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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Strasbourg, December 2013

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Austria, Norway.

Précis of important decisions of the reference period 1 January 2013 – 30 April 2013 will be published in the next edition, *Bulletin* 2013/2, for the following country:

Bulgaria.

Albania
Constitutional Court

Important decisions

Identification: ALB-2013-1-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 06.02.2013 / **e)** 1/13 / **f)** Laws and other acts having statutory force / **g)** *Fletore Zyrtare* (Official Gazette) / **h)** CODICES (Albanian, French).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State**.
3.9 General Principles – **Rule of law**.
3.10 General Principles – **Certainty of the law**.
3.16 General Principles – **Proportionality**.
3.18 General Principles – **General interest**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

Home, unoccupied residential property / Necessity and urgency / Restitution / Tenant, capacity, right / Tenant, obligation to vacate apartment.

Headnotes:

The principle of certainty of the law is one of the fundamental elements of the principle of the rule of law which, in addition to the clarity, comprehensibility and stability of the standard-setting system, also includes confidence in the legal system, without acceding to every expectation that favourable legal situations will never be changed.

Weighing up limited rights against the public interest is an attempt by the legislature to strike a balance between the state's right to ensure public and social order, on the one hand, and the protection of individual rights and freedoms on the other.

Summary:

I. Under Article 101 of the Constitution of the Republic of Albania (hereinafter, the "Constitution"), the Council of Ministers published Normative Act no. 03 of 1 August 2012 on the expulsion of tenants holding homeless status housed in private properties formerly expropriated and currently restored to their legitimate owners, an Act approved by Parliament under Law no. 82/2012 of 13 September 2012, which provides for the eviction of tenants housed in private properties formerly expropriated and currently restored to their legitimate owners.

The appellant party, the Association of Tenants of Formerly Privately-Owned Public Housing, lodged a request with the Constitutional Court for revocation of the Normative Act on the grounds that it infringed the principles of certainty of the law, of non-discrimination, of proportionality, of the hierarchy of legal standards and of the separation of powers, as well as the right to a fair trial.

II. The Court, drawing on the Association's statutes and founding deed and the nature of its activities, as well as the subject of the challenged Act, which is eviction and the restitution, before 1 November 2012, of housing units by tenants residing in the expropriated persons' former properties in accordance with the established conditions and criteria, considered whether there is also a vital link between the aim of the establishment of the association and the constitutional question raised.

The appellant party contended that the requirements of Article 101 of the Constitution were not met because the Council of Ministers promulgated the Normative Act in the absence of the necessity and urgency conditions which are explicitly laid down in the constitutional provision.

The Court recalled that the urgency element cannot exist *per se* without necessity, because urgency exclusively applies to a situation which brooks no further delay, whereas necessity indicates substance, points to a situation requiring a solution and evokes the social relationship which requires legal regularisation.

Drawing on the evidence produced during the plenary sitting and the parties' explanations, the Court considered that at the time of promulgation by the Council of Ministers of Normative Act no. 3 of 1 August 2012, the Albanian State was in a situation whereby the need to provide a final solution to conflicts between the public interest, i.e. the guarantee on property rights, and the interest of the social grouping of tenants in the formerly privately-owned residences, constituted a necessity. Notwithstanding the great importance of the tenants' interest in having permanent housing, in conditions whereby the balance between these interests is continually being reversed, beyond any reasonable deadline, given the excessive individual burden on the owners for the past 20 years, the prevailing situation required state intervention in order to implement prompt measures.

For this reason, the Court reached the conclusion that the Normative Act was promulgated under conditions of necessity and urgency.

In connection with the principle of certainty of the law, the Court stressed that, regardless of its importance, this principle cannot take precedence in all cases. This means that if a different method of regularising a relationship is directly influenced by the public interest, with all its essential elements, this interest will clearly take priority over the principle of certainty of the law.

Having examined the historical background to the legislation regarding the case under examination, the Court noted that the Albanian Parliament has approved a series of laws concerning the treatment of tenants. After the adoption of the Council of Ministers' Normative Act, the Court considered it necessary to weigh up the different interests, *viz*. the interest of the tenants (housed in the formerly privately-owned residences which have now been restored to their owners) in having housing, and the legitimate owners' interest in enjoying their property undisturbed.

As part of the effort to achieve the requisite social goals, the state has a legitimate right to regulate the social protection system by developing and implementing social policies and strategies. In this sense, in accordance with the priorities of economic and social development, the legislature must independently assess the most appropriate means of balancing interests and at the same time, make reasonable distinctions, without infringing constitutional standards.

The Court noted that the social protection of the tenants housed in the formerly privately-owned residences which have now been restored to their owners has changed in accordance with the dynamics of general social change. Such change is the result of the state achieving its social goals. It is also the consequence of constitutional review of the laws which reflected actual social policies and strategies, regulating needs and expectations of social realities different from the current social reality.

To that extent, the Court considered that the context in which the right to housing of the tenants housed in the formerly privately-owned residences which have now been restored to their owners used to be addressed was different from that of the case under consideration, where the right to housing comes up against the tenants' legitimate right to enjoy their property in an unrestricted and undisturbed manner.

The Court considered that the criteria and measures provided for by the challenged act are proportional and reasonable in terms of restoring a fair balance between the requirements of the general interest of the community and the requirements of protecting the fundamental property rights of the legitimate owners, who, because of the limitation of the use of their property over a long period, bear an excessive individual burden which exceeds any reasonable impact and which could potentially infringe their basic right of ownership.

The Court reached the conclusion that the legislature's aim, namely, to guarantee property rights, is sufficiently important to justify restricting the right to housing.

Consequently, the Court held the appellants' contention that the principles of certainty of the law, of acquired rights and of non-discrimination have been infringed to be unfounded.

The appellant party also claimed that the act challenged violates the principle of separation and balance of powers. It contended that, in promulgating the Normative Act and providing for other categories of writs of execution, exceeding the terms of the Code of Civil Procedure, the Council of Ministers had exercised competences of the legislature. Moreover, the appellant argued that the obligation on the first-instance courts not to suspend writs of execution infringes the independence of the judiciary and the fundamental right to a fair trial, as secured under Article 42 of the Constitution and Article 6 ECHR.

With reference to the nature of the appellant's contentions, the Court recalled its position adopted in its previous decisions to the effect that the examination of disputes and analysis of incompatibility between two different laws or between laws and codes lies outside its jurisdiction.

In view of the above considerations, the Court considered that since there is no breach of such constitutional principles as certainty of the law, non-discrimination and proportionality, as the appellant party contends, the latter has no standing *(locus standi)* to request the review of the constitutionality of the act (law) by virtue of Articles 7 and 116 of the Constitution.

In conclusion, drawing on the analysis of the appellants' contentions, the Court held that the Normative Act (Law) is not contrary to the requirements of Articles 15, 17, 18 and 101 of the Constitution; of Articles 6 and 8 ECHR and Article 1 Protocol 1 ECHR; and of Articles 2 and 11 of the International Covenant on Economic, Social and Cultural Rights.

For these reasons, the Court held that the appellant's request for the revocation of the Act (Law) under examination as being incompatible with the Constitution and the European Convention on Human Rights is unfounded and must consequently be rejected.

Languages:

Albanian.

Identification: ALB-2013-1-002

a) Albania / **b)** Constitutional Court / **c)** / **d)** 27.02.2013 / **e)** 7/13 / **f)** Laws and other acts having statutory force / **g)** *Fletore Zyrtare* (Official Gazette) / **h)** CODICES (Albanian, French).

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:

Taxes, court fee.

Headnotes:

The provision establishing the threshold levels of service fees, including fees for judicial services, does not infringe the individual right of access to the courts; it merely delegates responsibility for setting these scales to the relevant institutions of the public administration.

Summary:

I. The Parliament of the Republic of Albania approved Law no. 9975 of 28 July 2008 on national fees and taxes, revoking the 2002 Law on the system of fees and taxes in the Republic of Albania, which also provided for fees related to judicial acts. The Finance and Justice Ministers issued two sets of implementing regulations for the Law, in 2009 and 2010 respectively.

The appellants, the Courts of First Instance of Pogradec and Tirana, contended that Law no. 9975 of 28 July 2008 on national fees and taxes and the 2010 implementing regulations are incompatible with the Constitution because they infringe the right of access to the courts. They argued that the restriction of the right of access to the courts is disproportionate and discriminatory. Similarly, they contended that there is a breach of the absolute legal reserve laid down in Article 155 of the Constitution, concerning the determination of fees, taxes and other financial obligations solely by law. Nor are the constitutional obligations relating to the promulgation of normative acts as laid down in Article 118 of the Constitution fulfilled.

Another appellant involved in the request lodged with the Constitutional Court, namely the Centre for Civil-Law Initiatives (hereinafter, "CCLI"), contended that the 2010 implementing regulations create direct discrimination and are incompatible with Article 18 of the Constitution, which guarantees the right to equality and non-discrimination. The CCLI argued that the regulations infringe the constitutional right of access to the courts and the legitimacy principle. They do not provide for exemption from, or reduction of, judicial fees for specified categories of persons, and thus fail to respect their capacity for paying.

II. The Constitutional Court began by determining the appellants' *locus standi*:

The Court reached the conclusion that the reference courts fulfilled the conditions of the judgment relating to review of the constitutionality of the provision which can be requested by the ordinary courts: they identified the applicable law and the direct link between the challenged legal provisions and the solution to the basic conflict; and they presented the grounds of unconstitutionality of the law, drawing on the actual standards and principles of the Constitution.

Consequently, they have *locus standi* to submit to the Court a request for an interlocutory review of the provision under consideration (an interlocutory review is a review of the constitutionality of standards implemented exclusively by the ordinary courts).

As regards the *locus standi* of the CCLI, the Court held that the Centre has no standing to apply for review of constitutionality because it had not substantiated a direct link between the purpose for which it was set up (or the activity which it conducts) and the consequences of the provisions challenged as being incompatible with the Constitution. Nor had it proved the existence of any direct, certain and personal interest in this case.

In connection with the alleged violation of the right of access to the courts, the Court noted that by virtue of Article 11/2 of Law no. 9975/2008 amended, the threshold level of service fees, including fees for judicial services, is determined through the intermediary of the implementing regulations jointly issued by the Finance Minister and the relevant institutions. As the content of the Article clearly indicates, this is a delegatory provision which confers on the Finance Minister and the relevant institutions the right to determine, in accordance with the regulations, the (minimum) threshold levels for service fees as defined by law.

In the Court's view, this provision does not infringe the individual right of access to the courts; it merely delegates responsibility for setting these scales to the relevant institutions of the public administration.

There is nothing to stop the ordinary courts from investigating and exempting plaintiffs from paying this fee if they cannot afford it in financial terms.

The ordinary courts have discretionary powers and can decide whether this procedural criterion must be fulfilled or not in order to submit a complaint, and can permit exemptions on a case-by-case basis, so as not to prevent implementation of the right of access to the courts.

In accordance with the provisions of the Code of Civil Procedure, in the event of exemption from payment of judicial fees, including the tax on judicial acts, such expenses are covered from the fund earmarked in the state budget.

Moreover, Law no. 10039 of 22 December 2008 on legal aid appointed a collegial state body, the State Commission on Legal Aid, whose main duty is to provide legal aid to specified social categories by defraying the necessary expenses.

The Court stressed that on the basis of documentary evidence and civil procedural legislation, judges must investigate the plaintiff's claims as regards inability to pay and assess whether he or she must be exempted from payment of the judicial service fees.

The reference courts contended that by formally and substantively delegating the right to establish fees to the relevant Ministers by means of regulations, Article 11/2 of Law no. 9975/2008 amended is incompatible with the legal reserve set out in Article 155 of the Constitution, which only entitles the law to determine fees, taxes, and other national and regional financial obligations.

The Court considered that the legal reserve set out in Article 155 of the Constitution on the determination of fees, taxes, and national and regional obligations is a relative legal reserve.

In the Court's view, a distinction must be drawn between the concept of fees as a financial obligation which must be paid by all individuals, and that of service fees, which, in practical terms, is a financial obligation paid for a judicial service. In some cases, the word "law" as used in the Constitution, and generally in legislation, entails a broad interpretation which also includes legal acts. This is the case of general regulations, and so the word "law" is used in the sense of legislation or statutory law, not acts of the legislature.

Article 11/2 of Law no. 9975/2008, as amended, delegated the determination of minimum levels of service fees, including fees for judicial services, to the Finance Minister and the relevant institutions, which are authorised to promulgate implementing regulations to this end. The Court considered that, contrary to the contentions of the reference courts, this delegatory provision complies with the relative legal reserve set out in Article 155 and the criteria for the promulgation of legal acts laid won in Article 118.

In the light of all the foregoing observations, the Court held that nothing in the content of Article 11/2 of Law no. 9975/2008, as amended, suggests a breach of the standards set out in Articles 118 and 155 of the Constitution.

In conclusion, following the above argumentation, the Court held that Article 11/2 of Law no. 9975/2008, as amended, does not infringe the right of access to the courts within the meaning of Article 42 of the Constitution and is not contrary to the standards set out in Articles 118 and 155 of the Constitution.

Consequently, the request for the revocation of this Article is unfounded and must be rejected.

Languages:

Albanian.

Armenia
Constitutional Court

Statistical data
1 January 2013 – 30 April 2013

- 98 applications have been filed, including:
  - 17 applications, filed by the President
  - 79 applications, filed by individuals
  - 2 applications concerned with disputes relating the decisions of the Central Electoral Commission on the Presidential elections in 2013
- 26 cases have been admitted for review, including:
  - 7 applications, based on individual complaints concerning the constitutionality of certain provisions of laws
  - 17 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution
  - 2 cases concerned with disputes relating the decisions of the Central Electoral Commission on the Presidential elections in 2013
- 27 cases heard and 27 decisions delivered (including decisions on applications filed before the relevant period) including:
  - 17 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution
  - 3 decisions on cases initiated on individual complaints concerning the constitutionality of certain provisions of laws
  - 3 decisions, filed by the Human Rights Defender
  - 1 case on the basis of the application of the deputies of National Assembly
  - 2 cases concerned with disputes relating the decisions of the Central Electoral Commission on the Presidential elections in 2013

Important decisions

Identification: ARM-2013-1-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 30.01.2013 / **e)** 1073 / **f)** On the conformity with the Constitution of the provisions of Law on Taxes / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

Property right, restriction / Property, deprivation / Property, right, scope / Property, seizure / Tax, exercise powers and perform functions / Tax, powers of the tax authorities / Taxation law, interpretation.

Headnotes:

Considering the issue of the State's power to seize property in the framework of tax obligations and its correlation with the right to property, the seizure of property shall be implemented solely in those cases when all other possibilities guaranteeing the performance of tax obligations and stipulated by law are exhausted. No person may be deprived of his or her property, except in the interest of the community and subject to conditions stipulated by law and general principles of international law.

Summary:

I. The applicant challenged provisions of the Law on Taxes which concern mechanisms for the seizure of property. The applicant contended that the implementation of such seizure leads to deprivation of the possibility of full performance of the right to property, which means that the seizure of property is, *per se*, deprivation of the right to property, which, in its turn, may be performed only by the decision of a court according to the Constitution, whereas, in practice, it is performed by tax bodies.

II. The Constitutional Court considered the challenged legal provisions in the context of the constitutional regulations relating to the deprivation of property. The Court emphasised the necessity to ascertain whether

the challenged provisions aim to deprive the person of the property or to ensure the performance of tax obligations, and whether there are sufficient guarantees which prevent breaches of the human rights within the implementation of the power to seize property. The Court first highlighted the main kinds of limitation to the right to property allowed by the Constitution, which are the following: prohibition of the performance of the right to property by harming the environment; the rights and lawful interests of others; community and state; and deprivation of property, compulsory alienation of property and limitation of the right to land ownership for non-citizens. The Court stressed that the first limitation aims to guarantee a reasonable balance between right to property and the aforementioned values, thereby guaranteeing the right to property but not instituting an absolute right. The Court held that legal aim of the contested regulation is to guarantee the performance of tax obligations of individuals, which has the public-legal meaning predetermined by the Constitution.

The Court highlighted the peculiarities of the deprivation of property to ascertain whether seizure *per se* constitutes such limitation to the right to property. The Court referred to key features of the deprivation of property, such as; deprivation of the right to property without any compensation, against the will and express wishes of the person, simultaneous suspension of all components of the right and without any guarantee of continuation, and lastly deprivation as a civil sanction. Taking into consideration all these features the Court held that seizure of property definitely differs from the deprivation of property.

As regards the guarantees of human rights protection within the legal framework for property seizure, the Court stated that the acts deriving from the performance of property seizure prescribed in the Law on Taxes (e.g. signing of timetable) derive from the Constitution. The Court also noted that taking into account the real risk concerned with the performance of these measures by the tax bodies, the seizure shall be performed only after all other measures to ensure the performance of tax obligations have been attempted.

The Constitutional Court accordingly declared the challenged provisions to be constitutional, but solely within the legal interpretation accorded to them by the Court's decision.

Languages:

Armenian.

Belarus
Constitutional Court

Important decisions

Identification: BLR-2013-1-001

a) Belarus / **b)** Constitutional Court / **c)** En banc / **d)** 23.04.2013 / **e)** D-799/2013 / **f)** On the conformity with the Constitution of the Law on making alterations and addenda to certain laws of the Republic of Belarus / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 2/2013; www.kc.gov.by / **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**.
4.6.9.3 Institutions – Executive bodies – The civil service – **Remuneration**.
5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation**.
5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work**.
5.4.15 Fundamental Rights – Economic, social and cultural rights – **Right to unemployment benefits**.

Keywords of the alphabetical index:

State employee, end of functions / Dismissal from office / Redundancy, payment.

Headnotes:

Legislative provisions which exclude the norms of the Law on State Service and of the Law on Employment providing for higher rates of payments to former state employees and servicemen and instead stipulate a unified approach with other categories of workers are consistent with the constitutional provisions safeguarding the right to work and the duty of the State to undertake the necessary social measures to support unemployed persons.

Summary:

The Constitutional Court, in an open court session in the exercise of obligatory preliminary review, considered the constitutionality of the Law on Making Alterations and Addenda to Certain Laws of the Republic of Belarus, which made changes to the Law on State Service and to the Law on Employment of the Population.

In particular, the legislator made changes to the provisions of the Law on State Service and of the Law on Employment, in connection with redundancy payments to state employees, when their dismissal was due to the liquidation of the state body, reduction in numbers of workers or staff, and the payment of unemployment benefit and scholarships to these state employees and military servicemen when undertaking retraining.

It was noted that redundancy payments to state employees who have been dismissed because of the liquidation of the state body and reduction in number of workers or staff are paid in accordance with labour legislation. Unemployment benefit and scholarships are paid when the state employees concerned are registered as unemployed in accordance with the Law on Employment. The rules of the Law on Employment specifying rates of unemployment benefit and scholarships for military servicemen are excluded.

By excluding the provisions of the Law on State Service and of the Law on Employment on higher rates of payments to state employees and servicemen, the Law has established an approach in line with other categories of workers.

The Constitutional Court noted that under Article 41 of the Constitution, citizens are guaranteed the right to work; if somebody becomes unemployed for reasons beyond their control, they are guaranteed training in new specialist fields and upgrading of their qualifications in line with social needs, and to unemployment benefit in accordance with the law.

The Constitutional Court was of the view that the legislative provisions under challenge were consistent with the constitutional provisions safeguarding the right to work and the duty of the State to undertake the necessary social measures to support unemployed persons.

The legislator (on the basis of Articles 97.1.2 and 98.1.1 of the Constitution), taking into account the financial options open to the State, has the right to change those parts of legal regulations that establish differences, preferences or exclusion. The Constitutional Court

emphasised that international human rights instruments establish the obligation of every state to take steps individually to the maximum of its available resources with a view to achieving progressively the full realisation of the recognised rights by all appropriate means, including the adoption of legislative measures (Article 2 of International Covenant on Economic, Social and Cultural Rights).

It accordingly recognised the Law on Making Alterations and Addenda to Certain Laws of the Republic of Belarus to be in conformity with the Constitution.

Languages:

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

Identification: BLR-2013-1-002

a) Belarus / **b)** Constitutional Court / **c)** En banc / **d)** 23.04.2013 / **e)** D-800/2013 / **f)** On the conformity with the Constitution of the Law on Making Alterations and Addenda to the Subsoil Code / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 2/2013; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

4.14 Institutions – **Activities and duties assigned to the State by the Constitution**.
5.5 Fundamental Rights – **Collective rights**.

Keywords of the alphabetical index:

Resource, mineral / Resource, natural, exploitation / Resource, natural, right to use or exploit / Environment, protection / Property, control of use.

Headnotes:

The adoption of legislation introducing bans and restrictions on the use of subsoil and extraction of peat deposits was driven by the need to ensure the reasonable use and protection of subsoil and to prevent depletion of minerals and is constitutionally compliant.

Summary:

The Constitutional Court, in the exercise of obligatory preliminary review, considered the constitutionality of the Law on Making Alterations and Addenda to the Subsoil Code.

The adoption of this legislation was driven by the need to improve the rules regulating social relations arising in connection with the use and protection of subsoil, in order to protect the interests of the State and the rights and lawful interests of subsoil users and other persons.

The Constitutional Court took note of constitutional provisions to the effect that subsoil, waters and forests are the exclusive property of the State and that the State is to supervise the rational utilisation of natural resources to protect and improve living conditions, and to preserve and restore the environment (Articles 13.6 and 46.2 of the Constitution).

It also noted that the specification in the legislative provisions under challenge of the competence of state authorities, by means of which the State implements its rights of possession, use and disposal of subsoil, are aimed at the fullest and most effective implementation of the constitutional obligation of the State to control the rational management of natural resources. Thereby the protection of the interests of the State, which is the exclusive proprietor of subsoil, and the rights and legitimate interests of subsoil users and others persons, are ensured.

The new wording of Article 30.4 of the Subsoil Code, introduced by the legislative provisions under dispute, defines territories and natural objects, where, in accordance with legislative acts, the use of subsoil may be prohibited or restricted and extraction of peat deposits may be banned.

These provisions were, in the Constitutional Court's opinion, introduced in order to ensure rational use and protection of subsoil, to prevent depletion of minerals, and are in line with part one of Article 46 of the Constitution, which enshrines the right of everyone to a conducive environment.

It therefore found the Law on Making Alterations and Addenda to the Subsoil Code in conformity with the Constitution.

Languages:

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

Belgium
Constitutional Court

Important decisions

Identification: BEL-2013-1-001

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 14.02.2013 / **e)** 6/2013 / **f)** / **g)** *Moniteur belge* (Official Gazette), 19.03.2013 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.4.9.1 Constitutional Justice – Procedure – Parties – ***Locus standi***.
1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest**.
4.10.7 Institutions – Public finances – **Taxation**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.3.36 Fundamental Rights – Civil and political rights – **Inviolability of communications**.
5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

Keywords of the alphabetical index:

Remedy, collective interest, association, statutory aim / Interest, collective remedy / Tax / Banking secrecy / Secrecy of correspondence / Tax administration, bank, information / Bank account, tax inspectorate, disclosure of information / Banking secrecy, lifting, evidence of fraud / Private life, banking information / Tax fraud / Taxation, fraud, circumstantial evidence / Taxation, signs or evidence of affluence / Taxation, taxable income, inspection / Forced labour, banks, presentation of information / Tax, fraud, transaction.

Headnotes:

The right to respect for private life, which also applies to data on tax-payers held by banks and other financial establishments, is not disproportionately infringed by entitling the tax administration to demand such data from the said financial institutions in specified cases, subject to compliance with a number of procedural rules.

It is not contrary to the principle of equality and non-discrimination to make the possibility of conducting a transaction between the public prosecutor's office and a tax-payer suspected of a tax offence subject to the agreement of the tax administration.

Summary:

A number of non-profit associations submitted an application to revoke Articles 55 to 57 and 84 of the Law of 14 April 2011 laying down various provisions. These provisions made amendments to the investigatory methods available to the tax administration and amended Article 216bis of the Code of Criminal Investigation.

By virtue of Articles 55 to 57 of the Law of 14 April 2011, the tax administration can require banks and other financial establishments to communicate data on a tax-payer where it has any circumstantial evidence of tax fraud against this person or where it wishes to ascertain the tax base "on the basis of signs and circumstantial evidence" which point to a lifestyle of a level higher than that suggested by the declared income. Article 84 of this Law, which was also challenged, makes the possibility of conducting a transaction between the public prosecutor's office and a tax-payer suspected of a tax offence subject to the agreement of the tax administration.

In accordance with its established case-law, the Court allows a non-profit association defending the collective interest of its members to appeal against legal provisions liable to affect the association's social purpose.

The appellant parties rely on the violation of the right to respect for private life. The Constitutional Court notes that the collection and processing of data relating to accounts and financial transactions constitute interference in the private lives of the data subjects and of persons having conducted financial operations with them. The Court then verifies whether this legal possibility meets the conditions for interference in the right to respect for private life and is therefore admissible.

According to the Constitutional Court, the challenged legislative provisions pursue a public-interest aim in that proper determination of taxation is vital to ensure the country's economic prosperity.

Such interference also complies with the principle of legality, because it is not only provided for by the legislature itself but also worded sufficiently clearly to cover the two hypotheses in which the law permits the tax administration to demand information from financial establishments. According to the Court, the first hypothesis in which the legislature authorises the administration to interfere in tax-payers' private lives, viz where there is circumstantial evidence of tax fraud, is sufficiently accurately delimited, in view of the examples of such evidence mentioned in the *travaux préparatoires*, to enable tax-payers to ascertain, if necessary with the help of a lawyer, in which cases a request for information from a financial establishment is justified. If necessary, it is incumbent on the courts to assess whether the evidence presented by the tax administration is sufficient to justify interference in the person's private life. In connection with the second hypothesis, viz the possibility of accessing financial data on tax-payers in order to conduct indicator-based taxation of their incomes, the Court lays down the precise limits within which the tax administration can have recourse to this facility. For instance, in order to exercise its investigatory powers, the tax administration cannot simply envisage resorting to indicator-based taxation: it must also be in possession of concrete, corroborative evidence of a lifestyle of a level higher than that which is possible with the declared income. Nevertheless, the challenged measure has a sufficient degree of foreseeability.

According to the Court, the interference in the tax-payer's private life is also reasonably justified. The tax administration has to be in a position to adduce evidence of tax fraud or produce concrete, corroborative evidence of incompatibility between the tax-payer's declared income and his or her lifestyle. Furthermore, the legislature has laid down procedural requirements which constitute effective safeguards against arbitrary interference. The Court also stresses that tax-payers are notified, concurrently with the request from the tax administration to the financial institutions, of the evidence of tax fraud or the facts pointing to incompatibility between their declared income and their lifestyle, justifying the request for information. During the period, which must be reasonable, for the financial establishment to reply, tax-payers can react and challenge the legality of the request in the courts.

In connection with other types of evidence, there has been no breach of secrecy of correspondence, according to the Court, because the challenged provisions do not authorise the tax administration to intercept mail between financial establishments and their customers. Nor has the prohibition of forced labour been infringed, since the communication of information is part of the normal activity of any financial institution and therefore does not represent an abnormal workload. Nor has there been a breach of the tax-payer's right not to incriminate himself.

In connection with Article 84 of the Law of 11 April 2011, which has also been challenged, the Court acknowledges the differential treatment between the perpetrators of offences against tax and social legislation and other offenders, particularly as regards the possibility of concluding a transaction, which is subject to the agreement of the tax or social administration. Having found that Article 216bis, § 6.2 of the Code of Criminal Instruction does not deprive the public prosecutor of the right to decide whether or not to initiate prosecution, the Court stresses that tax and social offences are detrimental to the whole community in that they deprive the authority of the requisite resources for its smooth functioning, whereas the damage suffered by the victim of an ordinary-law offence is personal, and that furthermore there are differences between the two categories in terms of the extent and mode of reparation of the damage suffered. The difference in treatment is justified by the essential differences between the victim of an ordinary-law offence and that of a tax and social offence.

The Court therefore rejects the appeal.

Languages:

French, Dutch, German.

Identification: BEL-2013-1-002

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 14.02.2013 / **e)** 7/2013 / **f)** / **g)** *Moniteur belge* (Official Gazette), 11.03.2013 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect**.
3.12 General Principles – **Clarity and precision of legal provisions**.
5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.
5.2.2 Fundamental Rights – Equality – **Criteria of distinction**.
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.
5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest**.
5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial**.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file**.
5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.
5.3.13.23.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to incriminate oneself**.
5.3.13.24 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the reasons of detention**.
5.3.13.25 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the charges**.
5.3.13.26 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to have adequate time and facilities for the preparation of**
5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel**.
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:

Police custody, lawyer, access, restriction / Lawyer, access, restriction / Criminal proceedings, preliminary phase, rights of persons being heard / Criminal proceedings, hearing, right not to incriminate oneself / Criminal proceedings, hearing, right to remain silent / Criminal proceedings, hearing, right to legal assistance / Annulment, *ex tunc*, retention of effects / Criminal proceedings, access to the criminal file / Right to legal assistance, sanctions / Criminal charges, data, self-incrimination / Defendant, safeguards / Arrest, safeguards.

Headnotes:

The principles of the legality and foreseeability of criminal proceedings set out in Article 12.2 of the Constitution are applicable to the whole procedure, including the fact-finding and investigatory phases.

The required foreseeability of criminal proceedings ensures that citizens can only be the subjects of a search, investigation or prosecution under a procedure established by law, of which they must be able to be apprised before its implementation.

Deprivation of liberty is liable to increase the vulnerability of the person under examination. The deprivation of liberty criterion on which the legislature based the differential treatment challenged vis-à-vis the right to assistance from a lawyer during the questioning is relevant to the legitimate goal of protecting more vulnerable persons.

Owing to specific safeguards laid down in the Law on preventive custody, the situation of a defendant placed in preventive custody may be considered less vulnerable than that of a suspect who is questioned throughout the 24-hour period of deprivation of liberty preceding the possible issue of an arrest warrant.

The vulnerability of persons suspected of having committed an offence and their correlative need for assistance by a lawyer in order to ensure respect for their fundamental rights increase with the gravity of the facts on which they are being questioned, as well as with the severity of the penalty incurred. This means that it is not unreasonable to establish a certain gradation in granting the right of access to a lawyer depending on the gravity of the offences attributable to the person under examination and the severity of the sentence.

Summary:

Several associations of lawyers and human rights defence organisations submitted applications to the Constitutional Court to revoke the so-called "Salduz" Law, which the legislature adopted in order to bring Belgian legislation on the right of access to a lawyer and legal assistance during the preliminary phase of criminal proceedings into line with the case-law of the European Court of Human Rights (ECHR, 27 November 2008, *Salduz v. Turkey*, §§ 51-54).

The challenged Law secures several rights to persons being examined by the police services, the crown prosecutor and the investigating judge. These rights are granted in a gradual and differentiated manner depending on whether the person under examination is being heard as a suspect or in a different capacity (victim, plaintiff or witness), whether the person under examination as a suspect is being questioned on an offence the penalty for which can give rise to the issuing of an arrest warrant, except in the case of certain specified offences, and lastly, whether the person being examined is deprived of his/her liberty.

Many remedies have been submitted against this Law, adducing a breach of fundamental rights. The Constitutional Court annuls three provisions and imposes an interpretation complying with the Constitution of two other provisions.

The Court first of all reinforces the position of suspects who are being examined but have not been deprived of their liberty. Such suspects must, at the beginning of their examination, be informed by the authority that they cannot be forced to incriminate themselves and that they have the right to remain silent and, furthermore, with some exceptions, that they are entitled, prior to the examination, to hold confidential talks with a lawyer, who may remind them of the rights of the defence and explain the relevant aspects of the criminal proceedings. The Court accordingly annuls a provision which does not require persons who are to be questioned on offences attributable to them to be informed that that they are not under arrest and that they can consequently come and go as they please.

The Court also considers unconstitutional the exclusion of the right to prior confidential consultation with a lawyer where the facts attributable to the person under examination constitute one of the offences covered by the provisions relating to road haulage. Excluding a whole branch of litigation, including the most serious offences which can be committed in this context, is not reasonably justified if the suspect is in a comparable situation, as regards his or her state of vulnerability vis-à-vis the authorities conducting the examination and his or her correlative need to have access to a lawyer, to that of a person suspected of having committed an equally serious offence in a different context. The Court accordingly annuls this exception to the right of persons who are not deprived of their liberty to prior confidential consultation with their lawyer.

Lastly, the Constitutional Court censured the sanction which must be imposed in cases of breach of the right to legal assistance before or during the hearing. In laying down that no sentence can be passed on the sole basis of statements made in violation of the right to prior confidential consultation with a lawyer or the right to legal assistance during hearings, the legislative provision enables such statements to be

taken into consideration by the trial judge, in certain cases, and even enables such statements to be used in reaching the decision. This is incompatible with the right to a fair hearing as secured under Article 6 ECHR and as interpreted by the European Court of Human Rights. The suspect's right not to be forced to participate in his own incrimination and his right to remain silent, respect for which rights is part of the right to legal assistance, presuppose basing the charges on evidence other than that obtained in breach of these rights.

Finally, two further provisions of the Law are validated by the Constitutional Court, with an explicit reservation, to which the judgment refers.

The first provision accepted with this reservation concerns the prohibition of access to the criminal file before the prior consultation with the lawyer. According to the Court, lawyers cannot usefully advise the person to be examined if they do not know the facts and the context in which the person is to be questioned or if they have not been properly informed by their client. It must therefore be accepted that, if the lawyers are to be able to discharge their duties properly, in line with the circumstances and characteristics of the person in question, the police officers, the crown prosecutor or the investigating judge must also inform the lawyer of the facts forming the subject-matter of the hearing.

The second provision accepted with the said reservation concerns restricting the confidential consultation between suspects deprived of their liberty with their lawyers to a maximum period of thirty minutes. The provision must be interpreted as permitting the arrestee to consult with his lawyer for longer than thirty minutes, although the consultation can be restricted if required by the investigations, i.e. if compliance with Article 6 ECHR so requires in the light of the actual circumstances. This interpretation must be applied to every consultation which takes place after the publication of the judgment in the *Moniteur belge*.

Lastly, it is to be noted that, for reasons of certainty of the law, the Court retains the effects of some of the annulled provisions pending the intervention of the legislature, and until 31 August 2013 at the latest.

Languages:

French, Dutch, German.

Identification: BEL-2013-1-003

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 07.03.2013 / **e)** 30/2013 / **f)** / **g)** *Moniteur belge* (Official Gazette), 05.06.2013 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests**.
5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent**.
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

Keywords of the alphabetical index:

Child, born in wedlock, paternity challenge / Paternity, right to challenge, child / Privacy, balance between rights and interests / Child, best interests, overriding nature / Child's interests, overriding nature, judicial supervision.

Headnotes:

The legislature, when devising legal regulations in the field of lawful descent, must allow the competent authorities to weigh up the interests of the different individuals concerned in actual cases, otherwise it risks adopting a measure disproportionate to the legitimate aims pursued.

When weighing up these interests, those of the child take on special importance. Both Article 22bis.4 of the Constitution and Article 3.1 of the Convention on the Rights of the Child require the courts to attach overriding importance to the interests of the child in all actions concerning them, and this includes procedures for establishing lawful descent.

Despite the overriding nature of the interests of the child, they are not absolute.

Summary:

The Court of Cassation referred a preliminary question to the Constitutional Court relating to a dispute concerning a child born in 2004, the mother and the mother's husband, as well as a man whose biological paternity has not been challenged and who claims paternity. The Court was asked about the

compatibility with Article 22bis.4 of the Constitution of a Civil Code provision which only allows courts to reject applications to establish paternity where the establishment of lawful descent is manifestly contrary to the child's interests. The Court of Cassation interprets this provision as only requiring marginal consideration of the child's interests.

In terms of the provision at issue, the Constitutional Court, drawing on the work of the constitutional writer, notes that the constitutional review of 2008 was geared to extending constitutional recognition of children's rights to the central subject-matter of the Convention on the Rights of the Child. The Court therefore also refers to Article 3.1 of this Convention in order to affirm the courts' obligation to attach overriding importance to children's interests in proceedings concerning them, which also includes proceedings relating to the establishment of lawful descent.

As regards the provision at issue, one peculiarity of this case should be noted: the challenged provision of the Civil Code in fact pre-dates the constitutional provision relied upon because it came from the 1 July 2006 Law amending provisions of the Civil Code on the establishment of lawful descent and its effects. The Constitutional Court concludes from its analysis of the *travaux préparatoires* of this Law that the provision in question requires the courts to conduct marginal supervision of the child's interests, which are only taken into account when they are seriously infringed.

The Constitutional Court then reaffirms the obligation on the legislature, when devising legal regulations in the field of lawful descent, to allow the competent authorities to weigh up the interests of the different individuals concerned in actual cases. This obligation had already been established in other judgments on the basis of Article 22 of the Constitution in conjunction with Article 8 ECHR.

The Constitutional Court draws on several judgments of the European Court of Human Rights to conclude that when weighing up the interests at issue, the child's interests take on particular importance. It also recalls the principle enshrined by the European Court of Human Rights to the effect that the state must act to facilitate the development of a family bond with a child where its existence has been established, and to grant legal protection so that the child can be integrated into his or her family.

The Court also specifies that despite the overriding nature of the interests of the child, they are not absolute. In weighing up the different interests at stake, those of the child have special status because the child represents the weak point in the family relationship. Nevertheless, this special status does not dispense the authorities from also taking account of the interests of the other parties involved.

The Court concludes that the challenged provision is incompatible with the requirement to prioritise the child's interests when weighing up the interests involved in a particular case: by stipulating that courts must only reject applications if the establishment of lawful descent is "manifestly contrary to the interests of the child", Article 332*quinquies*, § 2.1 of the Civil Code, as interpreted to mean that it authorises the court to effect only marginal supervision of the child's interests, violates Article 22bis.4 of the Constitution.

Languages:

French, Dutch, German.

Identification: BEL-2013-1-004

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 14.03.2013 / **e)** 37/2013 / **f)** / **g)** *Moniteur belge* (Official Gazette), 22.05.2013 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
5.2 Fundamental Rights – **Equality**.
5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

Keywords of the alphabetical index:

Education, financing / Freedom of education, subsidies, enrolments / Right to education for adults / Teaching, further training / Right to education, foreigner, unlawful residence / Education, access, condition, citizenship / Foreigner, access to education, restriction / Covenant on Economic, Social and Cultural Rights, standstill obligation / Education, access to education, basic education, standstill.

Headnotes:

Neither the principle of equality nor that of freedom of education prevents the legislature from limiting eligibility for enrolment in an adult education centre, which is subsidised for this purpose, to Belgian nationals and persons residing lawfully in Belgium, excluding persons residing unlawfully in the country.

Summary:

Various non-profit associations submitted an application to revoke a provision set out in the 1 July 2011 Decree of the Flemish Community, which establishes an additional condition for persons wishing to enrol in an adult education centre (under the Belgian federal system education is a matter for the Flemish, French and German-speaking Communities).

The appellant parties, which include an association responsible for organising post-school training courses for persons who are not subject to compulsory schooling, contend that the new condition requiring persons to hold Belgian nationality or to reside legally in Belgium creates discrimination against persons illegally resident in the country. They adduce a breach of the principle of equality and non-discrimination (Articles 10, 11, 24.4 and 191 of the Constitution), as well as a breach of the right to education as secured by Article 24.3 of the Constitution, Article 2 Protocol 1 ECHR and Article 13 of the International Covenant on Economic, Social and Cultural Rights. In connection with the latter convention provision, a violation of the "standstill principle" to the effect that the right to free access to education cannot be rescinded is also adduced.

Articles 10 and 11 of the Constitution guarantee the principle of equality and non-discrimination. Article 24.4 of the Constitution reaffirms this principle in the educational field. By virtue of this provision, all students are equal before the law or decree. Article 191 of the Constitution provides that all foreigners present in the territory of Belgium must enjoy the protection granted to individuals and to property, with the exceptions established by law.

The Court notes that Article 191 of the Constitution in no way suggests that the legislature, when establishing a difference of treatment to the detriment of foreigners, can refrain from ensuring that such differential treatment is not discriminatory, whatever the nature of the principles at issue. However, Article 191 of the Constitution is liable to be breached only by a provision establishing differential treatment between Belgians and foreigners, not by a provision differentiating between different categories of foreigners.

According to the *travaux préparatoires* of the challenged provision, the decree was intended to avoid thwarting immigration policy by allowing irregular immigrants to take courses which they could then use to justify re-applying for regularisation. With reference to its established case-law, the Court confirms that if the legislature wishes to implement an immigration policy and accordingly lays down rules which must be observed in order to reside lawfully in the national territory, when it makes the granting of social assistance conditional on compliance with these rules it is using an objective and relevant criterion for differentiation. The policy on foreigners' access to and residence in the territory would be hampered if it were accepted that foreigners illegally resident in Belgium should be granted the same social assistance as those who are legally resident on Belgian territory. The difference between the two categories of foreigners is sufficient to account for the difference in state obligations towards them. In the Court's view, the wish not to thwart federal immigration policy is also sufficient reason for the drafters of the decree to have different obligations vis-à-vis foreigners residing unlawfully in the territory.

The Court considers that the principle of equality and non-discrimination has not been violated because it is not unreasonable for the legislature to reserve the specific efforts and resources which it wishes to implement to promote personal development, participation in any kind of further education, the exercise of an occupation or mastery of a language for individuals who, owing to their administrative status, are deemed to have settled in Belgium permanently or at least for a lengthy period.

The Court then considers whether the challenged provisions disproportionately infringe the right to education as secured under Article 24 of the Constitution and Article 2 Protocol 1 ECHR and the obligation deriving from Article 13 of the International Covenant on Economic, Social and Cultural Rights. The rights and freedoms guaranteed by Articles 10 and 11 of the Constitution include the rights and freedoms stemming from the provisions of international conventions by which Belgium is bound, and by virtue of Article 24.3 of the Constitution, everyone is entitled to education, with respect for the fundamental rights and freedoms.

The Court observes that freedom of education presupposes that educational establishments are, under certain circumstances, eligible for subsidies from the community, but does not prevent decrees from imposing conditions on the funding and granting of subsidies restricting the exercise of this freedom. According to the Flemish Government, which defends the provision challenged before the Court, there are

no regulations to prevent the centres in question from providing contractual education to illegally resident students, provided that such education is the subject of an accounting system totally separate from that of adult education as subsidised by the community and that it is completely financed by the students themselves or by an external party.

According to the Court, the right to education as secured under Article 24.3 of the Constitution does not stand in the way of regulating access to education, particularly education as provided after the period of compulsory schooling, in accordance with the needs and possibilities of the community and of individuals. Nor do Article 2 Protocol 1 ECHR and Article 13 of the International Covenant on Economic, Social and Cultural Rights, possibly taken in conjunction with Article 2 of the Covenant, taking them in conjunction with Article 24 of the Constitution, prevent making access to education provided after the period of compulsory schooling subject to certain conditions, provided that the principle of equality is thereby respected.

Having explained the scope of the aforementioned conventional provisions and recalled that no "standstill" obligation can be deduced from Article 13.2.d of the International Covenant on Economic, Social and Cultural Rights, contrary to indents b and c in respect of secondary and higher education, the Court concludes that the right of access to education can be made subject to restrictions, provided the equality principle is respected, and that the competent legislature can establish differential treatment between foreigners who are legally resident in Belgium and those who are illegally resident in the country.

The Court therefore rejects the application.

Languages:

French, Dutch, German.

Bosnia and Herzegovina
Constitutional Court

Important decisions

Identification: BIH-2013-1-001

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 30.01.2013 / **e)** AP 2175/09 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 18/13 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Contract, certification, court / Contract, certification, embassy / Tax, payment.

Headnotes:

The right to property under Article II.3.k of the Constitution and Article 1 Protocol 1 ECHR is violated when a law, despite its legitimate aim, interferes with this right by undermining the reasonable relationship of proportionality. This occurs when an individual bears an excessive burden as a result of actions of public authorities, which made the individual believe that he had acted in accordance with the law. There is no remedy for the deficiency and if the law was interpreted consistently, he would have been prevented from enjoyment and protection of the right entitled to him.

Summary:

I. The appellant (the gift receiver) and his father (the gift giver) entered into a gift contract (a flat), which he submitted to the competent tax authority for a tax assessment. Pursuant to Article 8 of the Law on Real Property Transfer Tax, a person under obligation to pay tax for a real property transfer that is a gift is a gift receiver, as the person acquiring the real property. In the challenged decisions, the appellant's

request for tax assessment is dismissed because the gift contract had not been verified in accordance with Article 14.2 of the Law on Real Property Transfer Tax. This provision, which was in force at the time of filing of the request, regulated that all contracts on transfer of real property – prior to application for tax assessment – must be verified at the competent court. The appropriate court shall be in the municipality where the real property is located. Given that the gift contract has been certified by the stamp of the Embassy of Bosnia and Herzegovina in Stockholm, Sweden, the competent tax authorities and ordinary courts concluded that it has not been verified according to the Law. Therefore, the tax assessment could not have been performed. The Cantonal Court did not accept the appellant's allegation that the verification of signatures in the particular gift contract has been performed according to provisions regulating the matter of diplomatic and consular functions. The appellant's request does not allege such regulations and the court does not know of such regulations that would derogate Article 14.2 of the Law on Real Property Transfer Tax either.

The appellant holds, *inter alia*, that the challenged judgments have violated his right to property under Article II.3.k of the Constitution and Article 1 Protocol 1 ECHR.

II. The Constitutional Court notes that the gift contract was verified at the Bosnia and Herzegovina Embassy in Sweden, where both the appellant and his father were living at the moment of its making and signing. The appellant held that the Bosnia and Herzegovina Embassy, as the state's representative abroad, consumes the jurisdiction of the courts it represents regarding the verification of signatures on documents produced for verification by citizens in the country where Bosnia and Herzegovina Embassy is located.

The Constitutional Court recalls that it has concluded, in this decision, that the interference with the appellant's right to property is based on law. The said law is clear and unambiguous; it was published in the official gazette and is available. Therefore, the fact that the appellant and his father at the time of conclusion of the gift contract were staying in Sweden cannot be viewed as a circumstance that would bar the appellant from being acquainted with the law in question. Also, it is not unreasonable to expect that a person, in ascertaining and protecting of his or her rights, takes an active attitude, i.e. takes measures and actions to effectuate the protection of his or her rights.

Furthermore, the Constitutional Court recalls that the Vienna Convention on Consular Relations provides that consular functions entail, *inter alia*, issuing passports and travel documents to nationals of the sending State, acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State. Consular functions also include performing any other functions entrusted to a consular post by the sending State in accordance with the conditions determined by the Vienna Convention. Pursuant to Article 8 of the Law on Ministries and Other Bodies of Administration, it is within the competence of the Ministry of Foreign Affairs, as an administrative authority performing administrative and professional duties that fall under the Bosnia and Herzegovina jurisdiction, to organise, direct and coordinate the operation of diplomatic and consular missions of Bosnia and Herzegovina aboard. It is, therefore, beyond dispute that embassies and consulates represent the public authority of the state for which they belong.

In the present case, the Embassy of Bosnia and Herzegovina in Sweden verified and stamped the signatures of the gift contract, by granting the appellant's request to verify the contract, the appellant was brought to believe that he met his obligation under the law. That is, there were no further steps he needed to take in order to protect his rights. In that sense, it does not matter how much time elapsed from the conclusion and verification of the contract at the Embassy of Bosnia and Herzegovina in Sweden to the death of the appellant's father. That is, it is no longer an issue whether there had been enough time to verify the contract at the competent court because the actions of public authorities made the appellant believe that he had complied with law. Given that the appellant's father passed away subsequent to the verification of the contract and prior to filing the application for tax assessment, the appellant is no longer able to remedy this deficiency. However, his claim that the gift contract was executed in its entirety and that he is in possession of the real property in question has not been brought into question in the proceedings conducted. Finally, the Constitutional Court notes that pursuant to the Law on Notaries, which became effective on 4 May 2007, certain legal affairs require legal transactions concerning the transfer or acquisition of ownership or other real rights. Following that, Article 14.2 of the Law on Real Property Transfer Tax has been amended. As such, the verification of a contract on transfer of real property at the local court where the real property is situated is no longer required. Instead, the verification is to be performed before the competent authority (Official Gazette of HNC no. 11/08, effective from 27 November 2008).

The Constitutional Court holds that in the specific circumstances of the present case,

1 where the appellant was made to believe that he had acted in accordance with law based on the public authorities' actions;
2 his contract was legally valid; and
3 no possibility exists to revalidate such contract subsequently and thus remedy the deficiency because the other contracting party died,

the consistent interpretation of the law stipulating that a contract has to be verified before a competent court no longer strikes a fair balance of proportionality between protecting the general interest and the interest of an individual, and that the appellant has to bear an excessive burden.

Languages:

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

Brazil
Federal Supreme Court

Important decisions

Identification: BRA-2013-1-001

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 02.05.2007 / **e)** 3.112 / **f)** Direct claim of unconstitutionality / **g)** *Diário da Justiça Eletrônico* (Official Gazette) 131, 26.10.2007 / **h)**.

Keywords of the systematic thesaurus:

3.18 General Principles – **General interest**.
3.20 General Principles – **Reasonableness**.
4.8.8 Institutions – Federalism, regionalism and local self-government – **Distribution of powers**.
5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial**.
5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Arm, firearm, use, control / Detention pending trial / Due process / Firearm permit / General interest / Public safety / Weapon, acquisition, permit / Weapon, circulation, control.

Headnotes:

The provisions of Law 10.826/2003 (Disarmament Statute) which establish that the crimes of illegal bearing or shooting of firearms are not subject to bail would render these crimes equal to other unbailable offences established in the Constitution of higher offensive potential.

The provisions that forbid pre-trial release for crimes of international trafficking and illegal trade of firearms, as well as the crimes of possession or bearing of allowed firearm violate the principles of the presumption of innocence and due process.

Summary:

I. This case refers to a direct claim of unconstitutionality filed against Law 10.826/2003 (Disarmament Statute), which established rules concerning the registry, possession and trade of firearms, rules about the National System of Arms (Sinarm, in the Portuguese acronym), and which also criminalised some acts related to the use and trade of arms.

II. The Brazilian Supreme Court, unanimously, denied the claim that the Statute was formally unconstitutional on the basis that it was not proposed by the Head of the Executive Branch. The Court explained that the Statute was issued after Constitutional Amendment 31/2001 came into force. That Amendment suppressed the exclusive initiative of the President to propose bills dealing with the structure and the establishment of attributions of ministries and bodies of the Government, such as Sinarm. Furthermore, the Statute does not create or extinguish bodies, offices or employments in the Government, which is still an exclusive power of the President.

The Court decided that the Federal Government did not violate the competence of States to regulate public safety and consumer matters because, according to the principle of the prevalence of the general interest, the formulation of policies of national scope, which are superior to regional interests, is a responsibility of the Federal Government.

The Court decided that the mandatory periodic renewal of the registry of the firearms, under the payment of a tariff, does not breach the right to property, since the bearer can give his firearm to the adequate body and receive an indemnity. The Court also considered legitimate the requirement that the firearm and the ammunition be identified, because it facilitates the tracking of manufacturers and buyers.

The Court denied the claim that the minimum age of 25 years for obtaining a firearm was unreasonable in comparison to the age of full legal capacity (18 years). The Court stated that the Statute had as a parameter statistical data which indicated an increase in the number of persons under 25 years of age, who were killed by firearm.

The Court, unanimously, declared unconstitutional the prohibition of pre-trial release in the crimes of international trafficking and illegal trade of firearms. By majority, the Court decided that the mentioned prohibition is unconstitutional for the crimes of the possession or bearing of permitted firearms. The Court decided that the Constitution does not allow automatic detention, because this could violate the principles of the presumption of innocence and due process. A judge is solely permitted to order provisional detention, before the sentence becomes *res judicata*, if, on a case-by-case basis, there is evidence that the accused could cause harm to society or to the trial (Article 312 of the Criminal Code).

By majority, the Court declared unconstitutional the provision establishing that the crimes of illegal bearing or shooting of firearm are not bailable. The Court viewed this prohibition as unreasonable, as it would render these offences equal to other offences specified as not bailable in the Constitution, because of their high offensive potential, such as heinous crimes, terrorism, torture, and drug trafficking.

III. In separate opinions, dissenting Justices stated that the Constitution did not establish a limited set of not bailable crimes. Accordingly, the ordinary legislator could establish other cases in which the payment of bail is not permitted.

Supplementary information:

- Law 10.826/2003 (Disarmament Statute);
- Constitutional Amendment 32/2001;
- Article 312 of the Criminal Code.

Languages:

Portuguese, English (translation by the Court).

Identification: BRA-2013-1-002

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 06.08.2009 / **e)** 974 / **f)** Extradition / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 228, 04.12.2009 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.2 Sources – Categories – Written rules – **National rules from other countries**.
5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime**.

Keywords of the alphabetical index:

Extradition / Limitation period / Repression organ, collaborator / Political repression, victim.

Headnotes:

The general pardon granted by Decree 1.003/1989 of Argentina does not prevent extradition because it was deemed unconstitutional by the Supreme Court of Argentina.

The crime of kidnapping of people who were never found or released during Operation Condor does not expire, as its consequences persist while the victims are deprived of their liberty or until their true identities are discovered.

Summary:

I. This case concerned a request for extradition, made by Argentina, in order to prosecute the accused for having allegedly committed a crime against individual liberty, kidnapping a child under ten years of age and illicit association (Articles 144.1, 146 and 210 of the Argentinian Criminal Code). The applicant alleged that the accused was a Uruguayan Army member, had participated in Operation Condor and, as such, in 1976 had taken part in some activities that resulted in the kidnapping of people who have never been released or found. The defendant in this application argued that the accused was granted a general pardon by Decree 1.003/1989 of the Argentinian government, and that the crimes had expired.

II. The Brazilian Supreme Court, by majority, partially granted the request. The Court held that the general pardon granted by Decree 1.003/1979 was not valid since it was deemed unconstitutional by the Supreme Court of Argentina. On the other hand, the Court denied the request regarding the crime of illicit association, as it had expired both in Argentina, where it has a fifteen-year statute of limitations, and in Brazil, where the equivalent crime (conspiracy) has a twelve-year statute of limitations.

Regarding the crime of individual liberty, the Court denied the charge of homicide, which had already expired, on the grounds that the Court cannot re-evaluate the criminal qualification assigned by the applicant State and because the bodies or other evidence that indicated the victims' death were never found. The Court found that the death could not be presumed as the Brazilian legislation (Article 7 of the Civil Code) requires a judicial death declaration. Furthermore, the crime against individual liberty still persists, as its consequences prevail during time, while the victims are still deprived of their liberty.

The Court also held that the statute of limitations for the crime of kidnapping had not expired. That is because the accused kidnapped the child in 1976, when the child was only twenty days old. The child was subsequently adopted, but only became aware ofs his true identity in 2002, which is when the statute of limitation started to run.

III. In dissenting opinions, the request was denied on grounds that the criminal imputation should be homicide, taking into consideration the presumption of the victims' deaths, and that this crime had expired.

Supplementary information:

- Decree 1.003/1989 of the Government of Argentina;
- Articles 144.1, 146 and 210 of the Argentinian Penal Code;
- Article 7 of the Brazilian Civil Code.

Languages:

Portuguese, English (translation by the Court).

Identification: BRA-2013-1-003

a) Brazil / **b)** Federal Supreme Court / **c)** Second Panel / **d)** 02.09.2010 / **e)** 4.451 / **f)** Referendum on Preliminary Injunction on Direct Claim of Unconstitutionality / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 24.08.2012 / **h)**.

Keywords of the systematic thesaurus:

5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.
5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.

Keywords of the alphabetical index:

Election / Media, freedom / Media, press, prohibition of publication.

Headnotes:

A law forbidding, from 1 July in an electoral year, the production of and broadcast by radio and television broadcasting stations of programmes using trickery, montage or other means that degrade or ridicule any candidate or party and that forbid them to publicise their opinion for or against a candidate or party violates the freedom of the press.

Summary:

I. This case refers to a direct claim of unconstitutionality filed by the Brazilian Association of Radio and Television Broadcasting Stations, with a preliminary injunction request, against items II and III of the Article 45 of Law 9.504/1997. These items forbid radio and television broadcasting stations, from 1 July in an electoral year, to produce or broadcast programs using trickery, montage or other means that degrade or ridicule candidate or party (item II) and forbid them to publicise their opinion for or against a candidate or party (item III).

The applicant alleged that the challenged items hindered the publication of polemic political material, since it would be considered the disclosure of opinions about candidates. Furthermore, the rules hindered the publication of political cartoons. Thus, the items breached the freedom of expression and the freedom of the press.

II. The Brazilian Supreme Court, by majority vote, confirmed the preliminary injunction granted individually by the Rapporteur Justice and suspended the rules of item II and the second clause of item III, both from Article 45, and, as a consequence, the paragraphs 4 and 5 of the same article, as they mentioned item II. The Court emphasised that the Government cannot set prior constraints on what broadcasting stations can publicise, mainly during the electoral season. The freedom of the press, which includes the freedom to create and to express, is strongly tied to the democracy. The full exercise of this freedom is paramount to publicise facts and ideas without Government bias. Humour, through cartoons and caricatures, is one of the most typical means of expression. It is, thus, as free as other means of expression and it cannot be subjected to prior censorship. On the other hand, it can always be subject to the tort, if there is a breach of other constitutional rights.

The Court emphasised, also, that radio and television are public services which depend upon the concession of the Government and, thus, they have a constitutional regime different from the written press. Their activities are equally free, but they must be impartial. However, it does not mean that broadcasting stations must not express opinion or journalistic criticism. Accordingly, the assessment of such opinion must be done on a case-by-case basis and only the opinion that tends to constitute party propaganda would be illegal.

III. In separate opinions, dissenting Justices stated that the challenged rules, as they were presented to the Court, would not hinder the publication of cartoons. Strictly speaking, the law intended to impede the misuse of the media of social communication, preventing the owners of such media from influencing the people's will with their own political preferences. Thus, the rule partially restricted the freedom of the press to favour isonomy between candidates. Accordingly, the dissenting Justices suggested that the items should be considered valid and only the interpretations that impeded the publication of cartoons or satire in radio and television would be considered unconstitutional.

Supplementary information:

- Article 45.I and 45.II of the Law 9.504/1997.

Cross-references:

- ADPF 130.

Languages:

Portuguese, English (translation by the Court).

Identification: BRA-2013-1-004

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 30.09.2010 / **e)** 4.467 / **f)** Preliminary Injunction on Direct Claim of Unconstitutionality / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 01.06.2011 / **h)**.

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.

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

Keywords of the alphabetical index:

Constitutional rights, violation / Regulation.

Headnotes:

A rule obliging voters to show a voter's certificate and simultaneously an official photo identification document, in order to cast their vote, breaches the proportionality principle. Only the absence of an official photo identification document can prevent voters from casting their vote.

Summary:

I. This case refers to a direct claim of unconstitutionality, with a preliminary injunction request, filed against Article 91-A of Law 9.504/1997, added through Law 12.034/2009, and against Resolution 23.218/2010 of the Superior Electoral Court, which obliged voters to show a voter's certificate and simultaneously an official photo identification document, in order to cast their vote. The plaintiff alleged that the mandatory showing of both documents breaches the proportionality principle.

II. The Brazilian Supreme Court, by majority vote, granted the preliminary injunction, in order to, under a constitutional statutory construction, acknowledge that only the absence of an official photo identification document can prevent voters from casting their vote. The Court stated that the objective of the norm was to give more security to the identification of voters. Accordingly, the Court emphasised that the name of the voter must necessarily be registered in the electoral roll of the polling place, at the time of casting the vote, as it proves that the voter fulfils the requirements to exercise his right to vote. Thus, only the obligation to show an official photo identification document, to identify the voter, is compatible with the aims of the challenged rule.

III. In a separate opinion, a dissenting Justice expressed the view that this claim had a political bias, as the rule was in force for one year and it was challenged only on the eve of elections. The Justice added that the Superior Electoral Court had decided that the norm should be enforced and had spent public funds on advertising to inform voters about it. Furthermore, the Justice deemed that the decision of the Supreme Court would have normative effects; thus, it should comply with the principle of anteriority (Article 16 of the Federal Constitution), according to which a law that modifies the electoral process can only be applicable to elections which take place in the year following passage of the decision. Lastly, the dissenting Justice emphasised that the proportionality principle was not breached, because legislators, acting within their margin of discretion, did not unreasonably restrict the fundamental right to vote, when they established the obligation to show two documents to vote.

In another separate opinion, a dissenting Justice added that the decision of the Court in, this case, would make voter registration useless. He stated that voter registration would be useful to prove that the voter must vote in that specific polling place, if the electoral roll had some shortcoming.

Supplementary information:

- Article 91-A. caput, Law 9.504/1997;
- Resolution 23.218/2010 of the Superior Electoral Court;
- Article 16 of the Federal Constitution.

Languages:

Portuguese, English (translation by the Court).

Identification: BRA-2013-1-005

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 15.12.2010 / **e)** 389.808 / **f)** Extraordinary Appeal / **g)** *Diário da Justiça Eletrônico* (Justice Gazette), 86, 10.05.2011 / **h)**.

Keywords of the systematic thesaurus:

4.7.3 Institutions – Judicial bodies – **Decisions**.
5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.
5.3.36 Fundamental Rights – Civil and political rights – **Inviolability of communications**.

Keywords of the alphabetical index:

Bank, banking secrecy / Confidentiality, obligation, breach / Information, privacy, right / Taxpayer.

Headnotes:

A rule should not permit direct access to the bank data of taxpayers by the Secretariat of the Federal Revenue of Brazil as it violates their right to privacy.

Summary:

I. This case refers to an extraordinary appeal filed against a decision holding that access to the bank data of a private company by the Secretariat of the Federal Revenue of Brazil, without a previous judicial decision, was lawful. The appellant alleged violation of the intimacy and the secrecy of data (Article 5.X and 5.XII of the Federal Constitution) and alleged that a previous judicial order is required to access such data.

II. The Brazilian Supreme Court, by majority, granted the extraordinary appeal, on the grounds that the challenged decision violates the principle of the human dignity, as it breaches the constitutional safeguards of the inviolability of the intimacy and of the secrecy of data. The Court decided that the general standard is the privacy of mailing, of telegraphic communications and of data, and that the exception is the breach of such privacy, when it is ordered by a judge, for the purpose of a criminal investigation or criminal trial. The decision of a judge is mandatory, because he is responsible for ensuring protection for fundamental rights and deciding on eventual breaches of such rights, and because he is not under the authority of the Executive Branch and has no direct interest in the data, a condition that is not shared by the Secretariat of the Federal Revenue of Brazil. The Court added that the inviolability of personal data is a requirement of life in society, which presupposes safety, stability and the absence of unexpected happenings.

III. In separate opinions, dissenting Justices argued that Supplementary Law 105/2001, which regulated the transfer of confidential bank data from financial institutions to the Secretariat of the Federal Revenue of Brazil, does not breach constitutional rights and safeguards. They explained that such transfer does not violate the confidentiality of the data, but only changes the body responsible to guard such information, which will have to maintain the secrecy of such information, or otherwise can be held responsible.

Supplementary information:

- Article 5.X and 5.XII of the Federal Constitution;
- Supplementary Law 105/2001.

Languages:

Portuguese, English (translation by the Court).

Identification: BRA-2013-1-006

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 08.06.2011 / **e)** 511.961 / **f)** Extraordinary Appeal / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 60, 03.04.2013 / **h)**.

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
4.4.3.5 Institutions – Head of State – Powers – **International relations**.

Keywords of the alphabetical index:

Detention, purpose of extradition, duration / Extradition / Extradition, offence, political / Extradition, treaty / Head of State, political and international criteria, decision, final / International treaty.

Headnotes:

In extradition cases, the Supreme Court has competence to verify the legal and constitutional requirements of the request. The President of the Republic has the final decision to grant the request, in the exercise of Brazilian international sovereignty. Disputes among sovereign states on treaties enforcement must be resolved by means of international law.

Summary:

I. This case refers to a motion on extradition to release the person claimed. He was temporarily arrested due to an extradition request filed by the Republic of Italy, which had been previously granted by the Supreme Court, but denied by the President. He alleged that the President´s refusal to extradite would allow his immediate release and that the refusal could not be reviewed by the Judicial Branch, since it is a matter of international policy.

II. The Brazilian Supreme Court, by majority vote, granted the request of the person claimed. Initially, the Court established that its role, in the analysis of an extradition request, is limited to verifying the legal and constitutional requirements of the extradition. If there is any irregularity, the Court hinders the delivery of the person claimed. However, if the Court authorises the delivery, it submits the final decision to the President´s political and international criteria. Such dichotomy exists because the Judiciary is the guardian of the individual's fundamental rights, even foreigners' rights, while the interests of other States should be negotiated before the President, who is responsible for maintaining relations with foreign states, pursuant to Article 84.VII of the Constitution.

The Court held that the President's refusal to grant extradition did not contravene the Court's decision, which had previously granted it. This is because such refusal is based on Article III.1.f of the Extradition Treaty, which authorises the refusal of extradition, if there is an assumption that the situation of the person claimed could be aggravated, because of his history of political activity. The President is the only one who has jurisdiction to enforce such Article as he or she represents the international autonomy of the Brazilian State. He will interpret the political context and the legal nature of the crimes to corroborate the decision on the request of extradition. The Brazilian Supreme Court has no constitutional competence to review this act of foreign policy, according to the constitutional principles of sovereignty and separation of powers. Occasional breach of the Extradition Treaty would raise a controversy among sovereign states, whose resolution must be effected through international law instruments.

III. In separate opinions, dissenting Justices defended that the President of the Republic should deliberate about the political expediency of the extradition, before submitting the request to the Supreme Court. After the judicial decision, if there is an extradition treaty, as it occurs in the present case, the President of the Republic should decide in compliance with the treaty, given that treaties, after their incorporation into the Brazilian legal system, are binding on all branches of the State. Hence, the President of the Republic could not arbitrarily refuse to extradite. In this case, there was an illegitimate refusal of the extradition, because the President considered that the crimes attributed to the person claimed were political and such qualification had previously been denied in the first decision of the Brazilian Supreme Court on this case.

Supplementary information:

- Article 84.VII of the Federal Constitution;
- Article III.1.f of the Extradition Treaty agreed between Brazil and Italy (Legislative Decree 78/1992);
- Cesare Battisti Case.

Languages:

Portuguese, English (translation by the Court).

Identification: BRA-2013-1-007

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 13.10.2011 / **e)** 596.152 / **f)** Extraorddinary Appeal / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 30, 13.02.2012 / **h)**.

Keywords of the systematic thesaurus:

2.3.11 Sources – Techniques of review – ***Pro homine*/most favourable interpretation to the individual**.
4.5.2 Institutions – Legislative bodies – **Powers**.
4.7.1 Institutions – Judicial bodies – **Jurisdiction**.
5.3.16 Fundamental Rights – Civil and political rights – **Principle of the application of the more lenient law**.
5.3.38.1 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Criminal law**.

Keywords of the alphabetical index:

Law, criminal, retroactive effect / Retroactivity, exceptional circumstance.

Headnotes:

Whenever there is a tie vote in the judgment of criminal suits, the decision shall be the one that benefits the accused the most. In this case, the decision that benefits the accused the most is the one that combines the penalty reduction factor of the current Drugs Statute with the penalty of the previous Drugs Statute. Such combination affirms the principle of the retroactivity of the penal statute that benefits the accused the most (an exception to the general principle that forbids the retroactivity of penal statutes), because it requires the retroactivity of specific rules, instead of the retroactivity of the whole statute.

Summary:

I. An extraordinary appeal was filed against a decision which combined the penalty reduction factor established in Article 33.4 of Law 11.343/2006 (current Drugs Statute) with the previous minimum penalty established in the Article 12 of Law 6.368/1976 (previous Drugs Statute). The challenged decision stated that such combination of diverse penal statutes is possible, because it applies the principle of the retroactivity of the penal statute that benefits the accused the most (an exception to the general principle that forbids the retroactivity of penal statutes). Specifically, the penalty established in the former statute (3-15 years) is lesser than the penalty established in the new statute (5-15 years).

II. The Brazilian Supreme Court, due to the tie vote, decided to apply the interpretation that benefits the accused the most, grounded on Article 146, sole paragraph, of the Internal Court Rules.

The doctrine applied states that the exception to the prohibition of the retroactivity of penal rules is established in the Constitution (Article 5.LXVI) and it does not establish that the statute that benefits the accused the most shall be applied as a whole, but only its specific rules. The decision, thus, allows the combination of specific rules from one statute that was superseded with the rules of the new statute that superseded the previous one, only if opposing regimes are not combined, thereby precluding the fragmentation of such regimes.

In this case, the regimes of the establishment of the penalty and the penalty reduction factor are diverse and are not opposed. This allows the judge to combine them to achieve the result which benefits the accused the most. The penalty established in the previous statute shall be applied to crimes perpetrated while it was in force, even if the decision is issued after the new statute (it is the regime of the application of the law after abrogation). However, the rules established in the new statute, that allow reduction of the penalty, can have retroactive effects to be applied to crimes committed before it was issued (it is the retroactivity regime).

The challenged doctrine stated that two diverse statutes cannot be combined. Otherwise, the judge creates a third statute, acting as a legislator. Thus, the judge should analyse each statute as a whole, to apply only the one that benefits the accused the most to crimes perpetrated under the superseded statute. The new statute only increased the minimum penalty, because it established new factors for reduction of the penalty, such as where the accused is a first offender or has a good criminal record. This distinction was established to distinguish the head of the drug traffic, who organises the crime, from the small trafficker. Accordingly, the combination of statutes could result in the application to heads of the drug traffic the same penalty that is applied to minor crimes, like perjury.

