political rights – **Right to participate in public affairs**.

Keywords of the alphabetical index:

Legislation, initiation, permission / Minority, representation in Parliament / Parliament, member, right to initiate legislation / Parliament, powers / Parliament, rules of procedure / Political activity, right to participate / Democracy, participatory / Public involvement, principle / Openness, principle / Transparency, principle / Accountability, principle.

Headnotes:

The constitutional right that empowers individual members of the National Assembly to initiate or prepare legislation may not be limited by the Assembly through its procedural rules. Insofar as the National Assembly's current rules have the effect of undermining these powers, they do not promote the constitutional values of participatory and representative democracy, openness, transparency, accountability and public involvement. The requirement that an individual member obtain permission before introducing legislation is therefore unconstitutional and invalid.

Summary:

I. In 2009, Mr Oriani-Ambrosini, a member of the opposition Inkatha Freedom Party and of Parliament, sought to introduce legislation into the National Assembly, in terms of Section 73.2 of the South African Constitution, which provides that "... a member [of the Assembly] ... may introduce a Bill in the Assembly". The Rules of the National Assembly require that a member of the Assembly obtain permission from a committee of the Assembly, which is dominated by the governing party, before introducing a Bill. He did so without obtaining permission. For this reason, the Speaker of the National Assembly refused to allow Mr Oriani-Ambrosini introduce the Bill.

Mr Oriani-Ambrosini launched proceedings in the Western Cape High Court challenging the constitutional validity of those Rules that require an individual member of the Assembly to obtain permission before she or he may introduce a Bill. The High Court dismissed the challenge. He then appealed to the Constitutional Court.

II. Writing for the majority, Chief Justice Mogoeng, with whom seven judges concurred, held that the Rules that provide for the permission requirement are inconsistent with the Constitution and therefore invalid. The Court's interpretation of Section 55.1.b of the Constitution, which empowers individual members of the Assembly to initiate or prepare legislation; Section 73.2, which empowers them to introduce a Bill; and Section 57, which vests the authority to make rules in the Assembly, led to the conclusion that the Assembly may not create rules that have the effect of spoiling or undermining the powers given by the Constitution.

The Court held that while the Assembly is entitled to regulate its business in a manner that it deems best, it may not do so in a way that renders the powers of

individual members empty or inconsequential, but rather must do so in a way that facilitates the exercise of those powers.

Additionally, the Court found that the meaningful exercise of the individual power to initiate or prepare legislation and introduce Bills is vital to the promotion of the constitutional values of participatory and representative democracy, openness, transparency, accountability and public involvement. These values must be considered by the Assembly when making its rules.

Thus the majority declared provisions of the Rules that impose, reinforce, or are linked to a permission requirement, constitutionally invalid, and severed them from the remainder of the Rules.

III. In a dissenting judgment, Justice Jafta (with whom one judge concurred) held that Mr Oriani-Ambrosini should have failed because he omitted to challenge the Rules that regulate the introduction of a Bill in the Assembly. Instead, he paid particular attention to the Rules that deal with the initiation or preparation of legislation. Justice Jafta also held that no matter the applicant's challenge, the Rules could be interpreted in a way that would not render them constitutionally invalid.

Languages:

English.

*Identification: RSA-2012-3-018*

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 09.10.2012 / **e)** CCT 23/12; [2012] ZACC 26 / **f)** Schubart Park Residents' Association and Others v. City of Tshwane Metropolitan Municipality and Others / **g)** www.constitutionalcourt.org.za/Archimages/19763.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home.**

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

Keywords of the alphabetical index:

Building, right to occupy / Constitutional Court, order to engage / Danger to life / Housing, eviction, arbitrariness, protection / Housing, unsafe / Eviction, court order, requirements.

Headnotes:

The mere dismissal by a High Court of an application by evicted residents for the immediate restoration and occupation of their homes – which were at that time in a state of disrepair and unsafe for human habitation – can never serve the purpose of a proper eviction order, contemplated by Section 26.3 of the Constitution, which provides that “no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances”.

Summary:

I. On 21 September 2011, following a two week discontinuation of electricity and water supply to the buildings, a number of residents of the Schubart Park residential complex, situated in the City of Tshwane Metropolitan Municipality, embarked on protest action that rapidly turned violent. The law enforcement authorities attempted to control the situation by removing the residents from one of the blocks and restricting access to the building. The removal of the residents from the premises continued and by the end of September more than 700 families had been displaced and were either on the streets or in temporary shelters.

On 22 September 2011, the residents unsuccessfully sought an urgent court order against the City allowing them to re-occupy their homes. The North Gauteng High Court found the buildings to be unsafe and ordered the parties to engage and to reach an amicable agreement on temporary shelter and alternative housing pending the outcome of the enquiry into the possible refurbishment of the complex. The parties were unable to reach a settlement. On 3 October 2011, the High Court made a final order. This required the City to provide temporary housing until the buildings had been refurbished and to relocate the residents into the buildings subsequent to the refurbishment. However, if renovation was not possible and the buildings had to be demolished, the residents were entitled to alternative accommodation.

The residents of the buildings sought leave to appeal this decision. The High Court and Supreme Court of Appeal refused leave to appeal.

II. In the Constitutional Court, the applicants were granted leave to appeal and their appeal was upheld.

In a unanimous judgment by Froneman J, the Court held that the dismissal of the application for immediate restoration of the residents' occupation of their homes could not serve the purpose of an eviction court order required under Section 26.3 of the Constitution. The Constitutional Court held that the High Court should have made it clear that its order operated merely temporarily and that the residents were entitled to return to their homes once it was safe to do so. The High Court orders were set aside and instead the Constitutional Court declared that they did not constitute an order for the residents' eviction as required by Section 26.3 of the Constitution and that the residents were entitled to occupation of their homes as soon as reasonably possible. To give effect to this, the Court directed the residents and the City to engage meaningfully with one another and to report to the High Court on the progress.

Supplementary information:

Legal norms referred to:

- The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998;
- Disaster Management Act 57 of 2002;
- National Building Regulations and Building Standards Act 103 of 1977;
- Regulation A15 of the National Building Regulations and Building Standards Act 103 of 1977;
- Government Notice R 2378 Government Gazette 12780, 12 October 1990;
- City of Tshwane Metropolitan Municipality, Fire Brigade Services By-Laws, published under LAN 267 in *Gauteng Provincial Gazette* 42 of 9 February 2005.

Cross-references:

- *Pheko and Others v. Ekurhuleni Metropolitan Municipality*, *Bulletin* 2011/3 [RSA-2011-3-020] (CCT 19/11; [2011] ZACC 34; 06.12.2011);
- *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v. City of Johannesburg and Others*, *Bulletin* 2008/1 [RSA-2008-1-002] (CCT 24/07; [2008] ZACC 1; 19.02.2008);
- *Tswelopele Non-Profit Organisation and Others v. City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA);
- *Rikhotso v. Northcliff Ceramics (Pty) Ltd and Others* 1997 (1) SA 526 (WLD);

- *Fose v. Minister of Safety and Security, Bulletin* 1997/2 [RSA-1997-2-005] (CCT 14/96; [1997] ZACC 6; 05.06.1997);
- *S v. Boesak, Bulletin* 2001/1 [RSA-2001-1-001] (CCT 01.12.2000; [2000] ZACC 25; 01.12.2000);
- *Hoffmann v. South African Airways, Bulletin* 2000/3 [RSA-2000-3-013], (CCT 17/2000; [2000] ZACC 17; 28.09.2000);
- *Doctors for Life International v. Speaker of the National Assembly and Others, Bulletin* 2006/2 [RSA-2006-2-008] (CCT 12/05; [2006] ZACC 11; 17.08.2006);
- *Albutt v. Centre for the Study of Violence and Reconciliation, and Others, Bulletin* 2010/1 [RSA-2010-1-002] (CCT 54/09; [2010] ZACC 4; 23.02.2012);
- *South African Broadcasting Corp Ltd v. National Director of Public Prosecutions and Others, Bulletin* 2006/3 [RSA-2006-3-011] (CCT 58/06; [2006] ZACC 15; 21.09.2006);
- *Minister of Health and Another NO v. New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae), Bulletin* 2005/3 [RSA-2005-3-009] (CCT 59/04; [2005] ZACC 14; 30.09.2005);
- *Khumalo and Others v. Holomisa, Bulletin* 2002/2 [RSA-2002-2-012] (CCT 53/2001; [2002] ZACC 12; 14.06.2002);
- *The Citizen 1978 (Pty) Ltd and Others v. McBride (Johnstone and Others, Amici Curiae), Bulletin* 2011/1 [RSA-2011-1-003] (CCT 23/10; [2011] ZACC 11; 08.03.2011);
- *South African Transport and Allied Workers Union and Another v. Garvas and Others, Bulletin* 2012/2 [RSA-2012-2-006] (CCT 112/11; [2012] ZACC 13; 13.06.2012);
- *Government of the Republic of South Africa and Others v. Grootboom and Others, Bulletin* 2000/3 [RSA-2000-3-015] (CCT 11/2000; [2000] ZACC 19; 04.10.2000);
- *Port Elizabeth Municipality v. Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) *Butterworths Constitutional Law Reports* 1268 (CC);
- *President of the Republic of South Africa and Another v. Modderklip Boerdery (Pty) Ltd and Others (Agri SA and Others, Amici Curiae), Bulletin* 2005/1 [RSA-2005-1-003] (CCT 20/04; [2005] ZACC 5; 13.05.2005);
- *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae), Bulletin* 2009/2 [RSA-2009-2-007] (CCT 22/08; [2009] ZACC 16; 10.06.2009);

- *Abahlali baseMjondolo Movement SA and Another v. Premier of the Province of KwaZulu-Natal and Others, Bulletin* 2009/3 [RSA-2009-3-019] (CCT 12/09; [2009] ZACC 31; 14.10.2009);
- *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another, Bulletin* 2011/3 [RSA-2011-3-019] (CCT 37/11; [2011] ZACC 33; 01.12.2011);
- *Occupiers of Saratoga Avenue v. City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9.

Languages:

English.



Identification: RSA-2012-3-019

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 09.10.2012 / **e)** CCT 69/12; [2012] ZACC 25 / **f)** Children's Institute v. Presiding Officer of the Children's Court, District of Krugersdorp and Others / **g)** www.saflii.org/za/cases/ZACC/2012/25.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Appeal, decision of High Court / Civil procedure, intervention, non-party, *amicus curiae* / High Court, Rules of Procedure / High Court, powers / Evidence, admissibility, from *amicus curiae* / Procedure, civil / *Amicus curiae*, procedure.

Headnotes:

Rule 16A of the Uniform Rules of Court permits an *amicus curiae* (a “friend of the court” who intervenes in a particular matter to assist a court but is not a party to the litigation) to adduce evidence in a High Court.

Summary:

I. The applicant, the Children's Institute, applied to be admitted as *amicus curiae* in proceedings before the South Gauteng High Court, Johannesburg (High Court), in a matter determining whether the caregivers of a minor orphan were entitled to a foster child grant from the State. The Children's Institute then applied to adduce evidence about the wider problem illustrated by the minor orphan's case. The High Court concluded that Rule 16A of the Uniform Rules of Court does not permit *amici curiae* to adduce evidence.

The Children's Institute challenged this decision. Its application was not opposed.

II. The Constitutional Court unanimously reversed the High Court's finding. The Court held that Rule 16A, properly interpreted, permits *amici curiae* to adduce evidence in High Courts, subject to the discretion of the court. This was evident from the text of the Rule (which amongst other things grants courts a wide discretion in determining the "terms and conditions" upon which *amici curiae* may be admitted). The Constitutional Court highlighted the important role that *amici* play in arguing on behalf of vulnerable litigants and in promoting and protecting the public interest by ensuring that courts are well-informed. Both these considerations militate in favour of allowing *amici curiae* to adduce evidence of their own in appropriate circumstances.

In an aside, the Court noted that even if Rule 16A were silent on the question of evidence, Section 173 of the Constitution empowers courts to regulate their own process, which includes the power to allow an *amicus curiae* to adduce evidence where it is in the interests of justice to do so.

Cross-references:

- *Governing Body, Rivonia Primary School and Another v. MEC for Education: Gauteng Province and Others (Equal Education and Another as Amici Curiae)* 2012 (5) *Butterworths Constitutional Law Reports* 537 (GSJ);
- *Wesbank, A Division of FirstRand Ltd v. Papier (National Credit Regulator as Amicus Curiae)* 2011 (2) *South African Law Reports* 395 (WCC);
- *Koyabe and Others v. Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* [2009] ZACC 23; 2010 (4) *South African Law Reports* 327 (CC);
- *De Gree and Another v. Webb and Others (Centre for Child Law, University of Pretoria, Amicus Curiae)* 2006 (6) *South African Law Reports* 51 (WLD);

- *S v. Engelbrecht (Centre for Applied Legal Studies intervening as Amicus Curiae)* 2004 (2) *South African Criminal Law Reports* 391 (WLD);
- *In re Certain Amicus Curiae Applications: Minister of Health and Others v. Treatment Action Campaign and Others* [2002] ZACC 13; 2002 (5) *South African Law Reports* 713 (CC).

Languages:

English.

**Identification: RSA-2012-3-020**

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 29.11.2012 / **e)** CCT 25/12; [2012] ZACC 28 / **f)** Giant Concerts CC v. Rinaldo Investments (Pty) Ltd and Others / **g)** <http://41.208.61.234/uhtbin/cgiisirs/20130104150045/SIRSI/0/520/J-CCT25-12> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi**.
4.7.2 Institutions – Judicial bodies – **Procedure**.

Keywords of the alphabetical index:

Asset, public, sale, tender / Contract, public law / Legal interest, criteria / Public contract, tender, obligation / *Locus standi*, constitutional / *Locus standi*, common law / *Locus standi*, legal interest, direct.

Headnotes:

Constitutional own-interest standing is broader than traditional common law standing. The own-interest litigant must however show that his or her rights or interests are directly affected by the challenged law or conduct. The interest must be real and not hypothetical or academic. Each case depends on its own facts. When a party has no standing, it is not necessary to consider the merits, unless there is indication of fraud or other gross irregularity in the conduct of a public body.

Summary:

I. In 2003, through a law allowing a municipality to sell land by private sale rather than a public tender, the Ethekwini Municipality sold prime property in the city of Durban to Rinaldo Investments (Pty) Ltd (Rinaldo) as part of its plan to promote the city as an international destination for film production. Rinaldo is a property-holding company ultimately controlled by film-maker Mr Anant Singh. The applicant, Giant Concerts CC (hereinafter, "Giant"), objected to the proposed sale and the Municipality rejected the objection.

Giant asked the KwaZulu-Natal High Court to set aside the sale. The High Court decided in favour of Giant, holding that the decision was unlawful, procedurally unfair and unreasonable. It declared the agreement between the Municipality and Rinaldo void.

On appeal, the Supreme Court of Appeal reversed the finding of the High Court. It found that Giant had failed to establish legal standing to challenge the decision to sell the land to Rinaldo since it had not shown a sufficient interest in the subject matter of the dispute. Giant claimed to act in its own interest in terms of Section 38.a of the Constitution.

II. In a unanimous judgment, Cameron J noted that Giant did not claim to act in the public interest or on behalf of a group or association or anyone who was not able to bring proceedings themselves (Section 38.b to 38.e of the Constitution). It therefore had to show standing on the basis of its own interest alone. The Court affirmed that constitutional own-interest standing is broader than traditional common law standing. A litigant must nevertheless show that his or her rights or interests are directly affected by the challenged law or conduct.

The Court concluded that even on a broad approach to standing, Giant did not show that it had interests that were capable of being directly affected. This was because Giant never demonstrated that it had any serious commercial interest in the venture. In fact, Giant had failed to establish anything more than a hypothetical or academic interest. The Court found that Giant had no standing.

It held that when a party does not have standing, it is not necessary to consider the substance of the dispute, unless there is at least a strong indication of fraud or other gross irregularity in the conduct of a public body. There was nothing of the kind in the case before it. The appeal was therefore dismissed with costs.

Supplementary information:

Legal norms referred to:

- Section 38 of the Constitution of the Republic of South Africa, 1996.

Cross-references:

- *Ferreira v. Levin NO and Others; Vryenhoek and Others v. Powell NO and Others* [1995] ZACC 13; 1996 (1) *South African Law Reports* 984 (CC); 1996 (1) *Butterworths Constitutional Law Reports* 1 (CC);
- *Minister of Home Affairs v. Eisenberg & Associates: In re Eisenberg & Associates v. Minister of Home Affairs and Others* [2003] ZACC 10; 2003 (5) *South African Law Reports* 281 (CC); 2003 (8) *Butterworths Constitutional Law Reports* 838 (CC);
- *Kruger v. President of Republic of South Africa and Others* [2008] ZACC 17; 2009 (1) *South African Law Reports* 417 (CC); 2009 (3) *Butterworths Constitutional Law Reports* 268 (CC);
- *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* [2001] ZACC 19; 2001 (3) *South African Law Reports* 1151 (CC); 2001 (7) *Butterworths Constitutional Law Reports* 652 (CC).

Languages:

English.

**Identification: RSA-2012-3-021**

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 10.12.2012 / **e)** CCT 34/12; [2012] ZACC 29 / **f)** National Credit Regulator v. Opperman and Others / **g)** www.constitutionalcourt.org.za/Archimages/20207.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.20 General Principles – **Reasonableness**.
 3.22 General Principles – **Prohibition of arbitrariness**.

5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation.**

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

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

Keywords of the alphabetical index:

Property, deprivation / Statute, interpretation / Limitation, right / Credit, illegal, forfeiture, proportionality / Property, forfeiture, proportionality.

Headnotes:

The compulsory cancellation or forfeiture of the right of a creditor to reclaim money paid under an unlawful agreement, without amelioration by judicial discretion, violates the right not to be arbitrarily deprived of property in Section 25.1 of the Constitution.

Summary:

I. The Western Cape High Court declared invalid Section 89.5.c of the National Credit Act. This order was subject to confirmation by the Constitutional Court.

Mr Opperman lent Mr Boonzaaier R 7 million. Section 40 and 42 of the National Credit Act (hereinafter, "NCA") requires that Mr Opperman be registered as a credit provider in order to do so. He was not registered and was unaware of the requirement. The agreement was thus unlawful. Section 89.5.a NCA requires a court to declare the agreement void.

Section 89.5.c NCA provides that a court must order that all purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered in terms of that agreement are either cancelled or forfeited to the state. The High Court interpreted this to mean that any right the credit provider would have had to claim the return of money paid or goods delivered must be cancelled or forfeited to the state and this included the common law right to restitution. The High Court found this violated the right not to be arbitrarily deprived of property and therefore constitutionally invalid.

II. The Constitutional Court, in a majority judgment by Van der Westhuizen J, agreed with the High Court interpretation and held that the provision leaves no discretion to a court to keep any common law or other restitution claim intact. The provision compels a court to declare the agreement void and order that the

unregistered credit provider's right to claim restitution be cancelled or forfeited to the state. The court's usual discretion to grant restitution to prevent injustice or to satisfy the requirements of public policy is therefore removed.

The right to restitution of money paid, based on unjustified enrichment, is property under Section 25.1 of the Constitution. By removing the unregistered credit provider's restitution claim, the NCA deprives him of property. The Court went on to find this deprivation was arbitrary because it lacked sufficient reason. The Court found that the means are disproportionate to its purpose. There are less restrictive means to achieve the purpose provision and therefore the provision does not constitute a reasonable and justifiable limitation of the right as provided for in Section 36 of the Constitution.