Supplementary information:

- Article 5.XLVI of the Federal Constitution of 1988;
- Article 33.4 of Law 11.343/2006 (current Drugs Statute);
- Article 12, caput, of Law 6.368/1976 (former Drugs Statute).

Languages:

Portuguese, English (translation by the Court).

Identification: BRA-2013-1-008

a) Brazil / **b)** Federal Supreme Court / **c)** Second Panel / **d)** 03.11.2011 / **e)** 4.568 / **f)** Direct claim of unconstitutionality / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 65, 30.03.2012 / **h)**.

Keywords of the systematic thesaurus:

4.5.2 Institutions – Legislative bodies – **Powers**.
4.5.6 Institutions – Legislative bodies – **Law-making procedure**.
4.5.10.3 Institutions – Legislative bodies – Political parties – **Role**.
4.6.2 Institutions – Executive bodies – **Powers**.
4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers**.
4.9.6 Institutions – Elections and instruments of direct democracy – **Representation of minorities**.

Keywords of the alphabetical index:

Minimum wage / Legislative power / President, decree, legal effect.

Headnotes:

A statute may define the value of the minimum wage for 2011 and that establishes that annual increases in the minimum wage, from 2012 to 2015, can be made by the Executive Branch through decrees.

Summary:

I. A direct claim of unconstitutionality was filed against Article 3 of the Law 12.382/2011. This statute defined the value of the minimum wage for 2011 and established that annual increases in the minimum wage can be made by the Executive Branch, through decrees, from 2012 to 2015. The claimants contended that the Article is unconstitutional, because, as it grants to the Executive Branch the power to update the minimum wage, through decrees, it would breach the powers of the National Congress, which would be the adequate body to update it, periodically, through formal statutes (Article 7.IV of the Federal Constitution).

II. The Brazilian Supreme Court, by majority, denied the direct claim of unconstitutionality. The Court held that Law 12.382/2011 did not grant the Executive Branch the power to define the value of the minimum wage during the mentioned period. The statute, besides establishing the value of the minimum wage for 2011, provided the criteria to update it in the following years, through objective data, such as the National Consumer Price Index (INPC, in the Portuguese acronym) and the annual growth of the Gross Domestic Product (PIB, in the Portuguese acronym). Thus, a formal statute, issued by the National Congress, already established the value of the minimum wage and which criteria would serve as references for increases. Accordingly, the Executive Branch decree, which is hierarchically below a statute, would have only a declaratory content concerning the value previously defined in the statute.

In a separate opinion, that also denied the claim, a concurring Justice made an admonition about the exclusion of the Parliament from discussion of the subject, during a certain period. The Justice emphasised that the Constitution establishes the principle of legality to define the minimum wage in order to impose the participation of the National Congress in the debate, making the debate more pluralistic. Accordingly, as the statute prevents the Legislative Branch from discussing the subject, during a certain period, it impedes the participation of the parliamentary minority, which can eventually become the majority. Lastly, the Justice stated that, as the increases made by the Executive Branch are established until 2015, the statute impedes discussion of the subject by the new Congress, which will be elected in the periodic elections of 2014.

III. In other separate opinions, dissenting Justices argued that to update the minimum wage implies the establishment of a new value, which is an exclusive power of the National Congress, according to Article 7.IV of the Constitution. Moreover, Law 12.382/2011 set rigid parameters for updating the minimum wage, preventing the possible use of other indices that may be created over the years as a parameter to update it.

Supplementary information:

- Article 7.IV of the Federal Constitution of 1988;
- Article 3 of Law 12.382/2011.

Languages:

Portuguese, English (translation by the Court).

Identification: BRA-2013-1-009

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 15.03.2012 / **e)** 79 / **f)** Original civil action / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 103, 28.05.2012 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Administration, public confidence / Contract, administrative / Public domain / Good faith, assurance given by the authority / Legitimate expectation, protection, principle / Senate.

Headnotes:

Contracts agreed between the State of Mato Grosso and private entities, in which the possession of public lands was granted in order to colonise them, breached the Federal Constitution of 1946, which was then in force. The lands granted were above ten thousand hectares and, in such cases, the Federal Senate should have provided prior authorisation for the granting of the lands. Despite this, to declare the

nullity of contracts 59 years after they were signed is impossible, otherwise the principles of legal certainty and of the protection of reliability could be violated, because the colonisation during this time period was consolidated, based on good faith and on the belief that the contracts were valid.

Summary:

I. An original civil action was filed by the Federal Government to declare the nullity of contracts, in which the State of Mato Grosso granted to some private entities the concession of the domain of public lands, once the lands granted were above ten thousand hectares and, in such cases, the Federal Senate should have provided prior authorisation to the granting, in accordance with Article 156.2 of the Federal Constitution of 1946, then in force.

II. The Brazilian Supreme Court, by majority, denied the action. First, the Court acknowledged that the contracts breached the rule in Article 156.2 of the Federal Constitution of 1946. The evidence showed that, until 1 December 1954, about two hundred thousand hectares of public land were donated to companies and more than ten thousand to colonisers, without the previous authorisation of the Federal Senate, which was required whenever more than ten thousand hectares of public land was granted or sold. The Court emphasised that, through such "colonisation contracts", the State of Mato Grosso handed the possession of public lands to companies that were obliged to people and to manage the selling of such lands to colonisers. On the other hand, these companies were required to develop the infrastructure and to give a portion of the amount raised to the State. Despite the benefits of this policy, which contributed to population of the inner areas of the country, these benefits did not overcome the mandatory constitutional rule.

However, the Court stressed that the contracts were signed by one state of the federation; thence, contracting parties presumed that they were legal. As the decision on this action occurred 59 years after these contracts were confirmed, many others were signed, following them, providing land for families and, as a result, cities, airports and other infrastructure were created, spanning an area of almost four million hectares. Thus, the declaration of nullity could revert or weaken this condition, which was stabilised with the passage of time. Accordingly, the Court decided to uphold these contracts, in accordance with the principle of legal certainty, in order to protect their reliability and the good faith of citizens. Although the contracts were upheld, overcoming the unconstitutionality, the Court stated that this would not validate other contracts, such as those dealing with the occupation of native peoples' lands or unproductive farms, because these were not the subject of this action and they must be discussed in their proper context.

III. In separate opinions, dissenting Justices stated that the passage of time could not overcome the constitutional rule that established the previous authorisation by the Senate. This rule is so relevant that it was reproduced in the following Constitutions, including the present Constitution of 1988. This Constitution transferred the previous authorisation to the National Congress and reduced the limit of the lands to two thousand five hundreds hectares (Article 49.XVIII). Furthermore, there was no clear explanation of who benefited from these contracts; colonisers or big companies and big landowners.

Supplementary information:

- Article 49.XVIII of the Federal Constitution of 1988;
- Article 156.2 of the Federal Constitution of 1946.

Languages:

Portuguese, English (translation by the Court).

Identification: BRA-2013-1-010

a) Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 03.05.2012 / **e)** 3.330 / **f)** Direct claim of unconstitutionality / **g)** *Diário da Justiça Eletrônico* (Justice Gazette), 22.03.2013 / **h)**.

Keywords of the systematic thesaurus:

4.8.2 Institutions – Federalism, regionalism and local self-government – **Regions and provinces**.
5.2.3 Fundamental Rights – Equality – **Affirmative action**.
5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

Keywords of the alphabetical index:

Federal State, entity, powers / Scholarship, access, restriction / Tax exemption / University, autonomy / University, private.

Headnotes:

PROUNI is the Brazilian quota programme which reserves university scholarships to students from low income backgrounds who have studied at public schools or who have received full scholarships at private ones. This programme establishes quotas for disabled people or for self-declared indigenous, afro-descendants or mixed people as regards these scholarships.

Summary:

I. This case refers to a direct claim of unconstitutionality against provisions of the Presidential Decree 213/2004, converted into Law 11.096/2005, that established the University for all Program (PROUNI, in the Portuguese acronym). The challenged provisions reserve scholarships to students from low income backgrounds, who have studied at public schools or who have received full scholarships at private schools. Among the scholarships, the programme sets quotas for disabled people and for self-declared indigenous, afro-descendants or mixed people. Furthermore, the law provides tax exemption to universities that adhere to the programme.

The applicants contended that those provisions violated the constitutional principles of legality, equal rights, university autonomy and the pluralism of pedagogical concepts. They also argued that the Federal Government has no competence to legislate in such a specific manner concerning education and that the provisions addressing the tax exemption should be enacted by a supplementary law.

II. The Brazilian Supreme Court, by majority, denied the claim. The Court held that favouring students from low income backgrounds and from certain social groups does not contravene equal rights provisions. The Court found that it is legitimate to grant advantages to offset inequalities that exist for a fact, in order to promote equality. The Court added that the differentiation set forth by the challenged law is in compliance with the constitutional values, since it aims at protecting historically disadvantaged social groups, such as afro-descendants, indigenous peoples and people from low income backgrounds.

The Court also stated that the challenged provisions do not regulate the tax exemption of social work organisations, which would necessitate the enactment of supplementary law. In fact, the Court found that the provisions established a criterion to offset (certain tax relief) the gratuity given (scholarships) by such organisations. Furthermore, the Court decided that, due to Articles 6, 22.XXIV, 23.V, 24.IX, 205, 208, 209, 213 and 213.II of the Constitution, which concern education, the Federal Government has a special role in education matters, being responsible for enacting the challenged rule.

III. In a separate opinion, a dissenting Justice argued that the tax exemption granted by the challenged provisions needed to be regulated by supplementary law since the National Tax Code, which can only be amended by a supplementary law, sets forth other requirements to grant tax advantages, such as to keep in the country the financial resources used to maintain their institutional objectives.

Supplementary information:

- Articles 6, 22.XXIV, 23.V, 24.IX, 205, 208, 209, 213.I and 213.II of the Federal Constitution;
- Provisional Presidential Decree 213/2004, converted into Law 11.096/2005.

Languages:

Portuguese, English (translation by the Court).

Canada
Supreme Court

Important decisions

Identification: CAN-2013-1-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 27.02.2013 / **e)** 33676 / **f)** Saskatchewan (H.R.C.) v. Whatcott / **g)** *Canada Supreme Court Reports* (Official Digest), [2013] x S.C.R. xxx / **h)** http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/12876/index.do; 441 *National Reporter* 1; [2013] S.C.J. no. 11 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities**.

Keywords of the alphabetical index:

Fundamental rights, limitation / Publication, prohibition / Hate speech.

Headnotes:

A prohibition of any representation that "ridicules, belittles or otherwise affronts the dignity of" any person or class of persons on the basis of a prohibited ground is not a reasonable limit on freedom of religion or freedom of expression.

Summary:

I. Four complaints were filed with the Saskatchewan Human Rights Commission concerning flyers published and distributed by the respondent. The complainants alleged that the flyers promoted hatred against individuals on the basis of their sexual orientation. A tribunal held that the flyers constituted publications that contravened Section 14 of The Saskatchewan Human Rights Code because they exposed persons to hatred and ridicule on the basis of their sexual orientation, and concluded that Section 14 of the Code was a reasonable restriction on the respondent's rights to freedom of religion and expression guaranteed by Section 2.a and 2.b of the Charter. The Court of Queen's Bench upheld the tribunal's decision. The Court of Appeal accepted that the provision was constitutional but held that the flyers did not contravene it.

II. The statutory prohibition against hate speech at Section 14.1.b of the Code infringes the freedom of expression guaranteed under Section 2.b of the Charter. The activity described in Section 14.1.b has expressive content and falls within the scope of Section 2.b protection. The purpose of Section 14.1.b is to prevent discrimination by curtailing certain types of public expression.

However, the limitation imposed on freedom of expression by the prohibition in Section 14.1.b of the Code is a limitation prescribed by law within the meaning of Section 1 of the Charter and is demonstrably justified in a free and democratic society. It appropriately balances the fundamental values underlying freedom of expression with competing Charter rights and other values essential to a free and democratic society, in this case a commitment to equality and respect for group identity and the inherent dignity owed to all human beings. The objective for which the limit is imposed, namely tackling causes of discriminatory activity to reduce the harmful effects and social costs of discrimination, is pressing and substantial. Hate speech is an effort to marginalize individuals based on their membership in a group. It lays the groundwork for later, broad attacks on vulnerable groups. It also impacts on a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy.

Section 14.1.b of the Code is proportionate to its objective. Prohibiting representations that are objectively seen to expose protected groups to hatred is rationally connected to the objective of eliminating discrimination and the other harmful effects of hatred. To satisfy the rational connection requirement, the expression captured under legislation restricting hate speech must rise to a level beyond merely impugning individuals: it must seek to marginalize the group by affecting their social status and acceptance in the eyes of the majority. The societal harm flowing from hate speech must be assessed as objectively as possible and the focus must be on the likely effect of the hate speech on how individuals external to the group might reconsider the social standing of the group. Section 14.1.b of the Code reflects this approach. The prohibition only prohibits public communication of hate speech; it does not restrict

hateful expression in private communications between individuals. However, expression that "ridicules, belittles or otherwise affronts the dignity of" does not rise to the level of ardent and extreme feelings constituting hatred required to uphold the constitutionality of a prohibition of expression in human rights legislation. Accordingly, those words in Section 14.1.b of the Code are not rationally connected to the legislative purpose of addressing systemic discrimination of protected groups and they unjustifiably infringe freedom of expression. Consequently, they are constitutionally invalid and must be struck from Section 14.1.b.

Section 14.1.b of the Code meets the minimal impairment requirement. The prohibition is one of the reasonable alternatives that could have been selected by the legislature. The modified prohibition is not overbroad, but rather tailored to impair freedom of expression as little as possible. The modified provision will not capture all harmful expression, but it is intended to capture expression which, by inspiring hatred, has the potential to cause the type of harm that the legislation is trying to prevent. The benefits of the suppression of hate speech and its harmful effects outweigh the detrimental effect of restricting expression which, by its nature, does little to promote the values underlying freedom of expression. The protection of vulnerable groups from the harmful effect emanating from hate speech is of such importance as to justify the minimal infringement of expression.

Section 14.1.b of the Code also infringes freedom of conscience and religion as guaranteed under Section 2.a of the Charter. An infringement of Section 2.a will be established where:

1. the claimant sincerely holds a belief or practice that has a nexus with religion; and
2. the provision at issue interferes with the claimant's ability to act in accordance with his or her religious beliefs.

To the extent that an individual's choice of expression is caught by the definition of "hatred" in Section 14.1.b of the Code, the prohibition will substantially interfere with that individual's ability to disseminate his or her belief by display or publication of those representations. However, for the same reasons set out in the Section 1 analysis in the case of freedom of expression, the prohibition of any representation "that exposes or tends to expose to hatred" any person or class of persons on the basis of a prohibited ground is a reasonable limit on freedom of religion and is demonstrably justified in a free and democratic society.

Languages:

English, French (translation by the Court).

Chile
Constitutional Court

Important decisions

Identification: CHI-2013-1-001

a) Chile / **b)** Constitutional Court / **c)** / **d)** 27.09.2012 / **e)** 2102-2012 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Arrest, debt / Debt, enforcement / Debt, imprisonment / Divorce, maintenance / Maintenance, obligation / Maintenance, recovery.

Headnotes:

Night arrest is justified and therefore constitutional as a measure to compel a *divorcé* to fulfil the payment of monetary maintenance agreed before a judge during divorce proceedings, because that compensation is a supportive measure according to the law.

Summary:

I. The applicant, a divorced man, challenged two legal rules related to the payment of maintenance between the parties to a divorce. During the divorce proceedings the plaintiff and his former spouse had agreed that the maintenance would be paid in rates. The first legal rule establishes that every rate will be considered as a support payment in order to force its fulfilment. The second legal rule regulates sanctions to address a failure to comply, namely, night arrest pending complete fulfilment.

Plaintiff alleged that those legal provisions violate his right to personal freedom guaranteed by the Constitution and international law, since imprisonment for non-payment of debts is forbidden. He also argued that in this case the owed payments have a compensation character rather than supportive character and that therefore the sanction of night arrest was contrary to his fundamental right to personal liberty.

II. The Constitutional Tribunal rejected the applicant's claim. First, because the compensation is based on a judicial agreement – a divorce order – and not on a convention, the Tribunal considered that the judiciary has the necessary means for compliance, including arrest.

Second, the Tribunal was of the view that the type of compensation at issue in the instant case was directly related to support of the applicant's child and wife, because it was the last expression of the duty of help and aid between husband and wife.

The Constitutional Tribunal held that enforcement of the agreement with arrest in this case was justified. Arrest is not a penal sanction, like imprisonment or detention, but rather an enforcement mechanism which seeks to ensure effective compliance with the terms of the divorce agreement concerning maintenance. In particular, the Tribunal held that night arrest does not constitute a violation to personal freedom, but only a restrictive measure to enforce a debt of family support.

Languages:

Spanish.

Identification: CHI-2013-1-002

a) Chile / **b)** Constitutional Court / **c)** / **d)** 20.11.2012 / **e)** 2324-2012 / **f)** / **g)** Official Journal, 06.12.2012 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation**.
4.9.1 Institutions – Elections and instruments of direct democracy – **Competent body for the organisation and control of voting**.

Keywords of the alphabetical index:

Election, law, electoral / Electoral offence / Identification, measure.

Headnotes:

Provisions of a bill concerning the regulation of primary elections that have various defects including, in particular, lack of clarity and the use of ordinary legislation to regulate matters, should be regulated by an Organic Constitutional Law as required by the Constitution.

Summary:

I. A bill, known as the Primary Election Act, purported to establish a legal framework for the nomination of candidates for presidential, parliament, and municipal elections. According to this bill political parties and independents may conduct primary elections to select their candidates for those political offices, which results are binding on all the participants, both political parties and individual candidates.

II. The Tribunal declared several provisions of the bill to be contrary to the Constitution.

First, the Tribunal found the regulation that conferred the ruling of political propaganda, voting and counting procedures, and in general, every provision in the bill concerning the Electoral Authority to be unconstitutional, on the basis that it empowers the Electoral Service to regulate propaganda, voting and counting procedures in a vague manner, thereby according it excessive discretion, and on the basis that such kind of regulations come within the concept of a "primary elections system", which under the Constitution must be regulated by an Organic Constitutional Law.

Second, the Tribunal also deemed unconstitutional a norm which excluded the identification procedure of electors from the primary elections. The identification procedure was applicable to all other public elections and plebiscites and was used in the case of reasonable doubts about the real identification of voters. The Tribunal declared that this exclusion could affect political rights, by being the identification crucial for exercising those rights.

Finally, the Tribunal held that the sanctions for irregularities committed by individuals or political parties during the primary elections to be unconstitutional, because they are based on offences and crimes defined on Election Act and Political Parties Act, respectively, both in a generic way, without providing any clarity to potential offenders as to which sanction may be applied to them.

Languages:

Spanish.

Identification: CHI-2013-1-003

a) Chile / **b)** Constitutional Court / **c)** / **d)** 11.12.2012 / **e)** 2203-2011 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality**.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

Keywords of the alphabetical index:

Criminal proceedings, initiation / Right to initiate proceedings / Equality, in criminal procedure.

Headnotes:

There is no legitimate purpose in a provision of the Penal Procedure Code that limits the entitlement to submit a criminal action to testamentary heirs and not to legal heirs.

Summary:

I. The applicants challenged a rule contained in the Penal Procedure Code that establishes that a criminal action can be submitted by the victim, his legal representative, and testamentary heir. They attempted to initiate a criminal action against the accused, concerning the murder of their relatives, but it was dismissed because they were not entitled to do so under the law. They contended that the provision inhibits them to the right to access to justice and also is a violation to right to equality, because it limits the entitlement to submit a criminal action to a testamentary heir, thereby excluding legal heirs.

II. The Constitutional Tribunal declared the challenged legal rule unconstitutional and held that, therefore, it cannot be applicable at the pending trial, since there is no justifiable goal pursued by that exclusion, given that the rule is arbitrary and discriminatory, and a disproportionate limitation to the right to access to justice.

Languages:

Spanish.

Identification: CHI-2013-1-004

a) Chile / **b)** Constitutional Court / **c)** / **d)** 13.12.2012 / **e)** 2024-2012 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality**.
5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law**.
5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability**.

Keywords of the alphabetical index:

Civil servant, dismissal, reason / Due process / Health, impairment / Public office, holder / Public officer, incompatibility.

Headnotes:

A legal norm may empower the Head of a public service to declare a public post vacant due to incompatible health of the public servant.

Summary:

I. The applicant was a public servant who took medical leave and was subsequently removed from office. He challenged two particular norms of the public servant Statute that give the Head of public service the power to declare a given public post to be vacant due to the incompatible health of the current post-holder, if that person takes medical leave for longer than six months in a total period of two years.

The applicant argued that those norms violate his right to due process, since he has no possibility to impugn the vacancy declaration, the principle of non-discrimination and the freedom to work.

II. The Constitutional Tribunal rejected the action. In its decision the Tribunal held that the Administration of the State – under the principle of the duty of service – exists to meet the public's needs in an on-going and permanent way. The Tribunal considered that, in order to fulfil that principle, it is necessary that public servants are capable of performing their public functions and that they fulfil the legal requirements to demonstrate their suitability to assume that public office. Therefore, if a public servant is not in the position to perform his or her public function due to an incurable health problem, it is completely compatible with the Constitution that legal norms allow the Head of public services to make that decision.

According to the public servant Statute, medical leave by itself will not enable the head of Service to declare a public post to be vacant. A head of service has to resolve, through a justified administrative act, that the public servant is no longer able to serve at his or her public position. If an abuse of that discretionary power is considered, there are other judicial instances besides the Constitutional Tribunal where it can be challenged. Accordingly, there is no violation to the right to due process and to equality.

Finally, the Tribunal held that there is neither a violation to freedom of work nor its protection in this case, since the Constitution allows restrictions upon that right due to the lack of capacity to perform a public function.

Languages:

Spanish.

Identification: CHI-2013-1-005

a) Chile / **b)** Constitutional Court / **c)** / **d)** 09.01.2013 / **e)** 2358-2011 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication**.
5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Enterprise, freedom / Mass media / Media, broadcasting, freedom / Media, freedom / Non-discrimination, principle.

Headnotes:

The right to broadcast implies the right for the license owner to broadcast and the right to use any mechanism for the full operation of a broadcasting enterprise. The legislator has the right to restrict and regulate that freedom, but not to affect it in a disproportionate way.

Summary:

I. The applicants, a group of parliament members, challenged a norm that prohibits the use of a mechanism, known as an “online people meter”, for measuring TV audiences. The challenged provision was introduced during the legislative discussion of a bill concerning the regulation of Digital TV. The applicants contended that the prohibition violates the freedom of opinion and information (due to prior censorship), the right to broadcast and the right to freedom of enterprise.

II. The Constitutional Tribunal declared the challenged legal provision to be unconstitutional. The Tribunal recognised that the purpose of that prohibition was to prevent and avoid vulgarity and triviality in editorial guidelines for TV programming. Nevertheless, the Tribunal did not see how this goal could be achieved through a prohibition on the use of an online people meter.

With regard to the rights to freedom of opinion and information, the Tribunal found no violation of this fundamental right, since the prohibition does not constitute mechanism of prior censorship, which is forbidden by the Constitution, but might have an effect on future editorial guidelines.

The Tribunal held that the right to broadcast implies not only the right of the license owner to broadcast, but also the right to use any mechanisms for the full operation of a broadcasting enterprise. The Tribunal affirmed that the legislator has the right to restrict and regulate that freedom, but not to affect it in a disproportionate way. In this case, it was disproportionate, because it could not be demonstrated that this measure, which restricts the right of broadcasters, is capable of fulfilling the stated goal.

The Tribunal also found a violation of the freedom of enterprise, on the basis that the prohibition inhibits provider enterprises from exercising their economic activity, given that no justificatory argument based on morality, public order or national security could be made in favour of the prohibition, as required by the Constitution.

Finally, during the public allegations the Tribunal requested the parties to present arguments concerning a potential violation of the principle of non-discrimination, since the prohibition of the use of an online people meter only applies to TV broadcasting, and not to any other social media. That violation was also confirmed and declared by the Tribunal.

Languages:

Spanish.

Identification: CHI-2013-1-006

a) Chile / **b)** Constitutional Court / **c)** / **d)** 23.01.2013 / **e)** 2386-2012 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality**.

Keywords of the alphabetical index:

Audience measurement system / Freedom of enterprise / Non-discrimination, principle / Enterprise, freedom / Licence, granting / Licence, to practise a trade, conditions.

Headnotes:

Legal provisions purporting to create new rules for regulating fishery licences, and establishing two

different categories of permit-holders, are not contrary to the right to equality before the law.

Summary:

I. The applicants, a group of senators, challenged several rules of a bill, which sought to regulate the industrial fishery activity, especially fishing licenses and maximum quota of sea products exploitation.

In particular, the bill sought to create a “Class A” licence for exploitation for fishery industrial enterprises that are already operating with fishing permission. That kind of license might be transferred, and could be renewed after 20 years if the legal requirements were fulfilled by the license holder. Those “Class A” licences would also maintain their exploitation quota; in other words, the previous legal regulation applicable to those fishing enterprises was recognised by the new bill.

For those seeking fishing permits who did not already hold permits, the bill sought to create a “Class B” licence, which did not have the same benefits as a Class A licence.

Plaintiffs argued that the new licensing framework violated the principle of equality before law by creating a privileged group, namely, those fishery enterprises which already held fishing permits. Meanwhile, other enterprises seeking entry to the fisheries market would have to obtain a license by a tender procedure.

II. The Tribunal rejected the requirement on the basis of the following arguments.

First, the Tribunal held that differences between historical fishery enterprises and new petitioners were not discriminatory or constitutive of a privilege, because the bill only recognised their previous economic activity at that market, following the continuity principle of early regulation of that matter.

Second, the Tribunal held that the legislator enjoyed the autonomy to regulate the fishery industry because the Constitution does not establish special rules for the regulation of that industry, unlike the mining or water industries.

Languages:

Spanish.

Croatia
Constitutional Court

Important decisions

Identification: CRO-2013-1-001

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 / Conflict of interest prevention, commission, competences, limits / Conflict of interest prevention, commission, relations to other state bodies / Conflict of interest, administrative sanction, balance / Official, high, declaration / Powers, division.

Headnotes:

The purpose of the measures prescribed in the Prevention of the Conflict of Interest Act is to promptly prevent foreseeable or potential conflict of interest, or effectively resolve already existing or newly arisen one. Therefore, the purpose of the sanctions in the Act is not to punish officials for finding themselves in a conflict of interest but rather to punish those who do not observe the legal obligations in the Act. This legal distinction is extremely important to correctly understand the concept. In other words, the area regulated by the Act belongs to administrative law. According to domestic classification, these are administrative measures and sanctions for infringing the Act.

The measures against officials who violate provisions of the Act must not be grounded on the assumption that by finding a violation of the Act, what is actually found is the existence of a conflict of interest itself with features of corruption or even the existence of the offence of corruption itself. This line must be clearly drawn. At this border, the effect of the Act ceases, as well as of the supervisory body thereby established (the Commission), and the effect of the criminal legislation with the established bodies of criminal prosecution begins.

The procedures concerning access to data protected by bank secrecy are possible and admissible. This occurs only when the disclosure of an official's assets is to conduct criminal investigation, namely establishing the criminal liability of a public official. It is not constitutional for an administrative-supervisory body established for preventive purposes, such as the Commission, to assume the authorities of criminal prosecution bodies.

To prevent the conflict of interest, the sanction must not question the elected official's very term of office.

Summary:

I. The 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* the review of constitutionality of Articles 26.3, 30.1, 45.3, 53.1-2, 55.2 and 55.4 of the Act.

Regarding all the proposals, the Court decided them in one constitutional proceeding. The proposals for a constitutional review of the entire Act were not granted. The Constitutional Court repealed the following provisions or parts of the Act: Articles 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 procedure 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 (hereinafter, the "Commission"), and other issues important to prevent conflict of interest.

Among other things, the proponents deem that the Act (i.e., its separate provisions) encroaches upon the right to privacy of state officials and members of their families. The proponents also argue 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. They also state the Act has transferred to the Commission the competencies of the Constitutional Court, the Parliament and judicial power contrary to the principles of constitutionality and legality. Finally, specifically in relation to 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, the proponents claim that such acts do not comply with the constitutional guarantee of safety and secrecy of personal data.

II. In the given case, the Constitutional Court found as relevant 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 firstly established 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, does not comply with the Constitution. It allows for an unacceptable degree of arbitrariness in the application of the Act to a specific case, creates legal uncertainty and prevents legal predictability of the effects of a law. Such legal solution breaches the principle of the rule of law. The period must be prescribed by law and must apply equally to everyone.

The Convention clearly identifies the difference between the preventive (Chapter II) and criminal area (Chapter III) of the fight against corruption, as well as between the specialised 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 specialised body to fight corruption within its criminal sphere. On the other hand, the Act also established, within the meaning of Chapter II of the Convention, the Commission for Conflict of Interest, as a specialised 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 by 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 examined the mixing of the administrative sphere (preventive) and the criminal sphere in parts of the Act regulating the Commission's competencies to check the data from the officials' declarations of assets. Authorising them to request "facts and evidence" on all the officials' accounts 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, does not conform with the legal purpose of the establishment of the Commission. Also, it may not generally be part of special administrative law dealing with preventive administrative measures in the area of preventing conflict of interest. This directly conflicts with fundamental principles upon which the constitutional order of the state is organised and built, and also excessively oversteps all the international legal commitments of the state. According to the Constitutional Court, the same view stands also for the other side of this relationship. That is, the obligation applies to 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 for the obligation of the official to give statements under legal coercion, allowing the Commission to have access to data protected by bank secrecy (Article 8.14 of the Act).

Pursuant to the above, the Constitutional Court found that parts of Article 8.13-14 and part of Article 39.5 of the Act breach the Constitution. They encroach upon criminal law and provide the Commission with the competencies 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." It directly conflicts with the requirements of legal security, legal predictability and legal certainty. Namely, the actions of the Commission must be clearly defined. Their definition simultaneously presumes their clear distinction from actions that only criminal prosecution bodies are authorised to undertake. This also applies to 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. The distinction concerns the constitutional requirement to clearly distribute competences among state bodies and the state public authority system.

Articles 26.3 and 27 of the Act presuppose that the official fulfilled his duty to timely deliver to the Commission a written declaration and enclose appropriate "evidence" necessary to align the reported assets with the established assets. However, from the disputed provisions, the Commission held that such statement had justified or had not 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."

The Constitutional Court noted that the Commission is not a body specialised in tax, financial, bookkeeping and accounting activities. Hence, it is not able to deliver final decisions about whether an official has or has not justified the mismatch between the data reported in the declaration and the data of the Tax Administration and other competent authorities. Moreover, it is not authorised to determine whether such a difference simultaneously 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. Therefore, they do not conform to requirements of the rule of law.

According to the Constitutional Court, establishing that the official had made declarations that are "untruthful or incomplete facts concerning his or her assets with the intention of concealing them" (parts of Articles 46 and 47 of the Act) cannot be subject to out-of-court procedures inherent to administrative-supervisory body established for preventive purposes, such as the Commission. Given its legal nature, the establishment of such declaration 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 criminal law and provide the Commission with competences of criminal prosecution authorities and criminal courts.

The Constitutional Court also found unconstitutional other provisions of Articles 46 and 47 of the Act (Articles 3-5 and 16). Namely, 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 that 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 sanction breaches the fundamental structure of the constitutional and legal order (Articles 3, 4 and 5 of the Constitution) since they result in consequences not permitted under the Constitution. In brief, in the area of preventing the conflict of interest, the sanction must not call into question the very term of office of the elected official.

Regarding the Commission's competencies, the Constitutional Court found that permitting the Commission to check data from officials' declaration of assets "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) breaches constitutional principles. These principles are applied to the hierarchy of legislation set in domestic legal order (Articles 3 and 5 of the Constitution). In a democratic society based on the rule of law, the law must regulate legal proceedings affecting individual legal situations of third persons or relating to decision about their rights and obligations or their punishment.

The Constitutional Court noted that in Article 30.1.2, there is an obvious 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 matters in this enactment are not matters related to the "procedures before the Commission" (part of Article 30.1.2), as the legislator wrongly qualified them. These are rules of procedure

or rules on the work of the Commission. At first glance, it may seem that they are just terminological omissions. However, the Constitutional Court finds that these omissions bear a significant legal dimension, disrupting the legal consistency of the objective legal order of the Republic of Croatia in the part concerning the nomenclature of legislation and thus it repealed the 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 repealed also the transitional provisions of Article 53.1-2 of the Act.

Cross-references:

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

Languages:

Croatian, English.

Identification: CRO-2013-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 23.01.2013 / **e)** U-I-3845/2006, U-I-5348/2012 / **f)** / **g)** *Narodne novine* (Official Gazette), 12/13 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
3.10 General Principles – **Certainty of the law**.
3.22 General Principles – **Prohibition of arbitrariness**.

Keywords of the alphabetical index:

Emergency measure, administrative / Law, entry into force / Substatutory act, entry into force / *Vacatio legis*, necessary length.

Headnotes:

In parliamentary practice, the general statutory formulation has generally read: “This Act shall enter into force on the day of its publication”. The formulation of the concluding provisions on the entering into force of laws is clearly not in conformity with Article 90.3 of the Constitution in connection with Articles 3 and 5 of the Constitution. The reason is that the possibility is still open for the law to come into force even before it has been published in the Official Gazette. According to this disputed formulation, an act would come into force at 00.00 hours on the day the Official Gazette is published, regardless of the fact that the Official Gazette is actually published later that day.

The Constitution prevents government bodies from setting the period of entering into force of ordinances, orders and instructions as “the day of publication”. The shortest *vacatio legis* period here must also be one day (time limits are calculated in days, not in hours), which means that the above-mentioned sub-statutory regulations may exceptionally come into force only on “the first day after the day of publication”.

The legislator is obliged to regulate the obligation of those who are legally authorised to adopt other regulations. This is defined in Article 18 of the Act on the State Administration System, which clearly explain in an accessible manner the “especially important reasons” for a certain ordinance, order or instruction to come into force exceptionally on the first day after its publication in the Official Gazette. This obligation is inherent in the authority of those who adopt other regulations when, according to their own assessment, they define a shorter *vacatio legis* period than that prescribed by law. The lack of any document or act containing an explanation of the “especially important reasons” for the exception should be assessed by nature as arbitrary conduct by those who adopt other regulations.

The same rules apply *mutatis mutandis* to all other regulations, including the decrees of the Government.

In administrative practice, intervention measures must not be erroneously identified with the “order” in Article 19.4 of the Act on the State Administration System. The legislator in the given Act, as a general act regulating the state administration system, is obliged to distinguish intervention measures from other regulations by government bodies consistent with Article 90.1 of the Constitution and Article 19 of the Act. The legislator must prescribe the time when they come into force and the time and manner of their publication. The general requirements under which, in the domestic legal order, the state administration is permitted to issue such measures must also be provided.

Summary:

I. A proposal has been submitted for a constitutional review of the second part of the sentence of Article 18.4 of the 1993 Act on the State Administration System (hereinafter, "Act/1993"). The part reads: "unless these regulations exceptionally specify that, for especially important reasons, the day on which they come into force shall be the day of their publication". The applicant, a natural person, found that it breaches Article 90 of the Constitution.

The Act/1993 lost its legal force and under Article 32 of the Constitutional Act on the Constitutional Court, the Constitutional Court rejected the proposal because the requirements to decide on the merits ceased to exist.

Due to the identical content of Article 19.4 of the 2011 Act on the State Administration System (hereinafter, "Act/2011") and Article 18.4 of the Act/1993, the Constitutional Court, however, decided to apply Article 38.2 of the Constitutional Act on the Constitutional Court.

II. In reviewing the constitutionality of the second part of the sentence of Article 19.4 of the Act/2011, the Constitutional Court examined the proponent's allegations that the provision makes it possible for those who adopt these implementing regulations to decide on the day those regulations come into force (i.e., provision makes it possible to remove *vacatio legis* completely). It also considered whether the possibility of removing the *vacatio legis* as a normative possibility is reserved exclusively to Parliament in its function as legislator.

Relevant for the constitutional review of the disputed part of Article 19.4 of the Act/2011 is Article 90 of the Constitution in connection with a part of Article 3 of the Constitution (the rule of law) and Article 5.1 of the Constitution (the principle of constitutionality).

Article 90.3 of the Constitution stipulates that "an act shall enter into force not later than on the eighth day after the date of its publication...". Only on exceptions, the legislator (the Parliament) can define *vacatio legis* differently in the law "for particularly justified reasons".

Determining *vacatio legis* in the legislative practice:

The Constitutional Court emphasised that the way the legislator, in its practice, formulates concluding provisions when it prescribes the shortest permitted *vacatio legis* for laws is not constitutional.

The Court pointed out that Article 90.1 of the Constitution expressly prescribes that laws must be published "before they enter into force" and Article 90.3 of the Constitution stipulates as the earliest day that a law may come into force, "the eighth day after its publication". Respecting these provisions, the Constitutional Court found that the exception contained in the second part of the sentence in Article 90.3 of the Constitution ("unless otherwise specified thereby for especially justified reasons") may not be interpreted so that it derogates from the fundamental rule on calculating constitutional time limits in days, contained in the first part of the same sentence. Therefore, the shortest permitted *vacatio legis* within the meaning of Article 90.3 of the Constitution is one day, which is the day after its publication in the Official Gazette. This constitutional rule is simultaneously a general statutory rule on calculating time limits in law. Within the meaning of Article 90.3 of the Constitution, they are calculated in days and not in hours.

At the same time, the Constitutional Court pointed out that the obligation to respect the requirement of the Constitution, which allows deviation from the seven day *vacatio legis* only "for especially justified reasons". In parliamentary practice, this requirement has not, as a rule, been respected. The reasons used to explain the "especially justified reasons," as necessary for a law to come into force before the seven day *vacatio legis* expiration, are usually not stated in proposed acts. The Parliament's Standing Orders do not define details of this constitutional requirement.

The Constitutional Court found that the present parliamentary practice, which applies Article 90.3 of the Constitution, must be amended and harmonised with its requirements.

The entering into force of other regulations of the state authorities:

Article 90.3 of the Constitution stipulates a regular *vacatio legis* only for laws.

Regarding "other regulations of governmental bodies" within the meaning of Article 90.1 of the Constitution, the regular *vacatio legis* for them is not determined in the Constitution. Rather, it is left to the legislator to decide.

The legislator has in Article 19.4 of the Act/2011 prescribed that the regular *vacatio legis* for other regulations of government bodies lasts until the eighth day after their publication ("Ordinances, orders and instructions shall be published in the Official Gazette, and shall come into force on the eighth day

from their publication at the earliest...”). This statutory prescription is not disputed in any aspect in constitutional law.

However, Article 19.4 in connection with Article 18 of the Act/2011 stipulates that ministers and other heads of state administration bodies may in the concluding provisions of adopted regulations, orders and instructions, as an exception, prescribe for especially important reasons that those regulations will come into force on the “day of publication”.

The general legal formulation “on the day of publication” contained in the second part of the relevant sentence of Article 19.4 Act/2011 is not in line with the spirit of Article 90 of the Constitution (analogous to the application of Article 90.3 of the Constitution). It is also neither aligned with the formulation contained in the first part of the same sentence (“from their publication”) nor with the general statutory rules on calculating time limits in law, which are founded on the principle of the rule of law and legal certainty. Therefore, the Constitutional Court determined that Article 19.4 of the Act/2011 in the part reading “on the day of publication” breaches Article 90 of the Constitution in connection with Articles 3 and 5 of the Constitution.

The coming into force of intervention measures:

Despite its obvious unconstitutionality, which has been present without interruption since 1993, the Constitutional Court has never instituted proceedings to review the constitutionality of the repealed legal solution (“the day of publication”). The basic reason lies in well-established and consistent administrative practice, which within the term “order” from the former Article 18.4 Act/1993 or Article 19.4 Act/2011 also included administrative intervention measures. Publication of such intervention measures, although obligatory, by nature can only be subsequent.

The incorrect inclusion of intervention measures under “orders” in practice has created the impression that this is a case of a clearly unconstitutional situation. If intervention measures are considered to be “orders”, their lack of conformity with Article 90.1 of the Constitution would be clear: they would come into force before being published in the Official Gazette.

The Constitutional Court found it wrong to identify intervention measures with “orders.” It pointed out that the time has come to abandon this administrative practice and for this area of law to conform to the principles of the rule of law to achieve the security of the objective legal order.

The Court found that state intervention measures, due to their aim and purpose, cannot be deemed “the other regulations” within the meaning of Article 90.1 of the Constitution, to which the statutory seven day *vacatio legis* is linked, which is counted from the first day after the Official Gazette publication. Accordingly, their adoption and implementation – aimed at immediately protecting the freedom and rights of other people, the legal order, public morals or health of the population – are beyond the scope of Article 19.4 Act/2011. They cannot be identified with any form of subordinate act to which those provisions relate.

Therefore, the legislator in the Act/2011, as a general act regulating the state administration system, is obliged to distinguish intervention measures from “other regulations by government bodies”, within the meaning of Article 90.1 of the Constitution and Article 19 Act/2011.

Languages:

Croatian, English.

Identification: CRO-2013-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 23.01.2013 / **e)** U-III-3304/2011 / **f)** / **g)** *Narodne novine* (Official Gazette), 13/13 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
3.9 General Principles – **Rule of law**.
3.10 General Principles – **Certainty of the law**.
3.13 General Principles – **Legality**.

Keywords of the alphabetical index:

European Court of Human Rights, judgment, execution / Obligations, international, state / Proceedings, reopening, ground / Victim, right.

Headnotes:

Concerning the state's execution of European Court of Human Rights' judgments, its domestic case-law must be developed in such a way as to observe its international legal obligations arising from the European Court of Human Rights.

The constitutional grounds to execute European Court of Human Rights' judgments are embedded in Article 46.1 ECHR in conjunction with Articles 115.3 and 134 of the Constitution. The competent bodies are always obliged to mention these constitutional grounds in their decisions when they relate to procedures to execute European Court of Human Rights' judgments, together with legal grounds of domestic law relevant to the specific case.

A European Court of Human Rights' judgment finding that a right under the European Convention on Human Rights has been violated constitutes a "new fact". If submitted, the well-foundedness of an applicant's request to amend a legally effective court decision based on a European Court of Human Rights' decision must be reviewed. This is pursuant to Article 502 of the 2011 Criminal Procedure (Revisions and Amendments) Act: request to amend a final court decision on the basis of a final judgment of the European Court of Human Rights).

The competent court is authorised to review, in each individual case, whether such a request is well-founded or not. In other words, dismissing the request is not permitted.

The review of the request's well-foundedness must be based on the particular circumstances of the individual case (primarily the nature of the act and/or the severity of the punishment). The review must factor in the findings of the violations and the reasons for these findings, which have been stated in the European Court of Human Rights' judgment and its case-law.

The competent court, after reviewing the request's well-foundedness, has the authority to reject or grant the request. A request may be rejected on the grounds of it being unfounded. In light of rules on the "appearance of justice" and on "maintaining citizens' legitimate confidence in the State and the law made by it", as inherent in the rule of law, the competent court must show that the circumstances for its rejection exist and substantiate them with sufficient reasoning. If these requirements are met, the rejection of the request cannot be qualified as a failure to execute a European Court of Human Rights' judgment.

Until the well-foundedness of the applicant's request to amend a final court decision based on a European Court of Human Rights' decision is reviewed in conformity with the positions expressed in the decision, the applicant is deemed a victim of a violation of the right to a fair trial in the meaning of Article 29.1 of the Constitution and Article 6.1 ECHR.

Summary:

I. To protect his constitutional rights, the applicant filed a constitutional complaint in proceedings to execute a judgment of the European Court of Human Rights in the case of *Vanjak v. Croatia* (Application no. 29889/04, decision of 14 January 2010). The case was finalised on 14 April 2010. In the judgment, the European Court of Human Rights established a violation of Article 6.1 ECHR (right to a fair trial) occurred due to deficiencies of disciplinary proceedings, which established that the applicant committed grave violation of work discipline and therefore the measure of termination of civil service was pronounced.

He filed a constitutional complaint against:

1. the ruling of the first-instance Disciplinary court of the Ministry of Interior of 12 May 2010 dismissing his request for the reopening of proceedings before a competent domestic body in the procedure for the execution of the above-mentioned European Court of Human Rights' judgment;
2. ruling of the second-instance Disciplinary court of the Ministry of Interior of 6 September 2010 dismissing the applicant's appeal as ill-founded and upholding the first-instance decision; and
3. the judgment of the Administrative Court of 14 April 2011 dismissing the applicant's appeal against the second-instance judgment.

The applicant posited that the following constitutional rights were violated: right to "effective legal remedy" (Article 18.1 of the Constitution); right to a fair trial (Article 29.1 of the Constitution) and right to equality before the law (Article 14.2 of the Constitution). In addition to Article 29.1 of the Constitution, he also invoked Article 6.1 ECHR.

II. Given the reasons stated in the constitutional complaint, the Constitutional Court rejected the applicant's complaints grounded on Articles 14.2, 18.1 and 29.1 of the Constitution as well as on Article 6.1 ECHR for their obvious lack of well-foundedness.

However, the Constitutional Court noted that the second-instance Disciplinary court found that "it cannot find any valid legal grounds to proceed with the execution of the cited European Court of Human Rights' judgment" or "find any case-law which would provide indications on how to resolve the arisen legal situation". The competent court was obviously referring to the domestic courts' case-law on legal rules to reopen criminal proceedings upon a request to amend a legally effective court decision based on a European Court of Human Rights' decision.

To that end, the Constitutional Court noted that the impugned rulings of the disciplinary courts and the impugned judgment of the Administrative Court are grounded on Article 502 of the Criminal Procedure Act. It determined that, in order to observe the State's international obligations and human rights (the highest value of the constitutional order), it is obliged to continue examining this case. The fact that the applicant's constitutional complaint did not rely on valid grounds of constitutional law and international law, and that his allegations on facts that are irrelevant for these Constitutional Court proceedings should not matter.

Namely, when competent courts admitted that the legal order lacks instructions for "resolving the present legal situation", and the Constitutional Court has yet to address the issue and no case-law exists in that field, it is not constitutionally acceptable to proceed with this constitutional complaint in the same manner as with constitutional complaints that lack international dimension and do not touch upon the state's obligations under international treaties. A dismissal of the applicant's constitutional complaint without considering the merits of the case should be assessed as overly formalistic. Such dismissal is not only contrary to the principle of the protection of human rights under the Constitution and the European Convention on Human Rights but also to the Constitutional Court's duty in Article 2.1 of the Constitutional Act on the Constitutional Court.

The Constitutional Court's opinion was based on the conclusion that the constitutional complaint sufficiently addressed the fundamental problem of the entire case: the non-execution of the European Court of Human Rights' judgment. Within this framework, it found the applicant's constitutional complaint admissible.

Consequently, the Constitutional Court accepted the applicant's constitutional complaint due to the competent courts' failure to execute the above-mentioned final and binding European Court of Human Rights' judgment within the meaning of Article 46.1 ECHR. It repealed the impugned judgment of the Administrative Court as well as the second and first instance rulings of the Ministry of Interior. It also referred the case back to the first-instance Disciplinary Court of the Ministry for a renewed proceedings.

The Constitutional Court noted that failure to observe international obligations, which in the present case led to the dismissal of the "request to reopen disciplinary proceedings", seriously effected the personal legal situation of the applicant (Article 35 of the Constitution). His interest, doubtlessly legitimate, for the European Court of Human Rights' judgment to be duly executed on a national level (namely that the well-foundedness of his request be reviewed) has weight in constitutional law, sufficiently corroborated by the European Court of Human Rights' findings contained in this judgment. The Constitutional Court could not have neglected this fact in the present proceedings. It is deemed indisputable that the impugned decisions and the judgment of the Administrative Court inevitably diminished the applicant's confidence in the justice system. Also, it further imperilled the principles of legal certainty and equality of all persons before the law, which are the main characteristics of the rule of law both in the Constitution and the European Convention on Human Rights. They also disrupted the applicant's legitimate expectation that the European Court of Human Rights' judgment would lead to a review of the well-foundedness of his request to amend a legally effective court decision based on the European Court of Human Rights' decision, and to a potential reopening of the disciplinary proceedings against him.

The Constitutional Court has taken general constitutional-law views on the obligations of courts when executing European Court of Human Rights' judgments, in which a violation of the right to a fair trial was found in the meaning of Article 6 ECHR in criminal proceedings and other proceedings on which the provisions of the Criminal Procedure Act apply (see *Headnotes*).

The above-mentioned views are appropriately applied to all proceedings initiated to reopen proceedings as individual measures for the execution of a European Court of Human Rights' judgment in which a violation of the right to a fair trial or another right in the European Convention on Human Rights has been found.

Cross-references:

Decisions of the Constitutional Court:

- Decision and Ruling no. U-I-745/1999 of 08.11.2000, *Bulletin* 2000/3 [CRO-2000-3-017].

Decisions of the German Federal Constitutional Court:

- 2 BvR 2365/09, 2 BvR 740/10, Preventive Detention I. of 04.05.2011.

Decisions of the European Court of Human Rights:

- *Broniowski v. Poland*, Application no. 31443/96, Judgment [GC] of 22.06.2004;
- *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2), Application no. 32772/02, Judgment [GC] of 30.06.2009;
- *Öcalan v. Turkey,* Application no. 46221/99, Judgment [GC] of 12.05.2005.

Languages:

Croatian, English.

Identification: CRO-2013-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 23.01.2013 / **e)** U-I-5612-2011 *et al* / **f)** / **g)** *Narodne novine* (Official Gazette), 13/13 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State**.
3.9 General Principles – **Rule of law**.
3.10 General Principles – **Certainty of the law**.
3.17 General Principles – **Weighing of interests**.
3.22 General Principles – **Prohibition of arbitrariness**.

Keywords of the alphabetical index:

Bailiff / Constitutional Court, decision, execution, method / Constitutional Court, jurisdiction, limits / Damage, compensation / Justice, higher value / Law, reconsideration by parliament / Law, suspension / Law-making, constitutional rules / Legal protection, interest / Legal remedy, right / Legislation, effect of amendment / Legislative approach / Legislative discretion / Legislative power / Legislator, omission / Legitimate expectation, protection / Liability for acts of the legislature / Liability, arising from a lawful act / Liability, state / Responsibility, authorities / Social justice, principle.

Headnotes:

The choice of legislative model to regulate society's individual relationships is not subject to constitutional review. The legislator had the constitutional authority to replace the institution of public bailiff with the institution of court bailiff.

However, the state's discretionary powers must not involve consequences that conflict with fundamental constitutional values, on which the state's constitutional order is built. The requirements of the rule of law demand that for the public bailiff service, systematic legislative amendments would be implemented in line with the principle of a fair balance with the least possible consequences for those affected by those changes.

If the legislator decided to abolish the public bailiff service, it was obliged to establish a fair balance between the realisation of that aim in the general or public interest and the protection of the interests of the persons appointed to be public bailiffs. It is not acceptable to completely ignore that obligation in a democratic state founded on the rule of law and the protection of human rights. Thereby, the principles of legal certainty, legal predictability and legal confidence are undermined, to the detriment of individuals, regardless of how important the public or general interests are that stand against them. This form of legislative practice inevitably also reduces public confidence in the state's legal system, thereby endangering the rule of law, a fundamental constitutional value of the legal order.

Summary:

I. The proposal to review the constitutionality of the 2010 Public Bailiffs Act was submitted by a human rights protection association. The proposals to review the constitutionality of the 2011 Act on Amendments to the Public Bailiffs Act were submitted by several natural persons who were appointed public bailiffs.

The 2010 Public Bailiffs Act regulated organisation, competencies and working methods of the public bailiffs as a public service. The Act should have entered into force on 1 January 2012. However, it was postponed by the first amendment of 2011 to 1 July 2012, and then to 15 October 2012 by the second amendment in 2012. Afterwards, the legislator passed the Act on Repealing the Public Bailiffs Act. By its entering into force, on 15 October 2012, the Public Bailiffs Act lost its legal force.

At the same time, after passing the Act on Repealing the Public Bailiffs Act, the legislator passed the new Enforcement Act, which introduced the institution of "court bailiff" instead of "public bailiff".

II. The Constitutional Court dismissed the proposals to review the constitutionality of the Public Bailiffs Act and the Act on Amendments to the Public Bailiffs Act. The reason is that the requirements to decide the merits of the case within the meaning of Article 32 of the Constitutional Act on the Constitutional Court ceased to exist for both Acts, which had lost their legal force.

However, regarding the part in both these Acts that directly affect the legal position of persons whom the Ministry of Justice appointed bailiffs pursuant to the Public Bailiffs Act, the Constitutional Court ordered, pursuant to Article 31.4-5 of the Constitutional Act on the Constitutional Court, that each of the total of 71 appointed persons shall have the right to redress in the lump sum net amount. The Court also noted that redress shall not affect the general right of every person to seek indemnity for the damage suffered before a regular court, according to the general rules of the civil obligations law. Redress, however, shall not be included in the calculation of any future court indemnity.

The Constitutional Court decided as stated above for the following reasons:

First, the appointed public bailiffs' state of uncertainty and insecurity due to the commencement of their work being repeatedly postponed and eventually, the complete abolition of the profession that they had prepared themselves and had attained qualifications had lasted about one year. This state of deep uncertainty and insecurity was caused by repeated legislative interventions, which was not in accordance with legal requirements stemming from the principle of the rule of law.

Secondly, the legislator did not regulate a transitional, legislative regime, which would satisfactorily resolve the problem of the already appointed public bailiffs after abolishing the institution. Consequently, the fair balance was disturbed between the legislator's aim by abolishing the institution, and the protection of the interests of persons appointed as public bailiffs. This omission is also not in accordance with legal requirements stemming from the principle of the rule of law. It directly undermines the principle of the legitimate expectations of persons who relied on the law and valid individual legal acts, adopted on the basis of those laws for them. Therefore, assuming that the individual legal situation of public bailiffs could have been presented as though it were serving some general or public interest, the appointed public bailiffs were bearing and continuing to bear an excessive individual burden of the overall legal reform of the state's enforcement system.

Thirdly, recognition of the institution of public bailiff and the abolition of that same institution are the legislator's exclusive authorities. Individual legal enactments rendered pursuant to the Public Bailiffs Act became irrelevant when the Act on Repealing the Public Bailiffs Act came into force. Due to direct legislative intervention, any administrative court or other court protection of the rights, which had been recognised by individual acts to specific persons, also became meaningless. In other words, those persons were left without any form of court protection of their rights.

Fourthly, regarding the constitutional protection of the appointed bailiffs, it is not sufficient to rely implicitly on the possibility that they could be indemnified for damage suffered by the legislator's direct intervention, in civil proceedings before the regular courts. They should not rely on the fact that any possible court indemnity for the damage would compensate them for the legislator's conduct.

The legislator's conduct towards the appointed public bailiffs was of such a nature and intensity that (alongside the general possibility of indemnity for damage according to the general rules of the civil obligations law) it also required an appropriate but different solution. The solution should strike a fair balance between the general or public interest of the community (that is the abolition of the public bailiff service and the introduction of a new legislative model of enforcement) and the protection of the rights of the appointed public bailiffs. These solutions were lacking both in the Act on Amendments to the Public Bailiffs Act and the Act on Repealing the Public Bailiffs Act.

All the stated facts clearly pointed out that it is necessary to grant to each of the total of 71 appointed persons special redress.

The Constitutional Court specially emphasised the appointed bailiffs situation due to the legislator's intervention and its failure to prescribe a satisfactory solution for their problem in the transitional provisions. The Constitutional Court also underscored the state's economic or financial difficulties cannot be a reason why the Constitutional Court would be permitted to deviate from the constitutional requirement of fairness. Fair balance has been undermined, and the balance between the demands of the general interest of the community and the requirements of the protection of those persons'

rights must be re-established. The rule of law permeates all the articles of the Constitution. It entails the duty of the state and public authorities to enact measures that are not arbitrary and that the burden of these measures is fairly distributed. Only in this way can the confidence of the public in state and public institutions be maintained, as well as their confidence in their dedication to the rule of law and the protection of human rights, and their confidence in the laws created by those institutions. The redress prescribed by the Constitutional Court in this ruling is meant to serve that confidence.

Cross-references:

- Ruling no. U-I-2921/2003 *et al.* of 19.11.2008, *Bulletin* 2008/3 [CRO-2008-3-016].

Languages:

Croatian, English.

Identification: CRO-2013-1-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 23.01.2013 / **e)** U-I-5991-2012 / **f)** / **g)** *Narodne novine* (Official Gazette), 13/13 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Appeal, Judicial Council, decision / Appeal, right / Constitutional Court, appeal, *locus standi* / Constitutional Court, jurisdiction, legal regulation / Judicial Council, decision, review.

Headnotes:

The National Judicial Council Act may not expand the jurisdiction of the Constitutional Court beyond the remit of its activities established in the Constitution, and as elaborated in the Constitutional Act.

Summary:

I. Pursuant to authorisation stipulated in Article 38.2 of the Constitutional Act on the Constitutional Court (hereinafter, the "Constitutional Act"), the Constitutional Court initiated on its own motion the proceedings for the constitutional review of Articles 71.2 and 74.2 of the National Judicial Council Act.

II. The Constitutional Court found relevant the following Articles of the Constitutional Act on the Constitutional Court: 120.2.4 and 120.3- 5, as well as 97 and 98.

Within the meaning of Articles 120.3-5, 125.10 and 127.1-2 of the Constitutional Act, the Constitution and the Constitutional Act are legislations regulating the organisation and jurisdiction of the Constitutional Court. An act that lacks the significance of the Constitution or the Constitutional Act, or any other regulation may not encroach upon the jurisdiction or the organisation of the Constitutional Court.

Articles 71.2 and 74.2 of the National Judicial Council Act allow the Constitutional Court to decide on an appeal by the applicant as a disciplinary prosecutor, against the decision on the disciplinary responsibility of a judge and the appeal of a judge against the decision on suspension from office.

These articles of the National Judicial Council expand the competence of the Constitutional Court without constitutional grounds. The Constitutional Court, pursuant to Article 97 of the Constitutional Act, is competent to decide only on an appeal lodged by a judge against the judicial office's dismissal. Beyond such competence, it cannot decide on the disciplinary responsibility of a judge.

For the reasons given above the Constitutional Court repealed Articles 71.2 and 74.2 of the National Judicial Council Act.

Languages:

Croatian, English.

Identification: CRO-2013-1-006

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 23.01.2013 / **e)** U-X-99/2013 / **f)** / **g)** *Narodne novine* (Official Gazette), 12/13 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.3.3 General Principles – Democracy – **Pluralist democracy**.
3.9 General Principles – **Rule of law**.

Keywords of the alphabetical index:

Law, consolidated text / Law, organic / Law, publication / Legislator, omission / Legislative procedure / Procedure, urgent.

Headnotes:

The frequent practice of enacting laws in summary proceedings infringes upon the very nature of parliamentarism. Such practice diminishes the significance of democratic procedures. The obligation to respect them, moreover, prevents public debate on relevant social issues, weakening grounds to develop and improve cultural dialogue, which are essential to a democratic society. People do not trust laws created in proceedings contrary to the spirit of parliamentarism, which, at the same time, undermines their trust in democratic institutions.

The procedure to enact laws at the session immediately following the constitution of a new convocation of the Parliament requires normative regulation. Standing Orders must comply with the fundamental constitutional framework, which includes the obligation to designate the fields of law from which it is permitted to enact laws at that session.

The Parliament's Standing Orders do not regulate the procedure for Parliament to determine if an individual proposal of an act being debated and decided is, by its constitutional law character, an organic law, which directly and immediately requires the majority of votes of parliament members for its enactment. It neither regulates the manner in which this fact will be recorded either, nor the act in which it will be recorded, which are fundamental requirements for a law to officially obtain the characteristic of an organic law. Thus, it is necessary to amend the Standing orders of the Parliament.

The consolidated text of the Standing Orders of the Parliament, so far published only on the web site of the Parliament, need to be published also in the Official Gazette.

Summary:

I. Authorised to monitor the realisation of constitutionality and legality under Articles 128.5 and 104 of the Constitutional Act on the Constitutional Court, the Constitutional Court delivered to Parliament a report on the procedures to enactment laws and on the Parliament's Standing Orders of the Parliament (hereinafter, the "Report"). The Report has been grounded on examples from legislative practice.

Starting from Parliament's frequent legislative practice of enacting laws, even systemic and organic laws, in summary proceedings, the Constitutional Court recalls the international obligation of the state formulated in a European Court of Human Rights case *Broniowski v. Poland* (judgment, (GC), Application no. 31443/96, 22 June 2004). The Court emphasised the authorities' obligation to review and minimise extra-legal practices to maintain citizens' legitimate confidence in the State and in the law, which are inherent in the rule of law.

Therefore, regarding procedures to enact laws, standards inherent to democratic procedures must be observed. This applies especially to widely public deliberations as well as the spirit of parliamentarism expressed in constitutional postulates of the State in which the Parliament is a representative body of citizens and the holder of legislative power (Articles 3 and 70 of the Constitution).

The Constitutional Court pointed out that the Report does not prevent the legislator from enacting a law in some specific situations in summary proceedings. This, however, is an exception. Besides clear justification, the reasons must be stipulated in the Parliament's Standing Orders ("only when required by the interests of national defence or other particularly justified grounds, or when necessary in order to prevent or eliminate major economic ruptures"). In such a case, the relevant reasons to enact the law in summary proceedings must be explained in the proposal of the act – without exception. It is not sufficient to refer to the Standing Orders or to justify the need for summary proceedings by general, vague or unconvincing reasons.

II. The Constitutional Court examined the procedure of the Public Bailiffs (Amendments) Act (cases nos. U-I-5612/2011, U-I-6274/2011, U-I-178/2012 and U-I-480/2012). It noted that immediately after the new convocation of the Parliament, the complex

procedure to enact laws, which involved participation of several bodies of state power, was conducted in one single day, and it informed the Parliament thereof.

In its case-law, the Constitutional Court has established fundamental substantive standards for determining whether a given law is by its nature organic. However, it lacks jurisdiction to regulate the Parliament's procedure to timely decide during the enactment of a specific law about whether it is an organic law, upon which conclusion depends the majority of MPs' votes required for its enactment.

In light of Article 83 of the Constitution and starting from Article 164 of the Parliament's Standing Orders, the Constitutional Court emphasised that Standing Orders do not regulate the procedure for Parliament to determine if an individual proposal of an act being debated and decided is, by its constitutional law character, an organic law that directly and immediately conditions the majority of votes of MPs' required for its enactment. It neither regulates the manner in which this fact will be recorded nor the act in which it will be recorded, which are fundamental requirements for a law to officially obtain the characteristic of an organic law.

Due to the constitutional significance of this fact in the proceedings to review the constitutionality a law before the Constitutional Court and to the general constitutional significance of organic legislation, the Constitutional Court reports to the Parliament about the need to supplement the Standing Orders in this respect. It is necessary to remove from the constitutional order the legal uncertainty existing today regarding this issue. The reason is that this is the fundamental cause for frequent legal challenges before the Constitutional Court, only due to their alleged formal lack of conformity with the Constitution.

In its present case-law, the Constitutional Court has repeatedly declared that the Standing Orders of the Parliament have the force of law and that their enactment is subject to the rules prescribed in Article 90 of the Constitution. Accordingly, only the last (eighth) amendments to the Standing Orders of the Parliament regulate the entry into force of the Standing Orders in line with the Constitution. By departing from the previous decisions not in compliance with the Constitution, the Parliament has contributed to the establishment of order in this field of law.

Due to the several amendments so far, in January 2002, the consolidated text of the Standing Orders of the Parliament was drawn up. Like the consolidated texts of the Constitution and laws and other pieces of legislation, this consolidated text was also not drawn up in line with general legal and non-technical rules for drawing up consolidated texts.

The Constitutional Court has sent Parliament two reports regarding this problem: nos. U-X-80/2005, 1 June 2005 and U-X-1435/2011, 23 March 2011.

It noted that after the last amendments to the Standing Orders (July 2012), the Parliament revised and consolidated the text, publishing it on its website. The revised consolidated text was drawn up following the rules set in the reports of the Constitutional Court. This fact bears extraordinary importance because it shows that parliamentary practice is starting to respect the principle of the credibility of normative texts. Therefore, the Constitutional Court pointed out that the need exists to publish a consolidated text of the Standing Orders of the Parliament also in the Official Gazette.

Finally, the Constitutional Court recalled that the Parliament still has to draw up and publish the consolidated text of the Constitution in accordance with the rules entailed in the above-mentioned reports of the Constitutional Court.

Cross-references:

Decisions of the Constitutional Court:

- Decision and Ruling no. U-I-3845/2006, U-I-5348/2012 of 23.01.2013, *Bulletin* 2013/1 [CRO-2013-1-002];
- Decision and Ruling no. U-I-5612/2011 *et al* of 23.01.2013, *Bulletin* 2013/1 [CRO-2013-1-004];
- Notification no. U-X-80/2005 of 01.06.2006;
- Notification no. U-X-1435/2011 of 23.01.2011, *Bulletin* 2011/1 [CRO-2011-1-003].

Decisions of the European Court of Human Rights:

- *Broniowski v. Poland,* Application no. 31443/96, Judgment [GC] of 22.06.2004.

Languages:

Croatian, English.

Czech Republic
Constitutional Court

Statistical data
1 January 2013 – 30 April 2013

- Judgments of the Plenary Court: 8
- Judgments of panels: 61
- Other decisions of the Plenary Court: 15
- Other decisions of panels: 1 525
- Other procedural decisions: 64
- Total: 1 673

Important decisions

Identification: CZE-2013-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 07.01.2013 / **e)** Pl. ÚS 27/12 / **f)** Presidential Election / **g)** http://nalus.usoud.cz / **h)** CODICES (Czech, English).

Keywords of the systematic thesaurus:

4.9.1 Institutions – Elections and instruments of direct democracy – **Competent body for the organisation and control of voting**.
4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility**.
4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates**.
5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections**.
5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

Keywords of the alphabetical index:

Presidential election / Election, procedure, review.

Headnotes:

A constitutional complaint cannot simply be a "vehicle", enabling the Constitutional Court to protect objective constitutional principles with zero (or negative) impact on the subjective rights of the applicant. Under such circumstances the conditions for opening the specific supervision of the enactment expressed by provision § 74 of the Constitutional Court Act cannot be considered to have been fulfilled.

A period of limitation cannot itself be unconstitutional; its unconstitutional nature may be assessed only in a broader context. In the case in point, such a context is represented by the fact that the statutory period of limitation of two days is construed to be a protective means, related to the registration of a candidate in the election. A similar concept of period of limitation may be found in all electoral laws; the application of the period of limitation in this case did not interfere with the rights of the applicant to access to court as they were exercised properly and in time.

The constitutional and statutory requirement to submit 50 000 signatures as a prerequisite for registration of the candidacy bid is proportionate from the perspective of access to elected office. This number is based on the considerations of the legislature, reflecting the fact that the constitutional system of the Czech Republic is based on a system of representative democracy (Article 2.1 of the Constitution) and a parliamentary form of government, and the introduction of direct election of the President does not change this in any way. The specific number of signatories reflects the boundary for sufficient support of a candidate as an expression of his or her seriousness.

The ability or lack of ability of those collecting personal data to provide citizens with a sufficient guarantee that no misuse will occur cannot be attributed to the public power nor, on the basis of lack of trust, can a breach of the candidate's right of access to a public elected office be construed.

Anybody who seeks presidential election and agrees to his or her candidacy must bear the negative consequences if the submitted candidacy bid and attached petitions contain errors and mistakes.

Summary:

By a judgment dated 7 January 2013, the Plenum of the Constitutional Court dismissed the constitutional complaint by Mr Tomio Okamura against the decision of the Ministry of the Interior dated 23 November 2012 (ref. no. MV-123865-12/VS-2012) and the resolution of the Supreme Administrative Court dated 13 December 2012 (ref. no. Vol 11/2012-36). The Constitutional Court dismissed the application seeking the repeal of Article 56.5 of the Constitution of the Czech Republic in the wording of the Constitutional Act no. 71/2012 Coll., in words "at least 50 000", further § 25 and 26 and § 65.1 of the Act no. 275/2012 Coll., on the Vote of the President of the

Republic and on amendments of certain acts (Act on the Vote of the President), in the words "within 2 working days from the delivery of the decision", and notice no. 294/2012 Coll., on application of certain provisions of the Act on Election of the President, application seeking postponement of the enforcement of the decisions of the President of the Senate of the Parliament of the Czech Republic dated 10 October 2012 on the declaration of the election of the President of the Republic published under no. 322/2012 Coll.. It also dismissed an application seeking postponement of the enforcement of the contested decisions of the Ministry of the Interior and of the Supreme Administrative Court.

On 6 November 2012 the applicant submitted a candidacy bid for the presidential election of the Czech Republic on 11 and 12 January 2013. A petition was attached with 8,612 signatory lists containing 63 530 entries. The Ministry of the Interior recognised as valid the entries for 61 966 of the signatory citizens. In the process of verifying signatures in a sample of 8 500 citizens, errors were detected in 19,353 % of signatory citizens, as a result of which an inspection of an equally extensive sample was conducted and an error rate of 22,953 % was detected. Pursuant to § 25.6 of the Act on the Election of the President of the Republic, the Ministry then subtracted from the total number of 61 966 signatory citizens the number of signatories corresponding in percentage to the total sum of errors in both samples (42,306 %), from which the Ministry arrived at the number of 35 751. As the number was lower than the 50 000 signatories required by law, the Ministry rejected the candidacy bid.