The Court held that the provision results in arbitrary deprivation of property in breach of Section 25.1 of the Constitution and therefore confirmed the order of the High Court.

III. A dissenting judgment by Cameron J (Froneman J and Jafta J concurring) differed from the main judgment on the interpretation of the provision. The main judgment reasoned that the provision was constitutionally invalid only by leaving out of account words essential to its meaning. Section 89.5.c only pertains to rights "under that credit agreement". Because restitution as a remedy exists only where an agreement is void, restitutionary rights "under" an agreement cannot exist, legally or linguistically. The words "under that credit agreement" therefore render the provision ineffectual. The lawmaker in effect misfired. But to regard the provision as ineffectual, taking into account all its words, is simpler and truer than ignoring some words and then finding the provision unconstitutional. On this basis, the dissenting judgment would have refused to uphold the declaration of invalidity.

Supplementary information:

Legal norms referred to:

- Sections 25.1 and 36 of the Constitution.

Cross-references:

- *First National Bank of SA Ltd t/a Wesbank v. Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance, Bulletin 2002/2 [RSA-2002-2-006];*

- *Cherangani Trade and Invest 107 (Pty) Ltd v. Mason NO and Others* [2011] ZACC 12; 2011 (11) *Butterworths Constitutional Law Reports* 1123 (CC).

Languages:

English.



Identification: RSA-2012-3-022

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 11.12.2012 / **e)** CCT 20/12; [2012] ZACC 30 / **f)** Dudley Lee v. Minister for Correctional Services / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.6.10.1.2 Institutions – Executive bodies – Liability – Legal liability – **Civil liability.**
 5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees.**
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
 5.3.12 Fundamental Rights – Civil and political rights – **Security of the person.**
 5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**
 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health.**

Keywords of the alphabetical index:

Appeal Court, procedure / Case-law, development / Causal link, establishment, stringency / Civil liability / Compensation, for damage / Damage, compensation, conditions / Damages, constitutional right / Detention, condition / Detention, humane / Disease, infectious, contracted during detention / Imprisonment, conditions / Prisoner, rights, violation, remedy / Physical integrity, right / Prison, health care, obligation to establish / Causation, hurdle, standard / Causation, chair, establishment / Common law development, need, avenues / Risk, exposure, state, obligation.

Headnotes:

In a claim for damages an applicant must prove that there exists a causal link between the act or omission and the harm suffered in order to establish the liability of the respondent. The test for factual causation should not be applied inflexibly. Hence, where it is impossible for a claimant to prove the source of his infection, a flexible approach may be adopted to whether the causal link is established.

There is a legal duty on the state to provide adequate health care services as part of the constitutional right of all prisoners to conditions of detention that are consistent with human dignity. A prisoner who acquired tuberculosis in prison was held to have proved a causal link with the prison authorities' negligent failure to enforce tuberculosis control measures in the prison.

Summary:

I. The applicant, Mr Lee, contracted tuberculosis (hereinafter, "TB") while imprisoned at Pollsmoor Maximum Security Prison from 1999 to 2004. He sued the Minister for Correctional Services for damages alleging that the poor prison health management resulted in his becoming infected. The High Court upheld the claim on the basis that the prison authorities had failed to take reasonable steps to prevent Mr Lee from contracting TB.

On appeal, the Supreme Court of Appeal (SCA) found that, while the prison authorities were negligent in their failure to maintain reasonably adequate systems to manage the disease, the Minister was not liable because Mr Lee, who could not show how exactly he had acquired TB, had not proved that the presence of reasonable, precautionary measures would have completely eliminated his risk of contracting TB.

II. The majority of the Constitutional Court, per Nkabinde J, with four judges concurring, found that the SCA in applying the test for factual causation adopted rigid deductive logic which necessitated the conclusion that because Mr Lee did not know the exact source of his infection, his claim had to fail. It held that South African law has always recognised that the test for factual causation should not be applied inflexibly. The majority held further that on the approach adopted by the SCA it is unlikely that any inmate will ever be able to overcome the hurdle of causation and that no effective remedy will be available. The majority noted that there is a legal duty on the responsible authorities to provide adequate health care services as part of the constitutional right of all prisoners to conditions of

detention that are consistent with human dignity. In upholding Mr Lee's claim for damages, the majority found a probable chain of causation between the negligent omissions by the prison authorities and Mr Lee's infection with TB.

III. In a dissenting judgment by Cameron J (with three judges concurring), the minority held that it is not possible to conclude, on the existing test at common law, that the negligence of the prison authorities more probably than not caused Mr Lee to contract TB. This is because of the unique characteristics of TB. The minority found that, because it was impossible with TB to prove the source of infection, Mr Lee could not show that in the specific case of his own infection, reasonable measures would probably have saved him from contracting TB. It therefore agreed with the SCA that Mr Lee could not satisfy the existing test for causation. It found however, the resultant injustice in cases such as this, where the disease by its very nature defies the "but-for" inquiry, required the Court to develop the common law. It was unjust that Mr Lee should not have a remedy – but that remedy was for exposure to risk, which is all that Mr Lee was able to prove. However, developing a remedy for exposure to risk was a complex matter. The minority concluded that it would not be possible, on the available evidence, for the Court to consider properly and justly all the avenues of possible development, and their implications for the parties' respective cases. The minority judgment would therefore have remitted the matter to the trial court, for it to consider the manner in which the common law ought to be developed in order to afford Mr Lee a remedy.

The Treatment Action Campaign, Wits Justice Project and Centre for Applied Legal Studies, were admitted as *amici curiae* in this matter.

Supplementary information:

Legal norms referred to:

- Sections 7.2, 27, 34 and 35 read with Sections 172 and 173 of the Constitution of the Republic of South Africa;
- Sections 2.a and 2.b and 12 of the *Correctional Services Act* 111 of 1998;
- *The Standing Correctional Orders* compiled to give effect to the *Correctional Services Act* 111 of 1998;
- Rule 31 of the Constitutional Court Rules.

Cross-references:

- *Administrateur, Natal v. Trust Bank van Afrika Bpk* 1979 (3) *South African Law Reports* 824 (A);

- *Barker v. Corus UK Ltd; Murray v. British Shipbuilders (Hydrodynamics) Ltd and Others; Patterson v. Smiths Dock Ltd and Another* [2006] UKHL 20, [2006] 2 *WLR* 1027;
- *Betlane v. Shelley Court CC* [2010] ZACC 23; 2011 (1) *South African Law Reports* 388 (CC); 2011 (3) *Butterworths Constitutional Law Reports* 264 (CC);
- *Carmichele v. Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*, *Bulletin* 2001/2 [RSA-2001-2-010];
- *Everfresh Market Virginia (Pty) Ltd v. Shoprite Checkers (Pty) Ltd* *Bulletin* 2011/3 [RSA-2011-3-016];
- *F v. Minister of Safety and Security and Others*, *Bulletin* 2011/3 [RSA-2011-3-023];
- *Fairchild v. Glenhaven Funeral Services Ltd and Others; Fox v. Spousal (Midlands) Ltd; Matthews v. Associated Portland Cement Manufacturers (1978) Ltd and Others* [2002] UKHL 22, [2003] 1 AC 32;
- *Herskovits v. Group Health Cooperative of Puget Sound* 99 Wash.2d 609, 664 P.2d 474 (1983);
- *In re Certain Amicus Curiae Applications: Minister of Health and Others v. Treatment Action Campaign and Others*, *Bulletin* 2002/2 [RSA-2002-2-013];
- *International Shipping Co (Pty) Ltd v. Bentley* 1990 (1) *South African Law Reports* 680 (A);
- *Kakamas Bestuursraad v. Louw* 1960 (2) *South African Law Reports* 202 (A);
- *Kruger v. Coetzee* 1966 (2) *South African Law Reports* 428 (A);
- *Lee v. Minister of Correctional Services* 2011 (6) *South African Law Reports* 564 (WCC);
- *McGhee v. National Coal Board* [1973] 1 *WLR* 1, [1972] 3 *All ER* 1008 (HL);
- *Minister of Correctional Services v. Lee* 2012 (3) *South African Law Reports* 617 (SCA);
- *Minister of Finance and Others v. Gore* NO 2007 (1) *South African Law Reports* 111 (SCA);
- *Minister of Justice v. Hofmeyr* 1993 (3) *South African Law Reports* 131 (AD);
- *Minister of Police v. Skosana* 1977 (1) *South African Law Reports* 31 (A);
- *Minister of Safety and Security and Another v. Carmichele* 2004 (3) *South African Law Reports* 305 (SCA);
- *Minister of Safety and Security v. Van Duivenboden* 2002 (6) *South African Law Reports* 431 (SCA);
- *Minister van Polisie v. Ewels* 1975 (3) *South African Law Reports* 590 (A);
- *Nyathi v. MEC for Department of Health, Gauteng and Another*, *Bulletin* 2008/2 [RSA-2008-2-007];

- *Olitzki Property Holdings v. State Tender Board and Another* 2001 (3) *South African Law Reports* 1247 (SCA);
- *Phillips and Others v. National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) *South African Law Reports* 505 (CC); 2006 (2) *Butterworths Constitutional Law Reports* 274 (CC);
- *Prince v. President, Cape Law Society, and Others* [2000] ZACC 28; 2001 (2) *South African Law Reports* 388 (CC); 2001 (2) *Butterworths Constitutional Law Reports* 133 (CC);
- *Rail Commuters Action Group and Others v. Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) *South African Law Reports* 359 (CC); 2005 (4) *Butterworths Constitutional Law Reports* 301 (CC);
- *Rutherford v. Owens-Illinois Inc* 941 P.2d 1203 (Cal.1997);
- *S v. Shaik and Others*, *Bulletin* 2007/3 [RSA-2007-3-012];
- *S v. Van As en 'n Ander* 1967 (4) *South African Law Reports* 594 (AD);
- *Sanderson v. Hull* [2008] EWCA Civ 1211 (CA);
- *Satchwell v. President of the Republic of South Africa and Another* [2003] ZACC 2; 2003 (4) *South African Law Reports* 266 (CC); 2004 (1) *Butterworths Constitutional Law Reports* 1 (CC);
- *Sidumo and Another v. Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; 2008 (2) *South African Law Reports* 24 (CC); [2007] 12 *Butterworths Labour Law Reports* 1097 (CC);
- *Sindell v. Abbott Laboratories et al*; *Rogers v. Rexall Drug Company et al* 26 Cal.3d 588, 607 P.2d 924, 163 Cal.Rptr. 132 (1980);
- *Siman & Co (Pty) Ltd v. Barclays National Bank Ltd* 1984 (2) *South African Law Reports* 888 (AD);
- *Smith, Hogg and Company, Limited v. Black Sea and Baltic General Insurance Company, Limited* 1940 AC 997;
- *Smith v. Auckland Hospital Board* [1965] NZLR 191;
- *Summers v. Tice et al* 33 Cal.2d 80, 199 P.2d 1 (1948);
- *Van der Spuy v. General Council of the Bar of South Africa (Minister of Justice and Constitutional Development, Advocates for Transformation and Law Society of South Africa Intervening)* [2002] ZACC 17; 2002 (5) *South African Law Reports* 392 (CC); 2002 (10) *Butterworths Constitutional Law Reports* 1092 (CC);
- *Wilsher v. Essex Area Health Authority* [1988] AC 1074 (HL).

Languages:

English.



Identification: RSA-2012-3-023

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 18.12.2012 / **e)** CCT 109/12; [2012] ZACC 31 / **f)** Ramakatsa and Others v. Magashule and Others / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.3.3 General Principles – Democracy – **Pluralist democracy.**
 4.5.10 Institutions – Legislative bodies – **Political parties.**
 5.3.29 Fundamental Rights – Civil and political rights – **Right to participate in public affairs.**
 5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**

Keywords of the alphabetical index:

Democracy, participatory / Election, candidate / Political party, democratic functioning / Political party, democratic organisation / Political party, democratic procedure / Political party, member, list, renewal / Political party, membership, conditions / Political party, inner democracy.

Headnotes:

Constitutions and other rules of political parties must be consistent with the Constitution in regulating their internal affairs, political parties must facilitate the exercise of political rights entrenched in the Constitution.

The Constitution provides that every citizen has the right to participate in the activities of, or recruit members for a political party; and to campaign for a political party or cause (Section 19 of the Constitution). Hence the facilitation of any political party's policies and organisation or internal affairs should be conducted in a manner that has regard to the effect of this right and within the ambit of the powers conferred by this provision.

Summary:

I. South Africa has a closed-list multi-party proportional representation electoral system. Participating political parties compile a list of delegates to represent them in Parliament. Pursuant to compiling the list, a political pay

may hold branch or other meetings to nominate individuals to represent it in the party's provincial conference, where delegates vote for nominees to represent them in the party's national conference, where the list of those who will secure the seats in Parliament is actually compiled.

The appellants, acting in their personal interests and also in the interests of a class of members of the African National Congress (hereinafter, "ANC") and voters resident in the Free State province, approached the Free State High Court for an order setting aside the ANC provincial conference held in the Free State, in June 2012, including all decisions and resolutions taken during the conference. In addition, they asked for rescission of the decision by the ANC to recognise the provincial executive committee (PEC) elected at the conference.

The High Court dismissed the application on procedural grounds, which included: the improper publication of the notice of motion without court authorization; not properly distributing the papers to parties cited in the application; failing to join as parties branches where there had been irregularities as well as the relevant provincial executive committee; and failing to exhaust remedies internal to the ANC.

The appellants approached the Constitutional Court directly on two issues: whether their rights under the ANC Constitution had been infringed by the irregularities and whether their constitutional right to participate in the activities of political parties had not been given effect to.

II. The Constitutional Court in a majority judgment, by Moseneke DCJ and Jafta J, with five judges concurring, held that constitutions and other rules of political parties must be consistent with the Constitution of the Republic. They held further that in regulating their internal affairs, political parties must facilitate the exercise of political rights entrenched in the Constitution.

The majority found that the applicants proved irregularities in the preparation process leading up to the provincial conference. These amounted to a violation of the applicants' right to participate in the activities of the ANC as well as a breach of the ANC's own constitution and its membership audit guidelines. These irregularities nullified the provincial conference.

III. A minority judgment by Froneman J, with whom two judges concurred (except for paragraph [39] to [45] of the Judgment), held that the ANC had, on the test applying to deciding matters on affidavits only (without live evidence), met the case brought by the applicants. The applicants, in their founding papers, had alleged that the ANC had failed to resolve any of the grievances

brought to their attention through the ANC's internal remedies. The ANC had proved that it had taken steps to deal with the grievances and, Froneman J held, it was not for the Court to determine whether the steps taken were adequate or not.

Supplementary information:

Legal norms referred to:

- Sections 1.d, 19, 19.3.a, 36.1, 39.1, 46.1.d and 105.1.d, 172.1 of the Constitution of the Republic of South Africa;
- Annexure A of Schedule 6 of the Constitution of the Republic of South Africa;
- Part 3 of the Electoral Act 73 of 1998;
- Schedule 3, Item 1.1 of Part 3 of the Electoral Act 73 of 1998.

Cross-references:

- *August and Another v. Electoral Commission and Others*, Bulletin 1999/1 [RSA-1999-1-002];
- *Head of Department: Mpumalanga Department of Education and Another v. Hoërskool Ermelo and Another*, Bulletin 2009/3 [RSA-2009-3-020];
- *Natal Rugby Union v. Gould* 1999 (1) *South African Law Reports* 432 (SCA);
- *Turner v. Jockey Club of South Africa* 1974 (3) *South African Law Reports* 633 (A);
- *Saunders v. Committee of the Johannesburg Stock Exchange* 1914 *Witwatersrand (Transvaal) Local Division* 112;
- *Plascon-Evans Paints Ltd v. Van Riebeeck Paints (Pty) Ltd* 1984 (3) *South African Law Reports* 623 (AD);
- *Administrator, Transvaal and Others v. Theletsane and Others* 1991 (2) *South African Law Reports* 192 (A).

Languages:

English.



Spain

Constitutional Court

Important decisions

Identification: ESP-2012-3-006

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 06.11.2012 / **e)** STC 138/2012 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), 286, 28.11.2012; www.boe.es/boe/dias/2012/11/28/pdfs/BOE-A-2012-14602.pdf / **h)** <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23106>; CODICES (Spanish).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Adoption, homosexual couple / Marriage, couple, same-sex / Marriage, definition / Same sex and different sex couples, non-discrimination / Homosexuality.

Headnotes:

The regulation of same-sex marriage does not violate the Constitution. The possibility of adoption by same-sex couples is not against the best interests of the child.

Summary:

I. Law 13/2005 amended the Civil Code so as to recognise same-sex marriage. The new regulation also provides equal rights to same-sex couples, including, among them, the right to adopt.

II. The Constitutional Court upheld the constitutionality of the regulation. The Court held that allowing same-sex couples to marry does not violate the principle of equality guaranteed by Article 14 of the Constitution. The “excess of equality”, as pointed out by the plaintiff, does not infringe Article 14 of the Constitution as this Article establishes no right to unequal treatment.

The Court considered that the regulation does not provide for normative discrimination and that it does not lack a rational explanation of the reasons for its adoption. Accordingly, the Court considered that the law does not contravene the prohibition of arbitrariness.

The Court favoured an evolutionary definition of the concept of marriage. In view of these grounds, the ruling highlighted that the questioned amendment does not render marriage unrecognisable to Spanish society. In the Court’s view, the relevant regulation is set within the constitutional framework, striving towards promotion of the liberty and equality of individuals. It is also in line with the Constitutional Court’s interpretation of the non-discrimination clause.

The Court held that, under the constitutional freedom of configuration, Parliament had modified the regulation of marriage without changing its basic nature or violating the rights of heterosexuals. The amendment had not modified the requisites and effects of civil marriage among different sex couples, nor did it deny the constitutional right to marry.

Respecting the right of same-sex couples to adopt children, the Court upheld the law. The Court stated that the best interests of the child are considered by all means in the adoption procedure, which evaluates applicants regardless of their sexual orientation. The Court held that the constitutional duty to protect children is not infringed by the possibility of same-sex adoption, either by a homosexual individual or by a married same-sex couple jointly.

III. Three Judges filed dissenting opinions (Judges Ollero, González and Rodríguez). Judge Aragón filed a concurring opinion.

Cross-references:

- Constitutional Court (Spain), STC 32/1981, 28.07.1981;
- European Court of Human Rights, *Schalk and Kopf v. Austria*, 22.11.2010;
- Privy Council (Canada), *Edwards v. Canada* (Attorney General), 18.10.1929.

Languages:

Spanish.



Switzerland

Federal Court

Important decisions

Identification: SUI-2012-3-007

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 26.04.2012 / **e)** 2C_459/2011 / **f)** X. v. the Migration Office and State Council of the canton of Basel-Landschaft / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 138 I 246 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

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

3.18 General Principles – **General interest.**

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

Keywords of the alphabetical index:

Asylum, procedure / Asylum, application, rejection / Social aid, asylum-seeker / Asylum, employment, gainful, right to engage in / Residence, authorisation, humanitarian grounds.

Headnotes:

Article 8 ECHR, Articles 14 and 43 of the Asylum Law (LAsi); Article 83 of the Federal Law on Foreign Nationals (LEtr); conformity with the ECHR of the prohibition on engaging in gainful employment during the asylum procedure.

The prohibition to engage in gainful employment pursuant to Article 43 of the Asylum Law is in principle compatible with the right to respect for private life enshrined in Article 8 ECHR (recitals 2 and 3). In exceptional circumstances, this provision may nevertheless give rise to a right to have one's status settled (temporary admission or recognition of a hardship case within the meaning of the asylum legislation) or to the granting of a work permit when an asylum-seeker under a removal order has been a

resident in Switzerland for a long time and has for years had recourse to emergency aid (recital 3.3.1); examination of these conditions in this specific case (recital 3.3.2 and 3.3.3).

Summary:

X. (born in 1962) is a national of Bangladesh. In 1995 he applied for asylum in Switzerland. On 19 March 1998, the Asylum Appeals Board dismissed his appeal against the negative decision of the Federal Office for Refugees of 4 September 1997 and in 1998, it dismissed his application for review. X. then applied unsuccessfully for reconsideration of the negative decision, which was accompanied by a removal order.

In 2007, he asked the Migration Office of the canton of Basel-Landschaft to grant him a residence permit on humanitarian grounds. This office informed him that it did not intend to submit a favourable opinion to the relevant federal office. In 2009, X. applied for a work permit so that he no longer needed to have recourse to emergency aid. The Migration Office and subsequently on appeal, the State Council of the canton of Basel-Landschaft dismissed his application on 20 August 2009 and 10 August 2010 respectively. The Basel-Landschaft Cantonal Court subsequently upheld the State Council's decision.

The Federal Court dismissed the public-law appeal filed by X.

For the first three months following the filing of an application for asylum, applicants do not have the right to engage in gainful employment (Article 43.1 LAsi). The canton with jurisdiction can subsequently grant them permission to do so, provided the conditions set out in the asylum legislation are met. This authorisation to work is provisional and limited to the probable duration of the asylum procedure when the applicant is legally entitled to remain in Switzerland.

Where an application for asylum has been rejected by an immediately enforceable decision, the authorisation to engage in gainful employment expires at the end of the time-limit given to the applicant for leaving the country. This applies even if the person has made use of an extraordinary procedure or an appeal and if execution of the removal order has been stayed (Article 43.2 LAsi). In the context of a hardship case, the canton can, with the agreement of the relevant federal office, grant the applicant a residence permit that allows him to engage in gainful employment. The following conditions have to be met: the person concerned must have been living in Switzerland for at least five years since the filing of his application for asylum, the

authorities must always have been informed of his place of residence, and the case must be one of hardship on the grounds that the person is well integrated into Swiss society. This rule applies both to ongoing procedures and to procedures that have been closed.

If execution of the removal order or deportation is impossible or unlawful, or cannot be reasonably demanded on technical or legal grounds that have nothing to do with the person concerned, the relevant federal office may grant temporary admission. This is an alternative measure, which does not constitute authorisation to stay in the country. Persons admitted on a temporary basis may secure an authorisation to engage in gainful employment from the cantonal authorities.

The applicant's asylum request was rejected. He was urged to leave the country but has to date failed to do so. The possibility of engaging in gainful employment in Switzerland expired at the same time as the time-limit he was given to leave the country (Article 43.2 LAsi). Given that the cantonal and federal authorities consider that it is possible to enforce the applicant's removal (provided he co-operates), the canton of Basel-Landschaft was not prepared to ask the federal office to consider his case as a hardship case or to grant him temporary admission because it was impossible to return him to his country of origin. The relevant rules concerning access to the labour market do not therefore apply.

Article 43 LAsi is in principle compatible with Article 8 ECHR. According to established practice, the European Convention on Human Rights does not give foreign nationals either the right to enter or reside in a member state's territory or a right to a specific residence permit. It does not preclude states parties from regulating the question of residence in their territory or from putting an end, where appropriate, to the presence of foreign nationals while taking account of their rights to respect for family and private life. States may also take into account the question of whether the person is legally present in the country or not. The right to organise one's life as one wishes, relied on by the applicant, is subject to a reservation under Swiss legislation on the residence of foreign nationals. Admittedly, the possibility of engaging in gainful employment also implies the opportunity to forge ties with other people and to earn one's living so as to be able to organise one's private life as one thinks right. Asylum-seekers whose applications have been rejected do not have a legal right of residence. The refusal to grant them permission to engage in gainful employment does not therefore, as a rule, come within the sphere of protection offered by Article 8 ECHR.

Such a right would in any case not be an absolute right: pursuant to Article 8.2 ECHR, a violation of the established legal right protected by Article 8.1 ECHR is admissible, provided it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The Convention requires that the private interests in granting an authorisation to stay in the country be weighed against the public interests in refusing such authorisation. The application of a restrictive immigration policy must also be taken into account as a public interest worthy of protection. Such a restriction is admissible in light of Article 8.2 ECHR, taking into account the need for a balanced relationship between Swiss nationals and foreign nationals, the establishment of conditions conducive to the integration of foreigners already established in Switzerland and the improvement of the structure of the labour market. Unlike asylum-seekers legally entitled to remain in Switzerland during the asylum procedure, asylum-seekers whose asylum application has been rejected are not authorised to stay in the country. The prohibition on working contained in Article 43.2 LAsi underlines the obligation to leave the country. Granting an asylum-seeker whose application has been rejected permission to work would be incompatible with the removal order. The prohibition on working contained in Article 43.2 LAsi is a measure intended to help enforce the consequences of the removal order and not make unlawful residence in Switzerland more attractive. In hardship cases (Article 14.2 LAsi) and when the applicant's removal or departure seems objectively impossible, there are special provisions permitting the persons concerned to engage in gainful employment.

In such circumstances, the proportionality of the refusal to grant authorisation to work after a removal order has been issued only appears to be problematic in exceptional circumstances under Article 8 ECHR. Persons whose presence in the country has not been legally settled or who do not have a permanent right to stay in the country but whose presence is *de facto* accepted as a reality or must be tolerated for objective reasons, may also, in exceptional situations, rely on the protection of private and family life in accordance with the case-law of the European Court of Human Rights.

The applicant has been in Switzerland for 15 years. For over 13 years, he has been unable to engage in gainful employment. Since 1 January 2008, he has therefore been obliged to live on emergency aid, a form of assistance that covers only the basic necessities and is intended to serve only as

temporary assistance until the removal order has been enforced. This prohibition on working now infringes the applicant's right to private life to such an extent as to call into question – in principle justified – the purpose and aim of the rule in Article 43.2 LAsi.

The Federal Court noted that execution of the removal order remained possible and that, as a matter of overriding public interest, the applicant should not be given the opportunity to prevent that happening by being allowed to engage in gainful employment. However, it also pointed out that the relevant cantonal and federal authorities should do their utmost to enforce the removal order. If the removal order is not enforced within a few months, it will be necessary to consider the possibility of temporary admission or if the conditions are met, to recognise the applicant's case as one of hardship. If the authorities fail once again to enforce the removal and the applicant's situation cannot be settled by recognising it as a hardship case or by granting temporary admission, his private interest to dispense with emergency aid and engage in gainful employment outweighs the public interest to not make illegal residence in Switzerland attractive by giving illegal migrants the right to work. It is, in principle, justified that the applicant should not be able to profit from his 13 years' unlawful residence in Switzerland. However, the prohibition on working and the ensuing dependence on social aid must also meet the conditions laid down in treaty law. They must also be proportionate. This no longer applies to the applicant after 13 years' presence in Switzerland, given that the enforcement of his deportation cannot objectively be regarded as an immediate possibility.

Languages:

German.



Identification: SUI-2012-3-008

a) Suisse / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 25.05.2012 / **e)** 1C_439/2011 / **f)** B. v. the City of Zurich and the Prefecture of the District of Zurich / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 138 I 256 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Data, personal, processing, police investigation / Data, personal, processing / Data, storage / Data, personal, deletion, right / Data, destruction / Database.

Headnotes:

Saving of personal data in the computer system of the Zurich police (POLIS); Article 13.2 of the Federal Constitution (right to protection of personal data), Article 8 ECHR.

Fundamental rights affected (recital 4).

Saving and deletion of personal data in the POLIS information system (recital 5).

Saving personal data is compatible with the Constitution and the European Convention on Human Rights. There is no serious breach of fundamental rights (destruction of personal data, reference to the dropping of the investigation) and there is an overriding public interest in solving the crime (rapid access to available data in the event of fresh information and discoveries; recital 6).

Summary:

In December 2000, criminals armed with knives and firearms carried out an attack at a restaurant in Zurich and seriously wounded several persons. The municipal police arrested B., whom it suspected of being involved in the attack. It noted his particulars and recorded them in the POLIS database. B. was released a few days later and the criminal investigation against him was dropped in February 2004.

B. asked the municipal police to delete all the data registered in connection with his arrest. The police announced that B's particulars had been deleted and with regard to the other data concerning him, added a reference to the dropping of the investigation. The remainder of his application was rejected.

B's appeal was dismissed by the relevant municipal and cantonal authorities and subsequently by the Federal Court.

The legislation of the City of Zurich regulates the acquisition, storage and processing of data by the police, as well as the transmission of such data between police departments and to other authorities. The relevant legislation contains provisions relating to management of the POLIS information system. The latter must be used to support the police in performing their duties, promote rationalisation of work processes and contribute to statistical studies. It serves to keep a record of facts that have occurred and measures that have been taken, to prepare reports for the relevant authorities and to document the activities of the police. The law also regulates the right of individuals to check such data and have incorrect information rectified or deleted. It limits the time for which data can be kept. Data must be deleted at the latest when criminal proceedings become time-barred. Decisions to discontinue proceedings or to acquit the accused are recorded and linked to the corresponding data but do not result in their deletion. Data are kept in hope that they may provide useful information for subsequent police investigations. When such data are shared within the police network and combined with new discoveries, they may help to solve crimes not yet elucidated. Without access to stored data, such discoveries would probably not be made. The keeping of data therefore meets a public interest as well as that of the victims and injured parties. The fact that a case has been closed or the accused has been acquitted does not rule out the possibility that the environment of the person registered may still provide useful information.

The storage and processing of personal data in state files entail a restriction of the right to respect for private life safeguarded by Article 8.1 ECHR and Article 13.2 of the Federal Constitution. The data subject may object to long-term storage of his or her data without serious grounds. Their deletion may be demanded, for example, when the person has been mistaken for someone else and mistakenly involved in the investigation. As a rule, data storage must be justified having regard to all the concrete circumstances. First of all, the data must appear able to help solve crimes. Secondly, it is necessary to weigh the various interests. Account must be taken of the seriousness of the breach of fundamental rights, the interests of the injured parties and third parties in the outcome of the investigation, the circle of persons who have access to the data, and the interest in the police carrying out their duties.

The applicant was not involved in the investigation by chance or as a result of mistaken identity. He had access to the data concerning him and did not dispute their accuracy. His particulars were deleted and the decision to drop the investigation can be clearly seen in the information system. There has therefore been no serious restriction of fundamental rights. Nevertheless, personal data and records of the hearings and the investigation have been kept. The facts already date back some time. The applicant's criminal file has been archived and remains accessible, but the data will in any case be removed in about four years' time. The public interest in preventing crime and the victims' interest in keeping the data are irrefutable. The perpetrators of the attack have still not been identified. It is important to preserve details of the context to ensure that any fresh discoveries can rapidly form part of the general overview of what happened. In these circumstances, the Federal Court noted that the public interest in identifying the perpetrators outweighed the applicant's private interest in securing the deletion of the data concerning him.

Languages:

German.



Identification: SUI-2012-3-009

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 03.07.2012 / **e)** 2C_415/2011 / **f)** Les Chemins de Fer Fédéraux (Swiss Federal Railways) CFF v. A. and APG Allgemeine Plakatgesellschaft / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 138 I 274 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.3.5 Constitutional Justice – Jurisdiction – **The subject of review.**
 3.16 General Principles – **Proportionality.**
 3.17 General Principles – **Weighing of interests.**
 5.2 Fundamental Rights – **Equality.**
 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:

Public property, use for advertising purposes / Censorship / Public domain, increased common use / Public domain, use for advertising purposes / Public-law matter / Publicity, restriction / Public service.

Headnotes:

Advertising in stations: a public-law matter; use of the public domain; subject of the appeal, Article 82.a of the Law on the Federal Court (LTF). Freedom of opinion; prohibition of censorship, Articles 16.2 and 35.2 of the Federal Constitution.

Regulation of the right to exceptional use of the public domain, in the narrow sense of the term, and of the extent of such use is a public-law matter within the meaning of Article 82.a LTF (recitals 1.1-1.4).

The display of posters on foreign policy issues is a form of expression that falls within the sphere of protection of freedom of opinion. Swiss Federal Railways (CFF) must comply with fundamental rights (recital 2.2).

The regulations of the CFF stipulate that the public domain, in the narrow sense of the term, may, by way of exception, be used for displaying posters. The CFF can only remove billboards after weighing all the interests involved (including proper use of the public domain). Once the location of all billboards has been determined, only the compliance of the poster itself with control measures may still be considered (recital 2.3).

A general ban on posters on foreign policy issues is inadmissible (recital 3.4). There is nothing reprehensible about the poster in question (recital 3.5).

Summary:

In early 2009, A. instructed *Société Générale d’Affichage* (SGA) to display a poster at two places in the ShopVille-RailCity complex at Zurich railway station as part of an action by the “*Solidarité Palestine*” movement, which opposes settlement of the territories occupied by Israel. The posters were left in place for three days until the CFF ordered that they be removed. The CFF issued an official decision on 28 October 2009 banning the impugned posters. On appeal, the Federal Administrative Court set aside this decision and ordered the CFF to allow the impugned posters.

The CFF lodged an appeal against this decision with the Federal Court, which dismissed it.

In the context of public-law appeals, the Federal Court hears appeals against decisions given in public-law cases. Determining whether a case comes under civil law, criminal law or public law case depends on the legal basis applicable to the dispute. The Federal Court applies various methods but, in principle, none of them outweighs the others. In the instant case, it is the theory of function that must be applied when examining the admissibility of the public-law appeal. This theory holds that a rule comes under public law if it regulates the performance of a public task or the exercise of a public activity, unless the relevant legislation makes this activity subject to private law.

The CFF is, in principle, responsible for performing public-service tasks that necessitate appropriate resources. It is therefore required to make infrastructure available, which includes stations. To this extent, stations are public property directly assigned to the public transport service. The power to use this property and the purpose for which it is used are therefore determined by public law, which may also determine the nature and the extent of any exceptional use. Based on security-related considerations, the appellant company specified the areas to be used for advertising and reserved a right of veto. The subject of the dispute is the intervention by the CFF based on its public-law power to administer public property. This is, therefore, a public-law case that may be the subject of a public-law appeal to the Federal Court.

The appellant company prohibited the display of a poster concerning Israeli-Palestinian policy based on a provision in its regulations stipulating that none of its advertising media may carry messages and publicity concerning sensitive foreign policy issues. Displaying posters related to foreign policy is a form of freedom of opinion and expression protected by Article 16.2 of the Federal Constitution, guaranteeing everyone the right to form, express and spread his or her opinion freely, in principle irrespective of the content of the message.

In order to express opinions, it is often necessary to use public property. Provided the exercise of the fundamental right in question does not constitute exorbitant use of the public domain, there is an unconditional right to use such property, subject to any restrictions provided for by law justified by a public interest and compatible with the principle of proportionality (Article 36 of the Constitution). On the other hand, in the event of more intensive use, the Federal Court initially recognised, in the case of

property subject to common use, the existence of a conditional right to be granted authorisation for increased common use if such authorisation is necessary to ensure the exercise of fundamental rights in the public domain. This claim is subject to conditions as there is, in principle, no right to demand that the state create new amenities to make it possible to exercise fundamental rights. There is also no right to make use of the public domain in a place, at a time and in a manner that have been unilaterally chosen. Moreover, the decision on exceptional use of the public domain must take account of public safety and other public interests. This includes the proper use of existing public amenities, in accordance with their intended purpose, and that of equal access for all interested parties. The authorities must therefore appraise the opposing interests based on objective viewpoints and take proper account of the legitimate need to use the public domain for appeals to public opinion. Authorisation may be subject to charges and conditions but may not depend on the value and degree of importance that the authorities attach to the opinions expressed. On the other hand, prior censorship is prohibited.

The appellant company itself provides, in exceptional cases, for the use of station walls to display posters. It is also responsible for the smooth running of the station and it is its duty to determine the various locations where posters may be displayed. It must decide this by weighing the various interests involved. In addition to the interests of public safety, the proper use of existing public amenities, according to their intended purpose, must be taken into consideration. However, once, as in the instant case, the locations have been determined, the appropriateness of each individual poster can only be examined from the standpoint of public order.

The appellant company has adopted rules on advertising messages. Advertising, irrespective of whether it is commercial or not, is in principle allowed. Advertising and messages concerning sensitive aspects of foreign policy are prohibited. In case of doubt, the parties concerned must contact the CFF, which may at any time demand the removal of a poster that has already been displayed or presented, or impose other restrictions. The impugned poster was prohibited because the message concerned a sensitive foreign policy issue, which constitutes a restriction of the respondent's fundamental right to freedom of expression. This measure must be examined from the standpoint of the conditions set out in Article 36 of the Constitution regarding the restriction of fundamental rights.

The expression of opinions on sensitive foreign policy issues is intended to raise public awareness and encourage people to address the subject and take a political stance. A general ban on such subjects disregards the role of freedom of expression in communicating ideas. It is tantamount to censorship (which is prohibited) and cannot be justified by any public interest. This general and abstract prohibition oversteps its purpose.

Account must also be taken of the fact that the station, as a "city within the city", also claims to be a forum for political communication. The latest news, which may also deal with sensitive issues, is shown on large electronic screens and the walls carry posters on sensitive domestic policy issues. Posters on sensitive foreign policy issues therefore fit readily into this context. In this vast forum of communication, it is difficult to see how posters and other messages on foreign policy issues might pose a threat to law and order or to the fundamental rights of third parties, any more than domestic policy issues. Consequently, a general ban on sensitive foreign policy issues is an inappropriate measure incompatible with equality of treatment.

The text of the poster neither contains any punishable expressions nor is incompatible with legal requirements. It does not incite violence or any other reprehensible action, and does not breach the fundamental rights of third parties. This also applies to the poster itself. Further scrutiny is inadmissible as that would be tantamount to prior censorship.

The fact that some passers-by may not share the opinions expressed on the poster and make that fact known by criticising it vehemently does not justify excluding the communication of ideas, which is protected by freedom of expression, from station premises.

Languages:

German.



"The former Yugoslav Republic of Macedonia" Constitutional Court

Important decisions

Identification: MKD-2012-3-002

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 20.11.2012 / e) U.br.24/2012 / f) / g) / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

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

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.

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

Keywords of the alphabetical index:

Non-discrimination / Religion, association, registration / Religion, free exercise / Religion, religious plurality / Religion, state.

Headnotes:

While the right of every religious subject (i.e. a religious Church, group or community) to registration is guaranteed as part of the exercise of religious rights, it must not violate the religious rights and feelings of the members of religious subjects which have already been registered under the applicable law.

The aim of the legal requirement for a non-identical name and official insignia of religious subjects, including the sources of religious teaching, is to prevent believers being misled and to avoid confusion, incorrect perception and endless legalised division of believers of the same religion into several religious communities or subjects.