The applicant subsequently sought to have the bid registered by the Supreme Administrative Court. The Supreme Administrative Court found all but one of the objections the applicant had raised to be unfounded. The Supreme Administrative Court conceded that the Ministry had made mistakes when, in both control samples, the percentage of errors was added up and not averaged but even after correct adjustment of the number of signatories, the applicant had not attained the 50 000 signatures required. The Supreme Administrative Court therefore dismissed the application requesting a declaration that the candidacy bid should be registered.

In his complaint the applicant objected to the unconstitutional nature of the Constitution and the Act on the Election of the President of the Republic, as well as a breach of constitutionally guaranteed rights in the implementation of the law by the Ministry of the Interior and the Supreme Administrative Court. Specifically, he raised objections regarding the length of periods of limitation available within the process of registration of the candidacy, regarding the constitutional and statutory requirement to submit 50 000 signatories as a prerequisite of the candidacy bid, as well as objections related to the risk of abuse of personal data of the signatories in the collection of the signatures and other objections regarding the breach of the right to petition. A separate complex of objections by the applicant was associated with the application of § 25 and 26 of the Act on the Election of the President of the Republic, within which the applicant questioned the process and the method of the inspection of the candidacy petition sheets. The applicant also questioned the impartiality of Judge Vojtěch Šimíček, who noted in the media that certain petition sheets of the applicant were filled in by the same hand. Finally the applicant alleged that in the process of the inspection of signatures the signatures were not verified for their authenticity. The applicant argued that the contested decision amounted to a breach of his constitutionally guaranteed rights pursuant to Articles 1, 3.1, 18, 21.1, 21.4 and 22 of the Charter of Fundamental Rights and Freedoms and of Articles 6.1 and 10.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and of the constitutional principle pursuant to Article 9.2 of the Constitution.

The Constitutional Court addressed the objections of the applicant in the order in which they were submitted within the constitutional complaint. Regarding the contested length of the period of limitation in the means of protection, the Constitutional Court noted that a similar concept of period of limitation may be found in all electoral laws, while in the particular case those acts are relevant for comparative purposes. Regarding the application of the period of limitation to the applicant's case, as the only facts that may be tested in constitutional complaint proceedings, the Constitutional Court found that the applicant's rights to access to court were not infringed since protective means were applied. The applicant also had at his disposal a period of limitation *de facto* extended to five days.

Regarding the alleged breach of Article 6 of the Convention, electoral matters, including proceedings on the registration of a candidate, do not fall within the article. The requirement for proportionate access to national courts in electoral matters does not follow from the case-law of the European Court of Human Rights, and the Convention does not actually require judicial review as such.

The constitutional and statutory requirement to submit 50 000 signatures as a prerequisite of the registration of the candidacy bid was considered proportionate by the Constitutional Court. The Court noted that the constitutional system of the Czech Republic is based

on the system of representative democracy (Article 2.1 of the Constitution) and a parliamentary form of government, and the introduction of the direct election of the President does not modify this in any manner. The applicant's contention that he had suffered discrimination by comparison to the candidates nominated by groups of senators or deputies of the Chamber of Deputies of the Parliament of the Czech Republic could not therefore be accepted, because the relevance of such support for candidates by senators and deputies is derived from the mandates of senators or deputies of the Chamber of Deputies of the Parliament of the Czech Republic who were themselves elected by a certain number of voters.

The applicant had also raised the issue of the threat of misuse of personal data. The Constitutional Court noted that those dealing with data are bound by obligations pursuant to Act 101/2000 Coll on personal data protection. This governs the situation *lex generalis*. The ability (or lack of ability) of those collecting personal data to provide citizens with sufficient assurance that no misuse will occur cannot be attributed to the public power nor, on the basis of lack of trust, can a breach of the candidate's right of access to a public elected office be construed.

The applicant had lodged objections regarding the application of § 25 and 26 of the Act on the Election of President of the Republic, questioning the process and the method of the supervision of the petition sheets. The majority of the Constitutional Court referred to the decision of the Supreme Administrative Court, which had addressed the objections in an adequate manner. The applicant had also suggested that the re-numbering of the sheets by the Ministry of the Interior prior to their computerised processing, in combination with the randomisation of the samples, cast doubt on the impartiality of the processing. This objection was raised in *"novum forum"* in the proceedings before the Constitutional Court. In compliance with the principle of subsidiarity the Constitutional Court was unable to address it. It noted, however, that the re-numbering of the petition sheets, admitted by the Ministry of the Interior in its response to the constitutional complaint, occurred in the course of electronically processing the sheets and the applicant failed to submit any evidence supporting the notion of arbitrary interference by the Ministry.

The Constitutional Court did not agree with the allegation concerning the absence of verification of the authenticity of the signatures. Testing the authenticity of the signatures in the individual samples beyond the extent of inspecting the correctness of the data could, in the instance of the applicant (and in other respects) give rise to a finding of even greater error. The course of action adopted by the Ministry of the Interior in compliance with the Act on the election of the President of the Republic was more advantageous to the applicant than that which the applicant sought through his arguments. The alleged error could not therefore have impinged on his rights.

The Constitutional Court also noted that anybody seeking presidential election has to take responsibility for the negative consequences of mistakes in the candidacy bid submitted and the petitions attached. It added as obiter dictum that the Act on the Election of the President of the Republic contains a loophole which might be assessed as unconstitutional if it fails to impose verification of the true, unmistakable and individualised manifestation of will of the signatory verified by the authenticity of his or her signature. If the purpose of the petition is to ensure the relevant support and seriousness of the candidacy, this cannot be realised in a manner from which it is not clear whether the signatory listed his or her authentic data and attached his or her handwritten signature, whether or not he or she listed data of family members or other persons the data of whom he or she has knowledge of to the extent required by the Act on the Election of the President.

The Judge Rapporteur in this case was Pavel Rychetský. No dissenting opinions were put forward.

Languages:

Czech.

Identification: CZE-2013-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 05.03.2013 / **e)** Pl. ÚS 4/13 / **f)** Amnesty by the President / **g)** http://nalus.usoud.cz / **h)** CODICES (Czech, English).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
4.4.3 Institutions – Head of State – **Powers**.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.

Keywords of the alphabetical index:

Edict, order, President / Amnesty, legal nature.

Headnotes:

No unambiguous agreement exists, in legal doctrine or in jurisprudence, as to a formal definition of the term "amnesty decision". The classification of the amnesty decision as an act of the application of law or as a normative legal act made no difference. If it had been classified as an act of the application of law, it could not have been qualified as "other legal regulation" and could not have been the subject of review in the proceedings on the repeal of an act and other legal regulations. If, however, it had been accepted that an amnesty decision amounted to a legal regulation, the substantive definition of an amnesty as a prerogative of the executive would have excluded it in principle from legal (judicial) review. It should therefore be considered as irrevocable, even from the perspective of judicial power.

Summary:

By Resolution of 5 March 2013 the Plenum of the Constitutional Court dismissed an application by a group of senators from the Senate of the Parliament of the Czech Republic seeking the repeal of Article II of the Decision of the President of the Republic no. 1/2013 Coll., on the Amnesty of 1 January 2013. Article II of the Amnesty Decision ordered the termination of criminal prosecution proceedings, apart from criminal prosecutions against fugitives, which by 1 January 2013 had been in progress for over eight years, for criminal offences not punishable under the Penal Code by a sentence exceeding ten years imprisonment.

The applicants considered the Amnesty Decision to be a normative act of a derivative nature satisfying the content of legal regulation and thus subject to Constitutional Court review under provision § 64.2.b of the Act on the Constitutional Court. In their opinion, in a democratic state the sovereign powers of the President may not be performed contrary to the constitutional order and without any opportunity for supervision. It follows from Article 36 of the Charter that the review of decisions concerning fundamental rights and freedoms must not be excluded from the authority of the courts. Ordering criminal prosecution proceedings to be terminated, even in cases of the most serious organised economic crimes, prevented the courts from being able to declare that a criminal offence had been committed and meant that injured parties were subsequently unable to seek redress. If injured parties cannot achieve a remedy through civil proceedings, potential then arises for a violation of the right to a fair trial and a violation of the right to own property in association with the legitimate expectation of acquiring such property. The argument given for the abolition resulting from the Amnesty (disproportionate length of pending criminal proceedings at the material time) was, in the applicants' opinion insufficient; this should always be assessed individually in specific cases, not across the board. The applicants also pointed out that as a result of the abolition, the proceeds from criminal activities in the cases concerned were legalised. Therefore, in their view, the abolition undermined the fundamental principles of a law-abiding state and the trust of the citizens in the law and a democratic state under the rule of law.

The Constitutional Court noted the lack, in legal doctrine and in case law, of an unambiguous consensus over the formal definition of the term "amnesty decision". Certain legal theoreticians consider it to be an act of the application of law with certain normative features or an individual legal act *sui generis* with certain general consequences. Others view it as a normative legal act (*sui generis)* or a special legal regulation, a view supported to an extent by Judgment File no. Pl. ÚS 24/99 as, by comparison with standard legal regulations, such a decision does not demonstrate all the signature features. The opposing view that an amnesty decision does not amount to a legal regulation may be justified by reference to the conclusions declared in connection with the decision of the President on the election to the Chamber of Deputies (File no. Pl. ÚS 27/09 and the decision associated therewith, namely Resolution File no. Pl. ÚS 24/09), pursuant to which the decision of the President of the Republic determining the date of election may be deemed to amount to an application of the Constitutional Act, although it carries certain elements of a normative legal act. However, Judgment File no. Pl. ÚS 27/09 was based on an individual constitutional complaint, which, in order to succeed, logically had to establish that it was directed against a decision as opposed to a legal regulation. If the President's decision in the case concerned was an act of application of the constitutional act, there is no reason to apply different qualification criteria to the amnesty decision, which would not then be reviewable within proceedings on norm compliance control. The Constitutional Court would have to declare its lack of jurisdiction.

If the opposing view had been adopted that it was a legal regulation, it would follow from the material definition of amnesty as a prerogative of the executive that it cannot be abolished. An amnesty may substantially be defined as the constitutional prerogative of the President of the Republic, whereby

sentences (or their consequences) imposed upon a certain group of criminal offenders are either remitted or reduced, or the criminal prosecution of such offenders is either ordered to be terminated or not to commence at all. By its nature, an amnesty may contain elements of abolition, remission and rehabilitation. It represents a typical example of the regulatory mechanism of checks and balances within the distribution of powers. The aim of an amnesty is to modify the impact or the consequences of criminal prosecution proceedings in order to satisfy the principle of the public good (necessarily defined by the executive in a subjective manner) through social mercy, forgiveness or effacing, or to respond, with regard to a situation in the state associated with political aspects or aspects of political crime, to potential dysfunctions of judicial power in the process of achievement of this goal. In entrusting such extraordinary authority to the executive power the legislator decided to limit the use of power by the constituted bodies (in this case the judicial power) by using the President's prerogative to undertake certain exemptions from the due course of law in criminal matters. The amnesty cannot therefore be subject to the safeguards provided by the checks and balances of the distribution of powers, which also follows from the extraordinary and specific nature of the amnesty decision (given by the identification of the authorised subject – the Head of State, by historical tradition – left over from the monarchy, by the determination of the content – social mercy, forgiveness or effacing, and the codification of the above in the regulation of supreme legal power).

By contrast with other acts by the President, these particular features of the amnesty decision exclude any subordination of this decision. The irremovability of the amnesty decision may be deduced from the judgment of the European Court for Human Rights in *Lexa versus Slovak Republic,* 23 September 2008, Application no. 54334/00. A similar effect results from Resolution File no. I. ÚS 30/99, 28 June 1999 of the Constitutional Court of the Slovak Republic. The abolition effects of the amnesty decision have already occurred and they cannot be reversed in any way, otherwise the principle of *ne bis in idem* would be breached, as well as the prohibition of retroactivity, both of which are almost absolute in nature when applied in criminal law. Therefore, even if the contested amnesty decision was qualified as "another legal regulation", the Constitutional Court would not have jurisdiction to discuss the application (the same applies to the alternative application seeking to have the Amnesty Decision declared unconstitutional).

The Constitutional Court also rejected the contention that Article II of the amnesty decision was incompatible with the constitutional order because of the breach of the property rights of injured entities in criminal proceedings terminated by the abolition. There is no constitutionally guaranteed subjective right on the part of a physical or legal entity to have another person subject to criminal prosecution, although the Constitutional Court noted the shifts in adjudication following from the case-law of the European Court of Human Rights in proceedings concerning victims of breaches of Articles 2 and 3 ECHR. Nor can the legitimate expectations of the Additional Protocol be associated with the "adhesive" proceedings themselves although the abolition inadvertently affects the right of the injured persons. It also has negative consequences regarding relevant proceedings, although it cannot be deemed unconstitutional as it represents a constitutional exemption from the standard course of criminal proceedings. It cannot represent a breach of the *denegationis iustitiae* principle since the injured entities always have the opportunity to file their claims in civil proceedings with no risk of forfeiture due to expiration of period of limitation. The applicants' contention that if the harm was caused by a criminal offence, the injured person cannot meet the burden of proof was not accepted; the alleged breach of the principle of equality was unfounded.

In its *obiter dictum* the Constitutional Court conceded that the amnesty decision would not necessarily always be immune from criticism – i.e. in situations of an extraordinary and extreme nature or instances of extraordinary deviation from the fundamental principles of legal order where the executive exercises its power in conflict with fundamental, inviolable values. In this type of extreme situation, the Constitutional Court could undertake to protect such fundamental values as a body of final instance. The traditional method of avoiding abuse of presidential authority is counter-signature by the Prime Minister and the application of the constitutional accountability of the Government cabinet as a whole. Should these safeguards not be effective, the legislature has full discretion to limit the President's power to grant amnesty, to exclude the abolition segment from such a power or to award such power to an Act or to Parliament. In the Constitutional Court's view, the application of such means in practice offers a restrictive interpretation of the amnesty decision. Therefore, from the perspective, for example, of an accused person who had gone on the run to evade criminal proceedings, consideration could be given to whether the corresponding period of time should be accounted for within the material period of criminal prosecution. A similar question regarding interpretation arises over whether a proportionate approach should be extended towards persons whose obstructive conduct during the proceedings was the sole cause for the relevant extension of the

criminal prosecution proceedings. In those circumstances, the potential contradiction of the specific impact of the amnesty decision with the international treaties referred to by the applicants could be assessed in such a way that the ordinary court would make Article 1.2 of the Constitution prevail over Article 63.1.k. It would be appropriate to proceed in this manner in cases where the amnesty decision could interfere with criminal proceedings where the injured persons become the parties therein as "qualified" victims of breach of Articles 2 and 3 ECHR.

The Judge Rapporteur in the case was Vladimír Kůrka. Judges Vojen Güttler, Ivana Janů and Pavel Rychetský expressed dissenting opinions to the sentence and Judge Miloslav Výborný dissented from the reasoning.

Languages:

Czech.

Identification: CZE-2013-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 27.03.2013 / **e)** Pl. ÚS 17/13 / **f)** High Treason of the President / **g)** http://nalus.usoud.cz / **h)** CODICES (Czech, English).

Keywords of the systematic thesaurus:

1.3.4.7.4 Constitutional Justice – Jurisdiction – Types of litigation – Restrictive proceedings – **Impeachment**.
3.24 General Principles – **Loyalty to the State**.
4.4.5.4 Institutions – Head of State – Term of office – **End of office**.

Keywords of the alphabetical index:

In dubio pro reo / High treason / Constitutional Court Act, procedural requirements, precedence.

Headnotes:

Once the term of office of President has ended for good reason, he or she is no longer eligible to remain an accused party in constitutional offence proceedings. The possibility of continuing in such proceedings after the cessation of the presidential office is generally excluded; exceptions which might allow him or her to continue would have to be expressly stipulated by law. The only exception is the one set out in a legal regulation effective as of 7 March 2013 allowing, pursuant to § 98.3 of the Constitutional Court Act, the continuation of such proceedings by resignation from office by the President. For any event whereby the office ceases by expiry of the term of office for which the President had been elected, no such exemption existed, thus it cannot be deduced by application of a new norm to the disadvantage of the person charged.

Summary:

The Senate of the Parliament of the Czech Republic lodged a constitutional action with the Constitutional Court (delivered on 5 March 2013) against prof. Ing. Václav Klaus, CSc. acting in the capacity of the President of the Czech Republic pursuant to Article 65.2 of the Constitution and provision § 96 of the Act on the Constitutional Court in the wording in force until 7 March 2013. Allegedly the conduct of the President of the Czech Republic amounted to the factual definition of treason when:

1. he failed to complete by his signature the process of ratification of the Decision of the Council of Europe amending Article 136 of the Treaty on the Functioning of the European Union regarding the mechanism of stability for the Member States whose currency is the euro;
2. he failed to appoint the missing judges to the Constitutional Court by which he gravely jeopardised the appropriate and due operation of this institution;
3. on the basis of Article II of the presidential pardon (amnesty) he granted on 1 January 2013, ordering the termination of criminal prosecution proceedings which have not been resolved in a final manner (apart from criminal prosecution against fugitives) from the commencement of which a period of more than eight years had elapsed by 1 January 2013 for criminal offences punishable under the Penal Code by a prison sentence not exceeding ten years, he significantly interfered with the operation of the criminal justice system and weakened the trust of the public in the enforceability of the law;
4. he failed to decide on the appointment of JUDr. Petr Langer, Ph.D. to the position of judge when entrusted to do so by an ordinary court in its decision;
5. he delayed ratification of the Additional Protocol to the European Social Charter.

The applicants were of the view that the outlined above of the conduct of the President of the Czech Republic were directed against the sovereignty of the Republic and against its democratic order.

The Constitutional Court's first task was to assess the impact on further proceedings of the fact that, after the constitutional complaint had been issued, on 8 March 2013, the position of the President, against whom the charge was directed, ceased to continue due to expiry of the term of office for which he was elected. Amendments effective as of 8 March 2013 extended by certain provisions both the Constitution and the Act on the Constitution relevant to the assessment of the matter, namely the newly amended wording of provision § 98.3 of the Act on Constitutional Court, adding another reason to the list of reasons for which the proceedings could not be terminated, namely the cessation of the position of the President by expiration of the term of office for which he was elected. The Constitutional Court arrived at the conclusion that with the given state of affairs, both from the point of view of the material facts and legal circumstances, it could not decide on the merits of the charge and no other option than to terminate the proceedings was available.

The relevant constitutional offences were allegedly committed prior to the date of 8 March 2013, at a time when the legislation applicable at the material time made no express provision as to the course of action which should be adopted in terms of commenced and unresolved proceedings on constitutional complaints lodged after the termination of the office of the president due to expiry of his elected term of office. This state of affairs could be construed as a legal gap that should be substituted for by a *per analogiam* interpretation. However, regarding the law on offences, *analogia in bonam partem* is permissible even in the area of procedural law. The Constitutional Court therefore considered the cessation of the position of the President by the expiration of his elected term of office to amount to an analogous reason parallel to the expressly stipulated reasons leading to the termination of the proceedings pursuant to § 98.2 of the Act on Constitutional Court. Referring to the provisions of § 98.2 of the Act on Constitutional Court in the wording effective until 7 March 2013, no preclusion or prohibition of the termination of proceedings for reasons other than those expressly listed (i.e. withdrawal of the charge by the Senate or death of the President who has been charged) may be interpreted. By application of an *a contrario* argument the provisions of § 98.2 of the Act on the Constitutional Court in the wording effective until 7 March 2013 could give rise to the conclusion that no reason other than resignation from presidential office after the commencement of the proceedings enables the continuation of the proceedings of a constitutional complaint after the person charged has ceased to remain in office and that other reasons may not be added to this provision (for instance the reason of expiry of the term of office) either by the use of analogy or substitution of law. The application of the new and amended wording of provision § 98.2 of the Act on the Constitutional Court would give rise to a non-permissible retroactive application of the law, which would be to the disadvantage of the person charged. The Constitutional Court accordingly applied § 98.1, 98.2, and 98.3 of the Act on the Constitutional Court in the wording effective before 7 March 2013, which is more favourable to the person charged.

Constitutional offence liability for treason is tied to the function or office of President, which is supported by the terminology used in the procedural norms relating to the proceedings on the constitutional complaint, wherein the person charged is always referred to as "the President of the Republic" rather than the "President emeritus". This follows from provision § 104 of the Act on the Constitutional Court, which sets forth three cumulative sanctions in the event of delivery of a final convicting judgment. One of them is loss of Presidential Office; in the event of prior termination of the office due to expiry of the term of office, however, loss of the Office of President may no longer occur. In such circumstances, the continuation of constitutional complaint proceedings would lose its main purpose; imposition of the main constitutional sanction (removal from office) could no longer be considered. The main sanction is associated with additional cumulative sanctions (loss of eligibility to be re-elected as President and loss of entitlement to the Presidential salary and benefits after termination of office). These are merely of a subsidiary nature and of relatively low importance; their imposition from a constitutional law perspective may be fairly easily dispensed with.

In the form of *obiter dictum* the Constitutional Court provided its view on the request expressed in the constitutional complaint, to "determine the boundaries" of the scope of authority of the President of the Republic. The Constitutional Court was unable to respond to this request; in doing so, it would have exceeded its scope of power. Interpretation of the rights and obligations of the President of the Republic in constitutional complaint proceedings would only be possible in relation to events in which the constitutional delict of treason is seen *de concreto*. Only then would it be permissible to test the merits of the constitutional charge.

The Judge Rapporteur in this matter was Jan Musil. Judges Stanislav Balík and Ivana Janů; expressed dissenting opinions on the Resolution.

Languages:

Czech.

France
Constitutional Council

Important decisions

Identification: FRA-2013-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 04.04.2013 / **e)** 2013-314P QPC / **f)** Mr Jeremy F. [Absence of appeal in case of extension of the effects of the European Arrest Warrant – preliminary question to the Court of Justice of the European Union] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 07.04.2013, 5799 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review**.
1.3.5.2.2 Constitutional Justice – Jurisdiction – The subject of review – Community law – **Secondary legislation**.
1.4.10.7 Constitutional Justice – Procedure – Interlocutory proceedings – **Request for a preliminary ruling by the Court of Justice of the EU**.
2.1.1.3 Sources – Categories – Written rules – **Community law**.
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:

Europe, arrest warrant.

Headnotes:

It is incumbent on the Constitutional Council, when examining legislative provisions on the European Arrest Warrant, to review the constitutionality solely of the legislative provisions proceeding from the legislature's exercise of discretionary powers as set in Article 34 of the Treaty on European Union.

The question whether the legislative provisions submitted to it for review necessarily derives from the framework decision of the Council of the European Union of 13 June 2002 on the European Arrest Warrant. As such, it requires a decision on the

interpretation of this framework decision. Consequently, the Constitutional Council submits a preliminary question on this interpretation to the Court of Justice of the European Union.

Summary:

I. On 27 February 2013, the Court of Cassation referred to the Constitutional Council an application for a priority preliminary ruling on a question of constitutionality (QPC) submitted by Mr Jeremy F. This question concerns the conformity with constitutional rights and freedoms in the fourth indent of Article 695-46 of the Code of Criminal Procedure (CCP).

Article 695-46 of the CPP concerns the European Arrest Warrant (EAW). This warrant was established under the framework decision of the Council of the European Union of 13 June 2002. The Law of 9 March 2004 incorporated the rules on this warrant into the CCP. Article 695-46 provides that following the handover of an individual to another EU member state in pursuance of an EAW, the investigating chamber must reach an "unappealable" decision within thirty days on request either to extend the effects of this warrant to other offences or to authorise the handover of the individual to a third state.

Mr Jeremy F., appellant, contended that the absence of an appeal against the decision by the investigating chamber infringed the right to an effective judicial remedy.

II. The Constitutional Council recalled that under the terms of Article 88-2 of the Constitution, "the law determines the rules relating to the European Arrest Warrant pursuant to acts adopted by the institutions of the European Union". These specific constitutional provisions are geared particularly to removing constitutional obstacles to adopting legislative provisions that derive necessarily from the framework decision of 13 June 2002 on the EAW. Consequently, the Constitutional Council, when examining legislative provisions on the EAW, must review its conformity with the Constitution solely of the legislative provisions proceeding from the legislative exercise set in Article 34 of the Treaty on European Union.

The Constitutional Council noted that the framework decision of 13 June 2002 does not contain provisions to appeal against judicial decisions to extend the EAW effects. It also noted that the framework decision does not specify whether this judicial decision is provisional or final. Therefore, the Council is not in a position to draw conclusions from Article 88-2. It cannot establish whether the provisions of Article 695-46 CCP, which establishes that the investigating chamber "shall make an unappealable decision", are a necessary application of the obligation set in the framework decision to take such decisions within thirty days from receipt of the request.

The Court of Justice of the European Union has exclusive jurisdiction to pronounce, on a preliminary basis, on the interpretation of the provisions of the framework decision. Consequently, to review the constitutionality of Article 695-46 CCP, the Constitutional Council referred to the Court of Justice of the European Union the question whether Articles 27 and 28 of the framework decision of 13 June 2002 on the EAW should be interpreted as preventing member states from allowing for appeals against judicial decision within thirty days from receipt of the request. The request is either to consent to an individual being prosecuted, convicted or detained with a view to executing a sentence or implementing preventive detention, for an offence committed before EAW enforcement. This is different from the offence for which he was handed over, or for the handover of an individual to a member state other than the executing state, under the EAW issued for an offence committed before his handover.

Because the subject-matter of this question relates to criminal proceedings, the situation of the appellant, who is in detention, and the period when the Constitutional Council must rule on the QPC, it has asked the Court of Justice of the European Union to adjudicate under urgent procedure.

Supplementary information:

The Court of Justice of the European Union answered the preliminary question in its Judgment no. C-168/13 PPU of 30 May 2013.

The Constitutional Council carried out its review of the conformity with the Constitution of the legislative provision in question in Decision no. 2013-314 QPC of 14 June 2013.

Languages:

French.

Germany
Federal Constitutional Court

Important decisions

Identification: GER-2013-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 07.06.2000 / **e)** 2 BvL 1/97 / **f)** Banana market organisation / **g)** *BVerfGE – Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 102, 147-166 / **h)** *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis* 2000, 1456-1461; *Wertpapiermitteilungen* 2000, 1661-1663; *Europäische Grundrechte-Zeitschrift* 2000, 328-333; *Neue Juristische Wochenschrift* 2000, 3124-3126; *Verwaltungsblätter für Baden-Württemberg* 2000, 427-430; *Die Öffentliche Verwaltung* 2000, 957-959; *Höchstrichterliche Finanzrechtsprechung* 2000, 839-842; *Europäische Zeitschrift für Wirtschaftsrecht* 2000, 702-704; *Europarecht* 2000, 799-810; *Bayerische Verwaltungsblätter* 2000, 754-755; *Zeitschrift für Öffentliches Recht in Norddeutschland* 2000, 501-502; *Entscheidungssammlung zum Arbeitsrecht*, Art 100 GG no. 2; *Verwaltungsrundschau* 2001, 104-105; *Steuerrechtsprechung in Karteiform GG*, Art 101 R. 23; *Lebensmittelrechtliche Entscheidungen* 39, 23-36; CODICES (German).

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court**.
1.3.4.14 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between the EU and member states**.
1.3.5.2 Constitutional Justice – Jurisdiction – The subject of review – **Community law**.
2.2.1.6.3 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Secondary Community legislation and constitutions**.

Keywords of the alphabetical index:

Banana market organisation / European Union, fundamental rights standard.

Headnotes:

1. Constitutional complaints and submissions by courts which assert that fundamental rights guaranteed in the Basic Law have been infringed by secondary European Community Law are inadmissible from the outset if their grounds do not state that the evolution of European law, including the rulings of the Court of Justice of the European Communities, has declined below the standard of fundamental rights required after the “Solange II” decision (*BVerfGE* 73, 339 <378-381>).

2. Therefore, the grounds for a submission or a constitutional complaint must state in detail that the protection of the fundamental rights unconditionally required by the Basic Law is not generally ensured in the respective case. This requires a comparison of the protection of fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court in the “Solange II” decision (*BVerfGE* 73, 339 <378-381>).

Summary:

I. The Frankfurt/Main Administrative Court submitted to the Federal Constitutional Court the question whether the application of the European Community banana market organisation in the Federal Republic of Germany was compatible with the Basic Law.

The banana market organisation, in particular Council Regulation (EEC) no. 404/93 and Commission Regulation (EEC) no. 1442/93, differentiates between Community bananas (from states within the European Community), ACP bananas (from certain African, Caribbean and Pacific countries) and third country bananas (another origin).

As regards price and quality, neither Community bananas nor ACP bananas can compete with third country bananas on open markets. In Germany, before the enactment of the Regulations submitted for review, the bananas best known and most sold used to be third country bananas.

The aim of the banana market organisation is to support the production of bananas within the Community and to ensure the duty-free sale of traditional ACP bananas (up to a specific import quantity, which corresponds to the customary sales of ACP bananas, ACP bananas are referred to as traditional ACP bananas).

To achieve this aim, compensatory aid arrangements for Community bananas were created. Traditional ACP bananas – as all bananas produced outside the

European Community – require an import licence, but are duty-free. Non-traditional ACP bananas and third country bananas may be imported, in the framework of a specified tariff quota, at low customs duty rates or duty-free. Beyond this quota they are subject to high levies.

The respective tariff quotas are distributed among the importers through import licences.

Due to the Community Regulations, the prices of third country bananas are above those of Community bananas and "traditional" ACP bananas.

In the original proceedings, banana importers brought actions against import limitations for third country bananas. The Frankfurt Administrative Court submitted the question whether the banana market organisation was compatible with European Community Law to the Court of Justice of the European Communities (hereinafter, the "ECJ"). The ECJ held that there were no reservations concerning the validity of the underlying Regulation. The Frankfurt Administrative Court thereupon submitted to the Federal Constitutional Court the question whether the application of the import arrangements for bananas was compatible with the Basic Law. In the Administrative Court's view, the Regulations violated the plaintiffs' fundamental rights to property, to the freedom to pursue economic activities and to equal treatment. Due to the banana market organisation, the plaintiffs had only been allowed to import less than 50 % of the quantities of third country bananas they had imported before. This devalued their ownership of their facilities and restricted their freedom to pursue economic activities in an unconstitutional manner, in particular because there was no transitional arrangement.

The Administrative Court regarded a submission to the Federal Constitutional Court as admissible, arguing as follows: basically, the ECJ was the lawful judge with regard to the provisions of secondary Community law. The ECJ had held that there had been no infringements of Community law. If, however, the submitting court held the view that the ECJ's case-law did not guarantee the protection of fundamental rights required by the Basic Law, did not respect the Federal Republic of Germany's obligations under international law arising from GATT, or did not counter the Community legislator acting outside, or violating, the EC Treaty, this raised the question of the limits of the primacy of application of Community law.

Since its decision of 12 October 1993 (*Maastricht* judgment), the Federal Constitutional Court extended its competence to review and to invalidate to sovereign acts of the Community that were effective in Germany. Unlike after its "Solange II" decision, it explicitly exercised its review authority again, albeit in co-operation with the ECJ.

The Federal Constitutional Court informed the Administrative Court of the fact that after its decision for submission had been issued, the ECJ, on 26 November 1996, had taken a decision according to which Article 30 of Regulation no. 404/93 required the Commission to take any transitional measures it judged necessary. Such transitional measures had to serve to overcome the difficulties which had occurred after the common organisation of the market came into being but originated in the state of the national markets before the enactment of the Regulation.

The presiding judge of the Administrative Court's chamber that had made the submission replied to this letter from the Federal Constitutional Court. Making reference to the statements made in the submission order, he stated that Article 30 of Regulation no. 404/93 did not provide a possibility of remedying the fundamental rights violations. There was no individual hardship which had not been seen at all, or not in this manner, by the legislator enacting the Regulation, but an intentional hardship.

II. The Federal Constitutional Court decided that the submission was inadmissible.

As the Panel had held in 1986 in its Solange II decision, the European Communities, in particular the ECJ's case-law, ensure effective protection of fundamental rights as against the sovereign powers of the Communities.

Such protection is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law. As long as this is the case, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation. Submissions of rules of secondary Community law to the Federal Constitutional Court are therefore inadmissible. In its Maastricht judgment, the Panel maintained this view. There, the Panel stressed: the Federal Constitutional Court, through its jurisdiction, guarantees, in cooperation with the ECJ, that effective protection of fundamental rights for the residents of Germany will generally be secured also against the sovereign powers of the Communities. Under the preconditions that the Panel has formulated in its Solange II decision, the ECJ is also competent for the protection of the fundamental rights of the citizens of the Federal Republic of Germany against acts done by the German public authority on account of secondary Community law. The Federal

Constitutional Court will only become active again in the framework of its jurisdiction should the ECJ depart from the standard of fundamental rights stated by the Panel in its Solange II decision.

This ruling has been confirmed by sentence 1 of Article 23.1 of the Basic Law, which was inserted pursuant to the Law of 21 December 1992.

Thus, constitutional complaints and submissions by courts are, as before, inadmissible from the outset if their grounds do not state that the evolution of European law, including the rulings of the ECJ, has resulted in a decline below the required standard of fundamental rights after the Solange II decision. Therefore, the grounds for a submission must state in detail that the protection of fundamental rights required unconditionally by the Basic Law is not generally assured in the respective case. This requires a comparison of the protection of fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court in its Solange II decision.

Such a statement is lacking here. The grounds of the submission fail to satisfy the requirement for admissibility, as they are based on a misunderstanding of the Maastricht decision. The submitting court is of the opinion that the Federal Constitutional Court, pursuant to the Maastricht decision, contrary to the Solange II decision, explicitly exercises its review authority again, albeit in co-operation with the ECJ. This conclusion cannot be drawn from the Maastricht decision. There is no contradiction between the Solange II and the Maastricht decisions. In particular, the Panel has nowhere in its Maastricht decision given up its opinion on the delimitation of the ECJ's authority for jurisdiction *vis-à-vis* the Federal Constitutional Court and *vice versa*.

In the present case there was, beyond these requirements, a special cause for detailed statements concerning a negative evolution of the standard of fundamental rights in the ECJ's case-law. This follows from the aforementioned judgment of the ECJ of 26 November 1996 requiring the Commission to take any transitional measures it judges necessary. The fact that the presiding judge of the chamber alone replied to information to that effect provided by the Federal Constitutional Court makes this statement inadmissible already for formal reasons. Moreover, against the background of this decision of the ECJ, it would not have been possible for the Administrative Court to infer a general decline of the standard of fundamental rights.

Cross-references:

- Decision 2 BvR 197/83 of 22.10.1986 (Solange II), *Special Bulletin Inter-Court-Relations* [GER-C-001];
- Decision 2 BvR 2134/92, 2159/92 of 12.10.1993 (Maastricht judgment), *Bulletin* 1993/3 [GER-1993-3-004].

Languages:

German, English (translation of excerpts of the decision by the Court) on the Court's website.

Identification: GER-2013-1-002

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 06.02.2013 / **e)** 2 BvR 2122/11, 2 BvR 2705/11 / **f)** Preventive detention following confinement in a psychiatric hospital / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Zeitschrift für die Anwaltspraxis* EN no. 192/2013; 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**.
2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
3.10 General Principles – **Certainty of the law**.
3.16 General Principles – **Proportionality**.
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.
5.3.38.1 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Criminal law**.

Keywords of the alphabetical index:

Detention, preventive retrospective / Expectations, legitimate, protection, principle / Detention, preventive, following confinement in a psychiatric hospital / Detention, preventive, "old cases".

Headnotes:

The retrospective preventive detention of a person who was convicted before the relevant new legislation entered into force (so-called "old cases"), and whose confinement in a psychiatric hospital has been terminated, is only compatible with the principle of proportionality if strict prerequisites are met.

Even if, before the preventive detention, the person concerned was confined in a psychiatric hospital, this person's legitimate expectations carry a particularly high weight and must be taken account of. The weight of these interests is increased by Articles 5 and 7 ECHR.

Summary:

I. In their constitutional complaints, the applicants challenged the continuance of their preventive detention. It had been ordered retrospectively when their confinement in a psychiatric hospital had been terminated.

§ 66b of the Criminal Code provides for preventive detention being imposed retrospectively in cases in which it is ascertained during the confinement in a psychiatric hospital that the condition which excludes or diminishes criminal responsibility is not, or no longer, met. In its judgment of 4 May 2011, the Federal Constitutional Court declared the provision incompatible with the Basic Law because it does not satisfy the constitutional requirement of establishing a difference between preventive detention and prison sentences *(Abstandsgebot)*. At the same time, the Federal Constitutional Court ordered that the provision would continue in effect until the legislator enacted new legislation, at the latest, however, until 31 May 2013. While it continues in effect, however, it may only be applied subject to a strict review of proportionality.

One of the applicants was confined in a psychiatric hospital after having served a full prison sentence imposed because of several offences of violence he had committed for sexual motives. In April 2007, the Regional Court's criminal division with jurisdiction over the execution of sentences declared the confinement terminated because – contrary to what had been assumed in the original judgment – the applicant was not in a condition which excluded or diminished his criminal responsibility. In March 2008, the Regional Court ordered the applicant's retrospective preventive detention because, it held, he was highly dangerous. By the challenged order of 15 July 2011, the division rejected an application made by the applicant to suspend the preventive detention for probation. It held that ordering preventive detention only replaced one measure of correction and prevention of indefinite duration that deprived the detainee of his liberty with another, which would therefore, in effect, not mean a change for the worse to the applicant. By its order of 22 August 2011, which was also challenged by the constitutional complaint, the Higher Regional Court rejected the immediate objection raised against the judgment.

The second applicant was also confined in a psychiatric hospital due to several sexually motivated offences of violence. After two experts had stated that the applicant did not have a personality disorder, the Regional Court's criminal division with jurisdiction over the execution of sentences declared his confinement terminated in July 2007. At the same time, it ordered his temporary confinement in preventive detention. The Higher Regional Court, however, reversed the temporary confinement order; as a result, the applicant was out of prison for two weeks. In April 2008, the Regional Court ordered the applicant's retrospective preventive detention. By its order of 30 August 2011, the Regional Court's criminal division with jurisdiction over the execution of sentences rejected the application made by the applicant to suspend the preventive detention for probation. On 15 November 2011, the Higher Regional Court rejected the immediate objection raised against the judgment.

A constitutional complaint that the two applicants had previously lodged against the original order of retrospective preventive detention had not been admitted for decision (decision of 5 August 2009). Both applicants thereupon filed an application with the European Court of Human Rights, which awarded them compensation for a violation of Article 7.1 ECHR (judgment of 7 June 2012).

II. The Federal Constitutional Court confirmed its jurisprudence on preventive detention imposed retrospectively, i.e. at the end of the detainee's detention. Until the new legislation, which has become necessary, enters into force, at the latest, however, until 31 May 2013, preventive detention may only be imposed retrospectively if specific circumstances in the detainee's person or conduct suggest a high risk that the detainee will commit most serious offences of violence or sexual offences, and if the detainee suffers from a mental disorder. These principles also apply if the person concerned was confined in a psychiatric hospital before. In these cases, preventive detention does not merely replace one measure of correction and prevention with another. Retrospective preventive detention is a new, independent interference with a fundamental right. If

the interference takes place based on legislation which had not entered into force at time of the sentencing for the original criminal offences, the protection of legitimate expectations carries particularly high weight.

The constitutional complaints are well-founded. The challenged orders violate the applicants' fundamental right to liberty (sentence 2 of Article 2.2 of the Basic Law) in conjunction with the principle of protection of legitimate expectations (Article 20.3 of the Basic Law).

Retrospective preventive detention, which is made possible by § 66b of the Criminal Code, interferes with legitimate expectations that are protected by fundamental rights. This especially applies if the persons concerned were convicted for the criminal offences giving rise to preventive detention before the provision entered into force (known as "old cases"). As preventive detention leads to deprivation of liberty of indefinite duration, the interests affected concerning the protection of legitimate expectations are of especially high weight.

In contrast, it cannot be argued that with a retrospective order of preventive detention, interests concerning the protection of legitimate expectations have lower priority because it is merely a "transfer" from one measure entailing a deprivation of liberty of indefinite duration to another. Preventive detention that follows confinement in a psychiatric hospital does not merely continue the previous measure on a different legal basis but is a new, independent interference with a fundamental right. This already results from the fact that preventive detention can only be ordered if confinement in a psychiatric hospital has been declared terminated before. Moreover, the organisation of the proceedings in which the order is made shows that it is an independent measure. The declaration that terminates confinement in the psychiatric hospital is made by the division with jurisdiction over the execution of sentences at the place of confinement, while preventive detention is ordered by the trial court. In addition, there is a qualitative difference between both measures.

The weight of the interests affected concerning the protection of legitimate expectations is increased by the valuations contained in the European Convention on Human Rights. In its judgment of 7 June 2012, the European Court of Human Rights held that the applicants' retrospective preventive detention violates Article 7.1 ECHR. Moreover, it results from the Court's further case-law that in old cases, retrospective preventive detention can only be justified under the Convention under the condition of sentence 2 of Article 5.1.e ECHR (i.e. for persons of unsound mind).

Thus, the valuations of the European Convention on Human Rights confirm that the trust of the persons affected in preventive detention not being imposed in old cases comes close to an absolute protection of legitimate expectations. Therefore, preventive detention may only be imposed retrospectively in these cases if specific circumstances in the detainee's person or conduct suggest a high risk that the detainee will commit most serious offences of violence or sexual offences, and if the detainee suffers from a mental disorder within the meaning of § 1.1 no. 1 of the Therapeutic Confinement Act.

The Higher Regional Court will therefore have to render a new judgment on the continuance of retrospective preventive detention according to the transitional arrangement resulting from the Federal Constitutional Court's judgment of 4 May 2011.

Cross-references:

- Judgment of the Federal Constitutional Court 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10, 2 BvR 571/10 of 04.05.2011, *Bulletin* 2011/2 [GER-2011-2-013];
- Decision of the Federal Constitutional Court 2 BvR 2098/08, 2 BvR 2633/08 of 05.08.2009, *Kammerentscheidungen des Bundesverfassungsgerichts* 16, 98-114; *Recht und Psychiatrie* 2009, 209-213; *Neue Zeitschrift für Strafrecht* 2010, 265-266; *Neue Juristische Wochenschrift* 2010, 1514-1517; *Europarecht* 2011, 405-417;
- Decision of the European Court of Human Rights (Applications nos. 65210/09 and 61827/09) of 07.06.2012.

Languages:

German, English (translation of excerpts of the decision by the Court) on the Court's website.

Identification: GER-2013-1-003

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 19.02.2013 / **e)** 1 BvL 1/11, 1BvR 3247/09 / **f)** Successive adoption / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Europäische Grundrechte-Zeitschrift* 2013, 79-91; *Neue Juristische Wochenschrift* 2013, 847-855; *Zeitschrift für das gesamte Familienrecht* 2013, 521-530; CODICES (German).

Keywords of the systematic thesaurus:

5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.
5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status**.
5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

Keywords of the alphabetical index:

Adoption, stepchild / Adoption, successive / Family as defined by the Basic Law / Civil partnership, same-sex, registered.

Headnotes:

1. Article 2.1 in conjunction with sentence 1 of Article 6.2 of the Basic Law grants the child a right that the State does guarantee parental care and education. This does not imply an obligation of the legislator to allow one a registered civil partner to adopt the child of the other registered civil partner (successive adoption).

2. Two persons of the same sex whom the law recognises as parents of a child are also parents in the constitutional sense (sentence 1 of Article 6.2 of the Basic Law). A person who so far is neither the biological nor the legal parent of a child is not a parent in the constitutional sense according to sentence 1 of Article 6.2 of the Basic Law simply because he or she lives in a socio-familial relationship with the child.

3. If one registered civil partner lives with the biological or adopted child of the other civil partner in a socio-familial unit they constitute a family within the meaning of the Basic Law that is protected by Article 6.1 of the Basic Law.

When drafting family-law provisions, the Constitution does not confer an obligation on the legislator to automatically grant a right of adoption to those persons who assume the social role of a parent solely because they assumed this role.

4. The rights to equal treatment of the children and the civil partners concerned (Article 3.1 of the Basic Law) are violated by the fact that § 9.7 of the Civil Partnership Act denies one civil partner the right to adopt the adopted child of the other civil partner (successive adoption) while it permits the adoption of an adopted child of a spouse and the adoption of a biological child of a civil partner (stepchild adoption).

Summary:

I. The Federal Constitutional Court had to decide on a constitutional complaint and in specific judicial review proceedings. Both proceedings were based on the question of whether § 9.7 of the Civil Partnership Act (hereinafter, the "Act") is compatible with the Basic Law in that it excludes the so-called successive adoption for registered civil partners.

Both proceedings regard individuals who entered into a registered civil partnership and who live in the same household as their partners and their partners' adopted child. They now intend to also adopt this child.

Under the current law, it is possible to adopt the biological child of one's registered civil partner (stepchild adoption, § 9.7 of the Act). It is, however, not possible to adopt the child of the other registered civil partner (successive adoption). Spouses, on the other hand, are granted both options of adoption.

II. The Federal Constitutional Court ruled that the exclusion of the successive adoption of children by registered civil partners is unconstitutional. The legislator has until 30 June 2014 to draft a regulation that is in accordance with the Constitution. Until the law is amended, the Act is to be applied with the stipulation that successive adoption is also possible for registered civil partnerships.

The decision is essentially based on the following considerations:

The exclusion of the successive adoption of children by registered civil partners violates the general principle of equality before the law (Article 3.1 of the Basic Law).

In this context, a standard of review that is much stricter than the mere prohibition of arbitrariness has to be applied. In order to prevent the unequal treatment of the children involved, this already applies because fundamental rights which are vital for the

development of the children's personalities are affected. The justification of the unequal treatment of married people and those who are in registered civil partnerships is also subject to strict constitutional requirements, since it is related to sexual identity.

The unequal treatment of the children concerned as compared to children adopted by spouses is not justified. The same applies to the unequal treatment of the partners concerned, as com-pared to married spouses, who have the option to adopt successively.

The general objective of the limitation of successive adoptions is to prevent the particular risk that a child is subject to competing parental rights, which could be exercised in a conflicting way. For the benefit of the child, the intention is also to avoid that, via a successive adoption, the child can be passed from family to family. Because these dangers are deemed to be negligible if the parents are married, the successive adoption by spouses is permitted. The adoption by a registered civil partner, however, does not differ in either regard from that of a spouse. In particular, the registered civil partnership is likewise intended to be lasting and is – like a marriage – marked by a binding assumption of responsibility.

The exclusion of successive adoption cannot be justified by the argument that it is harmful for the child to grow up with same-sex parents. It can be assumed that the sheltered conditions in a registered civil partnership can be as supportive for children growing up as the conditions in a marriage. Furthermore, it would be inappropriate to exclude successive adoption in order to eliminate potential dangers such as this, because it can, may, and shall not prevent a child from living with its adoptive parent and his or her same-sex partner. Neither the single adoption by homosexual people nor the factual living together of registered civil partners with one of the partner's children could be prevented without major violations of the Basic Law. The Act, in contrast, supports their living together by providing regulations for this very case that grants the partner who is not a parent under the law competences which are typical for parents.

In addition, successive adoption does not, *per se*, interfere with the child's best interest, but tends to be beneficial in the constellations that are at issue here. According to the assessment of the experts consulted, it is conducive to stabilising developmental-psychological effects. Furthermore, it improves the legal position of the child if the civil partnership ends due to separation or death. This concerns, on the one hand, custody, which then can, in case of separation, be adequately adjudicated upon, taking the child's best interest into consideration. On the other hand, a child benefits from a double parenthood, especially with regard to child support and the law of succession. Finally, endangering the child's best interest by allowing successive adoption should not be feared, because every adoption is preceded by a case-by-case assessment, during which potential problems of the specific case can be taken into consideration.

Excluding successive adoption is not justified by the aim of avoiding a circumvention of the legislator's decision not to admit a joint adoption by two registered civil partners.

The specific protection of marriage that is guaranteed by Article 6.1 of the Basic Law does not justify the discrimination of adopted children of a civil partner as compared to the adopted children of a spouse. It is true that due to the constitutionally protected institution of marriage, the legislator can, in principle, favour it as compared to other ways of life. However, for the justification of the discrimination of comparable ways of life, a sufficiently weighty reason is needed, which is absent in this case.

There are also no differences between the adoption of a registered civil partner's biological child and the adoption of a child that was adopted by the registered civil partner which could justify a different treatment.

The child's right to have parental care and upbringing guaranteed by the State, the fundamental right of parents, and the fundamental right of families, however, are not violated.

Article 2.1 in conjunction with sentence 1 of Article 6.2 of the Basic Law grants the child a right to benefit from parental care and upbringing guaranteed by the State. How the government fulfils its obligation to an effective protection of this fundamental right, is first and foremost to be decided by the legislator. In the present case, the legislator did not venture beyond the limits of its discretion. The children concerned are not without parents, but have one parent in the legal sense. Furthermore, by granting typical parental rights that are of practical importance (cf. § 9 Sections 1 and 2 of the Act), the legislator has in other ways taken care to ensure that the adoptive parent's civil partner can, to a certain degree, exercise parental powers.

The fact that a registered civil partner cannot adopt the child adopted by his or her partner does not violate the parental right protected by sentence 1 of Article 6.2 of the Basic Law. It is true that sentence 1 of Article 6.2 of the Basic Law does not only protect parents of different sexes, but also two same-sex parents. This already follows from the fact that the fundamental right of parents is directed at the child's

best interest. Neither the wording of the fundamental right of parents nor differing historic concepts are contrary to this understanding. However, a mere socio-familial parental relationship towards the civil partner's child does not constitute parenthood within the meaning of the Constitution. As a rule, only people who are in a parental relationship with the child that is either based on descent or on adoption or recognition of paternity or presumption of paternity can be holders of the constitutional parental right.

Finally, the exclusion of successive adoption does not violate the fundamental right of families guaranteed by Article 6.1 of the Basic Law. It is true that the socio-familial community between registered civil partners and one partner's biological or adopted child forms a family that is protected by Article 6.1 of the Basic Law. However, the legislator has some latitude in the legal definition of a family. This has not been exceeded by the denial of successive adoption.

Languages:

German, English (translation of excerpts of the decision by the Court) on the Court's website.

Identification: GER-2013-1-004

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 20.02.2013 / **e)** 2 BvE 11/12 / **f)** / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Zeitschrift für die Anwaltspraxis* EN no. 188/2013; CODICES (German).

Keywords of the systematic thesaurus:

1.2.2.4 Constitutional Justice – Types of claim – Claim by a private body or individual – **Political parties**.
1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation**.
4.5.10 Institutions – Legislative bodies – **Political parties**.

Keywords of the alphabetical index:

Political party, constitutionality, establishment.

Headnotes:

The application of a political party to establish its constitutionality is inadmissible because political parties are not entitled to make such an application.

The fact that no judicial procedure exists to establish the constitutionality of a political party does not entail a gap in legal protection and does not violate the rights of political parties.

Summary:

I. By its application, the National Democratic Party of Germany (hereinafter, the "NPD") sought a declaration that it is not unconstitutional. In an auxiliary application, it sought a finding that the respondents – the German *Bundestag*, the *Bundesrat* and the Federal Government – violated the NPD's rights as a party by publicly alleging its unconstitutionality without instituting the party-ban proceedings under Article 21.2 of the Basic Law. In another auxiliary application, it sought a declaration that the respondents violated the NPD's rights as a party by not having provided proceedings before the Federal Constitutional Court for a declaration of the constitutionality of a political party.

Under Article 21.2 of the Basic Law, parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or to abolish the free democratic fundamental order or to endanger the existence of the Federal Republic of Germany are unconstitutional. The Federal Constitutional Court rules on the question of unconstitutionality.

II. The Federal Constitutional Court dismissed the applications as inadmissible. The decision was essentially based on the following considerations:

The main application is inadmissible. The Federal Constitutional Court Act does not provide a party with the option to invoke the Federal Constitutional Court's jurisdiction for a declaration of its constitutionality.

Political parties are free to exercise their rights as long as the Federal Constitutional Court has not established their unconstitutionality. If it is contested that they are entitled to exercise these rights, they can take recourse to the courts. The applicant argues that it is too much for a party which is branded as unconstitutional to seek legal protection in every individual case, and that apart from this, legal protection often proves ineffective. This objection, however, does not show a structural deficit with regard to legal protection. The applicant merely names practical problems which can recognisably be handled with reasonable effort.

The applicant further alleges that the statements which it labels “debate on a ban” *(Verbotsdebatte)*, and the other measures directed against it, have the same effect as a ban. Also in this respect, a deficit in legal protection is not cognizable either.

In accordance with their function to participate in the formation of the political will of the people, political parties must face public dispute. Statements on the assessment of a political party as unconstitutional are part of the public dispute as long as they keep within the limits of statute and law. The party affected can, and must, counter such statements with the means available to it in the struggle of opinions.

Government agencies are not prevented from putting up for discussion the pros and cons of party ban proceedings with the required objectivity. If state agencies engage in political dispute, they must respect the limits set to them by the Constitution. Observance of these limits is open to judicial review. This also applies to the public discussion of whether proceedings to ban it are opened against a party. In such a case, however, it is possible that the party’s rights under Article 21.1 of the Basic Law are violated if the objective of such a debate is not to decide this question but to discriminate against the party affected.

Apart from this, recourse to the courts is open to the political parties and their members in order to counter the allegation of unconstitutionality. The applicant does not at all ignore that the constitutionality of a political party can be, and indeed is, the subject of judicial assessment. If it concludes from losing such actions before the ordinary courts that there is a gap in legal protection, this conclusion is implausible.

For these reasons, it is also unobjectionable that the respondents have not provided for proceedings for the establishment of the constitutionality of a party in the Federal Constitutional Court Act.

The auxiliary application with which the applicant sought a finding that the respondents violated its rights as a party by publicly alleging its unconstitutionality without instituting the party ban proceedings under Article 21.2 of the Basic Law is permissible as an action of one public body against another; its reasoning, however, makes it inadmissible. It has not been sufficiently stated that the applicant’s status as a party has been violated, or is directly endangered, by the respondents’ measures or omissions. The applicant quotes statements by *Länder* Minister-Presidents, *Länder* Ministers of the Interior, individual members of the *Bundestag* and a federal minister. However, it is not cognizable that the persons mentioned intended to make statements on behalf of one of the respondents. Even measures by a federal minister – such as support for programmes against right-wing extremism – cannot necessarily be attributed to the Federal Government as a collegiate body.

Languages:

German, English press release on the Court’s website.

Identification: GER-2013-1-005

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 05.03.2013 / **e)** 1 BvR 2457/08 / **f)** / **g)** to be published in the Federal Constitutional Court’s Official Digest / **h)** *Wertpapiermitteilungen* 2013, 815-818; CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Clarity, principle / Predictability, principle / State authorities, payment claims, period of limitation.

Headnotes:

The principle of the rule of law includes the requirement that (financial) burdens be recognisable and predictable. It thus requires statutes which ensure that contributions made in exchange for a benefit cannot be assessed indefinitely after the benefit has been received. The legislator must achieve a balance between, on the one hand, the public interest in receiving contributions for such benefits, and, on the other hand, the debtor’s interest in eventually obtaining clarity about if, and to what extent, he will have to contribute.

Summary:

I. According to Bavarian law, the time-limit for the assessment of municipal contributions is four years. As a general rule, the time-limit starts to run at the

end of the year in which the duty to pay the contribution has arisen. In this regard, the Bavarian Municipal Charges Act *(Bayerisches Kommunal-abgabengesetz)*, however, makes special provision for the case of invalidity of the rules on contribution: in this case, the time-limit starts to run only at the end of the calendar year in which valid rules have been published.

From 1992 to 1996, the applicant was the owner of built-up property which was connected to the local drainage system. In 1992, the local authorities found out that the top floor of the building had been converted. They levied a drainage construction contribution for the converted surface of the top floor from the applicant only in a subsequent assessment order of 5 April 2004. The order was based on Rules Governing Contributions and Fees which supplemented the Drainage Rules of 5 May 2000. To remedy the voidness of the previous Rules, the local authorities had enacted the Rules with retroactive effect as from 1 April 1995. During the applicant's objection proceedings, these Rules proved void as well. The local authorities thereupon adopted new Rules and put them into force retroactively as from 1 April 1995. The new Rules were published in the Municipal Gazette on 26 April 2005.

The action brought by the applicant against the assessment order and against the ruling by the local authorities on the applicant's objection was unsuccessful. He therefore lodged a constitutional complaint.

II. The Federal Constitutional Court held that the constitutional complaint was admissible and well-founded to the extent that it challenged a violation of the constitutional principle of legal certainty. The Federal Constitutional Court declared the special provision of the Bavarian Municipal Charges Act for the case of invalidity of the rules on contributions incompatible with the constitutional principle of legal certainty because the provision does not consider at all that the person liable to pay the contribution has an interest in a time limit for the levying of charges. The *Land* legislator was requested to enact a constitutional provision by 1 April 2014.

Essentially, the decision is based on the following considerations:

In the case at hand, the constitutional standards for the permissibility of retroactive laws are not violated. As far as the applicant is concerned, the special provision of the Bavarian Municipal Charges Act for the case of invalidity of the rules on contributions does not have retroactive effect. The Act entered into force on 1 January 1993. At that time, no Rules existed that effectively remedied the voidness of the existing Rules within the meaning of the provision. Irrespective of the new legislation, the period of limitation had therefore not begun to run.

However, the provision in question violates Article 2.1 of the Basic Law in conjunction with the principle of legal certainty, which is an essential component of the principle of the rule of law entrenched in Article 20.3 of the Basic Law, in its manifestation as principle of clarity and predictability of burdens.

In their interaction with the fundamental rights, legal certainty and the protection of confidence guarantee the reliability of the legal order, which is an essential prerequisite for self-determination over one's own life choices and their implementation. The principle of the protection of confidence means that the citizens must be able to rely to a certain extent on the continuance of certain statutes. Furthermore, under specific circumstances, the principle of the rule of law guarantees legal certainty even if no statutes exist that give rise to specific confidence, or if circumstances exist that are even contrary to such confidence. In its manifestation as principle of the clarity and predictability of burdens, the principle of the rule of law protects against using events that occurred a long time ago and are *de facto* completed as a link for imposing new burdens.

If obligations to pay contributions in return for benefits link to facts in the past, it is required under constitutional law to establish a time-limit for the obligation to pay.

The aim of limiting payment claims of state authorities is to achieve a fair balance between the justified interest of the public in the comprehensive and complete realisation of these claims on the one hand, and the citizens' interest, which is worthy of protection, on the other hand, in no longer having to expect at some point in time to be liable to make a contribution, and in being able to plan accordingly. It is a characteristic of statutes of limitation that they apply without evidence that confidence existed in an individual case, without confidence that is typically assumed, and in particular without confidence being actively exercised. Instead, they derive their justification and their necessity from the principle of legal certainty.

When levying contributions in return for benefits, the legislator is obliged to enact statutes of limitation, or at least to ultimately ensure that such contributions cannot be assessed for an unlimited time after the benefit has been received. Contributions derive their legitimation from compensating a benefit that the persons concerned received at a certain point in time.

The longer ago this point in time is when the contributions are assessed, the more the legitimation to assess such contributions decreases. The principle of legal certainty demands that the recipient of a benefit obtains clarity in reasonable time about whether, and if so, to what extent, contributions must be paid in return for the benefits received.

In the special provision of the Bavarian Municipal Charges Act, the legislator failed to achieve the necessary balance between legal certainty on the one hand and the validity of the law and the fiscal interest, on the other hand. By postponing the beginning of the period of limitation without setting any time limit, the legislator did not take into account the citizen's justified interest in no longer having to expect the assessment of the contribution after a certain period of time has passed after the benefit arose.

The legislator has several possibilities at its disposal for remedying the unconstitutional situation. The Federal Constitutional Court did therefore not declare the special provision void. Instead, the provision was declared incompatible with the Constitution. This has the consequence that the unconstitutional provision may no longer be applied by courts and administrative authorities. Pending court and administrative proceedings in which the decision depends on this provision remain suspended or are to be suspended until a new legislation is enacted, at the latest, however, by 1 April 2014. If the legislator has not enacted a new legislation by 1 April 2014, the unconstitutional provision will be void.

Languages:

German, English (translation of excerpts of the decision by the Court) on the Court's website.

Identification: GER-2013-1-006

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 19.03.2013 / **e)** 1 BvR 2635/12 / **f)** / **g) / h)** CODICES (German).

Keywords of the systematic thesaurus:

1.4.10.6.1 Constitutional Justice – Procedure – Interlocutory proceedings – Challenging of a judge – **Automatic disqualification**.

Keywords of the alphabetical index:

Judge, disqualification, prior involvement in the same case / Abuse of process, fee.

Headnotes:

If a justice of the Federal Constitutional Court took part in a non-appealable decision of this Court, which is nevertheless challenged in an inadmissible way before another court, the justice may still participate in the constitutional complaint proceedings that are brought against the other court's procedural decision.

Summary:

I. The Second Chamber of the First Panel had assessed fees for abuse of process against the applicant in three different constitutional complaint proceedings.

The applicant challenged those fees by bringing actions before the Administrative Court. The Court dismissed his actions as inadmissible because no remedy before the administrative courts was available, reasoning that administrative courts could not review, let alone set aside, decisions about constitutional complaints. The applicant's applications before the Higher Administrative Court for leave to appeal those decisions were unsuccessful on the same grounds.

In his constitutional complaint, the applicant challenged the decisions of the Administrative Court and the Higher Administrative Court. He considered the legal basis for the fee for abuse of process and its assessment against him unconstitutional.

II. The members of the Second Chamber of the First Panel are not disqualified from taking part in the decision on the constitutional complaint. This also applies to the decision whether they may participate in these proceedings in the first place.

The Panel is required to decide *ex officio* about its lawful composition. This includes the decision whether a justice is automatically disqualified by law according to § 18 of the Federal Constitutional Court Act (hereinafter, the "Act").

According to § 18.1 no. 2 of the Act, a justice of the Federal Constitutional Court is disqualified from exercising judicial functions if he has already been involved in the same case due to his office or profession. The criterion of the "same case" shall always be understood in a specific and strictly procedural sense. Prior judicial involvement in a case only leads to disqualification if it took place in proceedings in a previous instance. Furthermore, it must concern participation in the decision currently being challenged by the constitutional complaint.

At least in proceedings before the Constitutional Court, the participation in decisions which finalise a case and against which no appeal can be made no longer constitute an involvement in the "same case'".

It is not permissible to contravene procedural law and appeal against final Federal Constitutional Court decisions to other courts, in order to secure a new Federal Constitutional Court decision against the prior courts' rulings in which the participation of the previously involved justices is excluded.

A fee for abuse of process assessed by a chamber of the Federal Constitutional Court cannot be appealed and thus cannot be the subject of a decision by the administrative courts. In such situations, it is hence impossible to have prior involvement in the "same case" within the meaning of § 18.1 no. 2 of the Act.

The members of the Second Chamber of the First Panel may also take part in the decision on the question whether they are excluded from participation. The manifestly inadmissible actions brought before the Administrative Court constitute completely self-contained, new subjects of proceedings and can thus, under no circumstances, justify a disqualification.

Languages:

German.

Identification: GER-2013-1-007

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 19.03.2013 / **e)** 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11 / **f)** Plea bargaining in criminal trials / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Neue Juristische Wochenschrift* 2013, 1058-1071; *Strafverteidiger Forum* 2013, 153-159; CODICES (German).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence**.

Keywords of the alphabetical index:

Criminal law, individual guilt, principle / Criminal proceedings, plea bargains / Criminal proceedings, real facts of a case, establishment / Criminal justice system, functioning / Criminal proceedings, expedited proceedings, principle / Criminal proceedings, right against self-incrimination.

Headnotes:

The principle of individual guilt, which is entrenched in the Basic Law, and the ensuing obligation to investigate the substantive truth, as well as the principle of a fair trial in accordance with the rule of law, the presumption of innocence, and the court's obligation to remain neutral prevent that the handling of the investigation of truth, the application of the legal principles to the facts, and the principles of sentencing are placed at the free disposal of the parties and the Court.

Agreements between the Court and the parties to the case concerning the state and the prospects of the trial which promise the defendant a maximum sentence for a confession and announce a minimum sentence bear the risk that the constitutional requirements are not fully adhered to. Nevertheless, the legislator is not a priori precluded from permitting plea bargains in order to simplify proceedings. It must, however, establish sufficient safeguards to ensure that the constitutional demands are met. The legislator has to continually assess the effective-ness of the safeguard mechanisms provided. If it shows

that they are not comprehensive or unsuitable, the legislator must improve them; if necessary, it must revise its decision regarding the permissibility of plea bargaining in criminal trials.

The Plea Bargaining Act sufficiently ensures the compliance with the constitutional requirements. The fact that the implementation of the Plea Bargaining Act falls considerably short of these requirements does not, at present, render the legal provisions unconstitutional.

The Plea Bargaining Act comprehensively governs the permissibility of plea bargains in criminal proceedings. So-called informal agreements, which take place outside of the legal frame-work, are not permissible.

Summary:

I. The applicants challenged their convictions for criminal offences following plea bargains between the Court and the parties to the case.

Two of the three constitutional complaints were also directed against § 257c of the Code of Criminal Procedure which was added by the Act on the Regulation of Plea Bargaining in Criminal Proceedings of 29 July 2009 (hereinafter, the "Act"). The provision says the following:

1. "In suitable cases the Court may, in accordance with the following sections, reach an agreement with the participants on the further course and outcome of the proceedings. § 244.2 shall remain unaffected.
2. The subject matter of this agreement may only comprise the legal consequences that could be the content of the judgment and of the associated rulings, other procedural measures relating to the course of the underlying adjudication proceedings, and the conduct of the participants during the trial. A confession shall be an integral part of any negotiated agreement. The verdict of guilt, as well as measures of reform and prevention, may not be the subject of a negotiated agreement.
3. The Court shall announce what content the negotiated agreement could have. It may, on free evaluation of all the circumstances of the case as well as general sentencing considerations, also indicate an upper and lower sentence limit. The participants shall be given the opportunity to make submissions. The negotiated agreement shall come into existence if the defendant and the public prosecution office agree to the court's proposal.
4. The Court shall cease to be bound by a negotiated agreement if legal or factually significant circumstances have been overlooked or have arisen and the Court therefore becomes convinced that the prospective sentencing range is no longer appropriate to the gravity of the offence or the degree of guilt. The same shall apply if the further conduct of the defendant at the trial does not correspond to that upon which the Court's prediction was based. The defendant's confession may not be used in such cases. The Court shall notify any deviation without delay.
5. The defendant shall be instructed as to the prerequisites for and consequences of a deviation by the Court from the prospective outcome pursuant to section 4."

II. The constitutional complaints were well-founded insofar as they were directed against the challenged decisions; with regard to § 257c of the Code of Criminal Procedure, they were un-successful.

The Federal Constitutional Court reversed the ordinary courts' decisions which had been challenged by the applicants because it found violations of the Constitution in the respective proceedings and remitted the cases for a new decision.

Criminal law is based on the principle of individual guilt, which has constitutional status. This principle is entrenched in the guarantee of human dignity and personal responsibility (Articles 1.1 and 2.1 of the Basic Law), as well as in the principle of the rule of law (Article 20.3 of the Basic Law). The government is obliged under the Constitution to ensure the functioning of the criminal justice system. It is the central concern of criminal proceedings to establish the real facts of a case, without which it is impossible to implement the substantive principle of individual guilt.

The right to a fair trial guarantees defendants to exercise their procedural rights and to adequately ward off infringements – especially those from governmental entities. It is primarily the task of the legislator to design these procedural rights. A violation of the right to a fair trial only exists if an overall assessment of the law of procedure shows that conclusions which are compulsory under the rule of law have not been drawn, or that rights which are indispensable under the rule of law have been waived. In the context of this overall assessment the requirements for a functioning criminal justice system, including the obligation to ensure the speedy conduct of proceedings, have to be kept in mind as well.

The right against self-incrimination and the presumption of innocence are entrenched in the rule of law and have constitutional status. In particular, the defendant has to be in a position to decide under no constraints and independently whether and if so, to which degree he or she participates in the criminal trial.

Against this backdrop, it is true that plea bargains bear the risk that the constitutional requirements will not be fully adhered to. However, under the Constitution the legislator is not *a priori* precluded from permitting plea bargains in order to simplify proceedings.

The Act points out explicitly that the court's obligation to investigate the facts *ex officio* remains untouched. The legislator thus clarified that a plea bargain as such can never constitute the sole basis for a judgment, but that what is necessary is still exclusively the Court's own conviction. Furthermore, it is imperative that the plea bargain-based confession be verified. Moreover, the legal analysis can also not be modified in the context of a plea bargain.

The Act comprehensively governs the permissibility of plea bargains in criminal proceedings. It thus prohibits what are euphemistically called "informal" approaches during plea bargaining. Furthermore, it limits the plea bargain to the subject-matter of the trial.

Transparency and documentation of plea bargains are key aspects of the regulatory approach. This is meant to ensure an effective control by the public, the prosecution, and the court of appeals. Notably, the actions in connection with the plea bargain have to be comprehensively incorporated into the trial.

A violation of the duty to provide transparency and documentation will generally render a plea bargain that has nonetheless been concluded illegal. If a court adheres to such an illegal agreement, it will frequently not be possible to exclude the possibility that the judgment was based on this violation of the law.

Of particular importance is the monitoring by the prosecution. The prosecution is not only obliged to refuse to agree to an illegal plea bargain, but also has to lodge appeals against judgments that are based on such an agreement.