These goals are legitimate and necessary to protect the freedoms and rights of the others, to ensure religious tolerance and to prevent religious conflicts.

Summary:

I. The applicants, which comprised the Bektashi religious community (in foundation) and three individuals – Arben Sulejmani from the village of Raven, Gostivar, Abdulmutalip Bekiri from the village of Zdunje, Gostivar, and Taxhudin Idrizi from Tetovo – filed a complaint for the protection of freedoms and rights, claiming they had been discriminated against on the grounds of religious affiliation.

The applicants are citizens of the Republic of Macedonia whose religious affiliation is Bektashism which they have been practicing for a long time within their community. The alleged discrimination against them concerned decisions of the courts (at first instance by Skopje Basic Court II and by the Court of Appeal in Skopje) rejecting their request for registration of the Bektashi religious community.

After the entry into force of the Law on the Legal Status of a Church, Religious Community or Religious Group ("Official Gazette of the Republic of Macedonia", no. 113/2007), they had made several attempts to register their religious community before the competent courts, but without success. With the last decision, which was the subject of the constitutional complaint, the court of first instance had rejected the request for registration for a reason that the name contained the word "Bektashi" which was contained in the name of a religious community which had already been registered – the Ehlibejti Bektashi Religious Group of Macedonia – and that the sources of their religious teaching were not different from those of another registered religious community; the Islamic Religious Community. The Court of Appeal in Skopje upheld the first instance decision.

In their application to the Constitutional Court the applicants contended that the reasons on which the court based its decision to reject the registration of their religious community were arbitrary, discriminatory and contrary to the Law on the Legal Status of a Church, Religious Community or Religious Group. In support of their allegations, they gave the following comparative example: in the list of registered religious subjects in the Republic of Macedonia, the term "Christian" is found in the name of six churches, the term "Christian" was contained in the name of one religious community, and the term "Christian" was contained in the name of two religious groups (or nine religious subjects out of a total of 29 registered ones use the same term in their names, or almost 30% of the registered religious subjects use the same term). Furthermore, the names

of two churches contain the term "Evangelical", and out of a total of seven registered religious communities, two contain the term "Islamic" in their names. The applicants therefore concluded that it was not an obstacle for certain subjects to be registered, although their names contained terms similar to other religious subjects, and argued that the refusal to register their religious community represented discrimination.

II. On the basis of documents and evidence submitted by the applicants, as well as documents the Constitutional Court obtained *ex officio*, the Court established the facts of the case which are detailed in the full text of the decision. It based its legal opinion on the rights to religious freedom and equality, and the prohibition of discrimination in Articles 8.1.1, 9, 16.1 and 19.1.2 of the Constitution, Articles 18 and 29.2 of the Universal Declaration for Human Rights (UDHR), Articles 18 and 26 of the International Covenant on Civil and Political Rights (ICCPR), and Articles 9 and 14 ECHR. The Court also took note of the relevant provisions of the Act on the Legal Status of a Church, Religious Community and Religious Group ("Official Gazette of the Republic of Macedonia", no. 113/2007).

In the Court's view, the refusal to register the Bektashi community was based on reasons envisaged by law – the Law on the Legal Status of a Church, Religious Community and Religious Group – which, in the opinion of the Court, had been properly applied in this concrete case. Namely, under Article 10.1 of the said Law, the name and official insignia of each new church, religious community and religious group should be different from the names and official insignia of churches, religious communities and religious groups which have already been registered.

The Constitutional Court upheld the decision of the first instance court, according to which in addition to the name, the sources of religious teaching are also official insignia of the religious subject, on the basis that the sources of teaching of a religion and the name of the religious subject are essential and immanent characteristics by which the religious subject identifies itself and is recognised in the public.

The Court considered that while the right of every religious subject to registration is guaranteed as part of the exercise of religious rights, it must not violate the religious rights and feelings of the members of already registered religious subjects. Hence, the identification of the applicant for registration with another religious subject that has already been registered may mislead the public and confuse the believers, which is at the same time a violation of their religious feelings.

Every religious subject (whether it is a church, religious community or religious group) should have the right to distinctiveness and recognition in public with its narrow specific identity. If this does not exist, or if competition exists regarding identification, this may create confusion among the public, leading to a situation in which competitiveness, endless parallelism and fragmentation may develop among several such religious subjects.

The aim of the legal requirement for a non-identical name and official insignia of religious subjects, which includes the sources of religious teaching, and the legal determination in Article 9 of the said Law under which the competent registry enters a church, religious community or religious group in the register, if no such church, religious community or religious group has been previously registered, is to prevent believers being misled and to avoid confusion, incorrect perception and endless legalised division of believers of the same religion into several religious communities or subjects. These are goals which, in the opinion of the Court, are quite legitimate since they are necessary to protect the freedoms and rights of others, to ensure religious tolerance and to prevent religious conflicts, as an aspect of the protection of public order which is the responsibility of the State.

Accordingly, the Court, having found that the refusal to register the Bektashi Religious Community had not violated the applicants' freedom of religion and did not constitute discrimination against them on religious grounds, rejected the complaint.

Languages:

Macedonian.



Turkey Constitutional Court

Important decisions

Identification: TUR-2012-3-004

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 11.04.2012 / **e)** E.2011/33, K.2012/54 / **f)** Concrete Review of Article 13 of the Law on Agricultural Reform Concerning Fields in Irrigation Terrains (Law no. 3083) / **g)** *Resmi Gazete* (Official Gazette), 13.10.2012, 28440 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Access to courts, meaning.

Headnotes:

A prohibition on the rendering of any decision by a court or execution office requiring the transfer of property during the application of land reform arrangements, for a period of up to ten years, obstructs access to the courts and violates the right to fair trial.

Summary:

I. Eğil Civil Court asked the Constitutional Court to assess the compliance with the Constitution of the first sentence of Article 13/5 of the Law on Agricultural Reform Concerning Fields in Irrigation Terrains (Law no. 3083). The first sentence of Article 13.5 reads as follows:

“Within the periods mentioned in the first paragraph, no decision requiring a transfer and assignment shall be rendered by courts, directorates of enforcement or bankruptcy.”

The applicant court claimed that land reform arrangements in the wetlands may take up to ten years and the prohibition on the rendering of any decision requiring transfer and assignment of lands subject to the reform arrangements may result in unjustified interference with the right to property and prevent individuals' access to the courts. The court therefore claimed that the first sentence of Article 13/5 of the Law no. 3083 is contrary to Articles 35 and 36 of the Constitution, which guarantee the right to property and the right of access to the courts, respectively.

II. The Constitutional Court stated that the impugned Law aimed to finish land reform arrangements in a short time by prohibiting the transfer and assignment of lands during the reform arrangements. Although the Law included some exceptions to the prohibition of contractual transfers, the ban on the issuance of decisions by courts and execution offices is absolute. Therefore the courts cannot render judgments that require transfer and assignment of lands during the reform procedure, for a period of up to ten years.

The Court held that one of the basic elements of the right to fair trial guaranteed by Article 36 of the Constitution is the right of access to the courts. The right of access to the courts encompasses the right to obtain a judgment which can be executed. The contested provision hinders any individual from obtaining a judgment from the courts although it does not prohibit the bringing of an action. The Court concluded that the alleged provision is contrary to Article 36 of the Constitution since it breaches the right of access to the courts and accordingly annulled it.

Supplementary information:

Article 13 of the Law on Agricultural Reform Concerning Fields in Irrigation Terrains (Law no. 3083) dated 22 November 1984, which includes the impugned rule states as follows:

"Article 13 – The fields whose property and possession belong to real persons and legal persons of private law shall not be transferred or assigned until the completion of expropriation, consolidation, change of fields and distribution or registration of title deeds as the concluding procedure as of the date of publication of the decree by the Council of Ministers in the Official Gazette. These fields shall not be mortgaged and subject of a promise for sale. However, this period of restriction shall not exceed five years. The same procedures shall not be conducted until transition to irrigation following the completion of the irrigation network. As for this restriction, the period shall not be more than five years. However, in case the consolidation efforts in

irrigation fields cannot be concluded within the period of restriction, the period could be extended to a maximum of five years with a view to concluding the efforts with the motion of the Directorate General of Agricultural Reform and ratification by the Ministry of Agriculture and Rural Affairs."

In case real persons and legal persons in private law apply within the period of restriction for selling fields and facilities on the fields, if any, the executive body expropriates the agricultural field and facilities in case of their presence within sixty days in accordance with the provisions of this Law or grants permission for their sale to others within the scope of the principles to be determined by procedural regulations.

Within the period specified above, such fields may be mortgaged to Agricultural Loan Cooperatives and banks.

A value appraisal report to be prepared as a result of proceedings held by the conversion of a mortgage into money is notified to the executive body. The executive body is entitled to object to this report and file a lawsuit. The cost determined as a result of the finalised value appraisal report shall be paid in the case filed as part of the proceedings by converting the mortgage into money, provided that the executive body consents to the procedure. Thus, the field becomes the property of the Treasury. Yet, if no need arises on the part of the executive body, the sale of the field could be permitted. The related principals are regulated by procedural regulations.

Within the periods mentioned in the first paragraph, no decision requiring a transfer and assignment shall be rendered by courts, directorates of enforcement or bankruptcy. Inheritances by succession are out of the scope of this provision. Furthermore, courts shall not render dissolution of partnerships through sales as far as inheritance is concerned.

Languages:

Turkish.



Identification: TUR-2012-3-005

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 31.05.2012 / **e)** E.2011/38, K.2012/89 / **f)** Concrete Review of the Article 49 of the Tax Procedural Law (Law no. 213) / **g)** *Resmi Gazete* (Official Gazette), 13.10.2012, 28440 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

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:

Access to courts, meaning / Act, administrative, judicial review.

Headnotes:

The exclusion of tax payers from bringing an action against the decisions of the valuation commission which have been taken into account in the calculation of real estate tax is contrary to the principle of the rule of law and breaches tax payers' right of access to the courts.

Summary:

I. Bursa 2. Tax Court requested the Constitutional Court to assess the compliance with the Constitution of the first sentence of Article 49.b.3 of the Tax Procedural Law (hereinafter, the "Law"), Law no. 213, which reads as follows:

"The offices, institutions, organisations and relevant neighbourhood and village headmen offices to whom these decisions are communicated may file a suit against these decisions of the valuation commissions at the relevant tax court within fifteen days."

The applicant court stated that the first sentence of Article 49.b.3 of the Law entitles only tax agencies, institutions, organisations and related village or neighbourhood headmen to bring an action against the decisions of the valuation commissions which have been taken into the account in the calculation of real estate tax. However, it excludes tax payers from bringing an action against those decisions. The applicant court argued that the exclusion of taxpayers from bringing an action against decisions of the valuation commission is contrary to the principle of the rule of law and breaches tax payers' right of access to the courts of tax payers.

II. The Constitutional Court observed that the decisions of valuation commissions are administrative acts and tax payers are directly affected by them. Exclusion of taxpayers from bringing an action before the tax court against decisions of valuation commission is contrary to the principle of the rule of law and breaches the right to access to the court of tax payers. Thus the Court ruled that contested provision is contrary to Articles 2 and 36 of the Constitution and annulled it.

III. Judge Mr. Serruh Kaleli issued a separate concurring opinion and Judge Mr. Muammer Topal submitted a dissenting opinion.

Supplementary information:

The recurrent Article 49 of Tax Procedural Law (Law no. 213) amended by Article 1 of Law no. 4751, which includes the rule constituting the subject of case states as follows:

"Determination, notification and finalisation of costs and values belonging to real estate tax

Recurrent Article 49- (Amended: Article 1/4751 dated 3 April 2002)

a. The Ministry of Finance and the Ministry of Public Works shall jointly determine and publish in the Official Gazette the "fees for normal construction cost per square meter" four months before the year in which they shall apply, in accordance with the provisions of Real Estate Tax Law (no.1319) Article 29 and the regulation prepared as per Article 31 of the same Law.

The Union of Chambers of Commerce, Industry, Maritime Trade and Commodity Exchanges of Turkey may file a suit at the Council of State against these fees within fifteen days upon publishing in the Official Gazette.

b. The valuations to be made in every fourth year relating to the minimum level unit valuation of plots and lands by the valuation commissions shall be concluded at least six months before the beginning of the period for assessment and accrual procedures (including the valuations to be made in accordance with the Real Estate Tax Law, Article 33, Clause 8). And those relating to the plots shall be submitted to chambers of commerce and agriculture at province and district centres and to the relevant neighbourhood and village headmen offices and municipalities; those relating to the lands shall be submitted to chambers of commerce and agriculture at province and district centres and to the municipalities against signature.

At the provinces that have a metropolitan municipality, the decisions of the valuation commission shall be submitted against signature to a commission chaired by the governor or an officer acting on behalf of the governor and this commission shall be composed of the provincial treasurer or an officer acting on his behalf, land registry office director to be commissioned by the governor and one representative from each of the chamber of commerce, chamber of certified public accountants and chamber of merchants and craftsmen. This central commission shall examine within fifteen days the decisions communicated to them and shall return the figures determined on foot of the examination back to the relevant valuation commission. If the central commission determines different values and figure, such values and figures shall be taken into consideration by the relevant valuation commission by reevaluating them.

The offices, institutions, organisations and relevant neighbourhood and village headmen offices to whom these decisions are communicated may file a suit against these decisions of the valuation commissions at the relevant tax court within fifteen days. Objections against the rulings of the tax courts may be made at the Council of State within fifteen days.

The finalised minimum unit values for plots and lands shall be announced by their display at a suitable place at the relevant municipalities and headmen offices for a period beginning from the first day of the year of assessment and accrual until the end of May.

As per the four-year period laid down in this clause, the Council of Ministers is authorised either to extend it to eight years or reduce it to two years.

c. According to the clauses above, if a lawsuit is filed at the Council of State or the tax courts, the file shall be deemed consummated with a single defence to be given by the defendant within fifteen days. The Council of State and the tax courts shall conclude these lawsuits within one month at the latest upon the consummation of the file.

d. The Ministry of Finance is authorised to reduce as necessary the time periods relating to the determination of fees for normal construction cost per square meter and minimum level unit values described in clauses (a) and (b)."

Languages:

Turkish.



Identification: TUR-2012-3-006

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 15.06.2012 / **e)** E.2012/24, K.2012/95 / **f)** Concrete Review of Article 42 of the Law on Establishment of Radio and Television Enterprises and their Broadcasting Services (Law no. 6112) / **g)** *Resmi Gazete* (Official Gazette), 13.10.2012, 28440 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Administrative penalty / Licence, revocation.

Headnotes:

The revocation of media service providers' broadcasting licence because of their delay in payment of their debts to the Radio and Television Supreme Council is a disproportionate administrative sanction and contrary to the principle of the rule of law.

Summary:

I. Ankara 17. Administrative Court requested the Constitutional Court to assess the compliance with the Constitution of the phrase "...within two months, the Supreme Council shall resolve to revoke the broadcasting licence of the media service provider..." in Article 42.3 of the Law on Establishment of Radio and Television Enterprises and their Broadcasting Services (hereinafter, the "Law"). Article 42.3 of the Law reads as follows:

3. In case any delay in the payments to be made in accordance with the first and second paragraphs occurs, the respective private media service provider shall be warned within a month and notified to make the payment with its statutory interest. If the payment is not made from the date the warning resolution is served within two months, the Supreme Council shall resolve to revoke the broadcasting licence of the media service provider and the unpaid institutional revenues shall be collected in accordance with the general provisions.

The applicant court argued that although collection of the unpaid revenues was possible in accordance with the general provisions, revocation of broadcasting license of media services providers as an additional administrative sanction is a disproportionate penalty and contrary to the principle of the rule of law.

II. The Constitutional Court observed that the aim of the contested provision was to ensure due payment of institutional revenues to the Supreme Council on time. The Court examined whether the sanction of revoking a broadcasting license is a measure proportionate to the pursued aim. It found that although the stipulated measure was a suitable means to realise the pursued aim of payment of revenues as they fall due, it could not be considered necessary. On the other hand, the Court stated that since the revocation of a broadcasting license deprived the media service provider of the right to function completely and permanently, it cannot be said that a fair balance was struck between the means applied and the aim pursued. Therefore the Court ruled that the principles of proportionality and the rule of law were violated by the contested rule which is contrary to Articles 2 and 36 of the Constitution and annulled it.

Supplementary information:

The Article 42 of Law on Establishment of Radio and Television Enterprises and their Broadcasting Services (Law no.6112) which includes the rule constituting the subject of case is as follows:

“Collection of revenues

ARTICLE 42-

1. Broadcasting licence fees and broadcast transmission authorisation fees shall be collected in equal instalments within six months following the grant of the licence and authorisation document.

2. Television channel, multiplex capacity and radio frequency annual usage fees shall be paid in four equal instalments every year in January, April, July and October in accordance with Article 27.b; and the shares to be allotted from the commercial communication revenues as stipulated in subparagraph (ç) shall be paid by the relevant media service providers on the twentieth of the third month at the latest following the month that those revenues are derived in.

3. In case any delay in the payments to be made in accordance with the first and second paragraphs occurs, the respective private media service provider

shall be warned within a month and notified to make the payment with its statutory interest. If the payment is not made from the date the warning resolution is served within two months, the Supreme Council shall resolve to revoke the broadcasting licence of the media service provider and the unpaid institutional revenues shall be collected in accordance with the general provisions.”

Languages:

Turkish.



Ukraine

Constitutional Court

Important decisions

Identification: UKR-2012-3-013

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 19.09.2012 / **e)** 17-rp/2012 / **f)** Official interpretation of the provisions of Article 61.1 of the Family Code / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Property, joint, spouses / Enterprise, private, property, statutory capital / Marriage, family, rights, obligations, equality.

Headnotes:

The statutory capital and assets of a private enterprise which was formed at the expense of joint co-property is an object of such joint co-property.

Summary:

The applicant, IKIO, a private enterprise, lodged a petition with the Constitutional Court of Ukraine, seeking an official interpretation of the provisions of Article 61.1 of the Family Code (hereinafter, the “Code”). Under this provision, any property, except that excluded from civil circulation, may form an object of spouses’ right to joint co-property (the question had arisen as to whether the statutory capital and assets of a private enterprise are the object of spouses’ right to joint co-property).

Equality of rights and responsibilities in marriage and family entails equity in property relations regulated by the provisions of the Code and the Civil Code (hereinafter, the “CC”).

A central tenet of the property relations of spouses is that property acquired by spouses during the marriage is their joint co-property, irrespective of the

fact that, for valid reasons, one of them may not have been in receipt of earnings or income. It is understood that all goods acquired in marriage, save articles for personal use, form the object of spouses’ right to joint co-property (Article 60 of the Code).

Exercise of the right to joint co-property by spouses is prescribed by Article 63 of the Code. Husbands and wives enjoy equal rights to possess, dispose of, and administer property that belongs to them as joint co-property unless an agreement between them provides otherwise.

The disposal of joint co-property by spouses may occur through its division and separation into parts. The division of property forming part of joint co-property is a ground for acquiring personal property by each of the spouses.

The spouses’ right to partition the property forming the object of spouses’ right to joint co-property is enshrined in Article 69 of the Code. Partition of such property will be made in kind. Goods that may not be divided will be awarded to one of the spouses in the absence of an agreement between them providing otherwise (Article 71.1, 71.2 of the Code). Otherwise, division can be achieved through income transfer or material compensation for the value of his or her shares (Article 364.2 of the CC).

Inheritance is another way of acquiring personal private property by one of the spouses. It includes all the rights and obligations of the deceased, which belonged to him or her on the opening of succession and which were not terminated upon his or her death; rights and obligations that are inextricably linked with the person of the testator are not part of the inheritance (Articles 1218, 1219 of the CC). Any property not inextricably linked with the person of the testator may form part of the inheritance.

Property in the family context falls within two legal regimes: joint co-property of spouses and the personal private property of each spouse. Grounds for acquisition of the right to joint co-property is the legally defined fact of marriage or a man and woman living together as one family; grounds for the acquisition of the right to personal private property of each spouse is the division or separation of the proper share under inheritance and the law.

Under the Constitution, all subjects of the rights of property are equal before the law (Article 13.4); everyone is entitled to own, use and dispose of his or her property; the right to private property is acquired by the procedure determined by law (Article 41.1, 41.2); the legal regime of property is determined exclusively by the laws of Ukraine (Article 92.1.7).

One example of a disposition of property is the right of the owner to use his or her property for entrepreneurial activity, except in cases determined by law; the law may impose conditions for the use of his or her property by an owner for entrepreneurial activity (Article 320 of the CC).

Contributions to the statutory capital and selected assets (funds) may be transferred from joint co-property to the ownership of the private enterprise. Under Article 191 of the CC the enterprise is the sole property complex used for entrepreneurial activity. The enterprise as a single property complex includes all types of property intended for its activities, including plots of land, buildings, equipment, inventory, raw materials and products, claims, debts, the right to a trademark or other identification and other rights, unless otherwise determined by contract or by law. The enterprise as a single property complex is real estate. The enterprise or a part thereof may be the subject of purchase and sale, mortgage, lease and other contracts. Civil rights and obligations may emerge in relation to an enterprise as a single property complex or to part of it. The Constitutional Court presumed that a private enterprise, or a part of such an entity, set up by one of the spouses is a separate object of joint co-property, which includes all types of property, in particular the contribution to statutory capital and assets allocated from their joint co-property.

Languages:

Ukrainian, Russian (translation by the Court).



Identification: UKR-2012-3-014

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 13.12.2012 / **e)** 18-rp/2012 / **f)** Official interpretation of the provisions of Article 37.1.15 of the Law on Execution Proceedings in connection with the provisions of Articles 41.1, 124.5, 129.3.9 of the Constitution, Article 115 of the Commercial and Procedural Code of Ukraine, Article 1.1.3 and 1.1.4, Article 2.2, Article 3.3.7.6 of the Law on Measures Aimed at Ensuring Sustainable Operation of Enterprises of Fuel and Energy Complex / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.7.3 Institutions – Judicial bodies – **Decisions**.
5.1.1.5 Fundamental Rights – General questions – Entitlement to rights – **Legal persons**.

Keywords of the alphabetical index:

Energy company.

Headnotes:

Fuel and energy enterprises have strategic significance for the economy and state security and so it is acceptable for the legislator to establish specific features of legal regulation for the relations within this sphere. The suspension of the execution of court decisions on the collection of liabilities accumulated as a result of partial payments for energy resources from these enterprises, where they are included within the Register of fuel and energy enterprises participating in the process of discharge of liabilities, is a measure aimed at safeguarding vital public interests.

Summary:

Under Article 115 of the Commercial and Procedural Code (hereinafter, the “Code”), decisions, rulings, and resolutions of the Commercial Court which have entered into force are mandatory within the whole territory of Ukraine and are to be executed in the order established by the Law on Execution Proceedings dated 21 April 1999 no. 606-XIV (Law no. 606). The content of Articles 1, 2, 17, 18, 19, 25, 27, 37 and 38 of this Law demonstrates that the enforcement of decisions of the courts of Ukraine is to be carried out on the basis of the execution documents which are grounds for initiating of execution proceedings by the executing officer and the performance of acts of execution. The legislator also set out grounds for the suspension of execution proceedings.

The Constitutional Court noted that suspension of execution proceedings and measures to enforce court decisions imply the postponement of the execution of the decision for a specific period, in accordance with the principle of the rule of law and should be carried out in circumstances and on grounds established by law.

Under Articles 37.1.15 and 39.2.5 of Law no. 606, the execution process must be suspended where a fuel and energy enterprise has been included within the Register of fuel and energy enterprises participating in the process of the discharge of

liabilities (hereinafter, the “Register”) for the period of the procedure of discharge of liabilities by fuel and energy enterprises established by the Law on Measures Aimed at Ensuring Sustainable Operation of Enterprises of Fuel and Energy Complexes dated 23 June 2005 no. 2711-IV (hereinafter, “Law no. 2711”).

The content of Law no. 2711 demonstrates that it was adopted to facilitate the improvement of the financial situation of fuel and energy enterprises, to prevent their bankruptcy and to enhance their attractiveness to investors through measures aimed to decrease and/or spread accounts payable and receivable by means of the application of mechanisms of writing off, mutual settlement of accounts, restructuring and partial payment on conditions provided by Law no. 2711. This provision covers fuel and energy enterprises and other parties which have liabilities to pay or debts accumulated as the result of partial payments for energy resources as defined by Law no. 2711 (preamble, Articles 1.1.1, 1.1.2, 1.1.3, 1.1.4, 1.1.5 and 2.2).

The Constitutional Court therefore concluded that the provisions of Law no. 2711 do not regulate legal relations concerning the discharge of liabilities which is not defined by Article 1.1.4, in particular the discharge of liabilities which does not refer to partial payments for energy resources.

Article 3.3.7.6 of Law no. 2711 states that for the period of participation by a fuel and energy enterprise in the procedure of discharge of liabilities, execution proceedings and measures to enforce decisions on the collection of liabilities accumulated before 1 January 2012 shall be suspended.

Under the legislation of Ukraine, fuel and energy enterprises have strategic significance for the economy and state security. It is therefore, in the Constitutional Court’s view, acceptable for the law to establish specific features of legal regulation of relations within this sphere. The suspension of execution actions concerning the enforcement of court decisions on the collection of liabilities accumulated as a result of partial payments for energy resources from these enterprises, in case of their inclusion within the Register, is a measure aimed at safeguarding vital public interests.

The legislator has also provided, by establishing the mechanism of legal regulation described above, that enforcement action concerning fuel and energy enterprises included within the Register will not be suspended where they are aimed at the enforcement of decisions on the payment of wages, retirement allowance and other payment or compensation due to

an employee in connection with labour relations, compensation for material (property) damage caused by mutilation, other injuries or death, collection of alimony and decisions on the collection of payment of contributions to funds of mandatory state insurance accumulated before 1 January 2011 and liabilities concerning payment of single contribution for mandatory state social insurance to bodies of the Pension Fund of Ukraine (Article 37.3 of the Law no. 606, Article 3.3.7.6 of the Law no. 2711).

The Constitutional Court noted that the list of grounds mentioned above, where enforcement proceedings will not be suspended, is not exhaustive, as fuel and energy enterprises included within the Registry remain the subjects of commercial, labour and other legal relations which are not related to payments for energy resources.

Languages:

Ukrainian, Russian (translation by the Court).



United States of America

Supreme Court

Important decisions

Identification: USA-2012-3-008

a) United States of America / **b)** Supreme Court / **c)** / **d)** 04.12.2012 / **e)** 11-597 / **f)** Arkansas Game and Fish Commission v. United States / **g)** 133 *Supreme Court Reporter* 511 (2012) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Expropriation, compensation / Property, interference, temporary, compensation / Property, taking.

Headnotes:

When government physically takes possession of an interest in property for some public purpose, it has a duty to compensate the owner.

With the exception of permanent physical occupations of property authorised by government and regulations that permanently require property owners to sacrifice all economically beneficial uses of their land, there are no categories of governmental actions that either do or do not constitute takings of private property that will require payment of compensation; instead, courts must employ a case-by-case approach to takings claims, examining closely the facts in each particular case.

A temporary government-induced interference with property is not categorically excluded from examination as to whether it constitutes a compensable taking.

Recurrent flooding that is induced by the government and temporary in duration is not automatically exempt from liability as a compensable taking.

Summary:

I. From 1993 to 2000, the U.S. Army Corps of Engineers changed its pattern of releasing water from a dam it controlled in the State of Arkansas. The water periodically flooded a section of land that was managed by the Arkansas Game and Fish Commission. That management included the harvesting of timber and the operation of a wildlife and hunting preserve.

The Commission sued the U.S. government for compensation, claiming that the flooding constituted a “taking” of property. The “Takings Clause” in the Fifth Amendment to the U.S. Constitution states that private property cannot “be taken for public use, without just compensation.” The Commission maintained that the flooding caused the destruction of timber in its managed area and a substantial change in the character of the terrain, necessitating costly reclamation measures. The Federal First Instance Court upheld the Commission’s claim, ordering the federal government to pay compensation of 5.7 million dollars.

The Federal Circuit Court of Appeals reversed the first instance court’s decision. The Court of Appeals noted that it is possible for temporary government action to give rise to an actionable takings claim if permanent action of the same character would constitute a taking. However, citing two U.S. Supreme Court decisions in earlier cases, the Court of Appeals held that government-induced flooding can give rise to a taking claim only if the flooding is “permanent or inevitably recurring”, and such was not the case here.

II. The U.S. Supreme Court reversed the Court of Appeals. In so doing, the Court articulated certain fundamental principles in Takings Clause jurisprudence. The Takings Clause, the Court noted, is designed to bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. Therefore, when the government physically takes possession of an interest in property for some public purpose, it has a duty to compensate the owner.

In the instant case, the Court rejected the federal government’s proposition that government-induced flooding, recurrent and temporary in duration, should categorically be exempted from Takings Clause examination. Instead, the Court emphasised that a magic formula does not exist that would enable a court to determine, in every case, whether a particular government interference with property is a taking. The Court acknowledged that it has recognised categories in two circumstances which automatically

constitute takings: permanent physical occupations of property authorised by government; and regulations that permanently require property owners to sacrifice all economically beneficial uses of their land. Otherwise, however, as a general matter takings claims turn on situation-specific factual inquiries.

As to the question of whether recurrent, temporary flooding can ever give rise to a takings claim, the Court distinguished the earlier case law upon which the Court of Appeals had relied. Therefore, the Court concluded that it could not find any basis in its precedents for setting flooding apart from other government intrusions on property by recognising an automatic exemption for it.

The Court added that it could not find any other persuasive reason to create a categorical exemption for temporary flooding. It rejected the federal government's primary argument, which was that the absence of an exemption would disrupt public works dedicated to flood control. However, while acknowledging that important public interests might be presented, they are not categorically different from the interests at stake in the many other Takings Clause cases in which the Court has rejected similar arguments for blanket exemptions from Fifth Amendment examination.

Having rejected the proposition that temporary flooding is categorically exempted, the Court then identified certain factors that might be significant in determining on a case-by-case basis whether a temporary governmental interference with private property has resulted in a compensable taking. The amount of time involved is a factor, as is the degree to which the invasion was intended or was the foreseeable result of authorised government action. Other potentially relevant factors are the character of the land at issue, the owner's reasonable investment-backed expectations regarding the land's use, and the severity of the interference.

The Court did not rule on the question of whether a taking had occurred in the instant case. Because the Court of Appeals based its decision entirely on the temporary duration of the flooding, it did not address other challenges to the first instance court's decision that were presented to it. Therefore, the Supreme Court noted that these issues, such as causation, foreseeability, substantiality, and the amount of damages, would remain open for consideration on remand to the Court of Appeals.

The Court's decision was adopted by a 9-0 vote.

Supplementary information:

The two U.S. Supreme Court decisions upon which the Court of Appeals relied were:

- *Sanguinetti v. United States*, 264 *United States Reports* 146, 44 *Supreme Court Reporter* 264, 68 *Lawyers' Edition* 608 (1924);
- *United States v. Cress*, 243 *United States Reports* 316, 37 *Supreme Court Reporter* 380, 61 *Lawyers' Edition* 746 (1917).

Languages:

English.



Court of Justice of the European Union

Important decisions

Identification: ECJ-2012-3-001

a) European Union / **b)** General Court / **c)** Second Chamber / **d)** 19.01.2010 / **e)** T-355/04, T-446/04 / **f)** Co-Frutta v. Commission / **g)** *European Court Reports* II-1 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

European Union law, action for annulment, measures of a preparatory nature / Access, request, time-limit, failure to comply, consequences / Right of access to documents, exception.

Headnotes:

Only a measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his or her legal position is an act or decision which may be the subject of an action for annulment under Article 230 EC Treaty. As regards, more specifically, acts or decisions drawn up in a procedure involving several stages, only measures which definitively lay down the position of the institution on the conclusion of that procedure may be contested by means of an action for annulment. Consequently, measures of a preliminary or purely preparatory nature cannot be the subject of an action for annulment.

Summary:

I. The applicant, Co-Frutta, an Italian undertaking engaged in the ripening of bananas, had lodged an application for access to Commission documents

relating to the banana importers registered in the European Community. Following the negative reply from the Commission's Director-General for Agriculture, the applicant lodged a confirmatory application with the Secretariat-General of the Commission. Having received an implied negative reply by the expiry of the 15-day time-limit provided for by Regulation no. 1049/2001 (OJ 2001 L 145, p. 43), the applicant applied to the Court of First Instance (now the General Court) challenging the lawfulness of those two decisions. Two months later, the Secretary-General adopted an express decision which granted access only to some of the documents requested. The applicant then lodged a further.

II. In the context of the procedure for public access to Commission documents, it is clear from Articles 3 and 4 of the Annex to Decision 2001/937, amending the internal rules of the Commission, and from Article 8 of Regulation no. 1049/2001, regarding public access to European Parliament, Council and Commission documents, that the response to the initial application is only an initial statement of position, conferring on the applicant the right to request the Secretary-General of the Commission to reconsider the position in question. Consequently, only the measure adopted by the Secretary-General of the Commission, which is a decision and which entirely replaces the previous statement of position, is capable of producing legal effects such as to affect the interests of the applicant and, in consequence, capable of being the subject of an action for annulment under Article 230 EC Treaty.

The period of 15 working days within which the institution must reply to the confirmatory application, as laid down in Article 8.1 and 8.2 of Regulation no. 1049/2001, is mandatory. However, the expiry of that period does not have the effect of depriving the institution of the power to adopt a decision. The mechanism of an implied refusal decision was established in order to counter the risk that the administration would choose not to reply to an application for access to documents and escape review by the courts, not to render unlawful every decision which is late. On the other hand, the administration is required, in principle, to provide – even late – a reasoned response to every application by a citizen. That approach is consistent with the function of the mechanism of the implied refusal decision, which is to enable citizens to challenge inaction on the part of the administration with a view to obtaining a reasoned response. Such an interpretation does not affect the objective pursued by Article 253 EC Treaty of protecting the rights of citizens and does not permit the Commission to disregard the mandatory time-limits fixed by Regulation no. 1049/2001 and Decision 2001/937.

An institution which receives a request for access to a document originating from a Member State must, once that request has been notified by the institution to the Member State, immediately commence, together with that Member State, a genuine dialogue concerning the possible application of the exceptions laid down in Article 4.1 and 4.3 of Regulation no. 1049/2001, while paying attention in particular to the need to enable the institution to adopt a position within the time-limits laid down in Articles 7 and 8 of that Regulation, under which it is required to decide on the request for access. Nonetheless, failure to comply with the time-limit laid down in Article 8 of the Regulation does not lead automatically to the annulment of the decision adopted after the deadline. The annulment of a decision solely because of failure to comply with the time-limits (Regulation no. 1049/2001 and Decision 2001/937) would merely cause the administrative procedure for access to documents to be reopened. In any event, compensation for any loss resulting from the lateness of the Commission's response may be sought through an action for damages.

The Community legislature, by the adoption of Regulation no. 1049/2001, abolished the 'rule of the author' which had until then prevailed. Against that background, to interpret Article 4.5 of the Regulation, which provides that a Member State may request an institution not to disclose a document originating from that State without its 'prior agreement' as conferring on the Member State a general and unconditional right of veto, so that it can oppose, in an entirely discretionary manner and without having to give reasons for its decision, the disclosure of any document held by a Community institution simply because it originates from that Member State, is not compatible with the objectives of that Regulation.

The institution concerned cannot accept a Member State's objection to disclosure of a document originating from that State if the objection gives no reasons at all or if the reasons are not put forward in terms of the exceptions listed in Article 4.1 and 4.3 of Regulation no. 1049/2001. Where, despite an express request to that effect by the institution concerned to the Member State, the Member State still fails to provide the institution with such reasons, the institution must, if for its part it considers that none of those exceptions applies, give access to the document that has been asked for. On the other hand, where the opposition by one or more Member States to disclosure of a document does not fulfil that requirement to state reasons, the Commission may decide, independently, that one or more of the exceptions provided for in Article 4.1 and 4.3 applies to the documents covered by an application for access.

The statement of reasons required under Article 253 EC Treaty must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution responsible for authorship of the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

In the case of a request for access to documents, where the institution in question refuses such access, it must demonstrate in each individual case, on the basis of the information at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation no. 1049/2001. However, it may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and thereby defeating the very purpose of the exception.

The exceptions to document access fall to be interpreted and applied strictly so as not to frustrate application of the general principle of giving the public the widest possible access to documents held by the institutions.

Moreover, the examination required for the purpose of processing a request for access to documents must be specific in nature. The mere fact that a document concerns an interest protected by an exception is not of itself sufficient to justify the application of that exception. In principle, application of the exception can be justified only if the institution has previously determined, first, that access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in Article 4.2 and 4.3 of Regulation no. 1049/2001 that there is no overriding public interest justifying disclosure of the document concerned. A specific, individual examination of each document is also necessary where, even if it is clear that a request for access refers to documents covered by an exception, only such an examination can enable the institution to assess whether it is possible to grant the applicant partial access under Article 4.6 of Regulation no. 1049/2001. An assessment relating to documents which is carried out by reference to categories rather than on the basis of the actual information contained in those documents is insufficient. The examination required of an institution must enable it to assess specifically

whether an exception invoked actually applies to all the information contained in those documents.

However, in examining whether the disclosure of documents does in fact adversely affect the protected interest in a particular case, it is, in principle, open to the Commission to base its decisions in that regard on general presumptions which apply to certain categories of document, since considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature. It is nevertheless incumbent on the Commission to determine in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose.

In accordance with Article 4.2.1 of Regulation no. 1049/2001, the institutions are to refuse access to a document where disclosure would undermine protection of the commercial interests of a specific natural or legal person, unless there is an overriding public interest in disclosure.

Documents concerning the common organisation of the market in bananas, such as lists specifying the quantity of bananas imported during a given period and the provisional reference quantity attributed to each operator, contain confidential information concerning banana importing companies and their commercial activities and must accordingly be considered to fall within the scope of the exception provided for in Article 4.2.1 of Regulation no. 1049/2001.

Even within a common organisation of the market, the disclosure of provisional reference quantities and their actual use can undermine the commercial interests of the undertakings concerned, since that information makes it possible to determine in the abstract the maximum volume of operators' activities, as well as the actual volume of activity, and to assess the competitive position of those operators, together with the success of their commercial strategies.