Finally, the Act stipulates that the defendant be instructed under what circumstances and with which consequences the Court can deviate from the result which it had offered as a prospect. This instruction is meant to put the defendant in a position to decide independently about his or her cooperation in the plea bargain. If the duty to instruct has been violated, on appeal it will regularly have to be assumed that the confession and thus the judgment were based on this violation.

The Act sufficiently ensures the compliance with the constitutional requirements. The fact that the implementation of the Act falls considerably short of these requirements does not, at present, render the legal provisions unconstitutional.

The legal regulatory concept would only be unconstitutional if the envisaged protection mechanisms were so fragmentary or otherwise insufficient that they would promote the unconstitutional practice of "informal" plea bargains.

Neither the result of the empirical study nor the statements given in the course of the constitutional complaint proceedings make a compelling case for the assumption that structural flaws of the regulatory concept have led to the present implementation deficit.

The legislator has to keep a close eye on the future developments. If the legal practice continues to deviate to a large extent from the legal stipulations, and if the Act proves to be insufficient to overcome the implementation deficit, the legislator will have to counteract the misguided development with adequate measures. If this remained undone, it would lead to a situation that is unconstitutional.

The three decisions by the ordinary courts that were challenged with the constitutional complaints are incompatible with the Basic Law's requirements for plea bargaining in criminal proceedings. Two of the decisions violate the applicants' right to a fair trial in accordance with the rule of law and infringe their right against self-incrimination. The third decision challenged violates the constitutional principle of individual guilt because the Regional Court sentenced the applicant largely on the basis of a formal confession that had not been verified. Furthermore, the judgment was based on a plea bargain that had determined the content of the conviction in an impermissible way. In this case, the line to an unconstitutional infringement of the right against self-incrimination had also clearly been crossed.

Languages:

German, English (translation of excerpts of the decision by the Court) on the Court's website.

Identification: GER-2013-1-008

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 08.04.2013 / **e)** 2 BvR 2567/10 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
3.16 General Principles – **Proportionality**.
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.

Keywords of the alphabetical index:

Judge, obligation to clarify the facts of the case / Proceedings, speedy conduct, principle / Detention, summons for commencing / Criminal proceedings, young people.

Headnotes:

The delayed summons to commence detention of an adolescent who has been sentenced to youth custody violates his fundamental rights to personal freedom in conjunction with the principle of proportionality and the principle of the rule of law.

Summary:

I. The applicant, who was sentenced to several years of youth custody, was not summoned to commence detention until 22 months after the sentence entered into force. He complains against this summons.

With judgment of 24 October 2007, the Regional Court sentenced the applicant, who was 17 years old at the time of the offence, to two years and six months of youth custody for attempted murder and infliction of grievous bodily harm. With regard to the duration of youth custody, it was not ruled out that the periods spent in remand detention and other deprivations of liberty might be taken into account. The judgment became final on 22 April 2008. At that time, the applicant was 19 years old.

The applicant was in remand detention from his provisional apprehension on 16 April 2006 until 29 May 2006. In order to avoid further remand detention, he was then confined in a suitable institution until 24 October 2007.

Subsequent to his release, the applicant graduated from school and completed vocational training from September 2007 to June 2009. He then took up several jobs. After being released, he continued the psychological counselling he had started during his confinement, and which was aimed at processing the wrong he had committed.

The applicant was served the first summons to commence detention on 22 February 2010. A new summons was issued on 6 July 2010, after enforcement of the judgment had been postponed because of a pardon request which was ultimately unsuccessful.

The applicant lodged objections against the second summons, which the Regional Court rejected. The immediate complaint lodged against this was rejected by the Higher Regional Court as unfounded.

II. The Federal Constitutional Court accepted the constitutional complaint for a decision and granted it. The summons of the Local Court to commence detention and the orders of the Regional Court and of the Higher Regional Court were reversed. The case was remitted to the Local Court for a renewed ruling.

The summons by the Local Court to commence serving his sentence, and the orders of the Regional Court and of the Higher Regional Court confirming it, violate the applicant's fundamental right under the second sentence of Article 2.2 of the Basic Law, in conjunction with the principle of proportionality and the principle of the rule of law.

Personal freedom, which is protected by the second sentence of Article 2.2 of the Basic Law, may only be restricted for particularly important reasons. Interests of sufficient weight are, in particular, the irrefutable needs for effective criminal prosecution and protection of the public. The State's constitutional obligation to guarantee the functioning of the criminal justice system also includes the obligation to ensure the implementation of criminal proceedings that have been initiated, and to enforce (prison) sentences that have entered into force. It follows from the principle of the rule of law that the State has to implement its right to punish, which also means that proceedings that have been initiated must be continued, and that final sentences must be enforced.

From the principle of the rule of law also follows the principle of speedy conduct of proceedings in criminal matters. According to this principle, the functioning of the criminal justice system requires that the State's right to punish be enforced within a period in which the community is still able to perceive the punishment as a reaction to the wrong that has been committed.

This also applies to the enforcement of (prison) sentences. The principle of speedy conduct of proceedings takes on additional and particular significance in juvenile law because in that setting, prison sentences are enforced with the goal of education and social integration. This objective of enforcement has constitutional status.

In the event of a delay to the proceedings that is in breach of the rule of law, the criminal prosecution authorities are obliged to examine, at each stage of the proceedings, whether the punishment remains proportionate to the protection of legal interests to be achieved. This applies not only to the contentious proceedings, but also to enforcement. The impact on the life of the convicted person emanating from a sentence can increase as a result of the change in circumstances, given the time that has passed since the sentence became final.

Rulings resulting in the deprivation of personal liberty must furthermore be based on a sufficient clarification of the facts by the judge. The minimum requirements for a reliable investigation of the truth have to be adhered to not only in the contentious proceedings, but also in the enforcement proceedings.

The summons to commence detention of 6 July 2010 does not do justice to these requirements and neglects the significance and scope of the fundamental right to freedom under the second sentence of Article 2.2 of the Basic Law.

The judgment to be enforced had already been final for almost two years with the first summons to commence detention, and for more than two years with the second summons. The delay until February 2010 was not caused by the applicant's conduct, but – as far as can be ascertained – was caused solely by the state authorities.

Already with regard to this delay, the Local Court should have clarified the applicant's current circumstances in order to make sure that the purposes of the sentence were still achievable and that influencing the applicant by enforcing youth custody was still proportional. Especially in juvenile criminal law, procedural delays may counteract the purpose of the sentence, in particular the educational concept. Changes in circumstances may affect the need for an educational impact which was relevant at the time of sentencing or when the sentence became final. There is a constitutional requirement that this be taken into account in the course of a review of proportionality.

In addition to this, the applicant had already spent 18 months, i.e. much more than one-third of the imposed sentence, in remand detention and in another measure entailing deprivation of liberty without it having been ruled out that these periods could be taken into account when the sentence was imposed. In this respect, the review of whether the remainder of the sentence could have been suspended on probation, taking into account the development of the applicant in the meantime, suggests itself.

The orders of the Regional Court and of the Higher Regional Court confirming the summons also do not satisfy the constitutional requirements. They do not contain the clarification of the facts of the case and the necessary depth of reasoning which is required under the second sentence of Article 2.2 of the Basic Law in conjunction with the principle of proportionality for a ruling on the deprivation of personal freedom. They already lack an individual review of the course taken in the proceedings with regard to possible breaches of the principle of the speedy conduct of proceedings. The orders do not mention any reasons for the procedural delay.

Above all, however, the courts failed to take adequate account of the applicant's interest in freedom, protected by the second sentence of Article 2.2 of the Basic Law, who was sentenced as an adolescent to several years of youth custody, in light of the educational goal which is enshrined in juvenile criminal law. It is true that they evaluated the applicant's positive development since the judgment was handed down, and the potential loss of his job. There was, however, no discussion of whether the educational goal and the aim of social integration during imprisonment had not already been achieved, and whether a need for education – if it continued to exist – could be met via conditions and instructions according to juvenile criminal law. The presumption that the course of the proceedings had given the applicant the impression that it was possible to escape the consequences of a crime remains abstract and does not explore the specific circumstances. In this context, it is not considered that the applicant had to accept a quite considerable deprivation of liberty with regard to the offence for which he was sentenced, and that not enforcing the youth custody therefore does not entail completely forgoing the State's right to punish. The aspect which the courts regarded as decisive, namely that the purpose of youth custody of atoning for the wrong that was done has not yet ceased to apply, does not mean that the above aspects cannot be taken into account.

Languages:

German.

Identification: GER-2013-1-009

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 12.04.2013 / **e)** 1 BvR 990/13 / **f)** / **g)** / **h)** CODICES (German, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Equal treatment, competition, journalists / Criminal proceedings, formal course, order / Criminal proceedings, accreditation procedure.

Headnotes:

The decisions about access to court proceedings, the reservation of a certain number of seats for media representatives, and the distribution of a scarce number of seats among them, generally fall within the presiding judge's powers to direct the formal course of proceedings.

If a constitutional complaint against an order based on these powers, invoking, for example, the applicants' right to equal treatment in the competitive media environment – a right derived from Article 3.1 in conjunction with sentence 2 of Article 5.1 of the Basic Law – is not inadmissible or from the outset clearly without merits, a preliminary injunction must include a balancing of consequences.

Summary:

I. The Federal Constitutional Court had to decide on an application for a preliminary injunction. The constitutional complaint which the application referred to concerned the accreditation procedure and the allocation of reserved seats for media representatives in what is known as the NSU trial before the Munich Higher Regional Court. The trial of the so-called NSU terror cell deals in particular with crimes against Turkish citizens and citizens of Turkish descent. The interest of national and international media in the trial has been very high long before the trial started.

The applicants are a limited liability company which publishes a Turkish-language newspaper and the newspaper's deputy chief editor. In the accreditation procedure, the newspaper was not granted a reserved seat. No other Turkish medium was accredited with a reserved seat either.

II. Under § 32.1 of the Federal Constitutional Court Act, the Federal Constitutional Court, in a case of dispute, may deal with a matter provisionally by preliminary injunction if this is advisable for the common good in order to avert serious detriment, to prevent imminent violence or for another compelling reason. In such a case, the arguments advanced to substantiate the unconstitutionality of the state action challenged must generally be left out of consideration unless the constitutional complaint is, from the outset, inadmissible in its entirety or clearly unfounded.

In the case at hand, the constitutional complaint is neither inadmissible from the outset nor clearly unfounded. In particular, it does not appear to be impossible that the applicants' right to equal treatment in the competition among journalists, located in Article 3.1 GG in conjunction with sentence 2 of Article 5.1 GG, i.e. the right to equal participation in the opportunities of reporting from court proceedings, might be violated.

However, the decision on the opportunity of access to court proceedings, on the reservation of a certain number of seats for media correspondents and the distribution of a scarce number of seats among them is, in general, a question which, in light of the protection of the independence of the courts afforded by the Constitution, is first taken according to ordinary law and rests within the power of the presiding judge to direct the formal course of the proceedings in question. In this decision, the presiding judge has a broad margin of appreciation. The Federal Constitutional Court reviews the presiding judge's orders only insofar as they may violate constitutional law, and reviews in particular whether such orders are based on a fundamentally erroneous view of the meaning of a fundamental right.

Whether, according to these standards, the challenged decisions violate the applicants' fundamental rights must be reviewed in detail; such review raises difficult questions of law which cannot be finally resolved in preliminary injunction proceedings. Therefore, the preliminary injunction can only be based on a balancing of consequences.

If a constitutional complaint does not prove to be, from the outset, inadmissible in its entirety or clearly unfounded, the consequences which would occur if the preliminary injunction were not granted, but the

constitutional complaint were later successful, have to be weighed against the disadvantages that would occur if the preliminary injunction were granted but the constitutional complaint were unsuccessful.

If, in this case, no preliminary injunction were granted but the constitutional complaint were successful, there would be a danger that the applicants, without having been given the same opportunities as other media representatives, would remain excluded from the opportunity of their own news coverage based on the very essence of the court hearings as a whole in the so-called NSU-trial. The same would apply to other foreign media with a special relationship to the victims of the crimes brought to trial. In the present case, this weighs particularly heavy since especially Turkish media representatives can claim a particular interest to be able to cover this trial in complete independence because numerous victims of the crimes brought to trial are of Turkish descent.

These disadvantages outweigh the disadvantages that would occur if the application for a preliminary injunction were successful within the limits of the operating clause while the principal constitutional complaint would be unsuccessful. Because in this case, foreign media with a special relationship to the victims of the crimes brought to trial would have been granted reserved seats in the hearings of the court, which they would not have had a right to according to the present allocation of seats. If that would amount to unequal treatment of other media because the seats already granted to them would be taken away, or because they would not receive a seat from an additional allotment of seats, this would weigh less heavy against the backdrop of the specific interest these media have. In any case, the rights of media only exist within the limits of selection that does justice to equality *(gleichheitsgerechte Auswahlentscheidung)*. Also, the disadvantage that would occur for the general population if an additional allocation of a few seats for the public at large were given to certain media representatives is, in relation, smaller, because these seats have not been specifically allocated to individuals and because, according to the applicable principles, there is still an appropriate number of seats allocated to the general public.

In proceedings for preliminary injunctions, the Federal Constitutional Court may give an order, which is not to be understood as the enforcement of a result required by the Constitution, but as a preliminary order to avoid or minimise impending disadvantages. This applies all the more in a situation like the present one, in which there is, from the outset, no constitutional right to access to a court, but only a question of whether there is a violation of an opportunity to equal participation, and in which disadvantages derive from a potential violation of equal opportunities. The court order may focus on alleviating these consequences. In the present case, this in part anticipates the potential result of the principal proceedings; however, this is permitted in exceptional cases if the decision in the principal proceedings would be taken too late and no other sufficient recourse to the courts could be granted.

For these reasons, the presiding judge of the 6th Panel in Penal Matters of the Higher Regional Court is assigned to grant an adequate number of seats to representatives of other foreign media with a special relationship to the victims of the crimes brought to trial, according to a procedure that is to be decided within the limits of his power to direct the formal course of the proceedings. One possibility would be to open an additional allotment of at least three seats, which would be distributed according to the principle of priority or by the drawing of lots. But it also remains within the discretion of the presiding judge to arrange the distribution of seats or the accreditation as a whole according to different principles.

Languages:

German, English (translation of excerpts of the decision by the Court) on the Court's website.

Identification: GER-2013-1-010

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 24.04.2013 / **e)** 1 BvR 1215/07 / **f)** Counter-terrorism database / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.1.1.4.18 Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000**.
2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Communities**.
5.3.13.3.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – **"Natural judge"/Tribunal established by law**.

5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.
5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home**.
5.3.36.2 Fundamental Rights – Civil and political rights – Inviolability of communications – **Telephonic communications**.
5.3.36.3 Fundamental Rights – Civil and political rights – Inviolability of communications – **Electronic communications**.

Keywords of the alphabetical index:

Counter-terrorism database / Terrorism, international, combating / Data, exchange between police authorities and intelligence services / Informational self-determination, right to.

Headnotes:

1. The establishment of the counter-terrorism database as a joint database of different security authorities to combat international terrorism, which is limited to the initiation of the receipt of information, and which stipulates that only in urgent and exceptional cases can data be ex-changed for the fulfilment of operational duties, is in its fundamental structures compatible with the Constitution.

2. Provisions which facilitate the exchange of data between the police authorities and the intelligence agencies must meet increased requirements under constitutional law regarding the right to informational self-determination. From the fundamental rights derives the principle of separation of information *(informationelles Trennungsprinzip)*, which permits such an exchange only in exceptional cases.

3. A joint database between security authorities, such as the counter-terrorism database, requires with regard to the data to be collected and the possibilities of their use that a legal structure exists which is sufficiently clear and complies with the prohibition of disproportion-ate measures. The Counter-Terrorism Database Act does not fully meet these requirements, namely regarding the determination of the participating authorities, the scope of persons who are covered as having close connections to terrorism, the inclusion of contact persons, the use of extended basic data made covertly available, the security authorities' authorisation to specify the data to be stored, and the guarantee of effective supervision.

4. The unrestricted incorporation of data collected by infringing the privacy of correspondence and telecommunications, as well as the inviolability of the home, violates Articles 10.1 and 13.1 of the Basic Law.

Summary:

I. The applicant challenged the Act on Setting up a Standardised Central Counter-Terrorism Database of Police Authorities and Intelligence Services of the Federal Government and the *Länder* (hereinafter, the "Act").

II. The Federal Constitutional Court decided that the constitutional complaint was, in part, well-founded.

Essentially, the decision is based on the following considerations:

The constitutional complaint provides no reasons for a preliminary ruling before the Court of Justice of the European Union. Clearly, the Act and actions that are based on it do not constitute an implementation of Union law according to sentence 1 of Article 51.1 of the Charter of Fundamental Rights of the European Union. The Counter-Terrorism Database Act pursues nationally determined objectives which can affect the functioning of the legal relationships under EU law merely indirectly. Thus, the European fundamental rights are from the outset not applicable. The Court of Justice of the European Union is not the lawful judge according to sentence 1 of Article 101.1 of the Basic Law. The Court's decision in the case Åkerberg Fransson does not change this conclusion. As part of a cooperative relationship, this decision must not be read in a way that would view it as an apparent *ultra vires* act or as if it endangered the protection and enforcement of the fundamental rights in the member states in a way that questioned the identity of the Basic Law's constitutional order. The Panel acts on the assumption that the statements in the ECJ's decision are based on the distinctive features of the law on value-added tax, and express no general view.

The counter-terrorism database is, in its basic design, compatible with the right to informational self-determination according to Article 2.1 in conjunction with Article 1.1 of the Basic Law.

The exchange of information which the challenged provisions create carries considerable weight. For the persons concerned, the entry into such a database can pose a considerable hardship.

It adds to the severity of the interference with rights that the database also facilitates the exchange of information between intelligence agencies and the police. The legal order distinguishes between the police and the intelligence agencies: the police generally works in the open, is structured for operational tasks, and guided by detailed legal provisions. In contrast, the intelligence agencies generally work in secret, are limited to prior observation and reconnaissance for

political information and consultation, and can thus act within a less complex legal framework. From the fundamental right to informational self-determination follows a principle of separation of *information (informationelles Trennungsprinzip)* that applies to the exchange of data between these institutions. The exchange of data for operational tasks between the intelligence agencies and the police constitutes a particularly severe interference. This is only admissible in exceptional cases and has to serve a highly important public interest. In such a case, it is not permissible to undercut the respective thresholds for the interference with rights that apply in cases of data acquisition.

However, the severity of the interference is mitigated by the fact that the counter-terrorism database is structured as a joint database which is essentially limited to initiating the receipt of information via data that have already been collected. The transfer of data for operational tasks is governed by the relevant specialised legislation which, again, has to comply with the constitutional requirements and the principle of the separation of information. The Act itself legitimises an exchange of data for operational tasks only in urgent and exceptional cases.

Crimes with terrorist characteristics, at which the Act is aimed, are directed against the key elements of the constitutional order and the community as a whole. It is a requirement of our constitutional order not to view such attacks as acts of war or states of emergency, which would be exempt from adherence to constitutional requirements, but to fight them as criminal acts which can be countered within the bounds of the rule of law. This means, on the other hand, that in the proportionality test, the fight against terrorism has to be accorded considerable weight.

In view of these conflicting interests, there are no constitutional objections against the fundamental design of the counter-terrorism database. However, the provisions on the database only meet the requirements of the principle of proportionality in the narrow sense if these norms are clear and sufficiently narrow with regard to which data are to be recorded and how these data may be used, and if qualified supervisory requirements both exist and are adhered to.

The Act does not fully meet these requirements. Some of the provisions challenged violate the right to informational self-determination due to their lack of clarity, and because they are incompatible with the prohibition of disproportionate measures.

Furthermore, the additional complete and unrestricted incorporation, which is provided by the law, of all data collected through interference with Article 10.1 (secrecy of telecommunications) and with Article 13.1 of the Basic Law (inviolability of the home) into the counter-terrorism database is incompatible with the Constitution. In view of the particularly high degree of protection provided by these Articles, particularly strict requirements apply, as a general rule, to data collections which interfere with these fundamental rights. The additional unrestricted incorporation of such data into the counter-terrorism database makes the information available, irrespective of terrorist acts that have already been committed or are imminent, for investigation measures that take place even before tangible danger situations arise, and even though it would not be possible to justify collecting data through interference with the secrecy of telecommunications or with the inviolability of the home for such measures. This undercuts the requirements on data collection in this field.

The partial unconstitutionality of the challenged provisions does not result in their being declared void; it is only established that they are incompatible with the Basic Law. The provisions may continue to be applied until new legislation has been enacted, but no later than 31 December 2014. Before they continue to be applied, however, it must be ensured that certain conditions are adhered to.

Cross-references:

- Decision C-617/10 *(Åkerberg Fransson)* of the Court of Justice of the European Union of 26.02.2013.

Languages:

German, English (translation of excerpts of the decision by the Court) on the Court's website.

Hungary
Constitutional Court

Important decisions

Identification: HUN-2013-1-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 07.01.2013 **/ e)** 1/2013 / **f)** On the annulment of certain provisions of the not yet promulgated Act on Electoral Procedure / **g)** *Magyar Közlöny* (Official Gazette), 2013/3 / **h)**.

Keywords of the systematic thesaurus:

4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility**.
4.9.8.3 Institutions – Elections and instruments of direct democracy – Electoral campaign and campaign material – **Access to media**.
5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.
5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

Keywords of the alphabetical index:

Election, early registration, mandatory / Election campaign, limitation.

Headnotes:

Mandatory “early voter registration” restricts the right to vote without constitutional justification. Limitations on the publication of political advertisements and public opinion polls violate freedom of expression.

Summary:

I. At its session on 26 November 2012, Parliament adopted the Act on Electoral Procedure (T/8405), which would have introduced prior voter registration in a central register. The President of the Republic did not sign the Act because he had concerns over its constitutionality. Exercising the power vested in him by Article 6.4 of the Fundamental Law (hereinafter, the “FL”), he initiated a constitutional review of several provisions of the Act. The President was concerned that the challenged provisions of the Act concerning mandatory pre-registration requirement posed a disproportionate restriction on the right to vote. Several provisions concerning election campaigning and advertising were, in his view, contrary to Article IX of the FL.

Under Section 82 of the Act, a central register would have taken the format of a list of those who had previously registered at the local notary, expressing their wish to vote. Section 88 outlined the procedure for registering, which could be done in person or in part electronically. Those living outside the borders could have registered by post. Section 106 set a deadline of 15 days prior to the elections for eligibility for inclusion within the central register.

II. The Constitutional Court noted the Code of Good Practice in Electoral Matters published by the Venice Commission in which the Commission pointed out the importance of regular upkeep of domicile registers. It also referred to the relevant case-law of the European Court of Human Rights concerning the right to free election, in particular the decision delivered in *Georgian Workers’ Party v. Georgia*, which contained several legal opinions that went against the practice of voter registration unless absolutely necessary due to a lack of other reliable registers.

Article XXIII of the FL regulates who qualifies to vote in elections and the conditions under which they do so. The Constitutional Court observed that the provisions under dispute defined a further condition: voter registration. Early voter registration was found to be unconstitutional because of the existence in Hungary of the official domicile register. The State is under a duty to keep the official domicile register at its disposal up-to-date and to apply it for election purposes. There are no legitimate grounds for introducing registration under such circumstances; it curtails voting rights to an unjustifiable degree, as the requirement for voters to register prior to going to the polls applies to every voter. It also limits voter participation.

However, the Court noted certain instances where registration was justified, namely cases of Hungarian voters residing beyond the borders, members of national minorities living in Hungary and wishing to vote on the national minority list, and those needing assistance to take part in the elections. However, the Court ruled that it would be a disproportionate limitation of the right to vote, if those whose right to vote without previous registration could not be ensured could only register at their permanent domicile and not their usual residence.

In this regard, it found that excluding those living in Hungary without an address (i.e. homeless persons) from the possibility of personal registration was discriminatory.

The second part of the decision dealt with the electoral campaign provisions. Under Section 151 of the Act, all parties could advertise only within highly restricted time limits (600 minutes for national elections and 300 minutes for European parliamentary elections) and were only allowed to use the public TV and radio stations during political campaigns. They were also prevented from attaching "any opinion or evaluative explanation" to the advertisements. Public radio and television stations could not charge political parties for their services. The provision set further limits on advertisement, explicitly forbidding advertising on commercial radio and television stations, and on Internet websites. Section 152.5 of the Act forbade the publication of any political advertisement in movie theatres. Section 154 of the Act outlawed the publication of opinion polls in the last six days before the election.

The Constitutional Court found all these restrictions on campaigning unconstitutional, since they severely restricted the freedom of expression and the media. The provisions effectively restricted political advertising to the publicly run media, a disproportionate restriction on the universal right to speak freely on public matters (not just on the rights of the parties) and the right to free press (including editing) of the commercial media outlets. In addition, the Court found the ban on movies screening political advertisement during the campaign to be an unnecessary limitation. The ban on the publication of any election-related opinion polls in the six days prior to election day was a disproportionate limitation of free expression.

III. Justice Péter Kovács attached a concurring opinion, Justices István Balsai, Egon Dienes-Oehm, Barnabás Lenkovics, Béla Pokol and Mária Szívós attached a dissenting opinion to the decision.

Supplementary information:

As of 1 April, Article IX.3 of the FL was amended. Article IX.3 allows political advertisements to be published in the media exclusively free of charge, in order to guarantee adequate information necessary for the formation of democratic public opinion and in order to guarantee equal opportunities. In the campaign period leading up to the elections of Members of Parliament and Members of the European Parliament, political advertisements may be published by and in the interest of those organisations which set up a national list of candidates for the general elections of Members of Parliament or a list of candidates for the election of Members of the European Parliament, as defined in a Cardinal Act, exclusively via public media outlets, under equal conditions.

Languages:

Hungarian.

Identification: HUN-2013-1-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 14.02.2013 / **e)** 3/2013 / **f)** On the constitutional complaint of the party "Politics can be different" (LMP) / **g)** *Magyar Közlöny* (Official Gazette), 2013/23 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions**.
5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly**.

Keywords of the alphabetical index:

Police decision, non-competence / Assembly, organisation, limitations.

Headnotes:

The Constitutional Court for the first time exercised its competence to overturn a court decision which was found contrary to Fundamental Law. The ordinary court had failed to review the merits of a decision declaring lack of competence on the part of the police because of an agreement on the use of public area with the Municipality of Budapest.

Summary:

I. The party "Politics can be different" (hereinafter, "LMP") intended to organise an event on 15 March 2012 to commemorate the freedom-fight of 1848/49 in Heroes' Square, Budapest. On 6 February 2012 the party applied to the Budapest Police Department for acquiescence in the event, scheduled to take place in Heroes' Square. On the same day the Budapest Police Department refused to deal with the

application, observing that on 15 March 2012 the area in question is used by the Municipality of Budapest based upon a public area use agreement. Consequently, the measure (the agreement) – which was in place for 15 March 2012 – remained outside the Police Department's competence as regards the prohibition of or acquiescence in a gathering.

The Budapest Regional Court dismissed the applicant's request for judicial review, endorsing in essence the police authorities' reasoning. In addition, the National Police Commander upheld the decision of the Budapest Police Department. The party asked the court to review the latter decision. On appeal, the Budapest Regional Court quashed the decisions of the police authorities.

The party submitted a constitutional complaint against both the first and the second decisions of the Budapest Regional Court.

II. The Constitutional Court examined the constitutionality of the first court decision; it was this decision which prevented the party from holding its event to commemorate 15 March 1848 in Heroes' Square. The Constitutional Court declared that the decision of the Budapest Regional Court violated the right to peaceful assembly, because the Regional Court did not examine the decision of the Budapest Police Department on the merits. In this case, the Regional Court should have taken into account that the legality and the constitutional justification of the public area use agreement were questionable as well. The Municipality of Budapest did not need a public area permission to hold an official commemoration on public premises. Despite that, the Municipality of Budapest, by concluding such an agreement, reserved all the possible public sites in Budapest where the freedom fight of 1848 could have been properly commemorated with a large number of participants. Therefore an abuse of law occurred when the agreement in question was concluded. Furthermore, if the Regional Court had examined the case on its merits and the statement of the Municipality of Budapest regarding the resignation of the use of Heroes' Square on 15 March 2012 had been taken into consideration, the party would have organised its event, in the absence of any other legal reason to prevent it.

The Constitutional Court, for the first time, annulled a court decision and determined the following constitutional requirement to give guidance to the court in future legal disputes concerning the right to assembly. Based on these requirements, courts are always to review decisions of the police concerning holding gatherings on public premises on their merits, i.e. they are to review the legality and constitutional justification of the police decisions.

III. Justices István Balsai, Mihály Bihari and Béla Pokol attached a concurring opinion and András Bragyova and Mihály Bihari attached a dissenting opinion to the decision.

Languages:

Hungarian.

Identification: HUN-2013-1-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 21.02.2013 / **e)** 4/2013 / **f)** On the prohibition of the use of symbols of totalitarian regimes / **g)** *Magyar Közlöny* (Official Gazette), 2013/28 / **h)**.

Keywords of the systematic thesaurus:

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
3.10 General Principles – **Certainty of the law**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

Keywords of the alphabetical index:

Symbol, communist / Symbol, nazi / Totalitarian regime, symbols, ban.

Headnotes:

A provision of the Criminal Code prohibiting the use of symbols of totalitarian regimes violates the requirement of legal certainty, and in this context, the freedom of expression.

Summary:

I. The applicant, Mr Attila Vajnai challenged in his constitutional complaint that phrase of Section 269/B of Act IV of 1978 on the Criminal Code which prohibited the public use of a five-pointed red star among other symbols of totalitarian regimes. As the provision under dispute prohibited the use of symbols of the Communist as well as the Nazi regime, the Constitutional Court extended its review and examined the constitutionality of the whole provision

due to a strong correlation. The Constitutional Court had to take its precedent into account. In its Decision 14/2000, the Constitutional Court, referring to the special historical past of Hungary, upheld the provision declaring it a criminal offence to publicly use the symbols of despotism (the swastika "Hakenkreuz", the SS sign and the arrow-cross, hammer and sickle and the five-pointed red star). In 2008, the European Court of Human Rights in *Vajnai v. Hungary* held that the conviction of Mr Attila Vajnai, the vice-president of the left-wing Workers' Party for having worn the red star on his jacket, was an interference with his right to free expression. Although the Constitutional Court referred in Decision 14/2000 to historical circumstances, the European Court of Human Rights considered that twenty years after the fall of Communism there was no "real and present danger" of its restoration and found the ban of the Criminal Code indiscriminate and too broad in view of the multiple meaning of the red star.

II. In its recent decision the Constitutional Court allowed the constitutional complaint lodged by Vajnai and found that criminalising the public use of the symbols of despotism was unconstitutional. The main reason for overruling Decision 14/2000 was the Vajnai judgment of the European Court of Human Rights. The Constitutional Court also took into consideration the entry into force of a new Constitution called the Fundamental Law in 2012.

Having examined the constitutionality of the provision as a whole, the Court held that the challenged provision defined the range of criminal conducts too widely; public use of totalitarian symbol is punished in general. Section 269/B of the Criminal Code does not take into account the motive of the act, and the context and consequences of using these symbols. The provision defines the type of behaviour subject to criminal sanction too broadly, which might result in controversial judgments. It does not meet the requirements of constitutional criminal law, according to which any provision defining behaviour punishable under criminal law must be specific and clearly defined. The Constitutional Court accordingly held that the provision in question violated the principle of the rule of law and legal certainty and through this restricted disproportionately the freedom of expression. The Court annulled the provision *pro futuro* as of 30 April 2013, to allow Parliament sufficient time to prepare a provision in compliance with the Fundamental Law. The Constitutional Court also pointed out that the constitutional concerns with regard to Section 269/B are valid for Section 335 on the use of totalitarian symbols in the new, already promulgated but not yet effective Criminal Code.

III. Justices András Bragyova, Egon Dienes-Oehm, András Holló, László Kiss and Béla Pokol attached a concurring opinion and István Balsai, Barnabás Lenkovics, Péter Szalay and Péter Paczolay attached a dissenting opinion to the decision.

Supplementary information:

As of 1 April 2013 Article IX of the FL was supplemented by new Paragraphs 4 and 5. Under Article IX.4, exercise of the right to free expression cannot be aimed at violating the human dignity of other persons. Under Article IX.5, exercise of the right to free expression cannot be aimed at violating the dignity of the Hungarian nation or the dignity of any national, ethnic, racial or religious group. Members of such groups are entitled to turn to court as defined by an Act against any expression violating the group in order to enforce their claim related to the violation of their human dignity.

Languages:

Hungarian.

Identification: HUN-2013-1-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 01.03.2013 / **e)** 6/2013 / **f)** On the constitutionality of the Act on Churches / **g)** *Magyar Közlöny* (Official Gazette), 2013/35 / **h)**.

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
3.21 General Principles – **Equality**.
4.5.2 Institutions – Legislative bodies – **Powers**.
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:

Church, recognition.

Headnotes:

Allowing Parliament to decide on the status of churches could result in political decisions. Decisions in such cases should be taken by independent courts. The State must ensure that religious communities receive special status as "religion" based upon objective and reasonable criteria, and in compliance with the right to freedom of religion and the requirement of fair procedure. Legal remedy against such decisions must be guaranteed.

Summary:

I. Seventeen religious communities, which had previously operated as churches but had lost their status due to the new Act CCVI of 2011 on Churches (hereinafter, the "Act") submitted constitutional complaints. After analysing submissions from many religious organisations, the Commissioner for Fundamental Rights also turned to the Constitutional Court.

The applicants requested the review of the Act on both procedural and substantive grounds. The procedural complaints mainly concerned the violation of the rule of law, the procedural rules of legislation and the obligation to effectively consult the religious organisations. As regards the substantive complaints, the applicants' main concern was the annulment of the prerogative of Parliament to decide over the legal status of churches by a two-thirds majority. The applicants contended that the legal provisions regulating the recognition of churches were contrary to the principle of separation of power, to the right to fair procedure and to the right to legal remedy. The provision, without consideration for the constitutional principle of separation of powers, allowed Parliament to decide by itself on church status recognition without the right to an appeal. This was in their view unconstitutional.

According to the applicants, the close relationship to freedom of religion makes it indispensable for decisions on the recognition of churches and on bestowing religious status to meet all guarantees protecting fundamental rights. If the decision-maker has the discretion to bestow religious status, then the aspects of deliberation must be regulated by Act. The Act on Churches lacked such principles and provisions. There was no provision in the Act requiring reasoning in case of refusal. Finally, legal remedy must be guaranteed against decisions on church status; this was also missing from the Act on Churches. The applicants stressed that on the basis of the principle of separation of power, Parliament cannot carry out tasks during which it makes political decisions affecting fundamental civil rights, without having appropriate constitutional guarantees.

II. The Constitutional Court declared that, as a constitutional requirement, the State must ensure that religious communities get special status as "religions" based upon objective and reasonable criteria, and in harmony with the right to freedom of religion and the requirement of fair procedure. Furthermore, legal remedy against decisions on the special status must be ensured. However, it pointed out that it is not a constitutional requirement that every Church has the same rights or that the State cooperates with all the Churches to the same extent. Existing differences between religious communities could be taken into account by the legislator in accordance with the Fundamental Law provided this is not based on discrimination and is not the result of discriminatory practice.

The Constitutional Court pointed out that if the procedure set out in the previous Church Act has proved ineffective in terms of filtering out organisations performing non-religious activity and acting against organisations operating in breach of the law, Parliament is entitled to specify further the substantive conditions for acknowledgement as a Church, to incorporate additional guarantees within the acknowledgement procedure or to introduce more effective legal instruments against breaches of law. Acknowledgment of an organisation as having the status of a church is not considered as an acquired right protected by the Fundamental Law in the sense that it is possible to review or withdraw them if it later transpires that the preconditions for being deemed as a church did not exist. However, it is a constitutional requirement to ensure fair procedure and the possibility for legal remedy in connection with the procedure for reviewing church status.

The Constitutional Court held that the challenged Act made no provision for a duty to provide detailed reasoning if a religious organisation's request to be recognised as a church was turned down. The rejected religious community receives no official written explanation as to why it cannot be given or continue to hold religious status. There is no deadline within the Act for the Parliamentary Committee to make a proposal or for Parliament to make a decision and there is no guarantee of legal remedy should the application be rejected or in cases of lack of decision. Allowing Parliament to decide on the status of churches might result in decisions based on political aspects. Decisions in these individual cases, which should be assessed by legal discretion and to which there are also fundamental legal aspects, should be made by independent courts rather than Parliament, which is political by nature.

The Constitutional Court declared contrary to the Fundamental Law those provisions of the Act which resulted in the applicants losing their former status as churches. In view of the character of legal remedy of the constitutional complaints, it ordered the retroactive annulment of the unconstitutional provisions and excluded their application. Therefore, Decision no. 8/2012 of Parliament on the refusal of the acknowledgement as a Church and the unconstitutional provisions of the Act on Churches will have no legal effect. Those churches specified in the annex to Decision no. 8/2012 of Parliament and which submitted petitions to the Constitutional Court did not lose their status as churches; their transformation from Church to association could not be enforced.

The Constitutional Court emphasised that in its decision it did not examine whether the applicants met the conditions for acknowledgement defined in the Act on Churches, it reviewed the regulations of the Act in the framework of concrete norm control. The decision of the Constitutional Court did not affect the legal status of those Churches specified in the annex of the Act and acknowledged previously by Parliament.

III. Justices Elemér Balogh, András Bragyova, András Holló, Miklós Lévay attached a concurring opinion and István Balsai, Egon Dienes-Oehm, Barnabás Lenkovics, Péter Szalay and Mária Szívós attached a dissenting opinion to the decision.

Supplementary information:

As of 1 April 2013 Article VII of the FL was supplemented by Paragraphs 3-5. The new Paragraphs read as follows:

Parliament may recognise, in a cardinal Act, certain organisations that serve a religious mission as a church. The State collaborates with them in the public interest. A constitutional complaint may be filed against provisions of the cardinal Act concerning the recognition of churches.

The State and churches and other organisations serving a religious mission operate separately. Churches and other organisations that serve a religious mission are independent.

The Cardinal Act defines the detailed rules pertaining to churches. It may require an organisation with a religious mission to fulfil certain requirements in order to be recognised as a church, namely it must operate for a considerable period of time, have societal support and be suitable to cooperate with in the interest of community objectives.

Cross-references:

- Decision 164/2011, *Bulletin* 2011/3 [HUN-2011-3-006].

Languages:

Hungarian.

Ireland
Supreme Court

Important decisions

Identification: IRL-2013-1-001

a) Ireland / **b)** Supreme Court / **c)** / **d)** 09.04.2013 / **e)** SC 019/2013 / **f)** Marie Fleming v. Ireland, Attorney General, the Director of Public Prosecutions, and Irish Human Rights Commission, *Amicus Curiae* / **g)** [2013] IEHC 19 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality**.
5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability**.
5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty**.

Keywords of the alphabetical index:

Suicide, assisted, crime / Autonomy, dignity, values / Law, equality, discrimination.

Headnotes:

There is no constitutional right which the State, including the courts, must protect and vindicate, either to commit suicide, or to arrange for the termination of one's life at a time of one's choosing.

Summary:

I. The Supreme Court is the final court of appeal in civil and constitutional matters. It hears appeals from the High Court, which is a superior court of full original jurisdiction in all matters of law in the civil, criminal and constitutional spheres. The decision of the Supreme Court summarised here arose from an appeal from the High Court decision to the Supreme Court. The Appellant sought a declaration that Section 2.2 of the Criminal Law (Suicide) Act 1993 is invalid having regard to the provisions of the Constitution. The Appellant sought an order that Section 2.2 of the Act of 1993 is incompatible with the State's obligations under the European Convention on Human Rights; and in the alternative, sought an order directing the Director of Public Prosecutions to promulgate guidelines stating the factors that would be taken into account in deciding whether to prosecute or consent to a prosecution in circumstances such as this, that will affect a person who assists the appellant in ending her life. The High Court dismissed the claims made by the Appellant. The Appellant filed an appeal insofar as the High Court declined to grant a declaration that Section 2.2 of the Act of 1993 is invalid having regard to the provisions of the Constitution; and that it is incompatible with the State's obligations under the European Convention on Human Rights. There was no appeal against the judgment in respect of the role of the Director of Public Prosecutions or the provision of guidelines by the Director.

The Appellant is 59 years of age and lives with her partner. At age 32, in 1986, she experienced her first episode of multiple sclerosis and a diagnosis of that illness was made in 1989. While the Appellant considered travelling to Switzerland to avail of the faculty offered by Dignitas to end her own life five years ago, she postponed the decision because of the wishes of her partner and the location of the clinic. The Appellant claimed that she would end her life if she were able to do so and regrets not doing so before she lost the use of her arms. Her wish is to have assistance for a peaceful dignified death in the arms of her partner with her children present. However, she did not wish to leave a legacy behind where her partner or children would be prosecuted.

Suicide was a crime under the law until it ceased to be so by virtue of Section 2.1 of the Act of 1993. The Oireachtas has created a new specific offence, as set out in Section 2.2 of the Act of 1993, which provides:

> "A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years".

It is that law which the Appellant challenged in her appeal to the Supreme Court.

II. The Supreme Court considered carefully comparative cases from other jurisdictions and found it significant that a claim to a right to assisted suicide has come before many common law and convention bound courts, including those of the United Kingdom, the United States of America, Canada and the European Court of Human Rights, without having succeeded in any of those superior courts. However, the issue for the Supreme Court was whether there is the right sought by the Appellant under the Constitution of Ireland.

The provision of Section 2.2 of the Act of 1993 enjoys a presumption of constitutionality. The Court noted that while suicide has ceased to be a crime, the fact that it has so ceased does not establish a constitutional right. The repeal of the common law offence of suicide means that it is now legally open to a person to do the act which was previously prohibited. Any such right as the Appellant seeks to identify would require to be found in the Constitution. The Supreme Court held that there is no explicit right to commit suicide, or to determine the time of one's death, in the Constitution. Thus, any such right as sought for by the Appellant has to be found as part of another expressed right or in an un-enumerated right.

The Appellant laid the foundation of her case on the express right to life in Article 40.3.2. However, the Supreme Court stated that right to life does not import a right to die. The Court stated that while it is of the essence of certain types of rights, such as that of the right to associate, that they logically apply as a corollary, a right to dissociate, that reasoning cannot be applied to all rights guaranteed by the Constitution. In particular, the protection of the right to life cannot necessarily or logically entail a right which the State must also respect and vindicate, to terminate that life or have it terminated. Thus, insofar as the Constitution, in the rights it guarantees, embodies the values of autonomy and dignity and more importantly the rights in which they find expression, they do not extend to a right to assisted suicide. Accordingly, the Supreme Court concluded that there is no constitutional right which the State, including the courts, must protect and vindicate, either to commit suicide, or to arrange for the termination of one's life at a time of one's choosing.

The Appellant alleged that Section 2.2 of the Act of 1993 has the effect that she is treated unequally in comparison with persons who are able to commit suicide without assistance and it is thus incompatible with Article 40.1 of the Constitution. Since the enactment of Section 2.1 of the Act of 1993, everyone is free to do so. What prevents the Appellant from committing suicide is, on her own evidence, her disability. The Appellant was constrained to argue that the Oireachtas was obliged, when adopting Section 2.2, to provide an exception.

The Supreme Court held that it does not consider that the constitutional principle of equal treatment before the law, as interpreted and applied in its judgments, extends to categorise as unequal the differential indirect effects on a person of an objectively neutral law addressed to persons other than that person. This is particularly so when the prohibition contained in Section 2.2 is at least ostensibly a performance of the constitutional obligation contained in Article 40.1 and pursues an important objective

The Supreme Court rejected the submission that there exists a constitutional right for a limited class of persons, which would include the Appellant. The Supreme Court concluded that there is no constitutional right to commit suicide or to arrange for the determination of one's life at a time of one's choosing.

The Supreme Court held that nothing in its judgment should be taken as necessarily implying that it would not be open to the State, in the event that the Oireachtas were satisfied that measures with appropriate safeguards could be introduced, to legislate to deal with a case such as that of the Appellant.

The Appellant made a claim also for a declaration of incompatibility under Section 5.1 of the European Convention on Human Rights Act, 2003, which the High Court rejected, and which she appealed to the Supreme Court.

The Supreme Court found assistance in *Pretty v. United Kingdom* (Application no. 2346/02), which was decided by the European Court of Human Rights, and which held that no right to die could be derived from Article 2 ECHR. In relation to Article 8 ECHR, the Court in Strasbourg held that it was primarily for the States to assess the risk of abuse if the general prohibition on assisted suicide were relaxed or if exceptions were to be created.

The Supreme Court held that the complex issue of assisted suicide has been assessed, and the legislature has legislated in Section 2.2 of the Act of 1993. The Supreme Court, consequently, dismissed the appeal which was brought on the basis of Section 5 of the Act of 2003, seeking a declaration of incompatibility. In conclusion, for the reasons given, the Supreme Court dismissed the appeal of the Appellant in what it noted was a very tragic case.

Cross-references:

The factual circumstances of this case overlap with those in *Cosgrave v. Director of Public Prosecutions* [2011] IESC 24, *Bulletin* 2012/2 [IRL-2012-2-003].

Languages:

English.

Italy
Constitutional Court

Important decisions

Identification: ITA-2013-1-001

a) Italy / **b)** Constitutional Court / **c)** / **d)** 11.03.2013 / **e)** 40/2013 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 20.03.2013 / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.
5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.
5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.
5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living**.
5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

Keywords of the alphabetical index:

Permit / Residence / Support, allowance / Unfitness for work, allowance / Foreigners.

Headnotes:

The provision referred to the Constitutional Court (Article 80.19 of Law no. 388 of 23 December 2000) is unconstitutional in that it makes granting support allowance *(indennità di accompagnamento)* and the unfitness for work allowance *(pensione di inabilità)* to extra-Community foreign nationals legally residing in the national territory subject to holding a residence card (now called a "long-term EC residence permit"), violating Article 117.1 of the Constitution. The reason is that it infringes Article 14 ECHR and the principle of non-discrimination. There are also breaches of Article 2 of the Constitution (protection of inviolable rights), Article 3 of the Constitution (prohibition of discriminatory treatment), Article 29 of the Constitution (rights of the family), Article 32 of the Constitution (right to health), and Article 38 of the Constitution (social welfare).

Summary:

I. Urbino and Cuneo Regional Courts raised the question of the constitutional legitimacy of a provision (Article 80.19 of Law no. 388 of 23 December 2000), which makes the granting of the support allowance *(indennità di accompagnamento)* subject to holding a residence permit. This permit is issued to extra-Community foreigners after five years of permanent residence in the national territory.

II. The Regional Court considers that this allowance, which is payable to persons who suffer from a serious disability constituting a condition for unfitness for work, is vital for meeting the person's basic subsistence needs. Therefore the provision making the granting of this social welfare aid subject to a minimum period of residence in the national territory is contrary to Article 3 of the Constitution (principle of reasonableness), Article 32 of the Constitution (right to health) and Article 117.1 of the Constitution (compliance by the legislature with international obligations), as well as breaching the European Convention on Human Rights, particularly Article 14 thereof.

The Cuneo Regional Court also raised a question concerning the constitutional legitimacy of the same provision to the extent that it confines the granting of an allowance for total unfitness for work *(pensione di inabilità)* to extra-Community foreigners holding a residence permit. The Regional Court recalls that in its Judgment no. 187 of 2010, the Constitutional Court declared unconstitutional the provision that is the subject of the current reference to the Court. The reason is that it excluded the same individuals from the monthly disability benefit *(assegno di invalidità),* which is granted to persons with less serious disabilities than those eligible for the unfitness for work allowance. The incompatibility with Article 14 ECHR and the principle of non-discrimination as interpreted by the European Court of Human Rights is therefore self-evident. Consequently there is once again a breach of Article 117.1 of the Constitution. However, the Court also finds a violation of Article 2 of the Constitution (protection of inviolable rights), Article 3 of the Constitution (prohibition of

discriminatory treatment), Article 29 of the Constitution (on the protection of the family), Article 32 of the Constitution (right to health) and Article 38 of the Constitution (social welfare).

According to the provision that is the subject of the constitutionality question, the social measures aimed at foreigners are subject to holding the EC residence permit in the case of long-term residents, replacing the national residence card in 2007.

The long-term permit may be issued on the following conditions, provided that the applicant must have:

1. a specified minimum income;
2. housing that must meet certain conditions;
3. held a valid residence permit for at least five years.

By making social aid subject to conditions required under the regulations on long-term EC residence permits, which has different criteria attached, the 2000 legislature made it more difficult for specified foreign nationals who experience hardship because of their situation as persons afflicted with particularly serious disabilities to obtain financial support which is granted to nationals meeting the same conditions. So there is discrimination not only against the individuals in question, whose enjoyment of their fundamental rights is infringed, but also against their families, because many of those affected are minors. This discrimination constitutes a breach of Article 14 ECHR as interpreted by the Strasbourg Court.

The serious health conditions affecting persons who applied for a support allowance and an allowance for total unfitness for work and who have serious disabilities raise some extremely important constitutional issues. They include the right to health, solidarity with underprivileged persons and the rights of the family, which values also enjoy protection at the international level.

Cross-references:

See Judgments no. 306 of 2008 (*Bulletin* 2008/2), no. 187 of 2010 (*Bulletin* 2010/2) and no. 329 of 2011 (*Bulletin* 2011/3). The Court directly applies Article 14 ECHR as interpreted by the European Court of Human Rights, by means of Article 117.1 of the Constitution, which requires the legislature to respect “the constraints deriving from EU legislation and international obligations”.

Languages:

Italian.

Korea
Constitutional Court

Important decisions

Identification: KOR-2013-1-001

a) Korea / **b)** Constitutional Court / **c)** / **d)** 24.04.2012 / **e)** 2010Hun-Ba164 / **f)** School Meals Money / **g)** 24-1(B), *Korean Constitutional Court Report* (Official Digest), 49/… / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Education, compulsory / Education, free, limit / Education, public, free of charge / Equality / Right to education.

Headnotes:

The services to be provided free of charge under Article 31 of the Constitution (which stipulates that compulsory education shall be free of charge) must be, in principle, limited to the costs and expenses indispensable for realising the equal right to education under the Constitution.

Summary:

I. During the period from 3 March 2003 to 16 February 2006, the petitioners, who were middle school students and their parents, paid money for school meals. They filed a suit for reimbursement of this expense against the State government and local governments, Gyeonggi-do and Anyang-si, for their unfair profit, on the basis that requiring parents to pay for school meals violates Article 31 of the Constitution which guarantees that compulsory education shall be free of charge. While the underlying case is pending, the petitioners filed a motion with the court seised of the case, requesting that court to apply to the Constitutional Court for constitutional review concerning whether Article 8.2 and 8.3 of the School Meals Act is unconstitutional. However, the court denied that motion. Against such denial, the petitioners, on 12 April 2010, filed this constitutional complaint with the Court, arguing that the said provisions of the School Meals Act are unconstitutional.

II. In this case, the Constitutional Court held the provisions at issue to be constitutional as long as those provisions allow parents of schoolchildren to bear partial expenses for school meals while their children attend middle schools as part of the compulsory programme of education.

The Court considered that, notwithstanding that it may be desirable that all the parts necessary to school education in terms of compulsory education are provided free of charge, it was also necessary to consider the financial conditions of the government spending money in realising people's social rights, including rights to equal education. Thus, in principle, the scope of services provided free of charge in the provision of compulsory education must be limited to costs and expenses indispensable for realising the equal right to education guaranteed by the Constitution – that is to say, the amount of expenditure which is indispensable to ensure that all the students can study with no economic discrimination.

Thus, the services to be included in the scope of services provided free of charge in terms of compulsory education must be those essential for the actual and equal provision of compulsory education and the examples can be: exemption of the entrance fee; personnel expenses and maintenance expenses for maintaining human resources and facilities, such as teachers and school buildings; and exemption of the financial burden of funding for new facilities. Besides, other expenses incurred in the course of providing compulsory education which are indispensable for securing actual and equal compulsory education are to be included in the scope of services provided free of charge. The determination as to whether the expenses other than those expenses as described above must be included in the scope of services provided free of charge regarding compulsory education should be made by the legislature based on legislative policy, taking into account the government's financial situation, the income level of citizens, the economic situation of the parents of school-going children and the social consensus.

The Court considered that, even though school meals have certain educational aspects, they cannot be deemed an essential and crucial aspect of securing actual equality in compulsory education. Thus, the legislature must be permitted to exercise its discretion

in legislation with respect to expenditure on school meals. Although the challenged provisions permit some of such expenses to be borne by the parents of school-goers, expenses for the basic infrastructure for the execution of school meals are excluded from the expenditure to be borne by such parents. In addition, there are statutory provisions setting forth State or local government financial support to alleviate the financial burden on parents related to school meals. In particular, there are provisions providing for financial support for students from low-income families. For the forgoing reasons, the Court held that it is hard to say that the challenged provisions go beyond the scope of the legislature's policy-making power and thus violate the principle that compulsory education shall be provided at no cost stipulated in the Constitution.

Languages:

Korean, English (translation by the Court).

Latvia
Constitutional Court

Important decisions

Identification: LAT-2013-1-001

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 28.03.2013 / **e)** 2012-15-01 / **f)** On Compliance of Part 3, 5, 7 and 8 of Section 436 of Road Traffic Law with Article 92 of the Constitution of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), 02.04.2013, no. 63 (4869) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing**.
5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence**.

Keywords of the alphabetical index:

Administrative offence / Penalty, administrative, fine / Penalty, disproportionate / Penalty, individualisation / Road traffic, offence.

Headnotes:

The right of free access to court can be restricted only in cases of utmost necessity and only insofar as it does not deprive a person of a trial as to the merits of his or her case.

If a person is not heard before and after an administrative penalty has been imposed, and where a person has no right to request review of the imposed penalty, it must be considered that the person has been deprived of the right to fair trial as to merits.

Summary:

I. The complaint was submitted by the Ombudsman. He contested the constitutionality of a legal regulation in the Road Traffic Law, which provides for a special administrative process in relation to offences which have been recorded with technical means, without stopping the vehicle.

The applicant argued that in accordance with the presumption of innocence the State is required to prove a person's guilt in committing an offence; it is not for the person to prove his or her innocence. If a person is recognised as being guilty for committing an offence, even though the case does not contain evidence proving the person's guilt, the presumption of innocence is violated. The Ombudsman also noted that the right to defend one's interests in a fair trial depends upon the person's possibility to appeal against a decision adopted by an institution. However, the existing procedure, in cases where a guilty person fails to pay the fine in accordance with the procedure and within the terms set out by law, prohibits the owner or the registered holder of a vehicle, if he is not the person who committed the offence, to exercise this fundamental right.

II. The Constitutional Court expanded the limits of the claim.

The Constitutional Court concluded that the contested regulation allows a situation in which a person who did not commit the respective offence – namely, the owner of the vehicle – is exposed to a sanction where another person has failed to fulfil his obligation to pay the administrative fine. The only possibility for the owner to avoid these adverse consequences is to pay the monetary fine for the offence committed by another person.

The Constitutional Court recognised that in this case the issue under examination is not the compliance of the contested regulation with the presumption of innocence, but whether the contested regulation complies with the right to be heard and the right of access to a fair trial.

The Constitutional Court noted that, irrespective of whether the offence has been committed by the driver of a vehicle, who is not the owner of the vehicle, or a driver who is the owner of the vehicle, the contested regulation imposes a penalty upon these persons and an obligation to ensure that the penalty is paid. However, the contested regulation does not provide for any possibility for these persons to express their opinion concerning the existence of the offence and the circumstances thereof before the penalty is imposed. Thus, the contested norms envisage restriction of an element of the right to fair trial; the right to be heard.

The Constitutional Court concluded that the restrictions have been established by law and have a legitimate aim – protection of public interests – and that the contested regulation is appropriate for reaching the legitimate aim.

The compliance of the regulation with the principle of proportionality was assessed separately for the drivers and the owners of the vehicles.

Since drivers have the right to request a review of the imposed penalty, the Court held the restrictions on the rights of drivers to be proportionate.

As regards the restrictions on the rights of a vehicle owner who has not been a driver and who has not committed the offence, the Court observed that the restriction is significant. The Constitutional Court decided that the contested regulation, insofar as it does not envisage a right for the vehicle owner to request a review of the imposed penalty, is incompatible with the principle of proportionality and, thus, also with the right to fair trial.

The Constitutional Court held that, in imposing a penalty for an administrative offence, which has been recorded with technical means, without stopping the vehicle, the right to fair trial must be respected. The Court held that restrictions to this right are proportional insofar as the right to request a review of the penalty imposed is envisaged, but are not proportional insofar as they provide for adverse consequences for the owner of the vehicle but do not envisage appropriate judicial remedies for him.

Cross-references:

Previous decisions of the Constitutional Court:

- Judgment 2001-07-0103 of 05.12.2001;
- Judgment 2001-10-01 of 05.03.2002;
- Judgment 2001-17-0106 of 20.06.2002; *Bulletin* 2002/2 [LAT-2002-2-006];
- Judgment 2002-04-03 of 22.10.2002; *Bulletin* 2002/3 [LAT-2002-3-008];
- Judgment 2002-20-0103 of 23.04.2003; *Bulletin* 2003/1 [LAT-2003-1-005];
- Judgment 2003-04-01 of 27.06.2003; *Bulletin* 2003/2 [LAT-2003-2-009];
- Judgment 2004-16-01 of 04.01.2005;
- Judgment 2004-18-0106 of 13.05.2005; *Bulletin* 2005/2 [LAT-2005-2-005];
- Judgment 2005-12-0103 of 16.12.2005;
- Judgment 2005-18-01 of 14.03.2006;

- Judgment 2005-22-01 of 23.02.2006;
- Judgment 2006-07-01 of 02.11.2006;
- Judgment 2007-01-01 of 08.06.2007; *Bulletin* 2007/3 [LAT-2007-3-004];
- Judgment 2007-21-01 of 16.04.2008;
- Judgment 2007-23-01 of 03.04.2008;
- Judgment 2008-04-01 of 05.11.2008; *Bulletin* 2008/3 [LAT-2008-3-005];
- Judgment 2008-09-0106 of 16.12.2008;
- Judgment 2008-47-01 of 28.05.2009; *Bulletin* 2009/2 [LAT-2009-2-003];
- Judgment 2009-12-03 of 07.01.2010;
- Judgment 2009-43-01 of 21.12.2009; *Bulletin* 2009/3 [LAT-2009-3-005];
- Judgment 2009-93-01 of 17.05.2010;
- Judgment 2010-01-01 of 07.10.2010;
- Judgment 2010-06-01 of 25.11.2011; *Bulletin* 2011/1 [LAT-2011-1-001];
- Judgment 2010-51-01 of 14.03.2011;
- Judgment 2010-60-01 of 30.03.2011;
- Judgment 2010-71-01 of 19.10.2011;
- Judgment 2010-72-01 of 20.10.2011;
- Judgment 2011-16-01 of 20.04.2012;
- Judgment 2012-02-0106 of 18.10.2012;
- Judgment 2012-06-01 of 01.11.2012;
- Judgment 2012-09-01 of 31.01.2013.

European Court of Human Rights:

- *Engel and Others v. the Netherlands*, Judgment of 08.06.1976, para 82;
- *Sergey Zolotukhin v. Russia*, Judgment of 10.02.2009, para 52-56;
- *Krumpholz v. Austria*, Judgment of 18.03.2010, para 40-41;
- *Öztürk v. Germany*, Judgment of 21.02.1984, para 46-54;
- *Lutz v. Germany*, Judgment of 25.08.1987, para 182;
- *Falk v. the Netherlands*, Decision of 19.10.2004;
- *Salabiaku v. France*, Judgment of 07.10.1988, para 26-30;
- *Radio France and Others v. France*, Judgment of 30.03.2004, para 24.

Languages:

Latvian, English (translation by the Court).

Mexico
Electoral Court

Important decisions

Identification: MEX-2013-1-001

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 26.06.2009 / **e)** SUP-RAP-175/2009 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Media, libel, right to reply / Media, libel, electoral regulation infringement.

Headnotes:

Determining that a journalist's opinion may not constitute an electoral infringement would imply that journalists have unrestricted freedom of speech which may prevail over the right to honour and reputation. Affirming that in order to commit an electoral infringement a party, candidate or political actor should have paid for the referred news stories would imply that any non-political actor may finance articles or reports affecting candidates or political parties without responsibility to its political condition. Such reasoning does not comply with constitutional principles governing electoral matters.

Summary:

I. The appeal under file SUP-RAP-175/2009 was filed by Eduardo Arguijo Valdenegro in his capacity as Chairman of the State Secretariat of Nuevo Leon from the Democratic Revolution Party (PRD) and Alberto Picasso Barroel in his capacity as Federal Congress Candidate in the constituency no. 08.

The present case arises from resolution within the file CG276/2009 of the General Council of the Federal Electoral Institute, regarding the claim filed by Eduardo Arguijo Valdenegro against the Editorial El Sol trade name *"El Norte"* for what the plaintiff believes are constitute infringes to the Federal Code of Electoral Institutions and Procedures.

The authority of first instance considered that the news stories provided by the plaintiffs on 6 and 7 May lacked of enough evidences to support that the Editorial had infringed electoral regulations. The authority concluded that the new stories contained a personal opinion of the journalist and were not financed by any political party, national political organisation, candidate for any public office or any of the authorities or public servants of any of the federal powers. Accordingly, considered that the Article 345 of the Federal Code of Electoral Institutions and Procedures did not meet the facts.

II. The Electoral Tribunal heard the facts and ruled on the basis of a project presented by: Electoral Justice Manuel González Oropeza.

Contrary to the authority reasoning, the Court considered that in the news story on 6 May 2009, included beyond the personal opinion of the journalist facts and allegations to which the plaintiff were entitled to claim.

According to the Court, the authority was not in its right to point out that the news story provided by the plaintiffs were insufficient to accredit the infringement to electoral regulations and that it only contained the journalist's opinion. The Court affirmed that the authority misjudged by considering that in order to infringe the right to honour and reputation a political party should have paid for the news story.

By determining that a journalist's opinion may not constitute an electoral infringement, the authority lacks of ground, since such reasoning would imply that journalists have unrestricted freedom of speech which may prevail over the right to honour and reputation. Such reasoning does not comply with constitutional principles governing electoral matters.

The authority was also mistaken when supporting its denial by affirming that in order to commit an electoral infringement a party, candidate or political actor should have paid for the referred news stories, since following such reasoning would imply that any non-political actor may finance articles or reports affecting candidates or political parties without responsibility to its political condition.

Validating this reasoning would allow parties and candidates to execute negative electoral acts through ordinary citizens. In this sense, Article 233.3 of the Federal Code of Electoral Institutions and Procedures establishes that all political parties, candidates and pre-candidates can have the right to reply as set forth in Article 6 of the Constitution in respect to all information given by the media, when considering that it has distorted facts.

In this regard, having established that the news story does not represent solely to a journalist opinion but also included electoral matters, the responsible authority should have admitted the complaint and initiated a disciplinary proceeding, and, if applicable, timely determine whether a violation of the right to reply was committed under Article 6 of the Political Constitution of the United Mexican States and Article 233.3 of the Federal Code of Electoral Institutions and Procedures.

Stating as the responsible authority does, that a constitutional right, as the right to reply, cannot be implemented by any citizen, because the appropriate regulations have not been approved is equivalent to denying the right to access justice.

Consequently, the Court decided to revoke the resolution of the General Council of the Federal Electoral Institute, in respect to the complaint filed by Eduardo Arguijo Valdenegro against El Sol with trade name El Norte, by facts considered violations of the Federal Code of Electoral Institutions and Procedures, and revoked the agreement of the Executive Secretary in his capacity as Secretary of the General Council of the Federal Electoral Institute and ordered the authority to immediately admit the complaint and initiate the corresponding disciplinary procedure.

Languages:

Spanish.

Moldova
Constitutional Court

Important decisions

Identification: MDA-2013-1-001

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 22.04.2013 / **e)** 4 / **f)** Constitutionality review of the Decrees of the President of the Republic of Moldova no. 534-VII of 8 March 2013 on Government dismissal, in its part on maintaining in office the dismissed Prime Minister by a motion of no confidence (for suspicions on corruption) from 8 March 2013 until the formation of the new government and no. 584-VII of 10 April 2013 on the nomination for office of Prime Minister / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.
3.9 General Principles – **Rule of law**.
4.6.4.1 Institutions – Executive bodies – Composition – **Appointment of members**.
4.6.4.3 Institutions – Executive bodies – Composition – **End of office of members**.

Keywords of the alphabetical index:

Corruption prevention / Democratic state, core elements / Government, confidence, vote / Government, officials, dismissal, reason / Minister, removal from office / Prime Minister, candidate, proposal.

Headnotes:

The Preamble of the Constitution recognises the rule of law, civic peace, democracy, human dignity, fundamental human rights and freedoms, the free development of human personality, justice and political pluralism as supreme values. According to Article 7, the Constitution shall be the Supreme Law of the State. No law or any other legal act, which contravenes the provisions of the Constitution, shall have legal force.

Article 56 of the Constitution asserts devotion to the country as sacred and citizens holding public offices, as well as military persons shall be held responsible for loyal fulfilment of the obligations they are bound to and in cases foreseen by law, they shall take the oath as requested.

The Supreme Law notes that the office of a member of Government shall cease in case of resignation, revocation, incompatibility or demise (Article 100). Furthermore, in cases where it is impossible for the Prime Minister to discharge his/her functional duties or in case of his/her demise, the President shall designate another member of Government to fulfil the interim office of Prime Minister until the formation of the new Government (Article 101).

Summary:

I. A complaint was lodged at the Constitutional Court by a group of deputies, requesting interpretation of Articles 98, 100, 101, 103 and 106 of the Constitution, which regulate the dismissal of the Government as a result of a 'no confidence' vote (the adoption of a non-confidence motion) by Parliament. In particular, the authors of the complaint requested the Constitutional Court's interpretation of Articles 98, 100, 101, 103 and 106 of the Constitution, as to whether:

"1. The Prime Minister of a Government dismissed by a non-confidence motion, adopted as a result of distrust expressed by the Parliament for accusations of corruption, excess of official authority and for traffic of influence is entitled to continue exercising the mandate of Prime Minister until members of the new Government swear the oath or the President is obliged to nominate by a decree another *ad interim* prime minister, from the members of the dismissed Government";

2. When nominating the *ad interim* Prime Minister from the members of the dismissed Government, the President must, as an obligation, consult the parliamentary factions on the candidature that shall be nominated from the members of the dismissed Government or whether it is the case, the nomination of the *ad interim* Prime Minister, is a discretionary right of the President."

Subsequently, the authors of the complaint partially amended the reasoning and scope of the complaint, requesting the Court to undertake constitutionality review of the Decrees of the President no. 534 of 8 March 2013 and no. 584 of 10 April 2013, from the rule of law principle perspective.

II. Hearing the reasoning of the parties from the content of the complaint, the Court observed that it is referring, in essence, to the possibility of continuing the mandate as Prime Minister by a person who has led a Government dismissed by a non-confidence motion for acts of corruption.

Moreover, the Court asserted that corruption undermines democracy and the rule of law and that, therefore, the fight against corruption is an integral part of assuring respect for the rule of law.

The Court stated, as a matter of principle, that every political mandate has to be based on high standards with regard to integrity. Further, where this condition is not fulfilled, ignoring this finding and appointing or maintaining persons in leading positions whose integrity is in doubt implies a lack of respect towards the state based on the rule of law.

The Court pointed out that, in a genuine democracy, normality resides in the immediate resignation of the individuals who have lost the public's trust, with no need for their dismissal. For that purpose, the Court invoked the example of France, where a special practice has been developed for such cases, called Bérégovoy-Balladur: under this practice, an accusation against a minister (or even the Prime Minister) of committing some reprehensible acts, even lacking the existence of judicial documents, leads to his resignation or to his immediate removal from office (there have been 11 confirmed cases of this nature during the Fifth Republic). Following the same logic, in Germany, the President resigned due to obtaining credit under preferential conditions, and the Minister of Education and the Minister of Defence for suspicion of plagiarism. Similarly, the President of Hungary resigned following accusations of plagiarism.

The Court held that in such situations, where the dismissed persons from the government act for reasons of corruption, it would be not only reprehensible, but even inadmissible to reappoint them in leading positions in the state (at a short period of time, where the accusations which led to the dismissal have not been disproved).

In this context, it is contrary to rule of law principles to nominate a person for a leading position whose integrity continues to be in doubt or who has been dismissed for reasons of corruption.

In light of the foregoing, the Court held, with the value of principle that rule of law is not a fiction that only has a declaratory nature. The functioning of the rule of law must be manifested by practical actions. A Prime Minister who tolerates ministers suspected of corruption in the Government composition, against whom criminal prosecutions have been initiated, shows defiance to the rule of law principles and denotes a clear lack of integrity, thus, becoming incompatible with the held position.

In part regarding the appointment of a person as Prime Minister, the Court reiterated that a Prime Minister of a dismissed Government by a vote of no confidence for suspicions of corruption, manifesting defiance to rule of law principles and denoting a clear lack of integrity, has become incompatible with discharging his functional duties. Therefore, the appointment of such a person as Prime Minister is contrary to the rule of law principle (Article 1.3 of the Constitution).