Furthermore, it follows from Article 4.7 of Regulation no. 1049/2001 that documents the disclosure of which would undermine commercial interests benefit from special protection, since access to them may be prohibited for a period of more than 30 years. However, such protection must, in any event, be justified in the light of the content of those documents. The content of documents which go to the heart of the importing business, since they indicate the market shares, commercial strategy and sales policy of the undertakings in question, justifies that special period of protection.

The General Court, firstly, considered that it was not required to rule on the first application. In practice, the negative reply from the Director-General constituting merely a preliminary measure, only the decision adopted by the Secretary-General was capable of producing legal effects and, therefore, of being the subject of an action for annulment. And, by adopting the express decision, the Commission, *de facto*, withdrew the implied decision taken previously.

Then, ruling on the application against the express decision, the General Court rejected the arguments based on violation of the time-limit for which the regulation provides. Indeed, the General Court took the view that, although this time-limit was mandatory, its expiry did not have the consequence of depriving the institution of the power to adopt a decision. Hence failure to meet the set time-limit did not automatically entail the annulment of a decision adopted outside that time-limit.

Finally, the Court ruled on the obligation to state the reasons for a refusal of access to documents. In this respect, the Court considered that it was incumbent on the institution to demonstrate, in each individual case, that the documents concerned fell within the scope of the exceptions listed in Regulation no. 1049/2001. Those exceptions had to be interpreted and applied in a rigorous fashion, presupposing a practical individual examination of each document. In this case, the Court found that the requested documents contained confidential information about banana-importing companies and their commercial activities and, consequently, fell within the scope of one of the exceptions for which the regulation provides.

Cross-references:

- Tribunal, 09.06.2010, *Editions Jacob v. Commission*, T-237/05, *European Court Reports* 2010, II-2245.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2012-3-002

a) European Union / **b)** Court of Justice of the European Communities / **c)** Third Chamber / **d)** 21.01.2010 / **e)** C-546/07 / **f)** Commission v. Germany / **g)** *European Court Reports* I-439 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 3.26 General Principles – **Principles of EU law.**
 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**
 5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time.**

Keywords of the alphabetical index:

Expectation, legitimate, protection, principle / Community law, failure to fulfil obligation, action, time-limit.

Headnotes:

The procedure for a declaration of a failure on the part of a Member State to fulfil its obligations is based on the objective finding that a Member State has failed to fulfil its obligations under Community law, and the principle of protection of legitimate expectations cannot be relied on by a Member State in order to preclude an objective finding of a failure on its part to fulfil its obligations, since to admit that justification would run counter to the aim pursued by the procedure under Article 226 EC Treaty.

Summary:

I. In the present case, the Court ruled on the admissibility of an action for failure to fulfil obligations brought by the Commission against Germany, which it accused of having failed to fulfil its obligations in respect of freedom of movement of persons and freedom to provide services.

Germany disputed the merits of this action, arguing that it must be declared inadmissible. It submitted that the Commission's inaction over a period of almost seven years amounted to abandonment of the complaint.

II. Initially, the Court took the view that the Commission was not obliged to act within a specific period. Nevertheless, excessive duration of the pre-litigation procedure was capable of infringing the State's rights of defence. But the Court found that Germany had not proved that the unusual duration of the procedure had had any effect on the way in which it had organised its defence.

Subsequently, the Court took the view that the principle of protection of legitimate expectations could certainly not be relied on by a Member State in order to preclude a finding of a failure to fulfil obligations. The fact that the Commission did not take further action on a reasoned opinion immediately or shortly after its issue cannot create, on the part of the Member State concerned, a legitimate expectation that the procedure has been closed. That is *a fortiori* the position where efforts were made during the alleged period of inactivity to find a solution which would put an end to the alleged infringement. Finally, as no position was adopted by the Commission indicating that it was going to close the procedure instituted for a declaration of a failure to fulfil obligations, that Member State cannot validly claim that the Commission infringed the principle of legitimate expectations by not closing that procedure.

The Court therefore rejected the plea of inadmissibility.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.

*Identification:* ECJ-2012-3-003

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 02.03.2010 / **e)** C-135/08 / **f)** Rottmann / **g)** *European Court Reports*, I-1449 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.3.8 Fundamental Rights – Civil and political rights –
Right to citizenship or nationality.

Keywords of the alphabetical index:

Naturalisation, revocation / European Union,
 citizenship, revoked / CJEC, preliminary ruling.

Headnotes:

It is not contrary to European Union law (hereinafter, “EU law”), in particular to Article 17 EC Treaty, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality was obtained by deception, on condition that the decision to withdraw observes the principle of proportionality.

A decision withdrawing naturalisation because of deception corresponds to a reason relating to public interest. In this regard, it is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality. That consideration on the legitimacy, in principle, of a decision withdrawing naturalisation on account of deception remains, in theory, valid when the consequence of that withdrawal is that the person in question loses, in addition to the nationality of the Member State of naturalisation, citizenship of the EU.

Summary:

I. In this case, the Court of Justice ruled on the conditions for the withdrawal from a European citizen of the nationality of a Member State acquired by naturalisation through deception.

In this case, Dr Rottmann, who had been born in Austria, obtained naturalisation as a German citizen and thereby lost Austrian nationality. However, he had failed to disclose to the German authorities the fact that he was the subject of court proceedings in Austria. Consequently, the *Freistaat Bayern* decided to withdraw naturalisation from him with retroactive effect on the grounds that he had obtained German nationality by deception. The case was referred to the *Bundesverwaltungsgericht* (Federal Administrative Court), which decided to stay the proceedings and refer certain questions to the Court of Justice for a preliminary ruling. Those questions related to the compatibility of the withdrawal of nationality with EU law. In practice, the withdrawal of the applicant’s

German nationality did not automatically entail the recovery of his original nationality.

II. The Court considered that EU law did not prevent a member State from withdrawing from a citizen the nationality obtained through naturalisation, by deception, even if that withdrawal implied loss of citizenship of the EU. However, that withdrawal decision was required to observe the principle of proportionality. In this regard, it was necessary to establish, in particular, whether the consequences of that loss of European citizenship were justified in relation to the gravity of the offence.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.

*Identification: ECJ-2012-3-004*

a) European Union / **b)** General Court / **c)** Third Chamber / **d)** 02.03.2010 / **e)** T-16/04 / **f)** Arcelor v. Parliament and Council / **g)** *European Court Reports* II-211 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.26.1 General Principles – Principles of EU law –
Fundamental principles of the Common Market.
 5.3.10 Fundamental Rights – Civil and political rights
 – **Rights of domicile and establishment**.

Keywords of the alphabetical index:

Annulment, application, admissibility / Act, directly and individually concerning a person / European Union, non-contractual liability / European Union, acts, interpretation in line with fundamental rights and freedoms under EC Treaty.

Headnotes:

The mere fact that Article 230.4 EC Treaty does not expressly recognise the admissibility of actions brought by private persons for annulment of a directive within the meaning of Article 249.3 EC

Treaty is not of itself sufficient to render such actions inadmissible. The Community institutions cannot, merely by means of their choice of legal instrument, deprive individuals of the judicial protection which is afforded to them by the Treaty, even if that legal instrument is a directive. Similarly, the mere fact that the contested provisions form part of a measure of general application which constitutes a real directive and not a decision, within the meaning of Article 249.4 EC Treaty, taken in the form of a directive is not of itself sufficient to exclude the possibility that those provisions may be of direct and individual concern to an applicant.

Summary:

I. Arcelor, a company which produces steel, lodged an application to the General Court requesting, on the one hand, the annulment of certain provisions of Directive 2003/87/EC (OJ 2003 L 275, p. 32) and, on the other hand, compensation for the damage suffered by the applicant following the adoption of that directive. The directive in practice established a scheme for greenhouse gas emission allowance trading. It also introduced an obligation for the operators of certain installations to cover their greenhouse gas emissions by allowances which are allocated to them by Member States or purchased from an operator which has excess allowances available. The applicant argued that application of these provisions to installations for the production of pig iron or steel production facilities infringed several principles of Community law, including property rights, freedom to pursue an economic activity, the principle of proportionality, the principle of equal treatment, freedom of establishment and the principle of legal certainty.

II. Firstly, the General Court examined the plea of inadmissibility raised by the Council and Parliament against the application for annulment. In this regard, the Court noted that the fact that EU law did not expressly recognise the admissibility of actions brought by private persons for annulment of a directive is not of itself sufficient to render such actions inadmissible. A legal person may thus institute proceedings against a Community decision of general scope which concerns it directly and individually. Nevertheless, the General Court found that the applicant was not individually concerned by the directive, which applied in a general and abstract manner to all operators engaged in the activities listed in the Annex, including those in the pig iron and steel production sector.

Secondly, the General Court analysed the application for compensation lodged by the applicant. The applicant argued, *inter alia*, that the provisions of the

directive infringed its freedom of establishment by preventing it from transferring its production to a more profitable installation in another Member State. Indeed, the directive made no provision for such a possibility. The Court pointed out that Member States' authorities and courts had a duty to ensure that they did not rely on an interpretation of the directive which conflicted with the fundamental rights protected by the Community legal order, with the other general principles of Community law or with the fundamental freedoms of the EC Treaty, such as freedom of establishment. It was therefore sufficient for the directive to grant States a discretion which enabled them fully to respect the rules of the EC Treaty and the general principles of Community law.

Consequently, the General Court ruled that Arcelor had not shown that the Community legislature, by adopting the said directive, had infringed the Community principles relied on in a sufficiently serious manner for the Community's non-contractual liability to be established.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2012-3-005

a) European Union / **b)** Court of Justice of the European Communities / **c)** Fourth Chamber / **d)** 04.03.2010 / **e)** C-297/08 / **f)** Commission v. Italy / **g)** *European Court Reports* I-1749 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Action on grounds of failure to fulfil obligations, justifications.

Headnotes:

The procedure provided for in Article 258 Treaty on the Functioning of the European Union (hereinafter, “TFEU”) presupposes an objective finding that a Member State has failed to fulfil its obligations under the Treaty or secondary legislation.

Where such a finding has been made, it is irrelevant whether the failure to fulfil obligations is the result of intention or negligence on the part of the Member State responsible, or of technical difficulties encountered by it.

Summary:

I. In this case, the Court was required to rule on the possible justifications for failure by the Italian Republic to fulfil its obligations. In fact, the Commission had started proceedings claiming that the Court should declare that Italy had failed to fulfil its obligations under Directive 2006/12/EC (OJ 2006 L 114, p. 9). In this respect, the Commission argued that Italy had not established the installations necessary to ensure that waste was recovered or disposed of in the region of Campania. Italy was also alleged to have endangered human health and the environment.

On the other hand, Italy stated that the failure of which it was accused could not be attributed to it because of events constituting *force majeure*, such as local public opposition to the opening of landfill facilities, the presence of criminal activity in the region and a failure by public contractors to meet their contractual obligations.

II. With regard to the local inhabitants’ opposition to the establishment of certain waste disposal installations, a Member State may not plead internal situations, such as difficulties of implementation which emerge at the stage of putting a Community measure into effect, including difficulties relating to opposition on the part of certain individuals, in order to justify a failure to comply with obligations and time-limits laid down by Community law. The same holds true as regards the presence of criminal activity, or of persons described as operating on the fringes of the law, active in the waste management sector.

With regard to the non-performance of contractual obligations by the undertakings entrusted with the construction of certain waste disposal infrastructures, although the notion of *force majeure* is not predicated on absolute impossibility, it nevertheless requires the non-performance of the act in question to be attributable to circumstances, beyond the control of the party claiming *force majeure*, which are abnormal and unforeseeable and the consequences of which

could not have been avoided despite the exercise of all due diligence.

The Court dismissed Italy’s arguments, stating that, once it has been established that the State has failed to fulfil its obligations, the reasons for that failure are irrelevant.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.

*Identification:* ECJ-2012-3-006

a) European Union / **b)** Court of Justice of the European Communities / **c)** Second Chamber / **d)** 04.03.2010 / **e)** C-578/08 / **f)** Chakroun / **g)** *European Court Reports* I-1839 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Immigration, policy / Family reunification, right.

Headnotes:

The phrase ‘recourse to the social assistance system’ in Article 7.1.c of Directive 2003/86 on the right to family reunification must be interpreted as precluding a Member State from adopting rules in respect of family reunification which result in such reunification being refused to a sponsor who has proved that he or she has stable and regular resources which are sufficient to maintain himself or herself and the members of his or her family, but who, given the level of his or her resources, will nevertheless be entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his or her income, or income-support measures in the context of local-authority minimum-income policies.

Summary:

I. This case afforded the Court the opportunity to detail its case-law relating to family reunification.

In this case, Mrs Chakroun, a Moroccan national, applied in 2006 to the Netherlands Embassy in Morocco for a provisional residence permit. The applicant wished to join her husband, who had been living in the Netherlands since 1970, and to whom she had been married since 1972. Her application was rejected. In fact, Mr Chakroun was in receipt of unemployment benefit of an amount below the applicable income standard for “family formation”. National legislation effectively laid down stricter criteria in cases in which the family relationship arose after the sponsor’s entry into the Netherlands.

When an appeal was lodged before it, the *Raad van State* decided to stay the proceedings and to make a reference to the Court of Justice for a preliminary ruling concerning the interpretation of Directive 2003/86/EC (OJ 2003 L 251, p. 12).

II. Firstly, the Court pointed out that the provisions of the directive had to be interpreted in the light of the fundamental rights and, more particularly, the right to respect for family life enshrined in the European Court of Human Rights. The Court then noted that the directive allowed States to refuse family reunification insofar as the sponsor had to have “recourse to the social assistance system” in order to meet his or her needs. However, this concept of social assistance needed to be interpreted as assistance compensating for a lack of stable, regular and sufficient resources, and not as assistance which enabled exceptional or unforeseen needs to be addressed. Thus a State could not refuse reunification to a person who had provided evidence of having resources to meet his or her own needs and those of his or her family.

Finally, the Court noted that the directive made no distinction between family relationships arising before or after the sponsor’s entry into the territory of the host Member State. Hence the Court took the view that the introduction of such a distinction into national legislation contravened EU law. In practice, such a distinction jeopardised the objective of facilitating family reunification.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.

Identification: ECJ-2012-3-007

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 22.06.2010 / **e)** C-188/10, C-189/10 / **f)** Melki and Abdeli / **g)** *European Court Reports* I-5667 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.4.10 Constitutional Justice – Procedure – Interlocutory proceedings.

Keywords of the alphabetical index:

Constitutionality, interlocutory review / CJEC, obligation to refer / Border controls / CJEC, preliminary rulings.

Headnotes:

The priority nature of an interlocutory procedure for the review of the constitutionality of a national law, the content of which merely transposes the mandatory provisions of a European Union directive, cannot limit the jurisdiction of the Court of Justice alone to declare an act of the European Union invalid, and in particular a directive, the purpose of that jurisdiction being to guarantee legal certainty by ensuring that EU law is applied uniformly.

To the extent that the priority nature of such a procedure leads to the repeal of a national law doing no more than transpose the mandatory provisions of a European Union directive by reason of that law’s being contrary to the national constitution, the Court could, in practice, be denied the opportunity, at the request of the court’s ruling on the substance of cases in the Member State concerned, of reviewing the validity of that directive in relation to the same grounds relating to the requirements of primary law, and in particular the rights recognised by the Charter of Fundamental Rights of the European Union, to which Article 6 of the Treaty of the EU accords the same legal value as that accorded to the Treaties.

Summary:

I. In the context of a reference for a preliminary ruling, the Court ruled on the compatibility of the “priority question on constitutionality” under French law with the EU law.

In this case, Mr Melki and Mr Abdeli, who are Algerian nationals unlawfully present in France, were subject to a French police control near the Belgian border and placed in administrative detention. Mr Melki and Mr Abdeli then challenged the lawfulness of their detention before the *juge des libertés et de la détention* (judge deciding on provisional detention). *Inter alia* they pleaded that the provisions of the French Code of Criminal Procedure in the context of which such controls took place were unconstitutional.

The judge then referred the question to the *Cour de cassation* (Court of cassation) asking whether it was necessary to refer this question to the *Conseil constitutionnel* (Constitutional Council). The *Cour de cassation* decided to stay the proceedings and to refer to the Court of Justice for a preliminary ruling, the question of the conformity of the “priority question on constitutionality” mechanism with EU law. In practice, the decisions of the *Conseil constitutionnel* are not subject to appeal, a fact which restricts courts’ opportunity to refer a question to the Court of Justice for a preliminary ruling.

II. The Court first pointed out that the national courts, in order to ensure the primacy of EU law, must be allowed to refer preliminary questions to the Court at any stage of the procedure, even at the end of an interlocutory procedure for review of constitutionality.

The Court then examined the specific case in which the said procedure was applied to a law, the content of which merely transposed the provisions of a European Union directive. In this regard, the Court pointed out that it alone had jurisdiction to declare an act of the European Union invalid. Consequently, national court’s ruling in the last instance are required, before carrying out an interlocutory procedure for review of constitutionality, to refer to the Court of Justice a question on the validity of that directive, unless the court which initiates that procedure has itself referred that question to the Court of Justice.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.

Identification: ECJ-2012-3-008

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 29.06.2010 / **e)** C-28/08 P / **f)** *Commission v. Bavarian Lager* / **g)** *European Court Reports* I-6055 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Access to documents, right, exception / Community law, data, personal, protection, obligation.

Headnotes:

Article 4.1.b of Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents, which provides for an exception to access to a document where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data, establishes a specific and reinforced system of protection of a person whose personal data could, in certain cases, be communicated to the public. That provision is indivisible and requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with that legislation, and in particular with Regulation no. 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

Whilst, according to Article 1.1 of Regulation no. 45/2001, the purpose of that regulation is to ‘protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data’, that provision does not allow cases of processing of personal data to be separated into two categories,

namely a category in which that treatment is examined solely on the basis of Article 8 ECHR and the case-law of the European Court of Human Rights relating to that Article and another category in which that processing is subject to the provisions of Regulation no. 45/2001. In that regard, whilst it is clear from the first sentence of recital 15 of Regulation no. 45/2001 that the EU legislature has pointed to the need to apply Article 6 EU Treaty and, by that means, Article 8 ECHR, where such processing is carried out by Community institutions or bodies in the exercise of activities falling outside the scope of that regulation, in particular those laid down in Titles V and VI of the EU Treaty in its version prior to the Treaty of Lisbon, such a reference has not been found necessary for processing carried out in the exercise of activities within the scope of that regulation, given that, in such cases, it is clearly Regulation no. 45/2001 itself which applies.

It follows that, where a request based on Regulation no. 1049/2001 seeks to obtain access to documents including personal data, the provisions of Regulation no. 45/2001 become applicable in their entirety, including Articles 8 and 18 thereof, which constitute essential provisions of the system of protection established by that regulation.

Summary:

I. In 1993, an importer of German beer into the United Kingdom, a company called Bavarian Lager, informed the Commission of the violation by the United Kingdom of the provisions of the EC Treaty relating to the free movement of goods. In the context of the proceedings started by the Commission against the United Kingdom for failure to fulfil its obligations, representatives of the Community and UK authorities and of the *Confédération des brasseurs du marché commun* (CBMC) took part in a meeting on the subject of UK legislation, which was held on 11 October 1996. Having been denied, by the Commission, the right to attend that meeting, Bavarian Lager made several applications to the Commission for access to documents in the file.