For the foregoing reasons, the Constitutional Court, unanimously, recognised as constitutional Presidential Decree no. 534-VII on the resignation of the Government of 8 March 2013. Moreover, the Court declared as unconstitutional the Presidential Decree no. 584-VII on the nomination of the candidate for the position of Prime Minister of 10 April 2013. Furthermore, the Court explained in the meaning of Articles 1.3, 101.2 and 103.2 of the Constitution:

- The Prime Minister of the dismissed Government by a motion of no confidence for the suspicions of corruption is unable to exercise his duties;
- In the case of Government dismissal by a motion of no confidence due to suspicions of corruption, the President has the constitutional obligation to designate an *ad interim* Prime Minister from the Government members whose integrity was not affected;
- The President is not obliged to consult the parliamentary factions for the designation of an *ad interim* Prime Minister.

Languages:

Romanian, Russian.

Netherlands
Council of State

Important decisions

Identification: NED-2013-1-001

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 09.01.2013 / **e)** 201200317 / **f)** X v. State Secretary for Security and Justice / **g)** *Landelijk Jurisprudentienummer*, BY8012 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Marriage, right, limitation.

Headnotes:

Refusal to grant permission to prospective spouses to be represented at the occasion of the contracting of their marriage does not violate the right to marry.

Summary:

I. The State Secretary for Security and Justice (hereinafter, the "State Secretary") refused permission to X (a citizen; hereinafter, the "applicant") and Y (an interested party who lived in Morocco), to be represented at the occasion of the contracting of their marriage in the presence of the Dutch Registrar of Civil Status. Article 1:65 of the Dutch Civil Code requires that the prospective spouses must appear in person before the Registrar of Civil Status in order to contract their marriage. For compelling reasons the Minister of Security and Justice may grant them permission to be represented at the occasion of the contracting of their marriage by a person who is specifically authorised by authentic deed to act as their representative, or as the representative of one of them (Article 1:66 of the Civil Code). According to the State Secretary, the fact that a visa to travel from Morocco to the Netherlands had not been issued to Y did not qualify as a 'compelling reason', as it had neither been established that Y would not be able to travel to the Netherlands in the future, nor that X could not travel to Morocco to contract the marriage. The applicant argued that the State Secretary's refusal was unlawful, on the basis, *inter alia*, that the decision violated his right to marry under Article 12 ECHR. The District Court found for the State Secretary. The applicant then lodged an appeal to the Administrative Jurisdiction Division of the Council of State.

II. The Administrative Jurisdiction Division of the Council of State (hereinafter, the "Council of State") held that Article 12 ECHR had not been violated: the applicant's right to marry had been interfered with, but following the case-law of the European Court of Human Rights, this interference was held to be prescribed by law, despite the fact that the 'compelling reasons' criterion under Article 1:66 of the Civil Code left the State Secretary a margin. The Council of State considered that it followed from the European Court of Human Rights' case-law that limitations of the right to marry must not restrict or reduce the right to marry in such a way or to such an extent that the very essence of the right is impaired. However, in the instant case, the Council of State held that the formal requirements set out in Articles 1:65-1:66 of the Civil Code did not impair the essence of the right to marry, as these provisions did not operate to prevent X's marriage to Y.

Supplementary information:

The right to marry is not enshrined in the Netherlands Constitution.

Cross-references:

European Court of Human Rights:

- *Rekvenyi v. Hungary*, 25390/94, 20.05.1999;
- *Jaremowicz v. Poland*, 24023/03, 05.01.2010.

Languages:

Dutch.

Identification: NED-2013-1-002

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 13.02.2013 / **e)** 201202839 / **f)** X v. the Tax and Customs Administration / **g)** *Landelijk Jurisprudentienummer*, BZ1256, *Administratie frechtelijke Beslissingen* 2013, 125, *Jurisprudentie Vreemdelingenrecht* 2013, 146 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

2.1.1.4 Sources – Categories – Written rules – **International instruments**.
2.2.1 Sources – Hierarchy – **Hierarchy as between national and non-national sources**.
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

Keywords of the alphabetical index:

Benefit, right / Child, best interests.

Headnotes:

The application of statutory provisions based on a principle which denies benefits to aliens without a residence permit may be unlawful in very special circumstances, including the interests of the child.

Summary:

I. X (an alien; hereinafter, the "applicant") had applied to the Tax and Customs Administration for a supplementary contribution to the living expenses of her child. The applicant lodged objections against the refusal, which were turned down by the Tax and Customs Administration. The applicant then initiated proceedings in the District Court, which allowed her appeal. The Tax and Customs Administration then appealed to the Administrative Jurisdiction Division of the Council of State (hereinafter, the "Council of State"), which allowed its appeal.

II. The (Special) Child Benefit Act *(Wet op het kindgebonden budget)* provides that supplementary child benefits can only be paid to those who are entitled to standard child benefits under the (Regular) Child Benefit Act *(Kinderbijslagwet)*. The latter Act exempts aliens who do not hold a residence permit. For this reason the Tax and Customs Administration had turned down the applicant's application.

As the relevant statutory provisions not only distinguished on the basis of nationality but also on the basis of residence, the test for the justification of such distinctions was not the 'very weighty reasons' test but a 'sufficient reasons' test.

The Council of State held that turning down an application for a special child benefit by an illegal alien may in very special circumstances amount to a conflict with self-executing treaty provisions, in this case Article 14 ECHR, in conjunction with Article 8 ECHR, so that the relevant statutory provisions ought not be applied in the case concerned (Article 94 of the Constitution). The Council of State stressed that in this respect the interests of the child had to be taken into account, despite the fact that it was the parent (rather than the child) who may be entitled to the benefit. However, in the case at hand such circumstances had not been pleaded.

Cross-references:

- Court of Cassation, 23.11.2012, 11/0391.

Languages:

Dutch.

Identification: NED-2013-1-003

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 25.02.2013 / **e)** 201301173 / **f)** VEB and others v. the Minister of Finance / **g)** *Landelijk Jurisprudentienummer*, BZ 2265, *Administratie frechtelijke Beslissingen* 2013, 46, *Jurisprudentie Bestuursrecht* 2013, 68, *Jurisprudentie Ondernemingsrecht* 2013, 68 / **h)** CODICES (Dutch, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Bank / Expropriation, procedure / Nationalisation.

Headnotes:

An expropriation order based on the Financial Supervision Act in relation to a bank's securities and assets infringed neither the applicants' rights of access to court nor their property rights.

Summary:

I. The Minister of Finance issued an expropriation order based on the Financial Supervision Act in relation to securities and assets of the SNS Bank on 1 February 2013. More than 700 applicants (clients of the bank and interest groups) lodged an appeal to the Administrative Jurisdiction Division of the Council of State (hereinafter, the "Council of State"). A hearing was held on 15 February 2013. The claimants argued, *inter alia*, that the short time-limit for lodging appeals under the Financial Supervision Act and the short time between the lodging of the appeals and the hearing amounted to a violation of their rights under Article 6 ECHR and that the expropriation order violated their property rights under Article 1 Protocol 1 ECHR.

II. Following the case-law of the European Court of Human Rights, the Council of State held that the right of access to court under Article 6 ECHR is not absolute. Although the Financial Supervision Act sets very short time-limits for applicants to lodge appeals (10 days) and for the Council of State to give judgment (14 days after receiving the final notice of appeal), the very essence of the right of access to court had not been impaired, as these very short time-limits served the public interest. A prompt judicial decision was of exceptional importance, as the expropriation order aimed to avert a serious and immediate danger of the stability of the Dutch financial system. As long as the lawfulness of the order was under debate in court, this goal could not be achieved.

In addition, the Council of State held that the expropriation order did not violate the applicants' property rights under Article 1 Protocol 1 ECHR, as the relevant provisions of the Financial Supervision Act were adequately accessible and foreseeable and the determination of the general interest fell within the State's margin of appreciation. Moreover, the Council of State concluded that the Minister had been right in taking the position that there had been a serious and immediate threat to the stability of the Dutch financial system.

Cross-references:

European Court of Human Rights:

- *Ashingdane v. the United Kingdom*, 8225/78, 28.05.1985;
- *Amuur v. France*, 19776/92, 25.06.1996;
- *Špaček v. Czech Republic*, 26449/95, 09.11.1999.

Languages:

Dutch.

Identification: NED-2013-1-004

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 27.02.2013 / **e)** 201113453 / **f)** X v. National Maintenance Collection Agency / **g)** *Landelijk Jurisprudentienummer*, BZ 2516, *Jurisprudentie Bestuursrecht* 2013, 76 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

2.1.1.4 Sources – Categories – Written rules – **International instruments**.
2.2.1 Sources – Hierarchy – **Hierarchy as between national and non-national sources**.
2.2.1.5 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and non-constitutional domestic legal instruments**.

Keywords of the alphabetical index:

Administrative act, judicial review / Administrative act, validity / International agreement, direct applicability.

Headnotes:

The obligation not to apply (even restrictive) statutory provisions if such application is in conflict with self-executing treaty provisions not only applies to courts but also to administrative authorities.

Summary:

I. X (a citizen; hereinafter, the "applicant") applied to the National Maintenance Collection Agency (hereinafter, "LBIO") for abandonment of claims in respect of parental contributions. The LBIO refused, for the circumstances put forward by the applicant were not listed in Article 71b of the Decree implementing the Youth Care Act (hereinafter, the "Decree"), a provision which listed the circumstances for abandonment in a restrictive way. The applicant lodged objections, which the LBIO turned down. The applicant lodged an appeal to the District Court, but the court found for the LBIO. The applicant then lodged an appeal to the Administrative Jurisdiction Division of the Council of State (hereinafter, the "Council of State"), arguing, *inter alia*, that the LBIO ought not to have applied Article 71b of the Decree, on the basis that such application was in conflict with Article 8 ECHR, a treaty provision which is 'binding on all persons' in the sense of Article 94 of the Constitution.

II. The Council of State held for the applicant. The Council of State held that the obligation under Article 94 of the Constitution (i.e., the obligation not to apply statutory regulations in force within the Kingdom, if such application is in conflict with self-executing provisions of treaties) not only applied to the courts but also to administrative authorities. The LBIO should have examined whether the application of the limitative statutory provision which listed the circumstances for abandonment amounted to a violation of Article 8 ECHR in the present case. The applicant succeeded in her action, since the LBIO had not taken into account the circumstances she had put forward, as it should have done.

Languages:

Dutch.

Identification: NED-2013-1-005

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 13.03.2013 / **e)** 201107207, 201107202 and 201209565 / **f)** Vereniging van Vrijzinnige Hervormden Middelburg and others v. Mayor and Aldermen of Middelburg / **g)** *Landelijk Jurisprudentienummer*, BZ3972, 46, *Jurisprudentie Bestuursrecht* 2013, 82 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

International agreement, direct applicability / *Locus standi* / Religion, association / Religion, building, conservation / Religion, free exercise.

Headnotes:

The issuance of monument permits allowing the removal and replacement of a church organ does not amount to a violation of the right to freedom of religion.

Summary:

I. The mayor and aldermen of Middelburg issued monument permits to the National Museum Amsterdam *(Rijksmuseum)* to take down an organ from a church in Middelburg and replace it with a substitute organ. The local Association of Protestants (hereinafter, the "Association") and others lodged objections, arguing *inter alia* that their right to freedom of religion had been violated. The mayor and aldermen rejected these objections. The applicants appealed to the District Court, which struck out the Association's claim and dismissed (on the merits) the claims of the other applicants. All applicants then appealed to the Administrative Jurisdiction Division of the Council of State (hereinafter, the "Council of State").

II. The Association relied on Article 18 of the Universal Declaration of Human Rights and Article 9 ECHR. The Association, according to its articles of association, is aimed – in short – at the preservation and reinforcement of the protestant faith in Middelburg. The Council of State struck out the Association's claim on the basis that the Association lacked standing, given that the monument permits did not hinder the Association members in professing their faith. Therefore, the Association could not rely on Article 18 of the Universal Declaration of Human Rights, which was held not to be a treaty provision in the sense of Article 94 of the Constitution, and Article 9 ECHR. There was no restriction of the freedom of religion.

Languages:

Dutch.

Poland
Constitutional Tribunal

Statistical data
1 January 2013 – 30 April 2013

Number of decisions taken:

Judgments (decisions on the merits): 19

- Rulings:
  - in 11 judgments the Tribunal found some or all challenged provisions to be contrary to the Constitution (or other act of higher rank)
  - in 8 judgments the Tribunal did not find any challenged provisions to be 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)
  - 2 judgments were issued upon the request of Members of Parliament (one of these applications was examined jointly with an application of the National Council of the Judiciary)
  - 4 judgments were issued upon the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
  - 1 judgment was issued upon the request of the Prosecutor General
  - 1 judgment was issued upon the request of the Municipal Councils
  - 1 judgment was issued upon the request of the National Bailiffs' Council
  - 1 judgment was issued upon the request of the National Bar Association
  - 1 judgment was issued upon the request of the Association of Trustees and Liquidators
  - 3 judgments were issued upon the request of courts – the question of legal procedure
  - 3 judgments were issued upon the request of physical person – the constitutional complaint procedure
  - 1 judgment was issued upon the request of a legal person – the constitutional complaint procedure
- Other:
  - 3 judgments were issued by the Tribunal in plenary session
  - 5 judgments were issued with at least one dissenting opinion

Important decisions

Identification: POL-2013-1-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 21.09.2011 / **e)** SK 6/10 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2011, no. 217, item 1293; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2011, no. 7A, item 73 / **h)** CODICES (English, Polish).

Keywords of the systematic thesaurus:

1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties**.
3.10 General Principles – **Certainty of the law**.
3.12 General Principles – **Clarity and precision of legal provisions**.
5.3.9 Fundamental Rights – Civil and political rights – **Right of residence**.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.

Keywords of the alphabetical index:

Extradition, national, prohibition / Extradition, national, possibility / Extradition, treaty / Extradition, granting authority / Discretionary power, limits / Execution of sentence / Authority, executive / Convicted person / Nationality, double.

Headnotes:

Facilitating the prosecution of persons sought for offences other than political ones, who avoid punishment by fleeing to another country, entails support from the international community. Backing by the United Nations, the Council of Europe and the European Union counteract the culture of impunity. The fact that a person is a citizen of a requested state should not constitute an absolute obstacle to extraditing the person, as long as other premises specified in the law of the requested state do not preclude the extradition.

The extradition of a Polish citizen is admissible not only when a ratified international agreement introduces such an obligation but also when only such a possibility arises therefrom.

A decision on extradition issued by the Minister of Justice is not an administrative decision, but a decision based on the Code of Criminal Procedure, possibly in conjunction with the specific provisions of ratified international agreements.

The principle of specificity of legal provisions, which arises from Article 2 of the Constitution, has appropriate application merely to the provisions of international agreements. When assessing the conformity of international agreements to the principle of specificity of legal provisions, one should in particular bear in mind the need to cooperate with other states. This is mentioned in the Preamble to the Constitution: "(...) aware of the need for cooperation with all countries for the good of the Human Family (...)".

Summary:

I. The applicant, a dual citizen of America and Poland, challenged the conformity of Article 4.1 of the Extradition Treaty between the United States of America and the Republic of Poland, signed in Washington on 10 July 1996 (hereinafter, the "Treaty"), to Article 55.1 and 55.2 of the Constitution in conjunction with Article 2 of the Constitution, as well as to Article 78 of the Constitution.

Article 55.1 of the Constitution prohibits the extradition of a Polish citizen, except in cases specified in Article 55.2 and 55.3 of the Constitution. Under Article 55.2 of the Constitution, one of the formal requirements of the extradition of a Polish citizen is the existence of an international treaty, from which stems the possibility of extradition. According to the challenged norm of the Treaty, neither Contracting State shall be bound to extradite its own nationals. The Executive Authority of the Requested State, however, shall have the power to extradite such persons if, in its discretion, it is deemed proper and possible to do so.

II. Although the Treaty was published in the Journal of Laws already after the entry into force of the Constitution, it falls under Article 241.1 of the Constitution. Since it was ratified by the President under Article 33 of the 1992 Constitution, it is linked to matters specified in Article 89 of the Constitution. It is, therefore, an agreement ratified with prior consent granted by statute and as such may be subject to constitutional review in proceedings initiated by lodging a constitutional complaint.

Article 79 of the Constitution requires the complainant, in order to successfully lodge a constitutional complaint, to indicate the final decision on his or her constitutional rights and freedoms. In extradition proceedings, to guarantee the most secure protection of constitutional rights and freedoms of the complainant, the requirement can be fulfilled by indicating either the decision of the Court of Appeal, or the decision of the Minister of Justice upon the complainant's choice.

The constitution-maker does not require that a ratified international agreement necessitate the extradition of a Polish citizen. A requirement that suffices for a Polish citizen to be extradited, within the meaning of the Constitution, is a regulation contained in a ratified international agreement where such a possibility is implied. Despite the complainant's claims, the optional clause of Article 4.1 of the Treaty implies a possibility of extraditing a Polish citizen. The formal requirement set by Article 55.2 of the Constitution quoted above is thus met and Article 4.1 of the Treaty constituted the basis of the final decision on constitutional rights and freedoms of the complainant.

The actual extradition of a person sought by the authorities of the requesting state is directly preceded not by court proceedings, but by *sui generis* proceedings conducted by the Minister of Justice, based on provisions included in the Code of Criminal Procedure. A court decision on the inadmissibility of extradition rules out the extradition. By contrast, a court decision on the admissibility of extradition results in a situation where the Minister of Justice may not, in disregard of the court ruling and based on his/her own different assessment of legal premises, state that extradition is inadmissible in a given case. However, the Minister may refuse to grant extradition due to the occurrence of the so-called relative obstacles to extradition, enumerated in Article 604.2 of the Code of Criminal Procedure or obstacles of a different character, including political or humanitarian ones.

Granting executive authority to the requested state the power to extradite its own nationals, in Article 4.1 of the Extradition Treaty with the USA, "(...) if, in its discretion, it be deemed proper and possible to do so", does not mean entrusting this authority with absolute discretionary power isolated from any criteria for the legitimacy of action. Indeed, the said provision provides for the consent of the Minister of Justice to the extradition of a Polish citizen only when this is "possible", as well as "proper".

Due to political determinants related to the extradition of a person sought by the authorities of the requesting state, the participation of the Minister of Justice in extradition proceedings is a consequence of the constitutional power of the Council of Ministers to carry out foreign policy (Articles 146.1, 146.4 and 149.9 of the Constitution) as well as the separation of powers (Article 10 of the Constitution).

As a result of the ruling on the constitutionality of Article 4.1 of the Treaty, the Tribunal revoked the preliminary decision ref. no. Ts 203/09 of 1 October 2009, which suspended the enforcement of the decision of the Minister of Justice on the extradition of 24 August 2009.

The Tribunal issued this judgment *en banc*. Four dissenting opinions were raised.

Cross-references:

Decisions of the Constitutional Tribunal:

- Resolution W 2/91, 06.11.1991, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1991, item 20;
- Decision U 6/92, 19.06.1992, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1992, item 13;
- Decision U 7/93, 01.03.1994, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1994, item 5;
- Decision K 11/94, 26.04.1995, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1995, item 12;
- Procedural decision Ts 14/97, 05.12.1997, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1998, no. 1, item 9;
- Procedural decision Ts 27/97, 21.01.1998, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1998, no. 2, item 19;
- Procedural decision Ts 76/98, 20.05.1998, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1999 (Annex), item 53;
- Prodedural decision Ts 22/98, 17.06.1998, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1998, no. 5, item 76;
- Procedural decision Ts 107/98, 01.09.1998, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1999 (Annex), item 79;
- Procedural decision Ts 67/98, 07.09.1998, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1998, no. 5, item 75;
- Procedural decision Ts 87/99, 08.09.1999, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1999, no. 7, item 182;
- Judgment K 11/99, 15.09.1999, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1999, no. 6, item 116;
- Procedural decision Ts 19/99, 09.11.1999, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1999, no. 7, item 181;
- Judgment SK 11/99, 16.11.1999, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1999, no. 7, item 158, *Bulletin* 1999/3 [POL-1999-3-029];
- Procedural decision Ts 87/99, 17.11.1999, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1999, no. 7, item 183;
- Judgment SK 14/98, 14.12.1999, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1999, no. 7, item 163;
- Judgment SK 5/99, 17.10.2000, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2000, no. 7, item 254, *Bulletin* 2000/3 [POL-2000-3-023];
- Procedural decision Ts 139/00, 06.02.2001, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2001, no. 2, item 40;
- Judgment SK 1/01, 12.07.2001, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2001, no. 5, item 127;
- Procedural decision K 31/01, 21.11.2001, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2001, no. 8, item 264;
- Judgment SK 26/01, 12.12.2001, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2001, no. 8, item 258;
- Judgment SK 11/01, 06.02.2002, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2002, no. 1A, item 2;
- Procedural decision K 42/01, 20.03.2002, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2002, no. 2A, item 21;
- Judgment P 13/01, 12.06.2002, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2002, no. 4A, item 42, *Bulletin* 2002/2 [POL-2002-2-019];
- Judgment K 28/02, 24.02.2003, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2003, no. 2A, item 13;
- Procedural decision SK 33/02, 28.05.2003, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2003, no. 5A, item 47;
- Procedural decision SK 41/02, 21.10.2003, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2003, no. 8A, item 89;
- Judgment SK 34/03, 16.12.2003, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2003, no. 9A, item 102, *Bulletin* 2004/1 [POL-2004-1-008];

- Procedural decision Ts 57/04, 24.11.2004, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2004, no. 5B, item 300;
- Judgment P 1/05, 27.04.2005, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2005, no. 4A, item 42, *Bulletin* 2005/1 [POL-2005-1-005];
- Judgment U 4/06, 22.09.2006, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2006, no. 8A, item 109;
- Judgment SK 54/05, 18.12.2007, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2007, no. 11A, item 158;
- Procedural decision Ts 203/09, 01.10.2009 (unpublished);
- Judgment Kp 3/09, 28.10.2009, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2009, no. 9A, item 138, *Bulletin* 2010/1 [POL-2010-1-002].

Languages:

Polish, English (translation by the Tribunal).

Identification: POL-2013-1-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 11.07.2012 / **e)** K 8/10 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2012, item 879; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2012, no. 7A, item 78 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.
3.3.3 General Principles – Democracy – **Pluralist democracy**.
4.15 Institutions – **Exercise of public functions by private bodies**.
5.2 Fundamental Rights – **Equality**.
5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.
5.5.1 Fundamental Rights – Collective rights – **Right to the environment**.

Keywords of the alphabetical index:

Allotment gardens / Monopoly, *de facto* / Association, compulsory membership / Property right, communal / Property, municipal, management, restriction / Property, publicly owned / Property, control of use / Property, illegally occupied / Land, illegal occupation / Property, of legal person / Property, legal person, equal treatment / Property, public, use / Property, right to enjoyment / Property, right, equal protection / Legal person, equality / Property, right, special kinds / Property confiscation under communist regime.

Headnotes:

The Polish Association of Allotment Holders enjoys an actual monopolistic position in relation to gardens set up and managed by other organisations that bring together allotment holders than the said Association. The Act on Family Allotment Garden Sites as well as the current practice make it impossible for other associations of allotment holders than the said Association to be actually established and to actually function.

Legal guarantees of the privileged property position of the centralised, "imposed", monopolistic organisation of allotment holders are not compatible with a European standard of the protection of property.

The state's practice of granting privileges to certain associations (in the form of measures safeguarding against the establishment of competitive associations, guarantees of subsidies or the commission of certain actions) is contrary to the obligation to treat citizens equally and in addition leads to social apathy.

It is inadmissible in a democratic state ruled by law to have a public service organisation, such as the Polish Association of Allotment Holders, that remains outside the scope of supervision carried out by state or local self-government administration.

Deviation by the Act on Family Allotment Garden Sites from the principle of equal treatment and from the constitutional freedom of association may not be considered a constitutionally admissible form of assigning the enforcement of a public task to one non-state organisation.

The legislator infringed on the principle of appropriate legislation by creating a right of usufruct for the purpose of the Act on Family Allotment Garden Sites in an identical way to a limited property right set out in the Civil Code.

The legislator may not oblige the units of local self-government to set up allotment garden sites on land that constitutes their property. Still, it may impose a restriction on communal property where gardens are already functioning, guaranteeing supervision over them, as well as regulate the exercise of ownership powers by communes. The legislator should also specify the rights of allotment holders.

Summary:

I. The First President of the Supreme Court challenged the constitutionality of the entire Act on Family Allotment Gardens of 2005 (hereinafter, the "Act") or alternatively, of selected provisions of the Act.

The right of ownership is allegedly violated because the Act obliges communes and the State to establish limited property rights for the sake of the Association and to cover all losses the Association encountered in relation with the liquidation of the garden. In addition, the Act makes the liquidation of an allotment garden conditional upon the Association's consent (except when the liquidation takes place for public purpose).

The Act further infringes on the principle of appropriate legislation by using ambiguous legal terms, such as "facilities and structures", and by creating a new right of usufruct, in parallel to the one regulated by the Civil Code.

It also infringes on the constitutional freedom of association because the establishment of the "right to an allotment plot" is conditional on the adhesion to the Association. Despite the fact that the relationship between gardeners and the Association is governed by provisions of civil law, the gardeners are practically deprived of the right to influence its content and may not voluntarily associate themselves outside the Association.

II. In case where the applicant challenges the constitutionality of an entire statute, it is unnecessary to indicate each provision of the statute separately as the subject of the review and assign a given higher-level norm for the review thereto. The Tribunal deems it admissible for the applicant to indicate all the provisions of the statute that express norms that include fundamental content of the statute, i.e. norms without which the statute may not fulfil goals set by its author.

The Act infringes on the constitutional right of ownership, as the land plot owners' rights are hollowed *(nudum ius)* and their recovery action is illusionary. The gardeners' right of ownership is also infringed, as "facilities and structures" commonly used by them become the property of the Association. Finally, the satisfaction of a third party's claim whose land plot is occupied by an allotment garden may take place only through payment of damages or by granting a replacement land plot, even in cases when the Association does not have any legal title to the land plot. Consequently, the principle of equal protection of property rights and the principle of protection of confidence in the State are also infringed.

The Act theoretically does not exclude the creation of allotment garden associations other than the Association. Nevertheless, the Association enjoys *ex lege* the usufruct of any land plot planned for allotment gardening, free of charge. Such a land plot would have to be "taken away" first, and then sold to the other association. Nevertheless, the Association falls outside the jurisdiction of the Antitrust Court because it is not an *entrepreneur*. Furthermore, unlike the case of other legal persons created by statute, there are no provisions on the supervision of the Association and there is no organ supervising the Association. Such a legal standing of the Association has a chilling effect on persons aiming to register other allotment gardening associations.

Finally, the regulation of a "new" usufruct results in blurring the content of "the new right" and uncertainty as to which subject (i.e. within the meaning of the Civil Code or the usufruct mentioned in the Act on Family Allotment Garden Sites, or both categories of allotment holders) other provisions of the challenged Act refer to, regulating the scope of rights or the establishment thereof.

The legal basis for the functioning of the Association was declared unconstitutional, but the temporal effect of this judgment was postponed for eighteen months. The Association shall lose its legal personality by that time, unless legislative action is taken by the Parliament beforehand. The legislator may not establish another *de facto* monopoly in the domain of allotment gardening and should make the gardeners themselves subjects of rights stemming from the future regulation on allotment gardens.

The Tribunal issued this judgment *en banc*.

III. Two dissenting opinions were raised.

Cross-references:

Decisions of the Constitutional Tribunal:

- Decision K 7/90, 22.08.1990, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1990, item 5;
- Decision K 6/90, 12.02.1991, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1991, item 1;
- Decision K 12/94, 12.01.1995, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1995, item 2, *Bulletin* 1995/1 [POL-1995-1-003];
- Decision K 27/95, 20.11.1996, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1996, no. 6, item 50;
- Judgment K 34/97, 03.06.1998, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1998, no. 4, item 49;
- Judgment K 8/98, 12.04.2000, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2000, no. 3, item 87;
- Judgment K 39/00 of 20.02.2002, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2002, no. 1A, item 4, *Bulletin* 2002/2 [POL-2002-2-015];
- Judgment K 14/03, 07.01.2004, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2004, no. 1A, item 1;
- Judgment K 2/04, 15.12.2004, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2004, no. 11A, item 117, *Bulletin* 2004/3 [POL-2004-3-026];
- Judgment K 47/04, 27.11.2006, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2006, no. 10A, item 153;
- Judgment K 46/07, 08.07.2008, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2008, no. 6A, item 104;
- Judgment K 61/07, 09.12.2008, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2008, no. 10A, item 174.

Decisions of the Federal Constitutional Court of Germany:

- Ruling *(Beschluss)*, 12.06.1979, 1 BvL 19/76, *BVerfGE* 52, 1;
- Ruling *(Beschluss)*, 23.09.1992, 1 BvL 15/85, 36/87, *BVerfGE* 87, 114;
- Ruling *(Beschluss)*, 14.07.1999, 1 BvR 995/95, 2288/95, 2711/95, *BVerfGE* 101, 54.

Decision of the Slovakian Constitutional Court:

- Judgment Pl. ÚS 17/00 of 30.05.2001.

Decisions of the European Court of Human Rights:

- *Pammel v. Germany,* 01.07.1997, Application no. 17820/91;
- *Urbárska obec Trencianske Biskupice v. Slovakia,* 27.11.2007, Application no. 74258/01;
- *Jenisová v. Slovakia,* 03.11.2009, Application no. 58764/00.

Languages:

Polish, English (translation by the Tribunal).

Portugal
Constitutional Court

Important decisions

Identification: POR-2013-1-001

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 31.01.2013 / **e)** 75/13 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.
5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.
5.5.1 Fundamental Rights – Collective rights – **Right to the environment**.

Keywords of the alphabetical index:

Economic action, freedom / Environment, protection / Organic law, definition / Public health.

Headnotes:

Norms included in the Legal Regime governing End-of-Life Vehicles (hereinafter, "RJVFV") which set deadlines by which such vehicles must be the object of treatment in the form of depollution, re-use and recycling operations, do not undermine the principle of re-use, the fundamental right to private initiative, the right to the environment, or violate the proportionality test. In matters concerning social, economic and cultural rights the legislator enjoys a broad margin within which it is entitled to shape its legislative decisions. In this respect the Constitutional Court's role is only to verify whether those decisions configure a manifest violation of the principle of proportionality.

Summary:

I. This case concerned a claim by the appellant that two norms in an Executive Law that transposed a Directive of the European Parliament and the Council on End-of-Life Vehicles into Portuguese law, were both organically and materially unconstitutional. The norms, included in the Legal Regime governing End-of-Life Vehicles (hereinafter, "RJVFV") set deadlines by which such vehicles must be the object of treatment in the form of de-pollution, re-use and recycling operations.

With regard to the alleged material unconstitutionality, the appellant argued that setting short deadlines of eight days for performing de-pollution operations and forty-five days for re-use and recycling operations constituted a disproportionate restriction on the right to private initiative.

II. The Constitutional Court noted that the Constitution subjects the freedom to engage in private initiatives to the requirement to respect other constitutional values with which that freedom may conflict. European Union Law, the Constitution, infra-constitutional law and the general interest all mean that it is necessary to provide for the collection and treatment of end-of-life vehicles, whose component parts may prove damaging to both the environment and public health.

It is accepted that in matters concerning social, economic and cultural rights the legislator enjoys a broad margin in which there is room for it to take legislative decisions. The Constitutional Court's only role is to check whether such decisions configure a manifest violation of the principle of proportionality. Specifically in the present case, the Court found that the legislative measure appeared appropriate, inasmuch as the option to set short time limits was designed to ensure the fulfilment of constitutionally protected values (precisely the right to the environment, together with the right to health) and to reduce the risks of contamination of the environment by the damaging waste contained in vehicles, and because the concrete operations that treatment enterprises must undertake within the eight-day time limit do not presuppose that all the parts of the vehicles be treated, but only the most damaging among them.

The Court held that there is no violation of the fundamental right to private initiative here, because the latter's normative scope subjects it to the limitations imposed by the other fundamental rights. This particular right does not benefit from the specific regime applicable to constitutional rights, freedoms and guarantees; grounds for the limitations that may be placed on it by the norm in question are to be found in European Union Law, the Constitution and infra-constitutional law; and, for both environmental and public-health reasons, the general interest also requires that provision be made for the collection and treatment of end-of-life vehicles.

The Court held that there is no disproportionality in the restrictions imposed by the norm. The Court was of the view that the forty-five-day deadline for removing parts for re-use and recycling was not too short, but instead represented enough time to ensure a balance between guaranteeing that environmentally damaging waste is not left without a definitive treatment on the one hand, and, on the other, the appellant's right to use the parts that are removed with a view to the goal of making a profit which it legitimately pursues. The time limits do not impose excessive speed on enterprises that collect and treat vehicles of this kind. The Court said that one must bear in mind that the legal regime was designed to transpose a European Directive which, although it did not set time limits, did say that end-of-life vehicles must be subjected to de-pollution treatment as quickly as possible. It is thus impossible to deny that the ordinary legislator was internationally bound to adopt legal norms that require maximum celerity in the treatment of such waste.

In addition, the Constitution charges the state with duties to protect the environment and public health. These duties are reflected in both regimes governing the licensing of given economic activities, and regimes under which those activities are administratively controlled. From this point of view the right to private initiative itself presupposes that due provision be made for the state and other public legal persons to carry out those missions.

The Court recalled that the characterisation of organic unconstitutionality shows that the fundamental right in question does not enjoy the benefit of the specific regime applicable to constitutional rights, freedoms and guarantees.

The Court therefore did not uphold the appellant's allegation that the norm was organically unconstitutional because it breaches the Assembly of the Republic's partially exclusive legislative competence, under the terms of which the government can only legislate on matters regarding constitutional rights, freedoms and guarantees when it has prior authorisation from the Assembly to do so. The Constitutional Court agreed with the appellant that the essential core of the right to private initiative – which itself presupposes the existence of a right not to be absolutely, unreasonably and unjustifiably prevented from engaging in a given economic activity – shares some of the characteristics of constitutional rights, freedoms and guarantees, and to that extent can be considered a right that is analogous to the latter and should enjoy the protective constitutional regime applicable to them. However, not all the normative content of the right to free private initiative can benefit from that specific constitutional regime. In the case before the Court, the essential core of the right to free private initiative was not touched on by the application of the RJVFV norms. The imposition of legal time limits by which end-of-life vehicles must be treated can only be said to have conditioned some aspects of the way in which this activity is organised and exercised, and in the process to have reduced the profits to be gained therefrom. This conditioning does not interfere with the essential core of the fundamental right in question, which could be said to be equivalent to the negative dimension that typifies a right to a freedom.

Cross-references:

- Rulings nos. 76/85 (06.05.1985); 328/94 (13.04.1994); 329/99 (02.06.1999); 187/01 (02.05.2001); 289/04 (27.04.2004); 304/2010 (14.07.2010) and 557/11 (16.11.2011).

Languages:

Portuguese.

Identification: POR-2013-1-002

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 19.02.2013 / **e)** 96/13 / **f)** / **g)** *Diário da República* (Official Gazette), 50 (Series I), 12.03.2013, 1590 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment**.
5.2.2 Fundamental Rights – Equality – **Criteria of distinction**.
5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.

Keywords of the alphabetical index:

Discrimination of nationals / Equal protection of rights / Immigration / Proportionality.

Headnotes:

The regime governing the profession of seafarer, contains a norm that restricts registration of professional seafarers to those with Portuguese and European Union citizenship. However, foreigners who find themselves in Portugal or reside in Portugal enjoy rights equivalent to those of Portuguese citizens.

Summary:

I. This case involved an abstract *ex post hoc* review requested by the Ombudsman. The purpose of the legislative act containing the norm in question was to establish norms regulating the profession of seafarer, including norms regarding inclusion on the register of professional seafarers and the issue of seafarers' service record books, physical aptitude, classification, professional categories, requisites for admission to the profession, functions, training and certification, recognition of certificates, recruitment, shipboard and land-based regimes, and the minimum crew of vessels. Seafarers engage in this occupation aboard commercial, fishing, research and auxiliary vessels, and tugs, as well as other types of vessel when they belong to the state. The legislative act was also designed to implement the Amendments to the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (hereinafter, "STCW Convention"), which the International Maritime Organisation adopted in 1995 and which has since been seconded and strengthened by the European Union in the form of the issue of relevant Directives.

Given that the norm reserved inclusion on the register of professional seafarers to individuals holding Portuguese nationality or that of another Member State of the European Union, it meant that the exercise of the profession of seafarer on Portuguese-flagged vessels was, in principle, reserved to Portuguese citizens. The requirement for a person to be a Portuguese national in order to engage in this profession is not a new one in Portuguese law, although since Portugal joined the European Economic Community the relevant legislation has made provision for the obligations derived from that membership and from international conventions to which the country is a party.

II. The Constitutional Court noted that the Portuguese Constitution guarantees foreigners and stateless persons who find themselves or reside in Portugal the rights and duties pertaining to Portuguese citizens. It enshrines the so-called principle of "national treatment" – i.e. that such persons must be treated as favourably as the country's own citizens, particularly in relation to certain fundamental rights.

Where the concrete scope of this equivalence is concerned, constitutional jurisprudence and doctrine have gradually been setting out a broad conception of the principle, under which the latter does not just encompass fundamental rights, but also the rights that Portuguese citizens are recognised to possess under ordinary law. This understanding is justified by the universalist nature of the protection afforded to fundamental rights in a democratic state based on the rule of law and on the dignity of the human person.

In addition to the exceptions which the Constitution itself admits, it is accepted that the ordinary legislator can subject the enjoyment of certain rights to a nationality-based requirement. However, this possibility is conditioned by a number of parameters. In this sense, a restrictive measure must give way to the principle of the prohibition on excess, or of proportionality in the broad sense, which means that a restriction cannot be unnecessary, arbitrary or disproportionate, failing which the principle of equivalence itself would become empty and inoperable.

The Court observed that nationals of non-European-Union third countries who find themselves in Portugal or reside in the state and who wish to gain access to the profession of seafarer are in any case subject to the usual requirements in terms of training and the need to obtain the applicable certification, as set out in precisely the legislative act that approved the regime governing the occupation of seafarer and included the norm before the Court. As such, the exclusion of such individuals from access to the profession solely on the basis of the criterion of their nationality cannot be justified by a need to pursue public-order interests connected either with the safety of persons who are linked to or come into contact with the sea, or with the preservation of the marine environment – interests whose protection is the object of the various norms (nautical training; the adoption of processes for assessing seafarers' knowledge before they are issued with certificates demonstrating their qualifications or professional aptitude; the obligatory existence of a register of such certificates; the uncommonly demanding nature of those qualifications and the corresponding certificates; and the importance attached to physical aptitude when certificates are issued), whose requirements are addressed in the 1995 amendments to the 1978 STCW Convention.

The nationality-based requirement imposed by this norm represented an exception to the principle that foreigners who find themselves or reside in Portugal enjoy rights equivalent to those of Portuguese citizens, which does not fall within the scope of any of the exceptions that are directly established by the Constitution (which reserves political rights, the exercise of public functions that are not of a predominantly technical nature, and certain other rights and duties to Portuguese citizens). The status the Constitution grants to foreign citizens does allow the ordinary law to create exceptions to this principle of equivalence. However, such restrictions must fulfil the constitutional requirement of proportionality and must be limited to that which is necessary in order to safeguard other constitutionally protected rights or interests.

The norm before the Court used a criterion of nationality to deprive the citizens it applied to of the possibility of occupying any post aboard marine vessels. Nor were the vessels concerned solely those linked to the exercise of national sovereignty or the performance of functions derived from the exercise of powers of authority. The exercise of any set of tasks, competencies, duties or responsibilities was generically precluded aboard any type of vessel, including those whose commercial or fishing nature means that they have nothing to do with the political component or the authority/sovereignty dimension on which the constitutional restrictions on the principle of equivalence based on the nature of the function are founded.

There was no teleological connection between this restriction and the need to adequately, dutifully and proportionately safeguard any constitutionally protected right or interest, and it therefore did not fulfil the requisites in terms of legitimacy that would allow the ordinary law to make an exception to the principle of equivalence.

Nor was the limitation justified by the need to ensure effective on-board communication by requiring the whole crew to master a common language, because this would mean adopting the nationality criterion, but without the exceptions for citizens of other countries, including or excluding the rest of the European Union.

Nor was the norm warranted by a hypothetical desire to fight illegal immigration. Besides the fact that the norm applied indiscriminately to all nationals of non-European-Union third countries who find themselves or reside in Portugal – thus including those whose situation with regard to the regime governing entering and remaining in Portuguese territory is entirely legitimate – an exclusion linked to the interest in preventing illegal immigration would always have to give way to the superior efficacy of other types of measure which, without injuring core projections of the right to choose one's profession freely, introduce control mechanisms intended to avoid the improper entry and continued presence of citizens from countries that are not part of the European Union.

The Court therefore declared the norm before it to be unconstitutional with generally binding force.

Supplementary information:

One Justice concurred with the decision, but attached greater importance to the question of organic unconstitutionality. He contended that the legislative act containing the norm was issued by the government, but the competence to legislate on restrictions that affect constitutional rights, freedoms and guarantees pertains exclusively to the Assembly of the Republic (unless the latter authorises the government to legislate in its stead) and this meant that the norm before the Court inevitably suffered from organic unconstitutionality.

Cross-references:

- Rulings nos. 340/95 (22.06.1995); 423/01 (09.10.2001); 72/02 (20.02.2002) and 345/02 (11.07.2002).

Languages:

Portuguese.

Identification: POR-2013-1-003

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 20.02.2013 / **e)** 105/13 / **f)** / **g)** *Diário da República* (Official Gazette), 140 (Series I), 20.07.2012, 3846 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
3.10 General Principles – **Certainty of the law**.
3.12 General Principles – **Clarity and precision of legal provisions**.

Keywords of the alphabetical index:

Crime, elements / Criminal act, definition / Law, constitutional objective, accessibility, intelligibility / Sexual offence / Sexual self-determination, right.

Headnotes:

The inclusion in the Penal Code of acts that entail forcing ("constraining") another person to be the object of a contact of a sexual nature, within the specific legal category of "sexual importunacy", does not violate the principle of criminal legality. Even though legal doctrine and jurisprudence do not contain an entirely uniform interpretation of all the forms of conduct that are capable of fulfilling the conditions required to constitute this type of offence, the set of elements that comprise the type of offence does outline a behavioural framework that is sufficiently defined for citizens to be able to perceive what forms of conduct are sanctioned as a crime.

Summary:

I. In reaching its decision, a lower court applied a norm which the accused person had argued was unconstitutional during the proceedings. The accused appealed to the Constitutional Court, asking it to consider the constitutionality of the type of illicit act which the Penal Code (hereinafter, the "CP") provides for under the designation "sexual importunacy". The CP provides that: "Whosoever importunes another person by engaging before him in acts of an exhibitionist nature or constraining him to be the object of a contact of a sexual nature shall be punished by a penalty of imprisonment for up to one year or a fine of up to one hundred and twenty days, if no more serious penalty is applicable to him under other legal provisions".

The appellant to the Constitutional Court argued that this norm violates both the requirement that the law must be exact and the principle of legality, and also that it criminalises situations which, albeit disagreeable, do not attain the minimum threshold needed to be considered criminal. He said that in the latter respect, the alleged unconstitutionality resulted from the fact that legal precepts of this kind confuse the need for intervention by the Criminal Law – which is always resorted to as an *ultima ratio* – on the one hand, with morals and accepted customs on the other.

The 1995 revision of the Penal Code amended the legal framework applicable to sex crimes. The changes were underlaid by the assumption that the criminalisation of forms of conduct in the sexual domain can only be considered legitimate if, and to the extent that, they injure a specific and eminently personal legal asset, failing which one would be in the presence of a crime without a victim. Sex crimes stopped being seen as crimes against the ethical/social foundations of life in society, and came to constitute crimes against persons, and concretely against the victim's sexual freedom and self-determination.

A new distinction was also made between crimes against sexual freedom and those against sexual self-determination. The former are crimes committed against adults or minors without their consent, with the goal of ensuring the protection of the victim's sexual freedom. The latter are crimes in the form of consensual acts committed against minors with their "consent", in which the object of legal protection is the free development of the minor's personality in the sexual sphere.

The appellant contended that the "crime of sexual importunacy" must be seen as a crime against sexual freedom. To the extent that is relevant here, this type of illicit act introduced a concept of "contact of a sexual nature", whose purpose is to punish those who force or "constrain" others to be the object of acts of a sexual nature that are not grave enough to constitute serious sexual acts. This legal type criminalises the sexual importunacy of another person in the shape of two distinct forms of conduct: engaging before another person in acts of an exhibitionist nature; and constraining another person to be the object of contacts of a sexual nature.

The appellant argued that, in a democratic state based on the rule of law, crime prevention must be undertaken with respect for citizens' rights, freedoms and guarantees, and is subject to limits that preclude arbitrary or excessive interventions. Rigorous application of the principle of legality means that crime prevention can only be pursued in compliance with the requirement that there can be no crime or penalty unless it results from a prior, written and exact law.

The appellant contended that the prohibited conduct and all the concrete requisites for a punishment must be described in such a way as to make it possible to objectively determine the forms of behaviour that are forbidden and subject to sanctions, and for citizens to be able to objectively know what should motivate their conduct and how it should be directed. The principle of "typicity", which is linked to the principle of legality, requires the law to both adequately specify the facts that constitute a given legal type of crime, and typify the penalties for it.

The appellant also argued that this particular case involved the criminalisation of forms of conduct that do not deserve to be the object of criminal punishment, and that this was in breach of the principle of minimum intervention. He said that it is generally accepted that one cannot criminalise situations that do not warrant punishment under the criminal law, given that there is not a perfect match between an act that is socially or morally unacceptable and one that should be criminally punished; and that the failure to ensure that the need for intervention by the Criminal Law is not confused with morality and accepted customs is therefore unconstitutional.

II. The Constitutional Court recalled that under ordinary Portuguese criminal law, any fact that is described and declared subject to penalty by the law constitutes a crime. The Constitution expressly states that the ordinary legislator is entitled to create crimes, but that restrictions on constitutionally enshrined rights and freedoms which are imposed as a result of criminal penalties are only legitimate when the objective is to protect other rights or interests to which the Constitution affords its protection – i.e. when the typified situation deserves criminal punishment.

It is also necessary for the imposition of penalties or security measures to be the only way to protect the legal assets in question – i.e. the criminal law must be the *ultima ratio*, and the situation must be one in which there is a need for penal protection.

An asset that deserves to be protected by the criminal law is one that reflects a constitutional-law value which is recognised as being eminently worthy of protection, while the socially damaging nature of the injurious conduct means that the latter must be qualified as socially intolerable. However, the decision whether or not to resort to penal means pertains first and foremost to the legislator, who must be acknowledged to possess a broad scope for discretion. The legislator's freedom to shape legislation can only be limited when the criminal punishment it decides on appears to be manifestly excessive.

The penal norm addressed by the Court in the present Ruling is intended to protect sexual freedom. The legislator took the view that being constrained to be the object of a contact of a sexual nature constitutes an injury to the legal asset "sexual freedom", the importance of which is such that it deserves penal protection. The Court held that it was in the presence of a criminal policy option adopted by the legislator, who felt that such forms of behaviour are serious enough to warrant punishment. The criminalisation of this conduct was not based on reasons linked to the field of social morals or sexual morality, but only on the need to protect personal freedom in one of the domains in which that freedom is projected.

The Constitutional Court held that this crime must always entail the existence of a contact between the agent and the victim's person, that that contact must be of a sexual nature, that it must have been brought about by constraining the victim to undergo the action in question, that the conduct must have importuned the victim; and the act must be one that significantly affects the victim's sexual liberty, albeit without the gravity of a serious sexual act and without the use of violence, inasmuch as the elements that constitute a serious act and the use of violence are covered by other legal types of crime.

The Court rejected the claim that the challenged provisions of the CP failed to respect the principle of "typicity". The criterion for determining whether the principle of "typicity" has been breached in this respect is whether the criminalising norm allows one to know what type of behaviour is being sanctioned. It must be possible to determine that behaviour objectively, so that the judgement of exactly what it is that deserves to be punished on the penal level is clear and citizens can thus orient their conduct accordingly – i.e. in accordance with this normative judgement.

Even though legal doctrine and jurisprudence do not contain an entirely uniform interpretation of all the forms of conduct that are capable of fulfilling the conditions required to constitute the legal type in question, the set of elements that comprise the type does outline a behavioural framework that is defined enough for citizens to be able to perceive what forms of conduct are sanctioned as a crime.

Despite the use of concepts such as "constraint", "importune" and "contact of a sexual nature", without a specification of the concrete means employed in that contact, if one looks at the regulations that typify the content of sex crimes as a whole, it is possible to deduce the delimitation of the area the norm protects and the typical forms of behaviour it covers with enough precision for the persons at which it is directed to be able to orient their conduct.

The Court thus found that in the concrete case before it, the legal asset protected by the legal type of crime in question is unquestionably important enough to deserve penal protection. Given that the Court should only censure legislative solutions that are manifestly excessive, it concluded that the norm does not violate any constitutional norm or principle – namely those of need, appropriateness and proportionality, with which laws that restrict constitutional rights, freedoms and guarantees must comply.

Cross-references:

- Rulings nos. 25/84 (19.03.1984); 634/93 (04.11.1993); 83/95 (21.02.1995); 109/99 (10.02.1999) and 179/12 (04.04.2012).

Languages:

Portuguese.

Identification: POR-2013-1-004

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 27.02.2013 / **e)** 127/13 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

Divorce / Private property, protection / Property ownership / Property, control of use.

Headnotes:

The Civil Code norm that allows a court to order, as the effect of a divorce and particularly in the light of the needs of each of the ex-spouses and the interests of the couple's children, that the family home be rented to one member of the former couple, irrespective of whether the property belongs to them jointly or is even owned solely by the other member, and the latter opposes the rental, does not have the effect of completely eliminating the right to property in a way that could be said to constitute an expropriation, and it is legitimated by the need to defend a social element which the Constitution itself deems fundamental.

Summary:

I. The appellant argued that a Civil Code norm was unconstitutional because it violated the fundamental right to private property, to the extent that it obstructed the right-to-use and enjoyment dimensions of that right.

The norm is part of a list of measures designed to protect the family home. Their purpose is to defend the stability of the family accommodation from the point of view of the children, spouses and ex-spouses, both during conjugal life and in crisis situations brought about by either divorce or judicial separation, or the death of either of the spouses. In passing these norms, the legislator was of the opinion that in such cases the results of an application of common-law rules would not be adequate and might even be undesirable.

In situations in which a family establishes its main residence in rented property, there have long been measures to protect the family home if the conjugal union is dissolved by death, divorce or separation. The norm before the Court in this case extended this protection of the family accommodation to other hypotheses, in which the home is not rented from a third party. In the event of divorce or judicial separation and in a situation in which the family resides in a property that belongs solely to one of the ex-spouses, common-law rules would deprive the other of the home in which he or she had been living, even if he or she were the ex-spouse with the least resources and the one into whose care the couple's children had been placed. The same could happen when the couple's assets were shared out after a divorce, if the family home was the common property of both members.

The particular norm that is of interest here allows a court, at the request of one of the ex-spouses, to order that the family home be rented to him or her, whether it was the common property of the couple, or belongs solely to the other ex-spouse, and the latter opposes the rental. In taking its decision, the court must particularly consider the needs of each of the parties and the interests of their children. This is not a transmission to the ex-spouse who was not contractually a tenant, of a right to a pre-existing rental, by judicial order or the effect of a law, nor is it the concentration of that right in the hands of one of the previous tenants. The norm permits the formation of a rental relationship, based on and established by a judicial decision – an act of state authority. This rental is subject to the rules governing rentals for housing purposes – namely those on setting the amount of the rent and the obligation to pay it – and, after first hearing the parties, the court can not only define the contractual terms and conditions, but can

also later order the termination of the rental at the landlord's request, when so justified by supervening circumstances.

II. The Constitutional Court recalled its own jurisprudence, in which it has consistently held that while property/ownership is a presupposition of personal autonomy and that the corresponding right is one of the various economic, social and cultural rights that are included in the Constitution, it also possesses a dimension that enables at least part of that right to be numbered among the constitutional rights, freedoms and guarantees themselves.

The Court's jurisprudence makes it clear that the civil-law concept of property and the corresponding constitutional concept are not one and the same thing.

The subjective dimension of the right to property includes each person's right not to be deprived of his or her property, except by means of appropriate proceedings and in return for fair compensation – proceedings for which the Constitution makes provision.

The guarantee which the Constitution affords to the objective dimension of property is reflected first and foremost in constitutional commands to the ordinary legislator. The latter is forbidden to annul or affect the essential core of the infra-constitutional 'institute' of property and is required to shape that 'institute' in the light of the need to harmonise it with the principles derived from the constitutional system as a whole. So there exists a clause in the law governing the social shaping of the concept of property to which constitutional jurisprudence has always referred and one of whose consequences is that the right to property that is recognised and protected by the Constitution is a long way from the classic conception, under which the right to property is seen as *jus utendi, fruendi et abutendi* (the right to use, enjoy the fruits of, and dispose of one's property) – a conception which must be rendered compatible with other constitutional requirements.

An owner's freedom to use and enjoy his or her assets naturally forms part of the right to property to the extent that the latter refers to the universe of things. However, the constitutional limits on precisely this aspect are particularly intense, and the law can establish limitations – legitimated by the need to defend other constitutional values – on the owner's powers to use a thing. Within the overall set of abilities that are inherent in *proprietas rerum*, the *jus utendi* is the one whose content most needs to be determined and is most capable of being subjected to limitations. The grounds for the need before the Court in the present case are to be found in the need to make the right to property compatible with other constitutional values.

The norm in question does not have the effect of completely eliminating the right to property in a way that could be said to constitute an expropriation. The rental is subject to the rules governing rentals for housing purposes. The owner is not deprived of his or her ownership, and the norm cannot be directly accused of sacrificing the practical economic consistency of the law. Renting is one way in which a landlord can benefit from the assets he or she owns, and the ex-spouse and now tenant of the ex-family home is obliged to pay the other ex-spouse a rent that constitutes compensation for assignment of the enjoyment of the thing.

The aspect of the right to property that the ex-spouse who has forcibly been turned into a landlord is deprived of is the *jus utendi*. The owner and former spouse can neither use the asset, nor assign or commit its use, by an act that is undertaken of his or her own free will or can be attributed to him or her; and the owner is required by an act of authority (the court's) to assign use of the thing to his or her ex-spouse.

In the case of this norm, the objective of limiting the powers to use the thing is to fulfil the constitutional requirement to protect the family in the phase following divorce and judicial separation. This specific bond to which the property is subjected exists because of the family and may come to an end when supervening circumstances justify it. It is inherent in the essence of the conjugal bond (in the present case, this was the form in which the family was constituted) that that bond affects the spouses' personal and asset-related situations, giving rise to rights and duties that may last beyond the moment at which the bond itself is dissolved. This is not a sacrifice imposed on a right-holder in the name of a generic social "mortgage" on the property; rather, it represents the continued existence of a situation that emerges from the effects of marriage and lasts beyond the latter's termination.

The Court considered that the norm does not violate the guarantee which the Constitution affords to the right to private property, inasmuch as it is legitimated by the need to defend a social element which the Constitution itself deems fundamental.

The Court therefore held that the norm in question is not unconstitutional.

Cross-references:

- Rulings nos. 44/99 (19.01.1999); 329/99 (02.06.1999); 205/00 (04.04.2000); 263/00 (03.04.2000); 425/00 (11.10.2000); 57/01 (13.02.2001); 187/01 (02.05.2001); 391/02 (02.10.2002); 139/04 (10.03.2004); 159/07 (06.03.2007); and 421/09 (13.08.2009).

Languages:

Portuguese.

Identification: POR-2013-1-005

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 20.03.2013 / **e)** 177/13 / **f)** / **g)** *Diário da República* (Official Gazette), 50 (Series I), 12.03.2013, 1590 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality**.
5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors**.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.

Keywords of the alphabetical index:

Constitutional complaint, limits of review / Deprivation of liberty / Imprisonment, length / Imprisonment, open scheme / Imprisonment, period, reduction / Minor, detention.

Headnotes:

The fact that the Law governing Youth Custody, Protection and Re-education does not provide for a time-deduction mechanism like the one that exists in the Penal Code, under which the time an accused person spends in custody, on remand or in home detention is deducted in full from a subsequent prison sentence, is intentional. There is therefore no gap in the law that might be completed by analogy. The specific goals of youth custody, protection and re-education measures – namely that a minor be taught to be law-abiding and be inserted in community life in a dignified and responsible manner – imply an assessment of the minor's personality and an estimation of his or her future development, in which the effects of the application of earlier measures must necessarily be weighed up. The demanding nature of this evaluation process would not appear to be reconcilable with the rigidity and automatism inherent in the 'institute' of a criminal-law time deduction. The differences between the measures applied to persons who have committed acts that are qualified as criminally unlawful by the regime established in the Law governing Youth Custody, Protection and Re-education on the one hand and the time-deduction rules laid down in the Penal Code on the other is thus materially justified.

Summary:

I. The appellant in the present case was a minor who was the object of a custody, protection and re-education measure in the form of his institutionalisation under a semi-open regime at an education centre for one year. The court of first instance denied his request that the time he had already spent at an education centre under the terms of a preventive care measure be deducted from the time he was then ordered to spend in an institution. This was upheld by the Court of Appeal, whereupon the minor appealed to the Constitutional Court against the decision at second instance.

In a 2008 Jurisprudential Standardisation Ruling the Supreme Court of Justice had held that there is no place for time deductions of this type in youth custody, protection and re-education proceedings.

The appellant argued that there was a breach of the principle of equality, in that this position means that comparatively speaking, a minor who has committed the same illicit acts as an adult and who, under the terms of the Law governing Youth Custody, Protection and Re-education, has first been the object of a preventive care measure which restricts the minor's individual freedom, and is then sentenced to a custody, protection and re-education measure which also restricts the minor's liberty, is treated less favourably than an adult. Application of the protection and re-education measure entailing institutionalisation under a semi-open regime implies that the minor must have committed a fact that is qualified as a crime against one or more persons and is punishable by a maximum term of more than three years' imprisonment, or two or more facts that are both qualified as crimes (though not necessarily against persons) and whose commission can be punished by prison terms that can exceed three years. If the applicable regime were that established by the Penal Code, the agent would be able to deduct the

time already spent under the terms of an initial measure depriving that individual of his or her freedom from the prison sentence. This was not so in the case of the Law governing Youth Custody, Protection and Re-education.

II. The Constitutional Court noted that, although its competence includes assessing the reasonableness and internal coherence of infra-constitutional normative solutions, it is not just any incoherence or lack of harmonisation that justifies criticism on constitutional grounds The constitutional command that requires acts of the legislative power to comply with the principle of equality may lead to the prohibition of legal systems included in different normative solutions that are not in harmony or are incoherent with one another. This means that in order to be considered incongruent, the lawmakers' choices must be reflected in the fact that the solutions to certain subjective-law situations must have been configured in different ways and that there must be no justifiable reason for the extent of this inequality. The members of the Constitutional Court are responsible for preventing laws from establishing unreasonable regimes – i.e. legal disciplines that differentiate between persons and situations that deserve the same treatment or, on the contrary, treat people and situations in the same way when they ought to be handled differently. The Court cannot issue findings of unconstitutionality if what is at stake is the simple existence of a minor internal incongruence in a legal system that does not lead to an unreasonably different treatment of subjective-law positions.

In the case before it, the Court held that there are reasonable motives which materially justify the legislator's choice. The constitutional norm that enshrines the right to freedom and security distinguishes between the total or partial degrees of deprivation of freedom derived from detention, remand in custody or the imposition of a prison term on the one hand, and the subjection of a minor to protective, supportive and educational measures at an appropriate establishment on the other. What is more, recognition of the special need to protect children itself justifies the difference in regimes. Inasmuch as juvenile delinquency is practised by human beings who are in the process of being formed and trained, the justice applicable to minors must take account of the resulting specificities.

The Constitutional Court therefore took the view that the considerations which formed the grounds for the normative differentiation between penal measures and youth custody, protection and re-education measures set out in the above-mentioned Jurisprudential Standardisation Ruling by the Supreme Court of Justice were valid.

The principles applicable to the law in the field of the protection and re-education of minors are distinct from those in penal proceedings, and the teleology of criminal penalties is situated on a plane that is quantitatively and qualitatively different from that on which youth custody, protection and re-education proceedings take place. Criminal procedural principles are guided first and foremost by the need to protect legal assets that are important to the community, with a view to defending society, whereas the youth custody, protection and re-education process emphasises the minor's private interest in receiving education that will help the minor to be law-abiding and to re-socialise him or her – i.e. that will enable the minor to return to, or remain in, the general fabric of society without thereby undercutting the law. This also serves to fulfil the state's interest, in that the state is responsible for defending society from its most prevaricating members, even if the citizens concerned are minors.

The imposition of custodial, protective and re-educational measures is thus underlaid by the need to teach young people to abide by the law – a need which is displayed when a person commits a criminal act and which must continue to exist at the moment when the court decides what to do with the minor. The purpose of the intervention is not to seek retribution for the harm that has been caused. The law applicable to minors is not a punitive law, one that is targeted at sanctioning the commission of an illicit act; its goal is to correct the personality of the offending minor.

Notwithstanding the commission of an act which the penal law qualifies as a crime, it is not actually imperative that the state intervene at all, if the act is really not serious and there is no evident clash with important community values. This possibility of there being no state intervention because it is unnecessary and would be disproportionate is incompatible with penal law, but legitimate with regard to the law in the custodial, protective and re-educational field.

The way in which a measure that entails the institutionalisation of a young person is implemented also contrasts with a prison term, nor is preventive care at an education centre the same as remand in custody. Although the youth measures entail limitations on freedom, their legal regime is characterised by its greater flexibility.

In addition, the regime governing the review and revision of youth custody, protection and re-education measures, which is dominated by the principle *rebus sic stantibus* and makes it possible to adapt the measures to the minor's educational needs, is incompatible with the regime on the execution of criminal penalties.

If one were to deduct the time spent while held under a preventive care measure from the duration of a youth custody, protection and re-education measure, the latter's compression would work against the interests of the minor by prejudicing the scope of his or her re-education. This was not in the legislator's mind when it intentionally failed to provide for such a deduction.

The Constitutional Court therefore declined to find the norm before it unconstitutional.

Cross-references:

- Rulings nos. 232/03 (13.05.03); and 546/11 (16.11.2011).

Languages:

Portuguese.

Identification: POR-2013-1-006

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 05.04.2013 / **e)** 187/13 / **f)** / **g)** *Diário da República* (Official Gazette), 78 (Series I), 22.04.2013, 2328 / **h)** CODICES (English, Portuguese).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law**.
3.11 General Principles – **Vested and/or acquired rights**.
3.16 General Principles – **Proportionality**.
3.17 General Principles – **Weighing of interests**.
3.18 General Principles – **General interest**.
3.19 General Principles – **Margin of appreciation**.
3.22 General Principles – **Prohibition of arbitrariness**.
5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens**.
5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment**.
5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.
5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
5.3.38.3 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Social law**.
5.3.38.4 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Taxation law**.
5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.
5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension**.
5.4.17 Fundamental Rights – Economic, social and cultural rights – **Right to just and decent working conditions**.

Keywords of the alphabetical index:

Crisis, economic and financial / Costs, public / Debt, sovereign / European Union, financial assistance programme / Employment, extra holiday month of salary, suspension / Pension, public sector, retiree / Pension, private sector, retiree / Pension, cut in remuneration paid out of public funds / Unemployment benefit, reduction / Sickness benefit, reduction / Employment, overtime payment / Budget, deficit, reduction / Civil servant, income, reduction, equality / Pension, trust, protection / Holiday, payment, suspension / Social protection, reduction / Employment, minimum wage / Subsistence, minimum level, guarantee / Salary, reduction / Employment, overtime payment, reduction / Tax, income tax, progressivity / Tax, capacity to pay, principle / Fiscal justice, principle / Tax, income, capital, level, equality.

Headnotes:

The Constitutional Court was asked to review the constitutionality of various norms contained in the State Budget Law for 2013:

1. Suspension of the additional holiday month of salary or equivalent for Public Administration staff

The Constitutional Court declared the suspension of the additional holiday month of salary or equivalent for Public Administration staff (which also applied to the same types of amount payable under teaching and research contracts) to be unconstitutional with generally binding force, because it was in violation of the principle of equality that requires the just distribution of public costs. The Court did not exclude the possibility that, in exceptional economic/financial circumstances and in order to quickly reduce the public deficit, the legislator could lower the income of Public Administration staff, even if such a measure were to lead to unequal treatment compared to persons who earn income in the private economic sector. However, when not matched by equivalent sacrifices on the part of virtually all the other citizens

earning income from other sources, the cumulative, ongoing effects of the sacrifices imposed on people who earn income in the public sector represent a difference of treatment for which the goal of reducing the public deficit does not provide adequate grounds. This does instead constitute a breach of the principle of proportional equality, based on the idea that an inequality derived from a difference between situations must be judged from the point of view of whether it is proportional or not, and cannot go too far.

A different treatment for public-sector staff cannot continue to be justified by the idea that pay-reduction measures are more effective than other possible cost-containment alternatives. Nor can the special employment bond that ties such workers to the public interest serve as grounds for continuing to require them to make sacrifices in the form of a unilateral reduction in their salaries. Penalising a given category of people, in a way that is made worse by the combined effect of this reduction in pay and the generalised increase in the fiscal burden, undermines both the principle of equality with regard to public costs and the principle of fiscal justice.

2. Partial suspension of the holiday month for pensioners

The Court considered that the suspension of the holiday month of pensions for public and private-sector retirees should also be declared unconstitutional with generally binding force, for substantially the same reasons as those given in relation to the salaries of Public Administration workers.

The right to a private or public-sector pension is situated on the same level as the right to a salary. If there is a difference, it is in the sense that pensioners possess a legal position which warrants added protection in terms of the principle that trust must be protected. In their case, we are dealing with rights that have already been constituted, and not future rights. At the moment when a person's professional working life ends and he/she is entitled to start receiving the pension benefit, the pensioner no longer enjoys mechanisms that enable him/her to protect him/herself and to adapt his/her own behaviour to his/her new circumstances. This produces a situation in which there must be increased trust in the stability of the legal order and the maintenance of the rules that serve to define the content of the right to a pension.

The Court recognised the seriousness of the current economic/financial situation and the need to attain the public-deficit goals included in the specific economic policy conditions laid down in the memoranda of understanding between the Portuguese government, the European Union and the International Monetary Fund. However, it was of the view that the different treatment imposed on people who receive pay and pensions that come from public funds, in the form of the suspension of the holiday month, went beyond the limits established by the prohibition on excess where proportional equality is concerned, and that in the case of pensioners the situation of inequality in relation to public costs was even worse.

The imposition of the so-called extraordinary solidarity contribution, which sought to make the reduction in pensions equivalent to that in the monthly pay of public-sector staff, already means that pensioners are experiencing the same fall in disposable income as the latter. The suspension of the holiday month has also further aggravated an already unequal situation, not only in relation to other pensioners whose holiday month was not suspended, but also compared to people with other forms of income, who were only faced with the generalised increase in the fiscal burden applicable to all taxpayers.

3. Contribution payable on unemployment and sickness benefits

The Court declared the norm that provided for a contribution payable on unemployment and sickness benefits to be unconstitutional with generally binding force, because it violated the principle of proportionality.

The Constitution says that workers have a right to material assistance when they involuntarily find themselves in an unemployment situation, and also requires the legislator to provide for forms of material assistance for workers who are ill, in both cases within the context of a social security system. This objective must thus be achieved via the legal regimes that ensure social protection in cases of unemployment and sickness.

It is true that the Constitution does not establish a right to a concrete amount of material assistance, even in the event of unemployment. The scope of the protection provided by a worker's right to material assistance in situations of unemployment or illness does not mean that it is impossible to reduce the amounts of those benefits, unless the reduction is so great that it de-characterises them by making the welfare function they perform – that of replacing earned remuneration – unviable.

In the cases of both the unemployment benefit and the sickness benefit, the new contribution was accompanied by other measures that increased the

amount of the payments to which involuntarily unemployed or ill workers are entitled in certain specific situations (the unemployment benefit is now higher when both spouses are unemployed and have dependent children; and the calculation of the reference remuneration used to determine the sickness benefit has been changed to consider total remuneration from the beginning of the reference period until the day before that on which the beneficiary became unfit for work, thereby taking into account any reductions in income over the course of the reference period).

The ability to fulfil the constitutional programme under which citizens are protected when they are ill or unemployed is dependent on financial and material factors, and it is the legislator's job to make the content of the corresponding social right operable by defining the list of situations in which protection is required.

The fact that the measure before the Court was exceptional and transitory, with the reductions in the sickness and unemployment benefits imposed solely for the current budget year, could lead to the conclusion that the norm was constitutional.

However, the Court's view was that the absence of any safeguard clause meant that in practice it was not impossible for the cash amounts involved to be reduced to a point at which, in some cases, the benefit might fall below the minimum level already established in legislation. Such a solution would violate the principle of proportionality by affecting the beneficiaries in the most vulnerable situations, in that it encompasses social benefits whose function is to replace earned pay a worker has been deprived of and whose amount is supposed to be at least equal to the minimum material assistance already guaranteed by law. The fact is that the Constitutional Court has gradually been recognising the existence of a guarantee of a right to a minimum level of subsistence – a right which it has founded on a combination of the principle of the dignity of the human person and the right to social security in situations of need, as measured against the standard of the national minimum wage (SMN) or the guaranteed minimum salary (RMG).

4. Reduction in remunerations paid out of public funds

The Court did not declare the continued reduction in remunerations paid out of public funds to be unconstitutional.