Following intervention by the European Ombudsman, the Commission agreed to disclose certain documents relating to that meeting. It nevertheless deliberately blanked out five names which appeared in the minutes of the meeting. In fact, two persons had expressly objected to the disclosure of their identity, and the other three had not been able to be contacted by the Commission.

Following the rejection of its request for the full minutes of the meeting, Bavarian Lager lodged an application before the General Court for annulment of that decision. In its judgment of 8 November 2007, the Court annulled the decision, taking the view, in particular, that the communication of the names of the persons who had taken part in a meeting on behalf of the organisation which they represented did not constitute a violation of their privacy. Subsequently, the Commission, with the support of the United Kingdom and the Council, appealed to the Court of Justice.

II. In its judgment of 29 June 2010, the Court, first of all, pointed out that Regulation no. 1049/2001 (OJ 2001 L 145, p. 43) laid down as a general rule that the public may have access to the documents of the institutions. However, provision was made for exceptions, particularly in the event that disclosure would undermine the protection of the privacy and the integrity of the individual, in accordance with EU legislation regarding the protection of personal data. The Court took the view that the General Court had erred in law when it took no account of that legislation and limited the application of the exception to situations in which privacy would be infringed within the meaning of Article 8 ECHR and the case-law of the European Court of Human Rights.

In this case, the Court considered that the Commission had rightly taken the view that the list of participants in a meeting held in the context of proceedings for failure to fulfil obligations contained personal data. It had also recognised that the person requesting access needed to establish, in respect of those persons who had not given their express consent, the need to transfer those personal data. Hence the Court considered that the Commission had been right to reject the request for access to the full minutes of the meeting, Bavarian Lager not having successfully demonstrated such a need.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2012-3-009

a) European Union / **b)** Court of Justice of the European Communities / **c)** Second Chamber / **d)** 01.07.2010 / **e)** C-407/08 P / **f)** Knauf Gips v. Commission / **g)** *European Court Reports* I-6375 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Community law, fundamental rights, application for annulment, admissibility.

Headnotes:

As regards the application of the competition rules, there is no requirement under EU law that the addressee of a statement of objections must challenge its various matters of fact or law during the administrative procedure, if it is not to be barred from doing so later at the stage of judicial proceedings. Although an undertaking's express or implicit acknowledgement of matters of fact or of law during the administrative procedure before the Commission may constitute additional evidence when determining whether an action is well founded, it cannot restrict the actual exercise of a natural or legal person's right to bring proceedings before the General Court under Article 263.4 of the Treaty on the Functioning of the European Union (hereinafter, "TFEU").

In the absence of a specific legal basis, such a restriction is contrary to the fundamental principles of the rule of law and of respect for the rights of the defence. The rights to an effective remedy and of access to an impartial tribunal are, moreover guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union which, under Article 6.1.1 of the EU Treaty, has the same legal value as the Treaties. Under Article 52.1 of that Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law.

Summary:

In the context of an appeal against a judgment of the Court of First Instance (now the General Court), *Knauf Gips v. Commission*, of 8 July 2008 (ECR II-00115), the Court ruled on the question of companies' rights during the exercise of appeals. Knauf Gips KG,

a German company, had brought an action before the General Court for annulment of the decision by the Commission (OJ 2005, L 166, p. 8), which had imposed upon it a fine of 85.8 million euros for its anti-competitive practice on the plasterboard market. In its judgment, the General Court had upheld the Commission's decision.

Among the arguments relied on before the Court, the appellant held that the General Court had erred in law by finding that there was an economic unit constituted by Knauf Gips KG and the other companies in the group, and by imputing to the appellant liability for the activities of those companies. In this regard, the General Court had held that, during the administrative procedure, the appellant had presented itself as the sole interlocutor of the Commission. According to the General Court, it had been for Knauf Gips KG to demonstrate during the administrative procedure, failing which it would no longer be able to do so before the courts of the EU, that it could not be held liable for the infringement committed by the companies of the Knauf group. For its part, the appellant submitted that such an obligation would infringe the *in dubio pro reo* principle.

On the basis of the fundamental principles of the rule of law and of respect for the rights of the defence, the Court considered that the General Court had erred in law when it had held that the appellant was no longer able to deny responsibility for the activities of the Knauf group.

However, in its final ruling on the case, the Court found, on the basis of a number of factors, that the other companies of the group did not independently determine their conduct on the market, but depended, where the activity at issue was concerned, on Knauf Gips KG. The Court therefore found that the Commission had made no error of assessment in deciding that Knauf Gips KG was to be considered responsible for all the activities of the Knauf group.

Consequently, the Court had set aside the judgment of the General Court insofar as it had imputed to Knauf Gips KG liability for the activities of the Knauf group in the context of the infringement. It also dismissed the rest of the appeal and upheld the contested decision.

Cross-references:

- CJUE, 16.09.1999, *Commission of the European Communities v. Spain*, C-414/97, *European Court Reports* 1999, I-5585, *Bulletin* 2003/1 [ECJ-2003-1-004].

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



European Court of Human Rights

Important decisions

Identification: ECH-2012-3-001

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 12.09.2012 / **e)** 10593/08 / **f)** *Nada v. Switzerland* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 3.19 General Principles – **Margin of appreciation**.
 4.16 Institutions – **International relations**.
 4.16.1 Institutions – International relations – **Transfer of powers to international institutions**.
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

Keywords of the alphabetical index:

Foreigner, freedom of movement / UNO, Security Council, Resolution, implementation, proportionality.

Headnotes:

Where a State enjoys a degree of latitude in the implementation of UN Security Council resolutions, the measures it takes must comply with the State's Convention obligations, including the requirement of proportionality.

In particular, a prohibition on an individual entering or transiting through a State's national territory owing to the inclusion of his or her name on the UN Security Council's Sanctions Committee's list of persons suspected of being associated with the Taliban and al-Qaeda may be imposed only to the extent that it strikes a fair balance between the individual's right to the protection of his private and family life and the legitimate aims pursued.

Summary:

I. The Swiss Federal Taliban Ordinance was enacted pursuant to several UN Security Council Resolutions. It had the effect of preventing the applicant, an Egyptian national, from entering or transiting through Switzerland due to the fact that his name had been added to the list annexed to the UN Security Council's Sanctions Committee of persons suspected of being associated with the Taliban and al-Qaeda ("the list"). The applicant had been living in *Campione d'Italia*, an Italian enclave of about 1.6 square kilometres surrounded by the Swiss Canton of Ticino and separated from the rest of Italy by a lake. The applicant claimed that the restriction made it difficult for him to leave the enclave and therefore to see his friends and family, and that it caused him suffering due to his inability to receive appropriate medical treatment for his health problems. The applicant further found it difficult to remove his name from the Ordinance, even after the Swiss investigators had found the accusations against him to be unsubstantiated.

The Swiss Government argued that the application was inadmissible on several counts, namely that it was incompatible *ratione personae* and *ratione materiae* with the Convention.

II. The Court joined consideration of the issue of compatibility *ratione materiae* to the merits.

As regards the question of compatibility *ratione personae*, the Court could not endorse the argument that the measures taken by the Member States of the United Nations to implement the relevant Security Council resolutions were attributable to that organisation, rather than to the respondent State. Unlike the position in *Behrami and Behrami v. France*, in which the impugned acts and omissions were attributable to UN bodies, the relevant resolutions in the instant case required States to act in their own names and to implement them at national level. The measures imposed by the Security Council resolutions had been implemented at national level by an Ordinance of the Federal Council and the applicant's requests for exemption from the ban on entry into Swiss territory were rejected by the Swiss authorities. The acts and omissions in question were thus attributable to Switzerland and capable of engaging its responsibility. The Government's preliminary objection was therefore dismissed.

As regards Article 8 ECHR, the impugned measures had left the applicant in a confined area for at least six years and had prevented him, or at least made it more difficult for him, to consult his doctors in Italy or Switzerland or to visit his friends and family. There

had thus been interference with the applicant's rights to private life and family life. The measures had a sufficient legal basis and pursued the legitimate aims of preventing crime and contributing to national security and public safety.

The Court then considered whether the interference was justified. It reiterated that a Contracting Party is responsible under Article 1 ECHR for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. When considering the relationship between the Convention and Security Council resolutions, the Court had found in *Al-Jedda v. the United Kingdom* that there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights and that it was to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human-rights law. In the present case, however, that presumption had been rebutted as Resolution 1390 (2002) expressly required the States to prevent individuals on the list from entering or transiting through their territory.

Nevertheless, the UN Charter did not impose on States a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII, but instead left them a free choice among the various possible models for transposition of those resolutions into their domestic legal order. Accordingly, Switzerland had enjoyed a limited but real latitude in implementing the relevant binding resolutions. The Court went on to consider whether the measures taken by the Swiss authorities were proportionate in light of this latitude. It found it surprising that the Swiss authorities had apparently not informed the Sanctions Committee until September 2009 of the Federal Prosecutor's findings in May 2005 that the accusations against the applicant were clearly unfounded: a more prompt communication of the investigative authorities' conclusions might have led to the applicant's name being deleted from the UN list considerably earlier. As regards the scope of the prohibition, it had prevented the applicant not only from entering Switzerland but also from leaving *Campione d'Italia* at all, in view of its situation as an enclave, even to travel to any other part of Italy, the country of which he was a national. There was also a medical aspect to the case that was not to be underestimated: the applicant, who was born in 1931 and had health problems, was denied a number of requests he had submitted for exemption from the entry and transit ban for medical reasons or

in connection with judicial proceedings. Nor had the Swiss authorities offered him any assistance in seeking a broad exemption from the ban in view of his particular situation. While it was true that Switzerland was not responsible for the applicant's name being on the list and, not being his State of citizenship or residence, was not competent to approach the Sanctions Committee for delisting purposes, the Swiss authorities appeared never to have sought to encourage Italy to undertake such action or offer it assistance for that purpose. The Court considered in this connection that they had not sufficiently taken into account the realities of the case, especially the unique situation of the applicant geographically, and the considerable duration of the measures. The respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions, but should have persuaded the Court that it had taken – or attempted to take – all possible measures to adapt the sanctions regime to the applicant's individual situation. That finding dispensed the Court from determining the question of the hierarchy between the obligations arising under the Convention on the one hand and under the UN Charter on the other. The respondent Government had failed to show that they had attempted, as far as possible, to harmonise the obligations that they regarded as divergent. Their preliminary objection that the application was incompatible *ratione materiae* with the Convention was therefore dismissed. Having regard to all the circumstances, the restrictions imposed on the applicant's freedom of movement for a considerable period of time had not struck a fair balance between his right to the protection of his private and family life and the legitimate aims pursued. There had thus been a violation of Article 8 ECHR.

Cross-references:

- *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], nos. 71412/01 and 78166/01, 02.05.2007;
- *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011;
- *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, ECHR 2011.

Languages:

English, French.



Identification: ECH-2012-3-002

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 25.10.2012 / e) 71243/01 / f) *Vistiņš and Perepjolkins v. Latvia* / g) *Reports of Judgments and Decisions* / h) CODICES (English, French).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law**.
 3.16 General Principles – **Proportionality**.
 5.3.39.1 Fundamental Rights – Civil and political rights – Right to property – **Expropriation**.

Keywords of the alphabetical index:

Expropriation, compensation, proportionality / Compensation, limitation, budgetary difficulty / Compensation, alternative measure.

Headnotes:

Only very exceptional circumstances can justify the payment of purely symbolic or no compensation for expropriated property. Such circumstances may concern the personal circumstances of the owner or the general historical and political background to the case. However, neither the manner in which the land has been acquired (for example, without consideration), nor the length of the owner's possession, are relevant in this context.

While it is a legitimate for Governments to take into account budgetary difficulties, such difficulties do not constitute an imperative capable of justifying the adoption of measures as exceptional as expropriation without compensation. An exchange of land or a reduction in the rent due could constitute appropriate alternative measures when a State does not have the requisite budgetary resources to provide fair compensation for expropriated land.

Summary:

I. The applicants acquired plots of land under contracts of donation signed in 1994 on an island that is mainly occupied by port facilities and is part of the city of Riga. The plots had previously been expropriated illegally by the Soviet Union, but the donors had recovered their title in the context of denationalisation in the early 1990s. The cadastral value of the land as indicated at the time of the donation was insignificant, but in 1996, following its incorporation into the Port of Riga, it was estimated at about 900,000€ for the land belonging to the first applicant and for that of the second totalled about 5,000,000€. In 1997 the Latvian Parliament

enacted a law for the expropriation of land for the needs of the State within the Free Port of Riga. The compensation awarded to the applicants was fixed at 850€ and 13,500€, respectively, in accordance with the new statutory provision setting as the ceiling for such compensation the cadastral value as at 22 July 1940, multiplied by a conversion ratio. In 1999 the applicants brought proceedings to obtain rent arrears for the use of their land since 1994 and were awarded, respectively, the equivalent of about 85,000€ and 593,150€. They further requested the courts to annul the cadastral registration of the State's title, arguing in particular that the procedure provided for by the 1923 General Expropriation Act had not been complied with; but their claims were dismissed on the ground that the expropriation was not based on the 1923 General Act but on a special law of 1997.

II. In the present case there had been a "deprivation of possessions", within the meaning of the second sentence of Article 1 Protocol 1 ECHR.

In Latvian law the formal and final decision on expropriation was taken not by the executive but by Parliament in the form of a special law. This was a feature of the Latvian legal system, dating back to 1923, and enshrined in the Constitution in 1998. The general principles and objectives of the expropriation system set up by Latvian law did not, as such, raise any issue of lawfulness within the meaning of Article 1 Protocol 1 ECHR. Prior to the adoption, in 1997, of the regulation and the enactment of the special Law confirming it, the applicants could have expected that any expropriation of their property would be carried out in accordance with the 1923 General Expropriation Act. The Court had doubts as to whether the expropriation at issue had been carried out "subject to the conditions provided for by law", having regard in particular to the derogation applied to the applicants and to the procedural safeguards that were – or were not – attached to it.

The Government had argued that the State needed the expropriated land, situated near the Free Port of Riga, to extend, renovate and rebuild the port's infrastructure. The Court had no reason to believe that those grounds were manifestly devoid of a reasonable basis.

The Latvian authorities had been justified in deciding not to compensate the applicants for the full market value of the expropriated property and much lower amounts could suffice to fulfil the requirements of Article 1 Protocol 1 ECHR for three reasons. Firstly, because the actual market value of the land could not objectively be determined, in particular because of the exclusive right of purchase introduced for the benefit of the State and local authorities by the Ports

Act. Secondly, because the land at issue was subject to a statutory servitude for the benefit of the port. Lastly, because the applicants had not invested in the development of their land and had not paid any land tax, the tax-reassessment procedure subsequently initiated against them by Riga City Council having been unsuccessful. However, there was an extreme disproportion between the official cadastral value of the land and the compensation received by the applicants: the sum paid to the first applicant was less than one thousandth of the cadastral value of his land, and the second had received a sum some 350 times lower than the total cadastral value of all his properties. In the Court's view, such disproportionate awards were virtually tantamount to a complete lack of compensation. Only very exceptional circumstances could justify such a situation. It was accordingly for the Court to ascertain whether such circumstances existed in the present case, by examining, in turn, the applicants' personal situations and conduct, and the general historical and political background to the impugned measure.

The applicants' good faith as to the acquisition of the property in question had never been disputed at national level. The Latvian authorities had never taken legal action to challenge the validity of the 1994 contracts of donation. On the contrary, they had formally recognised the applicants' right of ownership by registering the land in their names and by paying them rent. In those circumstances the Court did not find any reason to question the conformity of the donations with the requirements of Latvian law or the validity of the applicants' right of ownership. The donations had been made in return for certain services rendered by the applicants to the donors. It would therefore be incorrect, strictly speaking, to assert that the property in question had been acquired "free of charge". In any event, the manner in which the applicants had acquired their property could not be held against them. Similarly, whilst it was true that the applicants had possessed their land for only about three years, that fact did not affect the value of the property and did not by itself justify a significant reduction in compensation. Consequently, the applicants' personal circumstances and conduct did not in themselves justify the award of such minimal sums.

By the time of their expropriation, all the disputed plots of land had already, with final effect, been denationalised and allotted to individuals. In this connection, the Court could not equate individuals who had not yet recovered their property with those who were already in possession of a valid title deed. The laws in the present case had been enacted by a democratically elected parliament and there was no reason why the applicants could not maintain their

rights, except in the event of fraudulent enrichment to the detriment of the former owners, but neither the validity of the contracts of donation nor the good faith of the applicants had been called into question by the Latvian authorities. Similarly, the applicants' status as property owners was unquestionably sound and the claims deriving from the enjoyment of their possessions had been further strengthened by the Free Commercial Port of Riga Act, which had subjected their land to profitable servitudes. Secondly, all the events at issue had taken place more than three years after the final re-entry into force of the democratic Constitution of 1922 and more than five years after the restoration of independence of Latvia, that is to say, well after the end of the period of historic upheaval. It followed that, whilst it had still been open to the Latvian legislature, in 1997, to correct any errors that might have been committed during the land reform, it could nevertheless have been expected to uphold the principle of legal certainty and to refrain from imposing excessive burdens on individuals. Thirdly, the expropriation at issue had been of benefit solely to the State, which had not redistributed any of the property to individuals. The present case was therefore not one where a manifestly unjust situation resulting from a process of denationalisation had to be remedied by the legislature *ex post facto* within a relatively short time in order to restore social justice.

Lastly, the Government had failed to show that the legitimate aim relied on, namely that of optimising the management of the Riga Port infrastructure in the general context of the State's economic policy, could not be fulfilled by less drastic measures than expropriation compensated for by purely symbolic sums. The State's budgetary difficulties did not constitute an imperative capable of justifying the adoption of such exceptional measures. In principle, it was not for the Court to indicate to the Contracting Parties what concrete legislative or regulatory measures should be taken in order to comply with their obligations. That being said, an exchange of land or a reduction in the rent due to the applicants – for as long as the State did not have the requisite budgetary resources to expropriate their land in return for fair compensation – were conceivable examples of such measures. Lastly, the authorities could have calculated the compensation on the basis of the cadastral value of the land at the date on which the applicants had actually lost their title instead of using the cadastral value from 1940. However, there was no evidence in the file that such measures had been discussed or even envisaged at national level. In those circumstances, even though Article 1 Protocol 1 ECHR did not, in the present case, require the reimbursement of the full cadastral or market value of the expropriated properties, the disproportion

between their current cadastral value and the compensation awarded was too significant for it to find that a "fair balance" had been struck between the interests of the community and the applicants' fundamental rights. The State had overstepped the margin of appreciation afforded to it and the expropriation complained of by the applicants had imposed on them a disproportionate and excessive burden, upsetting the "fair balance" to be struck between the protection of property and the requirements of the general interest. There had therefore been a violation of Article 1 Protocol 1 ECHR.

Cross-references:

- *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, ECHR 2005 VI.

Languages:

English, French.



Identification: ECH-2012-3-003

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 13.12.2012 / **e)** 22689/07 / **f)** De Souza Ribeiro v. France / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

5.3.32 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:

Foreigner, expulsion, right to family life / Foreigner, expulsion, administrative procedure, summary / Expulsion, remedy, effective / Effective remedy, deprivation / Foreigner, expulsion, remedy, effective.

Headnotes:

The unduly hasty execution of an order for an alien's removal that excludes any possibility of obtaining a court ruling on a request for a stay will render domestic remedies ineffective in practice, in violation of Article 13 ECHR.

Summary:

I. The applicant, a Brazilian national, lived in French Guyana with his family from 1988, when he was 7 years old, until January 2007. On 25 January 2007 he was stopped at a road check. Unable to show proof that his presence on French soil was legal, he was arrested and served with administrative orders for his removal and detention pending removal. At 3.11 p.m. the next day he applied to an administrative court for judicial review of the removal order. He made an urgent request for a stay of execution suspension of the removal order and expressed serious doubts as to its validity. At 4 p.m., barely 50 minutes after lodging his application with the Administrative Court, the applicant was removed to Brazil. That evening the Administrative Court declared his application for judicial review devoid of purpose as he had already been deported. In February 2007 the applicant lodged an urgent application for protection of a fundamental freedom (*requête en référé liberté*) with the Administrative Court, which was dismissed. In August 2007 he returned to French Guyana illegally. On 18 October 2007 the Administrative Court examined the applicant's application of 26 January 2007 for judicial review of the initial removal order, which it declared illegal and set aside. In June 2009 the applicant was issued with a "visitor's" residence permit, which was renewed until June 2012. He now has a renewable residence permit for "private and family life".

II. The Court noted, firstly, that the applicant had made use of the remedies available to him under the system in force in French Guyana prior to his removal. However, the prefect had effected only a cursory examination of his situation. The applicant had been removed from the territory less than thirty-six hours after his arrest pursuant to an administrative removal order that was succinct and stereotyped and was served on the applicant immediately after his arrest.

Furthermore, regardless of the reason for the applicant's illegal situation at the time of his arrest, he was protected under French law against any form of expulsion. That was the conclusion reached by the Administrative Court, which had proceeded to declare the removal order illegal. Thus, by 26 January 2007 the French authorities were in possession of evidence that the applicant's removal was not in accordance

with the law and might therefore constitute an unlawful interference with his rights. Accordingly, at the time of his removal to Brazil a serious question arose as to the compatibility of his removal with Article 8 ECHR and he therefore had an "arguable" complaint in that regard for the purposes of Article 13 ECHR.

The applicant had been able to apply to the Administrative Court. That Court fulfilled the requirements of independence, impartiality and competence to examine the applicant's complaints, which complaints contained clearly explained legal reasoning. However, the brevity of the period between the applicant's application to the Administrative Court and his removal had excluded any possibility that the Court had seriously examined the circumstances and legal arguments for and against finding a violation of Article 8 ECHR in the event of the removal order being enforced. It followed that no judicial examination had been made of the merits or of the applicant's urgent application for interim measures. While the urgent proceedings could in theory have enabled the Administrative Court to examine the applicant's arguments and, if necessary, to stay execution of the removal order, any possibility of that actually happening had been extinguished because of the excessively short time between his application to the Court and his removal. In fact, the urgent-applications judge had been powerless to do anything but declare the application devoid of purpose. The applicant had thus been deported solely on the basis of the prefect's order. Consequently, the haste with which the removal order was executed had had the effect of rendering the available remedies ineffective in practice and therefore inaccessible and the applicant had had no chance of having the lawfulness of the removal order examined sufficiently thoroughly by a national authority offering the requisite procedural guarantees.

Neither French Guyana's geographical location and the strong pressure of immigration there, nor the danger of overloading the courts and adversely affecting the proper administration of justice, justified the exception to the ordinary legislation or the manner in which it was applied. The discretion the States were afforded regarding the manner in which they conformed to their obligations under Article 13 ECHR could not be exercised in a way that deprived applicants of the minimum procedural safeguards against arbitrary expulsion.

In the light of all the foregoing, the applicant had not had access in practice to effective remedies in respect of his complaint under Article 8 ECHR when he was about to be deported. That situation had not been remedied by the eventual issue of a residence

permit. The Court therefore dismissed the Government's preliminary objection concerning the applicant's loss of "victim" status within the meaning of Article 34 ECHR, and found a violation of Article 13 ECHR.

Cross-references:

- *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 286-287, ECHR 2011;
- *I.M. v. France*, no. 9152/09, § 136, 02.02.2012.

Languages:

English, French.



Identification: ECH-2012-3-004

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 13.12.2012 / **e)** 39630/09 / **f)** *El-Masri v. "the former Yugoslav Republic of Macedonia"* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Extraordinary rendition / Deportation, detention pending / Deportation, torture, risk / Detention, arbitrary / Investigation, inadequate / Misconduct, *prima facie* case / Evidence, circumstantial / Right to truth / Secret, state, investigation, obstruction / Impunity, appearance / Torture, elements / Detention, location, unusual.

Headnotes:

"Extraordinary rendition" referred to the extra-judicial transfer of a person from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment. By its deliberate circumvention of due process, it was anathema to the rule of law and the values protected by the Convention.

A Contracting State may be considered directly responsible for a violation of Article 3 ECHR, even though treatment proscribed by that provision was imposed by agents from another State, notably if the agents from the Contracting State concerned actively facilitated the treatment and failed to take any necessary measures to prevent it. Likewise, a Contracting State may be held responsible when its authorities actively facilitated arbitrary detention by handing over the detainee to the agents of another State, despite the fact that they were aware or ought to have been aware of the risk of a flagrant breach of Article 5 ECHR. Failure to conduct an effective investigation in such cases could also give rise to a violation of the procedural aspect of Articles 3 and 5 ECHR.

Summary:

I. The applicant, a German national, alleged that on 31 December 2003 he boarded a bus for Skopje. At the Macedonian border a suspicion arose as to the validity of his passport. He was questioned by the Macedonian authorities about possible ties with several Islamic organisations and groups. Later he was taken to a hotel room in Skopje where he was held for 23 days. During his detention, he was watched at all times and interrogated repeatedly. His requests to contact the German Embassy were refused. On one occasion, when he stated that he intended to leave, a gun was pointed at his head and he was threatened. On the thirteenth day of his confinement, the applicant commenced a hunger strike to protest against his continued detention. On 23 January 2004, handcuffed and blindfolded, he was put in a car and taken to Skopje Airport.

There he was placed in a room, beaten severely by several disguised men, stripped and sodomised with an object. After a suppository had been forcibly administered, he was placed in a nappy and dressed in a dark blue short-sleeved tracksuit. Then, shackled and hooded, and subjected to total sensory deprivation, he was forcibly marched to a CIA aircraft, which was surrounded by Macedonian security agents who formed a cordon around the plane. When on the plane, the applicant was thrown to the floor,

chained down and forcibly tranquillised. While in that position, the applicant was flown to Kabul (Afghanistan) where he was held captive for five months.

On 29 May 2004 the applicant was returned to Germany via Albania. In October 2008 the applicant lodged a criminal complaint with the Skopje public prosecutor's office, but this was rejected as being unsubstantiated.

II. The applicant's allegations were contested by the respondent Government on all accounts. However, after drawing inferences from the available material and the authorities' conduct and in the absence of any satisfactory and convincing explanation from the Government, the Court found them established beyond reasonable doubt.

By filing the criminal complaint, the applicant had brought to the public prosecutor's attention his allegations that State agents had subjected him to ill-treatment and had been actively involved in his subsequent rendition by CIA agents. His complaints had been supported by the evidence which had come to light in the course of the international and other foreign investigations. He had thus laid the basis of a *prima facie* case of misconduct on the part of the security forces of the respondent State, which had warranted an investigation. However, almost two and a half months later the public prosecutor had rejected the complaint for lack of evidence. Apart from seeking information from the Ministry of the Interior, she had not taken any steps to examine the applicant's allegations. Moreover, although the applicant's allegations regarding the timing and manner of his transfer to Afghanistan had been strikingly consistent with the actual course of the aircraft concerned, the investigators had remained passive and had not followed up that lead, considering instead that no other investigatory measures were necessary. In view of the considerable, at least circumstantial, evidence available when the applicant submitted his complaint, such a conclusion fell short of what could be expected from an independent authority.

Another aspect of the inadequate character of the investigation was its impact on the right to the truth regarding the relevant circumstances of the case. The case was of great importance not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened. The issue of "extraordinary rendition" had attracted worldwide attention and triggered inquiries by many international and intergovernmental organisations, including the UN human rights bodies, the Council of Europe and the European Parliament. The concept of "State

secrets" had often been invoked to obstruct the search for the truth. State secret privilege had also been asserted by the US Government in the applicant's case before the US courts. Despite the undeniable complexity of the circumstances surrounding the present case, the respondent State should have endeavoured to undertake an adequate investigation in order to prevent any appearance of impunity in respect of certain acts. Therefore, the summary investigation that had been carried out in this case could not be regarded as effective and there had been a violation of the procedural aspect of Article 3 ECHR.

As regards the treatment imposed at the hotel the applicant had undeniably lived in a permanent state of anxiety owing to his uncertainty about his fate during the interrogation sessions to which he had been subjected. Furthermore, such treatment had intentionally been meted out with the aim of extracting a confession or information about his alleged ties with terrorist organisations. The applicant's suffering had also been increased by the secret nature of the operation and the fact that he had been kept incommunicado for twenty-three days in a hotel, an extraordinary place of detention outside any judicial framework. Therefore, the treatment to which the applicant had been subjected while in the hotel had amounted on various counts to inhuman and degrading treatment.

As regards treatment imposed at the airport the same pattern of conduct applied in similar circumstances had already been found to be in breach of Article 7 of the UN International Covenant on Civil and Political Rights. Although the applicant had been in the hands of the special CIA rendition team, the acts concerned had been carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State had to be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities. The applicant had not posed any threat to his captors. Thus, the physical force used against him at the airport had been excessive and unjustified in the circumstances. The measures had been used in combination and with premeditation, with the aim of causing severe pain or suffering in order to obtain information, inflict punishment or intimidate the applicant. Such treatment amounted to torture. It followed that the respondent State must be considered directly responsible for the violation of the applicant's rights under this head since its agents had actively facilitated the treatment and failed to take any necessary to prevent it from occurring.

As regards the removal of the applicant there was no evidence that the applicant's transfer into the custody of CIA agents had been pursuant to a legitimate request for his extradition or any other legal procedure recognised in international law for the transfer of a prisoner to foreign authorities. Nor had any arrest warrant been shown to have existed at the time authorising the applicant's delivery into the hands of US agents. Further, the evidence suggested that the Macedonian authorities had had knowledge of the destination to which the applicant would be flown from Skopje Airport. They were also or ought to have been aware that there was a real risk that the applicant would be subjected to treatment contrary to Article 3 ECHR, as various reports had been published at the time concerning practices resorted to or tolerated by the US authorities that were manifestly contrary to the principles of the Convention. Lastly, the respondent State had not sought any assurances from the US authorities to avert the risk of the applicant being ill-treated. Accordingly, having regard to the manner in which the applicant had been transferred into the custody of the US authorities, the Court considered that he had been subjected to "extraordinary rendition", that is, an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment.

The detention of the applicant also raised issues under Article 5 ECHR. His confinement in the hotel in Skopje had not been authorised by a court or substantiated by any custody record. The applicant had not had access to a lawyer, or been allowed to contact his family or a representative of the German Embassy and he had been deprived of any possibility of being brought before a court to test the lawfulness of his detention. It was wholly unacceptable that in a State subject to the rule of law a person could be deprived of his or her liberty in an extraordinary place of detention outside any judicial framework. The applicant's unacknowledged and incommunicado detention in such a highly unusual location as a hotel had added to the arbitrariness of the deprivation of liberty. This constituted a particularly grave violation of his right to liberty and security.

The applicant had then been subjected to "extraordinary rendition", which entailed detention outside the normal legal system and which, by its deliberate circumvention of due process, was anathema to the rule of law and the values protected by the Convention. Furthermore, the detention of terrorist suspects within the "rendition" programme run by the US authorities had already been found to have been arbitrary in other similar cases. In such

circumstances, it should have been clear to the Macedonian authorities that, having been handed over into the custody of the US authorities, the applicant had faced a real risk of a flagrant violation of his rights under Article 5 ECHR. The Macedonian authorities had not only failed to comply with their positive obligation to protect the applicant from being detained in contravention of Article 5 ECHR, they had also actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they had been aware or ought to have been aware of the risk of that transfer.

Having regard to the above, the applicant's abduction and detention had amounted to "enforced disappearance" as defined in international law. The respondent Government was to be held responsible for violating the applicant's rights under Article 5 ECHR during the entire period of his captivity.

Lastly, the Court had already found under Article 3 ECHR that the respondent State had not conducted an effective investigation into the applicant's allegations of ill-treatment. For the same reasons, it found that no meaningful investigation had been conducted into the applicant's credible allegations that he had been detained arbitrarily. Therefore, there had been a violation of the procedural aspect of Article 5 ECHR.

Languages:

English, French.



Systematic thesaurus (V21) *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

1 Constitutional Justice¹

1.1 Constitutional jurisdiction²

1.1.1	Statute and organisation	
1.1.1.1	Sources	
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¹ Ce chapitre – comme le Thésaurus systématique en général – doit être utilisé de façon restrictive. Les mots-clés, qui y figurent, doivent être introduits uniquement si une question pertinente se pose. Ce chapitre ne sert donc pas à établir des statistiques, mais le lecteur du *Bulletin* ou l'utilisateur de la base CODICES doit y retrouver uniquement des décisions dont le sujet est également le thème du mot-clé.

² Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

³ For example, rules of procedure.

⁴ For example, age, education, experience, seniority, moral character, citizenship.

⁵ Including the conditions and manner of such appointment (election, nomination, etc.).

⁶ Including the conditions and manner of such appointment (election, nomination, etc.).

⁷ Vice-presidents, presidents of chambers or of sections, etc.

⁸ For example, State Counsel, prosecutors, etc.

⁹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹⁰ For example, assessors, office members.

¹¹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

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¹³ Referrals of preliminary questions in particular.

¹⁴ Enactment required by law to be reviewed by the Court.

¹⁵ Review *ultra petita*.

¹⁶ Horizontal distribution of powers.

¹⁷ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁸ Decentralised authorities (municipalities, provinces, etc.).

¹⁹ For questions other than jurisdiction, see 4.9.

²⁰ Including other consultations. For questions other than jurisdiction, see 4.9.

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²¹ Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

²² As understood in private international law.

²³ Including constitutional laws.

²⁴ For example, organic laws.

²⁵ Local authorities, municipalities, provinces, departments, etc.

²⁶ Or: functional decentralisation (public bodies exercising delegated powers).

²⁷ Political questions.

²⁸ Unconstitutionality by omission.

²⁹ Including language issues relating to procedure, deliberations, decisions, etc.

³⁰ For the withdrawal of proceedings, see also 1.4.10.4.

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³¹ Pleadings, final submissions, notes, etc.

³² May be used in combination with Chapter 1.2. Types of claim.

³³ For the withdrawal of the originating document, see also 1.4.5.

³⁴ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

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³⁵ For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

³⁶ Only for issues concerning applicability and not simple application.

³⁷ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

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³⁹ Presumption of constitutionality, double construction rule.

⁴⁰ Including the principle of a multi-party system.

⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

⁴⁴ Including maintaining confidence and legitimate expectations.

⁴⁵ Principle according to which general sub-statutory acts must be based on and in conformity with the law.

⁴⁶ Prohibition of punishment without proper legal base.

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⁴⁷ Including compelling public interest.

⁴⁸ Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

⁴⁹ Including questions of treason/high crimes.

⁵⁰ Including prohibition on monopolies.

⁵¹ For the principle of primacy of Community law, see 2.2.1.6.

⁵² Including the body responsible for revising or amending the Constitution.

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⁵³ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵⁴ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁵ For example, the granting of pardons.

⁵⁶ For regional and local authorities, see Chapter 4.8.

⁵⁷ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁸ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁹ In particular, commissions of enquiry.

⁶⁰ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁶¹ Obligation on the legislative body to use the full scope of its powers.

⁶² Representative/imperative mandates.

⁶³ Including the convening, duration, publicity and agenda of sessions.

⁶⁴ Including their creation, composition and terms of reference.

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⁶⁵ State budgetary contribution, other sources, etc.

⁶⁶ For the publication of laws, see 3.15.

⁶⁷ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁸ For local authorities, see 4.8.

⁶⁹ Derived directly from the Constitution.

⁷⁰ See also 4.8.

⁷¹ The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

⁷² Civil servants, administrators, etc.

⁷³ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

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⁷⁴ Other than the body delivering the decision summarised here.

⁷⁵ Positive and negative conflicts.

⁷⁶ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁷ For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

⁷⁸ Comprises the Court of Auditors in so far as it exercises judicial power.

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⁷⁹ See also 3.6.

⁸⁰ And other units of local self-government.

⁸¹ See also keywords 5.3.41 and 5.2.1.4.

⁸² Organs of control and supervision.

⁸³ Including other consultations.

⁸⁴ For questions of jurisdiction, see keyword 1.3.4.6.

⁸⁵ Proportional, majority, preferential, single-member constituencies, etc.

⁸⁶ For example, *Panachage*, voting for whole list or part of list, blank votes.

⁸⁷ For aspects related to fundamental rights, see 5.3.41.2.

⁸⁸ For the creation of political parties, see 4.5.10.1.

⁸⁹ For example, names of parties, order of presentation, logo, emblem or question in a referendum.

⁹⁰ Tracts, letters, press, radio and television, posters, nominations, etc.

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⁹¹ For the access of media to information, see 5.3.23, 5.3.24, in combination with 5.3.41.

⁹² Impartiality of electoral authorities, incidents, disturbances.

⁹³ For example, signatures on electoral rolls, stamps, crossing out of names on list.

⁹⁴ For example, in person, proxy vote, postal vote, electronic vote.

⁹⁵ This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

⁹⁶ For example, Auditor-General.

⁹⁷ Includes ownership in undertakings by the state, regions or municipalities.

⁹⁸ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁹⁹ For example, Court of Auditors.

¹⁰⁰ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

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¹⁰¹ *Staatszielbestimmungen.*

¹⁰² Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

¹⁰³ Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

¹⁰⁴ Positive and negative aspects.

¹⁰⁵ For rights of the child, see 5.3.44.

¹⁰⁶ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

¹⁰⁷ Includes questions of the suspension of rights. See also 4.18.

¹⁰⁸ Taxes and other duties towards the state.

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¹⁰⁹ Universal and equal suffrage.

¹¹⁰ According to the European Convention on Nationality of 1997, ETS no. 166, "nationality" means the legal bond between a person and a state and does not indicate the person's ethnic origin" (Article 2) and "... with regard to the effects of the Convention, the terms 'nationality' and 'citizenship' are synonymous" (paragraph 23, Explanatory Memorandum).

¹¹¹ For example, discrimination between married and single persons.

¹¹² This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

¹¹³ Detention by police.

¹¹⁴ Including questions related to the granting of passports or other travel documents.

¹¹⁵ May include questions of expulsion and extradition.

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¹¹⁶ Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.

¹¹⁷ In the meaning of Article 6.1 of the European Convention on Human Rights.

¹¹⁸ This keyword covers the right of appeal to a court.

¹¹⁹ Including the right to be present at hearing.

¹²⁰ Including challenging of a judge.

¹²¹ Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

¹²² This keyword also includes the right to freely communicate information.

¹²³ Militia, conscientious objection, etc.

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¹²⁴ Aspects of the use of names are included either here or under "Right to private life".

¹²⁵ Including compensation issues.

¹²⁶ This keyword also covers "Freedom of work".

¹²⁷ This should also cover the term freedom of enterprise.

¹²⁸ Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

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* 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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