This is the third consecutive year in which this reduction in the remunerations paid within the scope of the legal public employment relationship has been in effect, and in this respect the 2013 Budget Law simply maintained the norms and reductions set out in its predecessors. The Court recalled its previous jurisprudence, in which it said that the rule under which salaries cannot be reduced is not an absolute one, but rather an infra-constitutional rule. The only absolute prohibition is that neither a public nor a private employer can arbitrarily reduce pay, unless a legal norm allows it to do so. The Court thus rejected the argument that there is a right under which salaries are irreducible – a right that was said to exist in labour legislation, but to have been given the nature of a fundamental right under the open clause in the Constitution which says that fundamental rights do not have to be expressly contained in the Constitution itself, but can also be established in infra-constitutional laws or derived from international-law rules that apply in Portugal.

The Court upheld its previous position (Ruling no. 396/2011) on the argument that the reductions in the pay of public-sector workers are in breach of the principle of equality because they only target people who work for the state and other public-law legal persons, and do not apply to workers who are paid for providing subordinate labour in the private or cooperative sectors, independent workers, or anyone else who earns income from other sources. It concluded that there are legitimate grounds for this differentiation, both because no evidence was presented to refute the position that only pay cuts are capable of guaranteeing a sure and immediate reduction in the weight of public spending, and because where this objective is concerned, people who are paid out of public funds are not in the same position as other citizens. For these reasons the Court felt that the additional sacrifice demanded of this category of persons for a transitory period of time does not constitute an unjustifiably unequal form of treatment.

5. Payment of overtime

The Court decided not to declare the unconstitutionality of a norm that provides for a reduction in overtime payments to public-sector staff.

As was already stated, the Court does not recognise the existence of a constitutional guarantee that salaries cannot be reduced. It said that this guarantee is infra-constitutional, and that the reduction in overtime payments does not breach either the principle of trust, or the principle of equality.

Unlike the extra holiday and Christmas-month payments, additional pay for doing overtime does not possess the habitual or regular nature that typically characterises remuneratory payments in the technical-legal sense.

Inasmuch as overtime pay is variable and unpredictable, because it depends on managerial decisions that fall exclusively within the employer's sphere of authority, this measure is not in violation of the constitutional principle of trust. The Court considered that the reasons why the measures involving the reduction and suspension of elements of people's pay packets are not unconstitutional to be even more valid here, and that this reduction in overtime payments does not cause damage that can be criticised on constitutional grounds, notwithstanding the fact that the expectation of immutability is actually more consistent and lastingly formed in this particular situation.

6. Extraordinary solidarity contribution (CES) payable on pensions

Nor did the Court find that the norm which subjects pensions to an extraordinary solidarity contribution to be unconstitutional, considering instead that this measure is appropriate and proportional and does not include elements that would constitute a confiscation.

The Extraordinary solidarity contribution was designed to work in conjunction with other measures to respond to the economic and financial crisis. The combination of a decrease in the revenues of the social security system, a major rise in unemployment and the ensuing increase in expenditure on the provision of support for the unemployed in particular and situations of poverty in general, falling salaries and thus falling social security contributions, and new migratory trends, is all requiring the state to subsidise the social security system. It also means that, within the overall framework of the basic choices available to the political authorities, there is an urgent need to strengthen that system's financing at the cost of its beneficiaries.

The Court acknowledged that, having reached the end of their professional working lives and secured the right to the payment of a pension calculated on the basis of the social security contributions deducted from their incomes during their working careers, retirees are legitimately entitled to expect continuity in the legislative framework and the maintenance of their legal positions. They cannot be required to have made alternative plans for a possible change in public policy that is capable of having negative effects in their legal sphere.

However, in the present case the Court was of the opinion that a para-fiscal contribution to be made by the universe of pensioners is a measure that is appropriate to the goals pursued by the legislator. It also felt that the measure fulfils the principle of need, in that the Court was not aware of any alternatives which, while remaining coherent with the system of which such measures form a part, would simultaneously cause less damage to the holders of the legal positions at stake and serve the public interest to the same extent.

Nor did the Court find the norm to be disproportionate or excessive, bearing in mind its exceptional and transitory nature and the effort the legislator made to ensure that the sacrifice demanded of private individuals is proportional to their income levels.

7. Changes in the Personal Income Tax Code (CIRS)

The Court rejected the suggestion that the norms in the State Budget Law for 2013 concerning a reduction in the number of taxable income brackets, an amendment to the additional solidarity rate, limitations on tax-deductible items, and the creation of Personal Income Tax (IRS) surtax, are unconstitutional.

On the subject of the reduction in the number of tax brackets and the increase in the normal and average rates applicable to each one, the Court held that the system is still sensitive to differences in levels of income. The initial amount of income that is free of tax continues to be proportionally higher for lower incomes, and the degree of progression from one bracket to the next is substantial. Although the changes do represent a certain reduction in this degree of progressivity, the Court did not consider it to be enough to be unconstitutional.

Under the IRS heading, the petitioners also questioned the constitutionality of the reductions in, or elimination of, tax-deductible items (in this case, deductible from the actual amount of tax payable, as opposed to reductions in the taxable income, which would thus only influence the calculation of the latter).

The Court held that the decision as to whether these measures are compatible with the principle of the capacity to pay taxes, which is itself derived from the principle of equality, is included within the scope of the legislator's freedom to shape ordinary legislation.

On the question of whether the IRS surtax is capable of breaching the principles of the unitary and progressive nature of income taxes, the Court felt that when the system is taken as a whole, the norm maintains enough progressivity to avoid criticism in constitutional terms.

The Court also found that the exceptional and transitory nature of the measures – designed as they are to offer a response to extraordinary public finance

needs – means that they are not in violation of the rule that taxes on personal income must be unitary.

8. Difference between the fiscal treatment of income from work and pensions and the taxation of income from capital

The Court declined to pronounce itself on the question of whether the Constitution – and specifically the principle of equality in the distribution of public costs and the principle of fiscal justice – is compatible with the legislator's decision to set rates of tax on income from work and pensions that can exceed 50%, while subjecting capital incomes to a single rate of 28%.

The Court was of the view that such a comparison is not viable. Firstly, because such rates apply to forms of income that are not calculated in the same way; and secondly, because the nature of the rates and the ways in which they operate are different, and it is thus not possible to make a comparison based on their nominal amount. What is more, the rates in question correspond to mechanisms that function on the basis of different logics (progressive vs. proportional), and thus concretely distribute the fiscal burden in different manners: the general rates are based on the concept of personal taxation – i.e. the idea that it is people who are taxed on their income; whereas "liberatory" withholding taxes or autonomous taxes represent the direct taxation of a specific item or amount.

Summary:

In view of its length, the English Summary is available in the CODICES database only.

Supplementary information:

Only the decisions not to declare the unconstitutionality of the norms on the cut in remunerations paid out of public funds, and on overtime payments to public-sector workers, were unanimous. The others were handed down by majority votes that varied between 11-2 and 8-5.

Cross-references:

- Rulings nos. 358/92 (11.11.1992), 396/11 (21.09.2011), 353/12 (05.07.2012).

Languages:

Portuguese.

Identification: POR-2013-1-007

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 24.04.2013 / **e)** 230/13 / **f)** / **g)** *Diário da República* (Official Gazette), 89 (Series I), 09.05.2013, 2782 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction**.
4.7.14 Institutions – Judicial bodies – **Arbitration**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
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:

Access to courts, meaning / Access to courts, scope / Impartiality, institutional / Administrative authority, independent / Judicial protection of rights.

Headnotes:

The norm which created a Sports Arbitration Tribunal (hereinafter, the "TAD"), as an independent jurisdictional entity with exclusive competences, and which precluded appeals to a state court against decisions on the merit of the case in mandatory arbitration proceedings violates both the right of access to the courts and the principle of effective jurisdictional protection – rights which the Constitution affords to all citizens in order to enable them to defend their legally protected rights and interests.

It is not acceptable for the state to delegate powers of authority to a private entity, thereby operating an organic privatisation of the Public Administration in its role as the executor of a certain public task, and for it to simultaneously renounce any jurisdictional control by state courts over the merit of administrative decisions taken within the legal framework of that delegation of competences.

Where what is at stake is mandatory arbitration, it is even more evident that there must be provision for a means of appeal to a state court when the issue is not one of mere private-law relations, or of mere administrative legal relations in which the parties are on a par with one another, but rather legal relations derived from the exercise of powers of authority.

Summary:

I. The President of the Republic requested the Constitutional Court to conduct a prior review of the constitutionality of a norm contained in the Law governing the TAD. The norm required parties to submit to arbitration and prohibited them from seeking access to the state courts in order to defend their legally protected interests. The norm would thus have meant that it was impossible to appeal against decisions issued within the scope of a mandatory TAD arbitration process.

The challenged norm gave the TAD both mandatory and voluntary arbitration competences. The former encompassed disputes arising from acts and omissions of federations and other sports bodies and professional leagues, as well as appeals against decisions taken by disciplinary bodies of sports federations, or against Portuguese Anti-Doping Authority (AAP) decisions with regard to breaches of anti-doping regulations.

The list of TAD arbiters was to be drawn up by the Sports Arbitration Council (hereinafter, "CAD", which forms part of the TAD's organisational and functional structure), with CAD free to choose both the first level of arbiters and those who compose the TAD's appeals chamber.

In general terms, the acts undertaken by sports federations in the exercise of their powers to regulate and discipline sporting activities are subject to administrative jurisdiction. This is a logical consequence of the public nature of the powers the state entrusts to them when it grants the public-interest status that in turn gives a sports federation the sole competence to exercise regulatory and disciplinary powers in relation to a given form of sport – powers that are characterised as being of a public nature. These days it is widely accepted that the administrative courts are the ones with the competence to hear cases regarding the decisions taken by sports federations in the exercise of public powers, except when what is at stake is a purely sporting question – i.e. one that results from the application of the "rules of the game" and where the decision cannot be qualified as an administrative act because it does not constitute the expression of a public power.

Administrative jurisprudence has sought to operationalise the concept of strictly sporting questions in order to define the scope of the administrative courts' own competence in the field of sport-related justice. In particular, the Supreme Administrative Court (hereinafter, the "STA") restrictively interprets the concept of the constitutional right of access to the courts in such a way as not to hear questions that are entirely sporting matters, while retaining within the jurisdiction of the state those decisions which undermine or negatively affect fundamental rights, rights which the holders are not free to dispose of, or legal assets which are protected by legal norms other than those strictly related to sporting practices. The STA's jurisprudence emphasises that decisions of sporting entities which might potentially undermine or negatively affect key values that form structural elements of the legal order cannot be removed from the jurisdiction of the state.

The work of arbitration tribunals, to which the Constitution expressly refers, is equivalent to a true private exercise of the jurisdictional function.

II. The Constitutional Court stated that the express recognition in the Constitution of the existence of arbitration tribunals means that the legislator can create them in order to judge certain categories of dispute, thereby obliging the citizens involved in such matters to resort to this jurisdictional conflict-solving path. However, it asserted that one must deduce consequences from the fact that mandatory arbitration has nothing to do with the autonomous will of the parties. If a dispute is submitted to mandatory arbitration, the decision to resort to the arbitration jurisdiction derives from the legislative act that makes it compulsory, and the interested parties are precluded from gaining access to either state jurisdiction or voluntary arbitration.

The Court observed that resort to a state court is the primary form of access to the law, and that this reservation of jurisdiction serves as the basis for the possible imposition of limits on the formation of arbitration tribunals. The right of access to the courts is a logical corollary of the tendency to resolve conflicts via the state courts.

The question here is whether the guarantee of access to the courts can be fulfilled by means of an arbitration-based jurisdiction in a way that always excludes re-examination of the case by a state court, regardless of the nature of the rights and interests at stake.

The Court took the view that, except in cases in which jurisdiction pertains exclusively to the state courts, it may be permissible for the right of access to the courts to be assured only at the appeal level and for the first stage of the resolution of a dispute to be handled by other powers. In such a case, one would be talking about a partially exclusive jurisdiction. The inability to appeal against arbitration decisions represents a clear violation of the right of access to the courts, not only because these are decisions that are taken as a part of a mandatory arbitration process, but also given the nature of the rights and interests in play and the fact that we are in the presence of an exercise of delegated powers of authority.

What is more, the way in which the norm proposed that arbiters be appointed limited the parties' freedom – when it is precisely in that individual act of appointment that we find the material grounds for the subjection of a certain category of dispute to a legally required arbitration jurisdiction – and the president of the tribunal could hand down a decision on a provisional resolution of the dispute without any need for acceptance or agreement by the parties. These circumstances configure limitations on the parties' self-determination and undermine the requisites of independence and impartiality that are imposed on an arbitration tribunal. As such, the inability to bring an appeal against an arbitration decision before an administrative court also represents a breach of the principle of effective jurisdictional protection.

For these reasons, the Court found the norm before it to be unconstitutional.

Supplementary information:

One concurring and one dissenting opinion were attached to the Ruling. The dissenting Justice took the view that the fundamental right of access to the courts – a right that is linked to the reservation of the jurisdictional function to the courts – is not guaranteed solely by means of access to the state courts. In her opinion, although the TAD was not a state court, the fact that its creation resulted from a legislative act and not a private-law private legal transaction, meant that its typically public nature was undeniable.

Cross-references:

- Rulings nos. 230/86 (08.07.1986); 52/92 (05.02.1992); 757/95 (20.12.1995); and 262/98 (05.03.1998).

Languages:

Portuguese.

Romania
Constitutional Court

Important decisions

Identification: ROM-2013-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 05.03.2013 / **e)** 123/2013 / **f)** Decision on an objection as to the constitutionality of Government Emergency Ordinance no. 143/2007 amending Article 6.2 and 6.4 of Government Emergency Ordinance no. 114/2005 establishing measures for implementing and finalising the privatisation of subsidiary electricity distribution and supply firms "Electrica Moldova" S.A. and "Electrica Oltenia" S.A., Law no. 147/2008 on approval of Government Emergency Ordinance no. 143/2007 *et al.* / **g)** *Monitorul Oficial al României* (Official Gazette), 214, 16.04.2013 / **h)** CODICES (French, Romanian).

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court**.
1.3.1 Constitutional Justice – Jurisdiction – **Scope of review**.
4.7.14 Institutions – Judicial bodies – **Arbitration**.
5.2 Fundamental Rights – **Equality**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Privatisation / Privatisation, company, employee, participation in privatisation, advantage / Privatisation, conditions / Privatisation, equal treatment, employees / Referral, competence.

Headnotes:

The adoption of certain legislative acts extending the deadline granted to employees, members of the board of management and retired persons whose last post was in privatised firms ("employees with preferential rights") for purchasing shares at the price paid by the strategic investor cannot be described as an interference with any property right, but rather as a measure geared toward fulfilling the conditions for implementing the rights set out in the privatisation contract. These legislative acts added no restrictions concerning the share purchase option of the applicant, E.ON România SRL (hereinafter, "E.ON"), but did stipulate the deadline for the effect of the restriction agreed by E.ON in the privatisation contract. Even if the strategic investor exercised the share purchase option it could only have an effect on the shares of employees with preferential rights when the conditions laid down in the privatisation contract were fulfilled.

The Constitutional Court cannot conduct a comparative examination of the privatisation of two subsidiaries of a commercial firm or analyse the reasons behind the legislative choices made by the Romanian legislature under the procedure for privatising them. Even if this approach were possible, it would involve comparing the different situations and conditions in which the privatisation took place, *vis-à-vis* the different legal situations of the investors.

Summary:

I. In accordance with Article 146.d of the Constitution, an objection as to the constitutionality of the above-mentioned legislative acts was referred to the Constitutional Court of Romania by the International Court of Arbitration of the International Chamber of Commerce, in Paris, France.

The acts in question consist of a series of emergency ordinances and laws approving the latter, which legislative acts established or extended the deadline granted to employees, members of the board of management and retired persons whose last post was in the privatised firms ("employees with preferential rights") for purchasing shares at the price paid by the strategic investor.

The objection as to unconstitutionality was submitted by E.ON as part of the arbitration application set out in Arbitration File no. 18105/GZ as registered in the books of the International Court of Arbitration of the International Chamber of Commerce, Paris, France, the respondent party being the electricity distribution and supply firm Electrica SA (hereinafter, "Electrica").

The statement of reasons for the objection included arguments based on extrinsic and intrinsic unconstitutionality.

In connection with extrinsic complaints, the author of the objection contended that the impugned emergency ordinances issued by the government failed to respect the notification requirements set out in Article 115 of the Constitution, on the grounds that they were adopted in the absence of any exceptional case or emergency situation and without giving

adequate reasons to justify the alleged emergency. It was argued that their approval by law does not cover the unconstitutionality noted, which is referred to the approving acts, which are in turn affected by the same flaws.

The second category of (intrinsic) complaints include breach of property rights, i.e., the interference by the state, without reasonable justification, with a right *in personam* which is sufficiently well-established under Romanian legislation to be regarded as a property right, as well as infringement of the right to non-discrimination on grounds of unjustified differential treatment of E.ON and CEZ (a Czech company which participated in the process of privatising Electrica Oltenia, another Electrica subsidiary).

II. When examining the objection as to unconstitutionality, the Court noted the following:

1. In connection with the lawfulness of the referral, the Court considered the fulfilment of the conditions for admissibility set out in Article 29.1 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, that is to say:

- referral to the Constitutional Court by "a court of law or commercial arbitration";
- the legislative acts objected to must be "in force";
- the challenged acts must be "germane to the settlement of the case".

a. The condition of referral to the Constitutional Court by "a court of law or commercial arbitration"

The commercial arbitration authority which referred the case to the Constitutional Court was the International Court of Arbitration of the International Chamber of Commerce in Paris. The author of the objection and the single arbitrator considered that the latter was "a court of commercial arbitration" within the meaning of Romanian legislation. The respondent party considered that since it was a foreign arbitration authority, it did not constitute "a court of commercial arbitration" according to Romanian legislation.

The Court noted that the logical interpretation of the provisions of Article 146.d of the Constitution and of Article 29 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, which texts govern the responsibility of the Romanian Constitutional Court to decide on "objections as to the unconstitutionality of laws and ordinances brought before courts of law or commercial arbitration", led to the conclusion that the legislature drew no distinction between courts of commercial arbitration in terms of their place of functioning.

Similarly, systematic interpretation of the Constitution shows that although in the case of courts of law (to which the same texts analysed refer–Article 146.d of the Constitution and Article 29 of Law no. 47/1992), the Constitution refers explicitly to the system of national courts of law via the reference in Article 126 of the Constitution to the High Court of Justice and Cassation and its role in ensuring unitary interpretation and implementation of the law by the courts of law, in the case of courts of commercial arbitration there is no such reference, specification or explanation, as the constitutional drafters had clearly taken a broader view in this context.

Adopting a teleological approach to the same legal texts, the Court noted that the goal pursued by the legislature in including courts of commercial arbitration among the bodies before which objections as to unconstitutionality can be brought (revision of the Constitution of 2003) was to ensure maximum access to constitutional justice. Mainly for these raisons, the Court noted that the condition of referral to the Constitutional Court by "a court of law or commercial arbitration" laid down in Article 146.d of the Constitution and Article 29.1 of Law no. 47/1992 had been fulfilled.

b. The condition requiring the legislative acts objected to be "in force"

The Court validated its Decision no. 766 of 15 June 2011, qualifying the interpretation of the expression "in force" used in Article 29 of Law no. 47/1992, which text confines review of constitutionality solely to laws and ordinances which are in force, and concluded that such review targeted "the provisions applicable to the instant case, even where they are no longer in force", in cases where such provisions continue to have legal effects after their expiry.

The Court noted that some of the legislative acts complained of (namely, Government Emergency Ordinance no. 143/2007, Law no. 147/2008 on approval of Government Emergency Ordinance no. 143/2007 and Government Emergency Ordinance no. 116/2008) had expired before the date on which E.ON exercised its share purchase option. Accordingly, these legislative acts are not laws or ordinances which are "in force" within the meaning of Decision no. 766/2011 of the Constitutional Court. Consequently, the objection as to unconstitutionality against Government Emergency Ordinance no. 143/2007, Law no. 147/2008 and Government Emergency Ordinance no. 116/2008 is inadmissible because these legislative acts are no longer "in force".

c. The condition requiring the challenged acts to be "germane to the settlement of the case"

The Court noted that of the legislative acts identified as being "in force", the only ones germane to the settlement of the case were acts issued after the date of the exercise of the share purchase option by E.ON, thus excluding Article II of Law no. 166/2009. The author of the objection is actually criticising the legislative acts successively amending the deadline set by Article II of Law no. 166/2009 for employees to exercise their option, not the text governing such deadline. Consequently, the Court ruled that the objection as to the unconstitutionality of Article II of Law no. 166/2009 is inadmissible because this legal text is not germane to the case.

2. As to the complaints of unconstitutionality

2.1 Complaints of extrinsic unconstitutionality

The Court concluded that the adoption of the challenged acts was determined by the need to create a coherent and complete normative framework by establishing clear legislative benchmarks to enable preferential employees to exercise the rights granted and guaranteed by law. This objective corresponds to a very important public interest, as laid down in the Romanian Energy Strategy, namely to set aside for energy sector employees a percentage of the shares in the companies for which they work. Consequently, the Government intervened against the background of an objective, quantifiable situation and in order to prevent the risk to a major public interest, which aspects solely concern exceptional situations. Furthermore, these regulations were adopted under conditions whereby the expiry of the deadlines prescribed for purchasing shares by those entitled was imminent, which situation corresponds to the emergency requirement in the regulations.

In appraising the exceptional nature of the situation which determined the adoption of the challenged emergency ordinances – from the perspective of the situation which imposed recourse to the regulations via emergency ordinances – the Court stated that a series of objective factors must be borne in mind, namely: the complexity of the privatisation process for the energy sector in the context of the transition to a market economy, in the context of the economic crisis; the changes to enterprises intervening in the privatised company, as well as the purchaser of the privatisation contract, as they emerge from the documents contained in the case file; and the need to protect the rights of a social category involved in the privatisation process.

All these factors suffice to show that the practical circumstances facing by the Government amounted to an exceptional situation and necessitated emergency measures in order to finalise the privatisation process under conditions complying with the law and the requirements of the public interest. The emergency regulations were justified by the very content of the legislative acts in the case, so that the criticisms levelled in this respect cannot be admitted either.

2.2 Complaints of intrinsic unconstitutionality

2.2.1 The alleged violation of property rights

The Court found that the facts of this case show that the author of the objection cannot even have a "legitimate hope" of becoming, as a result of exercising the share purchase option of 3 November 2010, the owner of shares earmarked for preferential employees. The Court noted that, drawing on the conclusion or approval of the privatisation contract, E.ON realised the importance, under the privatisation strategy, of earmarking certain shares for preferential employees, as well as the fact that such share percentages could only come under its share purchase options under the conditions laid down in legislation**.** Its right was therefore conditional upon the existence of an appropriate normative framework, for which the privatisation contract did not comprise any deadline, restriction or commitment for the legislature concerning the finalisation of the transmission of ownership of all the shares of the privatised company within a specific timescale. Consideration of the clauses of the contract concerning the prices of the share sale/share purchase options (17.3) shows that at the time of conclusion of this contract this procedure was expected to be lengthy (the period 2007-2012 was explicitly mentioned).

Moreover, the share purchase option was exercised under the influence of a legislative act which had just set a new deadline for preferential employees. Consequently, at the time of exercising the share purchase option the author of the objection had the sole option of asking Electrica to sell the remaining shares to Electrica Moldova subject to the condition of respecting the privatisation contract. Neither the privatisation contract nor any of the above-mentioned legislative acts provided for the establishment of any E.ON property rights over the shares earmarked for the preferential employees following the expiry of the deadlines set out for them in the Law. Consequently, there has never been any legal basis for E.ON's hope of purchasing the right of ownership of the corresponding shares upon the expiry of these deadlines.

E.ON's share purchase option was therefore subject to a series of conditions accepted by E.ON at the time of conclusion of the privatisation contract, which conditions were not fulfilled at the time of exercising the share purchase option, which led to the description of its conviction that it could purchase the shares earmarked for preferential employees as a mere hope, which is therefore not protected by Article 1 Protocol 1 ECHR. From this angle, the adoption of the challenged legislative acts cannot be described as an interference with property rights, but must rather be seen as a measure geared toward fulfilling the conditions for implementing the rights set out in the privatisation contract.

Setting a deadline for preferential employees to purchase the maximum 10% investment in the shares of the privatised company comes under the wide discretionary powers of the State in implementing its economic and social policies. E.ON's hopes that these shares will be sold on a specific date cannot be transformed into an obligation on the State to proceed as desired by E.ON.

2.2.2 The alleged violation of the principle of non-discrimination

The Court found that Article 16.1 of the Constitution could not be directly applied to this case because it provides that citizens are equal before both the law and the public authorities. Nor can Article 14 ECHR be relied upon, since the objecting party does not specify or demonstrate which rights and freedoms were being exercised when the challenged legislative acts caused discrimination.

The Court also noted that it was in fact being asked to conduct a comparative examination of the privatisation of two Electrica SA subsidiaries, i.e., an analysis of the reasons for the Romanian legislature's different legislative approaches to the processes of privatising the Electrica subsidiaries. Even if the action requested could be carried out by default, it is clear that it would involve comparing the different situations and the different conditions under which the privatisation occurred, as compared with the differing legal situations of the investors. The fact is that the constitutional principle of equality presupposes establishing equal treatment of situations which do not differ in terms of the aim pursued. This is why it does not exclude but, on the contrary, demands, different solutions in different situations.

For the above-mentioned reasons, the Court rejected as unfounded the objection as to the unconstitutionality of the provisions of Government Emergency Ordinance no. 126/2010, Law no. 79/2011, Government Emergency Ordinance no. 116/2011, Article 3 of Government Emergency Ordinance no. 120/2011 and Law no. 91/2012.

Languages:

Romanian.

Identification: ROM-2013-1-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 04.04.2013 / **e)** 196**/**2013 / **f)** Decision on the objection as to the unconstitutionality of the provisions of Article 55.4 and 55.9 of Law no. 317/2004 on the Higher Council of the Judiciary / **g)** *Monitorul Oficial al României* (Official Gazette), 231, 22.04.2013 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

3.12 General Principles – **Clarity and precision of legal provisions**.
4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body**.
5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.

Keywords of the alphabetical index:

Judicial Council, competences / Judicial Council, member, dismissal.

Headnotes:

The procedure for dismissing members of the Higher Council of the Judiciary must be established sufficiently clearly and explicitly in legislative terms to prevent such members from being exposed to possible pressure and to prevent the independence, freedom and security of such members, in the exercise of their and obligations under the Constitution and legislation, from being affected.

Summary:

I. An objection as to the unconstitutionality of the provisions of Article 55 of Law no. 317/2004 on the Higher Council of the Judiciary was referred to the

Constitutional Court in accordance with Article 146.d of the Constitution. On analysing the grounds for unconstitutionality, the Court decided that the main complaint was in fact the mode of regulating the possible reasons justifying the dismissal of elected members of the Higher Council of the Judiciary by court general assemblies, as well as the procedure enabling members to be dismissed by the Plenary Assembly of the Council. Consequently, the Court noted that the provisions of Article 55.4 and 55.9 of Law no. 317/2004 were the subject of the objection.

The author of the objection contended that the challenged text was unconstitutional and violated the principle of foreseeability of legal standards, as the dismissal procedure set out in the challenged standard was not sufficiently or clearly established.

II. In accepting the objection as to unconstitutionality on a majority vote, the Court noted the following:

Analysis of the provisions of Article 55 of Law no. 317/2004 shows that the procedure for dismissing a judge from membership of the Higher Council of the Judiciary can be proposed by:

- the President or Vice-President of the Higher Council of the Judiciary or a third of its members, in the following three cases:

1. where the person in question no longer fulfils the legal conditions for membership of the Council;
2. where his/her attributions in the Council are not being fulfilled or are being improperly discharged;
3. where a disciplinary sanction is implemented.

- the majority in the court general assemblies which he/she represents in cases of non-fulfilment or improper discharge of the attributions assigned by virtue of election as a member of the Council, in accordance with Article 55.4 of Law no. 317/2004.

In all situations, the Plenary Assembly of the Higher Council of the Judiciary can order the dismissal of an elected member in accordance with Article 55.1 of Law no. 317/2004.

In the former hypothesis, concerning cases of non-fulfilment or improper discharge of attributions in the Council, the Plenary Assembly of the Higher Council of the Judiciary establishes the attributions and responsibilities of each permanent member by field of activity, in pursuance of Article 22.3 of Law no. 317/2004, within 15 days of the inaugural meeting.

In the latter hypothesis, the dismissal procedure can be set in motion by any court general assembly represented by the member of the Council or by the judicial professional organisations. Dismissal procedures can only be commenced by a general assembly where the member of the Higher Council of the Judiciary is accused of not having fulfilled or having improperly discharged his/her attributions pursuant to election as a member of the Council.

The Court noted that in both hypotheses, regarding the subjects initiating the dismissal procedure, the regulations were clear and unambiguous. However, in connection with the grounds of dismissal: "non-fulfilment or improper discharge of attributions in the Council", and "non-fulfilment or improper discharge of the attributions pursuant to election as a member of the Council", the distinction drawn by the legislature is susceptible to a variety of interpretations.

In the former case, as stated above, the attributions represent the administrative and judicial tasks to be conducted as a member of the Higher Council of the Judiciary, but in the latter case, the attributions pursuant to election as a member of the Council are neither explicitly defined nor implied in the provisions of Law no. 317/2004. This being the case, it is unclear how a member of the Higher Council of the Judiciary could be accused of non-fulfilment or improper discharge of attributions which he or she has not been, and could not have been, assigned by the court general assemblies which elected him or her to the Council.

The Organic Law on the organisation and functioning of the Higher Council of the Judiciary lays down the latter's attributions and, implicitly, establishes the aforementioned administrative and judicial tasks, but it does not mention attributions assigned by the general assemblies to elected members of the Council. The words "attributions assigned" therefore exceed the legal regulations because attributions conferred on members of the Council must be specified in the Organic law on the latter. The fact is that the court general assemblies represented by the elected member of the Higher Council of the Judiciary cannot assign to such member other attributions in addition to those established by law.

The Court therefore concluded that Article 55.4 of Law no. 317/2004 presented a serious omission of content, i.e., a provision on the grounds for initiating the dismissal procedure, which made it unconstitutional. Where legislative technique is concerned, the text ought to have been drafted as a special provision with separate regulations, in order to establish specific regulations concerning sanctions. The solutions expected of a legislative act should not

be implemented haphazardly: the legislature is required to establish clear and precise conditions, modalities and criteria. However, in the case of dismissal of an elected member of the Higher Council of the Judiciary, there is no mention of how "non-fulfilment or improper discharge of attributions pursuant to election as member of the Council" can be established. So the dismissal procedure, as regards the grounds on which it is based, has not been sufficiently clearly and explicitly established at the legislative level, with direct consequences for the activity of the Higher Council of the Judiciary, or in connection with the professional careers of its elected members, who are judges or prosecutors.

The Court also noted that, although the court general assemblies appointing a member to the Higher Council of the Judiciary were undeniably entitled to dismiss this person, such dismissal should be effected under conditions clearly established by law, as regards the requisite grounds and also procedure. Analysis of the challenged texts set out in Article 55.4 and 55.9 of Law no. 317/2004 leads to the conclusion that the constitutional and conventional provisions on the right of defence have been violated, as a result of the lack of clarity and foreseeability of the provision, as well as Article 6 ECHR on the right to a fair trial, transposed by Article 20 of the Constitution. Whoever initiates the dismissal procedure cannot disregard the legal requirements concerning the imposition of a sanction, which necessitates information on the facts (committed or omitted) ascribed to the elected member of the Higher Council of the Judiciary and the analysis thereof, within a framework enabling the Council member to explain his or her viewpoint and present arguments in his/her defence.

Consequently, the Court decided that the right of defence as guaranteed by the Constitution was not confined exclusively to judicial proceedings but, by its nature and purpose, should also cover procedures before the Higher Council of the Judiciary.

Languages:

Romanian.

Identification: ROM-2013-1-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 29.04.2013 / **e)** 206/2013 / **f)** Decision concerning the exception of unconstitutionality of the provisions of Article 414^5.4 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 350, 13.06.2013 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court**.
1.6.3 Constitutional Justice – Effects – **Effect erga omnes**.
3.9 General Principles – **Rule of law**.
4.7.3 Institutions – Judicial bodies – **Decisions**.
4.7.7 Institutions – Judicial bodies – **Supreme Court**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

Keywords of the alphabetical index:

Constitutional Court, decisions, effect, binding / Judicial review, scope, limits / Defamation.

Headnotes:

Legal provisions exist that authorise the High Court of Cassation and Justice, based on an infra-constitutional rule, to deliver binding decisions contrary to the Constitution and to decisions of the Constitutional Court. The authority allows it to declare unconstitutional and invalidate the "solution on matters of law as adjudicated" by the Constitutional Court. Such authority seriously affects legal certainty and the role of the Constitutional Court. Therefore, the legal provisions establishing the binding nature of the High Court of Cassation and Justice's decision should be appealable in the interest of law.

Summary:

I. The Constitutional Court was notified, pursuant to Article 146.d of the Constitution, about provisions of Article 414^5.4 of the Code of Criminal Procedure, which established the binding nature of the High Court of Cassation and Justice's decision to exceptionally declare the Constitutional Court's adjudication unconstitutional by limiting appeals to the former's decision in the interest of law.

As grounds for the unconstitutionality exception, the High Court of Cassation and Justice claimed that a constitutional legal text is unconstitutional. More specifically, it found that the Constitutional Court's findings (Decision no. 62/2007) of unconstitutionality

of the Criminal Code Articles 205 and 206 on the criminalisation of insult and libel and Article 207 on the truth in evidence (repealed by the provisions of Article I.56 of Law no. 278/2006) are no longer in force. The High Court of Cassation and Justice invoked the binding unconstitutionality exception, using its power to settle appeals in the interest of law to deliver the decision, despite it being contrary to the Constitutional Court ruling.

II. Regarding the unconstitutionality exception, the Constitutional Court held the following:

Establishing circumstances when the exception of unconstitutionality was raised, the Constitutional Court referred to Decision no. 62 of 18 January 2007, published in the Official Gazette, Part I, no. 104 of 12 February 2007. The aforementioned decision stipulated the unconstitutionality of the provisions under Article I.56 of Law no. 278/2006 amending the Criminal Code, as well as other laws that referred to the part concerning the repeal of Articles 205, 206 and 207 of the Criminal Code. As grounds for that decision, it was held that, once the repealing provisions have been declared unconstitutional, such shall cease to produce legal effects under the terms of Article 147.1 of the Constitution. The legal provisions subject to repeal – in this case, rules criminalising insult and libel contained in Articles 205 and 206 of the Criminal Code, as well as provisions of Article 207 of the Criminal Code on the truth in evidence – shall continue to produce legal effects.

Following the publication of the Constitutional Court Decision no. 62/2007, the courts' practice became inconsistent. Some courts have considered the provisions of Articles 205-207 of the Criminal Code as in force. Other courts have held that these provisions are not in force, delivering judgements of acquittal based on Article 10.1.b of the Code of Criminal Procedure, respectively, judgements of dismissal of complaints filed under the procedure laid down in Article 278^1 of the Code of Criminal Procedure.

By Decision no. 8 of 18 October 2010 (published in the Official Gazette of Romania, Part I, no. 416 of 14 June 2011), the United Sections of the High Court of Cassation and Justice upheld the appeal in the interest of the law. The appeal was filed by the prosecutor general of the Prosecution Office attached to the High Court of Cassation and Justice and the referral from the Managing Board of the Prosecution Office attached to the Bucharest Court of Appeal "in relation to the consequences of the Constitutional Court Decision no. 62/2007 [...] over the application/effects of the provisions of Articles 205, 206 and 207 of the Criminal Code". The High Court of Cassation and Justice established that: "The rules criminalising insult and libel set forth in Articles 205 and 206 of the Criminal Code, as well as the provisions of Article 207 of the Criminal Code on the truth in evidence, repealed by the provisions of Article I.56 of Law no. 278/2006, provisions declared unconstitutional through Decision no. 62 of 18 January 2007 of the Constitutional Court, are no longer in force."

Referring to the situation created, the Constitutional Court emphasised that its decisions and those of the High Court of Cassation and Justice are the expression of specific powers, strictly provided by law. The Constitutional Court decides on the constitutionality of laws, while the High Court of Cassation and Justice, through the appeal in the interest of the law, decides on the interpretation and application of legal rules. On the other hand, the decisions of the Constitutional Court are generally binding pursuant to Article 147.4 of the Constitution, also for the legislator, while decisions delivered in settlement of appeals in the interest of the law are addressed to judges of the courts of law.

Consequently, in relation to the relevant Article 126.3 of the Constitution, the phrase "the solution on matters of law as adjudicated" contained in Article 414^5.4 of the Code of Criminal Procedure, on the one hand, can only concern the uniform interpretation and application of legal provisions, as normative acts. They do not apply to the decisions of the Constitutional Court and the effects that the latter produce. On the other hand, they can only concern the uniform interpretation and application of the law by courts of law, and not by the Constitutional Court, an authority outside the judiciary. In other words, only under these circumstances when "the solution on matters of law as adjudicated" can be binding, because only under these circumstances there can exist a compatibility with the constitutional rules. Any other interpretation is contrary to the provisions of Article 147.1 and 147.4 of the Constitution, because it deprives the effects of the decisions of the Constitutional Court. It also transforms the appeal in the interest of the law, infringing upon the Constitution, into a form of control of the acts of the Constitutional Court.

The Court held that the unconstitutionality exception in the present case shows, in terms of examination of constitutionality of Article 414^5.4 of the Code of Criminal Procedure, an interpretation of legal provisions regarding the appeal in the interest of the law that led to the refutation of a Constitutional Court decision. Since, in light of Article 126.3 of the Constitution, the phrase "the solution on matters of law as adjudicated" in Article 414^5.4 of the Code of Criminal Procedure can only regard the uniform

interpretation and application of legal provisions by courts of law, the interpretation of this phrase by the High Court of Cassation and Justice through Decision no. 8/2010 is unconstitutional. Proceeding to such interpretation, the High Court of Cassation and Justice posed as a court of judicial review of Decision no. 62/2007 delivered by the Constitutional Court.

Because this legal precedent seriously affects the role of the Constitutional Court, the Court held that it is necessary to sanction any interpretation of Article 414^5.4 of the Code of Criminal Procedure, establishing the binding nature of solutions on matters of law adjudicated by the High Court of Cassation and Justice by means of appeal in the interest of the law. The sanction applies to the interpretation that would allow the court, based on an infraconstitutional rule, to give binding decisions contrary to the Constitution and to the decisions of the Constitutional Court.

As a result, the Constitutional Court upheld the exception of unconstitutionality relating to the provisions of Article 414^5.4 of the Code of Criminal Procedure, and decided that "the solution on matters of law as adjudicated" through Decision no. 8 of the High Court of Cassation and Justice – United Sections dated 18 October 2010, is unconstitutional. The reason is that it infringed upon the provisions of Articles 1.3, 1.4, 1.5, 126.3, 142.1, 147.1 and 147.4 of the Constitution, as well as Constitutional Court Decision no. 62/2007.

Regarding the decision's effects, the Court held that it – from the date of its publication in the Official Gazette of Romania, Part I – will restore, the generally binding effect of the Constitutional Court Decision no. 62/2007 and enforcement of rules governing the criminalization of insult and libel contained in Articles 205 and 206 of the Criminal Code, as well as provisions of Article 207 of the Criminal Code on the truth in evidence.

III. A judge filed concurring opinion.

Languages:

Romanian.

Identification: ROM-2013-1-004

a) Romania / **b)** Constitutional Court / **c)** / **d)** 26.06.2013 / **e)** 334/2013 / **f)** Decizie cu privire la obiecţia de neconstituţionalitate a dispoziţiilor Legii pentru modificarea şi completarea Legii nr. 3/2000 privind organizarea şi desfăşurarea referendumului / **g)** *Monitorul Oficial al României* (Official Gazette), 407, 05.07.2013 / **h)** CODICES (English, Romanian).

Keywords of the systematic thesaurus:

1.6.1 Constitutional Justice – Effects – **Scope**.
3.1 General Principles – **Sovereignty**.
3.3.2 General Principles – Democracy – **Direct democracy**.
3.9 General Principles – **Rule of law**.
3.10 General Principles – **Certainty of the law**.

Keywords of the alphabetical index:

Referendum / Law, quality, foreseeable consequences.

Headnotes:

Regulating or amending requirements to validate the referendum is the sole responsibility of the legislator. To ensure compliance with the general principle of legal certainty in the matter of referendums, the new rules may not apply to referendums organised within one year of the entry into force of the amending law.

Summary:

I. Based on Article 146.a of the Constitution, the Constitutional Court has been notified by 83 Deputies of the provisions of the Law amending and supplementing Referendums Law no. 3/2000**.**

The new regulation provides that "The referendum is valid if it is attended by at least 30% of the people registered on the permanent electoral lists" (compared to 50% set by the current regulation). It also introduces a new element, in terms of the validity of the referendum. That is, "The result of the referendum is validated if the options validly expressed represent at least 25% of those registered on the permanent electoral lists."

The authors of the objection of unconstitutionality claimed that the impugned law is unconstitutional. They found fault with the 30% minimum participation quorum. While it is valid to revise the Constitution, the amendment violates Article 1.3 of the Constitution, which states that "Romania is a democratic state governed by the rule of law [...]". The amendment of

Law no. 3/2000 on the organisation and holding of the referendum generate legal uncertainty. This arises from the legislator's arbitrary establishment (without taking into account any article of the Constitution or any general principle of law) of a participation quorum for a valid referendum (respectively 30%), which can always be modified according to the interests of a parliamentary majority. According to the authors of the objection, since none of the provisions of the Constitution explicitly establishes the formal requirement for a valid referendum, such must be determined in relation to the article or articles having principle value that unequivocally establish the meaning of the expression "majority" of the electoral body. This can be determined with maximum precision, which is the correct result of a popular consultation.

II. On these challenges, the Court held the following:

Regulating or amending requirements to validate the referendum is the sole responsibility of the legislator, according to Article 73.3.d of the Constitution. The participation quorum chosen by the legislator, which is subject to constitutional review, ensures sufficient representativeness likely to give to the decision the force that reflects the popular will, so people's sovereignty, enshrined in Article 2 of the Constitution, is not affected in any way. This legislative solution respects also the recommendations of the Venice Commission – the report adopted at the 64th Plenary Session (Venice, 21 to 22 October 2005) on "Referendums in Europe – An analysis of the legal rules in European States."

Concerning challenges on the lack of foreseeability and clarity of the impugned provisions, the Court referred to its consistent case-law where it underlined the need for stable elections and referendums laws, as an expression of the principle of legal certainty. The Court also noted that the modification of the participation quorum took place in the same year when the procedure to revise the Constitution was initiated. Likewise, the procedure of referendum on matters of national interest, initiated by the President, on the grounds of Article 90 of the Constitution, is taking place during the same period of time. Amending the requirements to validate the results of the referendum, the ordinary legislator implicitly amends the legal effects of the referendum, which constitutes a structural element thereof.

Over time, the instability of referendums, caused by amending this legislation, especially when Parliament was preparing a procedure to dismiss the President, and currently upon initiation to revise the Constitution, proved to be a factor of legal uncertainty. At the same time, it stirred a civic challenge of this legislation, which was criticised upon application.

Even if the legislator has the power to change the participation quorum, the constitutional court must ensure that this tool is not used for purposes other than the one the constituent legislator had in view upon enshrining the referendum. The Court must ensure the observance of the principles of legal certainty of referendums. It must also ensure the loyal consultation of citizens with voting rights, principles that require creating all conditions for voters to know the issues submitted to referendum, the legal consequences of reducing the participation threshold, and the effects of the results of the referendum on the general interests of the community.

The Court should be mindful that the threshold for participation is an essential requirement for the referendum to actually and effectively express the will of the people. It is a prerequisite for a genuine democratic expression of sovereignty. The Court must bear these considerations in mind to balance between the need to protect citizens' right to decide by participating in the referendum, as a fundamental right, and the desire of a parliamentary majority to impose its political will in the State, at a certain time.

Therefore, the new rules should not cause a state of uncertainty about a defining element of this procedure. The options of the ordinary legislator concerning the participation quorum in the referendum may fluctuate depending on the political will of the majority in Parliament and the conjunctural interests. These are circumstances likely to create a general feeling of uncertainty about an essential element of the referendum, i.e. its validity.

In relation to the aforementioned, the Court considered the Code of Good Practice on Referendums adopted by the Venice Commission, with the Protocol 1 ECHR and with the International Covenant on Civil and Political Rights. In compliance with the general principle of legal certainty of referendum, the Court found constitutional the provisions of the Law amending and supplementing Law no. 3/2000 on the organisation and holding of the referendum. However, they may not be applied to referendums organised within one year of the entry into force of the amending law.

Consequently, the Court rejected the objection of unconstitutionality of the provisions of the Law amending and supplementing Law no. 3/2000 on the organisation and holding of the referendum. It found that they are constitutional insofar as they do not apply to referendums organised within one year of the entry into force of the law.

III. The president and two judges filed dissenting opinion.

Languages:

Romanian.

Russia
Constitutional Court

Important decisions

Identification: RUS-2013-1-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 14.02.2013 / **e)** 4 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 42, 27.02.2013 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
3.16 General Principles – **Proportionality**.
3.18 General Principles – **General interest**.
5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly**.

Keywords of the alphabetical index:

Public demonstration / Public order, disturbance, penalties / Public demonstration, organisers, liability.

Headnotes:

Organisers of a public demonstration cannot be held directly liable for disturbance of the peace. Their liability must be based on the existence of a fault on their part and the burden of proof lies with the prosecution.

Summary:

I. A group of members of the State Duma and one citizen referred this case to the Constitutional Court. The applicants claimed that the penalties imposed ran contrary to international principles. They asked the Court to reduce the fines handed down for breaching public demonstrations legislation and to declare that they are not liable for exceeding the number of demonstrators. In addition, they asked for the annulment of the passage prohibiting individuals convicted twice for breaching the law on public demonstrations from organising new demonstrations.

II. The Constitutional Court delivered its decision on the constitutionality of the law on public demonstrations along with reservations as to interpretation. In addition, it annulled certain provisions, replacing them with its own recommendations.

Without declaring the whole law to be unconstitutional, the Constitutional Court ruled the following:

1. The amount of fines should be reduced, especially with regard to the minimum. The Court authorised the lower courts to reduce the amount of fines as much as they felt necessary.

2. The organisers could not be held directly liable for disturbance of the peace. Their liability must be based on the existence of fault and the burden of proof lay with the prosecution. In addition, the responsibility of the law enforcement agencies should be considered if they had failed to help the organisers curb the disturbances.

3. The Court also challenged the validity of the alternative penalty of community service. In its views, such penalties could be viewed as a political sanction for the civil society activities of individuals. Nonetheless, it was possible to sentence a demonstrator to community service if the latter had caused damage to someone's health or property.

However, the Constitutional Court upheld certain substantive provisions, particularly the obligation to obtain the authorities' approval regarding the date, place, time and purpose of the demonstration. Based on the case-law of the European Court of Human Rights, it underlined the need to offer alternatives.

Languages:

Russian.

Identification: RUS-2013-1-002

a) Russian / **b)** Constitutional Court / **c)** / **d)** 22.04.2013 / **e)** 8 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 94, 30.04.2013 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

1.4.9.1 Constitutional Justice – Procedure – Parties – ***Locus standi***.
4.9.11.1 Institutions – Elections and instruments of direct democracy – Determination of votes – **Counting of votes**.
4.9.11.2 Institutions – Elections and instruments of direct democracy – Determination of votes – **Electoral reports**.
4.9.13 Institutions – Elections and instruments of direct democracy – **Post-electoral procedures**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.

Keywords of the alphabetical index:

Right to vote / Counting of votes / Right to bring legal proceedings.

Headnotes:

Voters have the right to challenge before the courts the result of elections in their constituency.

Summary:

I. In 2011 the applicants took part in the elections to the State Duma. Following the count, they challenged the result of the elections before the courts but without success. The courts rejected their appeal. The courts held that the rights of voters ended once they had cast their vote. Furthermore, breaches of the law during the counting stage concerned only the interests of the candidates, represented by their governing bodies. The electorate had no legal interest in bringing proceedings, unlike political parties that had the right to challenge the official results before the courts.

II. The applicants held that the courts' interpretation limited their electoral rights and their right to judicial protection.

1. The Constitutional Court ruled that the act of voting was not limited to the expression of private political interests; it was part of the fulfilment of the people's sovereignty. For this reason, each voter had a right to expect that his or her vote was correctly counted and attributed.

Similarly, the public interest included the objectivity of results and the formation of public bodies. The right to vote does not end once the vote had been casted,

without calling into question the constitutional value of that right and the establishment of the organs of representative democracy.

2. A secret ballot could not be an obstacle, since violation of the legislation when counting the votes challenged the legitimacy of public bodies and the principle of the sovereignty of the people. It was therefore in the each voter's interest to ensure the complete fulfilment of his or her right. This also included the right to bring legal proceedings in the same way as political parties. However, insofar as the legislation did not specify which decision by the electoral board could be challenged, court practice had interpreted this omission as a ground for dismissing appeals. In this regard, the legislation violated the Constitution.

It was for the federal legislature to introduce a system whereby citizens could appeal against the electoral boards' decisions on the counting of votes and announcement of the results. Pending amendment of the electoral law, the courts were not entitled to dismiss appeals by voters regarding the counting of votes and the announcement of results in their constituency.

Languages:

Russian.

Serbia
Constitutional Court

Important decisions

Identification: SRB-2013-1-001

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 20.12.2012 / **e)** IUz-733/2011 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), 124/2012 / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Court, president, appointment / Supreme Court, president, appointment.

Headnotes:

When prescribing the procedure for electing the first president of the Supreme Court of Cassation, the legislator overstepped its competences in omitting the obligatory phase of obtaining the opinion of a general meeting of the Supreme Court of Cassation in the process of nominating candidates as required by the Constitution.

Summary:

I. The Law on Judges was passed by the National Assembly. This Law came into force on 30 December 2008 and began to be implemented from 1 January 2010.

Article 102.5 of the Law is situated in Chapter eight (Transitional and Final Provisions) and regulates the first election of the President of the Supreme Court of Cassation (hereinafter, "SCC"). Namely, the provisions of Article 102.5 regulate the transitional regime for elections of court presidents in Serbia, which began with the work on 1 January 2010. Article 102 stipulates that the High Judicial Council (hereinafter, "HJC") sets the acting president of the court among judges elected in accordance with this law; that the holder of the office of the president of the court shall take office on 1 January 2010; that acting

presidents shall perform this office until the election of court presidents in accordance with this law; that presidents shall be elected, in accordance with this law, within three months from the expiry of the period referred to in the article; that as an exception to the provisions of previous paragraphs in this article, the president of the SCC shall be elected within 90 days from the date of constituting the HJC, and that the president of the SCC shall be elected by the National Assembly, from among persons who fulfil the conditions for the election of judges of this court, upon the proposal of HJC, and upon the received opinion of the competent committee of the National Assembly (the disputed paragraph 5).

Two applications were made to the Constitutional Court seeking review of the constitutionality of Article 102.5.

The applications contended that the challenged provision is contrary to Article 144.1 of the Constitution, because this constitutional provision expressly requires the opinion of a general meeting of the SCC, as an integral part of the process of electing the president of the SCC. It was argued that the disputed provision of the Law, contrary to the provision of the Constitution, reversed the process of the election of the first president of the SCC: instead of election, firstly, according to the Constitution, of the judges of the SCC, announcing a competition for selection of the president of the Court, obtaining the opinion of the general meeting of SCC and then submitting a proposal to the National Assembly for the election of the SCC president, the disputed provision prescribes that firstly the president of the Court should be elected. The applicants also claimed that such a prescribed election of the first president of SCC is contrary to the general principle that the president of any court in Serbia should be elected from among the judges of that court, following the opinion of the meeting of all judges of the court from which the election of the president is proposed.

II. The Constitutional Court held that there are grounds for initiating the procedure of normative control of the disputed act, and initiated the process for addressing the claimed unconstitutionality.

Pursuant to the provisions of the Law on the Constitutional Court, the Decision to initiate the procedure was submitted to the National Assembly for a response. The National Assembly in its response stated that the disputed provision is not in accordance with Article 144.1 of the Constitution, because the law cannot change the procedure for the election of the president of SCC.

The Constitutional Court found that according to the Constitution of 2006 the SCC is the highest court in Serbia and is managed by the president of the SCC. Article 144.1 of the Constitution regulates the procedure for the election of the president. This provision determines that the president of SCC shall be elected by the National Assembly, upon the proposal of HJC and the received opinion of a general meeting of the SCC and the competent committee of the National Assembly.

Contrary to the above-mentioned procedure, the legislator, when prescribing the procedure of electing the first president of SCC, in the disputed provision omitted obligatory phase of obtaining the opinion of the general meeting of SCC.

Accordingly, the Constitutional Court found that the legislator had overstepped its competences.

In addition, bearing in mind that Article 143.2 of the Constitution determines that the organisation, jurisdiction, system and structure of the courts shall be regulated by the law and that, as a general rule, the Law on Judges determines that the president of SCC shall be elected by the National Assembly from among the judges of this court, the Constitutional Court held that the disputed provision undermined the unity of the legal order established by Article 4.1 of the Constitution. This is done by prescribing that the National Assembly elects the president of SCC from among the persons who fulfil conditions for the election of judges of this court, thus enabling the election of the president of SCC prior to, and independently of, the election of the other judges of this court. The Constitutional Court held that firstly the judges of SCC should be elected in order to make possible the election of the president of SCC. The Court further held that the election of presidents of all other newly established courts must also follow this procedure.

The Constitutional Court also noted that the procedure for the election of the first president of the SCC prescribed by the disputed provision is only formally an interim legislative solution. Namely, this provision regulates the procedure for the election of the first president of the Court, but for the full term as well as in the case of a regular election.

The Court held that the legislator had no constitutional and legal basis for omitting the obligation to obtain the opinion of a general meeting of the SCC. Such a procedure cannot be justified by the fact that at the time of his election, the SCC was not constituted. This is because, in accordance with Article 7.1 of the Law on Judges, election of the president of the SCC and the first election of the

judges of this court shall take place no later than 90 days from the date of the constituting of HJC, as prescribed also by the provision of Article 100.2 and by the disputed provision of Article 102.5 of the Law on Judges.

The Constitutional Court therefore established that the provision of Article 102.5 of the Law on Judges is not in conformity with the Constitution.

Languages:

English, Serbian.

Slovakia
Constitutional Court

Important decisions

Identification: SVK-2013-1-001

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 04.07.2012 / **e)** PL. ÚS 111/2011 / **f)** Execution immunity of the State / **g)** *Zbierka nálezov a uznesení Ústavného súdu* 1/2012 / **h)**.

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
3.17 General Principles – **Weighing of interests**.
5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings**.
5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

Bailiff / Property, claim / Judgment, enforcement, law / Protection, judicial, effective.

Headnotes:

The public interest in preserving certain property of the State for certain unique and public purposes cannot be disputed. It will, however, be constitutionally unacceptable if its statutory construction poses such a restriction on the right of individuals and entities entering into legal relationships with the State that they cannot exercise their rights properly and they become illusory.

Summary:

I. At issue in this case were provisions of Slovak law which provided almost full immunity to state (Government) property and funds against any form of distraint (seizure of property in order to obtain payment of rent or other money owed).

In 2006, three individuals obtained a payment order against the state (Government). The government, represented by the Ministry of Justice, refused to comply fully with the payment order and an amount of some € 30 remained outstanding. The individuals applied to an official distrainer to enforce payment of the order against the state. However, the distrainer found that there was no property which could be seized from the State. Under the Law on Administration of State Property, state property (real estate, movables, claims and other proprietary rights) could not be made subject to distraint. A provision in the Law on Budgeting Procedures prohibited any seizure of funds provided from the state budget and the Law on State Treasury prohibited any distraint of accounts maintained by the State Treasury.

Upon the application of the three individuals, the ordinary court, which supervised the distraint, decided to stay the enforcement proceedings and asked the Constitutional Court for review of the provisions mentioned above, relying on two arguments. Firstly, the granting of immunity to the State to such an extent renders the claims of the State's creditors effectively unenforceable, as they cannot get satisfaction, in the event the state refuses to settle their claim. Monetary claims enjoy protection in principle as "property" under the European Convention of Human Rights. The challenged provisions therefore constitute a violation of the right to property under both the Constitution and the Convention. Discrimination also exists against creditors who have claims against the State, compared to creditors of other non-privileged debtors. Secondly, the granting of immunity to the State renders forced enforcement impossible, yet the Constitutional Court has repeatedly held that forced enforcement of judgments is an essential part of the right to court protection/access to court under the Constitution and the Convention.

II. The Constitutional Court in principle granted the application in full and declared the provisions mentioned above to be unconstitutional.

After a comparative introduction, showing that such extensive immunity of the State against any forced enforcement is rather uncommon in Central Europe and had been similarly uncommon in Slovak legislative history, the Constitutional Court turned to the examination of the two main argument lines invoked by the applying court.

The Constitutional Court agreed that claims, ("legitimate expectations"), which are effective and unconditional, enjoy protection as property under both the Constitution and the Convention. In order to be eligible for forced enforcement under Slovak law, the claim must be confirmed by a court judgment or similar public instrument. It is then indisputably effective and unconditional. Subsequently, the Constitutional Court found that the immunity of the State from forced enforcement interferes with the right of creditors with enforceable claims against the State to have their claims enforced; it interferes with the right to get effective satisfaction. Such interference is, however, in the public interest, since State property and funds are to be used for general welfare and public interest purposes.

The Constitutional Court went on to scrutinise whether such interference can be justified under the test of proportionality. It noted that the objective is the protection of property designated to serve the public interest and found the challenged provisions to be a suitable means to achieve this objective. The restriction is, in the Court's view, necessary for achieving the objective, as no other instrument is capable of effectively securing the protection of property which is designated to serve public interest, in ongoing enforcement proceedings.

The Constitutional Court then proceeded to the test of proportionality in the strict sense, considering and weighing empirical, systematic, contextual and value arguments. As to empirical arguments, the Court noted that the immunity, as provided for under the challenged provisions, was not originally intended by the legislator but had evolved as a result of unplanned legislative development. Immunity was not initially extended to government bank accounts. This was changed by the Act on State Treasury but the explanatory notes to the bill in question provided no reasoning for such change. Other State property such as securities, agricultural land and property used for state-owned businesses, is not subject to the immunity. However, other provisions exist which exclude the possibility of distraining against it in order to satisfy claims against the State. Practical experience (complaints handled by the Constitutional Courts) has shown that situations have indeed arisen where the creditor of a claim against the State has not been able to get it satisfied.

In terms of systematic argument, the Court invoked the acceptance of state immunities in international practice. A clear tendency exists towards restricting state immunities in respect of property, as documented by the European Convention on State Immunities (1976) and the UN Convention of Jurisdictional Immunities of States and their Property, although it was accepted by the European Court of Human Rights case-law. On the other hand, the Court emphasised the social function of ownership and responsibility of the owner, and in this respect, it stipulated that state legislation should provide for a

sufficient balance between the conflicting interests of various owners, including the State itself. The State needs to exercise caution, when it grants itself, as the owner, any advantage compared to other (private) property owners. The tendency towards restricting State immunities in international law requires even more rigorous scrutiny of any such immunity in domestic law, where the State is not in an equal position with the citizens.

The contextual argument is connected with the above arguments. The Court reiterated the negative economic and fiscal repercussions of non-satisfaction of enforceable claims by the state itself.

The accepted hierarchy of social values makes it impossible to accept total immunity of all state property. In particular, the principle that a creditor is entitled to have his or her claim satisfied is superior. It is the state's task to provide effective means of protection.

In conclusion, the Constitutional Court accepted the need for certain immunity necessary in order to protect the state's vital functions but emphasised that such immunity needs to be proportionate. In the light of the arguments outlined above, it concluded that the challenged provisions of the Act on Administration of State Property and the Act on State Treasury provide highly disproportionate immunity to the state against forced enforcement, rendering claims against the State effectively unenforceable. The provisions therefore violate the right to protection of property under both the Constitution and the European Convention of Human Rights. Consequently, they were also considered discriminatory under the Constitution.

On the basis of the same arguments, the Constitutional Court concluded that the challenged provisions on state immunity have resulted in the lack of a procedural pathway for creditors to have their claims against the State enforced. As the existence of such a pathway is a necessary procedural safeguard emanating from the right to court protection/access to court and an inseparable part of that right, the Constitutional Court found that the provisions violated those rights, which are guaranteed under the Constitution, along with Article 6 ECHR.

Supplementary information:

To reflect the Constitutional Court´s decision, the legislator enacted an amendment to the Enforcement Procedure Code (Law no. 230/2012 Coll.). Once again, considerable immunities were granted to state property (real estate, securities, incomes of state budget, money on account, certain receivables, funds designated to cover the budget deficit). The enforcement officer can select any item from among other property, but must notify the competent state body, which may then ask the court to grant individual immunity to that item of property.

It is debatable whether the new legislation has properly reflected the objections raised by the Constitutional Court.

Languages:

Slovak.

Slovenia
Constitutional Court

Statistical data
1 January 2013 − 30 April 2013

In this period, the Constitutional Court held 23 sessions – 13 plenary and 10 in panels: 3 in the civil panel, 2 in the criminal panel and 5 in the administrative panel. It received 126 new requests and petitions for the review of constitutionality/legality (U-I cases) and 422 constitutional complaints (Up cases).

In the same period, the Constitutional Court decided 98 cases in the field of the protection of constitutionality and legality, and 370 cases in the field of the protection of human rights and fundamental freedoms.

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas orders of the Constitutional Court are not generally published in an official bulletin, but are notified to the participants in the proceedings.

However, the judgments and decisions are published and submitted to users:

- In an official annual collection (Slovene full text versions, including dissenting/concurring opinions, and English abstracts);
- In the *Pravna Praksa* (Legal Practice Journal) (Slovene abstracts of decisions issued in the field of the protection of constitutionality and legality, with full-text version of the dissenting/concurring opinions);
- On the website of the Constitutional Court (full text in Slovene, English abstracts and a selection of full texts): http://www.us-rs.si;
- In the IUS-INFO legal information system on the Internet, full text in Slovene, available through http://www.ius-software.si;
- In the CODICES database of the Venice Commission (a selection of cases in Slovene and English).

Important decisions

Identification: SLO-2013-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 05.04.2012 / **e)** U-I-23/12 / **f)** / **g)** *Uradni list RS* (Official Gazette), 30/2012 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

4.5.3.2 Institutions – Legislative bodies – Composition – **Appointment of members**.
4.5.3.3 Institutions – Legislative bodies – Composition – **Term of office of the legislative body**.

Keywords of the alphabetical index:

Parliament, dissolution / Legislative power, restrictions.

Headnotes:

When the National Assembly is dissolved, its term of office finishes at the first session of the newly-elected National Assembly. The dissolution of the National Assembly does not affect its legislative competence.

Summary:

I. Following the dissolution of the National Assembly and the calling of early elections by the President of the Republic, the National Council issued suspensive vetoes on five statutes. Despite its dissolution, the National Assembly repeated the vote on these statutes and adopted them again. The National Council asked the Constitutional Court to review the constitutionality of the statutes, asserting that once it has been dissolved, the National Assembly is no longer competent to exercise its power and can only adopt statutes in matters of urgency.

II. The Constitutional Court clarified the impact of the dissolution of the National Assembly on its constitutional position or the continued exercise of its constitutional powers, particularly the exercise of legislative competence. The Court held that on the basis of Article 81.3 of the Constitution and with regard to the implementation of the principle of the separation of powers (Article 3.2) in other provisions of the Constitution, it can be concluded that the term of office of a dissolved National Assembly comes to an end at the first session of the newly elected National Assembly. The dissolution of a National Assembly and the calling of early elections do not mean that the National Assembly ceases to exist. It

does still exist - and its term of office continues - until a new National Assembly is constituted.

As the National Assembly is the bearer of the legislative branch of power and as the substance of its term of office, gained in elections in accordance with the principle of democracy (Article 1 of the Constitution), lies in the exercise of the legislative branch of power, it follows from Article 81.3 of the Constitution that a dissolved National Assembly will still have legislative competence until this is assumed by a newly elected National Assembly. The dissolution of a National Assembly and the calling of early elections do not result in any restrictions whatsoever on the legislative competence of the previous National Assembly until the newly elected National Assembly assumes office. Any restriction of the legislative branch of power, which constitutes one of the three fundamental branches of state power, should have been specifically prescribed by the Constitution. The constitutional draftsmen did not provide for such restrictions, the dissolution of the National Assembly does not affect the constitutional validity of laws and other decisions adopted in the period from its dissolution until the constitution of the new National Assembly. The purpose of the act of the President of the Republic by which a National Assembly is dissolved in the instances determined by the Constitution is to reduce the duration of the term of office of the National Assembly and initiate the procedure for early elections. From a substantive perspective, the constitutional position of the National Assembly after the calling of early elections is the same as after the calling of regular elections. In accordance with the principle of democracy, the competence to exercise legislative power is transferred to the newly elected National Assembly only after its first session.

III. The decision was adopted by seven votes against two. Judges Dr Mitja Deisinger and Jan Zobec voted against and submitted dissenting opinions.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-2013-1-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 19.09.2012 / **e)** Up-1268/11 / **f)** / **g)** *Uradni list RS* (Official Gazette), 79/2012 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Execution of judgment / Property, ownership, joint.

Headnotes:

The right to judicial protection entails the right to demand the execution of a judicial decision by which the court decided on a right or obligation. The procedure for the execution of final court decisions must be effective.

Summary:

I. The applicants initiated execution proceedings on the basis of a final court decision which stipulated that the legal predecessor of the debtors should allow the applicants to obtain payment of their claim by selling the real property on which there was a residential house and a building. The court of first instance issued an execution order. Upon the debtors' appeal, however, the Higher Court abrogated the execution order and dismissed the applicants' motion for execution, having established that the real property at issue was, before the application for execution was filed, divided into two separate condominium units, one of which belonged to the debtors. As co-ownership had ceased to exist and condominium was established, the initial real property referred to in the instrument authorising enforcement no longer legally existed and, therefore, execution against it was rendered impossible, making the motion for execution the applicants had filed unfounded due to the non-existence of the object of execution.

II. The Constitutional Court proceeded in its decision-making from the right to judicial protection as a right enjoyed by all to have any decision regarding their rights and obligations and charges made against them taken without undue delay by an independent, impartial court constituted by law. The Constitutional Court emphasised that as well as ensuring the right to demand from a court a decision on the merits of a

dispute in due time, the right to judicial protection entails the right to demand the execution of a judicial decision by which the court decided on a right or obligation. Therefore, a party whose right has been recognised by a final court decision must be provided with the possibility and the means to actually enforce this right. Execution proceedings by means of which final judicial decisions are enforced must be effective. Therefore, the right to effective execution proceedings prevents the right to repayment from a certain part of the debtor's property determined in a final court decision from legally ceasing to exist due to the debtor's unilateral actions that do not entail, either in a factual or legal sense, relevant obstacles to the initiation, course, or conclusion of the proceedings.

The Constitutional Court explained that in execution proceedings the courts can protect the right determined by Article 23.1 of the Constitution of creditors who had an enforceable civil law right to repayment from a co-owner's share of a part of real property before it was converted into condominium by allowing enforcement against the relevant individual unit of the condominium. By adopting the opposite stance, the Higher Court had, in the Constitutional Court's opinion, violated the applicants' right to judicial protection. It overturned the challenged order and remanded the case to the Higher Court for new adjudication.

Languages:

Slovenian, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-2013-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 07.02.2013 / **e)** CCT 42/12; [2013] ZACC 1 / **f)** Motswagae and Others v. Rustenburg Local Municipality and Another (Lawyers for Human Rights as *amicus curiae* / **g)** www.constitutionalcourt.org.za/Archimages/20328.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Housing, eviction, arbitrariness, protection / Interference, litigious / Housing, interference, protection / Housing, obliterance, protection / Housing, eviction, threshold / Housing, eviction, court order, requirement.

Headnotes:

An eviction does not have to consist solely in the expulsion of someone from his or her home. It can consist also in the attenuation or obliteration of the incidents of occupation. A municipality may therefore not enter onto property upon which someone's home is situated to provide public services without a court order, if the occupier objects. Protection against eviction under the Constitution includes protection against attenuating or obliterating of the incidents of occupation.

Summary:

I. At issue was whether the applicants, who were housed in former hostels, enjoyed any protection against major municipal works being performed close to their homes that had the effect of spoiling their enjoyment and occupation of their homes. The works consisted of major trenches being dug right next to the applicants' homes, and the use of heavy machinery including bulldozers.

In 2009 the applicants brought an urgent application for an interdict in the High Court, aimed at prohibiting the respondents (the municipality and its agent) from unlawfully disturbing or interfering with their homes. The municipality counter-applied for an order restraining the applicants from obstructing the municipality's contractor (the second respondent) in the execution of its duties pursuant to its agreement with the municipality.

The High Court held that the applicants had no clear right to interdict the construction activities, and that they ought to have objected to the decision to redevelop the land occupied by them when that decision was taken by the municipality. The High Court refused to grant the interdict and granted the counter-application sought by the municipality.

After the High Court and the Supreme Court of Appeal refused leave to appeal, the applicants sought the intervention of the Constitutional Court. The Constitutional Court had to decide whether the municipality acted lawfully in authorising construction work on the property occupied by the applicants without obtaining a court order for their eviction.

II. In a unanimous judgment by Justice Yacoob, the Court held that Section 26.3 of the Constitution, by necessary implication, guarantees to any occupier peaceful and undisturbed occupation of his or her home unless a court order authorises interference therewith. The Court found that an eviction does not have to consist solely in the expulsion of someone from his or her home; it can also consist in the attenuation or obliteration of the incidents of occupation. The Court held that the work authorised by the municipality interfered with the applicants' peaceful and undisturbed occupation of their homes. The Court accordingly set aside the order of the High Court and interdicted the first and second respondents and all persons acting under their authority from performing or causing to be performed any construction work on the properties on which the applicants' homes are situated, without the applicants' written consent or a court order.

Supplementary information:

Legal norms referred to:

- Article 17.1 of the International Covenant on Civil and Political Rights of 1966;
- Article 11.1 of the International Covenant on Economic, Social and Cultural Rights of 1966;
- The United Nations Committee on Economic, Social and Cultural Rights in General Comment 7 on forced evictions.

Cross-references:

- *Chief Lesapo v. North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) *South African Law Reports* 409 (CC); 1999 (12) *Butterworths Constitutional Law Reports* 1420 (CC).

Languages:

English.

Identification: RSA-2013-1-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 19.02.2013 / **e)** CCT 56/12; [2013] ZACC 2 / **f)** National Director of Public Prosecutions v. Meir Elran / **g)** www.constitutionalcourt.org.za/Archimages/20334.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.3.7 Sources – Techniques of review – **Literal interpretation**.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

Accused, right / Asset, freezing, order, limitation to vary / Assets, declaration / Court, discretion / Crime, organised, fight / Evidence, undisclosed / Forfeiture, property, used for crime / Prosecution, disclose, failure / Seizure, asset / Crime, organised, state institution, subversion.

Headnotes:

The Prevention of Organised Crime Act (hereinafter, "POCA") authorises the High Court to subject certain property to a preservation order if there are reasonable grounds for believing that such property

proceeds from or is an instrumentality of a criminal offence. While POCA has far-reaching and robust effects, the legislation is necessary to empower the state to deal with complex modern organised criminal activity. POCA should be embraced as a friend to democracy, the rule of law and constitutionalism – and as indispensable in a world where the institutions of state are fragile, and the instruments of law sometimes struggle for their very survival against criminals who subvert them. POCA authorises the High Court to grant an applicant living and legal expenses from property subject to the preservation order, provided that the applicant (a) can establish a need to have those expenses covered and (b) discloses all of his assets and liabilities (including those not subject to the preservation order). If either of these requirements is not met, an order for living and legal expenses may not be granted.

Summary:

I. At the heart of the matter is the interpretation of Section 44.2 of POCA and when a defendant against whose assets the NDPP has obtained a preservation order may obtain an order for legal and living expenses from the property subject to the order.

In 2006 the National Director of Public Prosecutions (hereinafter, "NDPP") obtained a preservation order against Mr Elran. The order was granted because there were reasonable grounds for believing that the property constituted the proceeds of drug dealing activities and associated money laundering on the part of Mr Elran. Three years later, in 2009, Mr Elran applied to the High Court to fund his legal expenses from the property covered by the preservation order. He relied on three year-old affidavits setting out his financial position as it had been in 2006. He did not disclose how he lived, or where his means had come from during those three years. All he said was that he had relied on charity and loans.

In terms of Section 44 of POCA, a High Court may permit payment of reasonable living and legal expenses from preserved property if an applicant meets certain requirements. The High Court, and the Full Court of the High Court on appeal, were both satisfied that Mr Elran had met these statutory requirements, and granted payment of legal expenses. On appeal, the NDPP challenged the High Court's interpretation of the statute and the award of legal expenses.

II. The majority of the Constitutional Court concluded that the outcome reached by the lower courts was wrong. Justice Cameron (with whom four judges concurred) noted that POCA should be embraced as a friend to democracy, the rule of law and constitutionalism – and as indispensable in a world where the institutions of state are fragile, and the instruments of law sometimes struggle for their very survival against criminals who subvert them. The Court held that the wording of Section 44.2 is clear. It specifically creates two preconditions that must be fulfilled before a High Court may grant living and legal expenses: need and full disclosure. Where an applicant has failed to meet either of these requirements, a court does not have a power to grant an applicant expenses from preserved property.

Because Mr Elran failed to disclose the existence and details of the loans he said had been made to him, and on which he said he was living, the High Court had no discretion to make an order in his favour.

The Constitutional Court thus upheld the appeal, with no order as to costs.

III. Justice Zondo penned a separate concurrence, agreeing that the appeal should be dismissed and setting out detailed reasons for the conclusion that Section 44 of POCA does not confer a discretion on the High Court to grant or refuse living expenses.

A minority of the Court would have dismissed the appeal. Justice Jafta (with whom three judges concurred) accepted that the "need" requirement in Section 44.2.a is a minimum threshold that would have to be fulfilled. However, Justice Jafta found that the disclosure requirement is not a precondition for the award of living and legal expenses, but merely a consideration to be balanced when a court exercises its discretion to make the order sought. Thus, even though Mr Elran's disclosure was incomplete, Justice Jafta was of the view that this did not bar the High Court from granting him his legal expenses. The minority would therefore have dismissed the appeal.

Supplementary information:

Legal norms referred to:

- Section 39.2 of the Constitution;
- Section 34.5 and 34.6 of the Restitution of Land Rights Act 22 of 1994;
- Sections 26, 38.1, 38.2, 40, 47 and 44 of the Prevention of Organised Crime Act 121 of 1998 (POCA).

Cross-references:

- *Phumelela Gaming and Leisure Ltd v. Gründlingh and Others, Bulletin* 2006/1 [RSA-2006-1-003];

- *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];
- *Giddey NO v. J C Barnard and Partners, Bulletin* 2006/2 [RSA-2006-2-009];
- *S v. Basson*, *Bulletin* 2005/2 [RSA-2005-2-008];
- *Mabaso v. Law Society of the Northern Provinces, Bulletin* 2004/2 [RSA-2004-2-008];
- *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others, Bulletin* 2000/1 [RSA-2000-1-001;
- *Moise v. Greater Germiston Transitional Local Council, Bulletin* 2001/2 [RSA-2001-2-009];
- *Naidoo and Others v. National Director of Public Prosecutions and Another, Bulletin* 2011/2 [RSA-2011-2-012];
- *Falk v. National Director of Public Prosecutions, Bulletin* 2011/2 [RSA-2011-2-014];
- *Carmichele v. Minister of Safety and Security and Others, Bulletin* 2001/2 [RSA-2001-2-010];
- *Daniels v. Campbell NO and Others, Bulletin* 2004/1 [RSA-2004-1-003];
- *Mohlomi v. Minister of Defence, Bulletin* 1996/3 [RSA-1996-3-018];
- *Minister of Defence and Another v. Khosis Community at Lohatla and Others* [2002] ZALCC 39;
- *Khosis Community, Lohatla, and Others v. Minister of Defence and Others* 2004 (5) *South African Law Reports* 494 (SCA);
- *Democratic Alliance v. President of the Republic of South Africa and Others* [2012] ZACC 24; 2013 (1) *South African Law Reports* 248 (CC); 2012 (12) *Butterworths Constitutional Law Reports* 1297 (CC);
- *Director of Hospital Services v. Mistry* 1979 (1) *South African Law Reports* 626 (A);
- *Fraser v. Absa Bank Ltd* (National Director Of Public Prosecutions as *Amicus Curiae*) [2006] ZACC 24; 2007 (3) *South African Law Reports* 484 (CC); 2007 (3) *Butterworths Constitutional Law Reports* 219 (CC);
- *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);
- *National Director of Public Prosecutions and Another v. Mohamed and Others* [2002] ZACC 9; 2002 (4) *South African Law Reports* 843 (CC); 2002 (9) *Butterworths Constitutional Law Reports* 970 (CC).

Languages:

English.

Identification: RSA-2013-1-003

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 28.02.2013 / **e)** CCT 46/12; [2012] ZACC 6 / **f)** Pilane and Another v. Pilane and Another / **g)** www.constitutionalcourt.org.za/Archimages/20435.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.
5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly**.

Keywords of the alphabetical index:

Assembly, function, democratic / Community, ethnic, right to use symbols / Community, traditional, secession / Culture, traditional / Freedom of expression, aspects, individual, social / Freedom of expression, unpopular views / Injunction, constitutional complaint / Traditional and customary-law authorities / Injunction, remedy, alternative, absence / Injunction, right, establishment / Injunction, injury, actually suffered / Democracy, constitutional, freedom of expression, value / Accountability, democratic.

Headnotes:

To obtain an injunction (interdict), an applicant must establish a clear right, an injury actually suffered or reasonably apprehended and the absence of an alternative remedy. The recognition of traditional communities and leaders and of customary law under Section 211 of the Constitution is subject to the Constitution itself and specifically to the rights in the Bill of Rights. Freedom of expression, freedom of assembly and freedom of association are fundamental constitutional rights that are interconnected and complementary: the lawful exercise of these rights heightens democratic accountability. There is an inherent value in allowing dissenting voices to be heard in a constitutional democracy, and interdictory relief should not lightly be granted if it would silence those voices.

Summary:

I. The question was whether interdicts were correctly granted against members of the Bakgatla-Ba-Kgafela Traditional Community (hereinafter, "Traditional Community") who wanted to secede from an established traditional authority.

The applicants were leaders of a traditional community who desired secession from the broader traditional community. They sought to convene a traditional gathering to discuss the proposed secession. The respondents (the senior traditional leader and the established Traditional Council) sought to prevent the meeting.

The North West High Court urgently granted three final interdicts against the applicants that effectively stopped them from holding the meeting. The three interdicts restrained the applicants from:

1. organising or proceeding with any meeting purporting to be a meeting of the Traditional Community or Tribal Authority without proper authorisation from the respondents;
2. taking any steps or conducting themselves in any manner contrary to customary law or the provisions of the relevant legislation; and
3. holding themselves out as a traditional authority under certain names.

The applicants applied to the Constitutional Court to have the three interdicts set aside. They argued that the interdicts infringed their constitutional rights to freedom of expression, assembly and association. The applicants further contended that the interdicts were overbroad and vague and should not have been granted.

The respondents opposed, arguing that they were the only legitimate and recognised traditional structures that could lawfully convene a traditional gathering and that the applicants were attempting unlawfully to create or reproduce alternative traditional leadership structures. The respondents argued that the interdicts did not infringe upon the applicants' rights because the applicants could still meet – they had only to do so under a different name and within lawful parameters.

II. In the majority judgment written by Justice Skweyiya, and concurred in by Deputy Chief Justice Moseneke and Justices Cameron, Froneman, Jafta, Khampepe, Van der Westhuizen and Zondo, the Court upheld the appeal and overturned the High Court's order, setting aside all three interdicts.

The majority judgment acknowledged the importance of customary law and traditional institutions, but emphasised that this occurs subject to the Constitution and the Bill of Rights.

The majority found that the respondents had failed to establish the requirements for an interdict.

With respect to the first interdict, the respondents had not proved a clear right. The contents and context of the invitation, which the applicants had distributed to convene the meeting, indicated that the applicants were not trying to appropriate the identity or authority of the respondents. Instead, the invitation reflected the applicants' disassociation from the respondents. The second interdict was set aside primarily because it raised rule-of-law concerns for lacking specificity and being overbroad. The third interdict was set aside because it effectively and impermissibly prevented the applicants from using terminology descriptive of their identity as a people. The applicants were found not to have used the terms of reference in the invitation in a manner that usurped the respondents' authority.

The majority judgment further considered the adverse impacts of the interdicts on the applicants' rights to freedom of expression, association and assembly. Justice Skweyiya emphasised the importance and complementary interaction of these rights, as well as the inherent value of allowing dissenting voices to be heard in a constitutional democracy. The behaviour of the respondents could be seen as an attempt to silence criticism and dissent in the community, a situation which should not be tolerated under the Constitution.

The Constitutional Court accordingly upheld the appeal and overturned the order of the High Court.

III. In a minority judgment, Chief Justice Mogoeng and Justice Nkabinde agreed with overturning the second and third interdicts but would have upheld the first interdict. They were of the opinion that the applicants had sought unlawfully to assume and undermine the statutory powers of the respondents in the use of the specific names in the invitation. Furthermore, under customary law the applicants were not lawfully entitled to convene a traditional gathering. In addition, the first interdict did not breach the applicants' rights to free association and speech.

Supplementary information:

Legal norms referred to:

- Sections 16, 17, 18, 211 and 212 of the Constitution of the Republic of South Africa, 1996;
- Traditional Leadership and Governance Framework Act 41 of 2003;
- Traditional Leadership and Governance Framework Act 2 of 2005.

Cross-references:

- *Alexkor Ltd and Another v. Richtersveld Community and Others, Bulletin* 2003/3 [RSA-2003-3-008];
- *Bhe and Others v. Magistrate, Khayelitsha and Others* (Commission for Gender Equality as Amicus Curiae*); Shibi v. Sithole and Others; South African Human Rights Commission and Another v. President of the Republic of South Africa and Another, Bulletin* 2004/3 [RSA-2004-3-011];
- *Democratic Alliance and Another v. Masondo NO and Another* [2002] ZACC 28; 2003 (2) *South African Law Reports* 413 (CC); 2003 (2) *Butterworths Constitutional Law Reports* 128 (CC);
- *Gumede v. President of Republic of South Africa and Others, Bulletin* 2008/3 [RSA-2008-3-013];
- *Khumalo and Others v. Holomisa* [2002] ZACC 12; 2002 (5) *South African Law Reports* 401 (CC); 2002 (8) *Butterworths Constitutional Law Reports* 771 (CC);
- *National Union of Metalworkers of South Africa and Others v. Bader Bop (Pty) Ltd and Another, Bulletin* 2002/3 [RSA-2002-3-021];
- *Oriani-Ambrosini, MP v. Sisulu, MP Speaker of the National Assembly, Bulletin* 2012/3 [RSA-2012-3-017];
- *Print Media South Africa and Another v. Minister of Home Affairs and Another, Bulletin* 2012/3 [RSA-2012-3-014];
- *Shilubana and Others v. Nwamitwa*, *Bulletin* 2008/2 [RSA-2008-2-008];
- *South African National Defence Union v. Minister of Defence and Another, Bulletin* 1999/2 [RSA-1999-2-006];
- *South African Transport and Allied Workers Union and Another v. Garvas and Others, Bulletin* 2012/2 [RSA-2012-2-006];
- *S v. Mamabolo (E TV and Others Intervening), Bulletin* 2001/1 [2001-1-005].

Languages:

English.

Identification: RSA-2013-1-004

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 07.03.2013 / **e)** CCT 117/11; [2013] ZACC 4 / **f)** Ngewu and Another v. Post Office Retirement Fund and Others / **g)** www.constitutionalcourt.org.za/Archimages/20592.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality**.
5.3 Fundamental Rights – **Civil and political rights**.

Keywords of the alphabetical index:

Insurance, pension and disability, calculation / Pension, criteria / Pension, married couple / Pension, right / Pension, single person / Public service, retirement, discrimination.

Headnotes:

Sections 10 to 10E of the Post Office Act, read with the Rules of the Post Office Retirement Fund, provide that an ex-spouse of a post office employee is not entitled to his or her share of his or her pension interest at the time of divorce, but rather when the employee terminates employment. This is different from other public pension fund rules, which provide for the payment of the pension interest to the ex-spouse upon divorce. This differentiation in the timing of payment to ex-spouses was found to be inconsistent with the Constitution's promise of equality.

Summary:

I. The applicant's ex-husband was employed by the Post Office and a member of its Retirement Fund (hereinafter, "Fund"). According to their divorce decree, she was awarded a 50% share of her ex-husband's pension interest. However, under the Rules of the Fund in accordance with the Post Office Act, her portion did not accrue on divorce, but was

payable only when her ex-husband terminated his membership in the Fund. The applicant sought to change the Rules of the Fund so that her pension interest, and those of other ex-spouses in a similar position, could accrue on the date of divorce.

All parties agreed that the Post Office Act was unconstitutional to the extent that it did not provide for the payment of the pension interest at the time of divorce. At the hearing, the legal representatives of the parties informed the Constitutional Court that they had reached agreement and submitted a proposed order to the Court.

II. In its judgment, the Constitutional Court found that the sections of the Post Office Act, which deal with the administrative and financial matters of the Fund, are unconstitutional. This is because of the differentiation between the payment of divorced spouses' pension interests regulated by the Pension Funds Act and the Government Employees Pension Law Amendment Act on one hand, as opposed to the payment of divorced spouses' pension interests governed by the Post Office Act on the other. The differentiation violates the requirement of equality before the law and equal protection and benefit of the law contained in Section 9.1 of the Constitution.

Therefore the Court declared the sections invalid. The declaration of invalidity was suspended for eight months for the legislature to cure the defect. If the unconstitutionality is not remedied within this period, Section 24A of the Government Employees Pension Law will be read into the Post Office Act.

Supplementary information:

Legal norms referred to:

- Pension Funds Act 24 of 1956;
- Government Employees Pension Law, Proclamation 21 of 1996, as recently amended by the Government Employees Pension Law Amendment Act 19 of 2011;
- Post Office Act 44 of 1958;
- Post Office Retirement Fund Rules, Government Notice 1107 in *Government Gazette* 28228 of 2005;
- Divorce Act 70 of 1979.

Cross-references:

- *Wiese v. Government Employees Pension Fund and Others* [2011] 4 All *South African Law Reports* 280 (WCC);
- *Wiese v. Government Employees Pension Fund and Others* [2012] ZACC 5; 2012 (6) *Butterworths Constitutional Law Reports* 599 (CC);
- *Harksen v. Lane NO and Others, Bulletin* 1997/3 [RSA-1997-3-011];
- *Prinsloo v. Van der Linde and Another, Bulletin* 1997/1 [RSA-1997-1-003];
- *Minister of Home Affairs and Another v. Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v. Minister of Home Affairs and Others, Bulletin* 2005/3 [RSA-2005-3-014];
- *Lawyers for Human Rights and Another v. Minister of Home Affairs and Another, Bulletin* 2004/1 [RSA-2004-1-005].

Languages:

English.

Identification: RSA-2013-1-005

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 14.03.2013 / **e)** CCT 50/12; [2013] ZACC 5 / **f)** Hattingh and Others v. Juta / **g)** www.constitutionalcourt.org.za/Archimages/20616.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.1.1.4 Fundamental Rights – General questions – Entitlement to rights – **Natural persons**.
5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Eviction / Eviction, family tie / Family life, definition / Family, reunification, right to lead a normal family life / Tenure, security.

Headnotes:

The Extension of Security of Tenure Act (hereinafter, "ESTA") creates a right to family life for an occupier of agricultural land. The Act requires that this right be

balanced with the rights of the landowner. The right allows an occupier to enjoy a family life, but only to the extent that this is not unjust and inequitable to the landowner. What is just and equitable depends on the facts.

Summary:

I. Mr Juta brought an application in the Stellenbosch Magistrate's Court (Magistrate's Court) to evict some members of Mrs Hattingh's family (the applicants) from his farm. Mrs Hattingh resides on the farm under an arrangement with Mr Juta, pursuant to which she lives in two adjacent units of a labourer's cottage.

Mrs Hattingh's two adult sons and her daughter-in-law resided with her. Mrs Hattingh is elderly and in poor health and wished to continue living with the applicants in the cottage. However, Mr Juta wanted the applicants evicted because he required part of the cottage to accommodate his farm manager.

Mrs Hattingh is an "occupier" under ESTA, in terms of which she has the right to reside on land which belongs to another person. ESTA provides that an occupier has "a right to family life in accordance with the culture of that family". The applicants resisted the eviction proceedings on the ground that their mother's right to family life under ESTA entitled them to live with her on Mr Juta's farm.

The Magistrate's Court held that the applicants were entitled to live with Mrs Hattingh on the farm in terms of ESTA. Mr Juta appealed to the Land Claims Court, which overturned the judgment of the Magistrate's Court and granted an eviction order. The Supreme Court of Appeal upheld the Land Claims Court's decision to authorise eviction.

II. In the Constitutional Court the issue turned on the interpretation of ESTA. The Court held that there is no need to define the term "family" since families come in different shapes and sizes and cannot be limited to the nuclear family.

It was therefore unnecessary to determine the meaning of "in accordance with the culture of that family". The Court concluded that Section 6.2 of ESTA requires that the right to family life of an occupier be balanced with the rights of the landowner. Therefore, the right to family life allows an occupier to enjoy as much of a family life as possible when this will not be unjust and inequitable to the landowner. What is unjust and inequitable will depend on the facts of each case.

In balancing the two parties' rights, the Court found that it would be just and equitable that the applicants be evicted. The factors weighing in favour of the applicants, such as the severe housing shortage in the area, were outweighed by the fact that they were adults and independent from Mrs Hattingh, they earned an income and would be free to visit Mrs Hattingh at any time after their eviction. Moreover, Mr Juta needed the housing to accommodate one of his employees. In the result, Justice Zondo, writing for the Court, concluded that the appeal should be dismissed with no order as to costs.

Cross-references:

- *Dawood and Another v. Minister of Home Affairs and Others; Shalabi and Another v. Minister of Home Affairs and Others; Thomas and Another v. Minister of Home Affairs and Others, Bulletin* 2000/2 [RSA-2000-2-007];
- *MEC for Education, KwaZulu-Natal and Others v. Pillay, Bulletin* 2007/3 [RSA-2007-3-014].

Languages:

English.

Identification: RSA-2013-1-006

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 28.03.2013 / **e)** CCT 52/12; CCT 55/12; [2013] ZACC 6 / **f)** Kwalindile Community v. King Sabata Dalindyebo Municipality & Others; Zimbane Community v. King Sabata Dalindyebo Municipality & Others / **g)** www.saflii.org/za/cases/ZACC/2013/6.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.3.10 Fundamental Rights – Civil and political rights – **Rights of domicile and establishment**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.
5.5.5 Fundamental Rights – Collective rights – **Rights of aboriginal peoples, ancestral rights**.

Keywords of the alphabetical index:

Apartheid, real, restitution / Community right, principles / Legislation, national, application, general / Land / Land, right / Land, dispute / Land, planning permission / Land, regulation on use / Property, right, restitution.

Headnotes:

In properly exercising its power under Section 34.6 of the Restitution of Land Rights Act to make an order that a land claimant will be paid cash instead of having the land restored (a non-restoration order), a court must be satisfied that non-restoration would be in the public interest and that the public would suffer substantial prejudice absent such order. A non-restoration order is invasive of the constitutional right of a claimant to possible restoration; therefore, the order must be made with sufficient particularity to ensure that the possible redress that would result in a successful claim is not unduly curtailed.

Summary:

I. The Kwalindile and Zimbane communities (applicant communities) lodged claims with the Regional Land Claims Commissioner (hereinafter, the "Commissioner") under the Restitution of Land Rights Act, 22 of 1994 (Restitution Act) for the restitution of their rights in land. The claims include restoration of land inside a major urban centre in Eastern Cape province, Mthatha (Erf 912). Both claims were accepted and investigated by the Commissioner, who referred them to Land Claims Court for adjudication.

The Land Claims Court granted the order sought by the local Mthatha King Sabata Dalindyebo Municipality (Municipality) to immunize the claimed land from restoration, subject to certain qualifications which the Supreme Court of Appeal later set aside. The Land Claims Court and Supreme Court of Appeal reasoned that the restoration of the remainder of Erf 912 to the claimant communities would not be in the public interest, that major social disruption would result and that it was neither physically and economically possible, nor realistic. Therefore, when claims in respect of any land situated in the town of Mthatha, including the remainder of Erf 912, are finally determined, the rights in the land would not be restored to any successful claimant.

The applicant communities applied to the Constitutional Court to set this limitation aside. Both communities reiterated the limits of their claim. The Municipality opposed. The second and third respondents – commercial property owners with interests at stake – also opposed.

II. In the Constitutional Court, the question turned on the proper exercise of a court's power under Section 34.6 of the Restitution Act to make a non-restoration order unless it is satisfied that non-restoration would be in the public interest and that the public would suffer substantial prejudice absent such order.

In a unanimous judgment, the Constitutional Court held that the courts below misdirected themselves on the value judgment they had to make. The Constitutional Court reasoned that a non-restoration order is invasive of the constitutional right of a claimant to possible restoration. Therefore, the order must be made with sufficient particularity to ensure that the possible redress that would result in a successful claim is not unduly curtailed.

The Court found that nothing justified the conclusion that it is in the public interest for rights on vacant and undeveloped land not to be restored, or that the public would suffer substantial prejudice simply because vacant and undeveloped land on the fringes of the town may be restored.

The Court thus upheld the applicants' appeal and set aside the orders of both the Supreme Court of Appeal and the Land Claims Court. It did not uphold the appeal by the commercial second respondent because its registered lease over part of the land in question had yet to be put into operation since the land had not been surveyed, sub-divided or developed. The Court however found that it would not be in the public interest and would be substantially prejudicial to the public to order restoration of the land of Erf 18647, on which the third respondent (a commercial entity) already had a registered long lease.

Supplementary information:

Legal norms referred to:

- Restitution of Land Rights Act 22 of 1994;
- Land Administration Act 2 of 1995;
- State Land Disposal Act 48 of 1961.

Cross-references:

- *Baphalane Ba Ramokoka Community v. Mphela Family and Others; In re: Mphela Family and Others v. Haakdoornbult Boerdery CC and Others* [2011] ZACC 15; 2011 (9) *Butterworths Constitutional Law Reports* 891 (CC);

- *Department of Land Affairs and Others v. Goedgelegen Tropical Fruits (Pty) Ltd, Bulletin* 2007/2 [RSA-2007-2-008];
- *Concerned Land Claimants' Organisation of Port Elizabeth v. Port Elizabeth Land and Community Restoration Association and Others* [2006] ZACC 14; 2007 (2) *South African Law Reports* 531 (CC); 2007 (2) *Butterworths Constitutional Law Reports* 111 (CC);
- *Giddey NO v. J C Barnard and Partners, Bulletin* 2006/2 [RSA-2006-2-009];
- *Mabaso v. Law Society of the Northern Provinces and Another, Bulletin* 2004/2 [RSA-2004-2-008].

Languages:

English.

Identification: RSA-2013-1-007

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 28.03.2013 / **e)** CCT 80/12; [2013] ZACC 7 / **f)** eThekwini Municipality v. Ingonyama Trust / **g)** www.constitutionalcourt.org.za/Archimages/20663.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.3.7 Sources – Techniques of review – **Literal interpretation**.

Keywords of the alphabetical index:

Inheritance, assets, fiscal evaluation / Interpretation, law, universally binding / Property, immovable, value / Property, use, by State / Rate, collection, procedure, constitutionality / Rate, payment, obligation / State asset, transfer to regions and municipalities / State institution, definition / State organ, relation / State succession, property.

Headnotes:

Property held in trust is state property and therefore exempt from rates in terms of Section 3.3 of the Rating of State Property Act 79 of 1984 (hereinafter, "Rating Act").

Summary:

I. This question was whether property held in trust under the Kwazulu Ingonyama Trust Act was state property and thereby exempt from rates in terms of Section 3.3 of the Rating Act.

eThekwini Municipality (hereinafter, "Municipality") brought an application in the KwaZulu-Natal High Court, Durban (hereinafter, "High Court") seeking a declaration that the Ingonyama Trust (hereinafter, "Trust") property falling within the jurisdiction of the Municipality is ratable. The period at issue in this test case was between May 1996 and June 2005. The Trust opposed contending that the land was state property which was exempt.

The High Court found that the property in question was not state property and held that it is therefore ratable.

The Trust appealed to the Supreme Court of Appeal. The Supreme Court of Appeal reversed, finding that the property constituted state property which was exempt.

II. In the Constitutional Court the Municipality sought to challenge the judgment of the Supreme Court of Appeal. But the Municipality's application was late by two months and therefore had to apply for condonation. The Municipality had to satisfy two requirements: a satisfactory explanation for the delay and that the interests of justice, including consideration of the prospects of success, favour condonation.

In a unanimous judgment, the Constitutional Court refused condonation on two grounds. It rejected the explanation given by the Municipality for the delay as unsatisfactory and held that it was not in the interests of justice to grant condonation and leave to appeal. There were no prospects of success because the land in question constituted state property exempt from rates in terms of the Rating Act.

Supplementary information:

Legal norms referred to:

- Section 239 and item 2-3 of Schedule 6 of the Constitution;
- Sections 3.3 and 1 of the Rating of State Property Act 79 of 1984;
- The Natives Land Act 27 of 1913;
- The Native Trust and Land Act 18 of 1936;
- Native Administration Act 38 of 1927;

- Promotion of Bantu Self-government Act 46 of 1959;
- Bantu Homelands Citizenship Act 26 of 1970;
- Bantu Homelands Constitution Act 21 of 1971;
- Schedule 1 of the interim Constitution Act 200 of 1993;
- Section 2 of KwaZulu Ingonyama Trust Act 3 of 1994;
- KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990;
- KwaZulu-Natal Ingonyama Trust Amendment Act 9 of 1997;
- Section 89.3 Local Government: Municipal Property Rates Act 6 of 2004;
- Sections 148-150, 155-158, 172, 167 and 105 Local Authorities Ordinance 25 of 1974.

Cross-references:

- *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v. North West Provincial Government and Another* [2000] ZACC 2; 2001 (1) *South African Law Reports* 500 (CC); 2000 (4) *Butterworths Constitutional Law Reports* 347 (CC);
- *Msunduzi Municipality v. MEC for Housing, KwaZulu-Natal and Others* 2004 (6) *South African Law Reports* 1 (SCA);
- *Ex parte Moseneke* 1979 (4) *South African Law Reports* 884 (TPD);
- *Brummer v. Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3*;* 2000 (2) *South African Law Reports* 837 (CC); 2000 (5) *Butterworths Constitutional Law Reports* 465 (CC);
- *Van Wyk v. Unitas Hospital and* Another (Open Democratic Advice Centre as *Amicus Curiae)* [2007] ZACC 24; 2008 (2) *South African Law Reports* 472 (CC); 2008 (4) *Butterworths Constitutional Law Reports* 442 (CC);
- *S v. Mercer* [2003] ZACC 22; 2004 (2) *S South African Law Reports* A 598 (CC); 2004 (2) *Butterworths Constitutional Law Reports* 109 (CC).

Languages:

English.

Identification: RSA-2013-1-008

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 28.03.2013 / **e)** CCT 108/12; [2013] ZACC 8 / **f)** Houston v. The State / **g)** http://41.208.61.234/uhtbin/cgisirsi/20130510130136/SIRSI/0/520/J-CCT 108-12 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Appeal / Criminal Law, parole.

Headnotes:

Cumulative sentences imposed successively without unfairness entail no intrinsic unfairness or unconstitutionality.

Summary:

I. The applicant sought leave to appeal against two sentences imposed successively by the Kwa-Zulu Natal High Court, Durban (hereinafter, “High Court”) in separate cases.

In the High Court the applicant was convicted on charges of murder, kidnapping and robbery with aggravating circumstances. On 28 September 1997, he was sentenced to an effective 30 years’ imprisonment. Later, he was convicted on separate charges of murder and two counts of robbery with aggravating circumstances. On 27 February 1998, he was sentenced on these charges to an effective 40 years’ imprisonment. The applicant was thus serving a term of 70 years’ imprisonment.

The applicant complained about the cumulative effect of his sentences. Under the correctional services and criminal procedure legislation, if he had been sentenced to life imprisonment for on one set of charges, the result would have been that the sentence on the second set of charges would automatically have run cumulatively with the life sentence. And the life sentence would have entitled him to consideration for parole, the applicant alleged after 13 years. Thus, anomalously, if he had been given a life sentence, he would have been entitled to consideration for release earlier than is now the case with the separate long-term sentences.

The High Court and Supreme Court of Appeal refused leave to appeal. The applicant's case was not that his trials were unfair. The applicant contended that the effect of the parole policies of the Department of Correctional Service was that he was being unfairly discriminated against because if he had been given a life sentence, instead of the 70 years' imprisonment sentence, he would be eligible for parole.

II. This Court found that there was no unfairness in the sentencing process in the High Court and thus there were no grounds to appeal against the sentences imposed in the High Court. The applicant in these proceedings did not challenge the constitutionality of the parole policies. It followed that the applicant's potential remedies lay elsewhere, if circumstances existed that warranted proceedings for reviewing the parole policies of the Department of Correctional Services.

Cross-references:

- *Bogaards v. S* [2012] ZACC 23; 2013 (1) SACR 1 (CC); 2012 (12) *Butterworths Constitutional Law Reports* 1261 (CC) paragraph 42;
- Correctional Services Act 111 of 1998;
- *Van Vuren v. Minister of Correctional Services and Others* [2010] ZACC 17; 2012 (1) SACR 103 (CC); 2010 (12) *Butterworths Constitutional Law Reports* 1233 (CC); and
- *Van Wyk v. Minister of Correctional Services and Others* 2012 (1) SACR 159 (GNP).

Languages:

English.

Identification: RSA-2013-1-009

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 18.04.2013 / CCT 51/12; [2013] ZACC 9 / **f)** Agri South Africa v. Minister for Minerals and Energy / **g)** www.constitutionalcourt.org.za/Archimages/20758.pdf / **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:

Resource, mineral / Resource, natural, exploitation / Enterprise, mining / Property right, restriction / Property, deprivation / Expropriation / Expropriation, compensation.

Headnotes:

Mineral rights constitute property for the purposes of Section 25 of the Constitution, which enshrines the right to property, but national legislation that deprives a pre-existing mineral rights holder of elements of its pre-existing mineral right does not result in expropriation of property if the property is not acquired by the State.

Summary:

I. On 2 October 2001, Sebenza (Proprietary) Limited (hereinafter, "Sebenza") purchased coal rights but did not obtain statutory authorisation to exploit the coal. On 1 May 2004, the Minerals Petroleum and Resources Development Act 28 of 2002 (hereinafter, "MPRDA") came into effect. On that date, Sebenza became the holder of what the MPRDA described as an "unused old order right". Holders of unused old order rights had the exclusive right to apply for a prospecting or mining right during a specified period. Because of corporate insolvency, Sebenza failed to apply for an authorisation or permit to mine during this period. Sebenza lodged a claim for compensation in terms of Schedule II to the MPRDA on the grounds that the commencement of the MPRDA had the effect of expropriating its mineral rights. Agri South Africa (hereinafter, "Agri SA"), an association not for gain, procured the claim from Sebenza. The claim was rejected. Agri SA then commenced litigation in the North Gauteng High Court (hereinafter, "High Court") seeking compensation for the alleged expropriation of Sebenza's mineral rights.

The High Court found that the MPRDA deprived Sebenza of its mineral rights and that they had been expropriated. Compensation of R750 000 (about USD$70 000) was ordered. The Minister appealed the High Court's decision to the Supreme Court of Appeal. The Supreme Court of Appeal set aside the decision of the High Court and found that Sebenza was not deprived of its mineral rights and that no expropriation took place. The majority judgment, written by Wallis JA, held that expropriation had not occurred because the MPRDA did not deprive mineral rights holders of their rights and did not vest those rights in the State. The minority, led by Nugent JA, also held that expropriation had not occurred, but for a different reason: In effect, the

MPRDA had merely deprived mineral rights holders of a statutory monopoly, something which does not constitute expropriation.

Agri SA applied to the Constitutional Court to overturn this. The Minister for Minerals and Energy opposed. The issue was whether Sebenza's mineral rights were expropriated when the MPRDA took effect.

II. In the majority judgment by Chief Justice Mogoeng, the Constitutional Court, differing from the approach of the Supreme Court of Appeal, held that the MPRDA had the effect of depriving Sebenza of elements of its pre-existing mineral rights. However, the deprivation did not rise to the level of expropriation at the time the MPRDA commenced. Further, this was supported by the transitional arrangements which painstakingly protected pre-existing mineral rights and improved security of tenure. In addition, in construing the effect of the legislation, the objects of the MPRDA had to be taken into account. The statute's purpose was to facilitate equitable access to the mining industry, promote sustainable development of South Africa's mineral and petroleum resources and to advance eradication of discriminatory practices in mining. The appeal was therefore dismissed. But the Court noted that it would be inappropriate to decide definitively that expropriation in terms of the MPRDA is incapable of ever being established.

III. In a separate judgment, Justice Froneman concurred in the outcome, but for different reasons. The appeal should fail because there was an expropriation – but what Agri SA received in terms of the provisions of the MPRDA amounted to just and equitable compensation, albeit in kind, for what it had lost under the MPRDA. He disagreed that acquisition of property by the State is a requirement for expropriation in all cases. According to Justice Froneman, the contestation about past and future rights to property must be done by interpreting the transitional arrangements in the MPRDA as seeking to give effect to the just and equitable compensation provisions under the Constitution, by providing past owners of minerals the opportunity of continuing to exploit the minerals in the transition, as well as giving them preferential treatment in acquiring new rights under the MPRDA.

In another separate judgment, Justice Cameron concurred in the majority judgment, but agreed with Justice Froneman that it is inadvisable to extrapolate an inflexible general rule of state acquisition as a requirement for all cases.

Supplementary information:

Legal norms referred to:

- Mineral and Petroleum and Resources Development Act 28 of 2002 (MPRDA).

Cross-references:

- *Anglo Operations Ltd v. Sandhurst Estates (Pty) Ltd* 2007 (2) *South African Law Reports* 363 (SCA)*;*
- *Biowatch Trust v. Registrar, Genetic Resources, and Others, Bulletin* 2009/2 [RSA-2009-2-006];
- *First National Bank of South Africa Ltd t/a Wesbank v. Commissioner, South African Revenue Service and Another; First National Bank of South Africa Ltd t/a Wesbank v. Minister of Finance* [2002] ZACC 5; 2002 (4) *South African Law Reports* 768 (CC); 2002 (7) *Butterworths Constitutional Law Reports* 702 (CC);
- *Mkontwana v. Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v. Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v. MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* [2004] ZACC 9; 2005 (1) *South African Law Reports* 530 (CC); 2005 (2) *Butterworths Constitutional Law Reports* 150 (CC);
- *Reflect-All* 1025 CC *and Others v. MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* [2009] ZACC 24; 2009 (6) *South African Law Reports* 391 (CC); 2010 (1) *Butterworths Constitutional Law Reports* 61 (CC);
- *Harksen v. Lane NO and Others, Bulletin* 1997/3 [RSA-1997-3-011].

Languages:

English.

Identification: RSA-2013-1-010

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 25.04.2013 / **e)** CCT 60/12; [2013] ZACC 10 / **f)** KwaZulu-Natal Joint Liaison Committee v. Member of the Executive Council, Department of Education, KwaZulu-Natal and Others (Centre for Child Law as *amicus curiae*) / **g)** www.saflii.org.za/za/cases/ZACC/2013/10.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.10.1 Institutions – Public finances – **Principles**.
5.1.1.5.2 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Public law**.
5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

Keywords of the alphabetical index:

Common Law, constitutional application / Constitutionality, principle / Contract, obligation, inability to fulfil / Contract, public law / Expectation, legitimate / Public education agreement / Education, right.

Headnotes:

A public official who promises to pay specified amounts cannot unilaterally reduce the amounts to be paid after the due date for payment has passed. This is based on the principles of reliance, accountability and rationality.

Summary:

I. In 2008 the Department of Education in the KwaZulu-Natal province (hereinafter, "KZN") issued a notice to certain independent schools indicating "approximate" subsidies that it intended to pay to those schools in several tranches in the forthcoming year. In 2009, after the due date for payment of the first tranche had fallen due, the Department announced that it would be reducing the subsidies to the independent schools (including the tranche that had already fallen due for payment) because of budgetary constraints.

The applicant (an association of independent schools in KZN) brought an application before the KwaZulu-Natal High Court, Pietermaritzburg to enforce payment of monies it claimed were due to it from the Department pursuant to the 2008 notice. The High Court dismissed the application, ruling that the notice did not create enforceable contractual obligations as between the Department and the provincial schools. In addition, the High Court ruled that a judicial order could not be granted for payment of an "approximate" amount. Both the High Court and the Supreme Court of Appeal refused leave to appeal.

The applicant applied to the Constitutional Court, arguing that the High Court should have granted the application as the 2008 notice constituted an undertaking to pay.

The respondents opposed, arguing that the applicant's remedy lay in public law rather than the law of contract, which the applicant had not pleaded. The respondents further argued that the case was not about the right to a basic education, but about the constitutional provision permitting state subsidies for independent schools.

The Centre for Child Law ((hereinafter, "CCL") was admitted as an *amicus curiae*. CCL contended that when a provincial department promises a subsidy in terms of the applicable statutory and constitutional framework, it creates an enforceable legitimate expectation. The Court should not inquire formalistically whether the applicant used the label "legitimate expectation", but whether a promise and/or settled practice and resultant prejudice were pleaded and supported by the facts on record.

II. A majority of the Court (per Cameron J, with whom five judges concurred) upheld the appeal, set aside the decision of the High Court and substituted it with an order directing the second respondent to pay the provincial schools that portion of the approximate amounts specified in the notice that had fallen due for payment on 1 April 2009.

The majority acknowledged that the undertaking was not extended as part of a bilaterally binding agreement and therefore did not give rise to an enforceable agreement or contract. The undertaking was nonetheless held to constitute a publicly-promulgated promise to pay.

The majority accepted that, in general, subsidies promised by the government may be reduced. However, the Court held that, for reasons based on reliance, accountability and rationality, it is a constitutionally sound principle that a public official who promises to pay specified amounts to named recipients cannot unilaterally reduce the amounts to be paid after the due date for their payment has passed.

III. In a separate concurrence Justice Froneman agreed with the reasoning of the main judgment, but was of the view that the reasoning applied to the promise made for the whole of the year, including the undertakings in relation to those amounts which had

not yet fallen due when the reduction was announced. He also held that the applicant's claim could comfortably be accommodated within the law of contract.

In a dissenting judgment, Justice Nkabinde agreed with the main judgment that leave to appeal should be granted, but was of the opinion that the appeal should be dismissed. In her view, the use of the words "approximate funding levels" highlighted that the notice did not constitute a promise to pay either the full extent of the allocated funds or any percentage thereof. The form of the applicant's case was important: since neither the existence of a contract or quasi-contract, nor the public-law ground relied upon by Justice Cameron, was pleaded or agreed upon, the applicant's claim ought to be dismissed.

In a separate dissenting judgment, concurred in by Chief Justice Mogoeng and Justice Jafta, Justice Zondo took the view that because the applicant's case was based on an alleged contract and the applicant was unable to prove its existence, the application ought to fail. Justice Zondo also held that "approximate" amounts were uncertain and vague and that no enforceable obligation could arise in relation thereto. He held that the order made by Justice Cameron would not be competent in law because the Department would not know the amounts that it would be required to pay to the affected schools.

In a separate judgment, concurred in by Justice Zondo, Chief Justice Mogoeng and Justice Jafta indicated that while they did not agree with Justice Nkabinde that leave to appeal should be granted, they agreed with the rest of her judgment.

Supplementary information:

Legal norms referred to:

- Sections 1.d and 1.f and 29 of the Constitution of the Republic of South Africa, 1996;
- Section 48 of the Schools Act 84 of 1996;
- KwaZulu-Natal School Education Act 3 of 1996;
- Amended National Norms and Standards for School Funding, published in Government Notice 869 in Government Gazette 29179 of 31 August 2006;
- Notice Regarding the Registration of and Payment of Subsidies to Independent Schools, published in Provincial Notice 287 in Provincial Gazette 5387 of 28 October 1999;
- Rule 53 of the Uniform Rules of Court.

Cross-references:

- *Maphango and Others v. Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2; 2012 (3) *South African law Reports* 531 (CC); 2012 (5) *Butterworths Constitutional Law Reports* 449 (CC);
- *Governing Body of the Juma Musjid Primary School and Others v. Essay N.O and Others* (Centre for Child law and another as *Amicus Curiae)* [2011] ZACC 13; 2011 (8) *Butterworths Constitutional Law Reports* 761 (CC);
- *Duncan v. Minister of Environmental Affairs and Tourism and Another* 2010 (6) *South African law Reports* 374 (SCA);
- *Masetlha v. President of the Republic of South Africa and Another*, *Bulletin* 2007/3 [RSA-2007-3-013];
- *Rail Commuters Action Group and Others v. Transnet Ltd t/a Metrorail and Others, Bulletin* 2004/3 [RSA-2004-3-012];
- *South African Veterinary Council and Another v. Szymanski* 2003 (4) *South African law Reports* 42 (SCA);
- *South African Football Association v. Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons and Another* 2003 (3) *South African Law Reports* 313 (SCA);
- *Bel Porto School Governing Body and Others v. primier of the Western Cape Province and Another* [2002] ZACC 2; 2002 (3) *South African Law Reports* 265 (CC); 2002 (9) *Butterworths Constitutional Law Reports* 891 (CC);
- *Pharmaceutical Manufacturers Association of South Africa 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. South African Rugby Football Union and Others, Bulletin* 1999/3 [RSA-1999-3-008];
- *Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others, Bulletin* 1999/1 [RSA-1999-1-001];
- *Premier, Mpumalanga, and Another v. Executive Committee, Association of State-Aided Schools, Eastern Transvaal, Bulletin* 1998/3 [RSA-1998-3-011];
- *Soobramoney v. Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1998 (1) *South African Law Reports* 765 (CC); 1997 (12) *Butterworths Constitutional Law Reports* 1696 (CC);
- *Jockey Club of South Africa v. Forbes* 1993 (1) *South African Law Reports* 649 (AD).
- *Minister of Home Affairs and Another v. American Ninja IV Partnership and another* 1993 (1) *South African law Reports* 257 (AD);

- *Dilokong Chrome Mines (Edms) Bpk v. Direkteur-Generaal, Departement van Handel en Nywerheid* 1992 (4) *South African Law Reports* 1 (A);
- *Fluxman v. Brittain* 1941 Appellate Division 273.

Languages:

English.

Identification: RSA-2013-1-011

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 26.04.2013 / **e)** CCT 41/12; [2013] ZACC 11 / **f)** Rademan v. Moqhaka Local Municipality and Others / **g)** www.constitutionalcourt.org.za/Archimages/20774.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Appeal, decision of Supreme Court / Debt, enforcement / Electricity supply, payment / Municipality, public utility, fee, collection / Municipality, resource, sufficiency, guarantee / Municipality, responsibility / Regulation, municipal.

Headnotes:

A resident of a municipality cannot pick and choose which components of a municipal account to pay. Municipal Systems Act entitles the municipality to consolidate various accounts for the collection of debts. A municipality is therefore entitled to cut off a resident's electricity when the rates and other tax components of the consolidated account have not been paid.

Summary:

I. The applicant, Ms Rademan, is a resident of Kroonstad, a town within the jurisdiction of the Moqhaka Local Municipality (hereinafter, the "Municipality") and is a member of the Moqhaka Ratepayers and Residents Association (hereinafter, the "Association"). In June 2008 the Association declared a dispute with the Municipality because of the Association's dissatisfaction with the Municipality's alleged failure to provide efficient services. As a result, members of the Association, including Ms Rademan, withheld payment of property rates in protest. However, Ms Rademan paid her electricity and other accounts for municipal services in full. On or about 17 August 2009, the Municipality disconnected Ms Rademan's electricity supply because of her failure to pay her rates and taxes.

Ms Rademan challenged the Municipality's conduct as unlawful before the Free State High Court (hereinafter, the "High Court"). The High Court found against her and confirmed that the Municipality was entitled to cut off her electricity. Her appeal to the Supreme Court of Appeal was dismissed. Ms Rademan then applied to the Constitutional Court for leave to appeal against that judgment.

Before the Constitutional Court, Ms Rademan's main contention was that the Municipality was precluded from disconnecting her electricity supply by the Electricity Regulation Act (hereinafter, the "ERA") because none of the grounds upon which the Municipality may cut off a resident's electricity supply was applicable to her. Ms Rademan contended that there was a conflict between the Local Government: Municipal Systems Act (hereinafter, the "Systems Act") and the Municipality's Credit Control and Debt Collection by-laws (hereinafter, the "by-laws") on the one hand, and the ERA on the other. She argued that the ERA should prevail. The Municipality contended that the Systems Act read with the by-laws entitled it to consolidate various accounts and to cut off Ms Rademan's electricity as she had not paid the rates component of the consolidated account. The Municipality contended that there was no conflict between the relevant legal provisions.

II. The Constitutional Court held, in a majority judgment penned by Justice Zondo, that the consolidation of an account means that different components of the account belong to one account and a resident cannot pick and choose which components to pay. The majority held further that there is no conflict between the relevant provisions of the ERA on the one hand, and the Systems Act and provisions of the by-laws on the other. The majority therefore dismissed the appeal.

In a separate judgment, Justice Froneman agreed with this outcome, but for different reasons. He found that the relevant provisions of the ERA do not apply to this case, concluding that the ERA deals with the

supply and termination of electricity in the context of national government, whereas the Systems Act and the by-laws deal with the termination of electricity in the context of local government and provide the manner and conditions for the payment of rates. Their constitutional validity was not challenged. He held that, as the main judgment shows, Ms Rademan has failed to comply with the provisions of the Systems Act and bylaws, therefore the appeal must fail.

Supplementary information:

Legal norms referred to:

- Sections 151, 152, 154 and 156 of the Constitution of South Africa, 1996;
- Section 21.5 of the Electricity Regulation Act 4 of 2006;
- Sections 4, 5, 96, 97 and 102 of the Local Government: Municipal Systems Act 32 of 2000.

Cross-references:

- *Body Corporate Croftdene Mall v. Ethekwini Municipality* 2012 (4) *South African Law Reports* 169 (SCA);
- *City of Cape Town and Another v. Robertson and Another* [2004] ZACC 21; 2005 (2) *South African Law Reports* 323 (CC);
- *Johannesburg Metropolitan Municipality v. Gauteng Development Tribunal and Others, Bulletin* 2010/2 [RSA-2010-2-005].

Languages:

English.

Switzerland
Federal Court

Important decisions

Identification: SUI-2013-1-001

a) Switzerland / **b)** Federal Court / **c)** First Civil Law Chamber / **d)** 10.10.2012 / **e)** 4A_367/2012 / **f)** Integration Handicap v. X Sàrl / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 138 I 475 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.2.2.2 Constitutional Justice – Types of claim – Claim by a private body or individual – **Non-profit-making corporate body**.
5.1.2 Fundamental Rights – General questions – **Horizontal effects**.
5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability**.

Keywords of the alphabetical index:

Disability, discrimination / Person with disabilities, rights.

Headnotes:

Capacity to bring proceedings of an organisation providing assistance to persons with disabilities, Article 9 of the Federal Act on the Elimination of Inequalities affecting Persons with Disabilities (LHand); discrimination within the meaning of Article 6 LHand.

Integration Handicap is entitled to bring proceedings in the civil courts for a finding of discrimination and, where applicable, to file a civil appeal (recital 1).

Concept of discrimination towards a person with disabilities in the case of services provided by private individuals. If the operator of a cinema not adapted for persons with reduced mobility refuses on safety grounds to admit a person in a wheelchair who has come to the cinema alone, that does not constitute discriminatory treatment within the meaning of Article 6 LHand (recital 3). Link with the ECHR (recital 4).

Summary:

I. The case had arisen after Mr X, a paraplegic, came unaccompanied to cinema Y to see a film that was not shown at any other cinema in town. The building where the cinema is located has not been adapted to accommodate persons in a wheelchair, such that they can enter or leave the auditorium without third party assistance. Mr X was refused access to the cinema in accordance with the operating company's internal safety rules.

Integration Handicap, a not-for-profit association that assists persons with disabilities, brought an action against X Sàrl in the Court of First Instance of the Canton of Geneva, then in the Civil Division of the Court of Justice of the Canton of Geneva. An application to the Federal Court for discriminatory treatment towards Mr X was dismissed.

II. The applicant association is on the list of organisations of national importance for aiding persons with disabilities. The organisation is entitled to bring proceedings in its own name against an inequality affecting a large number of persons with disabilities, notably in the civil courts, in order to obtain a finding of discrimination within the meaning of Article 6 LHand. Because a refusal of admission to a cinema applies to all persons with reduced mobility, the inequality in question may cover a large number of persons.

The object of the law on persons with disabilities is to prevent, reduce or eliminate inequalities affecting persons with disabilities (Article 1.1 LHand). Inequality in access to a service is one of the inequalities referred to in the law; this occurs where access to a service is impossible or difficult for persons with disabilities (Article 2.4 LHand). Article 6 LHand states that private individuals who provide services to the public must not treat a person with disabilities in a discriminatory manner on account of his or her disability. While the emergency evacuation of any building entails particular risks for a person in a wheelchair, these risks are greater in a theatre or other auditorium owing to the large number of people present and the resultant risk of a crush.

The discrimination referred to in Article 6 LHand is a "qualified" inequality. In other words, it refers to a blatant or particularly shocking difference of treatment that may have derogatory connotations. Applied to a private individual, the principle of non-discrimination does not obligate that individual to take particular measures to eliminate *de facto* inequalities and does not preclude differentiation of services according to the customer.

In the case in point, the refusal of service complained of was based on safety reasons and cannot be regarded as particularly shocking. It denotes neither a lack of tolerance nor a desire to exclude persons with disabilities. On the contrary, the operating company affords these persons unrestricted access to other cinemas in the town adapted for persons with reduced mobility. Furthermore, Article 6 LHand sets forth the principle that prohibiting discrimination within the meaning of Article 8.2 of the Federal Constitution applies not only to relations between the state and private individuals but also to relations between private individuals. The constitutional rights of third parties must, therefore, also be protected and it is accordingly necessary to weigh the different interests at stake. In conclusion, the argument of a violation of Article 6 LHand is ill-founded.

Lastly, the European Convention on Human Rights (ECHR) does not require Switzerland to adopt a broader definition of discrimination or to take positive measures. The reason is that Article 8 ECHR guaranteeing the right to respect for private life does not apply as a general rule and whenever the everyday life of a person with disabilities is in question. Article 8 ECHR applies only in exceptional cases when a lack of access to buildings open to the public compromises his or her right to personal development and to the maintenance of relations with other human beings and the outside world.

Languages:

French.

Identification: SUI-2013-1-002

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 12.10.2012 / **e)** 2C_828/2011 / **f)** X v. Migration Service and Department of Justice and Security of the Canton of Thurgau / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 139 I 16 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
2.2.1.4 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and constitutions**.
2.2.2.1 Sources – Hierarchy – Hierarchy as between national sources – **Hierarchy emerging from the Constitution**.
3.16 General Principles – **Proportionality**.
3.17 General Principles – **Weighing of interests**.
4.9.2.2 Institutions – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – **Effects**.
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:

Conviction, criminal / Foreigner, asylum, residence permit / Foreigner, deportation / Foreigner, undesirable / Popular initiative.

Headnotes:

Article 8 ECHR; Article 5 (principles governing the activities of the law-based state), Article 190 (applicable law) and Article 121.3 to 121.6 (version of 28 November 2010 ["Deportation Initiative"]) in conjunction with Article 197.8 of the Federal Constitution of the Swiss Confederation of 18 April 1999; Articles 62.b, 63.1.a, 63.1.b and 63.2 of the Aliens Act of 16 December 2005 (revocation of permits); direct application of new provisions of constitutional law which come into conflict with existing laws and public international law?

Review of the criteria laid down in the case law of the European Court of Human Rights and the Federal Court in order to assess the proportionality of measures to terminate the residence of foreign nationals guilty of criminally reprehensible behaviour (recitals 2 and 3). Following an interpretation that takes due account of "practical concordance" and in the absence of a sufficiently precise wording, Articles 121.3 and 121.6 of the Constitution introduced into the Federal Constitution by the "Deportation Initiative" of 28 November 2010 are not directly applicable and require transposition into legislation; they do not take precedence over the fundamental rights or safeguards of the ECHR. Account should be taken of the value judgments expressed by the drafters of the constitution insofar as this neither contradicts higher law nor conflicts with the discretion conferred by the ECHR on Contracting States in implementation of their policy for controlling immigration (recitals 4 and 5).

Summary:

I. X (born in 1987) is from Macedonia. He came to Switzerland in November 1994 under family reunification arrangements. He subsequently obtained a settlement permit. After compulsory schooling, he trained as a painter. In June 2000, he was given a suspended 18-month custodial sentence for a serious offence against the Narcotics Act. The criminal court found that he had participated in drug trafficking involving one kilo of heroin. The Migration Service of the Canton of Thurgau revoked his settlement permit in March 2011 and deported him from Switzerland. The appeals against these measures at cantonal level were unsuccessful.

The Federal Court allowed X's public law appeal and set aside the judgment of the Administrative Court of Thurgau.

II. Under the Aliens Act (Articles 62 and 63 LEtr), a settlement permit may be revoked when a foreign national has been sentenced to a long-term custodial sentence (i.e., more than one year) or when he or she seriously violates or endangers public security and order in Switzerland or another country or poses a threat to Switzerland's internal or external security. The grounds for revocation also apply where the foreign national has resided legally in Switzerland for a continuous period of over 15 years. The measure must also respect the principle of proportionality.

In this connection, under the case law of the Swiss Federal Court and the European Court of Human Rights, the criteria to be taken into account include the seriousness of the offence, the culpability of the person concerned, the time which has elapsed since the offence was committed, whether he or she was of full age at the time of the offence, whether it was an offence involving violence, the person's conduct, state of health and degree of integration, how long he or she has been in the country, and the disadvantages facing the person concerned and his or her family. Great reserve must be exercised in the matter of the revocation of the residence permit of a foreign national who has been in Switzerland for a long time. Withdrawal cannot be ruled out in the case of repeated or serious offences, even where the foreign national was born in Switzerland and has always lived there. Under the case law of the European Court of Human Rights, in the case of narcotics offences, the public interest in termination of residence rights generally takes precedence if the person has no particular personal or family ties in the country of residence. If the person is unmarried and

has no children, the public interest in his or her removal takes precedence in principle if the sentence is more than three years or if there are additional offences.

In light of the case law of the European Court of Human Rights and its interpretation of Article 8 ECHR, the Federal Court held that revoking X's settlement permit should be considered disproportionate. The appellant received a suspended 18-month custodial sentence for a serious offence against the Narcotics Act. He smuggled drugs and participated in trafficking although he was not in financial need and was not a drug addict. It should, however, be taken into consideration, by way of mitigating circumstances, that he has been living in Switzerland since the age of 7, received all his schooling there and served an apprenticeship as a painter there. The appellant was aged 19 at the time of the offence. He was convicted three and a half years after the events and has committed no other crimes. Despite his active role, the appellant was not the main offender and participated naively in the smuggling and trafficking because of his youthful irresponsibility. The fact that he neither requested nor received any significant financial benefits for his participation, despite the considerable value of the heroin, is an illustration of this.

The appellant was co-operative and confessed during the criminal investigation. In July 2010, he began to work in a facade building company. In the beginning of 2011, he founded a painting company with his father and brother, and would like to take over the company. At the end of July 2011 he became engaged to a compatriot born in Switzerland who holds a settlement permit. During the 16 or so years he has been in Switzerland, he has integrated into Swiss society – apart from his one offence. He no longer has any family in Macedonia, as nearly all his relatives live in Switzerland. Although he is familiar with his country of birth, having spent holidays there, he does not speak Macedonian and only has a sketchy knowledge of Albanian; however, he speaks German fluently. Under these circumstances, revoking the permit is contrary to Article 8.2 ECHR. If the appellant failed to take full advantage of the opportunity given to him, a future revocation following a further weighing of interests is not out of the question.

Article 121.3, 121.4, 121.5 and 121.6 of the Constitution introduced by popular initiative is clear on this point. That is, foreign nationals are stripped of their residence permit, regardless of their status, and of all their residence rights in Switzerland if they have been convicted by a final judgment, *inter alia* for drug trafficking. The persons concerned must be deported from the country by the authorities responsible and banned from entering Switzerland for a period ranging from 5 to 15 years. In the case of re-offenders, the ban on entry is for 20 years. According to some legal writers, loss of residence permit and deportation in the aforementioned circumstances are mandatory. There is no question of considering the proportionality of the punishment in individual cases. The government and parliament take the same view.

If parliament has not assigned priority to a particular rule, it is generally assumed that rules are equivalent for the purposes of interpretation. An interpretation of Article 121.3, 121.4, 121.5 and 121.6 of the Constitution, which disregards the overall constitutional law context and focuses solely on the wishes of the initiators of the referendum is inadmissible. One exception is if the rule in question is given unequivocal priority over the other constitutional rules in question. The fact that the new constitutional rule constitutes *lex posterior* is insufficient.

Constitutional rules may be sufficiently precise and be enforced as soon as they come into force without any need for implementing legislation. To determine whether this is the case, the text in question must relate to the specific constitutional features that exist in the matter.

Article 121.3 of the Constitution mentions various situations, some of which refer to provisions of the Criminal Code (rape and robbery) and some of which are worded in a very broad and non-technical way (trafficking in drugs, burglary), have no clear outlines and according to the text of the article itself, need to be defined in more detail by the legislature (Article 121.4 of the Constitution). Under the transitional provisions of the Constitution, this must be done within five years of adopting the initiative by the people and the cantons (Article 197.8 of the Constitution).

In accordance with the principle of legality, direct applicability is only possible if the statement of legal fact and the legal consequences are worded precisely enough for individuals to be able to adapt their behaviour accordingly. Article 121.3, 121.4, 121.5 and 121.6 of the Constitution are not worded clearly enough for them to be directly applicable. This is especially the case because their direct applicability would contradict not only with other constitutional and international rules, but also with key principles of the Swiss constitutional order as the rule of law and respect for fundamental rights.

The implementation of the Deportation Initiative raises serious problems of constitutional and international law. The reason is that automatic deportation, which would be the case if Article 121.3,

121.4, 121.5 and 121.6 of the Constitution were considered in isolation, would rule out an assessment in each individual case of the proportionality of the decision to revoke residence rights, as required under international law. It would be incompatible with various constitutional and treaty provisions. For this reason, the text of the Constitution clearly stands in a problematic relationship with the fundamental values of Switzerland's constitutional and international law. The constitutional provision does not distinguish between minor and serious offences because mandatory deportation is based on the type of offence and not on the quantum of the sentence. It rules out any weighing of interests and assessment based on the circumstances of the particular case, as required under the ECHR and the Agreement between the Swiss Confederation and the EU on free movement of persons.

Article 121.3 of the Constitution is a provision that gives the legislature a margin of implementation. Its relationship with other constitutional provisions and principles needs to be clarified. This cannot be done presently by the Federal Court owing to the separation of powers. The responsibility falls to the legislature (Article 121.4 of the Constitution). When conflicting laws cannot be resolved through interpretation, the Federal Court is obliged to apply both federal laws and international law (Article 190 of the Constitution). Political authorities must strike the necessary balance between the constitutional values at issue through legislation.

Even if Article 121.3.a of the Constitution were directly applicable to the instant case and one were to leave out of consideration how it fits into the Constitution as a whole, the outcome of the proceedings would be the same. When international law conflicts with a subsequent law, the position adopted by the courts is that, in principle, international law takes precedence, except where the legislature has deliberately accepted a conflict with international law. The courts have rejected this exception where there is a conflict with the human rights conventions. In its most recent decisions on the subject, the Federal Court has upheld the primacy of international law. If there is a conflict of rules between federal law and international law, Switzerland's international undertakings take precedence, even in the case of agreements not concerned with fundamental rights. This also applies to subsequent federal laws that come into force after the rule of international law. The *lex posterior* rule does not apply in the relationship between international and national law. Switzerland cannot rely on its national law to justify non-compliance with a treaty. Consequently, a federal law that conflicts with international law is generally inapplicable.

The instant case raises the issue of the relationship between international law and a subsequent constitutional provision. In accordance with Article 121.4 of the Constitution, an amendment to the Constitution must not violate binding international law. Similarly, popular initiatives violating binding international law are null and void (Article 139.3 of the Constitution). It follows *a contrario* that constitutional amendments that do not comply with other rules of international law remain possible. It is unclear how such cases should be dealt with. Some legal writers think that a directly applicable subsequent constitutional provision takes precedence over an earlier treaty; others disagree.

The European Convention on Human Right is a treaty and must be interpreted in accordance with the rules of the Vienna Convention. Article 8 ECHR guarantees everyone's right to respect for their private and family life. Under the case law of the European Court of Human Rights and in the practice of states, Article 8 ECHR is violated when the person in question has sufficiently strong personal or family ties in the country of residence lastingly affected by the decision to refuse or terminate residence. Under Article 8.2 ECHR, the case law of the European Court of Human Rights requires the person's private interest in staying in the country to be balanced against the public interest in removing him or her or refusing him or her entry for one of the purposes specified elsewhere. According to the criteria adopted by the European Court of Human Rights, the public interest must outweigh the private interest in the particular case based on an overall assessment, in the sense that the measure must be necessary.

That is not true of the instant case. In ratifying the European Convention on Human Rights and accepting the right of individual application, Switzerland adopted not only the substantive guarantees of the Convention but also its implementing mechanisms. Switzerland also undertook, with reference to the case law of the European Court of Human Rights, to take the necessary measures to avoid similar violations of the European Convention on Human Rights in future, if necessary by amending national law. The Federal Court must adopt the same approach when considering Article 121.3 of the Constitution. It must continue to implement the guidelines deriving from the case law of the European Court of Human Rights. In the balancing of interests required by the case law of the European Court of Human Rights, it must take into account of the legislature's opinion, provided this does not lead to a conflict with higher law or with the discretion which the European Court of Human Rights allows Contracting States in implementing their policies on migration or foreign nationals. In this context, the required balancing of interests cannot,

however, be reduced schematically to certain offences provided for in constitutional law, which are defined with varying degrees of precision, without taking account of the quantum of the sentence and other aspects proving the violation of private and family life linked to termination of the residence permit.

Languages:

German.

Identification: SUI-2013-1-003

a) Switzerland / **b)** Federal Court / **c)** First Social Law Chamber / **d)** 17.01.2013 / **e)** 8C_448/2012 / **f)** Civil protection group Z v. X / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 139 II 7 / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
3.17 General Principles – **Weighing of interests**.
5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.3.43 Fundamental Rights – Civil and political rights – **Right to self fulfillment**.

Keywords of the alphabetical index:

Civil servant, service obligations / Dismissal, employee's conduct / Spyware / Evidence, lawfulness / Work, conditions / Worker, surveillance.

Headnotes:

Article 6 of the Federal Labour Act (LTr); Article 26 of Implementing Order 3 of the Labour Act (OLT 3); Article 29.1 of the Federal Constitution (guarantee of a fair trial); Article 6.1 ECHR; installation of spyware to monitor a civil servant's computer operations; use of unlawfully obtained evidence and balancing of interests; dismissal.

The secret use of spyware to verify the suspicion that a civil servant is using the computer facilities assigned to him for purposes unrelated to his official duties is a prohibited measure (Article 26.1 OLT 3) or at least a disproportionate measure (Article 26.2 OLT 3; recitals 5.5 – 5.5.4).

Weighing of the public interest in establishing the truth against the civil servant's private interest in protecting his own personality (recital 6). Since the unlawfully obtained evidence was deemed to be unusable in the proceedings, the dismissal is unfounded (recital 7).

Summary:

I. X was recruited in 1985 by the Civil Protection Group Z. He advanced to the position of chief instructor and deputy commander. Following suspicions that X was misusing the personal computer assigned to him, the governing body of Z had spyware (Spector Pro) installed on X's computer in June 2009. The secret surveillance lasted for over three months and showed that X had devoted 70 % of the time spent on his computer to private activities unrelated to his duties, corresponding to roughly 23 % of his total working time. Following an administrative inquiry, the group ordered the employee's dismissal with immediate effect and withheld his salary. Following an appeal by X, this decision of 22 February 2010 was upheld by the Ticino State Council. X brought the case before the cantonal administrative court, which set aside the decision of the State Council and the dismissal ordered by the group. The judges held that the installation of spyware without the employee's knowledge was unlawful, disproportionate and that the evidence obtained in this way was therefore inadmissible.

The Federal Court dismissed a public law appeal lodged by Z.

II. Article 6 of the Federal Act on Work in Industry, Crafts and Commerce (Labour Act) requires employers to take all necessary measures to protect workers. Article 26 of Implementing Order 3 of this Act prohibits the use of surveillance or other systems to monitor the behaviour of workers at their workstations. While the use of surveillance systems is, in principle, prohibited, this prohibition is not absolute. It is limited to situations when the sole purpose of such measures is to monitor the worker. Furthermore, it must be proportionate to the aim pursued, having regard to all the circumstances, and the worker must have been informed of it in advance.

At federal level, based on the Federal Act of 21 March 1997 on the organisation of government and administration, the Federal Data Protection Officer produced a handbook for public authorities and private industry to monitor internet use and e-mail in the workplace. The purpose is to lay down minimum standards in the area of computer monitoring. It emerges from this that, as a matter of principle, the use of spyware is incompatible with the ban on monitoring of workers' behaviour.

The great majority of legal writers also regard these systems as being incompatible with the rules of Article 26 of Implementing Order 3 of the Labour Act. Spyware programmes installed without the worker's knowledge constitute such a serious interference in his or her activities, including private activities, that they must be regarded as clearly unlawful. It does not mater if the measure pursues aims other than monitoring of the worker's behaviour in the workplace. Indeed, the method employed is so invasive that it must be considered disproportionate, since the same aim could be achieved by other means. It may even be considered that any consent given by the worker would have no legal effect, given the mandatory nature of the rules deriving from Article 26 of the Implementing Order.

It remains to be determined whether evidence obtained in this way is usable, based on the argument that the employer's interest in establishing the truth takes precedence over the employee's interest in protecting his or her person. Article 29.1 of the Constitution and Article 6.1 ECHR guarantee the right to a fair trial. The courts have inferred from this a prohibition of principle on using unlawfully acquired evidence. The exclusion of such evidence is not absolute, however, and the court may have to weigh up the different interests at stake. Great reserve must be exercised with regard to admitting evidence acquired as a result of unlawful interference in the private sphere. In the instant case, the employee's right to protection of his person was seriously violated. The employer could have employed other, less invasive measures to protect his right to prevent abuses on the part of his employee. It would have been possible for him to issue a warning to the employee and give him the opportunity to change his behaviour or block his internet access. But the appellant did none of these things. The lower court was, therefore, right in finding that the unlawfully obtained information could not be used as evidence and that the defendant's dismissal should be set aside.

Languages:

Italian.

"The former Yugoslav Republic of Macedonia"
Constitutional Court

Important decisions

Identification: MKD-2013-1-001

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 24.04.2012 / **e)** U.br. 166/2012 / **f)** / **g)** / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
4.7.15.1 Institutions – Judicial bodies – Legal assistance and representation of parties – **The Bar**.

Keywords of the alphabetical index:

Lawyer / Lawyer, client, confidentiality / Fiscal control.

Headnotes:

Conditions introduced by a law to regulate the fiscalisation of the work of lawyers must be in line with the rule of law and not interfere with the autonomy and independence of the legal profession as a public service performing public mandates in accordance with the law.

Summary:

I. The Macedonian Bar Association, 15 individual lawyers and two citizens asked the Court to review the constitutionality of several articles of the Law on Lawyers' Stamps *("Official Gazette of the Republic of Macedonia"* no. 84/2012). This legislation was adopted in 2012 and introduced for the first time "Lawyers' Stamps" as a means of advance payment of personal income tax by individual lawyers. The aim of the Law is the fiscalisation of the work of lawyers performing their activities as individual lawyers. The obligation of payment of taxes by law firms is not covered by the Law on Lawyers' Stamps; this is covered by other legislation.

The applicants questioned the constitutionality of the entire Law, as well as several of its articles, as being unclear, imprecise and incomplete, and identified potential for discrimination against individual lawyers by comparison to law firms. The obligation for lawyers to submit the contract with the client to any document or submission not bearing a lawyers' stamp impinged on the internal work of the attorneys and relations with their clients, a business secret. The applicants also claimed that the Law violated the basic principle of lawyer/client relations – confidentiality of data about clients requesting legal assistance from attorneys. This was against the Constitution and the constitutional position of the legal profession as an autonomous and independent public service providing legal assistance and carrying out public mandates.

II. The Court took as its starting point the principle of the rule of law, Article 53 and Amendment XXV of the Constitution. It found that the obligation of the attorney to attach a lawyer's stamp to each document or submission before the courts was contrary to the principle of efficiency and cost-effectiveness in proceedings, one of the fundamental principles for a trial within a reasonable time, and certainly contrary to Article 6 ECHR. The obligation of the attorney to attach the lawyer's stamp to each document or submission for which, under the tariff a reward is set forth in the amounts referred to in Article 2.2 of the Law, was not, according to the Court, a true representation of the revenues of the attorney which would form the grounds for advance payment of personal income tax. This does not provide for the constitutional basis of the legislator to determine the sources of income of the individual attorneys, as the basis for their taxation.

Article 7.3 of the Law, which allowed recipients to reject documents or submissions made by a lawyer if a lawyers' stamp was not affixed, if it was submitted in a lesser sum than that specified in the tariff or if a contract with the client for legal representation was not enclosed, was found by the Court to contravene the principle of the rule of law and Amendment XXV of the Constitution.

The Court found the conditions mentioned above to be out of line with the principle of the rule of law, and ultimately with the ability of the legal profession as an autonomous and independent public service to perform public mandates in accordance with the law. The provision in question was contrary to Amendment XXV of the Constitution because the finding of an irregularity in the document or submission resulting in dismissal of the corresponding submission will influence the course of proceedings which, in the sense of Amendment XXV

of the Constitution, is the subject of procedural laws adopted by a two-third majority vote. This was not the case with the challenged Law.

The Court therefore repealed Articles 6.3, 6.4, 7.1 in the part: "to each document or submission", Article 7.2 in the part: "to each document or submission" and Article 7.3 of the Law on Attorney' Stamps.

Languages:

English, Macedonian (translation by the Court).

Turkey
Constitutional Court

Important decisions

Identification: TUR-2013-1-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 15.06.2012 / **e)** E.2012/30, K.2012/96 / **f)** Abstract Review of Presidential Election Law (Law no. 6271) / **g)** *Resmi Gazete* (Official Gazette), 01.01.2013, 28515 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

4.4.5.2 Institutions – Head of State – Term of office – **Duration of office**.
4.4.5.5 Institutions – Head of State – Term of office – **Limit on number of successive terms**.

Keywords of the alphabetical index:

Head of state, term, election.

Headnotes:

When term of office of the President of the Republic is reduced from seven years to five years by constitutional amendment, the term of office of the existing president will be seven years unless there is a transitional provision regulating *vice versa*.

Summary:

I. The parliamentary group of the main opposition party (Republican People's Party) asked the Constitutional Court, *inter alia*, to assess the constitutionality of Provisional Article 1 of the Presidential Election Law (Law no. 6271). The Provisional Article 1 reads as follows:

> "The term of office of the eleventh President is seven years.

> The Presidents who were elected before the entry into the force of "The Law Amending Several Articles of The Constitution of The Turkish Republic" dated 31 May 2007 (Law no. 5678) are subject to the previous Articles of the Constitution including the provision prohibiting to be elected for a second term."

The applicant party claimed that because the term of office of the President was reduced to five years by the Constitutional Amendment of 2007, the term of office of the existing eleventh President was also reduced to five years. Thus, the first sentence of the Provisional Article 1 of the Law no. 6271, which regulates the term of office of the eleventh President as seven years, is unconstitutional.

The party also claimed that because the Constitutional Amendment of 2007 determined the election system, the term of office and possibility of a second term election of presidents, changing these issues by law is not possible. Therefore, the party asserted that the second sentence of the Provisional Article 1 of the Law no. 6271, which prohibits the existing and former presidents from being candidate for a second term, is unconstitutional.

II. Articles 101 and 102 of the Constitution, which regulate the qualifications and election of the President, were revised by the Constitutional Amendment of 2007 (Law no. 5678). According to the revised Article 101 of the Constitution, the President shall be elected by the public, the term of office shall be five years and a person can be elected as president for two terms at most. Before the amendment, the president used to be elected by parliament for a non-renewable seven years. Although the term of office of the President of the Republic was reduced to five years, the Law no. 5678 did not include a transitional provision about the term of office of the existing eleventh president who was elected for a seven years term by the parliament before the constitutional amendment. The first sentence of the Provisional Article 1 of Law no. 6271 aimed to clarify the mist over the term of office of the existing president.

The Constitutional Court stated that the term of office of the existing president is subject to the conditions in effect when he was elected, so his term of office is seven years. The Court concluded that the first sentence of the Provisional Article 1 of Law no. 6271 is not contrary to the Constitution. Therefore, it rejected the claims of the applicant party group. Judges Mrs Fulya Kantarcioğlu, Mr Mehmet Erten, Mr Osman Alifeyyaz Paksüt and Mrs Zehra Ayla Perktaş put forward dissenting opinions.

As for the second sentence of the Provisional Article 1 of Law no. 6271, the Court observed that the provision prohibiting the Presidents' election for a second term in Article 101 of the Constitution was lifted by the Law no. 5678 and made possible for a President to be elected for a second term. It did not include an exception for former presidents either. The Court ruled that since the second sentence of the Provisional Article 1 of the Law no. 6271 prohibits the existing and former presidents from being a candidate for a second term, it is unconstitutional and annulled it. Judges Mrs Fulya Kantarcioğlu, Mr Mehmet Erten, Mr Osman Alifeyyaz Paksüt and Mrs Zehra Ayla Perktaş put forward separate concurring opinions.

Languages:

Turkish.

Identification: TUR-2013-1-002

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 20.09.2012 / **e)** E.2012/65, K.2012/128 / **f)** Abstract Review of Article 25 of the Basic Law on National Education (Law no. 1739) as amended by Law no. 6287 / **g)** *Resmi Gazete* (Official Gazette), 18.04.2013, 28622 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature**.
5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

Keywords of the alphabetical index:

Education, religious / Secularism, principle.

Headnotes:

Provision of courses on "The Quran" and "The Life of The Prophet" on an elective basis at public elementary and high schools is not contrary to the principle of secularism.

Summary:

I. The parliamentary group of the main opposition party (Republican People's Party) asked the Constitutional Court, *inter alia*, to assess the constitutionality of the third sentence of Article 25 of the Basic Law on National Education (Law no. 1739) as amended by Law no. 6287. The third sentence of Article 25 reads as follows:

> "The Quran and the Life of the Prophet are among the elective courses which shall be taught in elementary and high schools"

The applicant party argued that the teaching of the Quran and the Life of the Prophet in public elementary and high schools as elective courses is contrary to the principle of secularism since it establishes a connection between Islam and the state. The party contended that providing some courses related to the Islam but not other religions is not compatible with the impartiality of the state towards all religions and beliefs. They also argued that, although the courses are elective, choosing or not choosing those courses could be considered as manifestation of one's belief and therefore the existence of those courses is contrary to the freedom of religion.

II. The Constitutional Court observed that the aim of the contested provision was to provide an opportunity for students who want to learn their religion. The courses are not compulsory for any student and nobody will be forced to choose them. The Court also emphasised that the principle of secularism requires state impartiality towards all religions and beliefs. In a pluralist democratic society, a secular state should be the guarantor of a plurality of beliefs and believers. The Court also noted that the establishment of private schools for religious education was prohibited in Turkey and religious education is possible only under state observation. Under those conditions, the Court held that provision of such courses at public schools is a positive obligation of the state and does not conflict with the constitution. As a result, the Court rejected the claims of the applicant party. Judges Mrs Fulya Kantarcioğlu, and Mr Mehmet Erten put forward dissenting opinions.

Languages:

Turkish.

Identification: TUR-2013-1-003

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 01.11.2012 / **e)** E.2010/83, K.2012/169 / **f)** Abstract Review of the Provisional Article 2 of the Law no. 6111 / **g)** *Resmi Gazete* (Official Gazette), 22.02.2013, 28567 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

Property, seizure, adequate compensation / Property, unlawfully expropriated, return.

Headnotes:

A law allowing prospective application of a provision that provides less protection for unlawfully seized property than formal expropriation incites public authorities to unlawful seizure rather than formal expropriation.

Summary:

I. The parliamentary group of the main opposition party (Republican People's Party) and several courts asked the Constitutional Court, *inter alia*, to assess the constitutionality of Provisional Article 2 of the Law no. 6111. The Provisional Article 2 reads as follows:

"For fifteen years from the entry into the force of this law, Provisional Article 6 of the Law on Expropriation dated 04.11.1983 (Law no. 2942) shall be applicable for the unlawful seizures of property which took place after the date of 4 November 1983. However, 5 % of funds allocated to cap expenditures from the annual budget of public authorities shall be allocated in order to use in payment of compensations ruled by the courts according to Provisional Article 6.7 of the Law no. 2942 for unlawful seizure of property took place after that date."

The applicants argued, by indicating that Provisional Article 6 of the Law no. 2942 provides less protection than formal expropriation and conflicts with the constitution, that prospective application of such a provision shall leave all constitutional and legal guarantees for expropriation meaningless. The reason is that public authorities will prefer unlawful seizure of property, which is more advantageous for them, to formal expropriation.

The Provisional Article 6 of the Law no. 2942 regulates the compensation claims for unlawfully seized property between the dates of 9 October 1956 and 4 November 1983. It provides rules for value assessment of immovable property unlawfully seized by public authorities, allocation of funds for such payments, installment of payments and applicable interest rates. When compared to formal expropriation, most of those rules are more advantageous for public authorities.

II. The Constitutional Court observed that the Provisional Article 6 of the Law no. 2942 aimed to rectify past injustices. In case the amount of compensation claims will be very high to pay from the annual budget of public authorities, it has taken some measures to guarantee the provision of public services. However, the Court ruled that prospective application of such an exceptional and provisional rule will make constitutional and legal guarantees for expropriation of property useless and will encourage public authorities to unlawfully seize property. Therefore the Court found provisional Article 2 of the Law no. 6111 in conflict with the Articles 2, 35 and 46 of the Constitution, and annulled it.

Languages:

Turkish.

Ukraine
Constitutional Court

Important decisions

Identification: UKR-2013-1-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 05.02.2013 / **e)** 1-rp/2013 / **f)** official interpretation of the provisions of Articles 58.4, 64.1 of the Law on Commercial Partnerships / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 14/2013 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

5.1.1.5.1 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Private law**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Limited liability company, participants, number of votes / Statutory fund, share / Statutory fund, term of payment.

Headnotes:

The provisions of Article 58.4 of the Law on Commercial Partnerships no. 1576-XII dated 19 September 1991 with subsequent amendments according to which “participants have the number of votes proportionate to the amount of their shares in the statutory fund” in systemic conjunction with the provisions of Articles 13.3, 41.2, 41.4, 41.7 and 68.1 of the Constitution, Articles 3.1, 13.3, 13.6, 14.3, 16.3, 115.1, 117.1, 140.1, 144.1, 144.2, 147.3, 334.1 and 715.4 of the Civil Code and Articles 11, 12.1, 50.1 and 53.4 of the above Law are to be understood as reading that, during the first year after state registration of a limited liability company, in determining the authority of the general assembly of participants in the company and the results of voting for adoption of their decisions, note should be taken of the number of votes of participants defined in proportion to their shares in the statutory fund which is established by the charter of the limited liability company, irrespective of the value of the contributions they have actually made.

Summary:

The concept of a limited liability company or LLC is determined in Article 140 of the Civil Code (hereinafter, the "CiC"), Article 80.3 of the Commercial Code (hereinafter, the "CoC") and, Article 50 of the Law on Commercial Partnerships no. 1576-XII, 19 September 1991 with subsequent amendments (hereinafter, the "Law"). It is defined as a commercial partnership founded by one or more persons with a statutory fund divided into shares the amount of which is determined by the statutory documents. The above legislative provisions indicate that the setting up of an LLC falls within the remit of civil law. Parties to such legal relationships acquire civil rights and bear civil responsibilities.

The charter is the statutory document of the LLC (Article 143.1 of the CiC, Article 82.1 of the CoC, and Article 4.1 of the Law). It is a local legal act; compliance and implementation is mandatory for all parties. It should contain information about the scope of the statutory fund with the participatory shares being determined, as well as the scope, composition and order of contribution by each participant (Articles 140.1, 143.1 of the CiC, Article 82.4 of the CoC, Articles 50.1, 51.1 of the Law).

Contribution to the statutory fund of the commercial partnership can take the form of money, securities, property rights, alienated rights with monetary value and other items, unless otherwise established by law (Article 115.2 of the CiC, Article 86.1 of the CoC, and Article 13.1 of the Law). Under Article 177 of the CiC, the types of contribution mentioned above are the objects of civil rights and the share of a participant in the statutory fund of an LLC is the subject of the civil relationships proving the participation of an individual in the LLC. Consequently, the statutory fund is one of the legal attributes of a commercial partnership.

The statutory fund of the LLC consists of contributions made by its participants; its size is the sum of the values of such contributions (Article 144.1 of the CiC, Article 87.1 of the CoC). The statutory fund is divided into shares of each participant in proportion to the value of their shares, i.e. a participant's share in the statutory fund must meet the value of his or her property contribution in this fund, and the LLC is then administered accordingly.

The legislator introduced a deadline for the making of contributions to the statutory fund by participants in the LLC of one year after the date of the state registration of the LLC (Article 144.3.1 of the CiC, Article 52.1 of the Law). This period allows all participants a gradual implementation of their corporate duty to the LLC in terms of the formation of the statutory fund; they can make their contributions in the size, order and by the means provided in the statutory documents (Article 117.1.1, 117.1.2 of the CiC, Article 88.3.3 of the CoC, Article 11.b of the Law). The formation of the statutory fund of the LLC is the legal duty of the participants.

Until the end of the first year from the date of the state registration of the LLC, the size of each participant's shares is determined solely by the charter of the LLC. Changes to the value of assets assigned as a contribution and additional contributions by participants do not influence the amount of their share in the statutory fund determined by the statutory documents of the LLC unless the statutory documents (Article 51.2 of the Law).

During the first year following the date of state registration of the LLC, the votes of its participants will be in proportion to their shares in the statutory fund, irrespective of whether they have paid their contributions in full or in part. Determination of the number of votes for the authority of the general assembly of the LLC participants and the results of voting for adoption of their decisions in cases where, during that first year, a participant has not complied with his or her obligation in terms of formation of the statutory fund and the general assembly of the participants have not adopted the decisions envisaged by Article 144.3 of the CiC and Article 52.2 of the Law in accordance with Article 92.1.7 and 92.1.8 of the Constitution is subject to legislative regulation.

If, within the one year deadline, participants have failed to make any contribution to the statutory fund or their contribution is incomplete, Article 144.3 of the CiC, Article 52.2 of the Law requires the general assembly of the participants of the LLC to decide between the following options. The participants in question can be excluded from membership (a decision will then be needed as to the procedure for redistributing the shares to the statutory fund). Alternatively, the statutory fund could be reduced and a procedure decided upon for redistributing the shares to the statutory fund. As another alternative, the LLC could be liquidated.

Judge D. Lylak attached a dissenting opinion.

Languages:

Ukrainian.

United States of America
Supreme Court

Important decisions

Identification: USA-2013-1-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 26.02.2013 / **e)** 11-1025 / **f)** Clapper v. Amnesty International USA *et al* / **g)** 132 *Supreme Court Reporter* 2455 (2012) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.4.9.1 Constitutional Justice – Procedure – Parties – ***Locus standi***.
3.4 General Principles – **Separation of powers**.

Keywords of the alphabetical index:

Injury, future / Standing, to sue / Surveillance, electronic, *locus standi* / *Locus standi,* establishment, burden / *Locus standi,* establishment, criteria.

Headnotes:

The jurisdiction of federal courts is limited to concrete cases; an element of this requirement, based on separation of powers principles, is that plaintiffs must establish that they have standing to sue.

A court's standing inquiry is especially rigorous when the process of considering the merits of the dispute would force the court to decide whether an action taken by the political branches of the federal government was unconstitutional.

A lack of standing often is found in cases in which courts are asked to review actions of the political branches in the fields of intelligence gathering and foreign affairs.

A party invoking federal jurisdiction bears the burden of establishing standing and, after the pleadings stage, may no longer rely merely on allegations but must set forth specific facts by affidavit or other evidence.

To establish standing, a party must claim an injury that is: concrete, particularised, and actual or imminent; fairly traceable to the challenged action; and remediable by a favourable ruling. If a party seeks to show a threatened injury to establish standing, it must be certainly impending to constitute an injury in fact: allegations of possible future injury are not sufficient.

Summary:

I. In 2008, the U.S. Congress amended the Foreign Intelligence Surveillance Act (hereinafter, "FISA") to allow the executive branch to acquire foreign intelligence information by conducting electronic surveillance of communications of individuals who are not United States persons and who are located outside the United States. Before conducting such surveillance, the executive branch must obtain the approval of a specialised court, the Foreign Intelligence Surveillance Court, which may authorise the activity for a period of up to one year. The 2008 amendments deleted previous FISA provisions requiring the executive branch to demonstrate probable cause that the target of the electronic surveillance is a foreign power or agent of a foreign power, and to specify the nature and location of each of particular facilities or places at which the electronic surveillance will occur.

A group of individual attorneys and human rights, labour, legal, and media organisations filed suit in federal court, claiming that the 2008 amendments are unconstitutional. According to the plaintiffs, their work requires them to engage in sensitive and sometimes privileged telephone and e-mail communications with colleagues, clients, sources, and other individuals located abroad. They also stated that some of the people with whom they exchange foreign intelligence information are likely targets of surveillance under the amended FISA. Specifically, they claimed that they communicate by telephone and e-mail with people who the U.S. government believes are associated with terrorist organisations, people located in geographic areas that are a special focus of the government's counterterrorism or diplomatic efforts, and activists who oppose governments that are supported by the U.S. government.

The U.S. District Court ruled that the plaintiffs lacked standing to sue *(locus standi)*. Article III.2 of the Constitution states that the jurisdiction of federal courts is limited to certain "cases" and "controversies", and under long-standing case law an element of this requirement is that plaintiffs must establish standing.

The U.S. Court of Appeals for the Second Circuit reversed the District Court's decision. The Court of Appeals agreed with the plaintiffs' claim of standing based on the objectively reasonable likelihood that their communications would be intercepted at some time in the future. It also held that the plaintiffs had established that they were suffering actual present injuries, in the form of economic and professional harms resulting from a reasonable fear of future harmful government conduct.

II. The U.S. Supreme Court accepted the case for review and reversed the decision of the Court of Appeals. Citing its extensive case law, the Supreme Court reiterated that the Article III standing requirement is a jurisdictional limitation based on separation of powers principles. It serves to prevent the use of the judicial process to usurp the powers of the political branches. In keeping with the purpose of this doctrine, the Court stated, standing inquiries are especially rigorous when the process of considering the merits of the dispute would force a court to decide whether an action taken by the political branches of the federal government was unconstitutional. The Court added a lack of standing often is found in cases in which the judiciary has been asked to review actions of the political branches in the fields of intelligence gathering and foreign affairs.

As to the requirements for establishing Article III standing, the Court stated that a plaintiff's claimed injury must be "concrete, particularised, and actual or imminent; fairly traceable to the challenged action; and remediable by a favourable ruling. While imminence is a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – in other words, that the injury is certainly impending." Thus, the Court emphasised that it has reiterated that a threatened injury must be "certainly impending" to constitute injury in fact, and that allegations of possible future injury are not in themselves sufficient.

Turning to the specifics of the instant case, the Court noted as an initial matter that the "objectively reasonable likelihood" standard of the Court of Appeals was inconsistent with the requirement that a threatened injury must be "certainly impending" to constitute injury in fact. Moreover, a party invoking federal jurisdiction bears the burden of establishing standing and after the pleadings stage no longer may rely on mere allegations, but instead must set forth specific facts by affidavit or other evidence. The Court concluded in a detailed review of the plaintiffs' claims of future injuries that they were too speculative, lacking a sufficient evidentiary basis to establish that injury was certainly impending, or were fairly traceable to the legislation in question.

The Court also rejected the plaintiffs' alternative argument – that they could establish standing on the basis of the measures they already had taken or currently were taking to avoid surveillance authorised under the 2008 amendments. The Court of Appeals concluded that the plaintiffs had established that they were suffering present injuries in fact, in the form of economic and professional harms, resulting from a reasonable fear of future harmful government conduct. The Supreme Court concluded that this assessment improperly used an overly relaxed reasonableness standard that overlooked the fact that the plaintiffs' fears were about hypothetical future harms that were not certainly impending. Parties cannot manufacture standing, the Court said, by incurring costs in anticipation of non-imminent harm.

The Court's decision was adopted by a 5-4 vote among the Justices. Justice Breyer authored a dissenting opinion, in which the three other dissenting Justices joined.

Languages:

English.

Identification: USA-2013-1-002

a) United States of America / **b)** Supreme Court / **c)** / **d)** 26.03.2013 / **e)** 11-564 / **f)** Florida v. Jardines / **g)** 132 *Supreme Court Reporter* 2492 (2012) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Search, curtilage / Property, intrusion / Property, license to enter / Search, property / Drugs, sniffing dog, search / Search, warrantless.

Headnotes:

When the government obtains information by physically intruding on a person's home, a "search" has occurred that falls within the scope of the constitutional protection against unreasonable searches and seizures.

The area immediately surrounding and associated with the home, including the front porch, is part of the home itself for purposes of the constitutional protection against unreasonable searches and seizures.

A person typically grants an implicit license to permit a visitor, including a police officer not armed with a warrant hoping to speak to the occupants, to approach the home by the front path, knock promptly, wait briefly to be received, and then leave unless expressly invited to linger longer; however, the scope of such a license is limited not only to a particular area but also to a specific purpose.

The scope of an implicit license to enter a person's home area does not customarily include entry simply to conduct a search, using a trained police dog, in the hope of discovering incriminating evidence.

Summary:

I. The Miami-Dade Police Department in the State of Florida received unverified information that marijuana was being grown in the home of Joelis Jardines. A month later, the Department and the federal Drug Enforcement Administration sent a joint surveillance team to the home. Two Department detectives, William Pedraja and Douglas Bartelt, approached the house. Detective Bartelt was a trained canine handler, and his drug-sniffing dog accompanied him. The dog was trained to detect the scent of marijuana and several other drugs, indicating the presence of any of these substances through particular behavioural changes recognisable by his handler. Detective Bartelt had the dog on a six-foot leash, owing in part to the dog's "wild" nature and tendency to dart around erratically while searching.

As the dog approached Jardines' front porch, he apparently sensed one of the odors he had been trained to detect, and began energetically exploring the area for the strongest point source of that odour. After sniffing the base of the front door, the dog sat, which is the trained behavior upon discovering the odour's strongest point. Detective Bartelt then pulled the dog away from the door and returned to his vehicle. He left the scene after informing Detective Pedraja that there had been a positive alert for narcotics.

On the basis of what he had learned at the home, Detective Pedraja applied for and received a judicial warrant to search the residence. When the warrant was executed later that day, Jardines attempted to flee and was arrested; the search revealed marijuana plants, and he was charged with trafficking in cannabis.

At trial, Jardines moved to suppress evidence of the marijuana plants on the ground that the canine investigation was an unreasonable search and therefore a violation of the Fourth Amendment to the U.S. Constitution. The Fourth Amendment states in relevant part: "The right of the people to be secure in their…houses…against unreasonable searches and seizures, shall not be violated…." The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution makes the Fourth Amendment applicable to the States.

The trial court granted the motion to suppress, and the Florida Court of Appeal reversed. The Florida Supreme Court quashed the decision of the Court of Appeal and approved the trial court's decision to exclude the marijuana as evidence from the record.

II. The U.S. Supreme Court agreed to review the decision of the Florida Supreme Court. Its review was limited to the question of whether the officers' conduct was a search within the meaning of the Fourth Amendment.

According to the Court, at the "very core" of the Fourth Amendment stands the right of persons to retreat into their own homes and there be free from unreasonable governmental intrusion. Thus, a "search" within the meaning of the Fourth Amendment occurs when the government obtains information by physically intruding on a person's home. The curtilage – the area immediately surrounding and associated with the home, including the front porch – is part of the home itself for purposes of the Fourth Amendment.

As to whether a search occurred in the instant case, the Court grounded its analysis in long-standing tenets of property law. Citing the rule that a person may not enter another's home without permission, the Court concluded that Jardines had not explicitly or implicitly granted a license to Detectives Pedraja and Bartelt to enter into the curtilage and engage in information-gathering conduct. An implicit license does typically permit a visitor, including a police officer not armed with a warrant hoping to speak to the occupants, to approach the home by the front path, knock promptly, wait briefly to be received, and then leave unless expressly invited to linger longer. However, the scope of such a license is limited not

only to a particular area but also to a specific purpose, and there is no customary invitation to enter the curtilage simply to conduct a search, using a trained police dog, in the hope of discovering incriminating evidence.

Given the direct relevance of property law to the facts, the Court concluded that it did not need to decide whether the officers' investigation of Jardines' home violated his expectation of privacy. In its 1967 decision in *Katz v. United States*, the Court extended Fourth Amendment protection to all areas where a person has a "reasonable expectation of privacy"; however, in the instant case the Court noted that this test is an addition to, and not a substitution for, the traditional property-based understanding of the Fourth Amendment. Therefore, it is not necessary to consider it when the government has gained evidence by physically intruding on the home. The fact that the officers learned what they learned simply such an intrusion was enough to establish that a search occurred.

III. The Court's decision was adopted by a 5-4 vote among the Justices. Justice Kagan authored a concurring opinion, joined by two other Justices, in which she contended that the case also could have been decided on the basis of examination of Jardines' privacy interests. Justice Alito wrote a dissenting opinion, in which in which Chief Justice Roberts and two other Justices joined.

Cross-references:

- *Katz v. United States*, 389 *United States Reports* 347, 88 *Supreme Court Reporter* 507, 19 *Lawyers' Edition* 2d 576 (1967).

Languages:

English.

Identification: USA-2013-1-003

a) United States of America / **b)** Supreme Court / **c)** / **d)** 17.04.2013 / **e)** 11-1425 / **f)** Missouri v. McNeely / **g)** 132 *Supreme Court Reporter* 2537 (2012) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

"Search", alcohol level / "Search", blood sample, compelled / Search, reasonableness / Search, warrantless, exigent circumstances / Warrant, search.

Headnotes:

The taking of an involuntary blood sample is a "search" within the scope of the constitutional protection against unreasonable searches and seizures because it involves a compelled physical intrusion beneath the subject's skin and into her or his veins to obtain a blood sample for use as evidence in a criminal investigation; such an invasion of bodily integrity implicates an individual's most personal and deep-rooted expectations of privacy.

Under the constitutional right to be secure against unreasonable searches and seizures, a warrantless search of the person will be reasonable and therefore constitutionally permissible only if it falls within a recognised exception.

One recognised exception to the constitutional rule against warrantless searches of the person is the existence of exigent circumstances that make the needs of law enforcement so compelling that a warrantless search is objectively reasonable.

To determine whether a law enforcement officer faced exigent circumstances that justified a warrantless search involving the involuntary drawing of blood for use as evidence, a reviewing court must look to the totality of circumstances, a case-by-case approach that better advances constitutional interests than a categorical rule.

Summary:

I. Mr Tyler McNeely was driving on a highway in the State of Missouri when a state police officer stopped him for speeding and repeatedly crossing the centerline. After McNeely declined to use a portable breath-test device to measure his blood alcohol concentration (hereinafter, "BAC"), the officer placed him under arrest.

The officer took McNeely to a nearby hospital for blood testing. At the hospital, McNeely refused to consent to a blood test. The officer then directed a hospital lab technician to take a blood sample, which was secured approximately 27 minutes after the officer stopped McNeely on the highway. The officer did not attempt to obtain a search warrant from a judicial officer before ordering the taking of the blood sample. The follow-up laboratory testing measured McNeely's BAC at a level well above the legal limit.

McNeely was charged with driving while intoxicated. He moved to exclude the results of the blood test from the trial record, on the grounds that the warrantless, involuntary drawing of his blood violated his right under the Fourth Amendment to the U.S. Constitution to be protected against unreasonable searches and seizures. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution makes the Fourth Amendment applicable to the States. Under the Fourth Amendment, police must obtain a search warrant from a judicial official before conducting a bodily search of an individual unless a warrantless search would fall under a recognised exception making it reasonable. One of the recognised exceptions is the existence of an emergency ("exigent circumstances"), such as the imminent loss of evidence.

The trial court granted McNally's motion to suppress the blood test evidence. The relevant question was whether exigent circumstances were present during the time of his arrest and involuntary testing that would justify an exception to the Fourth Amendment's search warrant requirement. The trial court concluded that the exigency exception to the warrant requirement did not apply because, although McNeely's blood alcohol was being metabolised by his liver, there had not been circumstances suggesting the officer faced an emergency in which he could not practicably have obtained a warrant.

The Missouri Supreme Court affirmed the trial court's decision. It centered its analysis on a 1966 U.S. Supreme Court decision, *Schmerber v. California*, which directed lower courts to engage in a totality of the circumstances analysis when determining whether exigency permits a non-consensual, warrantless blood draw. The Missouri Supreme Court concluded that the mere dissipation of blood-alcohol evidence does not support a warrantless blood draw; instead, additional "special facts" must exist, such as a delay resulting from a traffic accident requiring an officer to investigate and transport an injured suspect to the hospital.

II. The U.S. Supreme Court affirmed the Missouri court's decision. The Supreme Court first determined that the involuntary drawing of blood was a "search" within the scope of the Fourth Amendment. The taking of the blood sample involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity, the Court determined, implicates an individual's most personal and deep-rooted expectations of privacy.

The Court then re-affirmed the use of its fact-intensive "totality of the circumstances" test for determining when a law enforcement officer faced an emergency that justified acting without a warrant. In so doing, it declined to accept the State of Missouri's argument that whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances making a warrantless search categorically reasonable will necessarily exist, because BAC evidence is inherently subject to dissipation. While acknowledging the fact that an individual's alcohol level gradually declines soon after that person stops drinking, the Court nevertheless concluded that it should not depart from careful case-by-case assessment of exigency and adopt a categorical rule.

The Court also considered and declined to adopt another categorical rule that Chief Justice Roberts proposed in his opinion concurring in part and dissenting in part. Under the Chief Justice's proposed rule, a warrantless blood draw would be permissible if the officer could not secure a warrant (or reasonably believed he or she could not secure a warrant) in the time it takes to transport the suspect to a hospital or similar facility and obtain medical assistance.

Among its reasons for retaining the totality of circumstances analysis, the Court cited the fact that in many circumstances expeditious processing of warrant applications is available to the authorities, for example via telephone or other reliable electronic means. At the same time, while citing these developments, the Court also noted that there will be other cases in which circumstances nevertheless justify a finding of exigency.

The Court also considered and rejected other arguments favouring a categorical rule, including concerns that a case-by-case approach will not provide adequate guidance for law enforcement officers, a position holding that the privacy interest implicated by blood draws of persons suspected of driving while intoxicated is relatively minimal, and the assertion of a compelling governmental interest in combating the operation of motor vehicles by intoxicated drivers.

III. In addition to the Court's opinion, Justice Kennedy authored an opinion concurring in part, and Chief Justice Roberts wrote an opinion, joined by two other Justices, concurring in part and dissenting in part. Justice Thomas authored a dissenting opinion.

Cross-references:

- *Schmerber v. California*, 384 *United States Reports* 757, 86 *Supreme Court Reporter* 1826, 16 *Lawyers' Edition* 2d 908 (1966).

Languages:

English.

Court of Justice of the European Union

Important decisions

Identification: ECJ-2013-1-001

a) European Union / **b)** General Court / **c)** Seventh Chamber / **d)** 30.09.2010 / **e)** T-85/09 / **f)** Kadi v. Commission / **g)** *European Court Reports* II-5177 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.1 Sources – Categories – Written rules – International instruments – **United Nations Charter of 1945**.
2.2.1.2 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and legislative acts**.
4.16 Institutions – **International relations**.
5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.
5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

European Union, law, act implementing resolutions of the United Nations Security Council / Terrorism, financing / Terrorism, restrictive measures, freezing of funds / United Nations, Security Council, resolution, implementation by the European Union.

Headnotes:

1. In an action for annulment brought against Regulation no. 1190/2008 amending for the 101st time Council Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban, it is for the General Court to ensure in principle the full review of the lawfulness of that regulation in the light of fundamental rights, without affording the regulation any immunity from jurisdiction on the ground that it

gives effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

That must remain the case, at the very least, so long as the re-examination procedure operated by the Sanctions Committee of the United Nations clearly fails to offer guarantees of effective judicial protection. In that regard, since the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee, the review carried out by the Community judicature of Community measures to freeze funds can be regarded as effective only if it concerns, indirectly, the substantive assessments of the Sanctions Committee itself and the evidence underlying them.

The principle of a full and rigorous judicial review of freezing measures is all the more justified given that such measures have a marked and long-lasting effect on the fundamental rights of the persons concerned (see paragraphs 126-129, 151).

2. Since Regulation no. 1190/2008 amending for the 101st time Council Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden imposes restrictive measures on a person as a result of his inclusion on the list in Annex I to Regulation no. 881/2002, without any real guarantee being given to that person as to the disclosure of the evidence used against him or as to his actually being properly heard in that regard, it must be concluded that Regulation no. 1190/2008 was adopted according to a procedure in which the rights of the defence were not observed.

Furthermore, given the lack of any proper access to the information and evidence used against him and having regard to the relationship between the rights of the defence and the right to effective judicial review, that person has also been unable to defend his rights with regard to that evidence in satisfactory conditions before the Community judicature, with the result that it must be held that his right to effective judicial review has also been infringed (see paragraphs 181, 184).

3. The imposition on a person of the restrictive measures (such as the freezing of funds) entailed by Regulation no. 1190/2008 amending for the 101st time Council Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, as a result of his inclusion on the list in Annex I to Regulation no. 881/2002, constitutes an unjustified restriction of his right to property, since Regulation no. 1190/2008 was adopted without furnishing any real safeguard enabling the person to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and duration of the freezing measures to which he is subject (see paragraphs 192-193).

Summary:

I. Mr Yassin Abdullah Kadi had been designated by the Sanctions Committee of the United Nations Security Council as being associated with Osama bin Laden, Al-Qaeda or the Taliban. In accordance with the United Nations resolutions, the Council of the European Union had adopted Regulation no. 881/2002 (OJ L 139, p. 9) ordering the freezing of the funds of persons appearing on the list annexed to that regulation. This list reproduces the one drawn up by the United Nations Security Council.

The action for annulment brought by Mr Kadi against that regulation was rejected by the Court of First Instance on 21 September 2005 (*Reports* 2005 p. II-03649). The General Court held that, in principle, the Community judicature had no jurisdiction to review the validity of the contested regulation, since, under the terms of the Charter of the United Nations member States were required to comply with resolutions of the Security Council.

In September 2008, the Court of Justice ruled on an appeal by Mr Kadi against the General Court's judgment *(Reports* p. I-06351). It held that the Community judicature had jurisdiction to review measures adopted by the Community which implemented resolutions of the United Nations Security Council and, accordingly, set aside the General Court's judgment. Ruling on the merits of the case, the Court of Justice considered that the regulation at issue made no provision for any procedure that would enable the persons concerned to know the grounds for their inclusion on the list and to put forward their views. It also observed that the Council had not informed the appellants of the evidence adduced against them. Consequently, the Court of Justice annulled the regulation ordering the freezing of funds on the ground that it was adopted in breach of the fundamental rights of the person concerned, while preserving its effects for three months to enable the Council to rectify the violations found.

II. In October 2008, the Commission sent a letter to Mr Kadi, informing him of its intention to adopt a legislative measure for him to continue to be included on the list. It enclosed a summary of the reasons given by the UN Sanctions Committee with the letter and invited Mr Kadi to submit comments. Despite Mr Kadi's comments, on 28 November 2008, the Commission adopted Regulation no. 1190/2008 (OJ L 322, p. 25). Mr Kadi therefore appealed against the new regulation to the General Court.

The first question dealt with by the General Court was what standard of judicial review was appropriate in this case. In this connection, the Court considered that it had a duty to carry out a full and thorough judicial review of the legality of the regulation. This review should relate indirectly to the substantive findings of the Sanctions Committee itself and to the evidence on which these were based.

Subsequently, in the course of this full review, the General Court noted, with reference to judgment *A. e.a. v. the United Kingdom* of the European Court of Human Rights (19 February 2009), that Mr Kadi's right to present his case had only been respected in a purely formal and superficial manner. Therefore, the Commission had not paid due regard to Mr Kadi's opinion, with the result that he had been unable to present his point of view properly. Furthermore, the Court noted that, despite his explicit requests, Mr Kadi had been denied any access to the evidence adduced against him. As a result, the appellant had been deprived of the opportunity to defend himself effectively. It followed that the regulation had been adopted with no regard for Mr Kadi's rights of defence or his right to an effective remedy.

Lastly, the Court found that, in view of the overall scope and continuity of the measures freezing funds, the regulation had also been an unjustified restriction of the appellant's property rights.

Consequently, the General Court annulled the regulation in so far as it applied to Mr Kadi.

Supplementary information:

The General Court's judgment is particularly significant for several reasons. Firstly, the General Court applied the principles set out in the Court of Justice's Kadi judgment by carrying out a full review of the regulation. Secondly, it took a sceptical view of the recent changes in the Sanctions Committee's delisting procedure, particularly the creation of the office of an ombudsperson, whose role was to assist the Sanctions Committee but whose powers were still limited.

This judgment is the subject of an appeal before the ECJ (pending joined cases C-584/10 P, C-593/10 P and C-595/10 P).

Cross-references:

- ECJ, Grand Chamber, 03.09.2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. European Council and Commission of the European Communities*, C-402/05 P and C-415/05 P, *European Court Reports* 2008, I-06351, *Bulletin* 2010/1 [ECJ-2010-1-007];
- CFI, Second Chamber enlarged, 21.09.2005, *Yassin Abdullah Kadi v. European Council and Commission of the European Communities*, T-315/01, *European Court Reports* 2005, II-03649.

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-2013-1-002

a) European Union / **b)** Court of Justice of the European Communities / **c)** Third Chamber / **d)** 05.10.2010 / **e)** C-400/10 PPU / **f)** MCB / **g)** *European Court Reports* I-8965 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.18 Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000**.
4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states**.
5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

Keywords of the alphabetical index:

Child, rights of custody / Child, wrongful removal / Charter of Fundamental Rights of the European Union, compatible interpretation.

Headnotes:

1. It follows from Article 52.3 of the Charter of Fundamental Rights of the European Union (hereinafter, "CFREU") that, in so far as the Charter contains rights which correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and scope are to be the same as those laid down by the latter. However, that provision does not preclude the grant of wider protection by European Union law. The wording of Article 7CFREU, according to which everyone has the right to respect for his or her private and family life, home and communications is identical to that of Article 8.1 ECHR, except that it uses the expression 'correspondence' instead of 'communications'. That being so, Article 7 CFREU contains rights corresponding to those guaranteed by Article 8.1 ECHR. Article 7 CFREU must therefore be given the same meaning and the same scope as Article 8.1 ECHR, as interpreted by the case-law of the European Court of Human Rights (see paragraph 53).

2. Regulation no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation no. 1347/2000, must be interpreted as not precluding a Member State from providing by its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court with jurisdiction awarding such rights of custody to him, on the basis of which the removal of the child by its mother or the retention of that child may be considered wrongful, within the meaning of Article 2.11 of that regulation.

Regulation no. 2201/2003 does not determine which person must have such rights of custody as may render a child's removal wrongful within the meaning of Article 2.11, but refers to the law of the Member State where the child was habitually resident immediately before its removal or retention the question of who has such rights of custody. Accordingly, it is the law of that Member State which determines the conditions under which the natural father acquires rights of custody in respect of his child, within the meaning of Article 2.9 of that regulation, and which may provide that his acquisition of such rights is dependent on his obtaining a judgment from the national court with jurisdiction awarding such rights to him. Consequently, Regulation no. 2201/2003 must be interpreted as meaning that whether a child's removal is wrongful for the purposes of applying that regulation is entirely dependent on the existence of rights of custody, conferred by the relevant national law, in breach of which that removal has taken place.

Articles 7 and 24 CFREU do not preclude such an interpretation.

While, for the purposes of applying Regulation no. 2201/2003 in order to determine whether the removal of a child, taken to another Member State by its mother, is lawful, that child's natural father must have the right to apply to the national court with jurisdiction, before the removal, in order to request that rights of custody in respect of his child be awarded to him, which, in such a context, constitutes the very essence of the right of a natural father to a private and family life, on the other hand, the fact that, unlike the mother, the natural father is not a person who automatically possesses rights of custody in respect of his child within the meaning of Article 2 of that regulation does not affect the essence of his right to private and family life, as stated in Article 7 CFREU, provided that his right to apply to the court with jurisdiction for rights of custody is safeguarded.

That finding is not invalidated by the fact that, if steps are not taken by such a father in good time to obtain rights of custody, he finds himself unable, if the child is removed to another Member State by its mother, to obtain the return of that child to the Member State where the child previously had its habitual residence. Such a removal represents the legitimate exercise, by the mother with custody of the child, of her own right of freedom of movement, established in Article 20.2.a and 21.1 TFEU, and of her right to determine the child's place of residence, and that does not deprive the natural father of the possibility of exercising his right to submit an application to obtain rights of custody thereafter in respect of that child or rights of access to that child. Accordingly, to admit the possibility that a natural father has rights of custody in respect of his child, under Article 2.11 of Regulation no. 2201/2003, notwithstanding that no such rights are accorded to him under national law, would be incompatible with the requirements of legal certainty and with the need to protect the rights and freedoms of others, within the meaning of Article 52.1 CFREU, in this case those of the mother. Such an outcome might, moreover, infringe Article 51.2 CFREU.

Further, having regard to the great variety of extra-marital relationships and consequent parent-child relationships, which is reflected in the variation among Member States of the extent of parental responsibilities and their attribution, Article 24 CFREU, with which Article 7 CFREU must be read, does not preclude a situation where, for the purposes of applying Regulation no. 2201/2003, rights of custody are granted, as a general rule, exclusively to the mother and a natural father possesses rights of custody only as the result of a court judgment. Such a requirement enables the national court with jurisdiction

to take a decision on custody of the child, and on rights of access to that child, while taking into account all the relevant facts, and in particular the circumstances surrounding the birth of the child, the nature of the parents' relationship, the relationship of the child with each parent, and the capacity of each parent to take the responsibility of caring for the child. The taking into account of those facts is apt to protect the child's best interests, in accordance with Article 24.2 CFREU (see paragraphs 43-44, 55, 57-59, 62-64, operative part).

Summary:

I. In this judgment, the Court of Justice ruled on the interpretation of Regulation no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (1347/2000, OJ L 338, pp. 1-29) in the light of Article 7 CFREU concerning the right to respect for private and family life.

In the case in question, Mr McB., who is of Irish nationality, and Ms E., who is of British nationality, had been living together as an unmarried couple with their three children in Ireland. Following deterioration in the couple's relationship, the mother left the family home with the children and moved into a women's refuge before taking a flight to England. In the meantime, the father had taken steps to obtain custody rights, but as the action had not been validly brought, it was dismissed. Consequently, Mr McB. brought a fresh action before the High Court asking it to find that the removal of the children was illegal. This claim was also dismissed on the ground that the father had had no rights of custody in respect of the children at the time of their removal.

Following an appeal by Mr McB., the Supreme Court of Ireland asked the Court of Justice to make a preliminary ruling as to whether the law of a member state which made the granting of custody to the unmarried father of a child subject to a court order was compatible with Regulation no. 2201/2003, as interpreted in accordance with Article 7 CFREU.

II. In its preliminary ruling under urgent procedure, the Court of Justice pointed out firstly that, while "rights of custody" was defined by the regulation in question, the identity of the person who enjoyed those rights was determined by the relevant national law. Accordingly, for the removal of a child to be considered wrongful, it was necessary for the removal to be carried out in breach of that law.

Secondly, the Court held that the fact that, unlike the mother, the natural father did not automatically possess rights of custody in respect of his child did not infringe his right to private and family life provided that he could apply for rights of custody to the relevant court. The Court also pointed out that, in so far as the rights contained in the Charter corresponded to rights guaranteed by the European Convention on Human Rights, their meaning and scope were the same as those laid down by the latter, as interpreted through the case-law of the European Court of Human Rights.

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-2013-1-003

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 09.11.2010 / **e)** C-92/09, C-93/09 / **f)** Volker und Marcus Schecke and Eifert / **g)** *European Court Reports,* I-11063 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
3.17 General Principles – **Weighing of interests**.
5.1 Fundamental Rights – **General questions**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

Keywords of the alphabetical index:

Data, personal, mandatory publication / Data, personal, natural person / Data, personal, legal person.

Headnotes:

Articles 42.8b and 44a of Regulation no. 1290/2005 on the financing of the common agricultural policy, as amended by Regulation no. 1437/2007, and Regulation no. 259/2008 laying down detailed rules for the application of Regulation no. 1290/2005 as regards the publication of information on the beneficiaries of

funds deriving from the European Agricultural Guarantee Fund (hereinafter, “EAGF”) and the European Agricultural Fund for Rural Development (hereinafter, “EAFRD”) are invalid in so far as, with regard to natural persons who are beneficiaries of EAGF and EAFRD aid, those provisions impose an obligation to publish personal data relating to each beneficiary without drawing a distinction based on relevant criteria such as the periods during which those persons have received such aid, the frequency of such aid or the nature and amount thereof.

The amounts which the beneficiaries receive from the EAGF and the EAFRD represent part of their income, often a considerable part, and because the information becomes available to third parties, publication on a website of data naming those beneficiaries and indicating the precise amounts received by them constitutes an interference with their private life within the meaning of Article 7 CFREU. It is of no relevance in this respect that the data published concerns activities of a professional nature. Moreover, the publication required by Article 44a of Regulation no. 1290/2005 and Regulation no. 259/2008 constitutes the processing of personal data falling under Article 8.2 CFREU. Furthermore, the fact that the beneficiaries have been informed of the mandatory publication of the data relating to them does not call in question the very existence of an interference with their private life, since Article 42.8b of Regulation no. 1290/2005 and Article 4.1 of Regulation no. 259/2008, which merely provide that beneficiaries of aid are to be informed in advance that the data concerning them will be published, do not seek to base the personal data processing for which they provide on the consent of the beneficiaries concerned.

Such interference is not justified having regard to Article 52.1 CFREU. While it is true that in a democratic society taxpayers have a right to be kept informed of the use of public funds, the fact remains that striking a proper balance between the various interests involved made it necessary for the institutions concerned, before adopting the provisions in question, to ascertain whether publication via a single freely consultable website in each Member State of data by name relating to all the beneficiaries concerned and the precise amounts received by each of them from the EAGF and the EAFRD – with no distinction being drawn according to the duration, frequency or nature and amount of the aid received – did not go beyond what was necessary for achieving the legitimate aims pursued, having regard in particular to the interference with the rights guaranteed by Articles 7 and 8 CFREU resulting from such publication. In this respect, no automatic priority can be conferred on the objective of transparency over the right to protection of personal data, even if important economic interests are at stake. Since it does not appear that the institutions properly balanced, on the one hand, the objectives of Article 44a of Regulation no. 1290/2005 and of Regulation no. 259/2008 against, on the other, the rights which natural persons are recognised as having under Articles 7 and 8 CFREU, having regard to the fact that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary and that it is possible to envisage measures with a less adverse impact on that fundamental right of natural persons and which still contribute effectively to the objectives of the European Union rules in question, the Council and Commission, by requiring the publication of the names of all natural persons who were beneficiaries of EAGF and EAFRD aid and of the exact amounts received by those persons, exceeded the limits imposed by compliance with the principle of proportionality.

By contrast, with regard to the legal persons who received EAGF and EAFRD aid, and in so far as they may invoke the rights conferred by Articles 7 and 8 CFREU, the view must be taken that the obligation to publish which follows from Articles 42.8b and 44a of Regulation no. 1290/2005 and Regulation no. 259/2008 does not go beyond the limits imposed by compliance with the principle of proportionality. The seriousness of the breach of the right to protection of personal data manifests itself in different ways for legal persons and natural persons. Legal persons are already subject to a more onerous obligation in respect of the publication of data relating to them. Furthermore, the obligation on the competent national authorities to examine, before the data in question are published and for each legal person who is a beneficiary of EAGF or EAFRD aid, whether the name of that person identifies natural persons would impose on those authorities an unreasonable administrative burden.

Summary:

I. In this case, the Court ruled on the reconciliation between the right to protection of personal data and the duty of transparency with regard to the use of European funds. The applicants, Volker und Markus Schecke GbR, which is an agricultural undertaking, and Mr Hartmut Eifert, who is a full-time farmer, were beneficiaries of funds deriving from the European Agricultural Guarantee Fund (hereinafter, “EAGF”) and the European Agricultural Fund for Rural Development (hereinafter, “EAFRD”). Under European Union rules, data concerning the applicants was to be published by the national authorities through means including the Internet. In response, the applicants brought proceedings in the Wiesbaden Administrative Court, Germany, to prevent publication of this data.

The Administrative Court decided to stay the proceedings and to ask the Court for preliminary rulings on the validity of Regulations no. 1290/2005 and no. 259/2008 *(Official Journal,* L 76, p. 28) considering that the European Union regulations were an unjustified interference with the right to protection of personal data.

II. The Court held that the publication of data on the beneficiaries of funds and the amounts received on an Internet site available to third parties did indeed constitute an infringement of their right to respect for their private lives and the protection of their personal data. Accordingly, the Council and the Commission were required to strike a proper balance between the different interests involved, namely the objective of transparency and the right to protection of personal data. In this respect, the Court considered that, by requiring the publication of personal data concerning all natural persons who were beneficiaries of EAGF and EAFRD aid without drawing a distinction based on relevant criteria, the Council and the Commission had failed to comply with the principle of proportionality. By contrast, with regard to the legal persons concerned, the Court held that the principle of proportionality had been respected.

Consequently, the Court annulled some provisions of Regulation no. 1290/2005 and the whole of Regulation no. 259/2008.

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-2013-1-004

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 09.11.2010 / **e)** C-57/09, C-101/09 / **f)** B and D / **g)** *European Court Reports* I-10979 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.4.14 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between the EU and member states**.
5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status**.
5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum**.

Keywords of the alphabetical index:

Refugee status, exclusion / Refugee, membership of a terrorist organisation / Refugee, responsibility, individual.

Headnotes:

1. Article 12.2.b and 12.2.c of Council Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be interpreted as meaning that:

- the fact that a person has been a member of an organisation which, because of its involvement in terrorist acts, is included in the list forming the Annex to Common Position 2001/931 and that that person has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that that person has committed 'a serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations';
- the finding, in such a context, that there are serious reasons for considering that a person has committed such a crime or has been guilty of such acts is conditional on an assessment on a case-by-case basis of the specific facts, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under Article 12.2 of the directive.

There is no direct relationship between Common Position 2001/931 and Directive 2004/83 in terms of the aims pursued, and it is not justifiable for a competent authority, when considering whether to exclude a person from refugee status pursuant to Article 12.2 of the directive, to base its decision solely

on that person's membership of an organisation included in a list adopted outside the framework set up by Directive 2004/83 consistently with the 1951 Geneva Convention (see paragraphs 89, 99, operative part 1).

2. Exclusion from refugee status pursuant to Article 12.2.b or 12.2.c of Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted is not conditional on the person concerned representing a present danger to the host Member State (see paragraph 105, operative part 2).

3. The exclusion of a person from refugee status pursuant to Article 12.2.b or 12.2.c of Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted is not conditional on an assessment of proportionality in relation to the particular case (see paragraph 111, operative part 3).

4. Article 3 of Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be interpreted as meaning that Member States may grant a right of asylum under their national law to a person excluded from refugee status pursuant to Article 12.2 of the directive, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive (see paragraph 121, operative part 4).

Summary:

I. In its judgment, the Court ruled on the arrangements for the application of the clause excluding refugee status provided for by Directive no. 2004/83/EC (OJ, L 304, p. 12 and – corrigenda – OJ, 2005, L 204, p. 24).

In the instant case, Mr B and Mr D were victims of persecution, in Turkey and Iraq respectively, for taking part in the guerrilla warfare led by groups hostile to the incumbent government. Consequently, they travelled to Germany, where they applied for asylum. Following the entry into force of a law to combat international terrorism, Mr B's application was rejected and the right to asylum and refugee status which had already been granted to Mr D was withdrawn.

The two cases were brought before the Federal Administrative Court *(Bundesverwaltungsgericht)*, which decided to stay the proceedings and refer certain questions to the Court of Justice for a preliminary ruling. The questions related to the application of the clause denying refugee status to any person who had been a member of the organisations on the European Union's list of persons, groups and entities involved in terrorist acts.

II. The first matter examined by the Court of Justice was whether a person's membership of such an organisation and his or her involvement in an armed struggle was such as to fall within the category of "a serious non-political crime" or "acts contrary to the purposes and principles of the United Nations" within the meaning of Directive no. 2004/83/EC. In this connection, the Court emphasised the need to carry out an individual assessment of the facts to ascertain whether the person concerned was involved in these crimes or acts. Consequently, the mere fact that the person concerned was a member of an organisation on the list could not automatically mean that that person had to be excluded from refugee status.

The Court also found that exclusion from refugee status pursuant to one of the exclusion clauses referred to was not conditional on the person concerned representing a present danger to the host member state. Exclusion clauses sought only to punish acts committed in the past.

Lastly, the Court found that member states were free to grant a right of asylum under their national law to a person who was excluded from refugee status pursuant to one of the directive's exclusion clauses. However, this other kind of protection should not entail a risk of confusion with refugee status within the meaning of the directive.

Supplementary information:

With regard to refugee status, see also:

- ECJ, 02.03.2010, *Salahadin Abdulla e.a.*, C-175/08, C-176/08, C-178/08 and C-179/08, *European Court Reports* 2010, I-1493.

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-2013-1-005

a) European Union / **b)** Court of Justice of the European Communities / **c)** Eighth Chamber / **d)** 12.11.2010 / **e)** C-339/10 / **f)** Asparuhov Estov e.a. / **g)** *European Court Reports* I-11465 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court**.
2.1.1.4.18 Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000**.

Keywords of the alphabetical index:

Charter of Fundamental Rights, application.

Headnotes:

When proceedings are brought before it under Article 267 TFEU, the Court of Justice is to have jurisdiction to give preliminary rulings on the interpretation of the TFEU as well as on the validity and interpretation of acts of the institutions of the Union. The jurisdiction of the Court is confined to considering provisions of Union law only.

Article 51.1 CFREU states that the Charter's provisions are addressed to the Member States only when they are implementing Union law.

Moreover, according to Article 6.1 TEU, which gives the Charter a binding nature, and according to the declaration on the Charter annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon, the Charter neither establishes nor modifies any power of the Union.

Consequently, the Court clearly has no jurisdiction to rule on the questions referred concerning the interpretation of the provisions of the Charter, given that the order for reference contains no concrete element allowing the Court to consider that the national decision in question would either constitute a measure implementing Union law or present other elements linked to Union law (see paragraphs 11-12, 14-15, operative part).

Summary:

I. In December 2009, the Council of Ministers of the Republic of Bulgaria adopted a decision amending the general plan for development of the city of Sofia. Under this decision, two plots of land previously designated for the construction of shops and offices now fell within a "green spaces" zone, where such construction was not permitted. The legal action brought against this decision by natural and legal persons had been dismissed on the ground that, under the Spatial Planning Act, general plans for development could not be challenged.

When an appeal was filed against the order to dismiss the action, the *Varhoven administrativen sad* (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice of the European Union: is non-recognition, under national law, of a right to challenge certain types of administrative decisions compatible with the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights?

II. Declaring that it clearly had no jurisdiction to answer the questions referred to it, the Court ruled, for the first time since the Charter had been given binding force, on the scope of the Charter. It pointed out that the provisions of the Charter were addressed to the Member States only when they were implementing Union law.

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-2013-1-006

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 23.11.2010 / **e)** C-145/09 / **f)** Tsakouridis / **g)** *European Court Reports* I-11979 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

European Union, right to free movement within the territory of the Member States, restriction / European Union, right to reside freely, restriction / Residence, expulsion, justification, public policy / Residence, expulsion, justification, public security.

Headnotes:

1. Article 28.3.a of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States must be interpreted as meaning that, in order to determine whether a Union citizen has resided in the host Member State for the ten years preceding the expulsion decision, which is the decisive criterion for granting enhanced protection under that provision, all relevant factors must be taken into account in each individual case, in particular the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State, reasons which may establish whether those absences involve the transfer to another State of the centre of the personal, family or occupational interests of the person concerned (see paragraph 38, operative part 1).

2. In the application of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, a balance must be struck between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned, assessed if necessary at the time when the expulsion decision is to be made, by reference in particular to the possible penalties and the sentences imposed, the degree of involvement in the criminal activity, and, if appropriate, the risk of reoffending, on the one hand, and, on the other hand, the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which is not only in his interest but also in that of the European Union in general.

The sentence passed must be taken into account as one element in that complex of factors. A sentence of five years' imprisonment cannot lead to an expulsion decision without the factors described in the preceding paragraph being taken into account, which is for the national court to verify. In that assessment, account must be taken of the fundamental rights the observance of which the Court ensures, in so far as reasons of public interest may be relied on to justify a national measure which is liable to obstruct the exercise of freedom of movement for persons only if the measure in question takes account of such rights, in particular the right to respect for private and family life as set forth in Article 7 CFREU and Article 8 ECHR (see paragraphs 50-52).

3. Article 28.3 of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is capable of being covered by the concept of 'imperative grounds of public security' which may justify a measure expelling a Union citizen who has resided in the host Member State for the preceding 10 years.

Article 28.2 of Directive 2004/38 must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is covered by the concept of 'serious grounds of public policy or public security' (see paragraph 56, operative part 2).

Summary:

I. In its Judgment of 23 November 2010, the Court of Justice ruled on the conditions for expelling a citizen of the European Union who has a right of permanent residence in a Member State. In the instant case, Mr Tsakouridis, a Greek national, had been born in Germany and had an unlimited residence permit to live in Germany. On 19 November 2006, he was arrested in Greece and then transferred to Germany where he was sentenced to six years and six months' imprisonment for illegal dealing in substantial quantities of narcotics as part of an organised group.

By decision of 19 August 2008, the *Regierungspräsidium Stuttgart* (Regional Administration, Stuttgart) determined that he had lost the right of entry and residence in Germany. It also informed him that he was liable to be expelled to Greece. Thereupon, Mr Tsakouridis brought proceedings before the *Verwaltungsgericht* Stuttgart (Administrative Court, Stuttgart) against this decision. By Judgment of 24 November 2008, the *Verwaltungsgericht* set aside the contested decision, on the ground that a criminal

conviction did not in itself suffice as grounds for the loss of the right of entry and residence of a Union citizen.

Hearing an appeal against this judgment, the *Verwaltungsgerichtshof* Baden-Württemberg decided to stay the proceedings and refer a number of questions to the Court for a preliminary ruling. In effect, the *Verwaltungsgerichtshof* Baden-Württemberg wished to know firstly to what extent absences from the host Member State prevented the person concerned from enjoying the enhanced protection laid down in Directive 2004/38 (OJ 2004 L 158, p. 77, and corrigenda OJ L 229, p. 35, and OJ 2005 L 197, p. 34) and, secondly, whether dealing in narcotics as part of an organised group could be covered by the concept of "imperative grounds of public security".

II. Firstly, the Court pointed out that an expulsion measure must be based on an individual examination of the specific case, the decisive criterion for granting enhanced protection being whether the person in question has resided in the host Member State for the ten years preceding the expulsion decision. In this context, it must be ascertained whether absences from the host Member State involve the transfer to another State of the centre of the personal, family or occupational interests of the person concerned.

The Court went on to state that, in order to assess whether the expulsion can be justified on imperative grounds of public security, a balance must be struck between the exceptional nature of the threat and the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated. In that assessment, account must be taken of the fundamental rights of the person concerned and, in particular, the right to respect for private and family life as set forth in Article 7 CFREU and Article 8 ECHR.

Lastly, the Court held that the fight against crime in connection with dealing in narcotics as part of an organised group was capable of being covered by the concept of "imperative grounds of public policy or public security", within the meaning of Article 28 of the directive.

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-2013-1-007

a) European Union / **b)** Court of Justice of the European Communities / **c)** Second Chamber / **d)** 22.12.2010 / **e)** C-279/09 / **f)** DEB / **g)** *European Court Reports* I-13849 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
2.1.1.4.18 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**.

Keywords of the alphabetical index:

Effective judicial protection, right / Legal aid to right, legal persons.

Headnotes:

1. The principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been affirmed in Articles 6 and 13 ECHR.

As regards fundamental rights, it is important, since the entry into force of the Treaty of Lisbon, to take account of the Charter of Fundamental Rights of the European Union, which, pursuant to the first subparagraph of Article 6.1 TEU, has 'the same legal value as the Treaties'. Article 51.1 of the Charter states that its provisions are addressed to the Member States when they are implementing Union law.

In that connection, according to the explanations relating to Article 47 CFREU, which, in accordance with Article 6.1.3 TEU and Article 52.7 of the Charter, have to be taken into consideration for the interpretation of the Charter, Article 47.2 of the Charter corresponds to Article 6.1 ECHR (see paragraphs 29-32).

2. The principle of effective judicial protection, as affirmed in Article 47 CFREU, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, *inter alia*, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer.

In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation of the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.

In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings that must be paid in advance and whether or not those costs might represent an insurmountable obstacle to access to the courts.

With regard more specifically to legal persons, the national court may take account of their situation. The court may therefore take into consideration, *inter alia*, the form of the legal person in question and whether it is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings (see paragraphs 59-62, operative part).

Summary:

I. In its Judgment of 22 December 2010, the Court ruled on the interpretation of the principle of effective legal protection, as enshrined in Article 47 CFREU.

In the instant case, a company, DEB, wished to bring an action to establish that the *Bundesrepublik Deutschland* had incurred State liability in order to obtain reparation for the delay in the transposition of Directive 98/30/EC (OJ, L 204, p. 1). In this connection, the applicant applied for legal aid to enable it to make the advance payment of court costs required by law for proceedings of this kind. The application for legal aid was refused, on the ground that the conditions for granting such aid to legal persons, as laid down in German law, had not been satisfied. The applicant accordingly filed an appeal with the *Kammergericht*. The latter decided to stay the proceedings and to refer a number of questions to the Court of Justice for a preliminary ruling in order to ascertain whether the national legislation in question was inconsistent with the principle of effectiveness of European Union law.

II. Firstly, the Court noted that Article 47 CFREU provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal. That right includes the right to legal aid for "those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

Secondly, the Court observed that it was apparent from examination of the case-law of the European Court of Human Rights in relation to Article 6 ECHR that the grant of legal aid to legal persons was not in principle impossible, but must be assessed in the light of the applicable rules and the situation of the company concerned.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.

Systematic thesaurus (V21) *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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1 This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.
2 Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).
3 For example, rules of procedure.
4 For example, age, education, experience, seniority, moral character, citizenship.
5 Including the conditions and manner of such appointment (election, nomination, etc.).
6 Including the conditions and manner of such appointment (election, nomination, etc.).
7 Vice-presidents, presidents of chambers or of sections, etc.
8 For example, State Counsel, prosecutors, etc.
9 (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.
10 For example, assessors, office members.
11 (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

1.1.4.1 Head of State[12]
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1.2 **Types of claim**
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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.

1.3.4.9 Litigation in respect of the formal validity of enactments[21]
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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.

1.4.7 Documents lodged by the parties[31]
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1.5.2 Reasoning

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.).

2.1.1.4.4 European Convention on Human Rights of 1950[38].....45, 64, 90, 161, 188
2.1.1.4.5 Geneva Convention on the Status of Refugees of 1951
2.1.1.4.6 European Social Charter of 1961
2.1.1.4.7 International Convention on the Elimination of all Forms of Racial Discrimination of 1965
2.1.1.4.8 International Covenant on Civil and Political Rights of 1966
2.1.1.4.9 International Covenant on Economic, Social and Cultural Rights of 1966
2.1.1.4.10 Vienna Convention on the Law of Treaties of 1969
2.1.1.4.11 American Convention on Human Rights of 1969
2.1.1.4.12 Convention on the Elimination of all Forms of Discrimination against Women of 1979
2.1.1.4.13 African Charter on Human and Peoples' Rights of 1981
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2.1.1.4.15 Convention on the Rights of the Child of 1989
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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.
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.

4.4.3.6 Powers with respect to the armed forces
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56 For regional and local authorities, see Chapter 4.8.
57 Bicameral, monocameral, special competence of each assembly, etc.
58 Including specialised powers of each legislative body and reserved powers of the legislature.
59 In particular, commissions of enquiry.
60 For delegation of powers to an executive body, see keyword 4.6.3.2.
61 Obligation on the legislative body to use the full scope of its powers.
62 Representative/imperative mandates.
63 Including the convening, duration, publicity and agenda of sessions.
64 Including their creation, composition and terms of reference.
65 State budgetary contribution, other sources, etc.
66 For the publication of laws, see 3.15.

4.5.7.1 Questions to the government
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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.
74 Other than the body delivering the decision summarised here.
75 Positive and negative conflicts.

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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.
79 See also 3.6.
80 And other units of local self-government.

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81 See also keywords 5.3.41 and 5.2.1.4.
82 Organs of control and supervision.
83 Including other consultations.
84 For questions of jurisdiction, see keyword 1.3.4.6.
85 Proportional, majority, preferential, single-member constituencies, etc.
86 For example, *Panachage*, voting for whole list or part of list, blank votes.
87 For aspects related to fundamental rights, see 5.3.41.2.
88 For the creation of political parties, see 4.5.10.1.
89 For example, names of parties, order of presentation, logo, emblem or question in a referendum.
90 Tracts, letters, press, radio and television, posters, nominations, etc.
91 For the access of media to information, see 5.3.23, 5.3.24, in combination with 5.3.41.
92 Impartiality of electoral authorities, incidents, disturbances.
93 For example, signatures on electoral rolls, stamps, crossing out of names on list.
94 For example, in person, proxy vote, postal vote, electronic vote.

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95 This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.
96 For example, Auditor-General.
97 Includes ownership in undertakings by the state, regions or municipalities.
98 Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.
99 For example, Court of Auditors.
100 The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.
101 *Staatszielbestimmungen*.

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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.
109 Universal and equal suffrage.
110 According to the European Convention on Nationality of 1997, ETS no. 166, "'nationality' means the legal bond between a person and a state and does not indicate the person's ethnic origin" (Article 2) and "… with regard to the effects of the Convention, the terms 'nationality' and 'citizenship' are synonymous" (paragraph 23, Explanatory Memorandum).

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5.3.13.12 Right to be informed about the decision

111 For example, discrimination between married and single persons.
112 This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.
113 Detention by police.
114 Including questions related to the granting of passports or other travel documents.
115 May include questions of expulsion and extradition.
116 Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.
117 In the meaning of Article 6.1 of the European Convention on Human Rights.
118 This keyword covers the right of appeal to a court.
119 Including the right to be present at hearing.

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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.
124 Aspects of the use of names are included either here or under “Right to private life”.

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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.

Keywords of the alphabetical index *

* The précis presented in this Bulletin are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

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